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Global Campus Human Rights Journal

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

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

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

- **European Master's in Human Rights and Democratisation (EMA)** https://www.eiuc.org/education/ema.html
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These Regional Programmes offer specialised post-graduate education and training in human rights and democracy from a regional perspective, with an interdisciplinary content as well as a multiplicity of research, publications, public events and outreach activities. The Global Campus integrates the educational activities of the Regional Programmes through the exchange of lecturers, researchers and students; the joint planning of curricula for attended and online courses; the promotion of global research projects and dissemination activities; the professional development of graduates through internships in inter-governmental organisations; and the strong focus of networking through the Global Campus Alumni Association, as well as support to the alumni associations of the Regional Programmes.

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

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

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Editorial

This is the fourth issue of the *Global Campus Human Rights Journal*. It consists of two parts. The first part provides a special focus on the phenomenon of 'the diaspora', and investigates its role and influence in various parts of the globe. While this phenomenon can be viewed from many vantage points, the prism through which the authors here view the issue is that of democracy building. This part comprises seven papers, presented at an event of the Global Campus of Human Rights at which students, lecturers and other scholars interrogated the topic 'The influence of diaspora on democracy-building processes: Behavioural diversity'. This event, the 'Global Classroom', took place at Yerevan State University, Yerevan, Armenia, from 23 to 27 April 2018. The Global Classroom gathers students and experts from the seven Master's programmes in human rights and democratisation, presented under a funding agreement with the European Union.

Dr Arusyak Aleksanyan of Yerevan State University, who co-edits this issue of the *Journal*, has largely taken responsibility for the review and editing of the articles in the special issue section.

The second part of this issue of the *Journal* contains a book review, drawing attention to the life and inestimable role of Raoul Wallenberg in saving lives during World War II.

Editors

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Editorial: The influence of diasporas on democracy-building processes: Behavioural diversity

*Arusyak Aleksanyan**

1 Introduction

Diaspora and democracy: These two phenomena have always aroused the interest of scholars. Indeed, in academic literature various significant research contributions and discussions are focused separately on either diaspora issues or on democracy. This special focus is an attempt to combine these two categories by exploring democratisation through the prism of diasporas' activities and the other way round – to reveal the influence of democratic changes on diaspora issues. Something that has been less explored in literature is the role of the diaspora in democracy-building processes. In this context, articles presented in this issue of the *Global Campus Human Rights Journal* are unique and in various ways fill this gap in the academic literature.

The aim of the research in this special thematic focus is to explore the role and influences that diasporas can have on democracy-building processes by identifying diverse behavioural approaches applied in various regions. In this framework, the main research questions highlighted in the articles are the following: What are the factors and spheres of diasporas' influence on the democracy-building processes in the states and regions under study? Which frameworks are the main driving forces for diaspora policies? What challenges are there in state-diaspora cooperation on both ends? Are there any geopolitical and socio-economic constraints in terms of cooperation? To address these questions, case studies, comparative analyses, desktop research, interviews, fieldwork, observation, policy analyses, discourse analyses and regression analyses are the research methods revealing and explaining the complex configurations of state-diaspora cooperation for fostering democracy in the states and regions under study.

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2 Diaspora: Definition and concept

The rapid growth in migration streams and the institutionalisation of immigrant communities have changed our perception of the role and potential of diasporas. These processes are increasingly deepening, taking on new forms and intensifying the influence of diasporas in various spheres of social life which, in turn, have led to the discussions about 'diaspora' as a scientific category.

A significant contribution to the theoretical understanding of the phenomenon of diaspora was made by Armstrong, Brubaker, Clifford, Cohen, Connor, Dabag, Esman, Safran, Sheffer and others.

According to Brubaker (2005), the term 'diaspora' has recently become a definition that is not simply related to the concept of homeland and the model of Jewish dispersal, which has traditionally been associated with banishment and oppression. In his book *Diasporas*, Dufoix (2008) also states that at present this term carries a positive meaning and mainly refers to the population abroad, that has a symbolic link to the homeland. Thus, in contrast to most early studies of the twentieth century, when the term 'diaspora' mainly concerned the description of the Jewish case and other 'classical' diasporas such as the Greek and Armenian, this definition has increasingly undergone a series of transformations in meaning. One of the broadest definitions is suggested by Connor (1986: 16), who presents diasporas as 'a segment of a people living outside the homeland'. Sheffer (1986: 3; 2003: 9) defines diasporas as 'ethnic minority groups of migrant origins residing and acting in host countries but maintaining strong sentimental and material links with their countries of origin – their homelands'.

These discussions that have developed in the academic community indicate the polysemy of this phenomenon and the great differences in its understanding. Indeed, much research and many studies are devoted to the concept of diaspora, but there still is no unified and comprehensive definition and it is interpreted in different ways by scholars. This inevitability of various approaches to the understanding of this complex phenomenon is due to the fact that 'diaspora' is the subject of study in various disciplines. For this reason, an interdisciplinary approach was adopted for all articles in this special thematic issue, which implies a holistic and multidimensional framework of analysis which is not limited to explaining the phenomenon from the premise of a single discipline. In this context, the authors were free in the formulation of a diaspora definition when studying their cases.

3 Diaspora, democracy and behavioural diversity: Regional approaches

The formation processes of diasporas have become so widespread that it is impossible to find a country in the world that does not have an agenda on diaspora issues in its state policy. Indeed, much has been said and written about the significant role and influence of diasporas. However, is this influence positive or negative? Does it foster democractic processes or does it have a reverse impact on it? Remiddi and others discuss these approaches in their article by examining various cases in the region of

South East Europe. In particular, the article explores the dichotomies of diasporas' activities in three main spheres, namely, the political, economic and cultural. It further explores the discourse over its potential controversiality.

Another interesting approach can be found in the European article. Amorim and others study the issues of diasporas in European Union (EU) member states both as sending and receiving sides and also consider these issues at institutional and local levels. From this point of view, the case of EU is unique, since EU member states for a long time have faced the challenge arising from both emigration and immigration movements. By studying the cases of France and Bulgaria, the article reveals the relationship between EU member states and diasporas at local levels. In addition to studying diaspora issues at the institutional level, the article analyses the connections between the EU and diasporas within its policy framework. What should be emphasised is the authors' analysis of diasporas' link to democracy through the parameters of citizenship, voting, education and culture.

Through an expert interview and regression analysis, Aleksanyan and others reveal the factors and fields of diasporas' influence on democratisation in the six Eastern Partnership countries. The article explores the second research question based on the theoretical framework provided by Ragazzi (2014). In particular, three explanatory frameworks are applied to understand and explain diaspora policy and diaspora-homeland relations in the given cases. The authors conclude that diasporas from these countries impact differently on democracy. The further analysis shows that the democracy level, in turn, largely determines diaspora policies.

Sarsar and others explore the role of the Arab diasporas on democratisation processes in home countries before and after the 2011 uprisings. An important approach in this article is the fact that the authors not only discuss the opportunities of diasporas' participation in political life, but also reveal the limitations of and obstacles encountered in such participation. Direct and indirect forms of political participation, such as lobbying, campaigning online from abroad, voting in parliamentary elections, national dialogue initiatives, and so forth, are the tools for revealing the diasporas' role in democratisation processes and the main changes in the field, initiated since the Arab Spring.

Gumedze's article is devoted to the role of the African diaspora in democracy-building processes. The majority of academic literature on diaspora concentrates on diasporas' issues in their homelands, while the approach of this article is to discuss the influence of the diasporas on democracy in their countries of residence – in the African diaspora. The author concludes:

> Racism, racial discrimination, Afrophobia, xenophobia and related intolerance remain antitheses for the full participation of people of African descent in democracy-building processes … People of African descent remain invisible 'visible' minority groups whose destiny is always determined without their involvement.

Studying the diasporas' engagement issues in the cases of The Gambia, Ethiopia and Zimbabwe, Tutlam and others come to the conclusion that governments are more open to interaction with diasporas in spheres of

development and investment, and are less interested in allowing political participation. The article reveals circumstances affecting relations between diasporas and African governments and provides recommendations for effective cooperation in the development of democracy.

In her article, Iskandaryan presents the situation of the Armenian community in Iran both before the Islamic Revolution and after the Revolution and subsequent waves of emigration. The author categorises the range of problems that Armenians encountered in Iran after the Revolution by applying the approach of holding interviews with and circulating questionnaires among approximately 100 respondents in order to understand the main reasons for emigration. Today, the size of the Armenian community in Iran is shrinking, but they retain all the rights and privileges granted them by the state.

4 Conclusion

The diasporas across the world are different and unique. They affect democratisation differently and in this process demonstrate behavioural diversity. This uniqueness of the diasporas determines the diversity of the authors' approaches when studying the diasporas.

Some of the points and findings can be highlighted in this special focus. Citizenship, voting, human rights, civil society, democratic governance, policy making, and so forth, are the spheres in which diasporas engaged as part of democracy-building processes. In turn, the level of democracy determines diasporas' activities both in their homeland and in their country of residence: The higher this level, the more intensive the activities of diasporas in various spheres of social life. Another finding that should be highlighted is the dichotomy between the positive and negative influence of diasporas. We used to perceive diasporas only as positive actors, but for a better understanding of the diaspora phenomenon, the antagonistic approaches should also be taken into account. It should also be noted that diasporas may affect not only democratisation in the homeland but also that in their countries of residence.

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The influence of diaspora on democracy-building processes

*Manfred Nowak**

1 Introduction

The Global Campus of Human Rights is a worldwide network of universities that jointly organise seven regional Master's programmes in Human Rights and Democracy. These Master's programmes are coordinated by universities in Buenos Aires (for Latin America and the Caribbean); Pretoria (for Africa); Bangkok (for Asia and the Pacific); Beirut (for the Arab world); Sarajevo (for South-East Europe); and Yerevan (for the Caucasus region). The organisational hub of the Global Campus is the European Inter-University Centre for Human Rights and Democratisation (EIUC), which coordinates the European Master's programme and which is based in an old monastery on the Lido of Venice. Whenever I travel from the Lido to Venice, I pass by the Island San Lazzaro Degli Armeni in the middle of the Venetian Lagoon, which has for some 300 years been occupied by Mechitarists, an Armenian Catholic congregation. The monastery has at its disposal a large collection of books, journals, artifacts, and the third-largest collection of Armenian manuscripts. Over the centuries numerous artists, writers and political and religious leaders have visited the island, the most notable being Lord Byron.

Although I have been based as Secretary-General of EIUC in Venice since 2016, I never visited San Lazzaro. However, when I left Venice two days ago to travel to Yerevan in order to discuss in our Global Classroom the influence of diaspora on democracy-building processes, I decided to soon pay a visit to this Venetian island, which is one of the best-known historic sites of the Armenian diaspora.

The word 'diaspora' originates from the Greek language and refers to dispersed peoples. For many centuries, the term diaspora was associated primarily with the Jewish diaspora, a people dispersed all over the world. The first Jewish ghetto was established in Venice, which underlines the

* Secretary-General, European Inter-University Centre for Human and Rights and Democratisation. Opening address, Global Classroom, Yerevan State University, 23 April 2018.

special relationship between the phenomenon of diaspora and the seat of the Global Campus. Today, diaspora is usually defined as a community of people that live outside their shared country of origin or ancestry and who maintain active connections with it. There are different reasons why people live in diaspora, ranging from poverty and voluntary migration for economic, political, cultural, professional, social or other reasons, to armed conflicts, persecution, forced displacement, ethnic cleansing and even genocide. People living in diaspora are migrants, refugees, displaced people as well as their descendants. They may still have kept citizenship of their countries of origin or may have acquired another citizenship, thereby losing their original citizenship. However, they need to maintain active economic, social, cultural, political or personal connections with their countries of origin in order to be considered diaspora. Most importantly, they must identify with their country of origin. This subjective element often makes it difficult to provide precise statistical data about the diaspora of a given country.

At a time when global migration is on the increase and the number of refugees is higher than in any other year since the end of World War II, the number of people living in diaspora is also sharply on the rise. Over the last 45 years the total number of people living outside their country of origin has tripled from 76 million to roughly 232 million, which constitutes more than 3 per cent of the current world population. The phenomenon of diaspora, therefore, is closely linked to the concepts of transnationalism and transmigration.

The roughly 20 monks living on the Venetian island of San Lazzaro Degli Armeni only constitute a small part of the Armenian diaspora. Altogether, there are some 11 million Armenians, but only roughly 3 million actually live in the Republic of Armenia. This means that more than two-thirds of Armenians live in diaspora: more than one million in Russia, and large numbers in the United States (mainly in California), France, Iran, Georgia, Lebanon and Argentina. The reasons for the Armenian diaspora are manifold, but the genocide against the Armenians of 1915 definitely plays a crucial role. Tomorrow, on 24 April, we will visit the Genocide Memorial and Museum and thereby join the Armenian people in commemorating the first genocide of the twentieth century, which still plays a decisive role in the political lives and culture of Armenians.

In terms of size and diaspora, Armenia may be compared to two other countries, which host regional Master's programmes of the Global Campus of Human Rights. Bosnia and Herzegovina has some 3,5 million inhabitants and a diaspora of roughly 2 million people. Most of them live in the United States, in Germany, Sweden, Switzerland, Austria, Australia and New Zealand. While many Bosnians emigrated for economic reasons, the most important single event causing displacement were the armed conflicts, ethnic cleansing operations and the genocide against Bosnian Muslims between 1992 and 1995.

With some 4 million inhabitants, Lebanon is only slightly bigger than Armenia and Bosnia and Herzegovina. However, the Lebanese diaspora is estimated to range between 8 and 16 million people (two to four times the number of Lebanese living in their own country), of which up to 7 million live in Brazil. Even the current President of Brazil, Michel Temer, is the son of Lebanese immigrants. Other larger Lebanese communities live in

Argentina, Colombia, the United States, Venezuela, Australia, Mexico and Canada. While historically trade-related, the recent increase in the Lebanese diaspora has been caused primarily by the Lebanese civil war between 1975 and 1990. The majority of the Lebanese diaspora are Christians, others are Muslims, Druze and Jewish.

While these three countries clearly stand out in terms of scale of their respective diaspora communities, other countries hosting regional Master's programmes of the Global Campus can also reference – although much smaller in numbers – diasporas. Thailand has a population of more than 50 million and a diaspora of 2,7 million, 1,5 million of which are in Vietnam and the rest based in the United States, South Korea, Australia, Taiwan and Germany. South Africa with 55 million inhabitants has only 600 000 people living in diaspora (200 000 of whom are based in the United Kingdom, 145 000 in Australia, and the rest in the United States, New Zealand and Canada).

The economic impact of the diaspora has been well researched. In the three countries of the Global Campus with a comparatively large diaspora, the remittances by members of the diaspora to their relatives at home constitute a substantial proportion of the national economy: in Armenia and Bosnia and Herzegovina roughly 15 per cent of the countries' economies, in Lebanon as high as 18 per cent.

Less well researched is the influence of the diaspora on democracy-building processes. Many questions arise in this regard. Do members of the diaspora enjoy the right to vote and to be elected in their countries of origin? Do they have a right to form and join political parties? In most countries the right to vote is restricted to citizens, which means that members of the diaspora who have lost their citizenship also lost their right to vote. Even with respect to members of the diaspora who remain citizens, many countries restrict the right to vote to citizens who actually reside in their countries, thus excluding the diaspora. On the other hand, out-of-country voting is on the increase. Is it at all desirable if the diaspora is actively involved in the democratic decision making of their countries of origin? One may argue that countries with a large diaspora may have gone through difficult political transition processes in which they might be in need of democratic assistance by their compatriots abroad. However, diaspora also often are inherently conservative in their outlook and may have a restrictive influence on the political process. If the diaspora significantly contributes to the economic growth, wealth and stability of their countries of origin, then the diaspora might also wish to contribute to the political and democratic development and good governance. This may entail active participation in elections, in political parties, in the media and in government. Does this mean that election campaigning should reach out to the diaspora communities, as we have recently witnessed with respect to Turkish politicians campaigning in Germany and Austria? Let us imagine the huge Italian diaspora in the United States, in Argentina and other parts of the world getting actively involved in Italian politics. What are the limits of legitimate interests of the diaspora to get involved in democratic decision-making processes in their home country? Is it a good idea to set up a special Ministry dealing with the diaspora, as in Armenia? What is the proper function of such a ministry of diaspora?

These and many related questions will be discussed by students and professors of the Global Classroom during the coming days at Yerevan

State University. The Global Campus of Human Rights is a network of some 100 universities in all world regions. But even in the seven countries, where the coordinating universities of our Master's programmes are located, I identified three countries with a comparatively large diaspora population, which in Armenia and Lebanon even outnumbers the inhabitants at home. Other countries in which our partner universities coordinate Master's programmes, such as Argentina, are classical immigration countries that host large diaspora populations from other countries, including from Armenia and Lebanon.

The fact that this Global Classroom takes place in Yerevan at a time when the Armenian people are in the middle of democratic changes which might soon result in something like a 'velvet revolution', makes this Global Classroom particularly interesting. To what extent is the widespread Armenian diaspora actively involved in these democratic movements and demonstrations, which we have all witnessed this morning and during previous days? If so, does it have a positive influence on the building of democracy in this tiny post-Soviet republic? Or should the influence of the diaspora be qualified as illegitimate interference in the domestic affairs of the Armenian people actually living in their home country?

No other academic network of students and professors would be better qualified to discuss these important and highly topical questions than the Global Classroom, one of the regular joint activities of our Global Campus of Human Rights. I very much look forward to our discussions in the coming days, which will address these issues from a global and comparative perspective.

A Remiddi, M Alibašić, S Kapetanović, E Davidović & E Zejnilović 'The ambivalent role of diaspora engagement for the homeland in the Balkans' (2019) 3 *Global Campus Human Rights Journal* 10-27
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The ambivalent role of diaspora engagement for the homeland in the Balkans

Adriano Remiddi,* Mubina Alibašić,** Sabiha Kapetanović, Emilija Davidović**** and Edima Zejnilović********

Abstract: *Diasporas have become significant role players in the democratic lives of their countries of origin. Such dynamic is particularly evident in the South East European context, a region characterised in contemporary history by massive movement, displacement and outflow of populations. This article aims at exploring the dichotomies that the diasporas' political, economic and cultural involvement in the homeland present, including the discourse over its positive and negative features, hence tackling the issue of its potential to give rise to controversy. In fact, in addition to exerting a pro-active role for the democratic and socio-economic development of their home countries, diaspora communities may also embrace antagonistic approaches, countering certain transformation processes, state-building agendas or favouring one elite rule over another. Through a set of cases from the South East European context, the research addresses the regional, therefore global, question of how diaspora groups transnationally participate in the life of their home states, what their objectives are and how they may hinder democratisation processes, acting as incubators or accelerators of – potentially violent – change.*

Key words: *diaspora; South East Europe; Balkans; democratisation*

1 Introduction

The word 'diaspora' has Greek roots: It derives from the verb *spiro* (to sow or to scatter) and the preposition *dia* (over). However, the origins of its contemporary use lie in the Jewish tradition and the idea of the 'Babylonian exile' connoted by expulsion, persecution and enslavement and implying the prospect of return. By definition, those in exile are to cultivate their native traditions and culture in preparation for a return to

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the 'promised land' (Hockenos 2003: 8). However, the Babylonian model presents the narrowest possible identity for diaspora groups. More recently a lively discourse that has arisen around the notion of global diaspora, the Babylonian 'victim typology', is deemed inadequate to make sense of today's heterogeneous transnational communities as it overlooks other kinds of migrations, such as economic emigration or voluntary expatriation. In this sense, diasporas if so strictly defined appear rather anachronistic in the age of globalisation (Hockenos 2003: 9). In this sense, a contemporary generic definition of diaspora should comprise all those members of a common ethnic-national group living outside the borders of their native home territory, hence primarily highlighting the two key criteria of 'ethnicity' and 'foreign residency'. Such a flexible definition includes immigrant families and their subsequent generations, as eventually a diaspora is made up of individuals who define themselves as such and are accepted as its members.

Global interest in the role of diasporas increased in the 1990s, when global remittances surpassed the total of the Western investments for aid cooperation. Consequently, with the increase of interest in the engagement of emigrants in the affairs of the homeland, diaspora studies became a growing field of research in Western academia in Europe, incorporating the disciplines of political science and international relations in a field that was predominantly centred on sociology and anthropology, but which suddenly became relevant for issues of securitisation and democratisation. In a somewhat domino effect, the rising relevance of diaspora as a political actor called for the rapid creation of manifold specialised institutions that were gathered for the first time by the International Organization for Migration (IOM) at the Diaspora Ministerial Conference in 2013, counting 548 high-level governmental representatives from over 140 states (Gamlen et al 2013: 4).

Today we know that diasporas' attitude towards the homeland differs greatly due to its transnational exposure: Diaspora communities can be either politically re-socialised in the host country, hence disengaging from the homeland's affairs, or conversely acquire a complementary dual loyalty, developing forms of long-distance nationalism. For those diaspora communities that wish to remain committed, political, economic and cultural participation are the main realms of their potential engagement, and can be used to pursue often contrasting and antithetical aims (Chaudhary 2016: 6).

By answering the question of how and why diasporas transnationally engage for the homeland through scholarly works on diaspora mobilisation (Hockenos 2003; Koinova 2017), post-territorial citizenship (Ragazzi & Balalovska 2011; Štiks 2010) and culture and trans-nationalism (Chih-Yun 2010; Kilduff & Corley 1999), but also resorting on primary data and examples from the South East European (SEE) region, the article questions the frequent attitude to glorify or deify the diaspora and its potential, shedding light on marginal aspects or even threats of diaspora engagement for or against the ongoing post-conflict normalisation and democratisation process in the Balkans.

2 Historical background

Due to the turbulent history of the region, migration has been a long-known phenomenon in South East Europe. The territories that formed part of Yugoslavia[1] have been countries of emigration, both permanent and temporary. A variety of reasons influenced people to leave their homeland, most notably political, social and economic factors. The countries of destination also varied and reflected the differences in motivation. In order to understand the behaviour of today's diasporas and current migration trends, an analysis of previous migration waves needs to be presented.

Four waves of Yugoslav citizens' migration can be outlined until the current twenty-first century migration flow. The earliest wave preceded the formation of the Kingdom of Slovenes, Croats and Serbs (Kingdom of SHS), which since its beginning can be traced back to the Balkan wars (1912-1913), but which has affected the territory that later became part of the Kingdom of Yugoslavia. The main characteristic of this period is that migrants were mostly unskilled and uneducated people whose destination targets were mostly overseas (Kosinski 1978: 315). The emigration continued until World War II, but due to a high return, it did not contribute much to the creation of solid diaspora communities. During the war, more than half a million people were affected by forced resettlements. Citizens of the Socialist Federal Yugoslavia moved to different republics within it, while ethnic minorities such as Jews and Germans were later on expelled from the territory (Bade et al 2011: 172). The second wave is marked by emigrations driven by political-ideological motivations after the end of World War II, when two particularly significant groups fled the newly-established Communist regime: on the one hand, the group of political opponents, including Serbian royalists and individuals who did not support the regime, and, on the other, members of the fascist Ustasha regime who by and large found a safe place in Latin America (Kosinski 1978: 318). At the same time war-torn European countries needed a labour force in order to regenerate their economies, which posed a great opportunity for Yugoslav emigration. This influenced the third period, which started in the 1960s when the borders opened for temporary workers (Kosinski 1978: 322)[2] and the opportunity was given to economic migrants. According to the census of 1971, just under 600 000 Yugoslav immigrants were situated in Western Europe, while estimates from 1973 exceed one million (Baučić 1973). Many of these guest workers never returned to their homelands and today constitute a significant part of the Yugoslav diaspora. The main destination was Germany, where around 1,7 million South-Eastern Europeans were registered in 1999: 737 204 from the Federal Republic of Yugoslavia; 213 945 Croats; 167 690 from Bosnia-Herzegovina; and 49 420 from the former Yugoslav Republic of Macedonia (Bade 2011: 175). The fourth period followed the wars of the 1990s. The

1 The term 'Yugoslavia' (land of the Southern Slavs) here connotes the territories that are part of the Kingdom of Slovenes, Croats and Serbs (1918), later renamed the Kingdom of Yugoslavia (1929); its successor the Social Federal Republic of Yugoslavia (1945-1992) and the states that followed its breakup: Slovenia; Croatia; Bosnia and Herzegovina; the former Yugoslav Republic of Macedonia (1991); the State Union of Serbia and Montenegro (1992); Montenegro (2006); Serbia (2016); and Kosovo – under UNSC Resolution 1244/99 (2008).

2 The Yugoslav government took this step influenced by rising unemployment rates, caused by the 1965 economic reforms.

number of refugees in this phase was even larger than previously, as over 4 million people overall were affected. Most people migrated and were forced to move to other federated republics of Yugoslavia and temporarily even further, when the main destination countries included Germany, Austria, Switzerland, but also Italy and Greece (Bonifazi 2006: 16).

The new century brought about changes to the migration processes, especially in the early years when forces generating international migrations experienced a peak, and human mobility became an essential aspect of global integration, making this century the 'age of mobility' (Castels 2014). South East European countries continued showing high emigration levels, despite them having been low during the early years (Ljuboja 2015). These states continue to suffer from the consequences of war and the challenging post-socialist economic environment (Thrändhardt (undated)). The main 'drivers' of the emigration process in these countries are social and economic inequalities, and labour demand and demographic changes, which encourage people to leave their homes in search of a better life (Castles 2013). The case of Serbia is illustrative, as 30 000 citizens decide to leave their homes annually. Serbs, Kosovars and Bosnians are mostly based in Central Europe, specifically Switzerland, Austria and Germany, whereas Albanians are mostly concentrated in neighbouring countries, such as Italy and Greece (Thrändhardt (undated)). The socio-economic effects of migration are most visible in Albania, as one in four Albanians is a migrant. On the one hand, Albania has one of the highest demographic growths in Europe. On the other, the structure of the population is changing, as emigration is gender and age selective, leading to a reduction in the number employable young people (Krasteva 2013). Among the countries of the region, apart from Albania, citizens of Bosnia and Herzegovina are the most mobile, as they form the largest immigration group in Slovenia, the third largest in Austria and the fifth largest in Sweden. The number of emigrants reached a remarkable number of 1 350 000 people, which is also characterised by the tendency of a terminal decrease of returns, as 'sustainable return' in terms of the right housing, health care and employment is not guaranteed (Krasteva 2013). However, interest in migration towards the neighbouring Balkan countries escalated by more than six times. The attractiveness of the region could be seen as a symbolic reconciliation, but also as an increase in the opportunities for employment that it provides (Krasteva 2013). Nevertheless, the profile of the migrants in this region is very important, since they are young people with at least secondary education, motivated by unemployment and inadequate housing to look for better opportunities abroad. These people often are single, which grants them bigger mobility in search for better work and the possibility of a lengthier, perhaps permanent, stay in the destination country (Ljuboja 2015). The greatest loss of economic migration today is the creation of brain drain, as the countries in the region could take advantage of their own young academic cadre as their own intellectual potential, which is nowadays respected only if it creates more employment opportunities (Ljuboja 2015).

In terms of future projections, despite the need for cheap labour, the demand in Western Europe is gradually decreasing mainly because of the economic crisis and its consequences, while more than 20 years after the violent dissolution of Yugoslavia, the SEE region continues to experience significant social, economic and political tensions (Williams 2017) that

might reasonably act as continuous drawing factors for, especially, youth emigration (Ljuboja 2015).

3 Economic impact

After the wars of the 1990s, the economic development of the region has relied largely on international assistance and financial remittances by the diasporas. Nowadays, the remittances come mostly from the newly-emerged diasporas, that is, from people who migrated due to better economic opportunities abroad. The remittances by individuals living abroad play a substantial role in the economic development of the region, mainly because the wages in developed economies are nearly five times larger than those in developing SEE countries (Topxhiu & Krasniqi 2017). Remittances sent to the region generally reduce the level of poverty, leading to human capital accumulation, entrepreneurship, enhanced small business investments, better access to information and technologies, and improving access to formal financial sector services. The scale of remittances sent is more than three times larger than the official development assistance. The 2016 World Bank Report states that three Western Balkan countries, Albania (12,12 per cent), Bosnia and Herzegovina (12,87 per cent) and Kosovo (16,68 per cent), are among the top ten countries receiving the largest remittances in comparison to the percentage of their gross domestic product (GDP) (Topxhiu & Krasniqi 2017: 30):

Table 1: Size of diaspora remittances to home country

YEAR	Albania	Kosovo	Macedonia	Montenegro	Serbia	Bosnia and Herzegovina
2005	15,81	18,77	3,62	5,6	8,8	18,15
2006	15,12	18,9	3,88	5,9	8,7	16,7
2007	13,72	19,01	4,14	5,35	9,34	17,03
2008	14,49	18,66	4,1	6,6	7,2	14,23
2009	14,26	18,66	4,05	7,31	10,91	12,08
2010	13,34	17,27	4,12	8,1	10,43	10,62
2011	12,04	14,93	4,14	8,85	8,52	10,51
2012	11,53	14,61	4,04	9,73	8,71	10,73
2013	8,56	14,97	3,48	9,48	8,84	10,79
2014	8,64	14,87	3,23	9,4	8,36	11,38
2015	9,19	15,08	3,05	9,48	9,07	11,14
2016	8,81	14,82	2,67	9,49	8,47	11,06
COUNTRY AVERAGE (20052016)	12,12	16,68	3,71	7,94	8,91	12,87

Post-conflict economies often are disadvantageous and commonly characterised by weak regulations and property rights. This often hinders the economic engagement of the diasporas due to the lack of support or the frequent barriers to potential investments in their home country (Williams 2017). Therefore, a large amount of often informal remittances are directed to household consumption (Williams 2017). In Bosnia and Herzegovina (BIH) the United Nations Development Programme (UNDP) creates and sponsors projects that seek to engage the diaspora based on support of investment, and matching grand schemes, usually funded by Western European countries (Williams 2017). This mostly occurs in light of a lack of active national policies with regard to diasporas, which are traditionally hard to achieve in highly-divided societies such as Bosnia and Herzegovina (Williams 2017). Publically available data on remittances in Bosnia and Herzegovina are based on official remittance flows, whereas unofficial remittances are not recorded (Efendic, Babic & Rebmann 2014: 15). Despite all these difficulties, diaspora is an important financial anchor for this country, which in 2012 received €1,75 billion in remittances (Efendic, Babic & Rebmann 2014: 15). According to a 2007 IOM report, the rate remittance inflow to Bosnia and Herzegovina grew the most over the period 1995-2004 in comparison to all other countries, which made BIH the sixth largest receiver of remittances, as a percentage of a country's GDP, in the world (Efendic, Babic & Rebmann 2014: 16). Considering that BIH has had a continuously high current account deficit, remittances are needed for sustainability, stability and functioning of the domestic economy, both current and potential (Efendic, Babic & Rebmann 2014: 16).

Compared to BIH, approximately 22 per cent of the population of Serbia is living abroad, and as at 2010 almost 22 per cent of these people sent more than €6 000 in remittances to their families, while 40 per cent spent between €600 and €6 000 (Baird & Klekowski von Koppenfels 2010: 38). The remittances are used mainly for consumption and daily needs such as clothing, utilities, rent, food, as well as housing improvements, but not for debt payments, education or investment. More than one-quarter of the remittances is used for savings for a house in the country or in the region, or buying land or travelling (Baird & Klekowski von Koppenfels 2010: 38). In addition, Serbia is also working on brain circulation and brain gain, mainly through intermediary organisations, with cultural and educational policies that promote international cultural dialogue and academic exchange (Stopic 2013).

As for Albania, remittances and remittance services are among the most important financial aspects of the diaspora. Financial incomes have had relevant political and economic effects in Albania. Because of the growing emigration, the 1997 remittance inflow induced a rapid recovery of the economy. Remittances usually enter through means other than banks, with diasporas directly bringing in money or sending it through relatives and friends. This is considered to stem from psychological, practical and historical reasons (Minister of State on Diaspora). The common behaviour of using remittances for personal consumption has a positive effect of reducing poverty and enhancing economic growth (Topxhiu & Krasniqi 2017: 32). World Bank research has revealed that financial remittances have an impact in reducing 3,5 per cent of the overall number of poor people in the SEE region (Topxhiu & Krasniqi 2017: 33).

Nevertheless, the phenomenon also has a negative impact. Tempestuous post-conflict and transitional dynamics present in South East Europe have led to a rapid increase in organised crime. Smuggling routes that were initially used as escape routes for migrants and to supply of arms to militant groups became the main avenues for trafficking illegal goods (Natarajan 2011) as the emergence of drug trafficking through Western Europe (Arsovska & Basha 2012). Alongside drug smuggling, financial remittances from diasporas were used for illegal migrations, the smuggling of alcohol and cigarettes, as well as to encourage activities such as plundering and looting and 'taxation of humanitarian assistance' (Siani-Davis 2003). In 2008 the US State Department estimated that drug-related crimes in BIH accounted for almost 2 per cent of the country's economy, accounting for more than 500 million BAM a year in earnings (CIN 2008). Furthermore, reports on drug smuggling reveal that not only do the diasporas provide financial support for this type of crime, but it also creates a safe haven for criminals, by allowing them to pursue business through their companies: Some cases illustrate Balkan-based transport companies being involved in drug trafficking from the region to Western Europe, especially Scandinavian countries (CIN 2008). In 2002 the OSCE estimated that around 200 000 women in the Balkans were victims of a smuggling network that extends to the EU (Institute for War and Peace Reporting). Trafficking in women was conducted mostly through Bulgaria and Romania, where many were sold to people from Serbia, Bosnia, Kosovo and Montenegro and subsequently transported to Italy and other EU countries.

Despite the negative aspects and the creation of a culture of dependency (Topxhiu & Krasniqi 2017: 34), remittance inflow has a great potential to improve the overall livelihood of recipients and create opportunities for investment. Nevertheless, the question of other positive aspects such as creditworthiness of recipients, economic stability, and designing policies that could adequately facilitate a productive use of remittances, still remains a challenge.

4 Political impact

Over the last decades, diaspora communities have shown an increasing interest in the origin countries' affairs and their growing influence in the political arena has been evident. Reasons for this could be found in the globalisation process which has provided cheaper air travel and communication, while the internet has also allowed people to easily stay in touch, becoming a prime instrument for mobilisation. A product of these processes is a 'digital diaspora' that supports common national interests and identity.[3] Ragazzi argues that the re-configuration of the nation as global, combined with the inclusion of diasporas by the origin country, marks the emergence of post-territorial citizenship (Ragazzi & Balalovska 2011: 5-7). A conception of national belonging transcends the territory of the nation state, and citizenship is distributed within the diaspora, while governmental agencies and ministries make it possible for diasporas to be included in the voting system. In this way the diasporas can constitute a

3 All countries of the former Yugoslavia have official and semi-official websites for bringing together diasporas and providing them with relevant information.

vital political asset and the state's regulation of voting from abroad can tell a lot about how possible diaspora engagement is perceived.

A number of former Yugoslav countries have accepted an ethnically exclusive citizenship policy and then secured seats in parliament for diaspora representatives. By doing so, these countries displayed their belief in the positive impact of diasporas on their origin country. Prime examples are Macedonia and Croatia, which demonstrate that motives for including diasporas can also be found in the fact that diaspora members are staunch supporters of the ruling parties. In Croatia all diaspora seats used to go to the Croatian Democratic Union (CDU),[4] with major political consequences, as in 2000, when it prevented the opposition party from achieving an absolute majority[5] in parliament, or in 2007, when it provided the CDU with the necessary seats to form a government.

Contrary to these citizenship policies aimed at attracting all members of certain ethnic groups, Montenegro has since early 2008 forbidden dual citizenship. Given the size of the Serb minority (28 per cent according to the 2011 census), as well as many Montenegrins living in Serbia (Stiks 2010: 31), such a move of the Montenegrin government indicates the fear of Serbian influence on its politics, and hence diasporas' kinship is regarded as negative.[6] Another example of imposing boundaries on diasporas' engagement is evident in the regulation established by Serbia. Despite the fact that Serbia has facilitated a citizenship policy enabling ethnic Serbs and those considering Serbia as their nation to acquire citizenship, it has not facilitated the voting process to its diasporas, or secured seats for diasporas in parliament. This practice has been striking considering the size of the Serbian diaspora, but is explainable if diaspora preferences are analysed: While their engagement in the 1990s supported Milošević's illiberal and ultranationalist agenda,[7] in the last presidential elections the majority of diaspora votes went to the main opposition candidate with a more liberal political programme (Prelec 2017).

Diasporas can engage in politics in diverse manners, not only through voting and representation in parliament, but also by lobbying in host countries, giving financial support to political parties and civil society organisations, but also by sponsoring actors involved in violent conflicts in the homeland. Examples such as that of Kosovo demonstrate how different diaspora groups can lobby and act either in favour of nation building, considering their engagement for the creation of an independent successor state of Yugoslavia, but also be actively involved in fostering nation-wrecking processes.

There were two instances when diaspora engagement was the strongest, namely, during the Kosovo war (1998-1999) and during the period preceding the 2008 Declaration of Independence. Before the 1999 North

4 The party established by the country's first President and promoter of this policy, Franjo Tuđman.

5 The SDP-HSLS coalition obtained 47%, while it would have won 50,7% of the votes without diaspora seats; see Ragazzi & Balalovska 2011: 11.

6 It is seen as negative since diasporas would include a large number of Serbs.

7 Liberal civil society groups gained little or no support from the diasporas, and not even the Otpor (Resistance) movement, that later brought democratic change in Serbia, succeeded in changing this. Chicago-based diasporas, for example, supported both radical Milosevic opponents – Vuk Drašković and Vojislav Šešelj; see Koinova 2009: 55-56.

Atlantic Treaty Organisation (NATO) intervention, diaspora activism was very strong outside the Kosovo territory, and even included informal taxation for the support of parallel institutions. Support for the radical Kosovo Liberation Army (KLA) forces also escalated from 1997 to 1999 and was shown through financing and fund-raising activities (Koinova 2017a: 9), part of which was used for arms collection, aided by arms smuggling, thus violating the international arms embargo on Yugoslavia. Some countries, such as Switzerland, even froze certain bank accounts connected to individuals linked to the supply of arms to the KLA (Transnational Communities Programme). In addition, KLA was recruiting Kosovo Albanians from the diasporas to fight for their homeland (Naegele 1999).

For a long time the Albanian diasporas lobbied for Kosovo independence, investing the greatest efforts in the area of lobbying. Accordingly, two inter-related circumstances should be taken into consideration: the geographic position or location of diaspora entrepreneurs, and the strategic importance of the issue for global powers. If diaspora entrepreneurs are physically located in Europe, close to Brussels, it could be expected that they would be well positioned to lobby European institutions. However, this is not necessarily the case. Albanian diasporas in European countries – even if more geographically contiguous – remained embedded in contexts less empowering for the pursuit of statehood (Koinova 2017b). Furthermore, Albanian diasporas based in Europe invested more efforts and resources in lobbying outside the borders of Europe, particularly in the USA. An example was Swiss billionaire Behgjet Pacolli who contributed to Kosovo's independence by lobbying in Washington, where he established a group of professional lobbyists. By contrast, minimal lobbying activities followed in the UK (Koinova 2017b). One possible reason could be that EU states at the time were more conservative regarding Kosovo independence due to the lack of unanimous consensus on the issue of official recognition of the country. Even in the UK, highly supportive of NATO's intervention, interest in the Kosovo issue waned (Koinova 2017b). By contrast, the USA-based Albanian diaspora remained relatively strong and consistent in the pursuit of independence for Kosovo. The New York-based Albanian American Civil League (AACL) and Washington-based National Albanian American Council (NAAC) (Koinova 2017b) are among the important organisations that played a significant role in lobbying for Kosovo's independence throughout the 2000s.

Today the Kosovo-Albanian diaspora remains connected to the political parties that have a strong, non-negotiable standpoint on the status of Kosovo, among them *Lëvizja për Bashkim* (Movement for the Unification) which favours the unification of all Albanians into one state in its political programme. Although it has not gained significant popular support, its leader was appointed the Minister for Diaspora, interpreting the feelings of a large part of the expatriates (Yabanici 2015: 26).

On the one hand, it can be argued that Kosovo Albanian diasporas' actions played a constructive role in interpreting and supporting the claims for self-determination of Kosovo Albanians in the homeland. On the other hand, it bears mention that they dangerously partook in and enhanced controversial extra-territorial claims and plans for the creation of a 'great Albania' that with their implications hinder the ongoing internal

state democratisation, as well as regional stabilisation, with great threats to the peace and security of the whole region.

5 Cultural impact

One of the main ingredients that influence diaspora communities is culture. Culture itself is a complex combination of knowledge, belief, art, morals, law, custom, and 'any other capabilities and habits acquired by a man as a member of society' (Gsir & Mescoli 2015: 8). The meaning of culture, *cultura animi* (the cultivation of the soul), as authored by German philosophers and linguists, connected the concept to both the individual and the collective (the nation) (Gsir & Mescoli 2015: 8). Cultural identity was further defined as a shared culture, but not a fixed one, rather changeable under the influence of continuous transformations (Gsir & Mescoli 2015: 9).

Diaspora communities are a good example of culture transformation. Once they leave their country of origin, they on the one hand take with them an image of their own culture and embody it while, on the other hand, they are influenced by a host culture, resulting in a 'transnational flow of cultural capital'[8] (Chih-Yun 2010: 34), which then leads to the creation of a hybrid culture.[9] In this way, due to the struggle of living between different cultures, diaspora members might tend to be more self-conscious of their culture of origin (Kilduff & Corley 1999: 2). This type of behaviour may have positive and negative, progressive or reactionary outcomes in terms of engagement with their home countries. In this part we focus on language and education resorting to examples from the post-Yugoslav space.

5.1 Language and diaspora

Language is used as a means of attaining nationhood in post-Yugoslav countries. Since the nineteenth century the predominant language of the region was the so-called 'Serbo-Croatian', which entailed several dialects and the use of two alphabets, namely, Latin and Cyrillic. The other official languages of Socialist Yugoslavia were Slovenian and Macedonian. Following the dissolution of the former Yugoslavia, the need to assert language as a national identifier became ever more pronounced. Thus, today one can speak of Bosniak, Croatian, Montenegrin and Serbian languages; despite the fact that Bosniaks, Croats, Montenegrins and Serbs understand each other quite well.

The recognition of the new official languages was used to achieve political independence. Languages remain the source of conflict in disputed areas where different ethnic communities live together, such as the case of Croatian Krajina where there is an ongoing dispute over the

8 The cultural capital of diasporas is related to the globalisation of ideas, knowledge and, to some extent, social models. While establishing themselves in a country, transnational societies bring with them a rich cultural background which, while representing the visible features of their identity, also provides them with the means for their integration and acceptance into their new society(International Organization for Migration 2013: 3).

9 These hybrid cultures are not necessarily superior cultures, but simply differ from the existing cultures from which they borrow (Kilduff & Corley 1999: 6).

usage of both scripts, Cyrillic and Latin. Another example is Bosnia and Herzegovina, where all administrative and legislative matters have to be 'translated' into three official languages: Bosnian, Croatian and Serbian.[10] Despite evidence by many linguists that the differences between these languages are actually dialect differences,[11] the leadership of post-Yugoslav states disregards these facts and promotes the specificities of their national language. These varieties transcend to diaspora members, who are defined on the basis of their new nation states and ethnicity, rather than on the basis of the country they or their families left. Even before the dissolution of Yugoslavia, diaspora communities have often differentiated themselves and attempted to counter loss of identity, hybridisation and even forms of cultural repression. For instance, starting in the 1980s, Croat communities in Germany established national cultural communities and schools with their own language and curriculum (Milardović 1992: 172). These Schools of Supplementary Learning in Diaspora are still active against cultural assimilation of diaspora communities, due to the influence of both host countries and successor states. They are supported by central governments that give financial aid to schools to co-finance the projects that politically aim at hardening ethno-national cultural divisions.

Some diaspora groups reject these manipulations. The Declaration on Common Language[12] constitutes a bright outcome of the engagement of people with such credentials who embraced the idea to problematise the existence of four 'political' languages in Bosnia and Herzegovina, Montenegro, Croatia and Serbia.[13] Those that signed the Declaration declared:

> Polycentric standardisation[14] is the democratic form of standardisation closest to the actual use of language;
>
> Does not bring into question the individual right to express affiliation to different peoples, regions or states;
>
> Each state, nation, ethno-national or regional community can freely and independently codify its variant of common language;
>
> The fact that this is a common polycentric standard language leaves the user the ability to name it as s/he wishes.[15]

10 All cigarette packets destined for the Bosnian market must contain anti-smoking warnings written in all three languages, which leads to a situation where the message 'Smoking kills' is written the same in all languages, the only difference being that the Serbian warning is written in the Cyrillic script (Milekic 2017).

11 Their main argument is the understanding of all new languages by speakers of other language groups, including Serbian, Croatian, Bosnian and Montenegrin. See The Economist 'Is Serbo-Croatian a language?' (The Economist 2017).

12 Croatian academic and linguist Snježana Kordić's seminal work *Language and nationalism* (Durieux 2010) was the foundation for the text of the Declaration. The Declaration was drafted after four regional conferences, held in Podgorica, Split, Sarajevo and Belgrade during 2016.

13 Jezici i Nacionalizmi, http://jezicinacionalizmi.com/o-projektu/.

14 Polycentric language is a language with several interacting codified standard versions (as German, English, Arabic, French, Portuguese, Spanish, etc are defined).

15 *Deklaracija o zajednickom jeziku, Jezici i nacionalizmi*, http://jezicinacionalizmi.com/deklaracija/.

By declaring this, they appealed for

> [a]bolishing all forms of language segregation and language discrimination in educational and public institutions;
>
> [a]voiding unnecessary, meaningless and expensive 'translation' in courts and administrative practices as well as public information media;
>
> [t]he freedom of 'mixing', mutual openness, and the permeation of different forms and expressions of common language to the universal benefit of all its speakers.[16]

Since 2016 there have been more than 9 000 signatories. Diasporas/émigrés lent their strong support: 1 339 out of 9 093 signatories (14,7 per cent) are expatriate intellectuals who joined the cause from all over the world, boosting its legitimacy and outreach.[17] The future of the Declaration remains uncertain. However, the constant increase in the number of diaspora signatories is perceived as a positive outcome of the Declaration.

5.2 Education: Bosnia and Herzegovina

> Snježana Kordić: In such a system the purpose of the education is purely political – to subjugate the will of the young people to the will of the nation. The schools are the tools of the state political agenda, just like the army, police or the budget (Ilic 2011).

Politics of language are closely connected to education politics and policies. The region's notorious example of this interrelation is Bosnia and Herzegovina. It has a deeply-divided educational system along ethnic lines, on the basis of the claim that there are three different languages in the country (Serbian, Croatian and Bosnian). Divisions persist in spite of the common standpoint of prominent linguists that the language essentially is one and the same. Today, there are three different curricula in use where the main subjects of distinction are the 'national group of subjects', namely, language, history, geography and religious education (Trkulja 2017: 7) as they are regarded as essential for preserving the national identities of the three constituent peoples in Bosnia and Herzegovina. The consequence of this are essentially mono-ethnic schools around the country and there are the so-called 'two schools under one roof' where pupils of different ethnic backgrounds are physically separated with different school entrances and are very often prohibited to mix (Trkulja 2017: 7). These schools were established in 1999 with the initial aim of assisting refugees' return by showing them that their rights and liberties will be fully protected, providing the education for children based on their national identities. One of the main obstacles in resolving this problem is the political structure of Bosnia and Herzegovina, where policy powers are delegated to different levels and where each level has its own policies and ways of implementing educational curricula, and the ethno-nationalist politics using education as a tool for nation building. These schools assisted in the development of segregation and division; where education serves as a separation instead of a uniting tool (Karabegović 2017: 6).

16 As above.
17 For the list of signatories, see https://docs.google.com/spreadsheets/u/1/d/1XVGV5Z306SeDFzpdpUHhfeK-voAFdaakS48LqXfGozA/pubhtml.

With these discriminatory and segregationist policies, what is the role of the diaspora? With its capacities and experiences, the diaspora sees education as a field where it can contribute, be it through organisations that bring children from different ethnic groups together or by reinforcing ongoing divisions. The case of the city of Mostar is a good example of the diaspora's transnational influence to bring Bosniak and Croatian children together under one roof. A few diaspora organisations are operating in that direction.

One organisation is Our Kids,[18] a non-profit diaspora organisation with a focus on orphans and youths with disabilities, regardless of their ethnic background. The board of directors consists of individuals declaring themselves citizens of Bosnia and Herzegovina, rather than placing themselves in one of the national groups (Karabegović 2017: 8). Another example is *Våra Bar* (our kids), a sister organisation of Our Kids, which is based in Stockholm, Sweden. Their focus group are young adults with special needs, who are provided with necessary services and employment opportunities, as well as a space in Mostar where they can meet (Karabegović 2017: 9). The third example is the Association of Bosnians in France,[19] which is in direct communication with particular schools, trying to mitigate the divided education system and to bring children together. One of their contributions was to furnish a computer laboratory, meant to be used by all students, without any divisions (Karabegović 2017: 10). With this they managed to bring all students together in one place, and schools into dialogue on how should they operate in these circumstances.

These kind of actions by diasporas are aimed against the ethnic subdivision of communities. However, along with examples of diasporas encouraging reconciliation, some diaspora groups reinforce ongoing divisions. An example is the case of Konjevic Polje.[20] Due to assimilation policies established in the Republika Srpska, the Bosniak minority group of Konjevic Polje did not have an opportunity to study their national group of subjects (Trkulja 2017: 10). Parents of those children decided to speak out and ask for education reforms. This battle was strongly supported by the diasporas. Diasporas from Switzerland and France raised awareness of the situation by taking diverse initiatives.

> The Swiss Bosnian Solidarité Bosnie organisation made pressure on the Office of the High Representative in BIH throughout this period, as well as publicising their cause in a variety of media outlets. A letter and petition

18 The Our Kids Foundation was founded in London in 2008 and incorporated as a charity in 2009 by individuals living in the UK. Their goal was initially localised towards an orphanage in Mostar, Egipatsko Selo. Over the years, they have raised enough funds to rebuild the orphanage, employ a qualified team of professionals to create a safe environment for the children, ensure a quality level of care, and help orphans and children with special needs develop career readiness skills in trades such as hairdressing and IT (Karabegović 2017: 9).

19 Established in 1991, the Association has approximately 500 members, most of whom arrived as guest workers in France before the war of 1992-1995. Others arrived as refugees towards the beginning of the war. Nearly all have since become French citizens. Since the war their mission has shifted from humanitarian work to education (Karabegović 2017: 12).

20 Konjević Polje, a village near Srebrenica, is located in the Republika Srpska entity. The RS curriculum is skewed towards a view of history favouring Serb historical narratives about the war, negating genocide in Srebrenica, and with politicised language instruction, leaving minorities in these schools with little possibility to engage in meaningful ways.

> were written with recommendations echoing the Konjević Polje parents' request to the Office of the High Representative, Ministry of Education, and other prominent governmental bodies (Karabegović 2017: 11).

Diaspora members also showed their support by coming to Sarajevo and taking part in organised protests. Apart from similar actions, diasporas from France organised a public discussion about the issue on the outskirts of Paris (Karabegović 2017: 11). After a long struggle the new, private school for Bosniak children teaching the Bosniak national curriculum was built (Karabegović 2017: 12). Konjevic Polje is an example of reinforcing the division: It is true that these people needed help and protection of their rights, but the diasporas could have advocated (as in other circumstances) community rights while considering the need for reconciliation and avoiding the outcome of dividing children without granting them an opportunity to interact.

These examples drive one to the conclusion that the diaspora has its potentials and limitations, a will to help the reconciliation process and a will to support segregation. It is willing to work and help local communities although it cannot change the political narratives present in the region. This brings us back to the Declaration on the Common Language because, as Snježana Kordić states, common language could be used as a tool for abolition of the system of 'two schools under one roof', since these schools are based on different national curricula (Milekic 2017).

6 Conclusion

The engagement of diasporas is an increasingly important issue at the global level that will inevitably acquire more and more relevance, as international migrations already constitute a pillar of contemporary politics and societies. Diaspora communities realise various socio-economic and political programmes through lobbying, remittances or personal participation, all of which have the potential of consistently impacting countries' decision-making processes.

In economic terms we discussed how the diasporas can have a significant impact on the relative wealth because of their remittances, topping 16,68 per cent of the GDP in the case of Kosovo. However, this practice, often informal, can be abused, fostering a system of social dependency, but also facilitating criminal enterprises and networks such as florid drugs trafficking in the region. Politically speaking, emigrants abroad play an increasingly active role, to the extent that many states have begun to recognise them as legitimate constituencies, granting them active and passive political rights. In this way the diaspora can activate itself to support parties or civil society organisations both financially and by lobbying for their causes. At the same time, we saw how it can successfully engage in antagonistic actions, for instance by contesting sovereignty, especially in weak states such as Kosovo. At the cultural level, the diaspora often disposes of tools for creating an impact on local communities back home and, in the case of highly-divided societies as in the Balkan region, where they can act to counter dynamics of discrimination and divisions, as seen in the example of the 1339 expatriated scholars and intellectuals who advocate the end of language segregation in the educational sector by supporting the Declaration of Common Language, while at the same time

it can also engage toward weakening ongoing reconciliation efforts, as in the case of Konjevic Polje.

The article shed light on the ambivalent role of diasporas, warning about the inherent controversy in the ongoing discussion in the policy area of the diasporas' engagement. The authors aimed at highlighting the potential threats coming from the diaspora's mobilisation for the homeland and the need for avoiding unnecessary reifications of this increasingly crucial social actor, while inviting a critical analysis of its dual impact. In fact, with its complex fluidity, diasporas' positionality is continuously exposed to historical developments, to shifts in narratives, to dynamics of boundary maintenance or erosion, with the result that its legitimacy and accountability might constantly vary. This is certainly not a claim for any form of diasporophobia: The purpose is rather to stress that, even with regard to its great potential for enhancing democracy, the diasporas' engagement always has to be carefully scrutinised, especially by the emerging non-state actors dealing with it.

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CK Tutlam, JG Akech, SC Mutambasere, T Ramakhula & UM Assim 'Africa's democratic deficit: The role of the diaspora in bridging the gap between citizens and government' (2019) 3 *Global Campus Human Rights Journal* 28-51
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Africa's democratic deficit: The role of the diaspora in bridging the gap between citizens and government

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Abstract: *Africa's diaspora continues to play an indispensable role in shaping the continent's social and political landscape. This impact has been felt since the struggle against colonialism to the contemporary challenges of democratisation. Recent developments in technology and the impact of globalisation have further amplified the power of the diasporas to influence events in their home countries. The trend in response by African governments has ranged from exclusion and isolation to cooperation and collaboration. Many African governments have been open to engagement with diasporas to facilitate financial investments, but have been more circumspect in allowing political participation by the diasporas. Can the diasporas play a positive role in facilitating and aiding Africa's new impetus towards democratisation or will diasporas further fragment some of their already fragile home countries? This article discusses democracy in sub-Saharan Africa against the backdrop of the peoples' lived realities, and explores the role of the diasporas in addressing challenges peculiar to the African context. It is argued that diasporas play a significant role in forging the development of democracy in their homelands. The article engages four claims to interrogate this position. First, it contextualises democracy as a reality in Africa. Second, it closely considers the participation by the diasporas. The third aspect involves an evaluation of Africa's legal and political frameworks, followed by the proposal for a collaborative approach towards the diasporas, to improve democratisation in Africa. As such, the research question that the article seeks to answer is whether the diasporas play a role in forging the development of democracy in Africa. With the aid of a desktop approach that draws on experiences from selected countries, the article maps the way forward in fostering a better*

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relationship between the diasporas and African governments to improve democratic governance, advocating a collaborative approach that is also cognisant of the important role of civil society in reaching the grassroots. The key findings indicate that while governments are open to engagement with the diasporas in the areas of development and investment, this is not the same in the case of political participation. This is based on the disregard of the minority view as used in the Western model of elective democracy. It is hoped that if consensus is used where the majority considers the positions of the minority, the issue of political participation would be greatly harnessed beyond the current trend.

Key words: *democratisation; African diaspora; civil society; democratic deficit*

1 Introduction

Prior to the 1960s the term 'diaspora' has had different meanings over different periods. The concept of diaspora can also be understood in light of its constitutive criterion. First, it is widely understood as dispersion. The term was predominantly used to describe the Jewish people and their dispersion (Akyeampong 2000). Central to this criterion is the need for dispersion in space where the persons cross countries, from one border to another, based on the use of force or any other reason that may turn out to be traumatic (Brubaker 2005). It should be noted, however, that this criterion is not universally accepted. This is because dispersion may take place without crossing borders. Some scholars suggest that ethnic groups in a given territory may use divisions of their frontiers as a form of diversion (Brubaker 2005).

In the second place, diaspora may also refer to homeland orientation. This context refers to an instance where a person or a group of people orient the place of habitation to become their actual or perceived place (Brubaker 2005). As such, one uses six steps to engage the use of homeland orientation (Safran 1991). These include maintaining a collective memory or myth about the homeland; maintaining the hope to return to the homeland; and a commitment to restore peace and prosperity in the homeland. Another step is a continuation of the relations with the homeland in a manner that shapes one's identity and solidarity (Safran 1991).

In the third place, diaspora is also contextualised as boundary maintenance, where a society in the diaspora preserves its distinct identity from the homeland (Brubaker 2005). The efficacy of this contextualisation is the need for it to develop organically over a period. In light of the three contexts of the diaspora, it is thus imperative to identify the criteria presented in a given setting in addition to a definition attached. In this regard, the reference to African diaspora as a group of people only emerged during the 1950s and 1960s (Zeleza 2005). During that period Pan-Africanism was the dominant discourse in Africa. The African diasporas have since played important roles in influencing Africa's socio-political conditions. The diasporas currently have an even greater platform for influence because of the interconnectedness of the world due to advances in technology and the effects of globalisation. Financially, the diasporas play a crucial role on the continent: African diasporas remitted US $35,2 billion to the continent in 2015 (World Bank 2016).

It is challenging to define and confine the term 'African diaspora', but this exercise is important in providing a frame of reference for further meaningful discussion. At the continental level, the African Union (AU) defines the diasporas as persons of African origin who are living outside of the continent and 'who are willing to contribute to the development of the continent and the building of the African Union' (African Union 2017). This formulation asks more questions than it resolves: Who is of African origin and is a person considered not to be an African diaspora if he or she is unwilling to aid in Africa's development? The mitigating factor may be that the second aspect of the formulation is indicative of the AU's desire for collaboration rather than a constitutive part of the definition.

In defining the term 'diaspora', Palmer identifies certain elements that are common to the diasporas such as a shared sense of identity and an emotional attachment to their homelands. This sense of identity is transboundary and unites the diasporas, irrespective of where each individual or group may reside (Palmer 2008). This collective identity is what Zeleza refers to as 'group consciousness' (Zeleza 2005). This identity should not, however, be homogenised. One must be cognisant of the multiplicity of identities within the diaspora itself pronounced along national, cultural or religious lines, among other factors. Safran identifies six elements to describe the concept of the diaspora, which also has commonalities with Palmer's two basic elements (Safran 1991).[1]

Migration is at the root of the formation of diaspora communities even though it does not necessarily follow that every migration stream leads to the formation of diaspora communities. There are numerous and complex reasons for the dispersal of the African people that can be traced all the way back to the transatlantic slave trade (Gilroy 1993). However, the focus of the article will be on the modern dimensions of this phenomenon. Zeleza describes the contemporary African diaspora as those formed since the late twentieth century, mainly driven by the colonial period and its fall-outs (Zeleza 2005).[2] Recently, the humanitarian situation of African irregular migrants making their way across the Mediterranean Sea to

1 Safran describes six elements that can be used to define the diaspora, namely, (i) they, or their ancestors, have been dispersed from a specific original 'centre' to two or more 'peripheral', or foreign, regions; (ii) they retain a collective memory, vision, or myth about their original homeland – its physical location, history, and achievements; (iii) they believe that they are not – and perhaps cannot be – fully accepted by their host society and therefore feel partly alienated and insulated from it; (iv) they regard their ancestral homeland as their true, ideal home and as the place to which they or their descendants would (or should) eventually return; (v) they believe that they should, collectively, be committed to the maintenance or restoration of their original homeland and to its safety and prosperity; and (iv) they continue to relate, personally or vicariously, to that homeland in one way or another, and their ethno-communal consciousness and solidarity are importantly defined by the existence of such a relationship. Safran does not consider these six elements to be all cumulative; suffice it that a community shares several of these elements.

2 Zeleza distinguishes the contemporary African diaspora from the 'historic diasporas' which were formed prior to the establishment of African colonial states. He also identifies three waves within the contemporary diaspora: the diaspora of colonialisation; the diaspora of decolonisation; and the diaspora of structural adjustments formed after the 1980s. In the first, he includes Africans that left to study or work in Europe or in the colonial power; the second are Africans that dispersed as a result of the struggle during decolonisation; and the third are Africans that left in the 1980s as a result of the socio-political and economic repercussions of the structural adjustment programmes instituted by African governments.

Europe represents the latest stream of African migration (UNHCR 2018).[3] In the article, the diaspora refers to persons not only outside of the African continent but also persons within the African continent but outside of their countries of origin.

The article adopts a desktop research methodology, whereby an analysis of existing literature on the various aspects of the argument is evaluated before informed positions are taken. To this end, the sources examined include journal articles, articles by experts, and statistical data. Thus, further, the researchers adopt purposive sampling as a mode of identifying the relevant literature, and data to use (Neuman 2011). This methodology does not engage a comparative analysis *per se*, but rather draws on experiences from selected countries to direct the argument and claims. The selected countries are The Gambia, Ethiopia and Zimbabwe. The justifications for the choice of these countries are the 'waves of democratisation' in the countries at the time; and the need to cover the different African sub-regions – east, west and south (researchers working on democratisation in the Middle East addressed North Africa).

The first part of the article explores Africa's relationship with democracy, discussing why democracy has by and large failed to take off on the continent. Second, the article looks into the diaspora's political engagement with their home countries, and to what extent this engagement has been effective. Conversely, the third part examines the reaction of African governments through the legal and political sphere to the engagement of the diaspora. Finally, the article discusses some factors that can help in building a relationship between the diasporas and their respective governments in order to better serve the democratic needs of the people.

2 Democracy in Africa – Our lived reality

Democracy, a word originating from the Greek word *demos,* is characterised as a form of government in which supreme power is vested in the people (Strum 2017). American President Abraham Lincoln identified democracy as a government 'of the people, by the people, and for the people' (Gettysburg 1863). In a democratic system, the people through the contestation of free and fair elections elect representatives. This further implies that elected officials are held accountable through the ballot box.

Generally, democracy is characterised by the joint participation of the members of society in selecting, usually through elections, one whom they wish to have as their representative in government. A state will therefore be deemed democratic if it displays the two elements of participation of the people as well as a decentralisation of the powers of the government, such that no one will have the opportunity to abuse power (Osabu-Kle 2000). Diamond (2004) defines democracy as characterised by four key elements: 'a political system for choosing and replacing the government through free and fair elections; the active participation of the people, as citizens, in politics and civic life; protection of the human rights of all

3 According to data from the UNHCR, as at 23 March 2018, 13 289 African migrants have arrived on European shores; 486 migrants have been declared dead or missing.

citizens; a rule of law, in which the laws and procedures apply equally to all citizens'.

The experience of democracy has been varied in many countries across the continent. While for some it has redeemed them from dictatorship, for others it has perpetuated dictatorial institutions and rule.

Contrary to the hope of democracy after the period of decolonisation, and its current transformative influence on other continents (Latin America and Asia), in Africa democracy has by and large failed to deliver its promises. For Africa, attempts at democracy and/or democratisation have been characterised by, amongst others, the rigging of elections, amendments to constitutions to enable ruling parties to remain in power indefinitely, and electoral violence (Adejumobi 2000). The use of violence to silence people from exercising their fundamental freedoms such as the right to free expression (Southern African Litigation Centre 2015) and association (International Service for Human Rights 2016) has become frequent occurrences across the continent.

A rhetoric question that demands answers is why democratisation has been failing. It is imperative to indicate why the reference is to 'democratisation' rather than 'democracy'. Democratisation is largely referred to as the process through which a country transitions to the application of democracy. In light of the fact that the transition takes time, countries that are making steady progress may still fail to achieve democracy in the strict sense.

For instance, democracies are acknowledged as governments for the people, by the people (Canovan 2006). As such, the provision of its services requires that the governments are fully accountable to the masses, with regard to the provision of health services, education and infrastructure; being accountable to the masses; allowing the other arms of the government to function independently; and ensuring that there is a growth of institutions that are pro-democratic (Norris 1999). The failure of the government to be accountable presents a danger to the democratisation process.

The failure to engage the masses in the democratisation process may lead to a partial, low-intensity or a pseudo-democracy where the citizens of a given country are disengaged from the activities concerning those who exercise real power, despite the existence of a system that ensures the use of the ballot (Ndegwa 2001). To this end, while a constitution exists, its relevance is limited to the framework it offers for the election of a government in disregard of the attendant abuse of the rights of the masses. The key issue that arises out of this assertion is how it is related to persons or a society in the diaspora. It is argued that although the diaspora community may not have a role in making a government accountable through the vote, the degree of impunity that a government grants its own citizens is but a fraction of the nature of treatment that the diaspora community may receive. It is for this reason that Norglo, Goris, Lie & Ong'ayo (2016) advocate the need to engage the diaspora community in policy making and other matters of state. On this basis, it is prudent to interrogate whether the nature of a government where a diaspora community is situated is instructive in determining the latter's attitude, and the subsequent development of the concepts of homeland orientation and boundary development.

Other issues have to be raised with regard to the discussion regarding the adoption of Western liberal democracy. It is perceived that the original wholesale adoption of Western liberal democracy does not take into cognisance issues particular to the African setting. Issues such as the poverty levels in the region (Joseph 1999) have been exacerbated by the mismanagement of resources by corrupt and self-serving 'democratic' governments (Callaghy 1985). As argued by Sen, democratic governance can lead to the end of poverty especially when people propose their priorities and elect leaders who work toward the achievement of social, economic and political transformation programmes (Sen 1999). In this regard, Africans have attempted to change the democratic regimes that are failing to deliver results.

Wiredu observed that the problem indeed began with the model of democracy, characterised by a multiparty system and a rule by the majority, which in one way or another led to the exclusion of some members of society (Wiredu 1996). Cultural diversity is another factor that the Western liberal version of democracy has failed to address in Africa (Bradley 2011). The many ethnic groups in respective African countries, sometimes each with their own interests, make governance more challenging. These challenges can be seen even in formal democracies such as Kenya and Nigeria, which struggle to contain ethnic and religious divisions and conflicts during elections.

Some African rulers have nevertheless held on to the model of Western democracy, as a result of the desire to maintain good relations with Western powers (the European Union and the United States), whose donor funds to some extent are conditional upon democratic governance. This, however, has simply been a face-saving exercise for the global front (Bradley 2011).

Traditional forms of governance may be argued to have worked well for Africans. For example, there was a central authority in the form of a king or principal chief who had delegates acting as guardians over different parts of the territory. These guardians governed individual regions within the territory, including by solving any disputes that arose within their area, and reporting to the king or principal chief on their guardianship.[4] The governance structure included the regular holding of public gatherings, where the chief would meet with all his people, discuss issues affecting them as a nation as well as hear the grievances of his people. These gatherings were known as *pitso* (Ministry of Information and Broadcasting Lesotho 1996). These traditional forms of governance and selection of leaders could also be considered part of the reason why Africa faces a problem of leaders that have difficulty letting go of the leadership reins. This is because in most African states pre-colonial leadership was inherited and one occupied such a position until death (Ray & Reddy 2003). Perhaps this 'leadership-till-death' mentality still lingers in some Africans, despite having moved to democracy, which is based upon leadership for an appointed time and on the will of the people.

There might be two possible ideas as to why democracy is not performing as strongly hoped for in Africa. These are mentioned below.

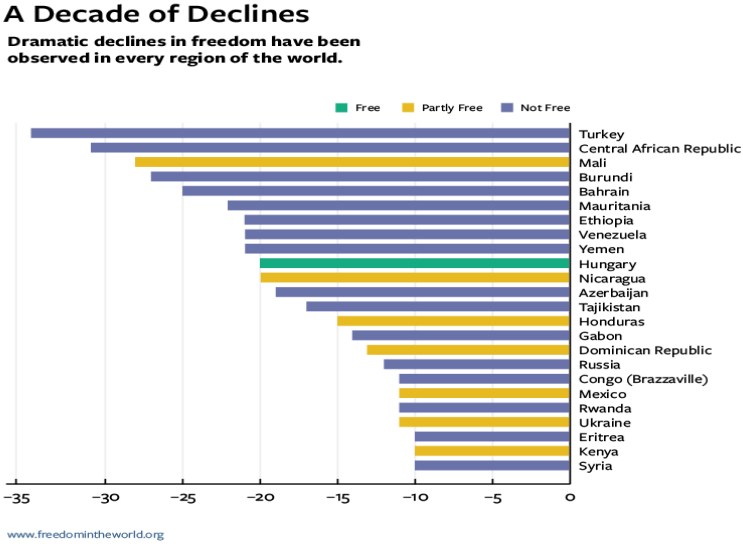
4 In kingdoms such as those of Lesotho, Zululand and Swaziland.

2.1 Lack of participation and inclusiveness

No political system has been found to be all-inclusive (Bradley 2011), but the fostering of stability and legitimacy within any system is highly likely to increase the citizens' identification with and sense of ownership of such a system, thereby increasing the success and smooth operation of the system (Bradley 2011). It is difficult to foster earnest and enthusiastic participation in a population that feels that the system is not legitimate. One may regard it as a foreign concept that overlooks and disregards the very fibre that makes them who they are as a people, including their history and traditions (Ake 1991). This lack of participation is exacerbated by the corruption among elected officials, leaving most people believing that democracy is a waste of their time and hope.

According to Freedom House (2018), several African countries do not reflect a good image of democracy. From a global perspective, only 45 per cent of countries have had a full democracy; 30 per cent have partial democracy while 25 per cent suffer a lack of democracy. At the core of these statistics is the steady decline, as indicated in the table below.

Table 1: Depiction of decline of freedoms from a global perspective



Source: freedomintheworld.org (2018)

An evaluation of the countries listed reveals that out of the 24 countries that project the downward trend in recognition of civil freedoms, nine are from Africa. This represents 37 per cent of these countries.

2.2 Was Western democracy 'forced' on Africa?

A cardinal principle that aids the understanding of democracy is to appreciate the basis of its construction. According to Ayittey (2010), there are two forms of democracy: democracy by majority and democracy by consensus. The former is understood as the 'Western form of democracy'. Wiredu (1996) contrasts this Western model of majoritarian democracy with the consensus-based model, which also embraces minority representatives/positions. This is an indication that the minorities have a space to have meaningful participation in the decision-making process in a political community. Democratic decisions by majority vote are known as being transparent, fast and efficient notwithstanding the fact that they ignore minority positions, whereas consensus-based democracy relates to decisions taken by consensus whereby minority positions are considered. However, it has the disadvantage that it takes a long time to arrive at a consensus on various issues (Ayittey 2010). According to Ayittey and other African scholars, this latter form of democracy is akin to what obtained in many traditional African societies (Ayittey 2010).

Ohachenu (1995) suggests that the idea and concept of each form of democracy is constructed from the 'historical knowledge, experience, values and capabilities' of the society within which it is to be enforced. Therefore, it seems ironic that the democratic model crafted in and for Western societies was adopted and applied extensively in Africa, a society so dissimilar to Western societies. This stemmed partly from the need to be seen or accepted by the West as 'democratic', largely 'as a condition for Western aid'. The result is the large-scale copying and adoption of the Western form of democracy rather than building 'upon our own democratic tradition' (Ayittey 2010).

Nonetheless, this is not to say that traditional institutions cannot adapt to and coexist with modern institutions of governance, but there would be a need for a clear and detailed fusion of the two. Mabogunje (1995) goes on to highlight that democracy in Africa would in fact benefit and flourish greatly if traditional methods and principles of governance were fused with modern governance structures, thus mitigating their seemingly antagonistic relationship. Perhaps a tempering of the Western democracy, characterised by the winner-take-all and majority rule set-up may be beneficial to Africa (Bradley 2011). At the least, as Ayittey (2010) notes, it would prevent a system that allows

> an elected leader to use power and the state machinery to advance the economic interests of his ethnic group and exclude all others: Kenyatta of Kenya and the Gikuyu, Moi of Kenya and the Kalenjin, Biya of Cameroon and the Beti, Eyadema of Togo and the Kabye, to name a few.

It is in this context and conceptualised version of democracy that the African diaspora needs to carve its contribution to democracy-building processes in the homeland.

3 Diasporas' participation

This section examines the current relationship between the diasporas and the homeland governments using the examples of three sub-Saharan

African countries (The Gambia, Ethiopia and Zimbabwe) with a focus on the democracy-building efforts by the diasporas.

Some research has been conducted on the political activism of the African diasporas (Matsilele 2013; Chivanga 2015; Jaw 2017) as well as on their contribution to the economic development of the homeland by way of financial remittances (Raga Lencho 2017; Ngulube 2013). Some of these examples speak to specific involvement of the diasporas in landmark transition periods in the homeland, for example, in The Gambia.[5] This section will draw inspiration from some of these examples, and use them as a basis to make recommendations for the formulation of sustainable policies that will capitalise on the experiences and knowledge that the diasporas have acquired. It will also encourage collaboration with grassroots civil society in the homeland in order to bridge the democracy deficit on the continent.

3.1 African diaspora

In the introduction to this article it was demonstrated that there are various definitions of the term 'diaspora'. However, what is clear are the common characteristics of diasporas. Two main characteristics of the diasporas are (a) that they are a population that is transnational or deterritorialised (Jaw 2017); and (b) that they have ties to the homeland through familial, economic and political interests (Cohen 2008).

It is important to indicate the heterogeneity of the diasporas, as this affects their engagement with the homeland, and is also important when formulating policies. Due to Africa's democratic challenges and deficit, as characterised by the repression of dissenting voices, a substantial sector of the African diaspora comprises political refugees and asylum seekers. This is a common feature in all the countries studied. It is reported that Zimbabweans are in the United Kingdom's top ten list of nationals that receive asylum (Chivanga 2015). The Gambian diaspora consists of a significant number of journalists, civil society actors and political activists who fled because of the shrinking democratic space under the dictatorship of Yayha Jammeh (Jaw 2017). Lyons describes the Ethiopian diasporas that fled in the late 1970s and early 1980s as conflict-generated, that is, people who experienced a 'forced, violent separation' from the homeland, which he differentiates from what he terms 'voluntary economic pursuits' (Lyons 2009).[6]

The persistently poor economic performance of many African countries has also resulted in the exodus of its nationals, who have left seeking the proverbial greener pastures. There are also migrants who leave for study purposes or career advancement as well as family reunification. While the needs and circumstances of the various types of diasporas differ, the majority organise themselves into communities in host countries. Some communities are initiated as support systems to facilitate assimilation in the host countries (Lyons 2009). It is also from this mobilisation of people with a common interest that political agendas and governance concerns are raised and used to influence politics in the homeland.

5 During the transition from Yayha Jammeh's dictatorship in 2016.
6 One could argue against the notion of voluntarism in the case of migration based on a debilitated economy in the country of origin.

3.2 Prodigal sons and daughters: Enemies of the state?

It is crucial to explore the extent of participation of the diasporas in homeland politics and its influence on democracy and good governance. During migration, some members of political parties in the homeland also migrate and sometimes form satellite branches of their parties in the host country. New political allegiances are formed, usually depending on whether or not their departure was hostile. For example, in the case of the conflict-generated diaspora described by Lyons, the framing of political issues is likely to be shaped around criticism and denouncing of the regime in the homeland that forced the migration. This uncompromising framing of issues often is enabled by the geographical distance that shields the diasporas from repercussions. They can exercise their freedom of expression through criticising a sitting government as they are outside the territory of the authoritarian rule they are criticising. One scholar describes them as 'long distance nationalists' who are unaccountable as they do not have to deal with the possible consequences of their actions (Demmers 2002). However, this viewpoint seems to imply that the exercise of freedom of expression must necessarily be accompanied by repercussions, although it is a universally-recognised human right. The exercise of this right can have both positive and negative consequences depending on the intensity of the activism by the diasporas. A positive consequence would be giving a voice to their fellow nationals in the homeland who are unable to freely speak out because of the repressive regimes that do not allow for constructive political debate. On the other hand, abrasive and overstated attacks on the regime might bolster and reinforce extremist actors in the homeland (Lyons 2009). In this instance, it may be argued that the activism of the diasporas may not always bring forth the desired change.

3.2.1 The Gambia

In The Gambia, it is estimated that 4,5 per cent of the population (90 000) live outside its borders as of 2016 (Population 2018). The majority of Gambians migrated during the 22-year dictatorship of Yayha Jammeh to escape the increasingly authoritarian rule, as well as to explore better economic prospects. Jammeh perceived democracy as a Western construct, and as having no place in the African context (Jallow 2017). Freedom of expression was severely suppressed in The Gambia, resulting in over 110 journalists fleeing the country by the end of 2015. Most left to re-establish their careers abroad with media outlets that cover events in their homeland (Journalists 2015).

Gambians in the diaspora were active in mobilising a vibrant opposition against Jammeh throughout his rule. Activism by the Gambian diaspora started through an e-mail list called Gambia-L where information was shared to influence people both in the diaspora and in the homeland to rally against Jammeh. One of the key characteristics of this activism (which is also common to the other countries under study) is the external lobbying efforts. These are often targeted at the host government, as well as international and regional bodies, to exert pressure on the homeland government. In the case of the Gambian diaspora, lobbying efforts were targeted at regional bodies such as the European Union, African Union (AU) and the Economic Community of West African States (ECOWAS). They also formed partnerships with international human rights

organisations such as Amnesty International and Human Rights Watch in order to highlight human rights abuses taking place in the homeland (Jaw 2017).

Another key feature of the Gambian experience was the involvement in the politics of the homeland. In the run-up to the 2016 elections in The Gambia, the diasporas are alleged to have sponsored mass protests that pushed for electoral reforms. In addition, UKGambia sponsored the participation of the youth and women in the national assembly elections in 2017 under the banners of NotTooYoungToRun and GamWomenIn-Parliament campaigns (Jaw 2017). The Gambian diasporas have what they call the Gambia Democracy Fund (GDF) in order to raise funds to support opposition political parties as well as to support families of victims of political persecution (GDF Press Release 2016).

Historically, in The Gambia (as with the other African countries) the relationship between the state and the diasporas has been hostile. The estranged relationship has been due mainly to the continued authoritarian rule in the homeland, prompting the diasporas to be critical of the homeland government. As a response to the mobilisation by the diasporas, Jammeh periodically banned diaspora websites, arbitrarily arrested any members of the diaspora who travelled to the homeland and used smear campaign tactics against prominent activists in the state's newspapers (Jaw 2017).

Motivated by the desire to benefit economically from the diaspora, Jammeh's government started to superficially soften the stance against the diasporas. One scholar states that African states have started looking towards the diasporas in order to bridge the fiscal gap created by donor fatigue and not necessarily out of concern for the welfare of their citizens (Iheduru 2011). An example of this is how, in 2012, Jammeh's administration renamed a government department the Ministry of Foreign Affairs, International Cooperation and Gambians Abroad. However, this inclusion is merely on paper as the government has not made any concrete efforts to adequately staff the division to deal with Gambians abroad, citing financial and technical limitations. After Jammeh, the focus now is on drawing the diasporas into rebuilding the country's economy. Through the Migration and Sustainable Development in The Gambia project, recommendations are being made to encourage diasporas to invest in the homeland (Courtright 2018).

3.2.2 Ethiopia

The Ethiopian diaspora is among one of the largest from the African continent, although for the purposes of this section particular emphasis will be placed on the Ethiopian diaspora in the United States of America. It is estimated that there are as many as 500 000 Ethiopian nationals living in the United States (Lyons 2009). A substantial portion of the diasporas comprise Ethiopians that left in the 1970s and 1980s because of the repressive Marxist military regime under Mengistu Hailemariam (Lyons 2009). As is typical of diaspora communities, there are diverse identities within the Ethiopian diaspora with a wide range of organisations, newspapers, blogs, websites, radio and television shows. They have been extremely vocal in their quest to influence the strategies of political actors in the homeland.

One such example of the measure of power that the Ethiopian diasporas wield is their ability to exert pressure on events in the homeland. In 1995 the opposition party Southern Coalition, which had the financial backing of the diasporas, engaged in deliberations to run for elections together with the ruling Ethiopian People's Revolutionary Democratic Party (EPRDP). The diasporas delivered sharp criticism to this move and labelled the leader of the coalition, Beyene Petros, a traitor. Bowing to this pressure, the Southern Coalition eventually boycotted the elections (Indian Ocean Newsletter 1995). Another form of involvement by the Ethiopian diasporas relates to the 2005 elections. The main opposition coalitions were deeply rooted in the diaspora. The United Ethiopian Democratic Forces (UEDF) was formed in 2003 in the United States where the majority of the executive committee remained. It included some persons in the homeland in addition to its diaspora-based members. Similarly, the Coalition for Unity and Government (CUD) had strong links to fund-raising efforts in the diaspora and had the backing of prominent political actors based in the United States (Lyons 2009). In the aftermath of the contested election and ensuing political crisis, the UEDF's executive committee dismissed its Chairperson and first Vice-Chairperson for having taken up their seats in parliament rather than boycotting the political process (Indian Ocean Newsletter 2006).

There has been much debate around the question whether the political activities of the Ethiopian diaspora have a positive or negative influence. It is reported that the Ethiopian diasporas for the most part were influential in the violence that erupted in 2017, which resulted in the declaration of a state of emergency and an internet blackout (Jeffrey 2016). The diaspora media had been calling for 'five days of rage' as a response to a stampede in Oromo that had occurred when the police and protesters clashed. When the state of emergency was lifted in December 2017, there was a cabinet reshuffle, which saw new appointees that are technocrats without a party affiliation (Jeffrey 2016). In a way it could be argued that the agitation by the diasporas produced both negative and positive results. It caused the government to tighten its repression, but at the same time prompted the consideration of reforms.

Turning to the policies of the government regarding the diasporas, the Ethiopian government has been making strides to incorporate the diasporas into its policies and strategies. What is of note is that Ethiopian political leaders, including those in government, often send representatives to North America to canvass for financial and political support. The Ministry of Foreign Affairs in the Ethiopian government has a State Minister for Business and Diaspora Affairs. From the title of the department, one may conclude that the policy of the government towards the diaspora is geared towards pecuniary matters.

3.2.3 Zimbabwe

Zimbabwe has over the years undergone multiple economic and political crises. Each episode was marked by the exodus of nationals, either fleeing the authoritarian regime or because of the deteriorating economic climate. It is estimated that more than 4 million Zimbabweans have left its territory, constituting the diaspora (IOM 2010). As in the case of the other African diasporas discussed, their identity is diverse, as is their location,

although the majority find themselves in the United Kingdom and South Africa.

The political views of the diasporas are not always aligned, one reason being that there are political party surrogates that appear in the diaspora. However, even among the seemingly-aligned political movements motives are not always aligned, owing to the heterogeneous nature of the diaspora. The Zimbabwean diasporas in the United Kingdom have mobilised a grouping called Zimbabwe Vigil which organises protests on various issues every Saturday at Zimbabwe House (the Zimbabwean embassy in London). The group comprises asylum seekers, refugees, opposition Movement for Democratic Change (MDC) party supporters as well as white Zimbabweans whose political interests include the redistribution of land in Zimbabwe. Some have questioned whether the activism of asylum seekers in the group is borne out of genuine concern for policy reform and democracy in the homeland, or whether their emphasis on the brutality in the homeland is a means to buttress their claims in the host country (Chivanga 2015). In analysing the effects of their activism, it is irrelevant what motivates it, only that they are able to influence democratic processes in their homeland.

It has been suggested that the nature of Zimbabwean diasporas' engagement has vacillated between combatant political issues and humanitarian and economic development (Musoro, Madziva & Magaisa 2006). An illustration is the Zimbabwe Diaspora Development Interface (ZDDI) created in 2008. This highly-organised platform is divided into thematic sections: agriculture and environment; education; finance and economic development; health and social care; industry and technology; justice and governance; and media. It makes use of the skills and experiences of the diverse group members to devise strategies for development and business opportunities, in response to the needs in the homeland.

The Zimbabwean government under former President Robert Mugabe adopted a hostile attitude to its diasporas and, in one instance, Mugabe labelled them 'stupid for looking for jobs in America' (News 24 2017). The relationship to some extent has started evolving, in light of the diasporas remitting close to US $1 billion per year back to the homeland. In 2017 the Zimbabwean government of adopted a five-year National Diaspora Policy Implementation Action Plan with the aim of tackling policies and legislation, the intra-governmental-diaspora relationship, institutional engagement, diaspora investment, remittances, national socio-economic development, and knowing the diaspora and diaspora's rights. When Emmerson Mnangagwa came into power as the President of Zimbabwe in November 2017, one of his first missions was to travel to South Africa to meet with Zimbabweans living there. The meeting was to encourage investment in the homeland and explore ways of economic collaboration (*The Herald Zimbabwe* 2017).

The Zimbabwean diasporas have for years been engaged in a battle to assert their right to vote. It has been said that giving the diasporas the right to vote bridges the psychological gap between the citizens and the homeland, making them more interested and involved in democracy building in the homeland (Laloupo 2015). At least 30 African countries extend a chance to vote to their non-resident citizens. In Zimbabwe, section 67(3) of the Constitution recognises the right of every citizen

above the age of 18 to vote in elections and referendums. However, provisions in the Electoral Act make it technically impossible for the diasporas to vote. In 2017, three diaspora citizens launched an application to the Constitutional Court challenging the Electoral Act in as far as it does not allow them to vote in accordance with the Constitution. As at 14 March 2018 the Court had heard the matter on the merits and reserved judgment.

Unlike in The Gambia, fundraising for political parties by the Zimbabwean diasporas has been fraught with challenges. The MDC in the UK was obstructed by the Political Parties Finances Act, which requires that all financing for political parties should come from within Zimbabwe. Furthermore, there were challenges regarding trust among the diasporas with some claiming that the leadership in the UK were opportunists seeking to benefit personally from the finances raised (Pasura 2009).

The current activities of the diasporas can be performed only within a defined legal framework for them to be effective. For this purpose, it is important to examine in detail the legal and political framework.

4 Africa's legal and political frameworks

On the continental level, Africa is more welcoming to the diasporas in its legal and policy frameworks as compared to the domestic level, where governments have enacted restrictive laws and policies. The African diaspora has always championed positive change and inspired African revolutionary dreams of independence, good governance and rule of law (AUC Agenda 2063)the people of Africa and her Diaspora, united in diversity, young and old, men and women, girls and boys from all walks of life, deeply conscious of history, express our deep appreciation to all generations of Pan-Africanists. In particular, to the founders of the Organisation of African Unity for having bequeathed us an Africa with exemplary successes in the fight against slavery, colonialism and apartheid. Agenda 2063, rooted in Pan Africanism and African Renaissance, provides a robust framework for addressing past injustices and the realisation of the 21st Century as the African Century. 2. We echo the Pan-African call that Africa must unite in order to realize its Renaissance. Present generations are confident that the destiny of Africa is in their hands, and that they must act now to shape the future they want. Fifty years after the first thirty-three (33. The Pan-African Movement (PAM) which was initially dominated by African diasporas was successful in their quest for decolonisation of Africa because of profound diaspora interest, support and leadership. In 2012 AUC Executive Council stated (African Union 2012):

> Member States of the Organisation of African Unity (OAU) and thereafter the African Union (AU) have long regarded the diaspora as a key element in the continent's development and integration process and in the renewal and renaissance of the Global African Family.

It should be noted that the AU has a Citizens and Diaspora Directorate (CIDO) housed within the AU Commission mandated to pursue, among others, enhancing participation of the African diaspora (African Union 2017). One of the key AU institutions that is mandated to coordinate with diasporas and civil society organisations is the Economic, Social and

Cultural Council (ECOSOCC), whose mandate include fostering and consolidating partnership between the AU and civil society organisations.

Article 3(q) of the Protocol on Amendments to the Constitutive Act of the African Union (2003) expands the objectives of the AU by adding 'invite and encourage the full participation of the African diaspora as an important part of the continent, in the building of the African Union'.[7] Similarly, sub-articles 21(d) to (f) of the African Youth Charter mandate state parties to '[e]stablish structures that encourage and assist the youth in diaspora to return to and fully re-integrate into social and economic life in Africa'; to '[p]romote and protect the rights of young people living in diaspora'; and to '[e]ncourage young people in diaspora to engage themselves in development activities in their country of origin'.

In contrast to the framework of the AUC, member states are enacting laws to restrict channels of engagement with the diasporas. To illustrate this state of affairs, the article will examine the nature of the legal and political framework in selected African countries. The perception of African political elites about the potential role of the diasporas in democracy building is sometimes characterised by suspicion, accusation and antagonism. The diasporas' engagement comes in many forms, ranging from financial contributions for governance projects to lending their expertise in supporting grassroots movements, to organising and mobilising for effective engagement in democratic processes. It is the latter part that troubles most African governments, leading them to enact strict laws to limit such activities.

As indicated above, the diasporas' engagement in domestic affairs is not viewed as completely negative, at least at the continental level, and their contribution to the economic development of the homeland is generally welcomed. To that end, their remittances support different projects including civic activities mainly run by civil society organisations. Foreign donors from countries where most African diasporas are located often fund civil society organisations. In the 1990s civil society organisations mushroomed in an unprecedented manner but suffered significant limitations in 2011 when 'security measures and other legal and policy restrictions were introduced as a response, and means, to overcome threats (perceived and actual) towards national security' (Save the Children 2012). The article demonstrates, with examples, countries that have enacted restrictive legislation to curtail civic engagement by the diasporas through civil society and other grassroots movements.

4.1 Nature of legal and political framework

Many factors influence policy choices of the government to enact laws and policies. On the African continent the dominant factor is the 'fear' of regime change through actions of non-governmental actors (civil society organisations, grassroots civic movements and diasporas). The tools that the diasporas and grassroots movements have in the past used include cyber space (social media); funding of local networks or movements; the organisation of political activities abroad; and lobbying for sanctions and

7 This Protocol, adopted in 2013, is not yet in force. Its entry into force requires ratification by two-thirds of AU member states (37 states). As at April 2019, 28 states have ratified the Protocol.

regime change with the help of international and regional political actors. The analysis is focused on legislation as a popular response strategy by states to direct the engagement of diasporas in democratic spaces in their homelands.

Many African countries are actively pursuing restrictive policy frameworks on civic programmes aimed at ensuring popular participation in critical governance aspects of African societies.[8] The pan-African legal regime is robustly laid out in the continental legal frameworks. The Constitutive Act of the AU provides for the promotion of political participation in governance. The protection of civil society organisations is articulated under the African Charter on Democracy, Elections and Governance (African Democracy Charter), which encourages states to ensure the existence of an environment conducive to the operation of civil society organisations within the confines of the law. The Democracy Charter also encourages states to engage civil society organisations in order to advance political, economic, and social governance. Furthermore, the Democracy Charter calls on the AU Commission and regional economic communities to promote engagement with civil society.

Civic spaces are narrowing despite the AU's position of encouraging diaspora participation and engagement in the civic activities of their homelands. This is due, in part, to the restrictive political environment being created by governments. Politics in Africa is characterised by poor governance, corruption and relentless repression of dissenting voices. The Horn of Africa Civil Society Forum[9] characterised the relationship between African states and civil society as distrustful mainly because of governments' repressive legal regimes and politics (Maru 2017) met with civil society leaders inside the university. At least one protester was killed and several wounded during clashes with the security forces. By UN -West Darfur, Zaleingi, Sudan -01 December 2010. About PAX PAX means peace. Together with people in conflict areas and concerned citizens worldwide, PAX works to build just and peaceful societies across the globe. PAX brings together people who have the courage to stand for peace. Everyone who believes in peace can contribute. We believe that all these steps, whether small or large, inevitably lead to the greater sum of peace. See also www.paxforpeace.nl About the Al Khatim Adlan Center for Enlightenment and Human Development (KACE). The report concludes that such mutual distrust is premised on the political perceptions that organisations receiving foreign funding are advancing neo-imperialist goals that threaten the sovereignty of their government (Maru 2017). To that end, countries in the Horn of Africa have similar regulations restricting civil society movements, their formation, registration, operations and funding.[10]

4.2 Under threat: Closing civic space

Grassroots movements are an important aspect of democracy building. These movements organise and mobilise more effectively and are catalysts

8 These countries include Ethiopia, Eritrea, Sudan and South Sudan that have some of the most restrictive legislations on the continent.

9 The Horn of Africa Civil Society Forum (HoACS Forum) is a regional network of civil society organisations that work together to monitor and expand civic space in the countries in which the Forum operates.

10 Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Somaliland, South Sudan, Sudan and Uganda.

for change. The organisations often cause confrontation with local authorities leading to arrests and, at worst, the killing of civil society leaders. Diasporas' expertise, knowledge and robust networks can buttress civic movements to agitate for democratic change in their communities. The political elites in Africa are cognisant of this fact, hence the near universal restrictive legislation on the continent aimed at limiting interface between diasporas and civil society movements.

Governments are bound by international law to ensure citizens' participation in the democratic processes of their country. This includes 'institutional, legal, political and administrative conditions that enable the existence and effectiveness of civil society' (Maru 2017). The right to form associations, freedom of expression and the right to participate in political governance is guaranteed under the African Democracy Charter and African Charter on Human and Peoples' Rights (African Charter). Specifically, article 28 of the African Democracy Charter obliges state parties to 'ensure and promote strong partnerships and dialogue between government, civil society and the private sector'. The diasporas' engagement with democratic processes in the homeland can also be curtailed if they are not able to mobilise through civil society organisations at home. A look at the legislative regime in Ethiopia demonstrates the challenges that can be met in agitating for democracy by both the diasporas and civil society organisations in the homeland.

Due to an overly restrictive space, civil society organisations face a particular challenge when implementing their programmes, in particular, restrictions on registration procedures, bureaucratic and unreasonable administrative processes and endless interference by government security forces in the internal affairs of civil society movements. The civil society organisation law in Ethiopia, for example, the Charities and Societies Proclamation Act (Proclamation 621/2009), forced the Ethiopian Women Lawyers' Association to retrench more than 70 per cent of its staff (Amnesty International 2012). The Charities and Societies law requires organisations to register in one of three categories, namely, (i) Ethiopian charities or societies; (ii) Ethiopian resident charities or societies; or (iii) foreign charities. The Proclamation defines any NGO that receives more than 10 per cent of its funding from foreign sources as a 'foreign charity', thereby prohibiting it from working on issues of governance or human rights. The law bars NGOs and those receiving more than 10 per cent of their funding from foreign sources from working on human rights issues. Article 2 of the Charities and Societies Proclamation 621/2009 states:[11]

> 'Ethiopian Charities' or 'Ethiopian Societies' shall mean those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not *more than ten percent* of their funds which is received from foreign sources.

In conclusion, many African countries seem to be attuned to tightening civil spaces for citizens, socio-political organisations and diasporas to engage in. The advent of populist governments around the world has left the door open for some already repressive African governments to enact

11 Our emphasis.

tougher laws restricting engagement on democracy, the rule of law and good governance.

To prevent grassroots movements from interfacing with diasporas and from receiving donor funding, African states enact laws to restrict funding for governance and human rights advocacy programmes.[12] The main arguments by their repressive regimes often are the preservation of sovereignty and national security. These assertions were faulted by the UN Special Rapporteur on the Rights to Freedom of Assembly and Association, who stated that such claims were 'not only spurious and distorted', but also 'in contradiction with international human rights law' (Human Rights Council 2013). Africa's democracy deficit, therefore, is a sad reality that has now been entrenched by way of policy and legislative frameworks. With Africa's young population actively engaged in social media, governments are moving fast to close down these spaces, as seen in Southern Cameroon, Egypt, Uganda, Kenya and Ethiopia during mass civil actions and times of election.

5 Way forward: A collaborative approach to democratisation

If any partnership between the diasporas and their respective governments is to have a positive bearing on the democratic processes of their countries, the starting point must be to build a relationship on shared values and not to lose sight of the African people as the ultimate beneficiaries. This relationship too often is abortive due to a lack of trust on the part of both parties, or because the relevant government may treat the diasporas as a security risk or a proxy for foreign interest groups, while the diasporas may view the government as an illegitimate regime forcefully holding onto power. For example, this was the case in Zimbabwe under former President Mugabe, whose mistrust of the diasporas and perceptions about their motives are well publicised. The diasporas are often charged with being out of touch with the realities of their homeland, while the government is seldom willing to cede any power in order to build an equal partnership or at least ensure a healthy level of collaboration. Governments are willing to encourage financial investment in their countries but are more guarded when it comes to political participation.

Shain and Barth identity three factors that determine the level and efficacy of the diasporas' political engagement with their homelands, namely, the degree of the diasporas' motivation to participate; the socio-political environment of their host and home countries; and the balance of power in relations between the diasporas and the governments of their homeland (Shain & Barth 2003). The interests of the people in their homelands and their own interests in their host countries affect the degree of motivation of the diasporas. When there is a correlation or an overlap between these two sets of interests, the diasporas become motivated to engage. 'If engagement in a homeland's foreign policy is perceived by the diaspora as identity-reinforcing and by the homeland as legitimate, then the diaspora will be motivated to exert influence on the issue' (Shain & Barth 2003). The host country's relationship with the diaspora's homeland

12 This is factually the case in Ethiopia, Eritrea and Uganda (2009 Charities and Societies Proclamation Act, Eritrea's NGO proclamation and Uganda's legal regime that restricts funding that political parties can receive for its programmes).

and the host country's willingness to allow a diaspora community to influence its foreign policy is at the heart of Shain and Barth's second element. For example, an Ethiopian diaspora community in the United States may have greater influence in their homeland because of the US's impactful foreign policy and the willingness to allow communities to influence policy through votes or lobbying. In contrast to this are the Ethiopian diasporas in Australia, whose influence may not be as substantial as Australia's foreign policy is less impactful than that of the United States. The situation in the homeland refers mainly to the receptiveness of the government towards diaspora influence, whether the government views it positively or otherwise. The balance of power between the diasporas and the homeland depends upon which has the greater leverage, whether financial or political, or, in other words, who needs the other more.

Below are recommendations to ensure that the diasporas have a positive impact on democracy.

5.1 Removing legal impediments

Homeland governments must remove the legal impediments that restrict the engagement of the diasporas. A prime example of such an impediment is the Ethiopian CSO Proclamation, which prohibits civil societies that raise more than 10 per cent of their financial resources from outside Ethiopia from engaging in governance or human rights issues (see part 3.2.2). This proclamation severely limits the motivation of the diasporas to participate in the affairs of their homeland, and attempts to undercut civil society, which plays an important role in reaching the grassroots (see part 3.2.2).

The state of dual nationality is also an important issue for the direct participation of the diaspora through either voting in elections or competing for public office. Ethiopia does not allow dual nationality but provides identity cards to persons of Ethiopian origin, allowing them rights which would otherwise be prohibited for non-citizens (Ethiopian Legal Brief 2011).[13] Some of these rights include the right to enter Ethiopia without a visa, to own immovable property and to seek employment. Although these are positive developments and initiatives for the Ethiopian diasporas, it does not mean that they are fully endowed with rights to directly participate in the democratic processes of their homeland. According to its Constitution, the right to vote or be elected into public office is given to 'Ethiopian nationals' as opposed to the terminology of 'Ethiopian citizens' which used for the right to own property. During Ethiopia's 2005 election, Andargachew Tsige, who at that time was one of the leaders of the opposition group (Coalition for Unity and Democracy), was a citizen of the United Kingdom. Tsige was arrested in Yemen and extradited to Ethiopia in 2014, charged with terrorism due to the political fallout after the 2005 elections (Aljazeera 2014). The

13 'An Ethiopian who acquires another nationality by virtue of being born to a parent having a foreign nationality or by being born abroad shall be deemed to have voluntarily renounced his Ethiopian nationality unless he has declared to the Authority his option to retain it by renouncing his other nationality within one year after attaining the age of majority, or unless there has been an earlier express renunciation of his Ethiopian nationality pursuant to article 19(3) of this Proclamation' (Ethiopian Nationality Proclamation 378/2003).

question of who can directly participate in the democratic processes of Ethiopia, a national or a citizen, remains an unsettled issue.

5.2 Tackling factionalism

In many instances the diaspora community can mirror the divisions and fragmentation of their homeland. The Ethiopian diasporas in the United States are known to be ethnically divided, reflecting the division in its homeland between the Amhara, Oromo and the Tigray (BBC World News 2016). In the face of such divisions, the diasporas become weaker and are unable to engage under a consolidated and common goal. Each group may have its agenda based on favouring their ethnic brethren in the homeland. These divisions also weaken the diasporas' leverage, tilting the balance of power in favour of the homeland's government. Factionalism is also a factor in the activism by Zimbabwean diasporas in the United Kingdom, which is fuelled by differing political opinions (Chivanga 2015). This is also the case with diasporas originating from many African countries, including Cameroon, Kenya and Nigeria.

5.3 Adherence to the 'African democracy'

It has been demonstrated in the article that the application of democracy on the African continent should take cognisance of the contextual framework within which it operates and the intersectionality of issues such as poverty and ethnic diversity. For the diasporas to effectively contribute to the democratisation of the homeland, one should not lose sight of the application of democracy in this context. The wholesale import of host country best practices should also be avoided as this might contribute to resistance by both the homeland governments and civil society organisations on the ground. The diasporas may need to temper the wholesale application of liberal values such as a heightened focus on individualism, which contrasts to the African organising principle of the community.

6 Conclusion

The tension between the diasporas and their respective homeland governments remains a stumbling block in the area of the political participation by diasporas. Although governments have been more open to engagement with diasporas in the areas of development and investment, they remain reticent in allowing for political participation. The government's willingness to engage in the financial sector is in recognition of the leverage that the African diasporas hold where this sector is concerned, by remitting more than US $35 billion to the continent.

A tool that the diasporas need in supporting their engagement with the governments of their homelands is in itself the mode of governance in the countries in which they reside. This may inform the degree of action or collaboration that the diasporas offer to their respective countries. In other words, diasporas residing in countries that allow for public participation, uphold accountability and promote civic spaces are better equipped to engage with their home governments, based on those examples and their experiences therein. Thus, the political participation of the diasporas

encompasses activities such as lobbying, raising funds and, more controversially, the right to vote.

These tensions have played out in The Gambia, Ethiopia and Zimbabwe. In The Gambia, the diasporas played a crucial role in ousting former President Yaya Jammeh, while diasporas were also involved in the ousting of former President Mugabe in Zimbabwe. In Ethiopia the diasporas continue their efforts to mobilise the youth in protests against the government, such as calling for 'five days of rage'. Recent protests led to the resignation of the Prime Minister, Hailemariam Desalegn, in February 2018, but reforms to the political system are still further away. However, the appointment of a new Prime Minister, Abiy Ahmed, in April 2018, has already started to spark some changes and reforms, the outcomes of which Ethiopians at home and abroad and the rest of the world are keenly observing. It is also worth noting that 'Abiy … is the first prime minister to come from Ethiopia's largest ethnic group, the Oromo, who spearheaded more than two years of unprecedented protests against the country's one-party government' (Aljazeera 2018; CNN 2018; News 24 2018; Reuters 2018).

If the diasporas and the respective governments are to work in partnership to allow for an environment in which democracy can succeed, both sides must compromise. On the one hand, governments must remove legal impediments targeted at civil society, which is a key partner for the engagement of the diasporas. On the other hand, the diasporas must also be cognisant of the social differences between their host country and their homeland, and thus tailor their messages accordingly.

The article has analysed the failure of democracy in Africa, and has attempted to map the circumstances that affect the relationship between the diasporas and African governments. By mapping this relationship, it has attempted to give some guidance on a successful partnership between African governments and African diasporas that will be able to aid democratisation in Africa.

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C Sarsar, C D'Hondt, MT Di Lenna, A al-Khulidi & S Taha 'The political participation of the diaspora of the Middle East and North Africa before and after the Arab uprisings' (2019) 3 *Global Campus Human Rights Journal* 52-75
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The political participation of the diaspora of the Middle East and North Africa before and after the Arab uprisings

*Chafic Sarsar, Cedric D'Hondt, Maria Teresia Di Lenna, Ali al-Khulidi and Suhail Taha**

Abstract: *The role of the Arab diasporas in the political processes of their home countries has changed significantly since the 2011 uprisings. The article aims to analyse these changes and assess the impact that diasporas have had on the democratisation processes of the post-2011 transitions. It does so by looking at examples of both direct and indirect diasporas' participation in the politics of their home countries during and after the uprisings through mechanisms such as lobbying, campaigning, national dialogue initiatives, and voting in the parliamentary elections. The background to the social, economic and political contributions of the Arab diasporas before 2011 highlights the multiple identities of the diaspora communities abroad as well as the changes to their inclusion from disputed members of the regimes' opposition to a more active civil society. With the shifting social and political environment of the last decade, the examples demonstrate the important political role that diasporas could play in cooperation and bridge building, both locally and internationally. However, they also demonstrate the obstacles and severe limitations they face in their inclusion in the governments' transition to democratic governance. Transnational repression and a negative reception context are limiting factors affecting the ability of diasporas to fully participate as active citizens in both their host and home countries. As an important index for democratisation in the region, the conclusions drawn in the article could offer new perspectives on shaping and constructing regional politics and local regimes. These constitute pressing issues for the future and the evolution of democracy in the region, especially within the post-war reconstruction of countries such as Syria, Libya and Yemen, and the democratic transitions in Tunisia and Egypt.*

Key words: *democratisation; uprisings; Arab diaspora; elections; negotiations; political participation; inclusion; civil and political rights; human rights; Middle East and North Africa*

1 Introduction

Since the beginning of the twentieth century diasporas have become important political players for their home countries. Their roles in democracy-building processes have recently attracted the attention of researchers (Cohen 2001; Vertovec 2005; Dahre 2007; Rigoni 2013). The participation of diasporas from the Middle East and North Africa before

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the Arab uprisings of 2011, sometimes referred to as the 'Arab Spring', was essentially disputed. A significant number of emigrants were political exiles, whose actions took the form of opposition through demonstrations, the denunciation of the regime's crimes or legal action against the regime. The article seeks to establish the extent to which diaspora communities have influenced the Arab uprisings, and how the 2011 revolts in turn have changed the political participation of the diasporas in their home countries.

In order to do so, it is important to analyse not only the diasporas' influence in the political arena of their home country (and *vice versa*), but to also scrutinise the practices and tools through which they contest and reframe the very idea of sovereignty as well as their own identities. In order to formulate an answer to the main objective of the article, it is important to equally consider other questions. First: What are the opportunities for participation of the diasporas in political life? Second: What are the mechanisms and limitations of their participation? Third: What are the main interests of governments and the diasporas themselves for their inclusion and participation? In search for an answer to these questions, the article first covers the sociological, political and economic foundations of the political participation of the diasporas from the Middle East and North Africa (MENA) region. The second part of this research places earlier findings in a critical perspective by examining some factors that restrict the political participation of diaspora communities. Finally, the third part builds on these foundations in order to analyse the different ways in which they participate. These include both indirect and direct participation in political affairs.

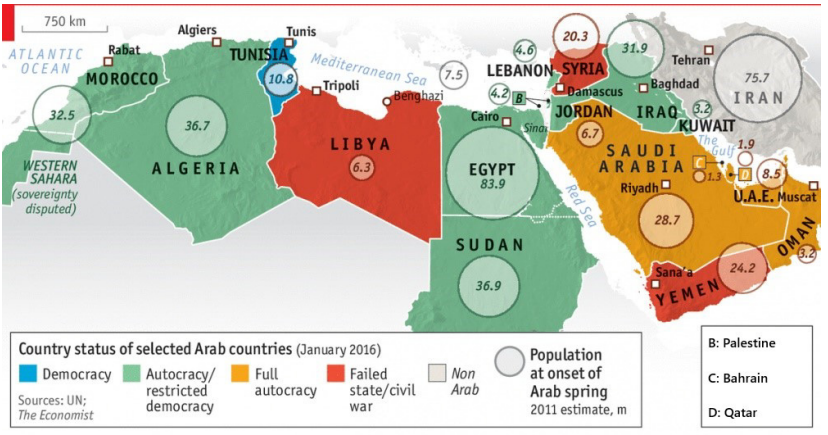
Before delving into these questions, two preliminary remarks need to be addressed. A first remark concerns the terminology used. One could say that the meaning of the word 'diaspora' has dispersed itself, as the term is being used in many contexts. The article has opted for Dumont's definition of diaspora as 'a community of individuals living together on the same territory and having in common the conviction or belief or belonging, themselves or their families to another territory with which they maintain regular relations' (Rigoni 2013: 5). This definition encapsulates the multi-faceted character of the phenomenon 'diaspora' and hence leads to a second remark regarding the scope of this research. The focus of the article is on the political participation of diaspora communities and their contribution to processes of democracy building in their home country. Although the study of diasporas raises important questions in relation to identity, integration and political participation in the host country, and even to the old Westphalian notion of sovereignty itself, these questions are beyond the scope of this research.

2 Foundations of the political participation of the diasporas

The United Nations (UN) estimates the diaspora population from MENA countries to be around 20 million individuals, 5 per cent of the total population in the region (World Bank 2016). This constitutes 10 per cent of the total migrant population in the world. As Middle Eastern countries go through new processes of transition from authoritarian regimes after the Arab uprisings, the question arises as to what role this growing number of citizens abroad play in influencing the political processes in the

region. Examining the composition and origins of these communities will shed light on the social, political and economic foundations of the mutations of the participation of the diasporas in transitional processes in the MENA region after the Arab uprisings.

Figure 1: Governance status of selected Arab countries

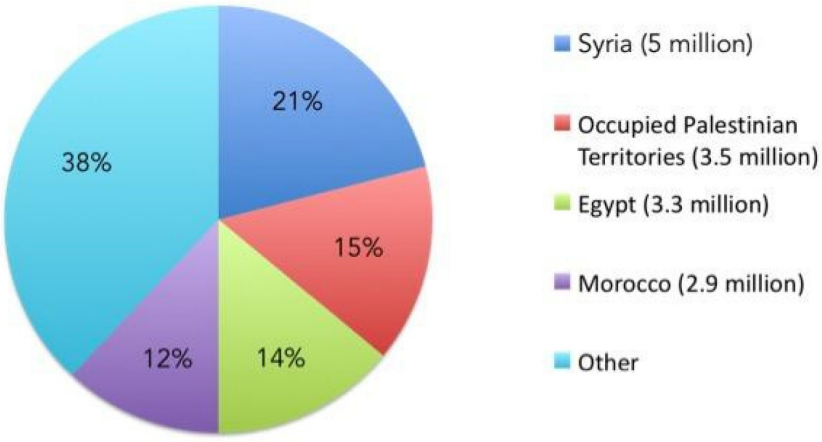


2.1 Social background to migration and political participation in the MENA region

Just over half of these migrants (53 per cent) remain in the region, especially in Gulf countries (IOM 2016), which are some of the wealthiest economies in the MENA region. The primary destinations of the other half of the migrant population from the MENA region are European countries (mainly for migrants from North Africa), Turkey and North America. The migrants' destinations, both in the Arab world and abroad, suggest that whether forced by conflicts or unemployment, migrants seek to settle in countries with social, political and economic stability. The numbers vary: The International Organisation for Migration (IOM) (2016) estimates that most migrants from the region come from Syria (21 per cent or 5 million); Egypt (14 per cent or 3,3 million); and Morocco (12 per cent or 2,9 million). These figures (see Figure 2) on the one hand show that it is not only conflict that has driven people to migrate but that it is a mix of political and economic factors. Furthermore, they draw a picture of a political and economic situation which is volatile throughout the MENA region, even in countries such as Morocco which are comparatively more stable and resilient on a political level. The variety of backgrounds, the reasons for emigration and migration routes pose a challenge to any research seeking to capture the uniqueness and specificity of the political role played by the diaspora in the Arab world (Dalacoura et al 2017). Therefore, the article focuses on overall trends as supported by existing case studies on specific diasporas. However, a further inquiry should be conducted into how diasporas are shaping the political transition of each country, especially in the post-war reconstruction of countries such as Syria, Libya and Yemen, and the democratic transitions in Tunisia and Egypt, among others. As their participation has long been disputed, the

changes occurring with the Arab uprisings constitute a potential major shift in the way in which diasporas not only are included in the political systems, but are also perceived within the contributions they provide.

Figure 2: Origins of migrants from the MENA Region (IOM 2016)



There have been several attempts at categorising and describing different types of diasporas according to their origins, the reasons for emigrating, or organisation (Sheffer 1993; Bruneau 1995; Cohen 1997). In the recent history of the MENA region, two main types of diasporas may be identified, namely, refugees and labour migrants, according to the economic and political factors surrounding their departure from their home countries.

On the one hand, since decolonisation many countries in the Arab world have undergone a history of conflicts which has created large diaspora communities settling all over the world. IOM figures show that at the end of 2015, 6 million refugees worldwide originated from MENA countries. Of these, refugees from Syria alone make up 30 per cent of the total number (IOM 2016), giving Syria a crucial space in the future of Middle Eastern politics. In Lebanon, the civil war (1975-1990) provoked new waves of emigration as some estimated 900 000 to 1 million Lebanese fled the country (Tabar 2011). These conflicts, therefore, created a community of expatriates who were forced to flee because of war or government repression. Moreover, the legal and social challenges faced by refugees in their host countries, including discrimination and stereotyping, often meant that they invested their energies in integrating in the new country while losing connections with their homelands.

On the other hand, economic imperatives created a different migrant community seeking employment abroad. Especially since the 1970s, the boom of oil production in the Gulf countries drove many people in neighbouring MENA countries to look for employment in the area. This trend found a parallel in new government policies in North African countries, such as Tunisia and Morocco, which forced people to look for

employment abroad and send remittances home in order to support the often-receding economies (Baldwin-Edwards 2005). In the case of Tunisia, bilateral agreements with European countries such as France (1963), Germany (1965), Belgium (1969) and The Netherlands (1971) regulated the flow of migrants to Europe and, with it, the inward flow of capital from remittances and relief from the local unemployment rates. The Fourth Plan of Bourguiba in the 1970s envisioned an annual planned emigration of around 60 000 labourers (Natter 2015). These migrants were closely monitored by the government to ensure the maintenance of economic – but not political – ties. The Office for Tunisians Abroad (OTE), launched in 1988, was an example of a government tool to encourage the diasporas' economic investment in the country by facilitating them. Similarly, initiatives by the European Union (EU), such as the European Neighbourhood Policy (ENP) and the Union for the Mediterranean (UfM), have in recent years been developed to promote democratic governance and regional and international cooperation through economic and political reforms aimed at strengthening regional institutions.

While migrants from North West Africa (Algeria, Libya, Tunisia and Morocco) have traditionally settled in European countries, both because of their proximity and because of their colonial histories and ties, Egyptians have largely moved to oil-producing countries such as Gulf Cooperation Council (GCC) countries or Iraq. These so-called 'labour diasporas', therefore, have a role in strengthening both the economic and social foundations of their position and involvement in their home countries and in the wider region. Cohen (1997: xii), for example, describes the position of Lebanese in West Africa and the Americas as 'prototypical cases of ethnic entrepreneurship that has been invigorated by the formation of diasporas'. On a social level, the IOM hints at the role they play in improving education (2018), including training as highly-skilled labour.

2.2 Going beyond the economic contributions of the diasporas

On an economic level, the communities maintaining links with their countries of origin have been the sources of significant remittances. In the case of Lebanon, remittances constitute 14,10 per cent of the gross domestic product (GDP), making it one of the top 20 countries in the world receiving these remittances (Credit Libanais 2017). In the Maghreb, Morocco receives remittances equalling 6,8 per cent of the GDP (World Bank 2016b). Interestingly, Egypt has since 2010 appeared in the top 10 countries receiving remittances with a rising US $12 (now $16) million (IOM 2018: 31). In some cases such remittances are a significant source of income for families at home and of financial stability for the country, as they are considered more stable than other financial flows. Such economic contributions provided by the diaspora community help to legitimise their requests for participation in the political processes in order to express their vision, difficulties and needs.

This has led to more positive views on the importance of and contribution brought by diaspora communities. A recent World Bank report highlighted how the diasporas in the Middle East can be 'critical to fostering regional integration, entrepreneurship and economic growth'. The World Bank further suggested that 'governments and international development organisations must do more to strengthen their connections and partnership with the diaspora' (World Bank 2016a). However, these

views only pay attention to the economic role of the diasporas and, as such, miss an important element of their identity and involvement. Therefore, it is important that such recommendations always add political inclusion and civil rights. On the other hand, the influence of Gulf countries in post-uprising politics takes on a new light if contrasted with their economic role in the region. In fact, Saudi Arabia lists as one of the top three remittance-sending countries, with an amount of US $38,79 billion. Kuwait and Qatar follow on the list of the top 10 (IOM 2018: 32). In this context, governments' inclusion (or exclusion) of citizens abroad in the political processes, such as by giving them voting rights in elections, becomes key in shaping how the transitional process will evolve.

2.3 Political significance of diaspora communities before and after the Arab Spring

On a political level, the Arab diaspora before the uprisings was partly composed of political opponents to the existing, authoritarian regimes. Even though they faced significant challenges, as will be explained by the next part, some political opponents continued their campaigns against the regimes from abroad and partly contributed to the democratic transitions stimulated by the Arab uprisings. In the case of Egypt, the uprising informed members of the diaspora with new tools of re-engagement in the political process. However, it also brought the new right to vote from abroad and the right to engage in the first elections in 2012 (Pages-El Karoui 2015; part 4.4.3 below).

Beaugrand and Geisser (2016: 2) highlight three major ways in which the diaspora communities played a relevant role in the uprising, by engaging in what they called 'distance politics' and mobilisation. First, they created a new space of activism from a distance, which meant the engagement of citizens abroad. Second, while governments' authoritarian rule had forced politically-active individuals to flee, regime falls encouraged many to return. Finally, the involvement and participation of diaspora communities helped to trigger the public debate on their civil and political rights to free speech and participation which, in some cases, resulted in legal changes.

A survey conducted by the World Bank (2016a: 16) investigated the effects the Arab Spring had on the willingness of diasporas to return to their home countries. The results reported that only one quarter of respondents believed that the uprisings stimulated an interest in the diasporas to return. Moreover, those willing to return, just under half of the respondents, stated that it would be for the purpose of opening their own businesses or for direct investments (World Bank 2016a). Although no questions about politics were asked, the answers suggest that those who did in fact return were persons who had been engaged in politics even before the uprisings and therefore were members of the opposition groups to the former regimes. Their new inclusion in the official democratic process, however, does not answer the question of inclusion of the less active sections of the population abroad. As Syria and Egypt appear in the top 20 migrant-producing countries in the world (IOM 2018: 19), the question as to their role in politics becomes critical, on the one hand, for the post-war reconstruction and transitional justice and, on the other, the post-revolution transition. In Syria, 65 per cent of the population is considered displaced (UNHCR 2018), which further adds complexity and

urgency to the question of their inclusion in transition. Recent studies on Syrians' engagement in Europe have shown, for example, that the diaspora is both being shaped by developments in the conflict in Syria, while at the same time providing an opportunity for peace, mediation and reconstruction (Ragab & Katbeh 2017). Similarly, the study on Tunisians in Germany sees their role in cooperation as 'bridge-builders' (Ragab et al 2013: 23) because of their proximity and understanding of both contexts.

Democratic participation is based on universal suffrage and, hence, the participation of all citizens in the management of public affairs. On a theoretical level, being abroad should not exclude citizens. The question of who is included, and simultaneously excluded, from participation in the political process is essential to understanding the type of democratic system being created. Doubts over the legitimacy of the participation of diasporas are pushed by the question of allegiance, which is the basis of the perceptions and trust in citizens living in a foreign country. The concept of diasporas having multiple allegiances to more than one nation is complemented by questions as to the motivation for their desire to be included in the system, especially in cases of economic investments and financial or political interests. In the case of post-Saddam Iraq, Shain and Ahram (2003: 661) discuss how diasporas had to 'withstand a withering test of loyalty' because of their links to America's 'harbouring imperial intentions'. Both democracy and political participation are eluding when it comes to defining these terms. Academic answers to the questions of 'what is democracy' and 'what constitutes political participation' are manifold (Van Deth 2016; Van Reybrouck 2013). However, this article does not aim to provide an answer to these questions, their fundamental character notwithstanding. Rather, it uses a classical notion of political participation, that is, the participation of state citizens in the management of public affairs through universal suffrage. Nevertheless, the social, economic and political bases of how diasporas are perceived and included or excluded from the political process are an important departure point for the reconceptualisation of their role and significance. The article will further trace their participation in transition as well as through the successes of the electoral processes or other avenues of engagement, such as lobbying and national dialogue.

3 Limits and perspectives of diasporas' political participation

The uprisings of 2011 and the ripples that reverberated through the Arab world in the subsequent years changed the political role of several diaspora communities. Revolutionary voices from abroad, ongoing financial remittances to the home state and the inclusion of the migrant population in the electoral process could mean a positive contribution to democracy building of the diaspora population. On the other hand, there are also limits to the abilities of diasporas to drive the process of democratisation. This part sheds light on these limits.

3.1 Transnational repression

The observation that diaspora populations enjoy more civil rights, such as freedom of speech, than their compatriots at home, requires some nuance. Beaugrand and Geisser (2016) argue appropriately that diaspora populations can speak out more easily against repressive regimes. At the

same time, however, authoritarian regimes can manage to keep their nationals abroad in check. The case of Syria demonstrates that diaspora communities can be silenced through 'transnational repression' (Moss 2016). Transnational repression can either manifest itself in an indirect way or directly target expatriates.

First, authoritarian regimes might target dissident voices abroad indirectly by collectively punishing friends and family members at home (Alexopoulos 2008; Heckathorn, 1988; Khawaja 1993; Moore 1978). Amnesty International has documented personal stories from all over the world in which family members of Syrian expatriates suffered harm. Mamoun Jandali, a doctor living in Homs, and his wife, Linah Doubri, were beaten and maltreated after their son had participated in a protest in the United States (Amnesty International 2011). Sondos Suleiman, a Syrian woman living in Germany, saw all her family connections severed as her family in Syria was threatened due to her online activism (Amnesty International 2011).

Second, emigrants opposing the regime can equally be targeted in a direct way (Moss 2016). Embassy officials can survey protests and threaten those who speak out against the regime. According to the Association to Support the Syrian People (*Asociacion de Apoyo al Pueblo Sirio*), staff members of the Syrian embassy in Madrid took photographs of Syrians participating in peaceful protests in front of the embassy (Amnesty International 2011). Ahed al Hindi, a former political prisoner residing in the United States, even stated that during a protest in front of the Syrian embassy in Washington on 15 March 2011 an embassy official left the embassy building and walked straight up to him, saying: 'Ahed, let me take your picture'. The identification by embassy staff renders a return home impossible, as it was likely to lead to the arrest and punishment of blacklisted dissidents. However, this is not the only way in which embassy staff can take part in transnational repression. They can also complicate the lives of expatriates by hindering necessary administrative procedures. Imad Mouhalhel, for example, declared that the Syrian embassy in Spain refused to assist him with his visa application.

Finally, regime informers might very well be part of the diaspora community. Syrian community organisations abroad might have ties with the regime. A Syrian woman living in Ottawa, Canada, testified about a local Syrian organisation that went from door to door. The organisation encouraged fellow-Syrians to attend pro-Assad assemblies and intimidated those who participated in anti-regime protests (Amnesty International 2011). This spreads mistrust among the emigrants, as speaking out against the wrong national might result in endangering oneself or one's relatives.

The events of 2011 weakened the regime apparatus of 'transnational repression'. The protests across the Arab world have led to what Khan (2012) has described as a 'Diaspora Spring'. From the beginning of 2011 onwards, expatriate communities started to mobilise and became rapidly involved in home-state politics (Jörum 2015; Moss 2016). In other words, the uprisings were not always organised from abroad. Sometimes diaspora communities only decided to step in after protests at home had become widespread. The reason for this decision is clear-cut: The fear of pacing relatives at home in jeopardy could no longer act as a deterrent for expatriates, as their loved ones put themselves at risk by taking to the streets (Moss 2016).

In spite of these changes, some forms of transnational repression continued after the outbreak of the popular revolts across the MENA region. The stories mentioned previously exemplify that the repressive arm of Bashar al Assad's regime stretches well beyond Syrian borders. Both in the Americas and Europe, embassy officials played a role in surveilling diaspora communities. On numerous occasions embassy personnel filmed, intimidated and harassed Syrian activists. Because of the actions of their relatives abroad, people in Syria are being questioned and threatened by security forces. This indicates that, even though expatriates may enjoy civil rights in the receiving state, they might be hindered to exercise them by the home-state regime.

3.2 Negative reception context

In the second place, not only the home-state regime can determine whether expatriates speak out about injustice. Another factor, which Beaugrand and Geisser (2016) refer to as the 'negative reception context', equally plays a role in silencing the voice of diaspora populations. The attacks of 9/11 have had profound repercussions for Arab communities in the occident (Khan 2012; Moss 2016). Slama and Heiss (2011) write that '[a]n examination of Arab diasporas in the post-9/11 world almost inevitably directs one's attention to the global war on terror that has targeted Arab migrants and their offspring in particular'. This once more becomes clear in the controversial attempt of United States President Trump to impose a so-called 'Muslim ban'.

In this 'context of negative reception', Arab expatriates might rather focus on the integration process, rather than profiling themselves as critical citizens (Beaugrand and Geisser 2016). Expatriates might even opt for complete assimilation. In the hypothesis of assimilation, one could even question whether the term 'diaspora' remains appropriate, as assimilation implies a complete rupture with the former identity. Yet, it is precisely a common identity that constitutes one of the key characteristics of a diaspora community. Cohen (2001) states that 'a strong ethnic group consciousness sustained over a long time and based on a sense of distinctiveness, a common history and the belief in a common fate' is one of the common features of diasporas. It is not surprising that the integration policies of the host state also plays a role in this regard, since some states, such as France, have adopted a policy of assimilation whereas others might favour plurality (Müller-Funk 2016).

Furthermore, authorities of the host state might facilitate transnational repression (Moss 2016). The home-state regime might depict any criticism as stemming from Islamic extremists or terrorists (Khan 2012). For example, after the Casablanca bombings of 2003, the Moroccan monarchy used the terrorist attacks as an opportunity to frame the Islamic opposition party *Hizb Al-Adala Wa At-Tanmia* (Justice and Development Party) as a threat (Wegner 2011). Turkish President Erdogan has made a similar move by vowing 'to continue pursuing terrorists abroad' when talking about opposition members within the Gülen movement. He also declared that France is 'abetting terrorists' by receiving the *quwwat suriya ad-dimuqratiya* (Syrian Democratic Forces), a military coalition opposing the Assad regime, in the Élysée. Portraying any dissenting voices as a security threat can open up cooperation between concerned Western authorities and home-state security forces. Consequently, not only the integration

policies of the host state, but also the relationship between the host and home state come into play.

3.3 Regime type and the right to vote

Instead of repressing its diaspora population, a regime may decide to extend the right to vote to expatriates. Yet, the inclusion in the electoral process does not necessarily indicate a positive contribution to democracy building by the diaspora population. Even though the participation in the electoral process might hint at an expansion of rights and democracy, the rationale of the regime to extend the voting right to expatriates must be scrutinised critically. In this examination, Brand (2014a) has correctly argued that the regime type plays a key role. In spite of the events of 2011, no Arab country initiated a genuine process of transition, Tunisia arguably being the sole exception. Most regimes, with Lebanon and Tunisia being the contentious exceptions, are characterised as authoritarian. The motive for an authoritarian regime to extend the right to vote to expatriates may not be inspired by democratic aspirations. The concession of the right to vote to expatriates may be explained as a move to legitimise the regime (Brand 2014a). Additionally, by including them in the voting process, the regime can extend its control over the diaspora community.

In addition, the inclusion of the diaspora community in the electoral process does not necessarily foster political change. Inspired by the 2011 movements, Tunisia changed its electoral law. As explained in part 4.4.1 below, expatriates have received the right to vote, and 18 out of 217 seats of the constituent assembly and parliament were allocated to Tunisians abroad. In the 2011 election of the constituent assembly, the diaspora vote proved to be even more conservative than the vote of their compatriots at home. While in total the Ennahdha Party won 37,04 per cent of the total number of votes, Ennahdha received 8 out of 18 of the 'diaspora parliamentary seats'. Thus, roughly 44,4 per cent of the diaspora voters favoured the conservative Ennahdha. Thus, it becomes clear that the inclusion of the diaspora community in the electoral process does not imply a process of democratisation. In spite of their inclusion in the electoral process, expatriates remain 'more subjects than citizens' (Brand 2013), 'subjects' that might be less progressive than their compatriots at home.

Another determining obstacle to democratisation efforts of the diaspora are the characteristics of the diaspora group itself (Müller-Funk 2016). How are diaspora communities organised among themselves in host states and what are their ties to the home state politics? Internal division within diaspora communities might reflect political rifts in the home country. Internal strife and differing political allegiances hinder the diasporas to speak out with one voice. The peace talks concerning the ongoing civil war in Syria exemplify this. For instance, on 20 November 2017, a mere two days before the planned meeting of the High Negotiations Committee in Riyadh to form representatives for the upcoming Geneva Peace Talks, the General Coordinator of the High Negotiations Committee (HNC) resigned along with ten other members. Baeza and Pinto (2016) argue that 'the political mobilisation of diasporic groups unleashes a kaleidoscopic reconfiguration of their internal differences and divisions into new tracings of their boundaries'. In addition, it should be noted that regimes might reinforce divisions within diaspora communities to hinder the formation

of a unified, critical voice abroad. The next part will analyse the electoral processes and other ways through which diasporas have participated in the political processes of their home countries since the start of the uprisings.

4 Forms of diaspora participation

The 2011 uprisings erupted in countries that had witnessed years of oppressive rule, in which governments often tried to build a facade of democratic governance to conceal the severe restrictions on civil and political rights. Tunisia, which sparked the wave of uprisings across the region, had been ruled by Zine El-Abidine Ben Ali for 22 years (1989-2011). Similarly, Egypt had been under the rule of Mohammed Husni Mubarak for 30 years (1981-2011); Libya under the regime of Muammar Al-Qaddafi for 42 years (1969-2011); while Yemen was ruled by Ali Abdullah Saleh for 33 years (1978-2011). Syria remains under the control of the Al-Assad family, with Bashar Al-Assad, who in 2000 succeeded his father's 29-year rule. By the end of 2010 the dissatisfaction about the ruling elites linked to economic and social factors led a large section of citizens to support the uprisings against these regimes. This part analyses how the diasporas of these countries contributed to this enormous change through both direct and indirect means, such as lobbying for inclusion in the electoral system, leading negotiations and campaigning online from abroad. In this way, diasporas played a significant role in the democratisation processes initiated since 2011.

4.1 Indirect diaspora participation

Indirect forms of diaspora participation in the uprisings against repressive regimes consisted of social media activism; protests in the diasporas' host countries; lobbying to influence the policies of foreign countries to support the revolutions; and participating in national dialogue and political negotiations. A significant role the diasporas adopted was to advocate from their host countries. As part 2 elaborated, many members of the diaspora were not able to criticise the regimes of their home countries before the upheavals of 2011. Transnational repression was carried out by intelligence agents, who 'conducted surveillance through informant networks, threatened dissidents, forced them into exile, held their relatives hostage at home, and in some cases harmed dissidents directly' (Moss 2016: 493). Therefore, diasporas were not able to advocate or support any revolt actions against these regimes out of fear of what impact this would have on family members.

The uprisings of 2011 were exceptional as they allowed some diaspora members to break their silence. It became easier for diasporas to support the uprisings as their relatives in their home countries put themselves at risk by clamouring the slogan 'The people want to overthrow the regime'. Diasporas organised protests in many host countries, advocating a revolution and showing the world that they sought to build democratic states with equal citizenship rights and freedom for all. It should be noted that this was one way in which to influence the host countries' policies in accepting and supporting the revolutionary waves against existing Arab regimes. A major method used by diasporas to break the silence was through cyber activism.

4.2 Diasporas' cyber activism

Social media helped protesters to organise meetings and exchange information about gathering locations in order to quickly and easily move from one place to another as they were targeted by the regimes. However, during the first days of the revolts, some regimes blocked social media outlets, such as Facebook and Twitter, in addition to imposing heavy censorship on the internet. 'On March 3 almost all internet service throughout Libya went down. Many phone systems suffered disruptions, and communication from Tripoli to East Libya was cut off entirely' (Eriksson et al 2013: 28). Also, governments hacked some blogs and Facebook pages and changed activists' passwords.

The diasporas contributed to supporting the Arab uprisings from abroad by drawing the world's attention to the movements in their home countries through their cyber activism. Those living abroad stayed active on social media to lead the movements and ensure mobilisation on the ground in their home country. Malik (2014: 197) concluded in her research:

> After a thorough examination of scholarly research, individual narratives, news articles, videos, and social media users themselves, this paper finds that social networking played an integral role in the Arab Spring revolutions. It was utilised by both local citizens and people abroad to stay connected and learn information.

Active participation through social media allowed more efficient and faster dissemination of information. Diaspora communities had easier access to a more reliable internet connection, which assisted in continuing advocacy and spreading more information about the revolts, particularly during the absence of those in the home countries due to the regime's censorship.

4.3 Participation in national dialogue, political negotiations and lobbying

Apart from cyber activism, diasporas also found a way to participate politically through negotiations, lobbying and fora of national dialogue. As a result of the Arab uprisings, the diasporas had the opportunity to play an influential role as they found a more open sphere for political participation. Consequently, a section of the diasporas returned from exile to participate in national dialogue or to run for elections in their home countries, such as in the cases of Tunisia, Egypt, Yemen and Libya. Others continued the struggle to overturn the authoritarian regimes, including by lobbying for their case abroad and taking part in political negotiations with the regimes themselves, such as in the case of Syria. The cases of the most prominent countries to witness the uprisings will be examined, namely, Tunisia, Syria, Yemen and Egypt.

4.3.1 Tunisia

The diasporas that were active from abroad could safely participate in the political processes of their home countries from their countries of exile. Members of the Tunisian diaspora returned home after the start of the uprisings, including figures of the Islamist party, Ennahdha, which had been banned in 1989 during the rule of Zine El Abidine Ben Ali. As in the case of other opposition figures, the party had faced oppression, arrests,

military trials and exile by the previous authoritarian regime. After Ben Ali had been ousted, the leader of Ennahda, Rachid Ghannouchi, returned to Tunisia after 22 years in exile. Ennahda obtained official recognition and started operating on 1 March 2011.

The Tunisian diasporas participated in the national action that was aimed at organising and facilitating democratic transition in Tunisia through the Higher Authority for Realisation of the Objectives of the Revolution, Political Reform and Democratic Transition, which included different spectrums of the society: political parties; syndicates; associations; activists; and public figures. As will be outlined, diaspora members played pivotal roles in post-2011 Tunisia.

4.3.2 Syria

Since the beginning of the uprisings in Syria, parts of the Syrian population experienced lethal oppression. In many countries the numbers of Syrians abroad have since then increased significantly, particularly in countries neighbouring Syria. As mentioned above, the IOM has found that most migrants from the region come from Syria. The Syrian diasporas struggled to contribute to political dialogue and negotiations as well as international lobbying and advocacy for the Syrian revolts against the regime. The revolutionary impulse, however, resulted in further efforts and aspirations to build a democratic government devoid of oppression. Syrians that more recently fled, along with those already in diaspora, attempted to enhance the opposition forces from abroad, and coordinate the movement in their homeland.

The Syrian opposition abroad formed different coalitions. Different meetings were convened in order to strengthen unity and improve organisation. In political dialogue and negotiations, coordination took place between different groups to delegate representatives and form an opposition. The National Coalition for Syrian Revolutionary and Opposition Forces was formed shortly after the uprisings against Assad's regime started. This Coalition included a wide range of opposition factions and was founded in Doha, Qatar, in November 2012. This National Coalition was recognised by many countries as being representative of the Syrian people. In December 2015 the High Negotiations Committee was founded in Riyadh, Saudi Arabia, which acted as an umbrella body to represent the Syrian opposition in the planned Geneva peace talks in 2016. The opposition coalition has worked on lobbying to influence foreign countries' policies on the Syrian Revolution and their stance towards Assad. Despite the attempts of these opposition groups to form a united coalition against the Syrian regime, internal divisions and fractions proliferated among them due to differing points of view.

4.3.3 Yemen

Shortly after the Gulf Cooperation Council Initiative Agreement was reached in November 2011, some members of the Yemeni diaspora returned to the country in order to contribute to the democratic transition process. The agreement sought to ensure a peaceful transition by dividing power equally between the regime and the opposition. Furthermore, the agreement provided the resignation of President Ali Abdullah Saleh, who had ruled Yemen for 33 years. One form of this political involvement was

through the National Dialogue Conference (NDC) in 2013, which included all parties and lasted for about nine months in Sana'a, the capital of Yemen. For instance, the southern political figure, Ahmed Bin Fareed Al-Suraimah, who had been in exile since the Yemeni civil conflict between the northern and southern parts in 1994, returned to Yemen in 2013 and participated in the conference. He later withdrew due to contrasting points of view regarding the national dialogue process, in particular the 'Southern issue', as he believed the NDC did not meet the Southerners' demands. Similarly, the former Prime Minister of the Unification in 1990, Haider Abu Bakr Al-Attas, returned from exile after having fled the country in 1994 due to the conflict with Saleh's regime. He is currently politically active within the presidential advisory.

Another form of political participation of the Yemeni diaspora after the Arab uprisings is the formation of coalitions and the proposal of political negotiation initiatives in their host countries. Prominent political figures held meetings to discuss and initiate actions on critical national political issues. To some extent, this helped in converging views. For example, the former President of Southern Yemen during 1980-1986, Ali Nasser Mohammed, who is still in exile, regularly meets with Yemeni political figures. He has previously proposed political settlement initiatives to end the conflict in Yemen based on the shifting situation on the ground. At present, the majority of Yemeni political figures are in exile due to the ongoing conflict since March 2015, and many of these are not able to return home as there is no safe sphere for political participation. Even the President of the state, Abd Rabbu Mansour Hadi, is out of the country. Various political meetings and peace negotiations are taking place abroad between the conflicting parties to seek the establishment of a political settlement and conflict resolution. Generally, the Yemeni diaspora remains active despite their struggle to engage in political processes since the start of the revolution in 2011. Many of its members returned to Yemen after former President Saleh had been ousted in 2012, but since 2015 more people have been exiled and remain out of the country as the conflict persists.

4.3.4 Egypt

During the Arab uprisings, and particularly during the revolt against Mubarak's regime in late 2010, the Egyptian diaspora supported the revolt through organised protests in host countries. Despite the regime's strategy of blocking social media outlets to repress dissent and any form of mobilising, the diaspora used social media to amplify the voice of the Egyptian people and to spread it worldwide. Some were inspired by the revolution to return to their home country and contribute to the democratic transition and the new social and political arena after the ousting of former President Mubarak. Wael Ghunim, the administrator of the 'We Are All Khaled Said' Facebook group, left his employment as regional marketing director for Google in Dubai in order to participate in the 25 January protest. Canadian-Egyptian writer and university professor, May Telmissany, tells a similar story, recounting how '[a]fter the revolution, I wanted to go back home and participate in the struggle against the dictatorship' (Pagès-El Karoui 2015). The Egyptian opposition leader, Mohammed El-Baradei, also returned to Egypt and joined the anti-government protests.

Both during and after the 2011 movements, the Egyptian diaspora worked on establishing associations and organisations in the political and economic development realm of their home countries. 'In France, numerous associations were created in the wake of the revolution (the Committee for Solidarity with the Struggle of the Egyptian People, the Association of the 25 January Youth, the Tahrir Square Movement, etc' (Nada 2013: 176). Similar occurrences also took place in the United States (Nada 2013: 176):

> The Egyptian American Rule of Law Association (EARLA) invested itself in the promotion of the rule of law in Egypt; the American-Egyptian Strategic Alliance (AESA) aimed to influence political relations between the United States and Egypt in order to encourage security, stability and mutual prosperity in both countries and promote democratic values; a group of entrepreneurs launched NEGMA (Networking, Entrepreneurship, Growth, Mobilisation and Action) at a conference in March 2012 at MIT (Massachusetts Institute of Technology), with the goal of connecting Egyptian businessmen with their expatriate counterparts.

However, the political environment discouraged diasporas from returning to their country, and many decided to leave the country for the second time due to frustration and political oppression. In particular, supporters of the Muslim Brotherhood sought refuge abroad as many leaders and members of the group faced harassment, arrests and sentences shortly after the overthrow of the Muslim Brotherhood president, Mohammed Morsi, by the Egyptian Army under Abdelfattah El-Sisi, who is currently Egypt's President. In September 2013 the military regime banned the Muslim Brotherhood Organisation. Morsi, the Supreme Leader of the Muslim Brotherhood Organisation, Mohammed Badie and other party members are on trial.

4.4 An overview of diasporas' direct political participation

Besides a certain behavioural change in indirect political participation, the 2011 uprisings also brought about changes to the types of direct engagement of the diasporas. Therefore, this section aims to revisit the forms of direct political participation among Arab emigrant communities and their effectiveness by examining the changes in MENA government policies towards diaspora inclusion in the political system in the aftermath of the 2011 uprisings. It will revisit government policies towards political participation of diaspora communities and how these policies were influenced as a result of the 'reform processes' that took place after 2011. As the examples show, the diasporas were not significant game changers, however powerful they may be, since their 'inclusion' was often constructed by the new regime as a façade in order to derive a seemingly broader, yet artificial legitimacy.

Emigrants' political participation can take different forms, manifested by financial support to political parties; lobbying and affecting public policies; conflict support; or sustaining post-conflict reconstruction (Vertovec 2005: 8-9). However, the most direct relation with the origin state remains participating in the electoral process, namely, by voting. Granting the right to vote to diasporas remains widely controversial, and can create complex political and legal implications. However, in the context of state building, or countries undergoing transitional periods, granting the right to vote to diasporas can stimulate a 'commitment to

democracy-building' (Francis 2015: 23). Thus, many countries around the world have been enacting laws allowing the inclusion of diasporas in the electoral process (Francis 2015: 23). Several electoral laws have been amended in order to create an opportunity for diasporas to vote.

4.4.1 Tunisia

After the Jasmine Revolution in 2011 Tunisia granted the right to vote to expatriates in the parliamentary elections, and the new electoral law allocated 18 seats to Tunisians abroad (Jaulin 2016: 7). This inspired similar changes in other Arab countries. For the first time in Lebanon, the foreign ministry opened the door for external voters to participate in the 2018 parliamentary elections (*Daily Star* 2017). Syria held widely-controversial elections that were targeting expatriates. Lastly, Turkey has also campaigned over diasporas in previous elections (Koinova 2017). Ennahda won 89 out of 217 seats in the Constituent Assembly in Tunisia's first democratic elections. A member of the diaspora became Tunisia's first democratically-elected President. After Ben Ali had banned the Congress for the Republic Party in 2002, its founder and president, Moncef Marzouki, moved to France to continue his political struggle. Marzouki returned to Tunisia in 2011 and would remain the country's President until 2014. These actors from the diaspora contributed to the enhancement of democracy-building efforts in the country.

In the first instance, this step resembles a natural process of what the Arab uprisings aspired for: more inclusion and broader political participation. However, a deeper analysis is required in order to uncover hidden motives and to truly assess the legitimacy that is produced through elections. Brand (2014) discusses the symbolism behind reaching for the external votes of citizens abroad, by highlighting the surrounding circumstances of such a move. She first addresses how Tunisia turned to external voting in order to 'secure a plurality of seats in the constituent assembly' (Brand 2014b) in opposition to the Islamist Ennahdha party. However, this idea is debatable, as the Ennahdha party only won eight out of 18 seats in the parliamentary election of 2014 (National Democratic Institute 2015). Instead, the *troika* parties (Ennahda, CPR and Ettakatol) together won 15 of the 18 seats. In Libya, external voting was banned for people who live in Egypt or Tunisia under the pretence that 'these communities were close enough to return home to vote' (Brand 2014b). However, Brand explains the other possibility in which 'their proximity also made them most likely hosts of supporters of the toppled Gaddafi regime' (Brand 2014b). In both cases, diaspora voters became new targets of local and regional politics.

4.4.2 Syria

The Syrian case is another example of how regimes – while re-inventing themselves – turn to external voices for their political agendas. The 2014 elections in Syria proceeded to give the world the impression that Syria is still politically functioning. However, external voting was not meant to legitimise the regime's position, but rather was 'inextricably linked to the ongoing regional and extra-regional power struggle' (Brand 2014b). These regional and extra-regional implications are also recognisable in the Turkish authoritarian model. Koinova (2017) explains that turning to

external voting is 'no longer [a] purely domestic political matter, but a part of Turkey's increasingly contentious foreign relations'.

4.4.3 Egypt

In the Egyptian context, the right to vote for diasporas had been banned under Mubarak's rule, but was amended immediately after the uprisings in the elections of 2012, 2014 and 2018, eventually allowing diasporas to vote in presidential elections. In both the elections of 2012 and 2014, the Egyptian government encouraged diasporas to participate through targeted internet websites and media campaigns. In 2014 the turnout remained low, reaching 355 000 from an original 7 million Egyptians living abroad (Zohry 2012). Yet, Egypt

> holds the record for the most OCV (out-of-country voting) votes since the revolution. Members of the Egyptian diaspora participated in the 2011 parliamentary elections, the 2012 Shura Council elections, the constitutional referenda in December 2012 and January 2014, and the presidential elections in 2012 and 2014 (Koinova 2017).

Müller-Funk (2016: 366) argues that Egypt has a history of restricting the political rights of expatriates as it 'extended external voting rights after a wave of massive campaigning in 2011'. This argument opposes the idea that the turn to external voting was initially incorporated in the politics of the new regimes. Nevertheless, the 'romantic' rhetoric that the Egyptian government used to collect external voices confirms that there has been a continuous role in the politicisation of diasporas. Brand (2014b) argues that 'authoritarian states in North Africa aim at cultivating emigrant loyalty through external voting rather than expanding meaningful political participation'. A response to the argument of Boccagni et al (2015: 3) is that there are moves through which states 'want to selectively and strategically manage what immigrants can and cannot do' by inventing new forms of relations.

4.5 External voting as a method of legitimising new regimes

The escalating events in the MENA in 2011 added new layers of analysis regarding the institutionalisation of democracy in the region. Thereafter, the notion of 'democratisation process' and its functionality was contested in the public discourse. This has led to critical re-examinations of the political and institutional structures of Arab regimes. These dynamics have been studied and debated through multiple discourses, such as neo-institutionalisation, transitional studies, legal and political studies, and so forth. However, little attention has been given from a 'diasporic' perspective.

The political participation of diasporas that diffuses the traditional meaning of the state in its physical sense may be considered a significant method of assessment to the political and structural changes in modern politics, particularly in light of the need to do 'a rethinking of democracy as operation within and across borders' as suggested by Underhill (2016: 25). However, the incorporation of diaspora participation challenged the democratisation process and the reform initiatives proposed by the Arab regimes after the 2011 uprisings. Moreover, it portrayed new reflections to the understanding of democratisation in the absence of substantial procedures that are needed to promote equality, inclusion and broader

political participation. Additionally, it presents new political and power actors that could play a role in shaping the new political system and affecting social and political change. Seen from another perspective of evaluation, the inclusion of expatriates and emigrants in the electoral process may be used to assess attempts by the new regimes to exploit diaspora communities as new targets in order to present themselves in a 'democratic manner', thus creating a broader sense of legitimisation by allowing for broader political participation.

Interestingly, the Arab context is adhering to these remarks and questions, witnessing different elements that can make this discussion richer. For example, Arab emigrants are great in number, especially if one looks at the case of Egypt with 'one of the largest emigrants populations worldwide' (Müller-Funk 2016: 353). Their participation can lead to changes in turnout. In addition, social and political mobilisation towards the uprisings has been witnessed in different countries, where emigrants were included in the electoral process. This suggests that the diaspora should not be excluded in the assessment of the transitional and democratisation processes (Underhill 2016: 26, 30).

Dahre follows the engagement of diaspora communities to their 'origin' institutions by examining different phases of academic studies representing this relation. He suggests that studies in the 1920s and 1930s focused 'on how migrants adopted themselves to a new environment or were socially excluded' (Dahre 2007: 8). Later studies, particularly in the last decade, emphasised how emigrants maintained a continuous attachment to institutions that 'are not linked to the state in which they now are living' (Dahre 2007: 8). However, whether the first or the latter, diasporas continuously find themselves at a crossroads: to remain in the country of origin or in the host country. This duality, which leads to multiple interests and views, can 'shape their engagement and participation in social and political change' (Underhill 2016: 26). Additionally, diaspora communities, as Jonathan and Daniel Boyarin (2002) explain, 'exercise a distinct form of cultural power in order to maintain themselves'. The need for self-maintenance and their aspirations may be manifested in constructive political acts. Such acts can contribute to creating an aspired 'imagined community' (Anderson 1991). For example, Egyptian emigrants' engagement becomes a practice to concretise what the ideal Egypt would and should look like after years of dictatorship and authoritarianism.

In the historical run, diasporas played a 'significant part in the development of nation building in poor countries and in ones which have undergone major transformations' (Vertovec 2005: 7). They 'powerfully embody broader trends in the changing nature of nation-state' ((Vertovec 2005: 10). It is therefore fair to acknowledge that diasporas are powerful actors and significant role players in the international political arena. Amin (2010: 12) suggests that their nature as a 'constructive, nonviolent force for democratic change should not be underestimated'. The importance of their political engagement is not only seen as an insurance for exercising their political and civil rights, but it gives a broader addition to the democratisation process in general. Rigone claims that this participation contributes to de-constructing any stereotypes, promoting peace and dialogue, and, most importantly, it makes people 'eager to promote in their countries of origin the values they consider positive in their country of

residence' (Rigoni 2013: 6). In this sense, diaspora communities could be regarded as 'bridges between their homes and residence which could help the "state-building processes"' (Amin 2010: 12).

Given this overview, is it correct to say that the means of direct political participation in Arab countries share similar characteristics? If this is true, then one has to question the governments' institutional structures that reproduce common behaviour. The change lies in amending the structure that leads to reproducing the same institutional behaviour. The change is not limited to the idea of demanding change and organising civil movements, but also entails follow-up procedures that include raising mass public awareness and address the roots of the problems that hinder liberties in a specific country. The argument is that voting as a form of direct political participation is not sufficient and does not guarantee achieving a public democratic choice. The idea of participation is to include all people in the election process, but the conduct of the voting process under controlled premises renders the idea of participation itself meaningless. Therefore, the participation by people itself is moulded into a tool to endorse the façade of legitimacy of undemocratic regimes.

5 Conclusion

Diasporas are entwined in the history of the MENA region. In fact, the very word 'diaspora' originally described events that took place in the region during the Classical Antiquity, such as the Assyrian captivity, the Babylonian exile and the destruction of the temple in Jerusalem by the Romans, which scattered the Jewish people. The return of one diaspora in the wake of World War II subsequently created another, namely, the Palestinian diaspora. Throughout the rest of the twentieth century, many more from the MENA region would leave their homes in order to settle abroad, due to either economic reasons, conflict or political repression. The multiplicity of reasons, routes and consequences of migration demonstrates that there is no single model for the diasporas' involvement in the political processes of a country. Yet, as Dalacoura et al (2017) highlight, it is important to analyse their role within the 'global identities' they shape and are shaped by in the attempt to clarify the extent of their political agency. This article has focused on overall trends as supported by existing case studies on specific diasporas. This allows some, albeit provisional, conclusions to be made.

The participation of diasporas is an important index of the evolution of the democratisation of the Arab world. However, the experiences following the Arab uprisings do not allow definitive conclusions to be drawn. First of all, starting from 2011, diasporas have shown an increased willingness and motivation to stand up against repressive regimes. They stood up against national or transnational oppression. The diasporic rallies and protests and the active social media participation presented a significant boost for these revolts. The Tunisian example seems to be exceptional compared to the other states that witnessed any form of uprising as it was the only one to go through all processes of elections, national dialogue inclusion, and the ongoing transitional justice process. Meanwhile, at least some part of the exiled diaspora had the opportunity to practise their political rights in their home country and even to participate in the process of transitional justice. Nevertheless, for other Arab countries experiencing uprisings,

efforts are still underway due to the ongoing civil war or the defiance of authoritarian regimes and the dire situation in countries such as Syria, Yemen, and Libya. Some diasporas of these countries are struggling to amplify the revolutionaries' voices and trying to come to terms with the events that took place in their home countries.

The Arab movements unleashed in 2011 aimed to change the political behaviour of MENA governments towards their people. The fall of some regimes threatened the existence of other regimes, which forced these regimes to initiate a process of democratisation in order to confront potential civil movements. One of these 'democratisation processes' is re-introducing external voting in elections, supposedly aimed at broader participation, and re-affirming sovereignty. In general, the inclusion of emigrant populations in the electoral processes in their home countries contributes to the democratisation of the elections process, as it means opening the door for dissenting voices in the diaspora to participate in democratic state practice. This is especially relevant when it comes at a time in which diaspora communities are aware of the power they exert in mobilising and influencing public discourse, for example by raising awareness of human rights violations and democratic deficits in their home countries.

Even though in a globalised world diasporas could play an important political role, they also face several obstacles. First, although at least a part of the diaspora broke the silence after the 2011 movements in the MENA region, transnational repression persists and silences people abroad. Second, emigrants from the MENA region often find themselves in a context of negative reception, which prevents them from becoming active citizens. Third, the inclusion of diaspora communities in the voting process does not necessarily foster political change. The inclusion might either be an attempt by the regime to create a democratic façade, as was the case in Syria, or to give expression to a more conservative voice, as in the case of Tunisia. Lastly, internal division within the diaspora impedes a firm, unified opposition from abroad. An objective evaluation of this participation will make it possible to draw the right lessons from the mutation of the diasporas' participation in order to perfect the modes of this participation. Diasporas could offer new perspectives on shaping and constructing domestic politics and local regimes. Further inquiry should be conducted on how diasporas are shaping the political transition of each country, especially within the post-war reconstruction of countries such as Syria, Libya and Yemen, and the democratic transitions in Tunisia and Egypt, among others. As their participation has long been disputed, the changes occurring during the Arab uprisings potentially constitute a major shift in the way in which diasporas not only are included in the political systems, but are also perceived by the contributions they provide. These constitute pressing issues for the future and the evolution of democracy in the region.

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The European Union diaspora dilemma: To dodge or to dive in

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Abstract: *The European Union member states have long been confronted with the phenomenon of diaspora resulting from both emigration and immigration. For centuries European communities have settled outside of the EU, almost creating 'little homelands' in various corners of the world. The same has occurred and still occurs with diasporas originating from third countries and residing in EU territory. A further feature makes the EU context unique when it comes to diasporas, namely, the opportunity for EU citizens to freely move across the borders of member states due to free mobility policies. The possibilities presented by free mobility have led to the formation of many diaspora communities in EU member states coming from other EU member states. However, over the past years much more attention has been devoted to large 'immigrating' diasporas, given the increased influx of migrants from third countries. This article analyses the approaches of member states and the EU as an organisation towards diasporas and diaspora engagement, including the question of whether any clear policy frameworks to mobilise diaspora actors exist. The first part provides a brief mapping of the 'EU diasporas', while the second part focuses on the various diaspora policy strategies adopted by member states when dealing with their own diasporas and those within their territories. By then studying the cases of France and Bulgaria, the article answers the first research question: What is the relationship between EU member states and diasporas within their policy frameworks? The last part examines the diaspora issue at the institutional level of the EU, answering the second research question: What is the relationship between the EU and diaspora within its policy framework? This question is of particular interest since the diaspora topic has garnered increased attention in the context of several EU high priority issues and because the EU regularly provides guidance for its member states through policy making.*

Key words: *European Union; diaspora; democracy; migration; policy*

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1 Introduction: The peculiarity of diasporas in the European Union

For centuries the member states of the European Union (EU) have been confronted with the phenomenon of diaspora resulting from both emigration and immigration. While for years European communities have settled outside of the EU, almost creating 'little homelands' in various corners of the world, the same has occurred and still occurs with diasporas originating from third countries and residing in EU territory. In addition to this twofold situation, a further feature makes the EU context quite unique as far as diasporas are concerned, namely, the opportunity for EU citizens to freely move across the member states due to free mobility policies. This, in turn, has led to the formation of many diaspora communities within EU countries coming from other EU member states. However, putting aside internal movements, over the past years much more attention has been dedicated to large 'immigrating' diasporas, given the increased influx of migrants from third countries (Eurostat 2018).

Therefore, the aim of this article is to analyse the approaches of both member states and the EU, as an organisation, towards diasporas and diaspora engagement, including the question whether any clear policy frameworks to mobilise diaspora actors exist. In order to do so, the article adopts a comparative approach, including two case studies, which examines different migration flows and the diaspora policies of the EU in light of those of its member states. The article begins with a brief mapping of 'EU diasporas' to show the complexity of this reality in the EU context. This examination is necessary to further understand the unique situation of the EU within diaspora research. In order to provide such mapping, existing research on emigration and immigration movements, closely linked to diaspora, is examined. Although not every group of migrants falls within the definition of 'diaspora' as described below, statistics on migration movements can still provide a useful starting point for diaspora research.

Based on the different scenarios present in the EU, the second part of the article focuses on the identification of the various diaspora policy strategies adopted by member states when dealing with their own diasporas as well as those within their territories. Two case studies are provided in order to answer the first research question of this article, namely, what the relationship is between EU member states and diasporas within their policy frameworks. The countries examined provide two fundamentally different scenarios, which offer a good sample of the diversified approach of the member states towards diasporas. To this end, France and Bulgaria were selected. The former is a founding member of the EU, with a long history of immigration and with a large diasporic presence within its territory. The latter, which more recently joined the EU, has by contrast experienced substantial flows of emigration of national citizens instead. However, as this study shows, the assumption that the cases differ to a large extent in terms of policy frameworks can be neither confirmed nor refuted. Overall, differences in their approach exist, particularly with France employing more elaborated policies regarding diasporas within its territory due to immigration being the focus of its political agenda. However, notable similarities are also present, especially with respect to education-related policies.

The last part of the article examines the institutional level of the EU, answering the second research question, namely, what the relationship is between the EU and diasporas within its policy framework. This question is not only of interest since in general the EU regularly provides guidance to its member states through its policy making. What is more, the inclusion of the topic of diasporas in EU-level policies seems useful, given its close link to some of the Union's current high priority issues, such as security, development and migration. However, not only does an explicit diaspora policy not exist at the EU level but, as the article shows, the overall consideration of the role of diasporas in other EU policy areas is rather sparse.

For the purposes of this analysis it must be noted that there is not a unanimously agreed-upon definition of the term 'diaspora' (Taylor et al 2014: 3f). What will be used here, unless otherwise specified, is the definition given by French scholar Gérard-François Dumont, who defines diaspora as 'a community of individuals living together on the same territory and having in common the conviction or belief of belonging, themselves or their families to another territory with which they maintain regular, symbolic or mythological relations' (Dumont 2014).[1]

2 Mapping diasporic communities in the European Union

When engaging in a discussion on diasporas and related policies in the context of the EU, it is useful to understand how this phenomenon manifests itself throughout the region. It is necessary to recognise where the main diasporas are located as well as where they originated from, as these factors largely determine the nature and type of policy frameworks adopted both at the EU and national levels. This part will thus provide a general mapping of EU diasporas with the aim of highlighting the complexity of the situation.

Indeed, the EU holds a peculiar position compared to other regions of the world as it has a significant and long history of both emigration and immigration, thus creating a twofold situation in terms of diaspora presence: Some member states may be viewed as mostly receiving countries, while others may be viewed as mostly sending countries. Since recent research on the geography of diasporas in the EU (such as that of Taylor et al 2014) has focused mainly on non-European immigrant communities, less information is available with regard to EU nationals themselves as diasporic communities both inside and outside the EU. While studies on emigration statistics provide useful indicators, one must bear in mind that not all migrants fall within the definition of diaspora.

To better understand the composition of diasporas in the EU, a further distinction for the sake of clarity is needed. On the one hand, one may identify diasporas originating from EU member states as a consequence of emigration ('emigrated diasporas'), among which two sub-groups may be

1 Translated from the French by the authors. Original text cited by Dumont (2014) from one of his earlier works, 'Ensemble d'individus vivant sur un territoire et ayant en commun la certitude ou le sentiment d'être originaires, eux-mêmes ou leur famille, d'un autre territoire avec lequel ils entretiennent des relations régulières, symboliques ou mythologiques'.

identified, namely, (i) 'internal diasporas', formed as a consequence of internal migration movements from and to other member states; and (ii) 'external diasporas', meaning diaspora communities that emigrated outside of the EU. On the other hand, there are diasporas originating from outside the EU due to immigration ('immigrated diasporas').

As far as 'internal diasporas' are concerned, research focusing on emigration movements has observed that in the past decades, EU nationals have predominantly emigrated to other member states, particularly due to the free movement policies adopted at the EU level (Koikkalainen 2011), the wave of new accessions, as well as the more recent Euro-zone financial crisis (Weinar 2014: 7f). The collapse of the Soviet Union and the subsequent state accessions to the EU in the early 2000s coincided with a rise in EU internal migration, which in certain cases led to the formation of diasporic communities (Favell 2008). EU 'internal diasporas' thus mainly originate from eastern EU countries (such as Poland, Bulgaria and Romania), but also, more recently, because of the Euro-zone crisis, from southern EU member states (mainly Greece and Portugal) and Ireland. Their main destinations are 'richer' member states in the western and northern EU, with Germany, the United Kingdom (UK) and France most commonly selected (Weinar 2014: 7).[2]

With respect to 'external diasporas', data is available only with regard to emigration flows. It has been found that the longstanding main destination countries for EU nationals have been the United States (US), Canada and Australia, as well as Argentina, with the US being the top destination in 19 out of 28 member states (Weinar 2014: 7). However, it should be kept in mind that the most prominent cases of 'external diasporas' of EU citizens were more a phenomenon of past centuries. In most cases, such communities have largely been assimilated by the receiving country and maintain weak ties with the homeland (Fassmann & Münz 1994). Today, however, mostly due to the ongoing economic crisis affecting some EU member states, new emigrating waves outside of Europe towards the above-mentioned destinations may lead to the formation of new diasporic communities of EU citizens. Therefore, this phenomenon should not be ignored.

With regard to EU diasporas originating from third countries and settled in EU member states, the situation is equally diverse. Indeed, the migration flows of the past decades towards Europe have greatly increased diaspora levels across member states and, with it, the attention of policy makers. Research has found that the largest diaspora communities present in the EU are Turkish, Moroccan and Filipino diasporas, with the first group spread over 19 member states. However, other considerably large groups also originate from India, Pakistan, Algeria and Egypt. Not surprisingly, the receiving countries again are mostly western and northern EU member states, particularly Germany, the UK, France and The Netherlands. Significantly, large diaspora communities can also be found in Portugal, Spain and Italy. Eastern EU member states, on the other hand, do not host very large diaspora groups besides those coming from their neighbouring countries (Taylor et al 2014: 23f, 28).

2 The geographical classification of EU member states as 'northern', 'eastern', 'southern' and 'western' reflects that adopted in Taylor et al 2014: 20.

It may be concluded that the EU is a mix between receiving and sending states (with the former being predominantly western and northern member states and the latter mostly eastern and more recently southern member states), with a plethora of diaspora communities originating from both inside and outside of the EU. Such a diverse and complex context poses great challenges at the policy-making level. The next parts address this issue further by giving a brief overview of the different diaspora policy frameworks adopted by EU member states towards engaging their own diasporas abroad and those living within their territories. Two case studies are then presented to compare the approaches of a receiving and a sending member state towards their immigrated and emigrated diasporas. Finally, the article discusses the question of whether the EU has a harmonised policy framework for engaging with diasporas at the institutional level.

3 Diaspora policy frameworks among European Union member states: A multifaceted approach

As the previous part illustrates, the EU offers a very diverse scenario in terms of diaspora geography. Consequently, substantial differences in the nature and the extent of diaspora policies and strategies exist. Governments engage to different degrees with their diasporas abroad and the communities in their countries, mainly based on what they choose to prioritise.

Diaspora scholar Agnieszka Weinar has usefully divided policies towards emigrated diasporas into two main categories: diaspora-building policies and diaspora-engagement policies. Diaspora-building policies aim to strengthen the cultural ties of diasporas with their home countries to help build a sense of 'community'. They usually include those governmental strategies of which the 'focus is on catering for the cultural needs of the communities of the same cultural background abroad, such as language schools, national curricula schools or active cultural programs for diaspora'. Almost all EU member states have such policies in place, with the exception of Austria, Denmark and Luxembourg, where the task is left to private institutions. In addition, but less commonly, states have also focused on identity building for certain professional groups (for example in the Czech Republic). Diaspora-engagement policies usually take the form of citizenship and direct-democracy policies (more a focus of the Baltic states or Poland), but also human capital policies and entrepreneurial outreach, as in the case of France and the UK (Weinar 2014: 11-13).

Similarly, with respect to policies aimed at immigrated diasporas, a uniform and harmonised practice remains lacking. Policies aimed at third country diasporas usually vary depending on the political agenda, although some similarities can be identified. In particular, member states have mostly engaged and mobilised diaspora groups in the field of development-cooperation and capacity building for diaspora organisations (Sinatti & Horst 2015). These policies take the form of national strategies, the establishment of forums and mechanisms to engage diasporas for development projects. Policies aimed at promoting peace in the country of origin have also been a widespread practice. Researchers have found that the countries engaging more actively with diasporas in their territory are mostly the UK and France, but also Belgium, Italy, Germany as well as

northern member states such as The Netherlands, Sweden, Finland and Denmark. These countries also tend to engage only with the larger diasporas, or with those with which they have historical ties, as in the case of Zimbabweans in the UK or Congolese in Belgium (Vorrath 2012: 26).

Having assessed the variety of member states' approaches and policies of engagement with their own diasporas or the diasporas within their territories, the next part will provide two case studies: one on France and one on Bulgaria. As mentioned previously, the rationale behind this choice is to illustrate the diversity of diaspora policies through two presumably very different situations. Three common parameters were used in the comparison, namely, citizenship, voting, and education and culture for the diaspora communities. These parameters were selected as indicators of the overall attitude towards diasporas and because of their strong link to democracy, which is a common value to both countries analysed. In this sense, it is important to acknowledge that this article understands both France and Bulgaria as well-established democracies within the terms of the 1993 Copenhagen Criteria for accession to the EU. Furthermore, the chosen parameters pay due regard to the ongoing discussion in diaspora scholarship on the relationship between diaspora and democracy (Mohamoud 2009; Koinova 2009; Kapur 2010; Ukraine Democracy Initiative 2017).

4 France: Keeping diasporas close, and the French diaspora (even) closer

Much like the EU, France has a long history as a country of mixed emigration/immigration flows that influences and is reflected in its diaspora policies. The circumstance of being simultaneously a receiving and sending country of diasporas, as well as some of the specificities of the legislative and policy options adopted, render the study of the French case particularly challenging.

France's mixed migration flows, and in particular its tradition as a receiving country of diasporas, are closely related to its history, economy and secular society. The latter, strongly influenced by the French Revolution, has contributed to the understanding of France as a safe haven for otherwise prosecuted diasporas (Cohen 2008).[3] The values of the French Revolution – liberty, equality and fraternity – have also found acceptance in the legislation, as French law prohibits the collection of ethnic or racial indicators (Conseil Constitutionnel 2007). Similarly, questions regarding religious membership have not been present in the census since 1872 (Farkas 2017: 14). Another important historic factor is France's colonial past, which still influences the country's geopolitics. The French territory not only is composed of metropolitan France, but also of the *départments, régions, térritoires et collectivités d'outre-mer* (DROM-TOM), or overseas France. The communities originating from these regions are composed of French (and EU) citizens, and the migratory movement towards metropolitan France is officially seen as internal. Finally, it is also worth mentioning that the French legal system allows for

3 Eg, the Jewish community is particularly significant, with France being home to the third-biggest Jewish community in the world.

several pathways to obtaining French nationality, including *ius soli*, albeit subject to conditions (Rouhette & Rouhette-Berton (undated): French Civil Code articles 17-21). It also allows for and recognises dual citizenship, which translates into a 'rather liberal polic[y]' (Howard 2005: 710).

The aforementioned particularities have been legally enshrined to grant equality before the law and tackle racial, religious or ethnic discrimination, and thus represent good examples of France's diaspora engagement policies, and of the country's effort to support the integration and the democratic participation of immigrated diaspora communities. It is a fact that the recognition of the French citizenship of these individuals grants them access to certain social and political rights that are otherwise denied to foreigners, such as the right to vote (Rigoni 2013).[4] Nonetheless, some of these legal safeguards may hinder the assessment of the actual situation, the cultural and social diversity and identity, and potentially the needs, of these communities. Moreover, as Cohen (2008: 129) states regarding the rights of DROM-TOM citizens, 'it is important not to confuse formal rights with substance'. The reliance on formal rights, not accompanied by integration measures adapted to the specificities of the different communities, is linked to the failure of some of these diaspora engagement policies, as is illustrated by cases of radicalisation of French citizen members of diasporas. As Sheffer points out, 'when considering the motivations of Muslim fundamentalist groups in Europe … it is hard to determine whether their members are motivated by pure religious sentiments or whether they are mainly concerned with the political and cultural rights of their co-nationals in their homelands and host countries' (Sheffer 2006: 122).

Despite the flaws in the French legislation described above and the fact that direct democratic participation is not in all cases possible, diaspora communities in France are also 'extremely well organised and institutionalised' (Frankenhaeuser et al 2013: 89). These diaspora associations often fill the integration gap left by the law.[5] France has capitalised on this, engaging the diasporas in co-development initiatives, which consist of 'promoting knowledge transfer, assisting the foundation of small-scale businesses in the countries of origin, and supporting the activities of hometown associations, capacity building and network efforts' (Keusch & Schuster 2012: 9). In fact, the country is a 'pioneer in involving diaspora communities in its development actions' (Frankenhaeuser et al 2013: 87) and these diaspora engagement initiatives are included in several policy documents.

As far as the French emigrated diasporas are concerned, France has been referred to as 'a country which does not acknowledge emigration', rather understanding the citizens' absence from France as temporary (Weinar 2014: 12). Consequently, legal, political, cultural and economic

4 French electoral law does not recognise foreigners' right to vote, the only exception being EU citizens, who can vote in local elections. The country has neither signed nor ratified the Convention on the Participation of Foreigners in Public Life at Local Level (Council of Europe 1992).

5 Eg, Berthommière, Maurel & Richard (2015) find a positive correlation between associativism and the identification with France and its institutions. According to the authors, this identification, on the other hand, plays an important role in the social integration.

ties to the country are preserved. In fact, 'France has a long history of granting political rights to its citizens abroad' (Beck & Weinar 2017: 12, 92). France not only allows its citizens residing abroad to vote, but also reserves twelve seats in the National Assembly for the representatives of the diaspora, and expatriates can also vote in local elections (Bauböck 2007: 2429).[6] Furthermore, it allows temporary migrants to choose between 'register[ing] abroad or vot[ing] for candidates in their home districts through postal voting or e-voting' (Beck & Weinar 2017: 92). The right to vote is even more extensive considering that French law allows for dual citizenship.

Connections with the diaspora are also preserved through diaspora-building initiatives, namely, through policies implemented in the areas of culture and education. In fact, there are 143 French institutes and French cultural centres in the world that are governed by the Ministry of Foreign Affairs (Beck & Weinar 2017: 96). They promote the French language and culture. Furthermore, through the *Agence pour l'enseignement français à l'étranger*, French expatriates have access to a network of almost 500 schools worldwide, which are approved by the French Ministry of Education and teach French curricula (AEFE (undated)). These *lycées français* constitute a unique network and are envisaged not only to disseminate French language and culture outside of the French territory, but also to provide for the education of the children of French families abroad. The fact that the students of these schools are allowed to transition to the French national school system without any examination confirms the notion that French emigration is seen as merely temporary. Through these initiatives, a wide area of Francophonie is created, in which French expatriates act as ambassadors of the country, its language and its culture.

The above-mentioned particularities make the French case an interesting one. On the one hand, the country has invested in a policy of integration of the immigrated diasporas through a multitude of initiatives, such as broad access to French citizenship, legal guarantees of non-discrimination, or engagement in co-development policies. The main criticism against these policies, however, is the mere reliance on formal rights which, in some cases, has led to non-satisfactory results. On the other hand, the French diaspora has not been forgotten. The diaspora-engagement and diaspora-building initiatives listed above, sponsored or developed by the French government, reveal the government's commitment to foster the ties of its expatriates with their home country, either through democratic participation or through culture and education, with the *lycées français* functioning as bridges for the return of younger generations to the country.

5 Bulgaria: Base and building blocks of the Bulgarian diaspora policies

The dynamic history of the Balkan region has contributed to a complex migratory situation, and Bulgaria is no exception. Although only a few people emigrated during the Soviet-backed political regime, its collapse in

6 Other than France, only Portugal, Croatia, Italy and Romania allow for the representation of the diasporas in national parliaments (Rigoni 2013).

1989 triggered a substantial wave of Bulgarians to permanently leave their country. Since the EU accession in 2007, emigration trends have been comparably lower but constant, possibly contributing to the increasingly severe aging of the population and its decline (Alexander 2017; Usheva 2011: 4f).[7] The large Bulgarian diaspora community is now estimated to have reached unprecedented levels, with a larger number of Bulgarians working abroad than in the country (Novinite 2015). Arguably, some of the most notable issues for the Bulgarian diaspora include citizenship, voting rights and education.

Regarding citizenship, interestingly, *de jure* someone who is of 'Bulgarian origin' is necessarily a 'Bulgarian citizen', since the Constitution provides for two separate terms: 'a person of Bulgarian origin' (ethnicity) and 'a Bulgarian citizen' (legal status). While the latter has the full legal rights and duties attached to citizenship, the former refers to someone of an ethnic Bulgarian origin and identity, who does not have to be a Bulgarian citizen and yet has the right to apply for naturalisation through a preferential regime, such as a reduced administrative fee requirement and an exemption from proof of language proficiency (Smilov & Jileva 2013: 6-13).[8] This may be viewed as part of the national policy to permanently attract people of Bulgarian origin from neighbouring non-EU countries, so as to decrease negative demographic trends (Ministry of Labour and Social Policy of the Republic of Bulgaria 2006: 40; Ivanova 2015: 128). However, according to some authors this is also a symbolic citizenship aimed at 'settling historical scores with neighbouring countries' (Smilov & Jileva 2013: 16), most of them currently non-EU member states. Nevertheless, granting citizenship rights on a national level automatically leads to EU citizenship and political participation rights at EU level. However, according to article 9 of the Treaty on European Union (TEU) and article 20 of the Treaty on the Functioning of the European Union (TFEU), the acquisition of citizenship falls within the exclusive competences of the member states and, hence, regardless of the underlying motives behind national citizenship policies, the EU cannot influence them.

Compared to France, Bulgaria can be said to grant fewer political rights to Bulgarians abroad. Currently, only in-person voting is possible (Rigoni 2013: 7), requiring travel to a designated polling station in the country of permanent residence, which in some instances has been hindered by excessively long queues preventing people from voting (Novinite 2016b). Moreover, since 2016 Bulgaria substantially changed its voting procedures, including the introduction of mandatory voting. Proposals to decrease the number of polling stations worldwide, which would have limited the participation of the Bulgarian diaspora, were withdrawn following civil society opposition (Spirova (undated)).

In the 2016 presidential elections, voter turnout was the highest in Turkey, with 14 700 votes, followed by the UK (3 400), Spain (3 200) and Germany with 2 000 votes (*The Sofia Globe* 2016). Although the Bulgarian

7 Despite these trends, Bulgaria has substantially failed to meet its asylum seekers EU relocation quotas. This may be due to the non-ethnically Bulgarian origin of asylum seekers from Africa and the Middle East.

8 Yet, it is interesting to note that the concept of 'Bulgarian origin' has evolved significantly. In 1940, when the country was still a monarchy, the meaning was 'all persons born of Bulgarian parents'.

diaspora abroad is unevenly distributed, and this undoubtedly impacts the voter turnout, in the case of Turkey, a more intricate set of historic reasons may play a role. Before 1989, the Soviet-backed ruling party introduced its policies of 'coercive assimilation' which included mandatory name changing for ethnic Turks, with the propaganda-based claim that this was a group of ethnic Bulgarians which has been forcibly assimilated by the Ottoman Empire (Smilov & Jileva 2013: 8; Bauböck 2007: 2441). After the fall of the Berlin Wall, many were 'allowed' to flee to Turkey and to obtain Turkish citizenship while retaining Bulgarian citizenship (Smilov & Jileva 2013: 7, 10). Some authors believe that the traditionally strong electoral support for the ethnically Turkish party in Bulgaria from the electoral votes cast in Turkey is an example of a minority using 'its external voting rights to bolster the representation of the minority remaining in the country' (Bauböck 2007: 2441). However, this view is questionable as it assumes a unified stance of the Bulgarian Turks in Turkey and implies that historical motivations are still crucial for the present position of this external Bulgarian diaspora group.

Given the complex migratory situation and the substantial size of the Bulgarian emigrating diaspora, there is a State Agency for Bulgarians Abroad and a special law for Bulgarians living abroad. Yet, arguably, a self-organised media forum, dating back to 2005, which relies on the facilitative role of world meetings of the Bulgarian Language Media (BGLM) is *de facto* more influential. The latter actively maintains the link between diaspora communities and the nation state, promotes BGLM journalists' coverage of the problems of the Bulgarian diaspora and has also contributed to the promotion of Bulgarian language, history and culture worldwide (Raycheva 2012). On the other hand, the Bulgarian state does not seem to focus on immigrating diaspora policies, which may be explained by a lack of societal interest in the matter. Perhaps the explicit goal of the Soviet-controlled government to 'create a homogenous one-nation state' and 'cultural purity' instilled a general perception that 'the real Bulgarian society' is mostly homogeneous, which has survived until today despite the country increasingly adopting EU policies on minority rights (Eminov 1997: 95; Dimitrov 2000: 5, 20). While this may be one possibility, some indications of an acknowledgment of the non-homogeneous nature of the society can also be found. For example, evening news in the Turkish language has been broadcast on Bulgarian national television for more than 17 years (Bulgarian National Television 2015).

As far as education is concerned, it is worth noting that Bulgaria provides university scholarships for academically outstanding high school graduates from third countries with an ethnic Bulgarian population to study in Bulgaria (Novinite 2016a). This seems to be an extension of the policy to reduce negative demographic trends. Very often ethnic Bulgarian communities, both inside and outside the EU, which are larger and in close geographical proximity, may have their own full-time or Sunday schools. For the 2017/2018 academic year the number of schools partially or fully financed by the Bulgarian state was 190 (Ministry of Education and Sciences of the Republic of Bulgaria 2017a). The state has also developed a national strategy, namely, 'Native language abroad', through which €750 000 (1,5 million Leva) are allocated for, *inter alia*, the support for the 'national, cultural and spiritual identity' of Bulgarians abroad by providing access to Bulgarian folklore-related musical instruments and

costumes, and dance and theatre classes (Ministry of Education and Sciences of the Republic of Bulgaria 2017b). In these areas, the support for the Bulgarian diaspora abroad has been notable, albeit arguably insufficient (Mintchev 2016:17). In addition, Bulgaria's 2018 presidency of the EU Council has been a missed opportunity to support the Bulgarian diaspora worldwide and to place diaspora issues on the EU agenda.

It may be concluded that the Bulgarian approach to diasporas is marked by a stronger investment in diaspora-building initiatives than in diaspora-engagement policies. The legal privileges of 'persons of Bulgarian origin', and the investment in Bulgarian schools and the promotion of Bulgarian culture abroad are examples of the general attempt to strengthen the ties of the Bulgarian diasporas with the country, despite some proposals to limit the political rights of those living abroad. At the same time, the country seems to be encouraging the emigration of ethnic Bulgarians, and underperforms when it comes to meeting its EU relocation quotas for asylum seekers that need human rights protection and would have a positive impact on the negative demographic trends. Moreover, the criticism that in the Bulgarian context formal mechanisms for diaspora engagement are less effective than non-formal measures such as the BGLM forum meetings may be an indication that the state needs to sponsor or develop more flexible initiatives, such as BGML, and a more engagement-centred approach such that of as the French. If Bulgaria builds more bridges, as is the case in France, to make the return of its youth and working age population easier, that may in the future partially offset the negative demographic trends.

The differences between the Bulgarian and French cases are evident. These can in part be explained by the two countries' contrasting realities, not only in terms of the migratory flows experienced, but also the historical, economic and demographic situations, which impact the adopted policies. Nonetheless, despite these differences, it is possible to draw parallels between the two cases, particularly regarding the big investment in diaspora-building initiatives directed at the countries' diasporas abroad. In both cases, the connection to the country is fostered through culture and education, with a strong focus on the promotion of the language. Furthermore, in both cases there indeed is an active acknowledgment of diasporas in terms of policy options, especially in the field of development. While France actively promotes the engagement of diasporas in co-development projects, Bulgaria actively attempts to engage its diasporas in the development of the country, namely, by promoting access to Bulgarian citizenship. Were the Bulgarian state to initiate an active diaspora engagement campaign similar to that of France, it would be sensible to exercise caution regarding the potential for Bulgarian populist rhetoric to exploit historical injustices and create ethnic tensions to the detriment of the Bulgarian-Turkish diaspora.

The two cases outlined above also illustrate how challenging the creation of a common EU diaspora policy would be since it would, in some respects, have to accommodate diametrically-opposing realities. Furthermore, many of these diasporas *de facto* consist of EU citizens and originate from internal EU migratory movements, which brings into

question the true meaning of EU citizenship, and the need to capitalise on this to the benefit of the internal market.[9] Nonetheless, the harmonisation at EU level would have to overcome legal constraints that, as was mentioned above regarding the question of citizenship, may even be enshrined in the treaties, and which the member states may not be willing to alter. However, the EU has shown an interest in engaging diasporas in some of its policies, and the following section sheds light on the developments in this area.

6 European Union and diasporas: A difficult relationship

While there is a broad range of distinct diaspora policies among EU countries, as it has been examined above, a comprehensive homogeneous diaspora policy is all but absent at the EU level. In the EU's legal regime, neither the TEU nor the TFEU contains provisions explicitly referring to diasporas. In addition, as will be shown at the end of this part, there seemingly is much reluctance on the part of the EU towards a stronger involvement in diaspora policies. This reticence disregards the fact that there is an apparent need to take action by the EU, which might play the role of a catalyst for the various policy approaches of its member states. Indeed, the EU is able to provide guidance for national diaspora policies, paying due respect to the economic, political, social and cultural character of diasporas. Such guidance is imperative to make the current patchwork of the existing policies more consistent, while incentivising member states that do not yet engage with diasporas to do so. Currently, it is up to each member state to choose its approach towards immigrating as well as emigrating diasporas.

The lack of a clear and active engagement at the policy level by the EU towards diasporas comes as a surprise in view of the obvious link between these groups and some of the EU's current high priority issues, such as security, development and migration. The link between these significant points on the Union's agenda and diasporas emphasises the necessity to include diaspora issues on EU policy level, as they could play a crucial role in successfully tackling these high priority issues. This would benefit both the EU and its members.

In addition, from the perspective of immigration, the need for a clear diaspora policy provided by the EU is supported by the fact that a significant decrease in the number of immigrants is not foreseeable in the near future. This seems true also despite the emergence of questionable border management, which is hostile to incoming migrants. Given the apparent link between immigration and diasporas, it is probable that diasporas will increasingly play a relevant role within EU borders.

With this in mind, the question arises as to what the current relationship is between the EU and diasporas within its policy framework. To answer this question, it must be noted that when it comes to EU-level policies with regard to its member states' emigrated diasporas, the EU almost entirely neglects the topic of emigration. Accordingly, the issue of

9 For example, according to the 2014 census, the Portuguese immigrant community is the largest one in France, with over 600 000 people. For further information see (INED n.d.).

emigration is absent from both EU legislation and its policy framework. Weinar (2014: 1) gets to the heart of the matter by stating that 'emigration is hardly an EU-level affair' at all. Indeed, emigration is covered neither by today's comprehensive migration policy nor by EU legislation. This seems problematic, given the fact that there is an emerging need for EU member states 'to be more proactive on emigration and diaspora policies', especially in view of the emigration movements as a consequence of the economic crisis affecting some EU member states in recent years (Weinar 2014: 1).

Furthermore, it must be acknowledged that in the last two decades there has been a change in the EU's overall approach towards the phenomenon of diasporas. For a long time the term 'diaspora' in EU documents was used primarily in the context of economics (European Commission 2000: 17).[10] This seems plausible given the fact that diasporas generated considerable revenues, thereby contributing to 'stabilising local and regional growth' (Weinar 2008: 16f). Besides, it must be kept in mind that the EU was born as an economic union and only at the end of the last century became a political entity. This was reflected, for instance, in the outcome of the 1999 special European Council meeting in Tampere, where the need for 'a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit' was agreed upon (European Council 1999). Since then, also due to the apparent link to development, diasporas started to enter the EU comprehensive migration policy, though only in passing (Weinar 2008: 17).

This weak inclusion of diasporas into EU migration policies can already be seen in the European Commission's Communication 'Integrating Migration Issues in the European Union's Relations with Third Countries' of 2002, which underlines the potential of diaspora cooperation. Accordingly, the Commission states that '[i]n order to really make the step into outward migration one needs contacts for practical advice and support. Usually the practical aspects of migration are facilitated by family contacts or the wider network of the migrant diaspora' (European Commission 2002: 11). Moreover, in its 2002 communication, the Commission refers to the potential benefits for both sending and receiving countries to consider cooperation with diasporas. Thereby, it underlines the positive inputs migrants can provide in the local development of their home countries. It further underlines that in some cases governments of migrant-sending countries implemented 'active policies to intensify contacts with their diasporas and to involve them in the national development process, both in economic and political terms' (European Commission 2002: 16). Besides, the Commission mentions migrant-receiving countries and international organisations, which 'have experimented with "co-development" schemes aimed at involving the migrant diasporas in the development process of their country of origin' (European Commission 2002: 16).

However, as the remittance framework of the EU concerning the support of African diaspora organisations shows, such co-development activities were not undertaken within the domain of democratic

10 For example, regarding Kosovo: 'Some Kosovars consequently emigrated to Western Europe to form a *diaspora* of high economic potential' (European Commission 2000: 17).

governance and political institutions, but rather within the economic realm. Since the goal of the EU was the reduction of poverty and the improvement of livelihoods in receiving communities, interest on the part of the EU beyond the aspect of remittances with regard to migration and development was almost entirely absent (Mohamoud 2009: 9).

As things developed, the focus on the link between diasporas and development in the context of migration remained, albeit rather superficially. Nevertheless, while the 2002 communication lacked a definition of what is meant by diaspora, in 2005 the Commission gave some concrete orientations regarding migration and development, including a broad definition of the term.

Diaspora from a given country, therefore, includes not only the nationals from that country living abroad, but also migrants who, living abroad, have acquired the citizenship of their country of residence (often losing their original citizenship in the process) and migrants' children born abroad, whatever their citizenship, as long as they retain some form of commitment to or interest in their country of origin or that of their parents. In some extreme cases, 'people may still feel part of a country's diaspora even though their family has been living in another country for several generations' (European Commission 2005: 23).

Today, however, the EU Directorate-General Migration and Home Affairs refers to the definition provided by the International Organisation for Migration (IOM), namely, 'individuals and members of networks, associations and communities, who have left their country of origin, but maintain links with their homelands' (Perruchoud & Redpath-Cross 2011: 30; European Commission Migration and Home Affairs (undated)).

Furthermore, the 2005 communication establishes four characteristics regarding diasporas. First, the Commission sees diasporas as transnational communities, which might guarantee the success of development initiatives (Weinar 2008: 17). This transnational character is also emphasised with regard to EU funding. For instance, the Commission prefers 'projects in third countries involving diasporas in two or more member states' (European Commission 2005: 8, 30). In addition, the Commission encourages diaspora development organisations to set up mechanisms 'that could ensure appropriate representation of their interests at EU level' (European Commission 2005: 6, 24). Second, the communication seems to distinguish between diaspora members and the narrower group of migrants, who are said to be more inclined to return to their home countries. According to Weinar, this distinction is to some extent problematic, as the latter group should be included with the former in view of the broad definition given above. This creates a certain ambivalence in the Commission's position (Weinar 2008: 19).

The third characteristic concerns the legal status of diaspora members. In this regard, the Commission not only acknowledges the need for support regarding the mapping of developing countries' diasporas, but also places an emphasis on the implementation of 'databases where members of diasporas … can register on a voluntary basis' (European Commission 2005: 24). This seems to refer mainly to those individuals legally staying and working. Thus, for the Commission the legal status is an indicator of being part of the diaspora. Finally, for the European Commission the fourth special characteristic of diasporas refers to its organisational side.

The regular use of the term 'member of diaspora' in EU documents suggests that some sort of organisational structure or at least some collective identity is expected by the EU. Additionally, in the eyes of the Commission, diaspora organisations must fulfil a certain degree of qualification to be able to become a partner in the development policy of their country. Hence, the organisation has to be trustworthy and well-established (Weinar 2008: 19). The parameters to measure these requirements, however, remain unclear.

With reference to more recent EU activities regarding diasporas, an increased focus with regard to the enhancement of diaspora engagement in the field of development must be noted. This is underlined by the summit declaration made in the context of the 2014 Africa-European Union Strategic Partnership, which explicitly includes the commitment 'to ensure that human rights of all migrants, including those of the diaspora … are fully respected' (Council of the European Union 2014: para 56). Furthermore, an action plan for the period 2014-2017 was adopted, which includes diasporas as one of its main priorities and asks for action with regard to '[s]trengthen[ing] EU and Africa policy frameworks and institutional capacities for enhancing diaspora engagement' (Africa and Europe in Partnership 2014: 4). Despite these important steps, results in the form of a clear, homogeneous diaspora policy provided by the EU are so far absent with respect to development as well as any other of the above-mentioned high priority issues. Indeed, in the latest goal-setting document published by the European Commission, the 2016 'Action Plan on the Integration of Third Country Nationals', diaspora is barely mentioned (European Commission 2016). This is evidence of the EU's ongoing reluctance towards the effective mobilisation and active engagement of diasporas.

In this regard, three common concerns are frequently expressed by EU officials and experts, as outlined by Vorrath with respect to EU development engagement with African diasporas. One of these seems to be the suitability of diaspora organisations as potential partners. Diasporas are regularly fragmented into sub-groups with multiple and sometimes even (partly) contradictory interests. Therefore, the task to identify an organisation holding a sufficient degree of undisputed, or at least widely-accepted, legitimacy and representativeness for the whole diaspora in a country may be fraught with difficulties. Moreover, one must keep in mind that the EU, being a supranational organisation, mostly interacts with governmental bodies rather than with non-state actors such as diaspora organisations. Indeed, the usual relationship between diasporas, their homelands and the receiving countries becomes more complex as soon as the EU enters the diplomatic stage. For instance, cooperation activities between the EU and diasporas could very well affect certain member states' interests. This is true especially with respect to those member states in which diaspora groups reside. As a result, the EU prefers classic diplomatic means to engage with diasporas, rather than addressing the issue on a policy level (Vorrath 2012: 23-25). In this context, it must also be noted that ultimately it is up to the member states to decide with how much power they invest the EU regarding its engagement with both immigrated and emigrated diasporas (TFEU 2012: art 5). In fact, the question of competences is closely related with that of member states' sovereignty, which is indeed a highly sensitive issue at the political level.

7 Conclusion: A call for a comprehensive European Union policy framework

To summarise, it seems that in the absence of a sufficient EU framework to address diaspora communities within the EU, member states are moving towards diaspora engagement at various speeds and from different directions.

The two case studies provide examples of countries with significant historical differences and, therefore, two distinct approaches to the needs of the diasporas. The most notable distinction is that France provides rather extensive political participation rights to its citizens abroad, while Bulgaria has been close to restricting these rights *de facto*. There seems to be more structure and active involvement in France's approach to both its own and incoming diasporas. This need for structure aligns with the image of France as a predominantly 'receiving state'. However, France seems to be unable to implement the distinction between 'formal rights and substance'. Bulgaria, on the other hand, seems to be almost advertising its citizenship to those who would satisfy the criteria for ethnic Bulgarians, predominantly living in neighbouring countries, to decrease the population decline due in large part to ageing and emigration. If it were to extend its welcoming approach beyond ethnic Bulgarians to a modest number of asylum seekers and refugees, this would benefit both the country's demographics and the EU's more equitable distribution of asylum claims.

One common approach of the two countries is the emphasis on education for their diaspora communities. This may potentially preserve and strengthen the link between the home state and the diaspora community and, in the wider EU context, help preserve and promote the language diversity. This undoubtedly has an impact on the employability of individuals from the diaspora communities within the EU's internal market, the very foundation of the Union, which arguably remains the most powerful driver of EU policies.

In this sense, the EU should develop a comprehensive policy framework for member states to engage and mobilise diasporas as potentially important actors on multiple levels, including in areas of politics, culture and economics. This is particularly the case with regard to diaspora groups coming from third countries and residing in the member states. If rightly engaged, they could play a key role beyond merely the realm of development, but also in areas of democracy building in their countries of origin. However, it is likely that at the EU level the differences between member states would be too significant to allow for successful negotiations of a common strategy. Perhaps this is one reason why diaspora engagement has not made it onto the EU agenda. Another possibility is that the diaspora issue is too closely related to the citizenship domain of which, as mentioned above, the exclusive competence rests with the member states and, therefore, is beyond the EU's legislative mandate. Nevertheless, it may still be possible for the EU to initiate a discussion among the member states on this topic to tap into the potential for positive developments that diaspora communities could offer, on both the national and the EU level.

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Diaspora and democratisation: Diversity of impact in Eastern Partnership countries

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Abstract: *Around the world diasporas are important role players, and they make a significant contribution towards democracy-building processes in their homelands. The advantages of cooperation with diasporas in the sphere of democratisation are substantial. Diasporas display behavioural diversity and invest both financial and non-financial resources and values to enhance democratic governance and policy-making processes, to ensure social welfare and economic growth, to protect human rights and to establish civil society and the rule of law in their homelands. This article explores the influence of diasporas on democratisation in Eastern Partnership (EaP) countries from a comparative perspective. Diasporas originating from the six EaP countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine) differ in scope, factors of influence on the democracy-building processes, and impact opportunities on government policies in both their homelands and countries of residence. At the same time, there are many similarities between these countries. Until 1991 these countries had limited ties with diasporas as they were Republics of the Soviet Union. All these countries experienced territorial conflicts, except for Belarus. Having different levels of democracy, they are involved in the EaP initiative aimed at sharing democratic values. From this point of view, it is of great interest to explore the diversity of the diasporas' impact on the democracy-building processes in the mentioned countries. The article provides an understanding and comparative analysis of the variety in diasporas' engagement in democratisation of homelands in EaP countries. Based on the findings, the authors argue that the diasporas of these countries have different impact levels on democracy. Moreover, they conclude that the democracy level in turn influences the countries' diaspora policies.*

Key words: *diaspora; Eastern Partnership countries; democracy; comparative analysis; diaspora policy*

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1 Introduction

The term 'diaspora' has been raised increasingly in academic circles. The continuous movement of people from their countries of origin to host countries due to economic, social, political and other reasons leads to significant changes and creates impacts in the country. This movement has national, regional and global dimensions. In this context, the collapse of the Soviet Union triggered new migration and mobility streams leading to a new dispersal of people both in the post-Soviet region and across the world. Six post-Soviet countries, namely, Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, have been selected to be researched. These countries are members of the Eastern Partnership (EaP) (EU 2016), which is a joint initiative of the European Union (EU) aimed at building a common area of shared democratic values, such as the rule of law, good governance, the protection of human rights, market-economy principles, and closer cooperation. In this regard, it is of great interest to explore the diasporas' influence on the democratisation of the mentioned countries.

Numerous studies (Carment & Nikolko 2017; Ziemer & Sean 2013; Tololyan 2000; Ciment 2001) have been devoted to diaspora issues in Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Nevertheless, the influence of diasporas on democracy in the countries under research, particularly in its the comparative aspect, remains underexplored. This research is an attempt to fill this gap.

In the article we explore the framework explaining diaspora policies and the fields diasporas mostly influence to understand their role in the democratisation processes in the countries studied. The research questions are the following:

- Which frameworks explain diasporas' policies in the homelands?
- What are the factors/fields of diasporas' influence on the democratisation in the states under study?

Three analytical frameworks have been selected to understand the diasporas' involvement in homeland politics in the context of democratisation in research cases. These are the structural-instrumental framework, the ethnic and the political-economy or governmentality framework (Ragazzi 2014). Each of these frameworks is used as a basis for identifying the factors that explain the character and form of diaspora-homeland relations.

In academic literature, studies on diaspora issues are based more frequently on qualitative research than on quantitative methods. We use a combined approach that includes *quantitative* as well as *qualitative* methods of research: qualitative content analysis; case studies; expert interviews; a regression analysis; a comparative analysis; scaling methods; and weighting schemes. Twelve experts were selected for expert interviews. During these interviews the experts not only discussed the issues of diaspora in respect of each country in the study, but were also asked to estimate and give weights to the fields we elaborated for a better understanding of the diaspora-homeland relations and ways in which they influence democratisation. For this purpose, the following 10 fields have been highlighted: democratic governance; human rights; the rule of law; civil society; policy making; financial remittances; integration into the world economy and culture; conflict; and national interest. Through a

regression analysis, the influence of these fields on the democracy is revealed in respect of each case under study.

2 Theoretical framework: Diaspora policy and democratisation

Numerous studies have been devoted to the phenomenon of the diaspora. However, there still is no exact general definition of the concept of 'diaspora' and it is construed by scholars in different ways. The reason for this is that diaspora is a subject of study in various sciences and disciplines, such as political science, history, anthropology, cultural studies, resulting in various approaches to understand this complex and diverse phenomenon.

Although the conceptual discussion of the term 'diaspora' is beyond the scope of this article, we proceed from the definition of Sheffer who defines diasporas as 'ethnic minority groups of migrant origins residing and acting in host countries but maintaining strong sentimental and material links with their countries of origin – their homelands' (Sheffer 1986: 3; 2003:9).

The academic literature about the linkage between diaspora and democratisation is less developed. However, there are studies (Shain 1999; Kapur 2010; Koinova 2009; Dahre 2007) that find that diasporas influence democracy-building processes in their homelands. Diasporas in fact influence democratisation. For example, diasporas can transfer funds, links and experience to civil society organisations, and thereby have an effect on political processes. They may cooperate with civic organisations promoting democratic values. Some representatives of diasporas oppose human rights violations in their homelands, in many cases because they themselves once experienced injustice. They may also be engaged in election campaigns and in monitoring processes, or actively participate in demonstrations and join opposition activities (Shain 1994-1995: 823-830; 1999; 2007; Biswas 2007; Lyons 2007; Koinova 2009).

The diasporas' impact on democratisation processes is not limited to the above-mentioned activities. Indeed, the spheres of diasporas' influence on democratisation are varied. This influence is also realised through financial remittances, including personal remittances and foreign direct investments. Diasporas may also affect democratic governance and policy making by means of close ties and cooperation with the government. Other examples include the promotion of the rule of law through the improvement of legislation and strengthening the justice system.

In the framework of this article, it is beneficial to understand and explain state policy in the context of democratisation. In this connection, three main explanatory frameworks, which were systematised and provided by Ragazzi (2014), serve as a theoretical basis to understand and explain diaspora policy and diaspora-homeland relations: the structural-instrumental, the ethnic, and the political-economic or governmentality frameworks.

The structural-institutional framework, which is based on utilitarian assumptions, explains the state-diaspora relationships in the context of economic interests. This approach holds that such state behaviour is more common in poor countries that are interested mainly in economic outcomes. In this regard, financial remittances are an important foothold,

and more so where the population abroad is considerable in numeric terms.

The second framework relates to an ethnic or ethno-national approach, which differs from the theories of cosmopolitanism and transnational nationalism. It argues that state behaviour is a consequence of globalisation and transnational processes. The behaviour of states in these cases is aimed at the regulation of issues and the unification of the nation's representatives abroad. It includes religious, cultural, language and citizenship policies.

Finally, there is the third political-economy framework, based on Foucault's (2004) governmentality conception, which departs from the insight that diaspora policies are not static and can be changed depending on the social, political, and economic situations in the nation states (Ragazzi 2014: 74, 82; Kovács: 93, 94). Three types of governmentality regarding state policy are possible: disciplinary, liberal and neo-liberal. Protectionism, wealth creation, cultural and other policies aimed at population growth and the promotion of those returning from abroad are common for disciplinary governmentality. By contrast, the liberal governmentality does not control the market (including the labour market) and the flow of goods and capital. Emigration is an acceptable way of solving some political and economic problems and threats of overpopulation. Neoliberalism considers the restructuring of politics and self-improvement not only in the economic sphere, but also in political institutions. Ragazzi (2014: 74, 87) argues that the political-economy or governmentality framework is the main driving force for diaspora policies and best explains diaspora policies, while the structural-instrumental and ethnic frameworks provide only a partial explanation.

In an attempt to look into frameworks of diaspora policy in the context of democratisation and taking into account the experience of diasporas' influence on the democratisation presented in literature, we summed up and elaborated 10 fields to evaluate diasporas' behavioural diversity in the states under study, as set out in part 1 above.

3 Armenian diaspora: At a crossroads of the new and old

The Armenian diaspora is unique and one of the oldest. Sheffer (2003: 75-77) states that it belongs to the classic type since its existence dates back to even before the formation of the nation state. The historical roots of the Armenian diaspora reach back to Mongolian times, in the thirteenth century, when as a result of Mongolian conquests many Armenians fled to neighbouring Eastern European regions and the Middle East (Tololyan 2000: 116). However, the decisive historical moment as far as the Armenian diaspora is concerned remains the events of 1915, the period of the collapse of the Ottoman empire with almost 1,5 million Armenians exposed to expulsion (Panossian 1998: 84).

Another prominent wave of Armenian migration is closely related to the civil war in Lebanon,[1] and the Iranian revolution.[2] With regard to the

1 The Lebanese Civil War lasting from 1975 to 1990 with 120 000 fatalities.
2 Iranian Revolution of 1978–1979, also referred to as the Islamic Revolution.

Soviet period, travel restrictions established by the Soviet Union suppressed the ability of Armenians to emigrate. Lastly, a final wave of emigration followed the demise of Communism. For Armenia, this wave embraced the 'brain-drain' generation, as well as economic migrants, and refugees from conflict zones such as people from Nagorno-Karabakh (BBC 2016).

During the current era, the proliferation of corruption, unfavourable economic conditions, social inequity, unfairness, and the lack of democratic values in the country resulted in gross migration (with an estimated net migration rate of -5,7 migrant(s)/1 000 population (2017)).[3]

As seen from the above, the reasons that prompt migration differ, but the outcome is simple, namely, diaspora.

Simply labelling diaspora communities as negligent nationalists is unfair. Diaspora really aids Armenia's pursuit of democracy. Inspired by the goal of strengthening the bonds between Armenia and its diaspora, the Ministry of Diaspora launched its activities in the Republic of Armenia. The activities of the Ministry of Diaspora are based on the mission to create one unified platform of information, which would bring together economic, political, educational, cultural and many other spheres.

The Armenian diaspora assists the development of the country's economy with vast amounts of financial remittances. Remittances, indeed, play an enormous role in the Armenian economy. Remittances have over the last five years been substantial, at 16 per cent of gross domestic product (GDP). Strikingly, Armenia is considered to be among the top 15 recipients of remittances in the world (Banaian & Bryan 2007).

Keeping in mind how crucial the role of civil society is in a country's democratisation process, it is worth mentioning that leading Armenian diaspora organisations forge links with civil society organisations, transfer finances and other resources through civil society, hence promoting democratic governance in Armenia.

The Armenian diaspora is inextricably bound to the conflict of Nagorno-Karabakh (BBC 2016). Taking into account the fact that during conflicts diasporas are involved in non-procedural aspects of democracy, the conflict of Nagorno-Karabakh played a crucial role in terms of limiting the involvement of the Armenian diaspora in democratisation. Hence, the Armenian diaspora was not motivated to pursue the deepening of democracy, and its involvement in the democratic procedures was negligible. For instance, in order to fight electoral fraud in Armenia[4] and Nagorno-Karabakh, the diaspora sent monitors to ensure free and fair elections. Taken together, the Armenian diaspora was engaged in the democratic processes of the country to demonstrate their devotion to the democratic values that, in fact, is of utmost importance to the international community. Throughout this process they never abandoned intrinsic nationalist goals (Koinova 2009: 58).

3 Data source: IndexMundi, available at https://www.indexmundi.com/armenia/net_migration_rate.html (last visited 1 April 2018).

4 In April 2017, rock musician Serj Tankian and several other prominent diaspora Armenian artists monitored Armenia's parliamentary elections to help ensure that they meet democratic standards, to end widespread corruption and respect laws.

Diaspora is indeed one of the major resources to the Republic of Armenia. As far as the influence of diaspora on national interests is concerned, the Armenian diaspora, with the help of traditional lobbying and other methods, attempts to advance statehood issues concerning Nagorno-Karabakh. A good example is when the diaspora lobbies to ensure that the Unoted States remains an honest broker in the negotiations despite having strategic interests in oil-rich Azerbaijan. Moreover, one of the leading diaspora organisations, the Armenian Revolutionary Federation (ARF), for more than 50 years has been a vocal advocate for Turkey's recognition of the Armenian genocide (Koinova 2009: 50).

Interestingly, the resignation of the former Armenian President Levon Ter-Petrossian was to some extent linked to the diasporas' judgment that he had mishandled the Nagorno-Karabakh issue and wanted to establish a more cooperative foreign policy towards Turkey (Libaridian 1999). As Shain argues, 'the diaspora enthusiastically supported a new government comprised of a number of veterans from the war in Nagorno-Karabakh, including Robert Kocharian' (Shain 2002).

When speaking about leading diaspora organisations, it is important to mention the Armenian General Benevolent Union (AGBU), the Armenian National Committee of America (ANCA) and the Armenian Assembly of America (AAA) (Kopalyan 2018). These organisations aim to disseminate democratic values, to promote human rights, and to preserve what culturally and historically is labelled as Armenian and 'for the prosperity of Armenia'.

The fact that diaspora organisations played a significant role in implementing democratic values and exposing human rights violations is clearly demonstrated in their actions around and open criticism of the 1996 presidential elections. The Armenian Revolutionary Federation and its affiliated diaspora organisations made the government accountable for the mass irregularities in the country. However, there was unanimous silence and negligence on the part of the leading Armenian diaspora organisations in the 2008 post-election upheavals (Human Rights Watch 2009); the 2009 Armenian-Turkish Protocols (Phillips & Lemmon 2012); the 2015 Electric Yerevan Protests; and the 2016 Sari Tagh Protests (Avedissian 2015).

Interviews with experts and surveys revealed that the Armenian diaspora plays an important role in democracy-building processes. However, this influence is never absolute and considerable changes are dependent on government-diaspora relationships. Experts also emphasise the fact that the democratic motives of the Armenian diaspora sometimes are very nationalistic, which directly stands in the way of democratisation. They stated that the most influential areas and factors of diaspora influence on the democracy-building processes in Armenia are financial remittances, conflict, culture, civil society and to some extent democratic governance (Babalyan, personal communication, 1 April 2018; Martirosyan, personal communication, 5 April 2018). Moreover, the political-economic framework is revealed as the main driving force of diaspora policies. Hence, the cooperation between the Armenian government and the Armenian diaspora communities may be characterised in symbolic, diplomatic and economic terms.

Taken together, the Armenian diaspora has not yet fully advanced liberal aspects of democracy. Instead, it has been primarily focused on nationalist aspects of democracy, while not excluding attempts at democratic turnover.

4 Azerbaijani diaspora and its lost potential

Plans regarding the Azerbaijani diaspora developed since 1993 when Heydar Aliyev came to power with a strong will to use the ethnic Azerbaijanis living in 'the west' and in post-Soviet countries as a political resource (Rumyantsev 2017). In 1995, in one of his speeches in the capital of Switzerland, Heydar Aliyev mentioned the example of Ireland's potato famine, which led to a strong Irish diaspora all over the world. He even called them 'a great source of joy for [the] nation … such a small country … has a big lobby overseas' (Lib.aliyevheritage.org 2018).

Nowadays, approximately 300 communities and organisations can be found all over the world (Azerbaijan.az 2018). Such a large number of organisations was probably established to overbalance the Armenian diaspora's lobbying power, and since the 2000s Azerbaijani authorities have invested a significant amount of money (Rumyantsev 2017). In 2008, the government of Azerbaijan established a special committee 'on Work with Diaspora of Azerbaijan Republic' in the Cabinet of Azerbaijan to promote the creation of new organisations and maintain contact with the formed ones (Diaspora.gov.az, 2018). Before that, there was another committee named 'on the affairs with Azerbaijanis living in foreign countries'. However, questions may be posed as to the effectiveness of these establishments.

Indeed, some successes may be identified around notable diaspora organisations. Among these is the significant role played by the US Azeris Network (Usazeris.org 2018), which held a campaign to raise awareness on the past of Azerbaijan, including anti-Armenian policies. The actions produced results, as several US Congressmen have made official remarks in the Congressional Record commemorating Khojaly's events, and 31 March was recognised as Azerbaijani Remembrance Day by Nevada Governor Jim Gibbons (Powley 2009). Another example is the fact that this organisation submitted a petition to the US White House in 2013 to acknowledge the events of Khojaly as a 'war crime' (Hirose 2016). According to the rules of the White House petition programme, the representatives engaged to answer any petition which has collected more 100 000 signatures (Petitions.whitehouse.gov 2018). This petition proved highly popular as it was signed by 120 000 people. Even though the White House's reply was not as expected, a level of awareness and mobilisation was achieved. To ensure the success of lobbying in 2015, Azerbaijani associations in New York organised a protest in front of the United Nations (UN) building, addressed to the Permanent Mission of Armenia to the UN.

Apart from the lobbying role, the Azerbaijani diaspora has a vital role in the democratisation of their homeland. As Murad Ismayilov, a research fellow at the Azerbaijan Diplomatic Academy, explains, diasporas are anxious about their image in their country of residence, making them more predisposed to motivate the democratic governments of their host

country and organisations such as the OSCE and EU to follow a 'more critical approach to the issue of Azerbaijan's democratisation'. In addition to this anxiety, members of the diaspora who consider returning to Azerbaijan are interested in returning to a democratic, prosperous and developed country (Ismayilov 2008).

The above examples clearly illustrate the motivations and activities of Azerbaijani diasporas, but how genuine are these actions and to what extent do the political elites of Azerbaijan control the diasporas? In the first place, as the organisations founded abroad are financed by the Azerbaijani state, this financial support may be interpreted as the government's power to dictate to some extent to those organisations. The researcher Sergey Rumyantsev writes in his article 'Long live the Azerbaijani diaspora!' that Baku uses the diaspora to tell the world 'the truth' about this country and especially about the 'great successes' of the Aliyev regime. He argues that state propaganda convinced diasporas to act solely in the interests of Azerbaijan, as in the example of the French elections, when Azerbaijanis were told to vote against Le Pen, due to her 'incorrect' positions on Karabakh (Rumyantsev 2017).The same author argues that the Azerbaijani diaspora cannot be classified as 'classical' as in the case of the Greek or Jewish, due to various reasons, such as that it did not emerge from historic agony (Rumyantsev 2017), or because it cannot be assigned to any type of diaspora identified by Cohen (2008), namely, labour, trade or imperial.

If the collaboration between diasporas and Azerbaijan continues in this way, a huge potential will most probably be lost. The government also has to pay attention to the needs and expectations of those abroad, rather than establishing as many organisations as possible and imposing orders on them. In this scenario, cohesion is not foreseen.

To sum up the results of interviews with experts, one may state that the Azerbaijani diaspora is not an independent unit. Receiving funding from the government of Azerbaijan, the representatives of the diaspora support the interests and values dictated from above, which differ from the wishes and will of the people of Azerbaijan. Accordingly, representatives of such a diaspora somehow cannot influence the processes taking place in the country. It is possible to make a division between representatives of the Congress of Azerbaijanis, supported by the government and a non-politicised diaspora, existing at its own expense. The diaspora could influence the population of Azerbaijan, the attitude towards values and the state, but the population as such has no opportunity to influence the government and the policy pursued. However, experts noted that over the past few years the attitude of Azerbaijanis to the situation has changed. More comments began to appear on the internet about what is happening in the country. People started to speak out more openly. This may be considered the beginning of some, albeit small, positive change in society (Makhmudzade, personal communication, 20 March 2018; Murselzade, personal communication, 30 March 2018).

5 Belarusian diaspora: Problem with self-perception

Due to globalisation and benefits of democratic regimes, many people from post-Soviet countries moved to the Western part of the continent in search

of a the better share (Yeliseyeu 2014; MTA CSFK Geographical Institute 2017). While keeping strong contacts with relatives in their country of origin, diaspora representatives become a so-called bridge between the countries. Thus, one should respect the international importance of diaspora as a potential mediator of democratisation.

Estimates are that between 2 and 2,5 million people of Belarusian descent reside outside Belarus (*BelarusDigest* 2016). Before independence, a section of the Belarusian population freely moved to different parts of the Soviet Union. After the collapse of the USSR, they remained in their places of residence and automatically became diasporas. Some part of it is represented by native Belarusians living in neighbouring countries. Another aspect of the diaspora emerged due to economic and political migration.

The competencies in Belarusian diaspora policy are shared between three state agencies: the Ministry of Foreign Affairs;[5] the Ministry of Culture;[6] and the Office of the Commissioner for Religions and Nationalities.[7] Structural units are assigned with the implementation of the Offices' task to 'assist Belarusians and descendants of Belarusians living abroad in satisfying their national and cultural needs and developing their connection with the Republic of Belarus'. The President of the Republic of Belarus defines general state policy about the government and diasporas' common activities. The government is responsible for the realisation of the state diaspora policy.

State cooperation with diaspora organisations is rather incoherent and intermittent. However, the diaspora law entitled the law 'On Belarusians living abroad' (2014) assigns the coordination task to the Ministry of Foreign Affairs.[8]

Diaspora members (Belarusians living abroad) are defined as 'ethnic Belarusians, persons born in Belarus, and persons identifying themselves as Belarusians who are permanently living outside the Republic of Belarus'. In practical terms, the following categories of persons belong to Belarusians living abroad, according to the law: Belarusian citizens permanently living abroad; foreign citizens and stateless persons permanently living abroad who were themselves born or used to live (or have ancestors in an ascending line who were born or used to live) in the territory of the present-day Republic of Belarus and foreign citizens and stateless persons permanently living outside Belarus who identify themselves as Belarusians from the point of ethnic belonging either to the Belarusian people, language, culture, or historical ties, or by their knowledge and preservation of Belarusian traditions and customs.

The cooperation with the Belarusian diaspora is limited largely to national and cultural issues: the provision of Belarusian literature; organising lectures by Belarusian scientists and cultural events abroad; and

5 See the official site of the Ministry of Foreign Affairs of the Republic of Belarus, available at http://mfa.gov.by/mulateral/diaspora/ (last visited 1 April 2018).
6 See the official site of the Ministry of Culture of the Republic of Belarus, available at http://www.kultura.by/en/ (last visited 1 April 2018).
7 See the official site of the Office of the Commissioner for Religions and Nationalities of the Republic of Belarus, available at http://belarus21.by/ (last visited 1 April 2018).
8 The Law 'On Belarusians living abroad', available at http://mfa.gov.by/upload/Law.pdf (last visited 3 April 2018).

so forth. Economic outcomes of state emigration policies in Belarus are limited due to an economic environment that hinders private investment and limits political contacts with Western countries, where the Belarusian diaspora is most influential (Taras 2017).

Belarusian state agencies pursue policies on cultural ties; support education in the national language abroad; allow diaspora congresses in Belarus; and provide media services and assistance to the activities of national associations abroad (Taras 2017). However, state assistance is often given to diaspora organisations on the basis of the convergence of their political and ideological views with the official ones. The programmes directed at cooperation with the diaspora are usually adopted without diaspora organisations' recommendations and have limited effectiveness. The first state programme 'Belarusians in the world' was adopted in 1993, with ensuing programmes. Belarusian diaspora associations are still in the early stages of development and do not have many members. In 1993 the First World Congress of Belarusian diaspora took place. It was the first and only time the Belarusian government took part in funding the event. However, since President Lukashenko's rise to power in 1994, governmental policies towards the diaspora took a negative turn. 'Consequent world congresses of the Belarusian diaspora did not receive any meaningful financial state support' (*BelarusDigest* 2016). Furthermore, the Association *Baćkauščyna* (Fatherland),[9] the main organiser of the congresses, became the subject of public criticism expressed by the high-ranking Belarusian officials.

In the early 2000s the Belarusian authorities attempted to set up a fully-controlled diaspora association in parallel with *Baćkauščyna* and to gather a parallel congress of Belarusian diaspora. These intentions were not realised.

It is important to mention that the Belarusian authorities, if interested in the diaspora question, tend to support those with pro-elite views. In turn, part of the Belarusian diaspora considers Lukashenko as an illegal president and treat him as a threat to the Belarusian language and culture.

Belarusian autocephalous Orthodox and Greek Catholic (Uniate) churches play an important role in supporting the Belarusian identity abroad. There are up to 20 Belarusian autocephalous Orthodox Church

9 The World Association of Belarusians, *Baćkauščyna*, is an influential international organisation of which the objectives include the development of permanent cultural, economic, spiritual and organisational contacts between the Belarusian diaspora and Belarus; the provision of assistance to Belarusians who reside abroad; and the encouragement of scientific research in the field of Belarusian studies and in different aspects of the Belarusian diaspora. Under the auspices and organisational effort of *Baćkauščyna*, seven world congresses of Belarusians have taken place since the beginning of the 1990s. Congresses traditionally gather a few hundred Belarusian diaspora representatives from several countries (including many EU countries such as Poland, the Czech Republic, Sweden, Germany, Belgium, Great Britain, and so forth) who adopt resolutions and action plans that take into account the situation in the country, the state of play of the diaspora, and activities linked to the diaspora. In addition to the world Congresses of Belarusians, 'Baćkauščyna' organises other cultural and educational events with diaspora associations. Belarusian MFA and the diaspora: A complicated relationship (Gubarevich 2016).

communities across foreign countries, including the United States, Canada and Australia.[10] Thus, the organisations of the Belarusian diaspora worked on the practical implementation of social and cultural projects; the restoration of historical and cultural heritage and its return (for example, the Holy Cross of St Euphrosyne of Polotsk); and humanitarian and medical assistance to Belarusian children.

Summing up the results of experts' interviews, one we can state that, in general, the Belarusian diaspora is viewed not as part of Belarus, but as a foreign policy factor. The diaspora means citizens of other states with whom the policy of the Ministry of Foreign Affairs on spreading national interests is being implemented.

Basically in all spheres of life, the Belarusian diaspora has little influence. This is due to the small number of representatives of the diaspora, the blurring of self-identification, when representatives of the diaspora of the Soviet period can define themselves also as Ukrainians or Russians, and the lack of a developed institutional apparatus and instruments of influence restrains the possibilities.

The creation of a certain image of the country (positive or negative) is among the opportunities of the diaspora. The diaspora is a potential resource for carrying out national interests. This does not happen due to the fact that there are no clearly-formulated concepts on this issue and the 'Law on Belarussians of Abroad' has more of a framework character without specific requirements.

Because of the low level of conflict in the country, it is difficult to estimate the impact of the diaspora on development or in avoiding conflicts. The most logical is the conduct of ethno-cultural activities with the simultaneous gradual formation of a positive attitude of the diaspora and a strong will to participate in Belarusian policy, and to support the progress of the country to deal with the demands of the modern world (Bukonkin, personal communication, 2 April 2018; Laikov, personal communication, 4 April 2018).

6 Georgian diaspora: Positive outcomes of emigration

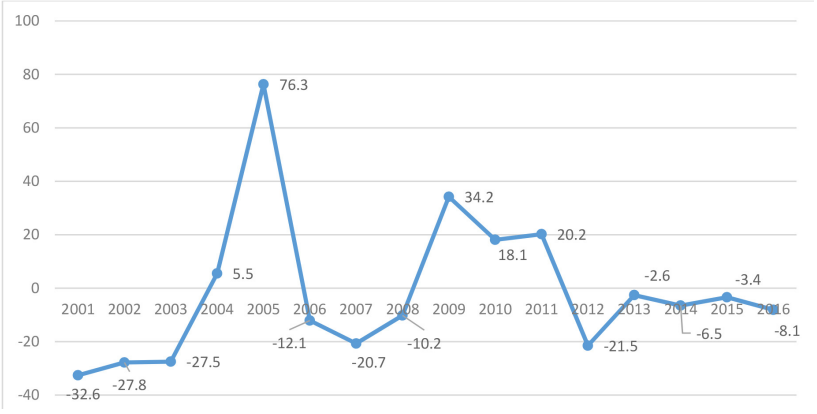
After the collapse of the Soviet Union, member states of the former Soviet Union started to develop independently. They framed their foreign and internal policies on their own. This process was not easy and smooth. Colour revolutions, struggles for self-determination and civil and international wars forced many people to move from one place to another. In some countries, it was expressed by emigration; in others, it was immigration. Unstable political and harsh socio-economic situations forced people to leave their home countries, with the result that people created diasporas in host countries. Georgia was one of those countries where emigration outweighed immigration. This explains why there are a vast number of diaspora communities all over the world, which has its influence on different processes of the homeland, Georgia.

10 See the official site of Belarusian Autocephalous Orthodox Church, BAOC, available at http://www.belapc.org/ (last visited 2 April 2018).

According to MFA Georgia, Mikhael Janelidze, there are approximately 272 diaspora unions or organisations all over the world. In one of his interviews, Janelidze mentioned that more than 1 million Georgians left Georgia before 1990, and around 1 500 000 Georgians left the country in the post-Soviet period (Sputnik-Georgia 2017). In fact, as in many post-Soviet countries, numerous Georgians stay abroad illegally. That is why it is impossible to give an exact number of Georgian diasporas. However, according to the Institute for Development of Freedom of Information (IDFI), there are 1 607 744 Georgians abroad.[11]

Meanwhile, the results of the General Population Census of 2014 revealed that there are 3 713 804 people living in Georgia, and the population decline was 15 per cent compared to the previous census held in 2002.[12]

Figure 1: Net Migration, Georgia (thousands)[13]



There were several reasons for emigration: wars at the beginning of the 1990s, unemployment and socio-economic issues. It is important to emphasise that most emigrants that later became Georgian diasporas left the country because of the poor economic and social conditions. They were determined to find better living conditions and develop themselves

11 Data source: Institute for development of Freedom of Information, available at https://idfi.ge/ge/georgian-diaspora-combines (last visited 1 April 2018).

12 The data source is the official site of the National Statistics Office of Georgia, available at http://www.geostat.ge/cms/site_images/_files/english/population/According%20to%20preliminary%20results%20of%20the%202014%20population%20census%20Final.pdf (last visited 5 April 2018).

13 The data source is the official site of National Statistics Office of Georgia, available at http://www.geostat.ge/index.php?action=page&p_id=173&lang=eng (last visited 10 April 2018). Analysing the data, we should mention the fact of occupied territories, during the last census Georgian agency of statistics had no access to Abkhazia and Southern Ossetia. Thus, regions with population of 200 000 were not included in the census. It is also important to mention the multi-nationality of the country. However, according to the data released by the national statistical agency, emigration was not done only by one nation.

economically. Some of these people were fortunate in that respect. They became large-scale businessmen. In addition, it should be mentioned that they were willing to invest money in their homeland, Georgia. In fact, many successful businessmen have for decades been investing in Georgia.

Cooperation between Georgia and its diaspora communities is mainly economic and political in nature. The continuing financial investments by Georgians in different spheres present a significant contribution to the economic development of the country. In addition, they ensure a competitive market, which positively affects the quality improvement of the market.

It should be mentioned that with the resolution of the Georgian government,[14] the position of Minister of Diaspora was disbanded and issues regarding the diaspora became part of the Ministry of Foreign Affairs (Sputnik-Georgia 2017). The government declared that this change did not come about because of the lesser importance of that institution, but for the purposes of mobilisation of resources.

In official documents and announcement of the Georgian Ministry of Foreign Affairs it is mentioned that the diaspora contributes to its homeland in socio-economic development through the financial aid from diaspora representatives to the people of Georgia, charity, and business encouragement. This assistance is highly appreciated. There are many projects aimed at the encouragement of this contribution. One such project is called 'United, powerful diaspora with close ties to the homeland' initiated by MFA (MFA Georgia 2015).

A significant portion of foreign investments in Georgia is contributed by ethnic Georgians. To understand the significance and sphere of diaspora investments, some foreign investments made by diaspora representatives during 2015-2016 are mentioned below. The data was released by the ex-Ministry of Diaspora (Charaia 2016).

For the functioning of the multitask complex Gino Paradise, founded by Georgian businessman Nodar Giorgadze, around €28 000 000 was invested. Another project established by Gino Paradise, the Gino Green City Resort, was funded in an amount of more than €100 000 000. An investment made by a Georgian diaspora representative is the American hospital, which is situated in the centre of the capital. The hospital was established by a Georgian doctor who works in America. Diaspora representatives from Poland erected the Hilton Tbilisi Hotel. Some other hotels were erected during 2015-2016 with the help of ethnic Georgian investors. There is also a wine production factory in Georgia called Danieli which is a Georgian investment from America. Other investments were made by Georgians from Holland, Spain and other countries.

The fact is that economic development is directly connected to the quality of life of the state. Moreover, it promotes the development of democracy. However, the contribution of the diaspora to the homeland is not only related to the economy. It is important to emphasise that during the past 15 years there was one revolution and one power shift in Georgia aimed at building democracy. All the leaders of the movements were representatives of the diaspora at some stage of their lives. Suffice it to

14 Parliament of Georgia, Resolution 512 (17 November 2016).

mention the case of Bidzina Ivanishvili who lived in Russia and owned large businesses there. He came to Georgia to, in his own words, improve the democratic and economic situation of the country. According to many international organisations (Freedom House 2016; NDI 2013) Ivanishvili managed to record a progress in democracy development.

Summarising the experts' interviews, we can underline that the government in the country became more democratic after the last change of power. As far as the formation of a more democratic government and democratisation process in general is concerned, the influence of diaspora was vital. Here the role of the diaspora is discussed mainly from a positive perspective. The experts in particular state that Georgian diaspora representatives all over the world have a huge impact on almost every field of democracy: democratic government; human rights; the rule of law; civil society; culture promotion; conflict solving; the promotion of national interests; and science and education. Here the importance of the host country was highlighted. The impact of the diaspora representatives on their homeland depends mainly on the level of democracy development in the host country. If the host country is highly developed, a person adopts and shares democratic traditions and mentality in the home country. The role of Georgian diasporas is irreplaceable in promoting Georgian culture abroad, which is also reflected in the sphere of tourism. Hundreds of Georgian diaspora organisations set a mission for themselves to promote Georgian culture abroad in order to save their dignity and identity. An issue no less important emphasised during the interviews with the experts was the important role of financial remittances. After all, the vast majority of Georgian emigrants are working migrants who aim to earn money to send to their homeland. Ethnic Georgians from all over the world provide financial support through huge investments in the homeland. There is no doubt that the Georgian diaspora is expanding rapidly. However, to make it more supportive to the homeland's democracy they should be united and should show more interest in the situation in Georgia (Rusetski, personal communication, 20 March 2018; Gaspariani, personal communication, 27 March 2018).

7 Moldovan diaspora – A competition between the west and the east

Today, more than ever, it has become increasingly possible for people to be mobile, and due to globalisation these trends are not decreasing. The Republic of Moldova is not an exception, due to its economic and social crisis since independence in 1991, when numerous people decided to migrate. It is difficult to approximate the number of migrants due to the Transnistrian conflict; central authorities do not have control over the eastern border; and there is no effective and lasting record-keeping of migrants. In 2016 the Moldovan government suggested that 520 000 Moldovan citizens were abroad in over 30 countries (Gov.md 2016). The Moldovan government might shrink the real number of Moldovan citizens abroad because the German Economic Team Moldova in 2015 published a paper titled 'Permanent Emigration from Moldova: Estimate and Implications for Diaspora Policy', offering different numbers, namely, in 2012 426 900 and in 2015 733 200 (Luecke, Ganta and Radeke 2015). The

trend of leaving the country persists, and it is difficult to accept that in three years 213 200 Moldovans returned.

Even though Moldovan elites understand the challenges of migration, such as brain-drain and separation from family, it also underlines the importance of migration, such as financial remittances, business ties, valuable skills, experiences and networks. The diasporas also face difficulties such as integration in host countries, but also keeping links with their native countries. It is clear that the cooperation between the state and diasporas would smooth many obstacles and both sides can benefit from it. Because of this, the Diaspora-2025 national strategy was approved together with an action plan for 2016-2018 for its enforcement (BDR 2016). It is worth mentioning that Moldova has the Bureau for Diaspora Relations (BDR) established by a government decision in 2012 (BDR 2018a). Being a consolidated state institution, the office is to ensure a coherent and comprehensive policy framework for the consolidation of the Moldovan diaspora, in order to actively involve all the country's citizens in the economic, social and cultural development of the country of origin and destination (BDR 2018a). The same BDR developed the Diaspora Engagement Hub – a grant programme in six spheres: educational centres; innovative projects; local programme of voluntary returning; the professional return; regional thematic partnerships; and women empowerment. The programme was designed to highlight the human capital of the diaspora (BDR 2018b).

Keeping in mind that until 2009 Moldova was under the rule of the Communist Party, which was pro-Russian, there was not much cooperation with EU diaspora, and from 2009 pro-European elected parties (which managed to win elections mainly because of EU diaspora) added diaspora to their political speeches (Rusu 2012), but not fully in their agenda.

Out-of-country voting is gaining more and more importance: In 1994 only 1 948 people voted; in 2009 17 484 citizens voted and in the last presidential elections in 2016 138 720 voted (Berlinschii 2016). Political parties currently seek electoral and financial support from the diaspora. A vivid example is Maia Sandu's party Action and Solidarity (PAS), that also created the PAS diaspora, so that members from the diaspora can have a political affiliation. Diasporas were also the main sponsors of presidential campaigns is 2016 (Partidul Acţiune şi Solidaritate 2018), where Maia Sandu was the strongest candidate opposing Igor Dodon, the president of the Socialistic Party of Moldova. Diasporas were very actively involved in those elections, promoting and advocating European values, but also creating initiatives such as 'Adopt a vote' of which the main goal was to offer the citizens of Moldova residing outside the country who wished to vote a place to stay overnight, if the voting station was not near them, and also food and some financial support. Another initiative called 'Adopt a troll' was aimed at curbing Russian propaganda and trolls (Indiegogo 2018). Through these actions, the willingness of the Moldova diaspora is shown to participate in the political processes and building democracy. In the interview, Vicol also underlined that the diaspora has an indirect influence on democratic governance in Moldova via its relatives (Vico, personal communication, 1 April 2018). Whenever some diaspora members return home for a holiday, they share their experiences in the

hosting countries, thereby revealing what is wrong or right regarding the democratic governance.

The diaspora plays a crucial role in Moldova, economically speaking, through remittances and investments, and politically and socially, through exercising their right to vote, through supporting political parties and founding non-governmental organisations (NGOs). In addition, a new trend is regarding diasporas as a lobbying and advocating resource in the host country. The Moldovan diaspora is monitoring the internal process of Moldova and can raise awareness in the international environment, especially when human rights are violated in the country of origin. An interesting example is the way in which diasporas from the United Kingdom, France and Spain pressured the Moldovan authorities to accept the anti-discrimination law imposed by the European Union (EU), justifying that the law is necessary for the visa liberalisation regime offered by the EU (Rusu 2012). The joint efforts of civil society from Moldova and activists from the diaspora to tackle some particular issues are the most efficient means of collaboration. The strength of civil society from Moldova is due largely to the diasporas' support and intellectual capacity.

It is understandable that diasporas become more and more active in their native countries, especially due to the new technology and communication, but also because politics itself has changed after the change of the Communist regime (Gigauri 2018). Individuals now have a clearer role in the political life, especially when the states call themselves democratic. In such instances, it is inevitable to give diasporas the opportunity to express themselves and be heard at all levels.

As a result of the experts' interviews and surveys, it was revealed that the government had failed to integrate diasporas' contribution in the policy-making process. One observed as follows:

> The governmental institutions are eager to integrate diaspora's inputs only if these validate their policy. If diaspora's contributions are against their policies, then the political actors from Moldova are usually justifying the refusal by mentioning the lack of resources.

There appeared to be a unique opportunity for democratic governance through 'obtaining a parliamentary mandate for constituencies for the diaspora' which will be possible in the 2018 parliamentary elections. Another expert interviewee argued that the problem concerned the different values from the west to the east which the various diasporas have assimilated. Democratic values and the principles of good governance are perceived differently in Moscow and Brussels, leading to different visions of democracy and good governance. The same expert believes that diasporas, besides engaging in protests and speeches, have to be more creative in promoting the rule of law. Experts expressed the same concerns, that '[c]orrupted politicians are immune towards external pressure'.

It is worth mentioning that the interviewed experts pointed out the lack of clarity of 'national interest'. Because the Moldovan government did not precisely define its own national interests, no one can effectively contribute to their achievement. In addition, the diaspora cannot act as a single actor due to the divergence between the west and the east. Both experts indicated that the diaspora has the most positive impact in promoting culture, financial remittances and civil society. No negative

impact was identified, only the absence of any impact in fields such as human rights or conflict (Vicol, personal communication, 1 April 2018; Gramada, personal communication, 4 April 2018).

What Moldova lacks is a clear vision for the national interest that would fortify the diaspora, but not dissolve it. Otherwise, the competition between values and interests from the west to the east will lead to internal disputes. The Moldovan diaspora has recently become motivated and active, and it is important that its enthusiasm be accepted and maintained by the government and civil society, or the possibility of losing the interest of the diaspora in all fields exists, from democracy and human rights to financial remittances and investments.

8 Ukrainian diaspora: Fighter of the Ukrainian crisis

The Ukrainian diaspora is the community of ethnic Ukrainians who to some extent connect their origin and identity with Ukraine (Завьялов 2017). Starting from the late 1870s, the Ukrainians have already been migrating to the United States (Ciment 2001: 1238). It is believed that Ukrainians came from Galicia (the western parts of present-day Ukraine (Kuropas 1991).

A massive wave of migration of Ukrainians is inextricably bound to the end of World War II. According to Fink, 'the post-war anti-communist exiles numbered around 85 000 Ukrainians' (Fink 1993: 37). As far as the Soviet period is concerned, travel restrictions did not allow Ukrainians to emigrate.

Currently, between 8,2 million (according to the foreign countries' census) and 20 million (according to various estimates) people of Ukrainian origin are living abroad. The Ukrainian migration and diaspora formation process conditionally is divided into four waves (IOM Ukraine 2016).

The first wave of the Ukrainian emigration dates back to the late nineteenth to early twentieth century. Around 1,6 million Ukrainians (10 per cent of the population) from Western Ukraine left their homeland to move to eastern countries. The second wave of emigration emerged during World War I. Additional to the difficult economic situation were political reasons that apparently forced people to move to other countries. World War II and problems in its aftermath caused the third wave of emigration. The fourth wave of emigration, which was socio-economic in nature, took place at the end of the twentieth century. This time Ukrainians moved to the area where previously there were no Ukrainians, particularly to Southern Europe.

There currently are numerous NGOs composed of Ukrainian diaspora populations. These organisations are brought together by one authoritative international Ukrainian organisation named the Ukrainian World Congress (UWC). It includes more than 300 NGOs from over 30 countries (MFA Ukraine 2018).

Within the theoretical framework to explain diaspora-state cooperation in the case of Ukraine, it is most appropriate to use the ethnic and political-economic frameworks. With regard to the ethnic framework, the majority of diaspora organisations adopted the mission of defending the

qualities of Ukrainian national identity, assisting the development and dissemination of the Ukrainian cultural heritage.

As for the economic framework, substantial financial remittances are transferred to Ukraine by diasporas. During the conflict with Russia, Ukrainian diasporas from different countries and in particular from Estonia sent financial and material aid to soldiers (Euromaidan Press 2017). Moreover, due to the strong lobby of Ukrainians in Estonia, the Estonian government came up with an initiative to treat wounded Ukrainian soldiers.

Interestingly, Ukrainian public diplomacy is strongly centred on the topic of mass killing of Ukrainians by soviet authorities, in some countries called genocide. In promoting this topic, the biggest impact may be attributed to the Canadian diasporas.

Migration resulted in the dissemination of European values in Ukraine which, on the one hand, promotes the notion of cosmopolitanism and openness to global innovations, but, on the other, is also a direct threat to Ukrainian national identity. Migration, however, has positive sides. For example, labour migration in the case of Ukraine curtails tensions in the marketplace. Many Ukrainians find work opportunities abroad, and apparently, if there was no way to work abroad, unemployment would prevail in the country (Pozniak 2012). Numerous surveys reveal that the wages of migrant workers abroad in fact are three to four times higher than the average wage in Ukraine. Labour migrants earn money abroad, which naturally improves the quality of life of their families and, therefore, that of the Ukrainian population. Apparently, this curbs poverty and has an influence on economic development.

According to the International Organisation for Migration study on how migrants influence the development of the country, migrant remittances constituted nearly 50 per cent of the household budget in the case of long-term migrants. As for short-term migrants, it is 60 per cent (IOM Ukraine 2016).

As a result of an expert interview and surveys, it was revealed that the role of Ukrainian diaspora is influential in democracy-building processes. The experts outlined that diaspora is of considerable assistance to the economy of Ukraine. They also highlighted the importance of the influence of diaspora on the culture. According to the experts, diaspora representatives in the majority of cases maintain Ukrainian culture and their ethnic origin worldwide. However, diaspora does not have much influence on the formation of internal policy and the Russian-Ukrainian conflict. With regard to human rights, diasporas continually undertake some human rights reforms, but the outcomes are highly dependent on how the country implements them. On the whole, public and cultural diplomacy, lobbying Ukrainian national interest and financial remittances are the main means by which diasporas influence democratisation (Atamanenko, personal communication, 21 March 2018; Gerasymenko, personal communication, 4 April 2018).

9 Comparative analysis of diaspora and democratisation in EaP countries

This section is devoted to the comparative analysis of EaP countries in terms of diaspora policy, diaspora activity and diasporas' influence on democratisation. The diasporas originating from Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine vary in scope of their activities: factors of influence on the democracy-building processes; impact opportunities on government policies; financial remittances; as well as by size and distribution. These countries also vary with respect to their diaspora policies and democracy level. The comparative analysis allows to define more explicitly the similarities, differences and peculiarities of the cases in the above-mentioned spheres.

Summing up the results of the experts' interviews, one may state that for Armenia, Georgia, Moldova and Ukraine the field mostly influenced by the diaspora is financial remittances; for Azerbaijan it is civil society; and for Belarus it is culture (See Table 1). In the case of Azerbaijan, the influence magnitude is not high, composing 2,5 points on scale {-5}-{+5}, but it is the highest in comparison with other fields. Analysing the fields by weights, it becomes more evident that the diasporas of Azerbaijan and Belarus are the most passive among the countries under study. Meanwhile, the democracy levels of the last two are the lowest, allowing an inference that this inactivity is a result of state policy.

Table 1: Mostly influenced fields by diasporas in democracy transformations[15]

Fields ({-5}-{+5})	Armenia	Georgia	Moldova	Ukraine	Azerbaijan	Belarus
1.Financial remittances	4.5	4	4	3.5	1	0
2.Civil society	1.5	1	3	1.5	2.5	2
3.Culture	2.5	2.5	3.5	2.5	2	3.5
4.Democratic governance	1.5	1	1.5	1.5	0	-0.5
5.Human rights	1	1.5	0.5	1	0	0
6.Rule of law	0.5	1	1.5	2	0	-0.5
7.Policy making	0.5	1.5	1	1.5	0.5	0
8.Integration into the world economy	1	0	1	0	1	1
9.National interest	0.5	2	0	2.5	1	2.5
10.Conflict	2	0.5	-0.5	0	2	0

15 Fields are estimated by experts on a scale of '-5' to '5', where '-5' is extremely negative influence; '0' is an absence of any influence; 5 is extremely positive influence. Source: personal communications.

Now that we have identified the main fields where diasporas have the most influence in Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, we will reveal diasporas' impact on democracy examining correlations between these fields and democracy. In order to measure diasporas' effect on democracy within the aim of the article and research questions, we used a regression analysis. For this purpose, we operationalised the highlighted fields into quantitative variables. Thus, our dependent variable is 'democracy' operationalised into the 'Index of Democracy Level'[16] (Aleksanyan 2017) for all cases. The independent variable for Armenia, Georgia, Ukraine and Moldova is financial remittances, operationalised into personal remittances (% of GDP).[17] For Azerbaijani, the independent variable is civil society, operationalised into civil society-nations in transit subindex,[18] and for Belarus, this is culture, operationalised into governments expenditure on culture or cultural events abroad.

Table 2: Diasporas' influence on Democracy, regression analysis[19]

Variable	Coefficient	R^2	Sig	N
Armenia /Financial remittances Constant Personal Remittances (%of GDP)	 .329 .009	.677	.000 .000 .000	20
Georgia / Financial remittances Constant Personal Remittances (%of GDP)	 .295 020	.239	.034 .002 .034	20
Moldova / Financial remittances Constant Personal Remittances (%of GDP)	 .417 .006	.571	.000 .000 .000	20
Ukraine / Financial remittances Constant Personal Remittances (%of GDP)	 .427 .023	.621	.000 .000 .000	20
Azerbaijan/Civil Society Constant Civil Society (Nations in Transit subindex)	 .230 .032	.462	.003 .000 .003	16
Belarus / Culture Constant Government expenditures on culture	 --		 --	

16 Index of Democracy Level aggregates 5 subindexes: Political, Social, Economic, Educational and Health. The index has the 0-1 ranking scale where 0 point implies the lowest level of democracy and 1 point indicates the highest level of it.

17 Data source is the official site of the World Bank, available at /https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=UA-AM-MD-GE-AZ-BY/ (last visited 1 April 2018).

18 Data source: Freedom House *'Nations in Transit 2017: Azerbaijan Country Profile'* (2017), available at https://freedomhouse.org/report/nations-transit/2017/azerbaijan (last visited 1 April 2018).

19 Source: calculations by the authors.

As presented in Table 2, the Indexes of Democracy Level of Armenia, Georgia, Moldova and Ukraine are strongly affected by financial remittances. It is worth mentioning that Moldova has the highest rate of remittances (21,7 per cent of GDP), while the same variable in respect of Armenia, Georgia and Ukraine is 13,1 per cent, 10,6 per cent and 6,6 per cent of GDP, respectively.[20] The regression analysis indicates that a 1 per cent increase in remittances is associated with 0,009, 0,2, 0,06 and 0,023 units increase in democracy index, respectively. Particularly, the R^2 for financial remittances of Armenia is the highest, with a value of 0,677, which explains 68 per cent of the variation in democracy.

The regression results also show that civil society in Azerbaijan has a statistically significant impact on democracy. One unit increase in civil society index leads to the increase in the Index of Democracy Level of Azerbaijan by 0,032 units.

The research has not detected any statistically significant linear dependence of Index of Democracy Level on the Culture in the case of Belarus (government expenditures on culture).

According to the Nations in Transit 2018 report of Freedom House (2018),[21] Ukraine (4,64), Georgia (4,68) and Moldova (4,93) have comparatively better results in the democracy index. Azerbaijan (6,93) has the worst value of democracy, followed by Belarus (6,61). Armenia has an average level among the six states. In this context, summing up the main results of the research and looking through the theoretical framework, we conclude that the diaspora policies of Ukraine, Georgia, Moldova and Armenia have a political-economic framework of diaspora policies including disciplinary and liberal governmentality elements, while the diaspora policies of Azerbaijan and Belarus are mostly disciplinary.

10 Conclusion

This article explores the influence of diasporas on democratisation in EaP countries in a comparative perspective. Within this framework, analysing diaspora policies and diaspora activities in Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, we raise the question whether the diasporas' influence on democracy is typical in these countries and whether they have similar diaspora policies. Based on the findings, we argue that diasporas of these countries have different impact levels on democracy. Moreover, we conclude that democracy levels, in turn, influence the diaspora policies.

A descriptive and explorative analysis of the article shows that financial remittances are the main means by which diasporas have influence in Armenia, Georgia, Moldova and Ukraine; in the case of Azerbaijan this

20 Data source is the official site of the World Bank, available at /https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=UA-AM-MD-GE-AZ-BY/ (last visited 1 April 2018).

21 'Nations in Transit' measured by Freedom House is estimated by 1 to 7 point scale where the states with 1 to 2,99 points have Consolidated Democracies, 3 to 3,99 points have Semi-Consolidated Democracies, 4 to 4,99 points -Transitional or Hybrid Regime, 5 to 5,99 points are Semi-Consolidated Authoritarian Regimes and 6 to 7 points are Consolidated Authoritarian Regimes. It estimates progress and fails in democratisation for 29 countries from Central Europe to Central Asia.

means is civil society, albeit with weak effect; and in Belarus it is culture. The regression analysis findings illustrate that the financial remittances variable is revealed as a significant predictor explaining the variation in levels of democracy. The civil society of Azerbaijan also has a statistically significant impact on democracy.

Another finding illustrates that the diasporas of Azerbaijan and Belarus are the most passive among the countries under study. Taking into account that the democracy levels of the two countries are also the lowest, we conclude that this passivity is a consequence of state policy, which limits and determines the diaspora activity agenda. Thus, in the case of Belarus and Azerbaijan, the diaspora policies are mostly disciplinary, while the political-economic diaspora policies of Armenia, Georgia, Moldova and Ukraine include components that are more liberal.

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The influence of the African diaspora on democracy-building processes in countries of residence

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Abstract: *This article discusses the role of the African diaspora in democracy-building processes in the African diaspora. The contribution presents a general overview of the sources and causes of the present-day situation of people of African descent in the diaspora and how they impact on their participation in democracy-building processes in the diaspora. The article underscores the critical role which the African diaspora plays and notes the challenges it faces due to the continuing social ills of racism, racial discrimination, Afrophobia, xenophobia and related intolerance. These social ills prevent the African diaspora from effectively exercising their rights to take part in the conduct of public affairs; to vote and to be elected in genuine periodic elections, and to have access, on general term of equality, to public services in their country. A quick scan of what obtains in the African diaspora shows that political participation remains a challenge for people of African descent and there is a need for a concerted effort to address this challenge both at the international and state levels. The contribution also underscores the need for the implementation of the International Decade for People of African Descent as a tool for changing for the better the situation of the African diaspora, particularly in their participation in democracy-building processes. Owing to the historical facts and contemporary migration, the African diaspora is not homogeneous. This presupposes the need to contextualise any strategy aimed at addressing the challenges faced by the African diaspora in democracy building.*

Key words: *African diaspora; people of African descent; democracy; political participation; racism*

1 Introduction

The African diasporas, just as any other human beings, have the right to influence democratic processes wherever they live. This right can take many forms and dimensions. The African diasporas, also referred to as people of African descent in the diaspora, are important political stakeholders for their countries of origin as well as for the countries in which they live. Depending on their circumstances, the African diasporas

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would at times have no links with their 'ancestral roots', but only with the countries in which they live. In this case, their right of participating in their country's politics remains equally important. It is for this reason that the Durban Declaration and Programme of Action (DDPA), the outcome document of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001), urged states to 'facilitate the participation of people of African descent in all political, economic, social and cultural aspects of society'.[1] The participation of people of African descent in the diaspora, which is the focus of this contribution, has a positive bearing on democracy-building processes. However, people of African descent in the diaspora continue to suffer racism, racial discrimination, Afrophobia,[2] xenophobia and related intolerance. This is despite global efforts to combat these undesirable acts. The lack of political participation no doubt has a negative bearing on democracy-building processes.

The role of African diasporas in democracy-building processes cannot be overemphasised. The influence of these diasporas on democracy-building processes cannot be discussed without context. First, the article presents an general overview of the sources and causes of the present-day situation of the African diaspora. Second, it discusses the way in which people of African descent effectively participate in politics and decision-making processes, if at all. To this end, it makes reference to what obtains in countries outside the African continent. Third, the contribution looks into the question of how people of African descent can effectively participate in politics, thus contributing towards democracy-building processes. Fourth, it discusses in brief the International Decade for People of African Descent and its importance in the discourse on the role of people of African descent in democracy building. Lastly, a conclusion is drawn.

2 The definitional conundrum

The definition of 'African diaspora' presents a double challenge in the sense that one must first define 'African' before defining 'diaspora'. Both terms require an intellectual exercise, which is likely to defeat the purpose of this contribution. For instance, the people in and from the African continent, as well as those who are of African ancestry, are quite diverse. The diaspora, which generally connotes migration or spreading, may be within the African continent as well as outside the African continent. It then boils down to a process of self-identification for one to be considered part of the African diaspora. Alpers argues that '[w]hen we speak of African diaspora, we must recognise that we are really speaking of multiple frequently overlapping diasporas' (Alpers 2001: 27). Alpers observes that we must further include in our definition 'a comparative dimension that looks both within that of the African experience and beyond to other global diasporic communities' (Alpers 2001: 27).

Kafle (2010: 136) observes that the concept of diaspora is associated with migration and dispersal. This is a term that signifies any people living

1 Para 4 of the Durban Declaration and Programme of Action, 2001.
2 This term describes the unique and specific form of racial discrimination affecting people of African descent and the African diaspora.

outside their homeland (Anand 2003: 212). In our context the 'homeland' would be the African continent. Descendants that are born away from their parents' or ancestors' 'homeland' are also regarded as the African diaspora. While, technically speaking, these would not be African diasporas since their 'homeland' becomes a 'homeland' outside Africa, they are nevertheless referred to as the African diaspora. It is for this reason that the term 'people of African descent' is used to encompass all people of African ancestry. The concept of people of African descent also presents another challenge as it does not differentiate between African residents and those in the diaspora. For this reason, the term 'people of African descent in the diaspora' is sometimes preferred.[3]

The term 'African diaspora' in this context is used in its broader sense as encompassing a multitude of people of African ancestry who find themselves living outside the African continent, to which they (and their ancestors) were historically 'rooted'. African diaspora, in this sense, is 'a term of self-identification among many varied groups who themselves or those of whose forbearers migrated [voluntary or involuntary] from one place to another or to several places' (Vertovec 2005: 2). Accordingly, the African diaspora was born out of the voluntary and involuntary movement of Africans to various areas of the world since ancient times, but involuntary migration through the trans-Saharan, transatlantic and Indian Ocean slave trades accounts for most black presence outside of Africa today (Jallow 1996: 3). The historical facts relating to Africans and people of African descent has a direct bearing on the contemporary situation of the African diasporas and their influence (or lack thereof) on democracy-building processes in the diaspora.

3 Sources and causes of the present situation of people of African descent

The sources and causes of the present situation of people of African descent are well documented. The Durban Declaration and Programme of Action is instructive in terms of shedding light on what befell Africans. This history is linked to the present situation of African descent in the African diaspora.

First, the enslavement of Africans and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity, not only because of their abhorrent barbarism but also in terms of their magnitude, organised nature and especially their negation of the essence of the victims. The enslavement of Africans and the slave trade are crimes against humanity. The vestiges of the slave trade and enslavement of Africans manifested in laws that had a negative impact on people of African descent. For example, it can also not be denied that laws such as

3 Para 7 of the Durban Declaration and Programme of Action, 2001, eg, 'requests the Commission on Human Rights to consider establishing a working group or other mechanism of the United Nations to study the problems of racial discrimination faced by people of African descent in the African diaspora and make proposals for the elimination of racial discrimination against people of African descent'. The Working Group on People of African descent has a mandate, among other things, '[t]o study the problems of racial discrimination faced by people of African descent living in the diaspora'.

the Jim Crow laws of the eighteenth, nineteenth and twentieth centuries in the United States placed a stigma on African Americans, which promoted the idea that blacks are second-class citizens. The Jim Crow laws practised during and after the slavery era fuelled racial segregation, which also affected the political participation of people of African descent and deprived them of being part of democracy-building processes. As a result of Jim Crow laws, African Americans were deprived of equal social and economic opportunities such as access to education, jobs, voting, travel and housing, as compared to white privileges. The remnants of Jim Crow laws are also reflected in the systemic exclusion of the African diaspora in democracy-building processes.

Second, colonialism just rubbed salt in African wounds. It intensified racism, racial discrimination, xenophobia, Afrophobia and related intolerance. Africans and people of African descent were victims of colonialism and to this day continue to be victims of its consequences. Not only did colonialism impact the political and economic conditions of contemporary Africa, but it also affected the manner in which Africans were (to be) treated in the African diaspora. Colonialism perpetrated the stereotype that African people are incapable of having any influence on democracy-building processes. This stereotype is also reflected in the African diaspora, where the political participation of people of African descent generally remains minimal. The adverse effects of colonialism, particularly in the treatment of Africans, had long-lasting effects even on Africans in the diaspora.

Third, apartheid was an untold evil and caused immense suffering for Africans and people of African descent. Apartheid constitutes a crime against humanity and is a major source and manifestation of racism, racial discrimination, xenophobia and related intolerance. Apartheid created a divide between white and black people. Despite the fact that apartheid occurred in South Africa, it affected Africans and perpetrated a stereotype that Africans are incapable of being part of democracy building, not only on the African continent but also in the African diaspora. It should be noted that the entry into force of apartheid laws in 1948 in South Africa resulted in institutionalised racial discrimination. Although not directly linked to apartheid, the minimal participation of the African diaspora in democracy-building processes in the diaspora sometimes results from institutionalised racial discrimination. The effects of apartheid are the same as those of systemic anti-black racism.

Fourth, the recent migration of Africans to Europe also revealed another cruel side: the trade in enslaved Africans in Libya. The actions of African migrants as merchandise in Libya are 'reminiscent of one of the darkest chapters in human history, when millions of Africans were uprooted, enslaved, trafficked and auctioned to the highest bidder'.[4] With the recent migration (voluntary and involuntary) of Africans to Europe, for instance, there is 'a tendency to regard categories "foreigners", "immigrants", and "ethnic minorities" as roughly interchangeable' (Crowley 2001: 104). These categories could be making up the African diaspora with citizenship

4 Statement of Independent Experts of the Special Procedures of the Human Rights Council, 'Libya must end outrageous auctions of enslaved people, UN experts insist', available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22475&LangID=E (last visited 18 April 2018).

(or even dual citizenship) and rights in African diaspora countries. However, for the careless categorisation, such African diasporas would generally not be 'accepted' as deserving all the rights to be exercised by the general citizenry.

The sources and causes of the present-day situation of African diasporas provide a perspective of what obtains in contemporary times, particularly in their contribution (or lack thereof) to democratic processes. This is backed up by the examples found in the enjoyment (or non-enjoyment) of political rights by people of African descent in the diaspora.

4 Political participation of people of African descent

According to Steiner, the concept of political participation has been an 'indispensable building block' in the post-war construction of human rights law (Steiner 1998: 77). Political participation is a vital human right. The Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR) both recognise a right to political participation. Article 21 of the Universal Declaration states:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> (2) Everyone has the right of equal access to public service in his country.
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal suffrage and shall be held by secrete vote or by equivalent free voting procedures.

Article 25 of ICCPR states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) to have access, on general terms of equality, to public service in his country.

The right to political participation is but part of a democracy-building process, which the African diasporas should exercise in accordance with the law. It is also important to note that the right to political participation contains two parts, namely, an 'election clause' and a 'take part' clause (Steiner 1988: 86). What follows are examples of challenges faced by people of African descent in the diaspora in their exercise of the right to political participation (or lack thereof). This has a direct bearing on their influence on democracy-building processes.

4.1 United Kingdom of Great Britain and Northern Ireland

During its country visit to the United Kingdom of Great Britain and Northern Ireland, the Working Group of Experts on People of African Descent (Working Group) found that people of African descent were

historically underrepresented in British politics both as political figures and as active participants in political processes.[5] The first people of African descent to be elected as Members of Parliament were Bernie Grant, Paul Boateng and Dianne Abbort, elected in 1987. In the 2010 elections there were 27 Members of Parliament of African and Asian descent elected.[6] While the situation was improving, the pace was very slow. It is clear that where there is an underrepresentation of people of African descent in politics, their influence in democracy-building processes is minimised. The right to effective political participation, therefore, is important in democracy-building processes.

4.2 Panama

During its country visit to Panama, the Working Group found that people of African descent were underrepresented in public service positions and only a few occupied important political positions.[7] During its visit to Panama in 2013, the Working Group found that the Minister of Education and certain other high-level politicians were people of African descent and were fully committed to the fight against racism in Panama. The reality, however, pointed to the fact that in Panama the number of people of African descent holding elective executive positions or belonging to political parties was substantially lower than it should be, based on their number in the general population.[8]

The Working Group established that in Colón, Panama, people of African descent remained invisible in public life, particularly in relation to political processes. People of African descent felt completely disenfranchised from decision-making processes. Panama presents another example where the influence of people of African descent on democracy-building processes is minimal.

4.3 Brazil

During its visit to Brazil, the Working Group found that Brazil had adopted several measures to increase Afro-Brazilian participation and representation in decision-making spaces. However, the Working Group noted that there was no law for quotas to ensure a minimum number of Afro-Brazilian parliamentary candidates. The Working Group also learned that under the initiative of the Nucleus of Black Parliamentarians of the Workers' Party and other members of the government, there were a number of legal projects under consideration in the National Congress to increase Afro-Brazilian parliamentary candidates. It was also comforting to note that under the initiative of the Nucleus of Black Parliamentarians of the Workers' Party and other members of the government, a number of legal projects were under consideration in the National Congress to increase Afro-Brazilian political participation. The Working Group also learned that the Constitutional Bill would add an item to the Transitional Constitutional Provisions Act determining the reservation of seats for

5 Report of the Working Group of Experts on People of African Descent on its 12th session. Mission to the United Kingdom of Great Britain and Northern Ireland, 5 August 2013, A/HRC/24/52/Add.1 14.
6 As above.
7 Report of the Working Group of Experts on People of African Descent on its 12th session Mission to Panama, 21 August 2013, A/HRC/24/52/Add.1 10.
8 Report of the Working Group (n 7) 10.

members of the black population in the House of Representatives and the Legislative Assembly.[9]

4.4 The Netherlands

During its visit to The Netherlands, the Working Group expressed concern about the lack of participation of Curaçaons in the political process involved in the development of legislation of The Netherlands. Curaçaons expressed dissatisfaction that due to their limited political participation, their voice was not heard in the international arena, which would further cement their autonomous status. The Working Group recommended that the Dutch government needs to take additional steps to change the historic underrepresentation of people of African descent in politics in The Netherlands both as political figures, as institutional figures in Curaçao, and as active participants in political processes.[10]

4.5 Sweden

During its visit to Sweden, the Working Group learned that the political discourse by far-right parties in Sweden, as in other countries, had contributed to the negative picture that immigration was a problem and a threat to Swedish culture and the welfare system.[11] This created a rise in Afrophobic attacks and fear amongst the communities concerned.[12] Such fear led to African diasporas being discouraged to participate in democracy-building processes, including participating in politics.

The role some politicians play in suppressing the participation of African diasporas or people of African descent in politics is also well document in Sweden. This sometimes is not direct but very subtle. A classic example involves a Sweden Culture Minister who in 2012 was invited to slice a cake which was designed like a naked African woman. While the Minister defended her action of cutting the cake by stating that she had only been invited to cut the cake and not to review art, the action was seen as a 'crude caricature which "makes mockery of racism"'.[13] This kind of action by a political figure not only demeans Africans but perpetuates dangerous stereotypes against people of African descent, and is an antithesis to the worldwide struggle against racism, racial discrimination, xenophobia, Afrophobia and related intolerance.

4.6 Italy

During its visit to Italy, the Working Group expressed concern about the escalation in xenophobia across Europe by the political manipulation of people's fears about the increase in the number of migrants. In Italy the Working Group observed how people's fears had been manipulated to

9 Report of the Working Group of Experts on People of African Descent on its 14th session Mission to Brazil, 23 September 2014, A/HRC/24/52/Add.2 10.
10 Report of the Working Group of Experts on People of African Descent on its 16th session, Mission to The Netherlands, 20 July 2015, A/HRC/24/52/Add.2 10.
11 Report of the Working Group of Experts on People of African Descent on its 16th session, Mission to Sweden, 25 August 2015, A/HRC/30/56/Add.2 5.
12 As above.
13 C Parsons 'A tasteless, racist spectacle: Swedish minister triggers race row after cutting cake in the shape of a naked, black, native African woman', available at http://www.dailymail.co.uk/news/article-2131365/Racist-cake-causes-outrage-Sweden-Lena-Adelsohn-Liljeroth-triggers-race-row.html (last visited 23 March 2018).

promote a racist anti-immigration agenda, to disseminate false information and incite hatred against people of African descent and migrants. In Italy, the Working Group was appalled by a statement made by the Deputy President of Senate, Roberto Calderoli, in 2013, which described Ms Cécile Kyenge (an Italian of Congolese descent), then Minister for Integration, as a 'orangutan'. Ms Kyenge was elected as Member of the European Parliament (MEP) on 25 May 2014. The Working Group found that this statement had racist connotations and was in contravention with the absolute prohibition of racial and ethnic discrimination stipulated in international human rights law.[14]

The Working Group underscored the key role that political leaders and political parties can and ought to play in combating racism and encouraging political parties to ensure that their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia, Afrophobia and related intolerance. These public statements generally discourage African diasporas from influencing democracy-building processes. They further inhibit African diasporas from effectively exercising their right to political participation as they are impliedly silenced.

4.7 Germany

In Germany, the Working Group found that the federal parliament had two members of African descent, and there were some elected officials of African descent at the state and community levels across Germany.[15] The Working Group observed that the lack of representation of people of African descent in government and politics meant that their issues were not taken up in national political dialogue. The Working Group recommended that people of African descent in Germany should be legally recognised by the government as a minority group that has made and continues to make profound economic, political, social and cultural contributions to Germany.[16]

5 Addressing the lack of political participation of people of African descent

The examples referred to above illustrate the point that in so far as the lack of political participation by people of African descent in the diaspora is concerned, more is required. Among the African diaspora, there are citizens who have the right to political participation. This right must not only be promoted but also protected. African diasporas maybe distinct from the general population, but this does not warrant any suppression of their right to political participation. Just like other citizens, the African diasporas must influence democracy-building processes. Disadvantaging the African diasporas in politics, particularly in political participation, has a negative bearing on any country's socio-economic development. Addressing the lack of political participation of people of African descent

14 Report of the Working Group of Experts on People of African Descent on its mission to Italy, 12 August 2016, A/HRC/33/61/Add.1 9.
15 Report of the Working Group of Experts on People of African Descent on its mission to Germany, 15 August 2017, A/HRC/36/60/Add.2 9.
16 Report of the Working Group (n 15) 14.

must include strengthening their influence on democracy-building processes, and this must be undertaken at all levels.

5.1 Role of states

In addressing the lack of effective political participation of people of African descent, various instruments must be implemented by states. The Universal Declaration provides for the principles of equality and non-discrimination. States, therefore, must encourage respect for human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[17] States must further ensure the universal accession or ratification and full implementation of their obligations arising under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the principal international instrument to eliminate racism, racial discrimination, xenophobia, Afrophobia and related intolerance.

In crafting the Durban Declaration and Programme of Action, states recognised that 'equal participation of all individuals and peoples in the formation of just, equitable, democratic and inclusive societies can contribute to a world free from racism, racial discrimination, xenophobia, Afrophobia and related intolerance'.[18] This equal participation, therefore, must include people of African descent in the diaspora. The Durban Declaration and Programme of Action highlights the need for states to ensure that political structures correspond to the multi-ethnic characteristics of the population. This in turn will ensure that the citizenry, including the African diaspora, has an effective influence on democracy-building processes for the betterment of society.

Despite the increasing racism, racial discrimination, xenophobia, Afrophobia and related intolerance, people of African descent continue to contribute to the political life of the countries where they live. States must encourage such contributions. It should be noted, however, that inequitable political conditions can breed and foster racism, racial discrimination, xenophobia, Afrophobia and related intolerance, which in turn exacerbate inequity. Special measures or positive actions aimed at achieving appropriate representation in political parties, parliament and other public institutions must be implemented by states. In some cases electoral reforms must be undertaken to ensure equal participation.

5.2 Role of the United Nations

At the United Nations (UN) level, the Working Group of Experts on People of African Descent was established to study the problems of racial discrimination faced by people of African descent living in the African diaspora and to make proposals for the elimination of racial discrimination against people of African descent. Indeed, the Working Group has pronounced on the issue of political participation in its reports. For example, in the case of the United Kingdom of Great Britain and Northern Ireland, the Working Group recommended that more should be done to empower people of African descent to be represented in political structures

17 Art 2 Universal Declaration of Human Rights.
18 DDPA 6.

such as parliament.[19] In particular, the Working Group stated that attention must be given to all political parties to improving the representation of people of African descent and to analyse their political representation at all levels.[20]

In Brazil, the Working Group underscored the implementation of affirmative action policies which have the potential of increasing Afro-Brazilian participation and inclusion in political processes which, in the long term, contribute to the reduction of racism and discrimination in society in general.[21] In the case of The Netherlands, the Working Group reaffirmed its firm belief that targeted policies and affirmative action policies should be adopted to promote the effective equality of people of African descent specifically to address the lack of sufficient political participation of people of African descent as well as the lack of appropriate representation of people of African descent in public sector employment.[22] In Italy, the Working Group recommended the importance of accountability for politicians that stigmatise and negatively stereotype people of African descent or use racist propaganda for political purposes.[23]

In Germany, the Working Group recommended that the government should ensure that people of African descent are actively recruited to state institutions in order to create a diverse workforce to represent the population of Germany and combat structural racism.[24] In the case of Panama, the Working Group noted that political participation was a key factor in the success of policies and measures designed to overcome discrimination and racism. For this reason, the full participation of people of African descent in politics was essential.[25]

6 International Decade for People of African Descent

People of African descent have made (and continue to make) significant contributions to the development of societies and nations the world over. They continue to shape the politics of the countries where they reside. Despite this, their influence on democracy-building processes remains minimal as a result of the challenges they face, which partly is the legacy of the enslavement of Africans, the slave trade and colonialism, among other things. These manifested in racism, racial discrimination, xenophobia, Afrophobia and related intolerances. The systematic exclusion people of African descent in politics has become a serious cause for concern. It is for this reason that the International Decade for People of African Descent (2015-2024) was proclaimed by the United Nations. The International Decade is an important commitment to the fight against racism as it is aimed at strengthening action to dismantle the multifarious obstacles encountered by the millions of people of African descent in every region of the world. Presenting an historic opportunity, the International Decade must be viewed as a tool of change aimed at addressing the need for

19 Statement (n 5) 18.
20 As above.
21 Report (n 9) 12.
22 Report (n 10) 19.
23 Report (n 14) 16.
24 Report (n 15) 16.
25 Report (n 7) 19.

African diasporas to have an effective influence on democracy-building processes wherever they reside.

6.1 International human rights law

There is no doubt that the influence of the African diaspora on democracy can be greatly enhanced through the implementation of the International Decade for People of African Descent, of which the life span is from 2015 until 2024. The International Decade was proclaimed by the General Assembly in its Resolution 68/237, with the theme 'People of African Descent: Recognition, Justice and Development'. The International Decade is a timely and unique opportunity to underline the important contribution made by people of African descent to societies and to propose concrete measures to promote equality and to combat discrimination of any kind. Among other things, the main objective of the International Decade is to promote respect, protection and fulfilment of all human rights and fundamental freedoms by people of African descent, as recognised in the Universal Declaration. This includes the right to political participation.

The International Decade focuses on the strengthening of national, regional and international action and cooperation in relation to the full enjoyment of economic, social, cultural, civil and political rights by people of African descent and their full and equal participation in all aspects of society. As part of its programme of activities, the International Decade urges states to 'adopt measures to enable the full, equal and effective participation of people of African descent in public and political affairs without discrimination, in accordance with international human rights law'.[26] In order for any influence on meaningful democracy-building processes to take place, people of African descent must be empowered.

6.2 Declaration on the Promotion and Full Respect of Human Rights of People of African Descent

As part of the programme of activities, the International Decade obligates the General Assembly to

> request states to consider adopting measures to further promote and protect the human rights of people of African descent as enshrined in international human rights instruments, including through the elaboration of a draft United Nations Declaration on the Promotion and Full Respect of Human Rights of People of African Descent.[27]

From this request it is clear that a declaration aimed at strengthening the human rights of people of African descent is a *sine qua non* for addressing the many challenges faced by people of African descent, which includes the legacies of the most shameful practices they were subjected to and the contemporary remnants, which perpetuate their racial discrimination, which is sometimes institutional.

It is envisaged that this Declaration will address the role of people of African descent in democratic processes, particularly in ensuring their full participation in politics. The Declaration will be an expression of the

26 Programme of activities for the implementation of the International Decade for People of African Descent A/RES/69/16 7.
27 Programme of activities (n 26) 11-12.

fundamental values which must be shared by all members of the community in relation to people of African descent. As an aspirational and not legally-binding document, the Declaration will influence the development of international human rights law, as it applies to people of African descent.

It must be noted that the adoption of measures to further promote and protect the human rights of people of African descent as enshrined in human rights instruments does not suggest that states should 'reinvent the wheel'. However, the elaboration of a UN Declaration on the Promotion and Full Respect of Human Rights of People of African Descent suggests that states must push the boundaries further. The elaboration of the Declaration must, therefore, build upon the foundation that is already in existence in the form of the human rights enshrined in human rights instruments. States already have an obligation to promote and protect human rights, and elaborating on a declaration pursues this 'obligation' further, particularly with its specific focus on people of African descent. Elements of the Declaration must, therefore, augment the human rights instruments aimed at protecting and ensuring respect for human rights.

7 Conclusion

For the purpose of this contribution the term 'people of African descent in the diaspora' has been used to refer to the African diaspora. While these terms may be viewed as simple terms to define, navigating through their definitional conundrums is not simple. Nevertheless, a common ground was found for practical purposes. While most of the literature on diaspora studies focuses on the influence of diasporas on democracy-building processes in their 'homeland' or their historical 'roots', this contribution focused on their sphere of influence in their country of residence, in the African diaspora. The analysis found that the present situation of people of African descent in the diaspora can only be understood within the context of historical facts, which are sometimes overlooked, particularly when discussing the role that the African diaspora must play in democratic processes.

Racism, racial discrimination, Afrophobia, xenophophia and related intolerance remain antitheses for the full participation of people of African descent in democracy-building processes. The examples of what obtains in the African diaspora relating to the participation of people of African descent in political processes are just the tip of an iceberg. The degree of political participation at different levels of government of people of African descent remains low, both in so far as voting and the underrepresentation in political and institutional decision-making processes are concerned. This is directly linked to the forms of racial discrimination they are subjected to in many countries, including the multiple and aggravated forms of discrimination based on other related grounds such as age, sex, language, religion, political opinion, social origin, property, birth or other status. Most recently, the world witnessed public and political discourse, as well as the use of political platforms that promote or incite racial discrimination. These are fuelled by old and new prejudices that emanate from the treatment of people of African descent in the past and present. The constant portrayal of people of African descent as criminals and security threats makes the situation of people of African descent worse.

Racism, which constituted a huge threat to democracy, continues in many parts of the world and people of African descent are always on the receiving end.

While efforts have been made to address the challenges faced by people of African descent, this is only reflected on paper. Generally, the reality on the ground points to something completely opposite. People of African descent remain invisible 'visible' minority groups whose destiny is always determined without their involvement. The effects of the untold suffering experienced by people of African descent for many centuries remain a scar which require many efforts to reverse not only on paper. Article 1 of the Universal Declaration could not have put it any more clearly: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' People of African descent in the diaspora or African diaspora belong to the human race whose rights deserve respect. This will ensure that all human beings influence democratic processes in their societies.

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The Armenian community in Iran: Issues and emigration

*Gohar Iskandaryan**

Abstract: *The Armenian-Iranian community has a history of around 400 years. According to official statistics, there were approximately 300 000 Armenians in Iran in 1960-1970. After the Islamic revolution in Iran in 1978-1979, a considerable number of Armenians fled from Iran. In addition, other reasons fuelling the emigration were the 1980-1988 Iran-Iraq war, the international sanctions against Iran and the harsh social-economic conditions in the country. Many Armenians remaining in Iran mostly live in the three communities of Tabriz, Tehran and Isfahan. Armenians are recognised by the state as a religious minority. The Constitution of Iran gives rights of domestic, cultural and religious autonomy to Armenians. At the same time, Islamic laws dictate certain limitations, notably in the spheres of equal employment opportunities, the court system and justice. Armenians in Iran adopt several approaches for retaining their Armenian identities, including the non-acceptance of mixed marriages. After the Islamic revolution, the Hebrew Immigrant Aid Society started to organise and support the emigration of Jews and other non-Muslim groups, thus propelling the next wave of the Iranian-Armenians' exodus.*

Key words: *Iran; Armenian community; Hebrew Immigrant Aid Society; Christians; religious minorities; emigration; rights; Islamic revolution*

1 Introduction

Armenia, situated at the crossroads between the east and the west, has always been in the midst of conflicts. For centuries, Armenians tried to stay away from clashes and took refuge in more secure places. There were also cases in the history when Armenians were forcefully deported from their lands. These are the two main ways of formation of the Armenian diaspora. Interestingly, in the foreign territories Armenians prefer living alongside each other, thus creating space and opportunities for building Armenian Apostolic churches, establishing Armenian schools, and so forth, to resist assimilation. After the establishment of these communities, the next issue was their institutionalisation in order to create a self-sufficient system to solve potential problems.

This article undertakes to present the establishment and the subsequent movements of the Armenian community in Iran. During the history, Iranian-Armenians succeeded in forming diocese bodies that solved numerous issues in the community. All three Armenian dioceses in Iran

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had councils of delegates with the main mission of dealing with administrative, national, clerical, educational and territorial issues of the dioceses. The councils also provide certificates of baptism, marriage, death, and so forth, and handle wills and adoptions of children. In case of civil cases, the community deals with these domestically, while criminal cases are within the domain of the legislation of the Islamic Republic of Iran.

Armenians participate in all elections in Iran. Armenians vote within the boundaries of their community, either in a church or other community building. Armenians can be elected during the election to the *Majlis* (Parliament).

The article aims to present the current situation and status of the Armenian community in Iran, their privileges and limitations. It also focuses on the present issues of the communities and the main reasons for the emigration of Armenians from Iran.

2 Methodology

In addition to extensive desk research, the author conducted both a field trip to Iran for qualitative in-depth interviews with key informants and organised a snap web-based quantitative survey as a secondary data source to validate the results.

The desk research made use of the available literature, Iranian-Armenian electronic resources and media outlets, and laid a solid base for the application of the historical comparative approach to the article.

The qualitative in-depth interviews were conducted in 2014, when the author visited the Islamic Republic of Iran and met with the following persons: the leaders of the Tehran, Isfahan and Tabriz dioceses; the deputies to the Iranian *Majlis* of Armenian origin; representatives of the council of delegates; and the editor-in-chief of the major Iranian-Armenian newspaper, *Aliq*. The standard question in-depth interviews focused on the Armenian community in Iran, their issues and the reasons for their emigration from the country.

The quantitative web-based survey was implemented during March to June 2018 and targeted those Iranian-Armenians that had emigrated from Iran. The topic of the survey was anchored on the reasons that forced them to leave the country, including aspects of their occupation in Iran before emigration, the issues they had to overcome in the new host country, and so forth. The survey was widely circulated on social networks, sent to the specific hubs of concentration of ex-Iranian citizens of Armenian origin (such as churches and community clubs) and also directly messaged to the targeted people through personal networks. Over 100 people responded to the survey in either the English or Armenian languages.

Remarkably, for centuries the main institution to bring them together and solve their issues has been the Apostolic Church. Another channel was the Armenian Revolutionary Federation (the Dashnak party), since a considerable section of Iranian-Armenians belonged to this party. Both these centres of gravity have a global spread, and even when Armenians fled Iran after the Islamic revolution, these two institutions were a source of support. This factor played a significant role to relieve the harsh situation of the migrants.

3 Deportation to Iran

The Armenian-Iranian community has a history of around 400 years. In 1604 Safavid Shah Abbas the First deported more than 500 000 Armenians to Iran. Of these, 20 000 to 30 000 Armenian families were placed in the northern regions of Iran, namely, Gilan and Mazandaran (Waterfield 1973: 63), and the rest were moved to the south. The first Armenian community in Iran was established near Isfahan. The place was named Nor Jugha (New Julfa, after the home town of some of the deportees). This evolved into a community with a strong institutional structure. Through the years the Armenian community grew and divided into three groups governed by three dioceses: Atrpatakan (residence in Tabriz), Tehran and Isfahan.

By means of a special decree, Abbas the First allocated lands in the southern part of Isfahan and Armenians constructed the town of New Julfa. Shah Abbas the First instituted a special policy for the deported Armenian population in order to give them the opportunity to take root in Iranian soil by presenting them with many privileges. Thanks to Armenians, the culture in the country developed, trade became more active given the foreign language knowledge of Armenians and their experience in the Silk Road trade, and artisanship and small production advanced substantially.

However, during the later reign of Iranian Shah Sultan Huseyin (1694-1722), the policy of Savafids changed and they not only imposed high taxes on Armenians, but also attempted to forcefully Islamise the Christian Armenians. These factors became the first major impetus for migration from Iran. In the eighteenth century, a considerable number of Armenians left for Constantinople, Smyrna, Aleppo, also further to European and Asian countries such as Italy, France, The Netherlands, Poland, Russia, India, Burma and Indonesia (Bayburtyan 1969). Since the middle of the eighteenth century the Iranian-Armenian community started to dwindle, promptly filling the ranks of the Armenian communities in the Europe.

At the end of the nineteenth century, Ottoman Sultan Abdul Hamid the Second organised mass ethnic cleanings of Armenians in Western Armenia, that is, the regions in the Ottoman empire neighbouring Iran. During these *pogroms*, the Iranian government permitted Armenian refugees to cross the Iranian border without hindrance to find shelter in Iran. The same scenario was repeated in the 1915 to 1923 genocide of Armenians in the Ottoman empire. Iran hosted the refugee Armenians and thus the Armenian community of Iran was replenished.

Some time later, in 1915 to 1916, the Persian-Armenian Council was established in Iran. It was considered the highest body of Iranian Armenians. Indeed, the Council played a major salutary role for the endangered Armenian population (Bayburtyan 2013: 25). With its petitions, the Persian Council reached a point where the Iranian government promised protection both to its citizens and to those Western Armenians that had crossed its border and taken refuge in the country.

The number of Iranian-Armenians significantly increased after the genocide due to the inflow of Western Armenians. Iran not only gave protection but also supported the Armenians by granting guarantees of life and property. Later, in 1935, the government of Iran adopted the

Assembly of Laws on Family and Heritage of Iranian Armenians to guide the community leadership in their domestic issues.

Although Armenians received the right of being represented in the Iranian *Majlis* after the 1905-1911 constitutional revolution, after 1915, given the increase rise in the Armenian community, they were entitled to two seats in parliament.

According to official statistics, in 1960-1970 there were approximately 300 000 Armenians in Iran. Armenians had their schools, sports and cultural clubs. Some of Tehran's most famous pieces of architecture – Hasanabad Square, the Foreign Ministry building, and the Golestan and Marmar palaces – were the work of Armenian architects. Before 1979, Armenian bars and cafes were very popular, and many famous personalities in the arts – music, dance, cinema, theatre and sculpture – came from the community (Stepanian 2010). According to the Armenian *Majlis* representative of Tehran and northern Armenian communities, Karen Khanlaryan, about 30 years ago 5 per cent of dentists and 3 per cent of all doctors in Tehran were of Armenian origin: 'As of now, we have a retreat in the area of medicine' (Interview with Khanlaryan).

Today Armenians have a reputation for quality work in business, food production and automobile repairs. Like other religious minorities, they cannot hold sensitive military or government positions, but some occupy senior positions as managers and engineers in state-run construction projects and industries.

Armenians also enjoy unofficial fame for producing homemade alcohol. Although strictly prohibited by Iranian law, the practice is tolerated as long as it is for consumption within the Armenian community. In Islamic Iran, the highest praise one can give to a glass of homemade wine, vodka or beer is 'Armenian' – even if it was made by someone else (Stepanian 2010).

However, after the Islamic revolution in Iran of 1978 to 1979, a considerable number of Armenians fled Iran as Christian Armenians feared that they would be accused of loyalty to the shah with subsequent expropriation and punishment.

Thus, although Khomeini gave verbal assurances that the rights of Iranian-Armenians would be respected (Hovhannisyan 2012: 72-73), almost half of the Armenian population left Iran. One thing was clear, and that is that a number of employment opportunities would not be available to non-Muslims. Armenians were regarded as a religious minority in Iran.

Despite efforts by the Islamic Republic of Iran to create conducive conditions for the non-Muslim population, Islamic laws dictate certain limitations. The most notorious of these are the following:

(a) Employment: There are limitations on certain types of work. For example, a non-Muslim cannot become a judge, cannot achieve a high rank in the armed forces, and cannot become a Minister or work for the administration of the President.

(b) Heritage: A non-Muslim cannot inherit from a Muslim, and if a person from a non-Muslim family adopts Islam, the other non-Muslim relatives are deprived of inheritance rights.

(c) The Criminal Code distinguishes between a Muslim and a non-Muslim, for example, in the case of the *diya*, that is, financial compensation, the payment of

the blood money/ransom in case of manslaughter. However, the courts try to find ways of compensating based on equality and equity.

(d) According to Islamic law, only a Muslim can be a witness. This law is reflected in procedural laws, hence it may be assumed that testimony by a non-Muslim can be disregarded during court hearings (Khaloyan 2013: 145-146).

According to Noel Minasyan, the Chairperson of the Council of Delegates of the diocese,

> [t]here [were] more than 15 000 Armenian population in the 14 villages of Southern Iran before 1946. Unfortunately, today there is very small Armenian presence in Peria. One part migrated to Armenia, others to Isfahan and Tehran. After the Islamic revolution, many of them fled the country finding refuge in the West (Interview with Minasyan).

All these factors contributed to the emigration of Iranian-Armenians after the Islamic revolution. These settled mainly in the United States, France and other European countries with large Armenian communities.

In addition to the Islamic revolution, the Iran-Iraq war of 1980-1988 (during the war with Iraq, Armenians fought alongside other Iranians, and around 300 were killed, disabled or captured by Iraqi forces), the international sanctions against Iran and hence the harsh social-economic conditions in the country were among other reasons fuelling the emigration.

However, not the entire Armenian population left Iran after the revolution. There are many Armenians in Iran today that, as during the term of the shah, mostly live in the three communities. Article 13 of the Constitution of Iran gives rights of domestic cultural and religious autonomy to Iranian-Armenians (Pahlevanyan 1997: 19). Armenians marry and get divorced, inherit and adopt children according to the Armenian Apostolic Church laws and traditions within the community. According to article 14 of the Constitution, the government of Iran and Muslims are obliged to display kind, sympathetic and just behaviour towards non-Muslims and respect their human rights. This principle is applied with respect to those citizens that do not plot against Islam and the Islamic Republic Constitution.

Armenians mainly reside in cities and large towns, such as Tehran, Isfahan, Tabriz, Urmia and Arak. As mentioned, Armenians are regarded as a religious minority by the state. Religious minorities are entitled to five seats in the Iranian Parliament: two for Armenians; one to Jews; one to Zoroastrians; and one to Assyrian and Chaldean by rotation. This was one of the articles (article 64) in the shah Iran Constitution that was preserved after the Islamic revolution of 1978-1979 and moved to the Constitution of Iran (Pahlevanyan 1997: 20). One of the Armenian members of the *Majlis* is elected from the northern and one from the southern diocese. The representative of Atrpatakan and Tehran dioceses in the tenth *Majlis* is Karen Khanlaryan, and the representative of Isfahan Armenians is Zhorzhik Abrahamyan.

4 Situation in three Iranian-Armenian dioceses and current problems

The Armenian Apostolic Church has three dioceses in Iran: the Tehran or Central diocese (the youngest and the most populous); the Isfahan and Southern Iran diocese; and the Atrpatakan diocese.

4.1 Tehran or Central diocese

The Armenian community in Tehran was established in the 1940s. It has the largest number of members in Iran. The first paragraph of the Charter of the Tehran diocese presents their mission and process of activity implementation.

> According to the main and civil laws of Iran, the Iranian-Armenians, adhering to the laws of the country and being recognised as religious community, has the freedom of religion, beliefs and ceremonies, the rights to teach its religion, language and traditional culture, as well as to have its special representatives to the parliament. In the personal issues, it adheres to the religious and confession laws and indisputable traditions that serve as basis to manage the clerical, religious and educational affairs through relevant councils and bodies (Prelacy website).

The council of diocese has its bodies to implement the functions. For example, there is an educational council to monitor the schools, and the property council and judiciary council to deal with family issues of the congregation, such as divorce and heritage (interview with Archbishop Sepuh). There are eight Armenian churches in Tehran.

There are approximately 25 Armenian schools in Tehran with about 7 000 students. A number of sporting-cultural unions operate in Tehran, and many periodicals are published. One of the most widely known is *Aliq Daily*.

However, there are several problems in the Tehran diocese, the largest one perhaps being emigration. Although the main reason is the socio-economic situation in Iran, Armenians in Tehran note that other issues present in the community fuel the emigration.

The main concern of Tehran Armenians is the lack of information and transparency in relation to the property of the Prelacy. Today many Iranian-Armenians demand from the council of delegates to present a list of properties owned by the Prelacy. In the case of some being sold, the community wants to be informed of the price and the aim for which the money will be spent. So far this issue has not been resolved, since the Prelacy finds that it is within its legal framework. However, Iranian-Armenians demand a more transparent method of operation.

4.2 The diocese of Isfahan and Southern Iran (Irano-Indian diocese)

The Irano-Indian diocese was formed in 1606 through the direct initiative of Shah Abbas the First when establishing New Julfa. Today, the centre of the diocese is the St All Saviour Monastery of Isfahan, one of the famous and beautifully-erected monuments of Armenian cultural history. The diocese used to have more than 100 churches, but currently only 24 function, including 13 only in New Julfa.

There has been the chair of Armenian studies in the Isfahan University since 1961. It has been of great importance for the formation of the Iranian-Armenian academic elite. It was established with state sponsorship and the state continues to support it. It also play an important great role in the continuous training of Iranian-Armenian teachers.

The community faces other issues, such as the problem of retaining the Armenian identity. It is hoped that this will be overcome with support from Armenia. The community makes efforts in this area by organising classes of poetry, acting and dancing with invited teachers from Armenia. However, both locally and in Tehran these are self-funded projects, namely, the communities pay from their own budgets. The Isfahan diocese is perhaps the second most wealthy Armenian community in the whole region, with Antelias (Armenian Church Cathilicosate of Cilicia in Antelias-Lebanon) being the first.

4.3 Northern or Tabriz diocese (Armenian diocese of Atrpatakan)

The Armenian diocese of Atrpatakan is the oldest Iranian-Armenian diocese and it unites Armenians residing in the northern provinces. Administratively, it includes the provinces of Eastern and Western Atrpatakan, and Ardebil. According to Garnik Badalyan, approximately 5 000 Armenians reside in this area, whereas in the beginning of the twentieth century the diocese had 30 000 members. After the repatriation movement to Soviet Armenia in 1946-1948, this number dropped to 17 000 (Badalyan 2011: 94-95). Therefore, although the Atrpatakan diocese used to be the most populous Armenian region, the situation has changed. This diocese has the highest emigration rate as compared to the other two dioceses. In addition to the issues present in the other dioceses, namely, harsh social-economic conditions and a lack of employment opportunities, there is another problem in Atrpatakan which is unique to the area. The number of Turkic-speaking Iranians is the highest in the population of Atrpatakan, and the local Armenians constantly face this issue. For example, local Armenians are not able to properly conduct their festive or mourning ceremonies.

The leader of the Atrpatakan diocese, Archimandrit Grigor Chiftchyan, openly mentions other issues in the diocese:

> Absence of employment and economic hardships that were aggravated especially during the last two years create adverse situation for the youth for both staying in the area and marrying. We have got many students with bachelor and master's degrees that look for jobs and often apply to us. We hope to raise this issue at the special state committee on minorities to support this need (interview with Archimandrite Chiftchyan).

Thus, in sum, the diocese of Tabriz, while being one of the oldest Iranian-Armenian communities and hosting more than 100 churches and vast properties, today faces gradual devastation. The Armenians of Atrpatakan prefer to settle in Tehran or other cities, or opt for emigration, mostly to the west. Today the issue of the preservation of Armenian schools in Atrpatakan is acute since there are not enough students to justify their functioning.

In general, Iranian-Armenians today face serious challenges. Since the number of Iranian-Armenians has largely decreased, Armenian pre-schools and schools in Iran are being closed. Moreover, the Armenian schools

succumb in quality to Iranian schools, and as a result an Iranian-Armenian adolescent has less chance to enter a university if graduated from an Armenian school.

According to the leader of the Tabriz diocese, Archbishop Sepuh,

> the main issue of the Armenians in Iran is the educational life where we have difficulties; the state sometimes supports us, and sometimes – not. Sometimes the difficulties stay as such despite our numerous petitions. They show us outwardly friendliness but I would not claim that there is a special policy to ease our situation in spite the created impression (interview with Archbishop Sepuh).

These issues are present in all three dioceses. It is worth nothing that the Iranian-Armenian community, after having lived in Iran for so many years, has come up with a self-preservation and non-assimilation mechanism of non-intervention in the domestic cultural processes, as well as by strictly prohibiting a marriage between an Armenian and a foreigner, especially a non-Christian. This is perhaps the most important factor for self-preservation.

The last point has often been mentioned by Iranian-Armenian political and cultural actors interviewed for the article. Although the question may be simple and logical in both the European and US communities, there is a very harsh response to this issue in Iran. Notably, Armenians marry persons of other nationalities in Turkey and Arab countries, but not in Iran. Ninety-nine per cent of respondents were men above the age of 40 years, and 100 per cent answered in the negative to the following question: 'What is the attitude of the community towards a marriage of an Armenian and a non-Armenian, and if that person can stay as a member of the community?'

Individual conversations with community members revealed that such marriages do take place but the newly-weds are always expelled from the community. The problem is that not only that person but also their children are not accepted by the community. According to Karen Khanlaryan:

> Muslims also do not welcome marriages with non-Muslims. Later, their children are not accepted by our community, and have issues with ethnic and religious identity, they get marry with difficulties. These marginalised families are often destined to decay. I think that especially the church should express special care towards this problem (interview with Khanlaryan).

Another interesting fact is that, in order to maintain its cultural front, Iranian-Armenians try not to become involved in Persian or Muslim culture. This hypothesis was tested during the field research and non-formal interviews with representatives of the Armenian community. These conversations revealed that most Iranian-Armenians did not watch Iranian films and were not aware of globally-famous films such as *Divorce Iranian style, Two women, My Tehran for sale, Children of heaven*, *About Elly, The Salesman* and others, and were not even interested in Iranian arts and culture as such. Thus, despite the fact that they reside in Iran, Iranian-Armenians try to limit their perceptions on cinema and theatre as another strategy to maintain their identity.

The Armenian parliamentarian at the IRI *Majlis*, Karen Khanlaryan, argues that Armenian 'community life is limited because it is based on

amateurism, ie non-professional system as a result of not sufficient funds'. He adds that Armenians try not to have any contact with Iranian art and culture, and do their best to study and engage with Armenian art and culture by cooperating with the Republic of Armenia. Hence, Iranian-Armenians try to evade assimilation by behaving as closed societies or ghettos.

5 Emigration of Armenians from the Islamic Republic of Iran

Emigration from Iran reached a large scale after the Islamic revolution. The revolution and the events that followed, including the establishment of an Islamic government following Shari'a law and the eight-year war between Iran and Iraq, served as catalysts for a mass exodus of much of Iran's established middle class. By 1988, the World Refugee Survey reported Iran to be tenth among countries with the highest source of refugees. Iranians who immigrated to the United States after the revolution were different from those who had done so in the preceding 25 years. The new immigrants no longer were principally individual students and professionals, but middle and upper-class families, most of whom were political refugees and exiles. They were diverse in their religious, political and ethnic background and their reasons for leaving Iran varied. They included families associated with the previous regime as members of the government and the military, and owners of large businesses. This second wave also included a disproportionately high number of ethnic and religious minorities such as Sunni Muslims, Christians, Jews, Baha'is and Zoroastrians, all of whom left in fear of religious persecution (Iranian Americans).

In the 1980s the Armenian population was estimated at around 200 0000, but there are no reliable updated statistics on their numbers since the recent upsurge in emigration began (Stepanian 2010). The emigration of Armenians was not an exodus form motherland, as most Armenians generally view Iran as their birth place. Iranian-Armenians residing here consider themselves the descendants of those deported to Iran throughout history.

Unfortunately, Armenia was not always the destination of Armenian emigrants from Iran after the Islamic revolution and Iran-Iraq war. It is most probably related to the non-stable socio-economic situation in Armenia, a certain level of corruption, a lack of justice and the absence of a resolution to the Nagorno-Karabakh conflict. The influx of Iranian-Armenians into Armenia is much lower in comparison to their flow to the United States, Germany and France, which have a rich history of accommodating Armenian communities. During the first years of independence of the Republic of Armenia, a substantial section of Iranian-Armenians decided to view Armenia as their destination. However, after some time most of these emigrated from Armenia due to harsh social conditions.

As is the case with other citizens of Iran, before the Islamic revolution Armenians migrated from Iran for better education opportunities, whereas after the revolution there were a plethora of reasons to leave. At the same time it seemed that after the Iran-Iraq war the emigration wave dropped and those Armenians that stayed up to that point had already accustomed

themselves to the situation and would remain in the country. However, after the Islamic revolution the Hebrew Immigrant Aid Society (HIAS),[1] an organisation registered in the United States, started to organise and support the emigration of Jews from Iran. They later started facilitating the emigration of other non-Muslim groups, thus propelling the next wave of Iranian-Armenians' exodus. In general, they transfer non-Muslims to the west and later work on their family reunification. When discussing the reasons and the supporting factors of the Armenian emigration, the leader of Isfahan diocese, Bishop Babken Charyan, says the following:

> The problem of Armenians' emigration is rather immense in all three dioceses. They leave mostly to the West. The Jewish HIAS organisation organises the logistical issues of moving Armenians to the West for little price and thus works towards de-Armenising Iran, as a way to accomplish their shadowy plans. Even the Iranian government is not able to stop the activities of this organisation (interview with Archbishop Charyan).

While not traditionally considered refugees, the US Congress created a special refugee status for religious minorities from the former Soviet Union, which now allows for the resettlement of Jews, Christians and Baha'is from Iran (HIAS: History). As a matter of fact, their official mission is to support and provide aid to the immigrants and refugees. According to the open information, the US government allocates around US $3 million to HIAS in order to support the exodus of non-Muslim religious minorities from Iran. Thus, most of the Armenian and Assyrian emigrants of the mid-1990s up to 2015 have left Iran through this organisation.

When the application is approved, HIAS pays US $3 000 for each family member, and then they all travel to Austria where they stay until all the legalities have been finalised and they can then leave for the United States (Stepanian 2010). Iranian hardliners naturally view HIAS with suspicion, but the country's government has turned a blind eye to this channel of emigration, since in principle ridding the country of non-Muslims without major repercussions is convenient to Iranese authorities. According to the representatives of the Iranian-Armenian community, approximately 6 000 Armenians have left Iran for the United States through HIAS (Jewish Support to Iranian-Armenians to migrate to the US 2008).

The HIAS has discontinued its programme of moving non-Muslims out of Iran. The reason is that US President Donald Trump announced during his election campaign that he would prohibit immigration from several countries to the United States. In September 2017 President Trump banned or restricted visas to travel to the United States from eight countries, the next step in what began as his travel ban from six Muslim nations, soon after taking office in January 2017.

The new presidential order retains restrictions on five of the six countries (Iran, Libya, Somalia, Syria and Yemen), lifts restrictions on visitors from the Sudan and adds new restrictions on visitors and immigrants from Chad, North Korea and Venezuela. In a Sunday night proclamation, Trump blocked the issuance of all visas from North Korea

1 Hebrew Immigrant Aid Society, established in 1881 in order to support Jewish immigrants. Given the decrease in the number of Jewish immigrants, the organisation started supporting the emigration of Christians. In particular, HIAS spent substantial funds to organise the emigration of Christians from Iran in the 1990s.

and Syria, while blocking nearly all visas from Iran except those intended for students and exchange visitors. The issuance of all immigrant visas and business and tourist visas was suspended from Chad, Libya and Yemen (NBC News).

Before President Trump entered office, similar refugee cases under the Lautenberg Amendment had an approval rate of close to 100 per cent. Prior to arriving in Vienna, the refugees undergo an initial screening, after which Austria issues transit visas at the request of the State Department. Once in Austria, the refugees are interviewed by US authorities (Foreign Policy).

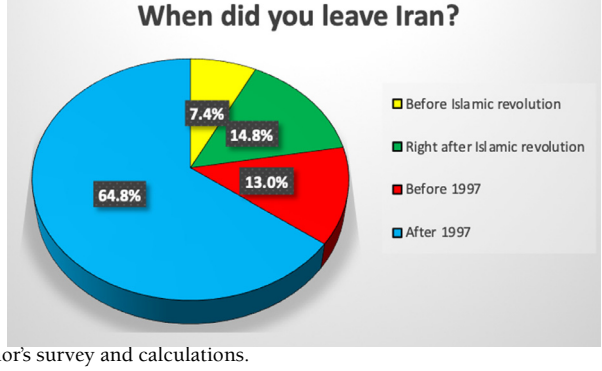
Thus, the United States changed the immigration policy, and because of this shift, hundreds of Christians from Iran, mostly Armenians, wait in Vienna in an uncertain status. They will most probably have to return to Iran, where they will not be welcomed.

A spokesperson for the State Department told Foreign Policy that the applications for resettlement had been rejected by the Department of Homeland Security but declined to provide a reason or other details. The Department of Homeland Security did not respond to requests for comment. 'These individuals were subject to the same rigorous process for resettlement as all refugees and, following input from all relevant departments and agencies, the applications for resettlement were denied' (Foreign Policy).

While Armenians in Iran manage to maintain their identity through restricting marriages with other ethnicities and preserving all the characteristics of Armenian traditional families, after moving to the United States or Europe they face this challenge in a more ambiguous situation. In Iran restrictions on marriages are relatively simple because of the Muslim environment, whereas in the United States or Europe the fact of being surrounded by Christians accelerates the assimilation process. This is not the only issue mentioned by ex-Iranian-Armenian respondents in the survey organised for the purposes of this article.

More than 100 subjects completed the questionnaire of the quantitative web-based survey implemented during March to June 2018, targeting those Iranian-Armenians that had emigrated from Iran.

Figure 1: *When did you leave Iran?*



Source: Author's survey and calculations.

In response to the question 'When did you leave Iran?' 7,4 per cent of those surveyed indicated that they had emigrated from Iran prior to the Islamic revolution; 14,8 per cent left Iran directly after the revolution; 13 per cent emigrated before 1997 (the launch of the activities of HIAS in Iran); and 64,8 per cent exited the country after 1997. These responses have both objective and subjective interpretations. Most of those that left Iran because of the Islamic revolution currently are seniors; most of them do not operate computers and do not make use of social networks. However, it is worth noting that most of the emigrants left Iran after 1997, indicating that it was as a result of the activities of HIAS.

In response to the question 'What was the reason to leave Iran?', most of the respondents (27,8 per cent) indicated a fear for the future in the Islamic Republic, which is confirmation of the hypothesis that during that period Christian Armenians had no idea how they would continue living in a theocratic country. Thirteen per cent of those surveyed mentioned higher education since their chosen specialisation was not developed in Iran. Interestingly, 9,3 per cent answered that the reason for migration was a pure wish to live in the west, that is, they had no anxiety about living in a state with an Islamic value system; they merely wanted to live in the west.

Naturally, each of those surveyed had to overcome certain challenges in the new host country, and in the case of 27,8 per cent these were living conditions; for 25,9 per cent cultural shock; for 16,6 per cent language skills; and 9,3 per cent had legal issues to solve.

Two-thirds of the respondents (64,8 per cent) claimed that they felt themselves completely integrated in the new host country. Incidentally, most of these responses came from those emigrants who permanently live in Armenia.

6 Conclusion

As expected, the research reveals that the Iranian-Armenian community today is relatively weakened, and the harsh socio-economic conditions often lead to emigration, in most cases the preferred destination being the United States and European countries.

Those who opt to stay in their country of birth, namely, Iran, apply several approaches for keeping their Armenian identities, namely:

- non-acceptance of mixed marriages, including those with non-Armenian Christians such as Assyrians from northern provinces of Iran; marrying a Muslim is more often disallowed by community norms;
- adherence to Iranian-Armenian cultural groups and artwork, and a disregard of Iranian cultural values; and
- cooperation with cultural and academic circles from Armenia that has the effect of 'fresh oxygen'.

The article established that the greatest challenge for Iranian-Armenians was emigration that over the years had grown in magnitude. Unfortunately, neither the community, nor the prelacy, nor the state has strategised a mechanism to prevent this flow or to direct it towards Armenia.

The emigration of Iranian-Armenians consisted of two major waves. The first wave started directly after the Islamic revolution of 1978-1979, mainly occasioned by a fear of the new regime and uncertainty. The second wave was facilitated by the activities of the Jewish HIAS organisation that supported the emigration of non-Muslims from Iran.

A considerable number of Armenians faced serious language and cultural challenges in their new host countries. Naturally, the younger generation has overcome those issues much more seamlessly than the seniors. As many migrants and refugees worldwide, during the first period of their stay in the new country, most of the emigrants were not able to find employment according to their professions and contented themselves with whatever was available.

The research provided interesting data about another challenge that requires a specifically dedicated study, namely, issues around the Armenian schools. In reality, these are called such only because they offer one or two additional courses on Armenian studies. A significant number of interviewees stated that the graduates of those schools were not competitive with their peers in neither Iran nor Armenia. In the first case, the general courses in Farsi are being taught by mediocre teachers since the best teachers are not being directed to the Armenian schools. In the second case, students are equipped with knowledge in classical Eastern-Armenian orthography that is not readily applied in Armenia. As a result, graduates of those Armenian schools mostly fail to enter further higher educational institutions.

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Ingrid Carlberg *Raoul Wallenberg: The Man Who Saved Thousands of Hungarian Jews from the Holocaust* (with an introduction by Kofi Annan) (original in Swedish)

Norstedts 2012; Editions Limited, translated hardcover edition (2016); MacLehose Press, translated paperback edition (2017) 640 pages

Jan Mutton*

In times of growing nationalism, arrogance and bullying in international relations, it is refreshing to read the biography of a man, the Swede Raoul Wallenberg, who, almost by coincidence and without any predestination, was faced with the horrors of genocide and human rights abuses and who seized the moment to save thousands of Jews from the Nazi Holocaust in Budapest, the capital of Hungary. To do so, he used imagination and determination, only to be trapped in the end and to disappear, at the age of 33 years, into the prison system of the Soviet Union after the liberation of Budapest by the Red Army in 1945.

In 2012 Ingrid Carlberg wrote an extensive, well-researched and well-documented biography of Wallenberg including a bibliography and lists of sources and interviews. It was translated in 2015 into English by Ebba Segerberg and published in paperback by MacLehose Press in London. The introduction to the English edition is by former United Nations (UN) Secretary-General, Kofi Annan, who died in 2018 and who was married to Wallenberg's niece.

The biography may be subdivided in three parts. In part 1, Carlberg gives one a full but concise picture of Wallenberg's family background, his education and training and his professional life in as much as it is necessary to understand the character of the man who jumped into action to save lives. Part 2 is, from a human rights point of view, the most interesting as it explains in detail Wallenberg's *modus operandi*, the procedures he developed and the imagination he displayed to work as effectively as possible. Part 3 covers the endless search for Wallenberg after his disappearance from Budapest into the Soviet prison system, mainly by his family as Swedish and international official channels were, within the context of the Cold War, hesitant to confront Moscow.

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Throughout the biography Carlberg reminds us of a number of interesting background issues which give us a better understanding of that dark period of World War II. First, there is the late reaction of the Allies, who were at war with Germany, such as the United States of America (US) and the United Kingdom (UK), to become involved with the Jewish question. Second, there is the issue of the role that Sweden played as 'neutral country' with respect to Nazi Germany seeing post-war Germany as a viable democratic alternative for the rising power of the Soviet Union. This explains, for example, why German companies were placed under temporary Swedish cover during the war, to protect them from reprisals by the Allies, or why German troop transports were allowed to cross through Sweden on their way to occupy Norway. Third, there is a good description of the special place Hungary occupied during the war as an ally of Germany. Fourth, this biography describes well how Sweden tried to remain neutral after the war and develop a constructive relationship with the Soviet Union at the expense of diplomatic initiatives to free Wallenberg from Soviet prisons.

Raoul Wallenberg was born in Stockholm on 4 August 1912. Although his parents were not very wealthy, he grew up in a well-educated and cultured upper-class family, the grandson of Sweden's envoy to Japan and a junior relative in the Swedish Wallenberg banking dynasty. It must be emphasised that these privileged relations did not play an important role in his professional life, nor in his diplomatic mission in Hungary or in the search for him in Soviet prisons. On the contrary, the ambiguous role which the Wallenberg dynasty and 'neutral' Sweden had played *vis-à-vis* Nazi Germany may have played against him when the Soviets decided to capture and imprison him. Wallenberg was very much his own man, which explains the determination and courage with which he operated in Budapest.

Carlberg describes well how nothing in Wallenberg's formative years, apart from a strong interest in international politics and a natural empathy for injustice, hinted at the heroism he was to display during his mission in Hungary. On the contrary, he was a rather average young man who had trained, not as a diplomat or as a lawyer, but as an architect. Following his studies, in the mid-1930s, he gained commercial experience in South Africa and Palestine. Both experiences broadened his thinking and made him sensitive to social injustice and inequality in the world, the racial segregation in South Africa and the tension between Jewish immigrants and the local populations in Palestine. Upon his return to Sweden, at a tense time of rising Nazi political power and German military build-up in Europe, Wallenberg entered into several business ventures, finally becoming a partner in the Mid-European Trading Company, which specialised in food imports from Hungary.

The author explains well how and why the Jewish question only became an urgent topic in the latter part of the war. This clarifies why Wallenberg only arrived in Budapest towards the end of the war, a few months before Soviet troops liberated Hungary. In this regard she points at the lack of general awareness because the horrors took place behind the curtain of Nazi secrecy. The first report on the extent of the Holocaust only appeared among the Allies in 1942. She also explains how the main focus of the Allies was on winning the war and having peace rather than be sidetracked by humanitarian rescue operations.

The rising awareness of the Jewish question in the second half of the war brought neutral Sweden more into the orbit of the Allied forces such as the US and the UK, and led, for example, to efforts to save the Norwegian Jews from the Holocaust. Later on, it would allow the Swedes to send Wallenberg as a diplomat to become involved in Jewish rescue operations in Hungary. In the US, internal pressure led President Roosevelt to establish the War Refugee Board (WRB), an independent authority, funded by US-based Jewish organisations, to lead Jewish rescue operations in Europe. However, the WRB went beyond rescue in Europe and was also interested in developing a post-war reconstruction programme for the continent. It is important that the author drew our attention to this dimension as it may have pushed the Soviets, who were weary of Western intervention in post-war Eastern Europe and their future sphere of influence, to capture Wallenberg after the liberation of Budapest.

Carlberg equally explains well the special role played by Hungary as an ally of Nazi Germany, fighting with the Germans against the Soviet Union but by and large maintaining an independent domestic policy which left the Hungarian Jews, unlike those in the rest of Nazi-occupied Europe, mostly untouched. This changed, however, when Germany, frustrated with the liberal Hungarian government and under pressure from mounting war losses, in March 1944 militarily occupied Hungary and installed a pro-German Hungarian government. The Holocaust was now suddenly also facing the Hungarian Jews. In a short period of time, more than 400 000 Jews were deported to the Nazi gas chambers.

Sweden, as were Switzerland, Portugal and Turkey, was neutral in the war. It had an embassy in Budapest and, consequently, was the indicated partner to be approached by the WRB for a rescue operation in Hungary. At that time Wallenberg was a young businessman involved in trade with Hungary. It did not take long for diplomatic, political and economic circles in Stockholm to identify him as the ideal man to take on the WRB work, given his enterprising character, his past international exposure and his command of the English and German languages. Sweden would offer the diplomatic cover and add him as a diplomat, as special humanitarian attaché, to their embassy in Budapest. Sweden paid for the administrative costs while the WRB gave him the mandate and paid for the operational costs. He arrived in Hungary in July 1944. He would disappear in January 1945.

When Wallenberg took up his post as humanitarian attaché in the Swedish embassy in Budapest, recent deportations of Jews had been enormous. Of the estimated 700 000 Jews, only about 250 000 were left in the country, 200 000 of which were supposed to live in Budapest. At the time of his arrival, deportations had temporarily ceased but internment camps had multiplied and Jews were still sent to labour camps. Their general situation was dire and the sword of extinction continuously hung over them. At that time, only a few hundred were under Swedish protection, and approximately 7 000 were awaiting transfer to Palestine on the basis of Swiss emigration certificates.

Carlberg describes how Wallenberg, in the face of the urgency and the magnitude of the situation, approached his mission not as a conventional diplomat but rather as a businessman, clear-sighted, intelligent, courageous, undeterred, determined, independent and driven, even with bluff, to obtain results. He always remained careful, though, never to

compromise the credibility of the Swedish diplomatic service. His office soon grew to a few hundred staffers, funded by Sweden. Fortunately, the political climate allowed him to move around, to make contacts and to set up his rescue operation. He built a network of contacts that covered all political tendencies in Budapest, ranging from the Jewish community and Jewish organisations to the government in place, the security institutions, the Nazi occupier as well as anti-Nazi political organisations and his colleagues in humanitarian work, especially the Red Cross and the Swiss embassy.

Wallenberg very soon realised that it would be impossible to find a solution for all Jews in Hungary, and decided to concentrate his efforts on the approximately 200 000 Jews in Budapest. He realised that the instrument of protection, so far used by the Swedes, namely, a protection certificate, delivered on the basis of connections with Sweden and stating that a person was on a collective passport, aroused the suspicion of the German occupier and was too cumbersome as a tool in the situation facing him.

Taking the Jews out of the country indeed seemed impossible. Therefore, they needed to be protected locally. Keeping them in Hungary was also less costly than transporting them to Sweden.

As a consequence Wallenberg developed a new document, namely, a 'protective passport' which would not be the official passport or a vague protection certificate, but which would appear very professional and would be printed on embassy paper, with photographs, Swedish emblems, signatures and embassy stamps, satisfying both the Hungarian and Swedish authorities and not provoking the wrath of the Nazi occupier. It was a letter of promise, stating that a person intended to depart for Sweden and would, until that time – highly unlikely given the disrupted transport systems – remain under Swedish protection. These letters were only valid for travel in combination with a collective passport. Such letters could be mass-produced. Wallenberg, however, ensured that the credibility of the document would not be jeopardised, that Swedish diplomacy remained respected, that no corruption took place and that each individual application was examined thoroughly. By being in possession of such a document, Jews could leave internment camps and be housed in Swedish protection buildings.

The second part of the plan, as Carlberg describes it, was to find accommodation for as many Jews as possible, even for those without a 'protective passport', in houses abandoned by their owners or in properties made available by the Hungarian authorities, and to place these people under Swedish diplomatic protection. By August 1944, approximately 40 houses in the international ghetto had been made available to house some 10 000 Jews under either Swedish diplomatic protection or Swedish Red Cross protection. Together with housing came the challenge of the distribution of food, clothes and medicine, not only for the Jews in Swedish protection houses but also for Jews in the international ghetto and for those in internment camps in Budapest or in labour camps elsewhere in the country.

By October 1944 Wallenberg had established a well-oiled protection mechanism. However, his life became more complicated when the Nazi occupier became frustrated by Hungary's signing of a ceasefire with the

Soviets, resumed the deportation of Jews and installed a brutal local government of their choice. Wallenberg's determination and enthusiasm drove him beyond the mere protection of Jews through a Swedish protection process and pushed him to intervene on their behalf in many respects, in the face of deportations, extra-judicial killings and internment in labour camps.

By the time the war ended, according to Carlberg's biography, roughly 70 000 Jews had survived in the main ghetto of Budapest, and approximately 35 000 in the Swedish protection houses. It could be said that even though hundreds of thousands of Hungarian Jews had perished, the efforts of one single man, supported by the Swedes and the WRB, in a few months had saved approximately 15 000 Jews.

While advancing to liberate Europe, the Soviet Union kept a very close watch on events taking place, as it wanted to bring large parts of Eastern Europe into the Soviet sphere of influence. The Soviets, and Stalin in particular, had always been concerned about Wallenberg and the operations of the American WRB, the Swedish connections with Germany early on in the war, Wallenberg's contacts and negotiations with Nazi authorities in Budapest over the Jewish question and his commitment to the Jewish plight in general. It should be recalled that the Soviet Union had known its own persecution of Jews.

When the Russians arrived in Budapest in mid-January 1945, Wallenberg wished to discuss with them the return of Jewish property to their rightful owners. He also wanted to discuss his proposal for a general reconstruction programme for the country. Wallenberg never returned from his meeting with the Russian military. He was taken prisoner and, as was discovered later, brought to Moscow upon direct instructions from Stalin.

In the third part of the book Ingrid Carlberg describes the relentless efforts, mainly by Wallenberg's parents, to establish his whereabouts. They never did, and never found closure. In January 1945 Wallenberg simply disappeared from Budapest and was never seen or heard of again outside the Soviet Union.

Initially, for some years the Soviets denied any knowledge about Wallenberg. They claimed that he had remained in Hungary, indirectly suggesting that he had been killed by the Nazis or by the pro-Nazi government installed towards the end of the war and in place at the time of the liberation by the Soviets. For a while it was not difficult for the Soviets to maintain this position as several people, for unknown reasons, claimed to have seen him around Budapest or in Hungary. Such statements gradually subsided, however, since they could not be corroborated by facts.

However, as the years passed it became more and more clear that Wallenberg was held prisoner in the Soviet Union. Several prisoners of war, who had been liberated from the Soviet Union in the years following the war, testified having seen or heard or having been in contact with Wallenberg in several Soviet prisons. When conflicting statements also surfaced by persons connected with the Soviet system, authorities could no longer remain in denial. They finally construed some evidence and

admitted that he had died in prison some years after the war. The family never accepted this explanation. They continued to fight, but in vain.

They were rather alone in this struggle. Their own Swedish government remained aloof throughout the ensuing decades. Generally speaking, Sweden wanted to build relations as strong as possible with the Soviet Union and wanted to be a bridge between the Soviet Union and the West during the Cold War. Wallenberg fell victim to global politics. In the second place, as a matter of ethical policy, Stockholm continued to refuse an exchange between Wallenberg and Soviet prisoners in Sweden, claiming that human beings could not be the object of barter.

For a long time, also internationally, the Wallenberg case did not arouse much emotion. It took the more ethical and human rights-based administration of President Jimmy Carter of the US at the end of the 1970s to increase international attention. It cannot be said that any clarification of Wallenberg's whereabouts ensued but, at least, he started receiving the international recognition he deserved. He slowly became recognised as one of history's heroes in the protection against genocide and crimes against humanity. Around the world streets and squares were named after him but, most importantly, he was made an 'honorary citizen' of countries such as Australia, Canada, Israel and the US, where he became only the second person to be so distinguished since Winston Churchill.

This biography should be read, especially by human rights students and practitioners, as it invigorates and shows that, even when circumstances work against you, there is always a way to fight for the defence of human rights and to save people from atrocities.

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Editorial

The first volume of the *Global Campus Human Rights Journal* appeared in 2017. This is thus the fifth issue of the *Global Campus Human Rights Journal*.

This volume consists of two parts.

The first part provides a special focus on 'technology and human rights', an area of growing interest and concern. In seven articles devoted to this topic, authors from across the globe investigate this issue. These seven articles are based on papers that were presented at an event of the Global Campus of Human Rights at which students, lecturers and other scholars interrogated the topic 'The impact of new technologies on human rights'. The Global Campus of Human Rights consists of the Global Campus Europe, South East Europe, Africa, Asia Pacific, Caucasus, Latin America and the Arab World, with the participation of post-graduate students from their respective Master's programmes in Human Rights and Democracy.

The Centre of International Studies of the University of San Martin (CIEP-UNSAM), which headquarters the Global Campus Latin American programme, in May 2019 hosted the 2019 'Global Classroom' in Buenos Aires, Argentina. Experts and representatives from governmental, inter-governmental and non-governmental agencies and organisations, including the Regional Office of the UN High Commissioner for Human Rights, UNESCO, ILO, the Delegation of the European Union in Buenos Aires and the UN Rapporteur on the Right to Privacy attended the event. The editors of this 'special focus' part of the *Journal*, Veronica Gomez, Director for Education Global Campus Latin America, and Diego Lopez, Academic Coordinator Global Campus Latin America, also provided substantive guidance in preparing and facilitating the event.

As in earlier issues of the *Journal*, the second part of this issue of the *Journal* contains a discussion of 'recent developments' in the fields of human rights and democratisation in five of the regions covered by the Global Campus of Human Rights. In this issue, developments during 2018 in five regions are covered: Europe, the Asia Pacific, the countries making up the Eastern Partnership, sub-Saharan Africa and South East Europe.

In Europe, the ability of European institutions to respond appropriately to the challenges posed by migration and quests for asylum is examined. The authors analyse the Global Compact on Migration with respect to 'climate migrants' and 'migrants in vulnerable situations'. They also identify and discuss crucial developments in this context such the criminalisation of search and rescue NGOs, the transfer of search and rescue responsibilities to third countries, and the outsourcing of migration-related responsibilities. In the Asia Pacific, issues such as the treatment of the Rohingya by the Myanmar state and the violence of the Duterte regime in the Philippines remained of concern during 2018. The

authors also shine a light on some positive developments, such as the voting out of power of the corrupt governing party in Malaysia, despite a ruling-party controlled media and various manipulations of the electoral system. A review of developments during 2018 in the Eastern Partnership reveals an ambiguous picture of both achievements and perplexing challenges. In particular, the authors deal with human rights with the focus on child protection in three selected countries: Armenia, Georgia and Ukraine. The article focuses on changes in political transformation both in domestic and international relations, economic declines and social transformations caused by the aftermath of the conflicts with Russia, as well as the advancements in fulfilling the bilateral agendas. The contribution dealing with the status of human rights and democratisation in sub-Saharan Africa discusses the African Continental Free Trade Agreement, adopted in 2018, and consider whether it can lead to more democratic governance and respect for the rule of law in African countries. It also focuses on developments within the three main African Union human rights bodies: the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

Editorial of special focus 'The impact of new technologies on human rights' (2019) 3 *Global Campus Human Rights Journal* ix-xi
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Editorial of special focus: The impact of new technologies on human rights

Diego Lopez and Veronica Gomez***

The profusion of new technologies and of information and communication technologies in many aspects of individual and collective life is one of the defining features of our times. The advancement of new technologies in the twenty-first century – also known as the fourth industrial revolution – along with the expansion of the internet, social media and artificial intelligence has a direct impact on the way in which the public and private sectors and individuals interact. These new and transformational environments present opportunities and challenges when their practices are analysed in terms of rights.

The nature and speed of these developments have raised important questions. Among these is the impact of new technologies on the traditional notions of sovereignty and the new challenge of digital sovereignty; their impact on the dynamics of democracy and government; the challenges regarding human rights protection systems with respect to non-state actors in the realm of new technologies; the transformation of labour forces, social production relations and markets (commercial, financial, and so forth); access to education and to information in terms of use, benefit, profit and development; and the impact on the social fabric in terms of communicational dynamics, consumer behaviour, practices and identities (ethnicity, nationality, gender, class, religion, ideology).

During its 2019 Global Classroom,[1] the Global Campus of Human Rights regional programmes assessed the impact of new technologies on human rights and democracy by mapping and analysing regional and global trends. The conceptualisation of these challenges meant moving

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1 The 2019 Global Classroom involved several months of research at the seven Global Campus regional headquarters located at Global Campus Europe, South East Europe, Africa, Asia-Pacific, Caucasus, Latin America and Arab World, with the participation of post-graduate students from their respective Master's in Human Rights and Democracy. The process culminated in a face-to-face international conference in Buenos Aires, hosted by the Centre of International Studies of the University of San Martin (CIEP-UNSAM), headquarters of Global Campus Latin America. The event, held at the Legislative Palace of the Autonomous City of Buenos Aires, was attended by experts and representatives from governmental, inter-governmental and non-governmental agencies and organisations, including the Regional Office of the UN High Commissioner for Human Rights, UNESCO, ILO, and the Delegation of the EU in Buenos Aires and the UN Rapporteur on the Right to Privacy.

away from traditional, state-centric conceptions; understanding new trends that permeate human existence in terms of the interface between technology, development and human rights; and promoting a new integrated approach to advancing development within and across nations.

The research outcomes have been summarised in the articles presented in this edition of the *Global Campus Human Rights Journal*. Each article provides a regional perspective on a particular issue and they are guided by research questions, including the identification of long-term structural challenges and at the national and regional level; the identification of actors and of conditions for the emergence of new risks to the enjoyment of rights; and the analysis of viable responses. The articles intend to understand the nexus between individual and collective rights, human development and new technologies and to analyse responses/initiatives/activities that can or should be supported when responding to the identified challenges and risks.

The contribution from Global Campus Africa (HRDA) analyses state-sponsored internet shutdowns in Zimbabwe, Sudan, Cameroon, Chad and the Democratic Republic of the Congo (DRC) in earlier 2019 coinciding with major political events, including mass protests and elections. In light of these incidents, the article addresses the role of information and communication technologies in human development and probes the intersections of the right to development and internet shutdowns in Africa. After analysing the invocation of judicial remedies in some jurisdictions and the role of the private section in light of corporate responsibility, the article proposes a multi-stakeholder approach to face these challenges.

The contribution from Global Campus Europe reviews technological developments such as thermal imaging, biometric data, virtual reality, artificial intelligence, and drones and their deployment at the service of action at the external border of the European Union (EU) in light of the regulatory framework on data privacy in the EU and the General Data Protection Regulation (GDPR). The article explores how vulnerable groups are to be affected by the collection of biometrics, how algorithms are repositories reflecting the manufacturer's bias, and proposes a diverse workforce as a tool to face the proliferation of bias.

The contribution from Global Campus South East Europe addresses the issue of online assemblies in Croatia, Serbia, Bosnia and Herzegovina and Turkey. After exploring applicable domestic and international law, the article assesses the role of the state in providing and facilitating access to the internet and enabling online assemblies. The article analyses the surveillance of digital activities and security and its relation to online and offline assemblies.

The contribution from Global Campus Arab World analyses digital surveillance companies based in democratic countries and the use of their services by oppressive regimes, from monitoring centres facilitating mass surveillance on all telecommunications, to firewalls that filter the contents that users are allowed to access, and spyware that tap into the information stored in any personal device connected to the internet. The article assesses the volume of trade in these repression tools and the market value of surveillance companies operating in states that portrayed themselves as democracies.

The contribution from Global Campus Latin America presents a number of case studies on challenges and opportunities connected with information and communication technologies and their impact on social movements, litigation, politics and the enjoyment of individual rights. It also refers to the attempts to promote the legal regulation of the digital sphere in Colombia, Argentina and Ecuador. The analysis highlights the gap between citizens with access to technology and connectivity and those left behind.

The contribution of Global Campus Asia-Pacific focuses on digital authoritarianism as a state practice involving the invasion of privacy, the denial of access to information while promoting the spreading of misinformation, and the limitation of expression and participation. The article presents a number of case studies on arbitrary surveillance; secrecy and disinformation; fake news and misinformation, hate speech, racism and discrimination; troll armies on controlling freedom of expression and shaping public opinion; communication shutdowns; blocking and content removal by government cyber-control centres – all these leading to violations of freedom of expression – and other serious violations involving arrests, detention, gagging and killings or assassinations.

The contribution from Global Campus Caucasus aims at identifying long-term structural challenges to human rights in Armenia, Belarus and the Kyrgyz Republic with a focus on cyber security, freedom of expression, freedom of speech, access to information and data protection policies. On the one hand, the study reveals that the development of new technologies increased the accessibility of people to information in terms of e-governance programmes. Moreover, it shows that political mobilisation and participation, and freedom of expression have been enhanced due to social media developments. On the other hand, it identifies the growing challenges in terms of hate speech online, media manipulation, the spreading of disinformation, data leakage and cyber security. The piece presents a number of recommendations to stakeholders with the modernisation of legal framework as a basis, followed by unified regulations, the protection of personal data, guaranteed security in the digital environment, e-education, and culminating in the legitimate monitoring of human rights violations.

The above contributions and the general conversation leave us with the challenge of drawing equations to balance the impact of new technologies in the exercise of rights, among these the prohibition of discrimination, social rights and the access to public services, privacy and data protection, fair trial and due process, freedom of expression and freedom of assembly and association.

Editors

D Mburu Nyokabi, N Diallo, NW Ntesang, TK White & T Ilori 'The right to development and internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa' (2019) 3 *Global Campus Human Rights Journal* 147-172 https://doi.org/20.500.11825/1582

The right to development and internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa

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Abstract: *The right to development is generally assessed as an all-inclusive right. It is regarded as a rallying right in which all other rights are mostly realised. The progressive nature of the right to development in realising other rights as a benchmark to a society's development has become popular even beyond legal jurisprudence to include other qualitative fields of knowledge. The role played by information and communications technology in the realisation of this right has also been acknowledged, particularly in the digital age. However, this progress has not been even across regions in the world. While some regions have experienced a fast-paced development due to ICT, several countries in Africa have been held back due to unfavourable state and non-state policies that have had negative impacts on human rights and democratic development on the continent. This article assesses the impact of ICT on the right to development, particularly as a rallying right, and the way in which the internet, a major component of ICT, has affected the right. The article especially considers the effects of network disruptions on human rights and democratic development that have become rife in the region. This study finds that there have been several human rights violations through ICT by many state and non-state actors in Africa. Most importantly, the article finds that these violations impede the right to development and pose threats to democratic development in the region. A conclusion is based on these findings and proffers feasible solutions to resolve the challenges posed by these violations.*

Key words: *right to development; Africa; information and communication technology; digital age; internet shutdowns; democratic development*

* This article is based on a paper prepared for and presented at the Global Classroom, a project of the Global Campus of Human Rights, Buenos Aires, Argentina, in May 2019.

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1 Introduction

The advent of information and communications technology (ICT) has amplified human interaction and globalisation. Therefore, human activities in all spheres of life are becoming fast-paced and redefined due to digitisation. This has also caused several developments, some of which are commendable while some, unfortunately, are undesirable (Goldsmith & Wu 2006). The internet as a major component of survival in the digital age has undergone several phases of development and over the decades many countries have been able to latch on to these developments for their socio-economic and political benefit. However, this has not been the same experience across the board, especially in many African countries. For example, of the 267 incidents of internet shutdown between 2016 and 2019, 46 have occurred in Africa (*Access Now* 2018). Several reports have linked these shutdowns to the arbitrariness of state power and very few to technical problems (CIPESA 2019). Due to the importance of the internet in the twenty-first century, not only can human development be accelerated, but democracy and human rights also have the opportunity of being improved across the world.

In the first month of 2019, and at the time of this study, five African countries had already recorded internet shutdowns. Zimbabwe, Sudan, Cameroon, Chad and the Democratic Republic of the Congo (DRC) have all experienced a shutdown at some point during this period, and the key feature of these shutdowns, as is typical of other shutdowns, is that they occur particularly when major political events such as mass protests or elections are taking place or are about to take place. These state-sponsored internet shutdowns, therefore, have been linked to the spate of democratic development in many African countries.

As a result of this connection, the article analyses the role of ICT in human development and probes the intersections of the right to development and internet shutdowns in Africa. It then considers how the right to development is being hampered by internet shutdowns on the continent and later proffers workable solutions that can address challenges posed.

2 An overview of the right to development, information communications technology and democratic development in Africa

At a global level, the right to development was regarded more as a collective right than an individual right (Villaroman 2010). It took the United Nations (UN) Declaration on the Right to Development (RTD Declaration), adopted in 1986, to formally revisit the right to development from an individual right perspective. This also in a way paved the way for more robust Global North-Global South relations as most developing countries were only beginning to rise above several decades of political instability which had caused socio-economic distress for most of these countries (Arts & Tamo 2016). This coincided with the adoption of the African Charter for Human and Peoples' Rights (African Charter) in 1981, which later entered into force a year after the RTD Declaration. To date, the African Charter in its article 22 remains the only regional framework

that imposes a duty on member states to ensure the right to development, with important cases that expand the jurisprudence of the right by the African Commission on Human and Peoples' Rights (African Commission).

The remarkable international awareness in soft law and treaties with respect to human rights, and particularly the right to development, also preceded the period when Africa experienced the third wave of democratisation – when more African countries adopted constitutional democracies and moved away from military regimes. What could be gleaned from this wave was the new constitutional culture that was the feature in most African states which caused for new institutionalised human rights systems. Some countries were able to ensure that not only civil and political rights were guaranteed, but that socio-economic rights were also protected and justiciable under these constitutions (Kibet & Fombad 2017). On civil and political rights, most constitutions began to impose term limits on public office holders, especially Presidents, and introduced more robust provisions for fundamental human rights in their constitutions (Posner & Young 2007). At least, between that period and 2018 many African countries have not only been able to invoke the constitutional limitation on term limits to force leaders from power that have exceeded their constitutionally-provided term limits, but a country such as South Africa is also regarded as one of the most improved jurisdictions in terms of socio-economic rights.

With respect to socioeconomic development, the Millennium Development Goals (MDGs), the Sustainable Development Goals (SDGs) have been regarded as an important means of achieving even development across countries. Even though the efforts of states in the implementation of SDGs vary, there is a global consensus that these goals are necessary in pushing for a more just and equitable society (Morton et al 2017). As a result, the connection between these SDGs, therefore, is tied to human rights development (Winkler & Williams 2017). Further probing this connection with respect to African countries, the right to development as defined under the African Charter states:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

This provision is capable of being read outside general human rights development due to the specific mention of socio-economic rights to the exclusion of other rights. However, a close reading of the Preamble of the African Charter reveals that there is a special relationship between civil and political rights and socio-economic rights, especially as it relates to the realisation of the right to development in Africa. The African Charter points out that '[c]ivil and political rights cannot be dissociated from economic, social and cultural rights … and that the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights'.[1]

1 Preamble to the ACHPR, para 8.

This settles the right to development as being not only a socio-economic right but also including civil and political rights under the African human rights system. This connection is necessary in understanding the role of ICT, as agreed to be an important aspect of human development and critical to the realisation of the right to development and the impact these have on human rights in general (Bankole et al 2001). It shows that the right to development in Africa includes the ability of citizens to access ICT for their utmost good and states' responsibility to ensure that this access is at all times guaranteed (Selian 2002). As a result, the importance of ICT in the realisation of the right to development and the right of the people to be part of such a process, including democratisation, has become an important connection to be made, especially in the digital age (Selian 2002).

As a critical and primary component in the democratisation process, the organisation of elections in Africa has played a significant role in driving democratic governments in countries such as South Africa, Senegal, Cape Verde and Mauritius. This has propelled the human rights project, particularly that of civil and political rights, because historically, the political transition in African states was a source of tensions, civil wars and military *coups* (Brown & Kaiser 2007). More recently, these elections, which in the past have been marred by violence and fraud, have been made forcefully transparent at least in the electoral process by the use of technologies (Nyabola 2018). The recently-concluded 2019 general elections in Nigeria were projected to the world by the active citizenry just as the case was in the 2015 and 2011 elections (Paradigm Initiative 2019). The same was the case in Uganda, Zimbabwe and the DRC, despite state-sponsored disruptions and attacks calculated at reducing the use of these technologies by citizens. Although the way in which digital technologies were able to play a role during these periods vary, it made the process more participatory because of the way citizen media was able to play a key role in urging political and governance audits during the elections.

These bold steps by citizens in getting more involved in the political process of their countries and also demanding more people-focused public policies may be regarded as a nuanced interpretation of the protection of the right to development. Through the enablement of ICT, many citizens have had the opportunity to demand more direct participation in governance by being able to assess power through hashtags and citizen media. What seemed to be a watershed moment for many African countries and digital technology was the Arab Spring which, through the brave act of one man, spread like wildfire across North Africa and some Middle East countries (Nyabola 2018). The effective spread of protests across the regions, made more global through the use of platforms such as Twitter, signalled the beginning of the end to a seemingly docile African citizen (Papacharissi 2014). The awakening, amplified by the internet, caused many autocratic leaders to become anxious and they have since chosen to respond in kind. Their response, together with the physical mauling of protesters and activists for more open and democratic systems, were internet shutdowns.

With Egypt also facing its fair share of the effects of the Arab Spring, it introduced a disingenuous means of stifling dissent following the footsteps of Guinea in 2007, through internet shutdowns (Ilori 2019). The importance of the internet as causing a people-focused and mass-driven

democratic development was captured by the state by the disruption of the infrastructure providing for such organisation against autocratic states. Due to the remnants of militarisation that remained in existence in most African countries despite the post-1990 constitutionalisation processes, many states also took to shutting down the internet, mainly during protests, to discourage people-centred organisations, and also during elections to assert information controls usually calculated to encourage electoral fraud and political violence (Ilori 2019).

A study recently conducted has revealed that of the 22 countries that have shut down the internet during the past five years, 77 per cent were autocratic regimes (CIPESA 2019). What this means is that there is a direct link between political underdevelopment and internet shutdowns in Africa. This has been able to link the longest-serving leaders in Africa, especially those averse to the introduction of the new features in the post-1990 constitutionalisation processes, such as Uganda, The Gambia, Egypt, DRC, Sudan and many more to the whimsical use of state powers to order internet shutdowns.

3 Conceptualising internet shutdowns

Internet shutdowns or network disruptions have been defined as 'the intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable for a specific population within a location' (Freyburg & Garbe 2018). Technically, the internet cannot be shut down due to the its complex architecture, making the term 'network disruption' being preferred in some circles compared to internet shutdown. Internet shutdowns have been described as 'the most brute force method of internet control' (Freyburg & Garbe 2018). As explained earlier, the peculiarities of internet shutdowns in Africa have been linked to countries with records of human rights violations and protracted authoritarian practices in the region. For example, since 28 March 2018 Chad has enforced an internet shutdown lasting more than a year (Association for Progressive Communications 2019). Cameroon has also done the same due to the ongoing humanitarian crisis in the country for more than a year with huge human rights and economic costs to the country. Uganda has also at some stages carried out internet shutdowns, during either protests or general elections. In all these countries and others, the connection has been a leader who will not relinquish power and who, therefore, has grown more powerful and later fearful of the rallying power of the internet for citizens' organisation against their rule.

The manifestation of internet shutdowns occurs and has severe effects, including preventing:

> ordinary internet users from accessing any websites including social media platforms; hindering access of online mapping and coordination tools, and crippling anti-censorship tools which circumvent social media blocks such as The Onion Router (TOR) (Freyburg and Garbe 2018: 3900).

Many of the arguments against internet shutdowns have been the inability of most African countries to situate their actions within the law for legitimacy. Even though international, regional and domestic laws do not contain established sets of guidelines to engage violations of rights that occur due to the intersection of new technologies, democratic governance

and public policy, existing international law instruments have at one point or another given directions on how both state and non-state actors must approach human rights in the digital age. As will be discussed further, it has been shown that in the process of African governments shutting down the internet for justifications such as national security or public order, international law principles established through several intergovernmental and supranational bodies have held that these shutdowns occur without compliance with international human rights standards.

Together with these challenges, Africa has the most expensive mobile data in the world with users spending approximately 8,76 per cent of their monthly income to purchase one gigabyte of mobile data. This is way above the United Nations Broadband Commission recommendation of 2 per cent monthly income (Kazeem 2018). This is contrary to the principle that access to the internet should be 'affordable and available for all persons without any discrimination on any ground whatsoever', and adversely affects the right to development on the continent as envisioned in the African Declaration on Internet Rights and Freedoms (African Internet Declaration).[2] The lack of access in Africa due to gender inequality, the high costs of access imposed by governments, the arbitrary imposition of internet taxes and the lack of adequate infrastructure have been termed a form of censorship and impediment to the realisation of the right to development by the UN Human Rights Council (Paradigm Initiative 2017).

3.1 Justifications for internet shutdowns

There have been several justifications for internet shutdowns. Some of the prominent justifications include national security (the DRC and Uganda); elections and protests (Mali, Uganda, Ethiopia, the DRC, Chad, and Cameroon); and school examinations (Ethiopia and Algeria) (*Access Now* 2016). Governments are likely to enforce shutdowns 'when laws are outdated or overbroad; when laws are not transparent, and when international standards do not clearly disallow shutdowns' (*Access Now* 2016). The term 'national emergency' or 'national security' often is defined very broadly, resulting in the abuse of state of emergency declarations, as has been the case in Ethiopia and the Central African Republic (*Access Now* 2016). In Ghana, Uganda and, more recently, in Zimbabwe, governments have threatened shutdowns without making any specific reference to law, citing undefined issues such as public order, safety and destabilisation (*Access Now* 2019). Telecommunications regulators also oblige internet service providers to sign restrictive non-transparent contracts, which service providers cite as justification for compliance with shutdown orders (Ilori 2019).

3.2 Implications of internet shutdowns on human rights and development in Africa

Internet shutdowns are a form of technology-enabled authoritarianism and are not justifiable under international law (Ilori 2019). Internet shutdowns

2 The African Declaration on Internet Rights and Freedoms is a persuasive set of principles that looks to guide states and non-state actors in Africa on how to protect human rights in the digital age and ensure rights-respecting technology and public policy initiatives.

severely affect freedom of expression, which is a precondition for the exercise of all the other rights (*Access Now* 2016). Shutdowns are prohibited on any grounds, including national security, public order and conflict (African Declaration 2014). The Special Rapporteur on Freedom of Expression and Access to Information in Africa has bemoaned recent shutdowns in Zimbabwe, Gabon, the DRC, Sudan, and Chad and has noted that '[i]nternet and social media shutdowns violate the right to freedom of expression and access to information contrary to article 9 of the African Charter' (African Commission 2019). African governments are mandated to 'promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs' (African Charter 1981). African governments order internet shutdowns without complying with the standard three-part test for human rights limitations, namely, that the limitation should be anchored by law; it must be necessary in a democratic society; and it must be in pursuit of a legitimate aim (Ilori 2019). These orders by governments not only violate international law but also do great and avoidable damage to the socio-economic prospects of most of these African countries.

Internet shutdowns have been regressive for democratic development in Africa. They cause irreversible damage to political participation and freedom of expression (*Access Now* 2016). The malaise of internet shutdowns in Africa is alarming in the context of the dismal performance of sub-Saharan Africa in the Democracy Index of 2018 with only one full democracy; seven flawed democracies, 14 hybrid regimes; and 22 authoritarian regimes (CIPESA 2019). The question of whether there are political restrictions on access to the internet features in the Democracy Index survey (The Economic Intelligence Unit 2019). It is not surprising that countries that have experienced shutdowns, such as Ethiopia, Congo (Brazzaville), Cameroon, Zimbabwe, Togo, Central African Republican and the DRC, are ranked as authoritarian and have the lowest scores in the Democracy Index (The Economic Intelligence Unit 2019).

In a few exceptional cases, internet shutdowns have had the reverse effect of a surge in democratisation due to an increase in public participation. The national internet shutdown in Egypt during the Arab Spring caused street protests to spiral beyond Cairo to large sections of the population in other urban districts, suggesting that a disruption of central communication can result in unconventional local leadership of protests. In Zimbabwe, the #ShutDownZimbabwe2016 was 'the first digital campaign whereby online mobilisation resulted in offline action' (CIPESA 2019). The exceptions, however, are outliers as the impact of shutdowns on democratisation is mostly detrimental. There is a need for coordinated multi-stakeholder resistance to internet shutdowns by citizens, civil society coalitions, courts, legislators and international institutions to ensure that the dream of a democratic Africa, as envisioned by the African Charter on Democracy, Elections and Governance (African Democracy Charter), does not sink into oblivion.

Due to the lack of a go-to international instrument on a category of rights accruable in the digital age, there has been a reluctance to define new technologies, specifically the internet, as a right. Instead, the internet has been viewed as an 'enabler' of other rights (Cerf 2012). It is seen as a means of promoting already-existing rights, rather than a stand-alone right

in and of itself. This position has been shared by the United Nations General Assembly (UNGA) by stating that 'the same rights that people have offline, must be protected online' (General Assembly 2018). Rights accruable on the internet are regarded as not being distinctly different from the rights already provided for offline and in existing applicable international human rights law principles. This position is further cursorily considered below.

3.2.1 The nature of internet shutdowns as violations of the right to development in Africa

The internet has provided novel and impactful avenues for the exposure of political misbehaviour and human rights violations to internal and international audiences (Freyburg & Garbe 2018). Authoritarian governments in Africa are paranoid at the force of the internet and have resorted to using internet shutdowns as an avenue for states to assert control over digital communication and information. Since many governments get away with internet shutdowns, this emboldens other governments to resort to internet shutdowns, which are often a disproportionate mechanism of dealing with political unrest (CIPESA 2016). In countries such as Cameroon and the DRC, the governments enforced two internet disruptions within two months, showing the eagerness of governments to resort to shutdowns and how this is perceived as a go-to solution in resolving internal strife (Paradigm Initiative 2016). These shutdowns as a result are particularly egregious as they fortify access barriers on a continent that is already lagging behind in terms of access provision.

Mobile shutdown orders are often issued by national or regional judicial or executive authorities compelling internet service providers to suspend services, citing clauses in the country's communication laws or criminal codes (Rydzak 2018). In extreme cases, verbal orders are issued by telephone followed by a written order upon demand by the internet service provider. The actual links connecting the service providers to the outside world are not terminated, but services such as specific communication applications, mobile data, SMS/texting and calls are made unavailable (Rydzak 2018). The overwhelming majority of shutdown orders target mobile networks, but a small percentage 'entail the suspension of fixed internet access as happened in Togo in 2017' (Rydzak 2018). Governments are often hesitant to shut down fixed lines as government offices' operations depend on fixed and leased lines.

The technical aspects of large-scale internet shutdowns normally involve manipulating the Border Gateway Protocol (BGP), which routes the global internet traffic, by withdrawing country routes from the global routing table, as happened in Egypt when it withdrew approximately 3 500 routes accounting for 88 per cent of its internet traffic; the sabotage of infrastructure and cable cuts, which is rare as it is self-defeating for governments, but is occasionally used to justify acute disruptions, as happened in Zimbabwe in November 2017; and bandwidth throttling which is the 'intentional slowdown of network traffic', as happened in Gabon (Rydzak 2018; Maurushat et al 2014). A prominent feature of internet shutdowns also is that they are often bogged down by the lack of corporate or government transparency (*Access Now* 2016).

Given the provisions of the African Charter, the right to development, coupled with the enjoyment of civil and political rights, includes the right to work and enjoy socio-economic benefits. Internet shutdowns, however, have been shown to have had dire implications for socio-economic rights. The digital economy is projected to contribute US $300 billion to Africa's gross domestic product (GDP) by 2025 (Ilori 2019). The repercussions of internet shutdowns are often acute due to the importance and popularity of mobile services in Africa, an industry that raised $13 billion in taxes, generated $110 billion in economic value, and provided 3,5 million jobs (Ilori 2019). As of 2016, 140 mobile money and banking services operated 280 million registered accounts across 39 countries including Uganda, resulting in a significant erosion of the economic rights of citizens during the internet shutdown in Uganda of 2016.

The internet offers incredible avenues, resources and innovation opportunities for a continent with the highest youth population in the world, which faces various socio-economic challenges, including unemployment (Ilori 2019). Agenda 2063 of the African Union anchors technology as a tool for the elimination of youth unemployment, guaranteeing full access to economic opportunities (AU 2063 Agenda 2013). It is estimated that shutdowns in Africa resulted in a loss of US $237 million between 2015 and 2017 (Ilori 2019). As of February 2019, internet shutdowns had resulted in a cumulative loss of US $267,2 million (Ilori 2016). Youth unemployment is likely to be exacerbated rather than redressed. Shutdowns undeniably put socio-economic rights at a grave irreversible risk.

3.2.2 The violation of freedom of expression

Article 19 of the Universal Declaration of Human Rights (Universal Declaration 1948), the foundational, but not binding, document for other human rights covenants, provides that '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'. It has been suggested that this article is neutral in its use of the word 'media', thereby making it possible to include the internet as a means through which one can express themselves (Joyce 2015). This notion was buttressed by a resolution passed by the Human Rights Council where the internet was included in the recognition of all forms of media (UN Human Rights Council 2016). As an improvement on the provisions of the Universal Declaration, article 19 of the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976, amplified the provisions of freedom of expression to accommodate key but lean restrictions. Article 19 of ICCPR guarantees:

> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

A close reading of the provisions of the ICCPR shows that while freedom to hold an opinion is an unqualified right, freedom of expression is restricted based on certain exceptions. While these rights are not necessarily different, it may be argued that both rights can be used interchangeably and the berth afforded the right to opinion as a result can be extended to freedom of speech.

Freedom of expression as a qualified right is limited in three parts. This test provides that for the right to freedom of expression to be limited, whether offline or online, it must be provided for by law, pursue a legitimate aim and be necessary in a democratic society. These three limitative tests as restrictions on the right to freedom of expression is imposed on states under international human rights law, occur together and must be jointly satisfied. These principles enunciated by the test are further considered below.

Legality

The laws that African governments use to enforce shutdowns are not compliant with the requirements of clearly-enumerated behavioural norms as well as the limits of governmental power in enforcement. There is no delineation on the public instances in which lawful shutdown can be ordered in vague national security and emergency laws; the duration of shutdowns often is arbitrary; and the laws are silent on how long shutdowns should last. Procedurally, such laws are quickly passed without substantial input on constitutionality by legislators and the public. In *Cengiz & Others v Turkey* (*Cengiz* case), the European Court of Human Rights (ECtHR) held that blocking access to YouTube was illegal as there was no domestic law allowing for blanket orders blocking access to the internet.

Legitimate aim

The reasons for shutdowns, such as for slowing rumours, for ending cheating during examinations and for disrupting public protests, do not meet the limitation requirements of article 19 (3) of ICCPR. Legitimate aims should be construed narrowly, a criterion that is not met by the vague references made by African governments. Article 25 of the African Union Convention on Cyber Security and Personal Data Protection stipulates that

> [i]n adopting measures in the area of cyber security and framework for implementation, state parties shall ensure that the measures adopted will not infringe in the rights of citizens guaranteed under the national constitution and internal laws, and protected by international conventions, particularly the African Charter, and other basic rights such as the freedom of expression.

Necessity and proportionality

The necessity of shutdowns cannot be proven as no transparent information exists as to the actual harm state officials intend to prevent and, where there is such, internet shutdowns have not been demonstrated to help mitigate these harms. The proportionality threshold is breached by the fact that shutdowns impact everyone within the targeted area, not only

those people engaging in a proscribed or prohibited activity. Proportionality does not only involve the number of people affected but also the severity and extent of infringement of the human rights of each individual. In *Ahmet Yildirim v Turkey* the ECtHR held that the judicial blocking of access to Google sites for hosting a website belonging to a person facing criminal proceedings was a violation of the right to freedom of expression since it blocked the access of other internet access and that less restrictive means could have been used.

Perhaps one of the most instructive legal expositions to create a causal link between the international law use of 'any other media' is the United States Supreme Court case of *ACLU v Reno*.[3] In this case a formally-recognised connection was established between the internet as being a medium of expression, thereby qualifying as a form of media that can be subsumed under the international law jurisprudence of freedom of expression in the digital age.

Furthermore, Special Rapporteur Frank la Rue stated that the internet was a crucial method through which persons can exercise their right to freedom of opinion and expression.[4] Most importantly, it may be argued that article 19 of the Universal Declaration at the time of its drafting had envisaged future changes in forms through which persons can assert their right to freedom of expression and opinion. This is one of the most prominent arguments for the internet to be regarded as one of such 'any other media' due to one of its key features being a medium of communication (Land 2008).

Article 9 of the African Charter provides for an unqualified right to access information and qualified right to freedom of expression and opinion as follows:

> (1) Every individual shall have the right to receive information.
>
> (2) Every individual shall have the right to express and disseminate his opinions within the law.

Under other regional human rights instruments, the right to freedom of expression is qualified just as it is under international law. However, the African Charter is the only instrument that does not qualify the right to freedom of expression, at least not explicitly or directly. As a buffer to the provisions of article 9 of the African Charter, the Declaration on the Principles of Freedom of Expression and Access to Information was adopted in Banjul in 2002. The Preamble to the Declaration emphasises the importance of respecting and promoting human rights through the use of ICT which includes the internet.

3.2.3 The violation of freedom of association and peaceful assembly

Association is a key component of any modern society. Political parties, private organisations and interest groups have become important aspects of social engineering through which socio-political socio-economic formations take place. These formations are an integral part of any

3 51 US 844.

4 Human Rights Council Resolution: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/26/30/Add.2.

democratic society due to the participation and involvement they generate in democratisation processes. The right to freedom of association and assembly, as a twin right used interchangeably, therefore solidifies the rights of citizens to join associations of their choice and also to organise for the general good of their interests, especially as established under ICCPR and the African Charter. The internet in its formation has become important in this regard. Hashtags are used politically to organise protests or create awareness on public policy concerns while people of common interests are encouraged to associate with people of like interests and views.

Due to the rallying characteristics of these two rights in the way in which they unify voices across the board and encourage diverse views on issues, the internet, being home to several of such diverse perspectives, was able to amplify and connect the public beyond physical boundaries. This organisation and association online, therefore, has led to several projections of violations of human rights and dwindling democratic fortunes in many countries in Africa. The affectation that connects the public has galvanised several movements beyond the reach of most African governments, in effect resulting in more political and economic changes in countries.

For example, during a nationwide protest in Uganda in 2016, the state ordered multiple shutdowns at different times in order to quell dissent during protests. Also, in Zimbabwe the government recently ordered an internet shutdown when citizens protested the hike in fuel prices in which many people lost their lives. Similarly, in Sudan the state ordered the cutting of communications networks in the country due to protests over the prolonged rule of Omar Al-Bashir, who eventually was toppled even in the absence of internet networks. This has also been the case in countries such as Cameroon, Egypt, Togo, Algeria, the DRC and many other countries. The right to peaceful assembly and association on the internet is one of the most potent rights that are infringed and violated by many autocratic states because of the power of new technologies to demand change in the most unified and persistent manner.

3.2.4 The violation of the right to political participation and access to public service

Shutdowns during elections and protests infringe on the right to direct political participation. In Gabon, the Republic of Congo, the DRC, Uganda and Chad, shutdowns resulted in less visibility for the opposition during or after the elections (Rydzak 2018). Additionally, the internet has offered new opportunities for governments to communicate with people (African Declaration on Internet Principles 2014). Seventy-one per cent of African political leaders and governments had a presence on Twitter as of June 2014 (Scott 2014). Political leaders and governmental institutions are increasingly using social media to pass on critical information that is essential for accessing public service. E-governance encompassing digitisation of the public service infrastructure has grown significantly in countries such as Kenya, Uganda and Nigeria as citizens access critical services and documents through online portals. Shutdowns, therefore, are likely to sever critical access to governmental platforms and services. During the shutdown in Zimbabwe, the government could not get critical information across to Zimbabweans. President Mnangagwa appealed for

calm on his Facebook and Twitter accounts, but the message could not reach Zimbabweans as the internet had been blocked (*AlJazeera* 2019).

Internet shutdowns sometimes are strategically executed to disenfranchise marginalised religious or ethno-linguistic minorities as a form of collective punishment. This occurred in Ethiopia where the Oromo ethnic group in Oromia was specifically targeted by internet slowdowns and shutdowns in March and August 2016 due to their long-term grievances against the government. In Cameroon, the internet shutdown was specifically extended in the country's Anglophone region where the President faced vocal opposition. Vulnerable groups such as migrants, refugees and women experience further intersectional barriers (Rydzak, 2018).

3.2.5 The violation of the right to life, bodily integrity and security of the person

Internet shutdowns are often used by governments to perpetrate impunity by causing gross human rights violations, violations of the laws of war and violence to be invisible to civil society, activists and the international community. Large shutdowns are often accompanied by paramilitary and military operations, making it difficult for documentation by citizen journalists and reporters, as happened in 2015 in Port-Gentil, Gabon and the Pool Region of the Republic of Congo in October 2015. In Sudan during the 2013 shutdown, dozens of protesters were killed during a crackdown after the shutdown had been enforced (*Access Now* 2016). Digital sieges often put vulnerable groups at risk of further violence from the military and militias and have led to the emergence of internet refugees, as people endanger their safety by undertaking hazardous journeys to areas with internet access, as happened in Anglophone Cameroon.

3.2.6 The violation of the right to mental and physical health

Internet shutdowns cause significant disruptions in the areas of emergency and healthcare services, resulting in the violation of the right to the 'highest attainable standard of physical and mental health' under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2017 a three-week disruption in Somalia hindered the delivery of critical medical paperwork involving crucial cases in addition to obstructing humanitarian assistance (Rydzak 2018). There have been reports of delays in life-saving procedures when medical specialists have been unable to contact one another as well as service breakdowns in hospitals that rely on digital technology. Disruptions would be particularly catastrophic if they were to coincide with a natural disaster.

3.2.7 The violation of the right to education

The right to education is a fundamental right as it enables effective participation of all in an open and democratic society, promotes tolerance and diversity, and furthers the maintenance of peace. The role of the internet in education has become increasingly significant as resources become digitised. Internet shutdowns to stem leaks and cheating during school examinations have undercut educational opportunities for all groups in the DRC, Ethiopia and Algeria. Internet disruptions impact

vulnerable populations disproportionately, particularly women and girls, especially in the area of Science, Technology, Engineering and Mathematics (STEM), as happened in Cameroon.

4 Democratisation and information and communications technology in Africa

As a precondition to good governance, human rights cannot be disregarded in analysing democracy in Africa. The role played by human rights in an African context reveals a positive change in most African governance systems. The introduction of international democratic standards to ensure and enhance political and civil rights has given a more holistic approach to democracy. In fact, human rights have offered a set of performance norms and different mechanisms to measure the integration and implementation of democratic principles such as accountability, transparency, impartiality and participation. As a result, in Africa most domestic and regional policies, such as the African Charter, have been drafted to protect and fulfil fundamental human rights. Hence, at the continental level there is also the African Charter on Democracy, Elections and Good Governance (African Democracy Charter) with its articles 2, 3, 4 and 5 which provide that state parties have the duty to ensure that the rule of law, human rights and democratic principles are protected and respected.

This new approach to democracy has globally assisted in monitoring inequalities at the continental level. As a consequence, human rights, especially civil and political rights, are more respected, and individuals are now empowered in many African countries. People are aware of their rights and benefit from an enabling legal framework to claim their human rights. Human rights have become an ultimate weapon for citizens with respect to government accountability, which enhances democracy.

The fundamental principles of human rights being designed to inform the legislative, judicial and executive frameworks, its implementation requires a stable and enabling context. However, in Africa, despite efforts made to harmonise domestic laws with international standards of human rights and democracy, the continent still encounters discrepancies between national and regional policies and the implementation system. Hence, designed to guide policies and programmes, in Africa human rights are yet to be incorporated in the system of governance because of the absence of strong enforceable measures.

As an example, elections, which are usually the first step towards democratisation, are often the period during which serious human rights violations occur. During the past decade, elections in Africa have generated several controversies regarding management and process (Adejumobi 2000). In fact, during the different stages from preparation, the actual elections to the post-electoral period, cases of serious violations of human rights have been recorded. Unfortunately, these common practices, such as election rigging, clientelism, unlawful constitutional amendments and last-minute delays or cancellations, reveal the weakness of African democracy (Adejumobi 2000). These irregularities often cause frustrations among populations. As a result, protests ensue offering

grounds for serious violations of human rights by the state through its so-called security agents.

Having a primary duty to respect, protect and fulfil rights, some African states have become perpetrators of violence or enhance its permissibility by the absence of sanctions in situations of violations of human rights. Therefore, although many states identify their respective countries as being democratic, it appears that in some countries only the concept has been added to the official name of the state without reflecting the country's political reality (Wiseman 1990). Due to the illegitimacy of electoral processes, the issue of the legitimacy of some governments in Africa often is questionable. The process of state building and democratisation requires the integration of the social, political and economic dimension of a specific country. However, as post-colonial states, African countries inherited their political systems from their previous colonisers and, therefore, they have missed the opportunity to build their own systems of democracy based on African values and standards of democracy.

For that reason, the AU takes democracy seriously by adopting the AU Constitutive Act 2000, 'to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[5] Therefore, since human rights are meant to empower people, African states have the responsibility to respect and protect human rights with sustainable strategies. especially in the age of new technologies that can represent both a threat to and an asset for democracy.

Articles 5, 6 and 7 of the African Democracy Charter deal with member states' responsibility to ensure adequate changes of government with transparency without failing to protect human rights. Additionally, article 8(1) goes further by insisting on the suppression of all forms of discrimination based on political opinion.[6] In other words, the state is under the obligation to provide a democratic environment to its citizens where every individual has the liberty to choose and support a political party without fear of encountering discrimination or violence from the state or its agents.

The majority of these rights fall under civil and political rights that allow individuals to enjoy the inherent right to engage in public affairs by participating in the election of members of the government.[7] These rights can only be exercised through a conducive political and electoral environment. With human rights activists raising the importance of holding free, fair and transparent elections with respect to the rule of law, technology becomes a strong tool and a means to protect human rights. In fact, it appears that with digital technology, exercising the rights cited above not necessarily requires the implication of the government.

In African countries, for instance, digital technology has enabled individuals to become aware of their fundamental rights and has created diverse channels to claim these rights through social media platforms. In addition, technology has been used in both advocacy and awareness-raising activities as well as fund-raising platforms to enhance human

5 Preamble of the African Union Consecutive Act.
6 Arts 5,6,7, 8(1) of the African Charter on Democracy, Elections and Good Governance.
7 UNHR Report, Monitoring Human Rights in a Context of Elections, ch 23.

rights. As far as transparency and accountability are concerned, technology has allowed people to monitor electoral processes in many African countries. Information concerning countries' budget allocations and international policies are also available and accessible to the public.

Technology has helped to build transnational movements and networks aimed at denouncing human rights violations at the international level. Technology, therefore, has removed boundaries and facilitated the realisation of the rights to freedom of expression, access to information and participation (Banisar 2010). At the continental level, during the past years, digital technology has contributed to enhancing peace, which has created a positive change regarding democracy, especially with respect to electoral processes. Digital technology has enabled the creation of advanced electoral monitoring systems, such as the biometric system, to ensure transparency and platforms the mapping of violence breakouts. This reveals governments' engagement and cautiousness in ensuring participation and accountability as a result of digital technology. In addition, digital technology has helped to reduce corruption with the adoption of electronic systems of public administration.

Therefore, it is important for Africa, moving forward with development, to design strategies to navigate in a context of digital technology by adopting a governance framework within which democracy and technology can coexist with the objective of protecting human rights (Banisar 2010). Developing strategies at both national and continental levels will enable Africa to be better prepared in dealing with the advantages and threats of digital technologies.

Therefore, despite the advancement in technological development, the stage of democracy in Africa is described to have deteriorated in the past years due to several violations of human rights in the digital age. The use of the human rights framework in the digital age to analyse democratic development in Africa reveals that many rights have been violated. For instance, 28 out of 54 countries have enacted legislation to address cybercrime, and a recurring feature of these laws is that they impede internet freedoms and human rights.[8] This shows an adverse use of law and policy on digital technology in governance systems in Africa as a region.

Specifically, in some countries these laws are used as a legal basis for human rights abuses by states. In many instances, digital technologies have been used to repress people's rights to freedom of expression or to participate in public affairs. In countries such as Ghana, Liberia, Nigeria, Somalia, South Africa, South Sudan, Uganda and Zimbabwe, states have used measures such an increase in the cost of data, internet shutdowns and surveillance, among others, to deprive citizens of the right to freedom of expression (MFWA, 2018). Additionally, regarding the rights to privacy, states have been using ICT as a means of collecting personal data for surveillance purposes to track down opponents. This often leads to the unwarranted arrest of civil society members or citizens based on

8 United Nations Conference on Trade and Development, Cybercrime Legislation Worldwide https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Cybercrime-Laws.aspx (last visited 20 March 2019).

information shared on social media or communication networks (IGF 2018).

5 Combating internet shutdowns

When used effectively, an internet 'kill-switch' can paralyse a protest. It can leave activists unable to mobilise, and enable state agents to perform a wider range of human rights violations, comfortable in the knowledge that these overreaches will never make it to the wider global public. Given the far-reaching political and economic consequences of an internet blackout, there is an urgent need to recruit effective counter-activities to quell the issues posed by internet shutdowns. Some of these counter-activities are discussed below.

5.1 Judicial recourse

In order to make governments protect human rights in the digital age, national courts have become involved with internet shutdowns. For example, the High Court of Zimbabwe recently held that the Minister of State 'did not have the power to switch off the internet' (Swart & Mahere 2019). In Egypt, the Supreme Administrative Court imposed a fine of EGP 200 million on the President, on the Prime Minister EGP 300 million, and on the Interior Minister EGP 40 million for the 2011 internet shutdown, although these fines were later set aside (Sutherland, 2018). In Kenya, the High Court revoked a government order shutting down three television stations for broadcasting the inauguration of the opposition leader as the alternative President upon the latter disputing the process of conduct of the elections.

Traditionally, law and technology in Africa have interacted in a strange, recurring cycle. First there was the rapid development of impressive technologies that pushed the boundaries of cellular and internet communications. Then followed a series of belated legal reforms to regulate new industries and tame innovation. As innovation improves on the continent, respect for digital rights crawled behind at the lazy pace of the legislative process (Palmerini 2013). This cycle, however, is slowly being disrupted by efforts at strategic litigation, which has already secured key victories in several jurisdictions. By litigating important 'test cases' in national (and, later, supranational) judicial systems, activists for online freedom are able to effect long-lasting change 'both inside and outside' the courtroom (Open Society Justice Initiative, 2018).

A novel test on issues of network disruptions and human rights development came up in Zimbabwe in *Zimbabwe Lawyers for Human Rights (ZLHR) and Media Institute for Southern Africa Zimbabwe (MISA Zimbabwe) v Minister of State for National Security & Others* after local civil society took the government to court to declare an internet shutdown during

protests last year illegal.[9] The High Court ruled against the government, setting aside an internet shutdown directed under Zimbabwe's Interception of Communications Act even though the decision was arrived at based on technicality. Despite justifications by the Minister for State Security, the Court decided for the petitioners, and ordered the state to 'unconditionally resume the provision of full and unrestricted internet services' – a major victory for internet freedom.[10]

A similar legal challenge gripped Uganda, after a targeted blackout had hit Kampala in May 2016 (Taye 2018). As voters took to the polls for the elections, they were hit by a 72-hour social media shutdown of sites including Twitter, Facebook and WhatsApp (Golooba-Mutebi 2011). Since the 2016 elections, the internet has become the newest feature of President Yoweri Museveni's efforts to silence growing opposition. In July 2018, the government introduced a 'social media tax' in a bid to increase domestic revenue and stop online 'gossip' (Al Dahir 2018). According to early reports, however, the tax is 'holding back' economic growth, shrinking profits, and placing thousands of jobs in jeopardy (Research ICT Africa 2018). To oppose the tax, and the recent spate of shutdowns in Uganda, Unwanted Witness – a local non-governmental organisation (NGO) – filed a petition before the Constitutional Court in December 2018 claiming, among others, a violation of article 29(1) of the 1995 Ugandan Constitution (BBC News 2018).[11] While the Court is yet to rule on the matter, this case highlights the emergence of new energies in the legal fight against internet shutdowns.

Similar legal proceedings have been instituted in Cameroon, Chad and Pakistan as internet freedom advocates cover more ground in the battle against shutdowns (*Access Now* 2018; BBC *News* 2018; *Telegeography* 2018;). Incremental as these efforts may seem, this gradual exhaustion of domestic remedies will unlock access to regional courts and other oversight mechanisms. If these tribunals rule that internet shutdowns are illegal, internet activists would make a significant step towards protecting internet freedom in Africa and elsewhere. While exploring the avenue of strategic litigation, digital rights advocates should involve the ICT sector in their strategies to combat internet shutdowns.

5.2 Mobilising the private sector

Resisting shutdown orders is potentially risky for internet service providers as they are bound by the laws governing their countries of operation, and non-compliance may result in licence revocations, fines, threats, or gateway shutdowns (Association for Progressive Communications 2019). Telco representatives have reported threats to employees on grounds of non-compliance with shutdown orders, as happened in Ethiopia (Ilori 2019). In Zimbabwe, the director of Econet wireless claimed that he had to comply with a shutdown directive from the

9 Case 265/19 (Provisional Order) 21 January 2019 (*Zimbabwe Shutdown* Provisional Order) http://www.veritaszim.net/node/3396 (last visited 20 March 2019).

10 *Zimbabwe shutdown* Provisional Order (n 10) 2.

11 Which guarantees the rights to 'freedom of speech and expression which shall include freedom of the press and *other* media' (our emphasis). Sec 29(1) Constitution of the Republic of Uganda 1995.

government or face three years' imprisonment for non-compliance (Association for Progressive Communications 2019).

Over the past 50 years, Africa has leapt from the outdoor market to the online store, as internet access reoriented economic activities on the continent (Ernst & Young 2016). Tax benefits aside, the ICT sector makes a significant contribution to the micro- and macro-economies of African states, unlocking opportunities for inclusive growth and larger markets for local entrepreneurs (Bankole et al 2011). Abrupt disconnections are frustrating these opportunities, driving down profits and overall GDP (CIPESA 2018). Although a few studies suggest that strategies of political repression are implemented more effectively if the government controls the infrastructure, the role of telecommunication companies in enabling or disabling network disruptions has not yet been sufficiently explored (Weber 2011). To limit the impact of unlawful disconnection orders, companies should establish procedures (internally, for their boards of directors, and externally, for the ICT industry itself) to ensure accountability and enforce transparency in the event of an internet shutdown (*Access Now* 2016). By employing a combination of these strategies, the private sector can prove to be a powerful ally in the fight against internet shutdowns.

A failure to respond adequately to even a brief internet shutdown can have serious implications for a company's bottom line. In 2015 millions of Brazilians downloaded the mobile messaging application Telegram after a 24-hour court-ordered shutdown of WhatsApp (Griffin 2015). Those customers that defected are not returning to WhatsApp (Wong 2016). Profit motive aside, internet shutdowns carry with them reputational and other non-tangible costs that far exceed the financial implications of a temporary disconnection. Taking all these risks into consideration, companies have an obvious motivation for forming their own response to internet shutdowns. This response should be guided by the United Nations Guiding Principles on Business and Human Rights (UNGPs) which, despite well-deserved criticism, represent international consensus on the *minimum* obligations of companies to respect human rights (Okoloise 2017).[12]

According to the UN Guiding Principles, a company's responsibility to respect human rights applies in all situations and 'exists independently' of whether the state meets its own human rights obligations (UN Guiding Principles 2011). Furthermore, these responsibilities require companies to 'avoid infringing on the human rights of others' and 'address adverse human rights impacts' (UN Guiding Principle 2011). Citing this obligation as justification, 2016 saw telecommunications companies Millicom and Orange refuse government demands for internet shutdowns that were not made according to proper procedures under domestic law (Telecommunications Industry Dialogue 2016). In 2012 the Vodafone group and Orange, in response to shutdown orders in Egypt in 2011, established the Telecommunications Industry Dialogue (TID) to help

12 United Nations Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementation of the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011).

prevent future abuses (*Access Now* 2016). Since then, membership has swelled to include AT&T, Millicom, along with various members of international civil society.[13] To focus its efforts, the TID established its own set of Guiding Principles (TID Guiding Principles) which address the corporate responsibility of telecommunications companies to respect human rights. Among others, the TID Guiding Principles require members to '[a]dopt, where feasible, strategies to anticipate, respond and minimise the potential impact on freedom of expression … where a government demand or request is received that is unlawful' (TID Guiding Principles 2011).

More recently, ICT companies have encircled their weapons to better respond to demands of unlawful disconnection. Through the Global Network Initiative (GNI), companies such as Ericsson, Google and Nokia worked together with the TDI to issue a Joint Statement on Network and Service Shutdowns. The statement declares internet shutdowns to be a threat to public safety and freedom of expression, with the further danger of restricting access to vital payment and health services in the event of an emergency. In a similar vein, the Global System for Mobile Communications Association (GSMA), one of the world's largest technology associations, has laid out strict standards for orders issued to telecommunications companies to terminate service, relegating them to 'exceptional and pre-defined circumstances, and only if absolutely necessary and proportionate to achieve a specified and legitimate aim consistent with internationally recognised human rights and relevant laws' (GNI & TID 2016).

Companies in the ICT sector are catching on, and are beginning to realise that internet shutdowns are as bad for business as they are for human rights. While the outbreak of these new democratic pushbacks seems exciting, the private sector needs to implement broader reforms to comply with their obligations under international human rights law. Internet service providers and telecommunication operators should endeavour to uphold the rule of law by challenging illegal requests from governments (Glans & Markoff 2011).[14] They should also be transparent with their customers around the sources of shutdown requests and communicate how long these disruptions are likely to occur. Further, when looking for opportunities to invest, venture capitalists should integrate shutdowns into their risk assessment to discourage investments in states that too hastily resort to internet shutdowns.

In many cases, an alliance with the private sector can be a formidable weapon in the hands of activists of digital freedoms. At the same time, however, human rights practitioners should be cautious in their engagement with telecommunications sector while noting that monopolies in the African telecommunications sector also pose threats to the rights to freedom of expression and privacy due to market dominance.

13 http://www.telecomindustrydialogue.org/about/ (last visited 20 March 2019).

14 Vodafone, eg, resisted demands by Egyptian authorities for service interruptions until 'it was obliged to comply'; J Glanz & J Markoff 'Egypt leaders found "off" switch for internet' *The New York Times* 15 February 2011.

5.3 Multi-stakeholder approach

Several approaches are involved in engaging internet governance challenges. There have been the traditional and state regulatory means through which state authorities use laws and policies to determine the direction of internet governance. There has also been the private sector attempt at self-regulation, which looks to put private companies involved in internet governance as duty bearers in upholding human rights. However, all these models have failed mainly because of from where they emanate and how democratically the processes that inform their decisions are made (Garton Ash 2016). Since the internet is a collaborative system of networks, a policy initiative from one aspect of its stakeholder is bound to be mono-themed and unrepresentative.

This is one of the main motivations for the multi-stakeholder approach to internet governance, which looks to make the internet more open, people-focused and all-stakeholder-driven (Graham & MacLellan 2018). This approach registers the importance of the internet as technically democratic in design and functionally representative with respect to the policies that shape it. It allows for not only state and private businesses to come together to design approaches to internet governance challenges, but affords civil society, the academia and a broader spectrum of stakeholders to be involved in designing lasting policies for internet governance.

In resolving the challenges posed by internet shutdowns, a multi-stakeholder approach lends a good governance approach to assessing threats and managing risks associated with internet regulation. There are instances when restrictions of human rights through ICT could be justified, but such limitation must be narrowly construed, comply with international law standards and must be as a result of a multi-perspective deliberations.

6 Conclusion

It is undeniable that we are living in an era driven by clicks of the mouse and virtual interactions. Digital technologies have permeated our everyday lives – including the exercise, enjoyment and fulfilment of human rights. Human development across countries is tied to how much technology a society can adapt to its society to ensure improved living standards. While the study of ICT and the right to development is still growing, the maximisation of available ICT resources is currently on full throttle in many societies, However, the same cannot be said of other countries, especially in Africa. These challenges faced by many African countries include the violation of human rights; affordability of internet access; state-sponsored censorship; internet taxation; and network disruptions. These disruptions together with the other problems have hampered democratic development and pose huge threats to the right to development in the region. It is important, now more than before, for state and non-state actors to commit to a standardised set of rules, perhaps a model law on key thematic areas of digital rights in the region that involves all stakeholders including the courts, private businesses and civil society to engage the challenges of internet shutdowns in Africa.

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Are smart walls smart solutions? The impact of technologically-charged borders on human rights in Europe

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Abstract: *This article reviews new technologies on the external border of the European Union, and the human rights ramifications of these developments. It utilises a multi-disciplinary approach, writing on the emerging technologies themselves, their impact on vulnerable groups, legal developments relating to privacy, and the political context informing migration policy. The first part outlines emerging trends in border technology. The discussion relies on examples beyond the European Union to inform its analysis, including case studies from the United States border with Mexico. Technological developments considered include thermal imaging; biometric data; virtual reality; artificial intelligence; and drones. The second part explores how vulnerable groups will be affected by the collection of biometrics at the external border of the European Union. This part explores how algorithms, far from being objective arbiters, in fact are repositories for the bias of the manufacturer. The article postulates that to tackle the proliferation of bias, it is necessary to have a diverse workforce creating these systems. Third, the article addresses the regulatory framework on data privacy in the European Union. The significance of a right to privacy post-9/11 context is described. The conception of data privacy of the General Data Protection Regulation (GDPR) is set out. This part first analyses how GDPR has affected the processing and storage of data in the EU and, second, draws out the implications for the data of migrants. Special emphasis is placed on the concept of consent, and the ability of migrants to refuse the collection of their data is put into question. Finally, the article turns to the political context. Arguing that right-wing populism is not inherently opposed to new technologies, the article points to populists' reliance on social media to garner support. Furthermore, it is advanced that the potential for migrants' human rights to be impinged by new technologies is compounded by the influence of right-wing populism on migration policy.*

Key words: *smart borders; surveillance; consent; privacy; biometrics; human rights; vulnerable groups; securitisation; technology; artificial intelligence*

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1 Introduction

Since the end of World War II a significant number of border walls and fences have been erected around the world as a means of separating the in-group from the out-group. Metal, wire or concrete walls separate Greece from Turkey, Turkey from Syria, Spain from Morocco, Morocco from the Western Sahara, Hungary from Serbia, Israel from Egypt, Israel from the West Bank, Saudi Arabia from Iraq, Iraq from Iran, Malaysia from Thailand, Zimbabwe from Botswana, the United States from Mexico, Pakistan from India, India from Bangladesh, North Korea from South Korea, and the list continues. The European Union (EU) has over 1 000 kilometres of fences or walls guarding member states against non-member states, according to a recent study by the Transnational Institute (Ruiz Benedicto & Brunet 2018). In the 1990s the EU had two walls, while in 2019 there are now 15 walls (Ruiz Benedicto & Brunet 2018).

Since the 9/11 attacks in 2001, the construction of these physical barriers has spiked even further, as leaders preach the imperative urgency – even as a national emergency – of keeping migrants out and nationalists in, furthering a xenophobic 'us versus them' mentality. Governments seemingly build these walls with the unrealistic expectation that they will render their citizens impervious to the effects of any hardship beyond their barbed wire limits. However, as the opposition argues, they are a medieval solution to a twenty-first century problem. As we shift from emergency-driven policies to intelligence and risk management policies, many populist leaders currently in power are offering walls as the simple solution to complex immigration challenges. With this shift to risk management policies, which focus on prevention to obtain the maximum security, proportionality tests should be carefully made since civil rights and liberties could be at stake.

Populist rhetoric revolves around state identity and the consolidation of state sovereignty. This is often tied to an anti-immigrant agenda, whereby immigration is blamed for citizens losing control of their country. In this sense, border walls are emblematic of the populist conception of sovereignty. The militarisation of borders and border walls also feeds into an extremist narrative of state sovereignty, as it implicitly reinforces the divisive rhetoric which portrays immigrants as 'invaders'.

Offered as an alternative and more rational solution, many politicians of the developed world propose intensifying the role that technology plays in determining who can cross over from one state into the next. This article explores the advantages and disadvantages of building digital walls. It examines possible human rights benefits of border technologies, but argues strongly in favour of necessary precautions for integrating innovations from the Fourth Industrial Revolution[1] into states' immigration processes and systems. As technology evolves, it seems that the watchful eye of governments can be overreaching: collecting data without consent, peering over state lines, and treating civilians as suspects.

1 According to Prof Klaus Schwab (2016), founder and executive Chairperson of the World Economic Forum, the fourth industrial revolution involves imbedding technology into people's everyday lives, and even into their bodies, made possible by advancements in biotechnology, the Internet of Things (IoT), artificial intelligence, robotics, nanotechnology, quantum computing, and more.

But the application of technological advancements can reap true benefits if implemented with a human rights framework in mind. State sovereignty is also affected by technologically-established frontiers in so far as they grant the state additional access to – and, potentially, control over – personal data. This article explores the most advanced technologies being used at the border and plans for future technological integration at transit checkpoints. In analysing topical case studies, the current legal framework and the overall political environment, we aim to critically review how travellers' human rights are being (and potentially could be) impacted.

Moreover, while these technologies redefine the concept of border, they also reaffirm it. Tangibly crossing the border can now involve more than just treading over a single 'line in the sand' and passing through an immigration checkpoint. Now, the areas surrounding the border also include surveillance technologies associated with border control and potentially cause even further human rights violations, particularly considering the effects on vulnerable groups. This is linked to the so-called militarisation of borders. In this way, even where physical walls are not built, strong barriers 'protecting' the state from immigrants may nonetheless be constructed from 'smarter' materials. Security concerns are regularly conflated with questions surrounding immigration policy and the technology it hires. However, this creates a false dichotomy between human rights for immigrants and national security.

The tendency to move towards a 'surveillance society' has also produced a significant shift in citizens' perceptions of both personal privacy and security. As populist discourses in Western societies foster a 'culture of fear' and 'overprotection', so too does the notion that in order to have security, one must relinquish one's privacy. Within this privacy-for-security trade-off, infringements upon privacy and other human rights arise, and along with them questions about the compatibility of constant border surveillance with democratic societies.

Indeed, a pressing problem is political rhetoric that positions migrants as a serious risk to national security, regardless of a connection with arms or human trafficking, drug smuggling, or terrorist activity. This inherently threatens the idea of maintaining human dignity, even more so at the hands of intelligent machine intervention. Security concerns are being paired with a strike against 'illegal' migration,[2] as wars in the Middle East and gripping economic distress and violence in Central America have forced migrants from their dangerous and impoverished nations towards the Western world. In 2015 and 2016 Frontex, the European Border and Coast Guard Agency (nd) detected more than 2,3 million 'illegal crossings'. Refugees are widely considered to be the new 'threat' and anti-immigrant rhetoric is fuelling the desire for states to close their borders, which will be further discussed in part 6 of this article.

Furthermore, the use of more advanced technology attempts to reconcile two aims of the state that are often contradictory, namely, 'facilitating the movement of people while increasing the level of control

2 Based on legal terminology, 'illegal' immigration occurs when a person crosses into a state's territory without permission from the government. For the purposes of this article, we will refer to mass migration movements as irregular migration so as to not further stigmatise the affected groups.

over them' (Koslowski 2011). This causes tensions between the freedom of movement as well as rights to privacy and security. Security-privacy tradeoffs and the effects of border digitisation on data security and privacy protection will be examined in part 5 of this article.

Finally, scholars have long declared the necessity of integrating ethics and human rights considerations into the development and use of advancing technologies (Bowling, Marks & Murphy 2008: 41). Part 4 of this article argues that greater attention should be given to how furthering the capacities of 'virtual fences' and 'smart borders' impacts all people, regardless of nationality or side of the border, particularly those considered most vulnerable. First, however, the next part sketches the historical development of border technologies, before part 3 provides an overview of state of the art of digital borders.

2 Background and historical development of border technology

Physical borders have traditionally 'marked the limits of sovereign territory and acted as the primary site of expression of the exclusionary powers of the state' (Pickering & Weber 2006: 19) determining who and what should be allowed to cross onto domestic soil. Yet while globalisation intensifies, so does the flow of people, goods and conveyances across geographic lines, making maintaining territorial sovereignty an ever-daunting challenge for border-control authorities (Koslowski 2011). Over the past three decades, substantial increases in funding, staff and technological capabilities used towards surveilling states' air, land and maritime frontiers have amplified political contention over the most efficient and effective ways to maintain a national stronghold (Koslowski 2011). While many specialists argue for a multi-pronged approach to security (Meyers 2003; Mittelstadt et al 2011) deploying more advanced technology – more specifically in the form of algorithmic additions, Internet of Things (IoT)-based information systems and biometrics – is widely considered the 'magic bullet' solution to filling the problematic gaps left by solely erecting physical barriers (Ceyhan 2008: 19; Marx 2005: 9).

As technology evolves, so does its varied applications. However, states that are employing these new technologies for border control purposes cannot be absolved from their responsibility for the resultant human rights implications, regardless of geographically-imposed boundaries. Katja Franko Aas (2005: 22) argues that 'contemporary technological paraphernalia ... not only enables fortification of the border, it also reshapes the border according to its own logic', meaning that a concrete definition of a border can no longer be accurately drawn on any map. The expansive reach of technological capabilities can extend miles beyond any previous understanding of nation-bound jurisdiction.

2.1 The evolution of technology at international transit-points

From the 1970s until the present, states have been using surveillance technology in order to 'make visible the invisible' in terms of politically-determined threats (Haggerty & Ericson 2000: 620). Initially, states installed portable electronic intrusion-detection ground sensors and low-light video cameras at their borders in order to better monitor migrants

and traffickers on the ground (Koslowski 2011). However, the equipment lacked effectiveness as it was difficult to determine whether the person or thing that triggered the sensors actually was a threat. Additionally, the video quality on the low-light cameras was extremely poor. At airports, an identity document typically was not required for air travel. Airlines, being generally opposed to conducting individual screenings according to company policies, merely requested suspicious passengers to pass through a metal detector (Gardiner 2013). In the 1990s all metal items were subject to screening through an X-ray machine in search of weapons, and passengers' checked bags were usually only screened on international flights (Gardiner 2013). At this time, certain state borders were more equipped with motion, infrared, seismic and magnetic sensors in order to collect a clearer image of who or what was approaching state lines. By 2000 the United States government had placed approximately 13 000 ground sensors along the US-Mexico border (Gardiner 2013). As camera quality improved, the addition of images and sensors made it possible to determine how many people were on the other side of the border, where they were moving and in which direction, as well as whether or not they were carrying weapons.

Since 9/11 the US has led the global trend of thickening borders, making them less porous and more deflective. Following the attacks, the Transportation Security Administration (TSA) was created in 2001 and the US Department of Homeland Security (DHS) was created in 2003; the DHS quickly began 'including increased manned aerial assets, expanded use of unmanned aerial vehicles (UAVs) and next-generation detection technology' (2005) on US borders. TSA soon commissioned new full-body scanners within all international airports (Arnold 2010). A globally-piercing societal fear which revolves around an imagined 'low probability, high consequence' event is just one consequence of terrorism (Amoore 2013: 11), and national borders and immigration checkpoints have become physical spaces where citizens can tangibly understand the management of catastrophic risks.

Governments introduced data-collection mandates and heightened security screenings in order to create databases of biographic, immigration, and criminal histories of individuals, which are now 'shared among law enforcement agencies in a fashion unprecedented before the 2001 terrorist attacks' (Chishti & Bergeron 2011). The US signed bilateral Smart Border Declarations with Canada and Mexico in December 2001 and March 2002, respectively, calling for the standardisation of biometric data processing for all types of travellers – tourists, migrants and refugees included (Meyers 2005: 14). Immigration policy around the world is now based on information sharing between intelligence agencies as well as international, state and local law enforcement, all of which are increasingly reliant on the latest technologies to collect this data (Mittelstadt et al 2011: 5-9).

Countries around the globe have invested billions of taxpayer dollars into information technology-based programmes such as the Secure Border

Initiative (SBI);[3] the Electronic System for Travel Authorisation (ESTA); automated biometric entry-exit systems such as US-VISIT and Europe's EES; registered traveller systems such as NEXUS, Global Entry and SENTRI; Electronic Travel Information and Authorisation Systems (ETIAS); the Schengen Information System (SIS II); and more (US CBP nd). Government budgets for border control are ballooning under the justification of mitigating alleged national security breaches. The EU announced its €34,9 billion spending plan for 2021 to 2027 on border infrastructure including scanners, automated licence plate recognition systems, and mobile laboratories, as compared to €13 billion from the previous period (European Commission 2018b). Meanwhile, the European Commission (2018a) announced their support towards EU agencies managing security, border and migration management, valued at €14 billion, in comparison to the €4,2 billion from the previous session. The US has spent approximately $41 billion for border security since 2001 (American Immigration Council 2017) and President Trump's proposed wall would cost upwards of $5,7 billion to complete (Nowrasteh 2019). According to Jean-Claude Juncker, President of the European Commission, '[b]etween now and 2027 we want to produce an additional 10 000 border guards. We are now going to bring that forward to 2020' (Angelescu & Trauner 2018). The US Immigration and Customs Enforcement (ICE) has more than doubled in size since President Trump took office (Politifact at the Poynter Institute 2017) and now employs more than 20 000 law enforcement and support personnel.

In 2016 the United Kingdom and France concluded a deal to construct a £2,3 million wall preventing refugees from entering French ports and boarding transport vehicles bound for the UK. The project requires an additional £44,5 million for additional fencing, closed-circuit television (CCTV) surveillance and other detection technology (Travis & Stewart 2018). In India, the Minister of State for Home Affairs, Kiren Rijiju, announced in 2018 that 'a pilot project for deployment of Comprehensive Integrated Border Management Solution (CIBMS) which includes different types of sensors, radars, day and night vision cameras, etc, has been taken up' to prevent the 'infiltration' of foreign threats into Indian territory (The Economic Times 2018). Brazil, too, announced in 2013 its plans to construct a $13 billion virtual wall that will stretch 10 000 miles across 10 border countries, citing the need to curb illicit activities (Moura & Garcia-Navarro 2013). According to predictions by the market research company Frost and Sullivan, the global border protection and biometrics market is projected to grow from $16,5 billion in 2012 to $32,5 billion by 2021 (Ring 2013). Border security and immigration enforcement funding has an ever-increasing budget which is, at least partially, spent on cutting-edge equipment, as further explored in the next part (US ICE 2018; EOP 2019).

3 In 2006, the United States government commissioned Boeing to create a 'virtual wall' along the southern border, but the project was completely terminated in 2011 after being deemed a failure by the Government Accountability Office: '[a]bout 1,300 SBInet defects had been found from March 2008 through July 2009, with the number of new defects identified during this time generally increasing faster than the number being fixed — a trend that is not indicative of a system that is maturing and ready for deployment.' Around $1 billion had been spent on the project by the time it was cancelled (U.S. GAO, 2010).

3 Constructing digital walls and data-driven barriers

Technology is neither inherently good nor bad, and its simultaneous ability to both cause problems and solve them is what provokes antithetical feelings of awe and apprehension. Arguing for whether or not technological advancements bring about more harm than good is rooted in the effects of their applications, but the full extent to which governments are implementing new technologies for securitisation remains unknown. Behind the semblance of national security, certain research and development initiatives as well as the scope of civilians' data utilisation are kept secret. What the public understands is based on the information they are allowed to know via government press releases, company reports from technology suppliers and developers, investigative reporting, and eyewitness or experiential testimony. The full picture is incomplete, but the evidence that has been disclosed thus far is unfavourable from a human rights perspective.

However, this is not to say that the technologies described in this part are not useful for protecting civilians from legitimate threats, such as violent actors or destructive weaponry, and the aim is to vilify neither border patrol nor the military. To date, it would seem that border technologies are not being applied with a human rights-bound mission in mind. Technology that has otherwise been used in wartime now is targetedly aimed at migrants, and the consequences of unquestioned civilian surveillance are already apparent along EU and US borders.

3.1 Technologies currently in use at the border

While steel fences and concrete walls lined with barbed wire continue to be erected around the world, military contractors are leading the armament of traditional border barriers with high-tech surveillance features and aerial reconnaissance (Vallet 2016: 53). Advancements in surveillance were the first upgrades for border patrol stations, as global increases in cross-border traffic corresponded with augmented pressure for states to monitor and manage this movement (Broeders 2011: 21). Primarily involved in the development of aerospace and defence technologies, companies such as Raytheon, Northrop Grumman, Lockheed Martin, Boeing and Ericsson now are repositioning their products towards protecting national frontiers against more abstruse threats – as opposed to identifiable enemy combatants. Aside from the major players, there are also many new market entrants attempting to capitalise on the global multi-billion dollar border security market, a few of which have already begun testing their products for further iteration. Since the US continually spends more on border control than any other country, most implementation trials take place along their borders, as discussed below.

Radars transmit radio waves in order to determine an object's position and velocity, while various types of sensors may use light or heat to detect objects. In the town of Roma, Texas along the US-Mexico border, patrol agents use Tethered Aerostat Radar System (TARS) blimps[4] watch towers, drones and helicopters with powerful infrared sensors that were

4 Which are similar to Joint Land Attack Cruise Missile Defence Elevated Netted Sensor System (JLENS) blimps, which are an armed version of the blimp (Raytheon nd).

repurposed from the Department of Defence's missions in Afghanistan (Long & Barrios nd); this machinery was previously used to track and monitor the Taliban (Nixon 2017). TARS use two tethered, helium-filled airships, called aerostats, that float around 10 000 feet (around 3 000 meters) in the air. The blimp can be as large as the length of a football field, and can scan a territory the size of Texas (Raytheon nd), clearly extending far beyond the immediate radius of the borderline itself. While the blimps have been successful in detecting impending aircraft attempting to airdrop drugs across the border, they are also capable of detecting vehicles and other moving objects for miles within Mexican territory. This brings into question the legality of whether or not the US should be able to peer over into the lives of foreign citizens, placing an unconsensual hovering eye over communities that may not even be alongside the border.

Quanergy, a Silicon Valley startup, is testing the installation of its LiDAR sensors along the US-Mexico border. LiDAR stands for Light Detection and Ranging, which is a remote sensing method that pulsates light to measure distance and graph shape, and it is the same laser-based processing that gives operable vision to self-driving cars (National Ocean Service 2018). The laser can detect objects and humans in a variety of weather conditions, during the day or night, providing real-time three-dimensional object classification and tracking (Quanergy Systems 2018). LiDAR can use 'topographic, near-infrared lasers' to map the land, and 'bathymetric water-penetrating green lasers' to measure seafloor and riverbed elevation levels (Quanergy Systems nd). These sensors allow for machines to 'see' their environment, even below water. This could be used in search and rescue missions to save the lives of refugees who have fallen overboard, but instead it is being used to facilitate their capture.

Radars with 360 degree surveillance, light, heat and soundwave sensors are built into military-grade drones, drive-through beams, and individual body scanners. Thermal fencing is also a solution offered by many defence companies, using heat-detection as a means of monitoring perimeters. As described by Josef Gaspar, Chief Financial Officer of Elbit, an Israeli defence contractor, '[t]he electronic solution has far more advantages than any physical [barrier]. It detects early, long range, and the information is gathered from multiple sensors' (Reed 2016). The problem arises when these radars and sensors are being used to locate and track migrants, which leads to overcrowded detention facilities.

While sensors collect data concerning object location and classification, other thermal imaging and high resolution cameras are conjunctively operating in order to further detect and identify moving people on the ground. Unmanned aerial vehicles (UAVs or drones) combine cameras, lasers and sensors, and although they are increasingly used they are relatively cost-inefficient. US Customs and Border Protection completed 635 drone missions in the 2017 fiscal year, totaling over 5 625 hours of flight (Office of Inspector General 2018). The US flies nine drones along the southern border, but they have only assisted in 0,5 per cent of apprehensions at a cost of $32 000 per arrest (Bier & Feeney 2018). This cost does not account for the value of privacy, which is fully neglected since no warrants are needed for border patrol-related UAV use. However, as argued by Koslowski and Schulzke (2018), drone surveillance also creates new accountability mechanisms, and supervision of patrol officers

may also lead to more calculated and cautious behaviour by police and guards.

Elbit,[5] an Israeli defence contractor, has created a Groundeye system that can establish 'virtual safe zones' which establish an invisible fence around the perimeter of an area via mast-mounted tripods that notify operators when a person or vehicle crosses into the 'safe zone' area. Groundeye is able to 'zoom into multiple target areas of interest, while offering easy maneuverability between different areas according to operational requirements, and facilitating continuous reception of data and video coverage as well as high-quality image resolution in all areas of surveillance', which applies to both sides of the border (Elbit Systems 2016). Similarly, Northrop Grumman positions itself within the border patrol market by selling intelligent AlertVideo surveillance and geospatial imaging systems, which the US Marine Corps have used to improve decision-making capabilities for military operations along coastal zones (Fleming et al 2009: 213). The company describes these systems as being able to 'extract valuable behaviour and event information from existing surveillance systems and provides instantaneous visual and audible alerts' to the border patrol officers on watch (Northrop Grumman 2004). These integrated IoT communications networks are more quickly collecting information from previously-installed technologies, categorising that data and sending it back to government agencies. If migrants are considered to be a threat, then determining what is 'valuable' information to extract from surveillance footage can be interpreted varyingly, and whatever information is collected is systematically done without prior consent of the individuals.

Graduates of MIT's Media Laboratory founded Zebra Imaging in 1996, which first sold its holographic printers to the US military for deployment strategising in Iraq. However, now three of these million dollar printing machines are stationed at border crossing points in San Diego, Tucson and El Paso. To create these holographic maps, a drone first captures an aerial photograph of the border zone, and then uses the 360 degree view that the machine creates to construct a three-dimensional display of the landscape on the ground, better allowing for realistic targeting when deploying missions. Rick Black, director of government relations for the company, stated that 'the government brings in multiple agencies in emergencies that may not all operate in an area – like with the large Central American migrant issue', referring to the flow of migrants from Guatemala, Honduras and El Salvador that have been travelling north into Mexico and the United States (Hoffman 2016). 'Now [border patrol] can all understand where they are', Black explained, 'There's nothing else out there like this printer in the world' (Hoffman 2016). The EU Travel Information and Authorisation System (2017) credits holographic visualisation as an important tool for its security operations: 'The images

5 Elbit Systems is also a prominent company in the military defense technologies and services, with a presence in Europe, the Americas and Asia. Elbit describes itself as a company that sells 'digital soldiers' for a nation's combat needs, and has been granted multi-million dollar contracts to secure national borders. Elbit was responsible for building the 'smart' wall along the entirety of Israel's border with Egypt, which is both above and below ground. The wall was completed in 2013, and while there were around 12,00 migrants crossing this border in 2010, only about 12 crossed in 2016 (Elbit Systems, n. d. b; Elbit Systems, n. d. a; Reed, 2016).

create better battle-space awareness in order to give border security a better vantage point when trying to prevent or defend themselves against danger. Should danger actually strike, the holographs can be used to evacuate areas and help in recovery efforts.' In this instance, the discourse seemingly is directed towards combating terrorist activity along EU borders, but it is not specified. Rather than using this technology to intercept migration flows and capture refugees, states could better protect migrants in the event of extreme danger. Refugee camps are typically overcrowded with confined streets and layered cohabitation, and 3D models of the sites could help to better plan and execute emergency evacuation plans in the event of terrorist activity or a natural disaster. There is no evidence that this technology is being used to protect all lives, only American and European lives.

Member states of the EU and the regional body itself have for over a decade been logging, storing and monitoring migration databases concerning the inflow and outflow of passengers (Broeders 2007: 71). All the information collected is then analysed through centralised intelligence stations, where the data must be processed, stored and disseminated in a useful way. With such amassed amounts of data, algorithms are being used to analyse the content more quickly – an example being IDEMIA's Morpho Video Investigator, which automatically hones in on faces, bodies, motion and licence plates (IDEMIA nd). Algorithms are simultaneously sorting through video footage while also referencing volumes of raw data in order to record and classify elements deemed to be 'of interest' to law enforcement and the intelligence community. The greatest risk lies in misappropriated uses of what the government deems to be 'of interest'. The EU Travel Information and Authorisation System (2017) determines that any border technology implementation will work towards fulfilling the 'same goal of keeping citizens as safe as possible from terrorism and illegal entry,' thereby posing refugees as a threat and equating a person fleeing conflict with a terrorist. IDEMIA (nd) is already in use by governments within Europe, Latin America, the US, Asia and the Pacific, but not all countries have policies stipulating how the algorithmic conclusions of the system can be ethically used. There have already been instances when government-collected data is kept longer than presumed legal, which was the case when 35 000 images of citizens' body scans from TSA airport security leaked in 2010, even though US policy stated that all images are 'automatically deleted from the system after it is cleared by the remotely located security officer' (Johnson 2010). Global inconsistencies in how these algorithms are translated into government policy and an overall misunderstanding of how said policy is implemented leave ample room for mistakes without consequence.

3.2 Technology of the future, happening now

Collecting biometric data, via fingerprinting, has been a means of border-crossing identification for travellers since the mid-1990s when the United States created IDENT, the Automated Biometric Identification System (Gemalto nd). Worldwide, it has become more commonplace that fingerprints are taken at international transit points, and this personally identifying stamp can be used to determine an individual's eligibility for entering or exiting a country. Biometric data, as defined by the European Commission's Department of Migration and Home Affairs, is 'data relating to the physical, physiological or behavioural characteristics of an

individual which allow their unique identification, such as facial images or dactyloscopic data' (European Commision nd). Biometric data collection has since evolved to include the reading of irises, facial bone structure, the distance between one's eyes, nose and mouth, and so forth. The IT systems incorporated into the machinery that have been mentioned thus far in this report often store biometric data. All individuals participating in the US-VISIT programme – including persons with visas and green cards – must submit digital photographs and fingerprints providing biometric data to the federal, state and local governments (Mason nd). To date, biometric data and other personal information has been collected from over 200 million people who have entered, attempted to enter, or exited the United States (Gemalto nd). While the US plans to install more advanced biometric-based systems in all major airports within four years (TSA 2018), biometric data is also a required component of applications to enter Schengen states, which have collectively issued 14,6 million visas for short stays in 2017 alone (Schengen Visa Info 2018). On 8 April 2019 Singapore's Immigration and Checkpoints Authority (ICA) (2019) began testing iris scanning as a means of identification that replaces the need to show a passport. The iris scanner logs the unique patterns within the coloured circle of the eye, and capturing a person's biometric stamp only requires a person to look at the camera for one to seven seconds (ICA 2019). ICA states that the government's back-end database will determine if the traveller holds a valid passport and necessary visa in order to grant access. While iris recognition improves identification accuracy, reduces the likelihood of forgery and enhances efficiency at transit points, the tech companies that are incorrectly describing this technology as 'non-invasive' considering data could be collected surreptitiously, without individuals' knowledge (EFF nd). Additionally, if this information is hacked or leaked, then the responsibility lies with the third party vendor where the databases are stored and citizens may not even know that their information is being housed within these companies. If the result of non-compliance is the denial of access to the country, then ultimately the traveller is left with no choice as to whether or not they consent to have their irises read.

Anduril's Virtual Reality (VR) devices, backed by artificial intelligence, are currently undergoing testing by US Customs and Border Protection along the Texas border (Levy 2018). These devices, however, are not simulation based; they are being fed live information that is picked up by radars and laser-enhanced cameras that have been installed at high altitudes for a grander purview. The surveillance equipment can detect motion at approximately a three kilometre radius, and then locks on a target to determine its classification – 88 per cent likelihood of it being a person; 93 per cent likelihood of it being a plant; 76 per cent likelihood of it being an animal, for example (Anduril nd). The software that allows for communication between these systems is called Lattice, which synthesises data from potentially thousands of sensors and translates that into images on a Samsung Gear VR headset. On screen, the categorisations are highlighted making it easier for the human eye to determine where a target is moving or if an object in motion is worth noticing. Although still undergoing tests for further development, Lattice's experimental trial in Texas already assisted customs agents in detaining 55 'unauthorised border crossers' (Wodinsky 2018). According to their current business model, the data Lattice collects will belong to whatever agency has purchased a leased contract for the technology.

Based on the direction and rapid frequency of technological updates, it is likely that facial recognition technology will start specifying classifications of people that are seen through the VR goggles – by sex, gender, age, nationality, criminal status, and whatever other information the government may wish to reference against volumes of big data. China, for example, a country known for hyper-surveillance, has been using facial recognition technology to track and control the Uighurs (Uyghurs), a Muslim minority group. This has been called the first known example of a government utilising artificial intelligence for racial profiling, leading towards a 'new era of automated racism' (Mozur 2019). With this kind of virtual reality software serving as a gatekeeper for our borders, the potential for ethnically-motivated segregation is a grave concern.

Artificial intelligence is the science of building technology that can mimic human intelligence by instilling 'logic' into an algorithm or machine. Machine learning is a subset of artificial intelligence, and is based on a machine's ability to make choices based on algorithms that feed neural networks and decision-making models, which are continually adapting to new information in order to self-improve. The ability for a machine to change algorithms as it learns more information is what differentiates machine learning from the broader category of artificial intelligence, and both of these advancements are being quickly adopted by law enforcement. In 2017 the West Midlands Police Department in the UK announced the development of a system called NAS (National Analytics Solution), which is a predictive model that can 'guess' the likelihood of someone committing a crime (Portilho 2019). The programme utilises machine learning as a means of combining related data sets – from other partner agencies as well as the Department of Education, the Department for Communities and Local Government, the Department for Work and Pensions and the National Health Service – to determine statistical probabilities prior to a person having committed the offence (West Midlands Police nd: 22). Therefore, neural networks will process data sets regarding people's employment status, education levels, community involvement and health conditions (potentially mental and physical) in order to predict whether or not they are a threat to society. This kind of preemptive judgment has massive human rights ramifications, targeting individuals prior to an actual offence having been committed – nullifying the entire conceptual understanding of a right to a fair trial. The Alan Turing Institute's Data Ethics Group (2017: 5) denounced the use of NAS, stating that '[w]e are generally concerned that the development of ethical principles in the NAS is not at a sufficiently advanced stage to permit them to keep abreast of the proposed uses of technology and data analytics for a new and wider law enforcement mission'. Border patrol is considered a branch within law enforcement, although thus far there is no evidence of patrol agents utilising this technology.

While machine learning is becoming pivotal in the field of medicine for more accurately diagnosing disease, and businesses are becoming more heavily reliant on its ability to sort through large amounts of data and detect patterns, a major underlying flaw in using machine learning for profiling is that the datasets may be biased or even doctored (Papernot et al 2017: 13). It is possible to reverse engineer algorithms in order to produce a desired output, which is why the true intelligence of the machine is influenced by the prejudice or intentions of its creator. Regardless, the artificially intelligent machines at our borders lack the

contextual knowledge of what human rights are, and have yet to be programmed with valuable insights on important bigger picture factors, such as the causes of global migration waves, personal concerns of privacy infringement, the stark effects machine decisions can have on an individual's life, to name just a few.

While humans are trying to teach artificial intelligence to machines, researchers are trying to recreate the marvels of nature by studying the flight patterns of birds and insects. Micro Aerial Vehicles (MAVs) are small robotic drones with cameras and built-in microphones and can be as tiny as a few centimetres (US Air Force Recruiting 2015). MAVs can work individually or in a swarm to infiltrate a sensitive areas, where larger drones would be too bulky or noticeable, and transmit information back to a control centre. Considering that UAV surveillance has become more commonplace, it is not far-fetched for border patrol to further their surveillance efforts by employing MAVs. The MAVLab (nd) at the Delft University of Technology in The Netherlands specialises in micro and nano-air vehicle research, as does Harvard's Microrobotics Lab, and departments within MIT.

Considering that this type of surveillance is designed to be incognito, the infringements upon privacy rights are flagrant. A goal of MAV aeronautical engineering is for the device to be capable of accurately landing on the human skin, and potentially collecting DNA samples or detecting chemical radiation (Office of Communications 2012). Policy relating to the use of these machines at transit points needs to be discussed at greater lengths with more transparency as to their capabilities and applications, allowing for an interdisciplinary approach to important regulation for technology that has unprecedented consequences.

3.3 Human rights implications

The effects of utilising fourth revolution technologies will continue to be a morally-charged issue, and voters without a detailed understanding on matters of privacy versus security will remain in a haze of doubt. At present, advancing technologies are contributing to an already dehumanising and under-resourced flood of immigration casework. Steven Levy, a tech correspondent for WIRED, addressed the human rights concerns that arise when painstakingly omniscient technology begins to infiltrate sensitive situations:

> Families are not part of the Anduril [executives'] thought processes. They're fulfilling what the government wants done and they aren't getting involved in the politics. But what we are learning is that technology is politics. They consider themselves as patriots doing this for the government, but you can't do this without dealing with the implications of your technology (CNBC 2018).

Under the Trump administration's 'zero tolerance' immigration policy, close to 3 000 children were forcibly separated from their parents and placed in shelters – some with extremely poor conditions – or foster care (Office of Inspector General 2019:1).

Reviewing the equipment used by the border patrol agents, it is clear that militarising the border means far more than just deploying troops manned with heavy artillery weaponry. The same technology being used to hunt high-profile enemies of the state and internationally infamous

terrorists is being used to peer over state lines and detect the movement of migrants in neighbouring countries. Operating under the guise of national security is an ethos-driven argument for patriotism, yet the implications of surveillance with piercing accuracy include dangerous human rights violations.

As explained by Lyon (2007: 7), if the objective of surveillance is social sorting, then systematising classifications of people merely precedes unequal treatment. In the case of migration, this translates to either granting or rejecting access to state territory, visa privileges or asylum status. Digitising the border via artificial intelligence, integrated IoT communications networks, and biometric data collection can lead to formulaically differentiating between which people governments consider to be more valuable. Artificial intelligence is already sorting cargo in the EU, as explained by Sven Suurraid, head of the customs department for the Estonia Tax and Customs Board: 'It's nice to have very modern railway X-rays but the analysation of the images must develop to the next level, not made by humans. Our future is in pairing machine learning and artificial intelligence to check these pictures' (Lewington 2018). Will humans be processed in the same way?

When machine-learning outputs include solutions based on one-dimensional algorithms, the risk lies in an inability to programme the essence of morality into a technological system, leaving all other dimensions related to human rights behind. Bowling and Sheptycki (2015: 151) argue that law enforcement and all of its peripheral branches will increasingly rely on technology, but officers must remember that 'a device is more than just a technological tool and should be seen as an important component in the process of transnational policing and in the deployment of specific rationalities in the governance of security'. As suggested, technology is a mere component to the larger picture, as there are many other sensitive factors at play when dealing with migrants, refugees and asylum seekers. A state's border security strategy should incorporate cooperative neighbourly relations in order to achieve the common goal of filtering out smugglers and terrorists, all the while stimulating business, cross-cultural value sharing, and ensuring that all people have the right to be treated with dignity.

As in the case of all new technologies, its application is more important than the technological development itself. There are infinite examples of how technology has been used to help humankind, but it has only ever been accomplished with a person who values humanity driving the achievement.

4 The impact of digital walls and data-driven barriers on vulnerable groups

In the past, humans were responsible for managing tasks and risk along the border, meaning a conscious mind would make the final decisions. However, these tasks are now increasingly being carried out by machines, implying an algorithm may decide the future of a human's fate.

This part of the article examines the impact of border digitisation on individuals, particularly focusing on the discriminating effects pertaining to vulnerable individuals or groups. It explains how a machine can hold

biases and the extent to which algorithmic discrimination can be applied at the border. The interactions between facial recognition systems and vulnerable groups, including dark-skinned women, are the basis for this section, which explains how machines can impose discrimination and further disadvantage the most vulnerable groups in society.

A machine itself is not discriminatory, but machine-learning algorithms can be shaped to be so. Facial recognition is performed by automated facial analysis algorithms that are trained with datasets, which contain thousands of pictures of faces. By training the algorithm with those pictures it can learn to recognise and classify faces. A comparative study carried out by Buolamwini and Gebru (2018: 77-79) showed that some of the widely-used datasets are composed of samples where more than two-thirds of the images are light-skinned faces. Therefore, the algorithms trained with these skewed datasets will be much more precise in recognising light-skinned people over dark-skinned people. The study by Buolawinis and Gebrus not only reveals that the trained algorithms have problems correctly identifying dark-skinned people, but they also have a gender bias. Many women were wrongly detected as male or not recognised as human faces at all. Females were underrepresented in the dataset, which resulted in an average error rate for dark-skinned women as 34,7 per cent, whereby light-skinned males were misclassified by only 0,8 per cent (Buolamwini & Gebru 2018: 77-82).

These kinds of skewed datasets are not only used for facial recognition systems by tech companies, such as Apple installing facial recognition into their products, but also by the police to enforce the law. Consequently, public authorities make decisions based on these flawed systems. For instance, in some US states law enforcement uses a facial recognition system called Rekognition provided by Amazon (Cagle & Ozer 2018). Shortly after the publication of the Buolawinis and Gebrus study, the American Civil Liberties Union (ACLU) tested Amazon's software. The ACLU results were shockingly similar to those of the Buolawinis and Gebrus study, which tested facial recognition systems from other providers. ACLU's test proves that Rekognition was trained with a dataset predominantly made up of pictures of light-skinned people (Snow 2018).

Test results such as these triggered Amazon's shareholders to call for a bar on selling facial recognition systems to law enforcement. The shareholders were particularly concerned about civil and human rights violations (McFarland 2018). Wood (2018) points out in Amazon's official AWS Machine Learning Blog that Rekognition can be used to fight crimes such as human trafficking or child exploitation and that any unlawful use or harmful act towards someone with the software is prohibited. Facial recognition systems might have some positive uses and make several areas of work more efficient. However, even in lawful use and properly exercised by professionals, algorithms can be biased and, therefore, discriminatory.

Concerns about facial recognition systems and their impact on civil and human rights have already proven to be valid. The danger of such systems stems, on the one hand, from the issue of racial and gender bias. On the other hand, it lies in how this biometrical technology is used in practice. It can lead to unfair practices and discrimination due to biased profiling. Unfortunately, technologies have evolved so fast that legal regulations have not yet caught up, which is particularly important to observe in the US.

In the context of border management, facial recognition systems are most often used to conduct profiling. Profiling is a way of categorising individuals on the grounds of changeable or unchangeable characteristics. The collected data is converted into profiles and stored for a certain amount of time (European Union Agency for Fundamental Rights 2018a: 15-16). It is important to note that profiling, exercised either by humans or systems with an underlying algorithm, is always – consciously or unconsciously – biased. Algorithmic systems are biased because of previous learning experiences or from the database that trained the algorithm. Those biases influence the profiling assessment as well as the decision making (European Union Agency for Fundamental Rights 2018a: 18). Thus, there is a high risk for discrimination. In other words, profiling is unlawful if an individual or a group of people would be treated less favourably than another person or group in a comparable situation as a result of targeting due to subjective justification (Council Directive 2000/43/EU, Article 2, 2000). In addition, using a biased algorithm in a facial recognition system could lead to structural discrimination.

However, facial recognition systems are becoming standardised for profiling at most border checkpoints. There are two main reasons for conducting profiling in border management: first, to identify individuals. This is important in order to find out whether the subject is already known or not, and if there is already a history with that individual. Second, profiling is used to predict behaviour and to make decisions concerning the profile due to these predictions. This is especially important for security and law enforcement reasons, and even of greater importance if the subject is not yet known in the system. Such a presumption could be the likelihood of the person remaining in a country after their authorised stay has finished. With the presumptions regarding the subject generated from the system, border management has an additional tool to decide what kind of policing (proactive or reactive) is adequate for the situation.

In the EU Schengen zone, facial recognition is being tested for entry/exit situations. By collecting biometric data, policy makers hope to maximise security by minimising the falsification of travel documents and illegal stays. Augustin Diaz de Mera Garcia Consuerga (2017) from the European Parliament points out that security- and preventive-driven policing became more prominent after the increased mixed migration flows towards Europe in 2015 and several terrorist attacks – such as the 2016 Berlin attack when the police uncovered that one of the assailants had used 15 different identities.

Amassing vast amounts of personal data and conducting profiling are methods being more frequently used in combination with algorithms to create coded solutions for automated decision making (ADM). Algorithms with ADM have been a fixed part of our lives for a while now. One of the most common examples is the spam filter in every inbox (European Union Agency for Fundamental Rights 2018b). Sometimes an e-mail is moved to the spam folder by the algorithm, despite it being an e-mail that typically would not be regarded as 'junk mail'. The same thing happens when using ADM at border crossing points, especially when the algorithm contains racial and gender biases. A refugee woman could be wrongly detected as someone who has already applied for asylum and would therefore be rejected. ADM is applied frequently and the reasons why it is used could

turn out to be more dangerous than anticipated. This danger provides reason for legal regulation that must be kept up-to-date with technological developments.

The EU law is more developed than the US law regarding the regulation of profiling and ADM. Regulation (EU) 2018/1725 applies to personal data proceedings directly executed by an EU governing body, organisation or agency. This regulation allows the EU to collect and process intimate personal data if an EU body needs the data to fulfil its mandate. This usually applies in the context of security such as border management. In practice, this means that Frontex is only allowed to use ADM under certain circumstances. Therefore, in most cases Frontex is obliged to use profiling as an additional tool to gather information but not to make decisions solely based on this technology. This minimises the risk of vulnerable parties falling victim to a biased or incorrect algorithm.

In addition to Regulation (EU) 2018/1725, the EU also regulates profiling and ADM under the General Data Protection Regulation (GDPR). This is important because of the limitation on data mining and surveillance performed by private companies. The GDPR prevents the gathering of personal data in another context in addition to prohibiting the sale of that information to law enforcement. Under article 22 §1, GDPR (Regulation (EU) 2016/679, article 22) profiling is only accepted under the condition that the decision cannot solely be based on ADM and it shall not affect the data subject in a significant way. Even though article 22 §2 allows profiling under very specific circumstances, article 22 §3 restricts this profiling. It does so by referring to article 9 §1 GDPR, which regulates processing of special categories of personal data (Regulation (EU) 2016/679, article 9). These include, among other personal data, genetic data and biometric data, which are extremely sensitive because they remain unchanged for a very long period of time (Deutsches Referenzzentrum für Ethik in den Biowissenschaften 2019).

In situations such as border management, profiling can have a very serious impact on minorities or vulnerable groups such as dark-skinned women. Nonetheless, profiling is widely used in border management and in some countries even in combination with ADM (Osborne Clarke 2018). Facial recognition systems are not the only AI systems with algorithmic discrimination. In recent years more systems have developed similar problems. However, as a result of these other systems being largely used among different sectors, facial recognition systems have come under more prominent scrutiny than others. Nonetheless, the legal framework still has to keep up with the fast evolvement of new technologies, which is discussed in more detail in the next part.

5 Balancing security and human rights: Analysing the shifting policy and legal frameworks on digital walls and border surveillance

As discussed above, means of surveillance have greatly transformed since the beginning of the twenty-first century. What started as traditional, manual mechanisms rapidly shifted towards new, automated technologies,[6] which have proven to be cheaper, faster and able to deliver thousands of terabytes of information and knowledge in a single chip. This

part first focuses on the shift in policy making that has taken place in response to the expansion of surveillance and biometric data collection in law enforcement, using the US and Europe as case studies. It addresses the risks and consequences of constant border surveillance and concludes with an analysis of the present legal framework and attempts to balance security and fundamental rights.

After the 9/11 attacks people's perceptions of privacy and security changed radically, not only in the US but worldwide. As a global political narrative began to focus on border control, civilian attention also began narrowing in that direction. Emergency driven policies transformed into organised intelligence, in which constant mass surveillance became necessary for law enforcement and national security. The increased number of surveillance mechanisms and high-profile biometric devices pending patent registration reflects this change in policy and mindset. Between 1970 and 1995 the US Patent Office granted fewer than ten patents involving facial recognition systems. From 1995 to 2000 it issued 20 such patents. Between 2001 and 2011 the number leapt to 633 (Donohue 2012: 410).

Emergency-driven policies, which tried to tackle problems once they materialised, became obsolete within policy making as governments shifted towards a risk-management approach, which focused on prevention as the main way to avoid terrorism, (non)-organised criminality and irregular migration.

In practice, however, the risk management approach often is not proportional to the limitations of rights it brings with it, consequently becoming too invasive (Degli Spotzi 2018: 79). With massive surveillance operations, there is a tendency to move from contextualised surveillance to a generalised surveillance through the collection of purely preventive information, carrying with it the respective violations of the fundamental right to privacy.[7] From a human rights law perspective, this approach should incorporate a proportionality test, as it should analyse risks in accordance with overall risk tolerance and decide whether or not the limitation of civil liberties is warranted. Since border surveillance suggests a threat to privacy by enabling widespread surveillance and massive personal information storage in databases (Nissenbaum 2010), the privacy-security trade-offs must be carefully assessed. The so-called risk-management approach has inevitably taken us to profiling and uninterrupted data storage as common practices. Border agents have used profiling as a modern tool for identifying and categorising people in order to detect threats within the stream of border traffic through data mining, as explained in the previous part.

Establishing what a legitimate limitation of rights entails can be a daunting task. While surveillance for illegitimate reasons violates privacy, surveillance for legitimate purposes can also do so if the associated privacy harms are not proportional to the ultimate purpose (Latonero 2018: 149-161).

6 Automated technologies are those operating by automatic means, reducing the human intervention as an operator to a minimum.

7 Art 12 UDHR; art 8 ECHR; art 7 EU Charter of Fundamental Rights (ECFR).

In the current context of high migration flows, both border agents and governments have been accused of profiling (Panneta 2019) and of data retention[8] as an abuse of privacy (Massé 2016). As explained in this article, efforts to increase biometrical identification systems are spreading fast around the world. Within biometric identification, there are two types that have been widely used (Donohue 2010: 414-415), namely, immediate biometric identification (IBI) and remote biometric identification (RBI). IBI is focused on a single individual, with a close-up, and it is used in particular for detention purposes in a government-owned area. RBI, on the other hand, gives the government the ability to determine the identity of multiple people, both in public spaces and at a far distance (Donohue 2010: 414-415). As part of the risk management approach, the federal government in the US has increasingly invested in RBI technologies to supplement its IBI capabilities (Donohue 2010: 414-415).

The legal nature of these two types of biometric identification is different. Whereas IBI involves notice and consent and is limited in its occurrence, RBI does not require notice or consent, as it is done in a continuous manner (Donohue 2010: 414-415). This distinction is especially important in the context of border management, since millions of people are crossing borders daily. Surprisingly – or perhaps not – all this personal information is stored in servers that are not accessible to the public, raising concerns about data privacy and potential misuse. The same concerns apply to facial recognition technology (FRT), as this allows governments to observe and retain data in public spaces. China started a national surveillance system comprising 200 million cameras, with plans to have 300 million cameras in place by 2020 (Mozur 2018). China is also using its mass surveillance capabilities to create a system of 'social points'; the government is tracking people's habits, like online shopping behaviour or smoking in public, to grant and detract from civic rights and opportunities (McDonald 2018).

In response to all these privacy concerns, each government's script is often the same: National intelligence agencies promise to minimise terrorism and crime with the retention of our personal data. States often defend this by saying that it is not an intrusion into our private sphere. However, evidence such as the Snowden revelations has shown that there is a permanent state of surveillance by states of people both at borders and within them (Greenwald 2013).

As far as mass data retention is concerned, Frank La Rue, the former UN Special Rapporteur on Freedom of Expression, acknowledged:

> National data retention laws are invasive and costly, and threaten the rights to privacy and free expression … [M]andatory data retention laws greatly increase the scope of state surveillance, and thus the scope for infringements upon human rights. Databases of communications data become vulnerable to theft, fraud and accidental disclosure (A/HRC/23/40).

8 Art 5(e) GDPR: [Data should be stored for] 'no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes'.

This shows not only how we are subject to mass surveillance, but also the risks of such mass surveillance. The legislative framework in place with regard to data retention contains many shortcomings. These shortcomings increase the risk of human rights violations, as they allow for the use of data to limit access to certain territories, curtail freedom of expression and hamper personal data sovereignty due to the creation of long-lasting personal files. These not only present an immediate risk, but raise concerns for greater risks in the future, depending on the judgment of those in power.

There are no worldwide legal provisions that regulate and protect the processing and storage of biometric data. Instead, the overall trend is to include the collection and use of biometric data within the framework of personal data protection and domestic privacy laws (Council of Europe 2018). The intangible nature of data poses a complicated dichotomy. In practice, data flows freely across geographic borders, but the territorial scope of data protection laws is restricted. While border digitisation undeniably affects privacy and data protection, practice shows that the lack of territoriality of the internet also poses grave concerns for the right to privacy. According to Justice Abella from the Supreme Court of Canada, '[t]he internet has no borders – its natural habitat is global' (*Google v Equustek* 2007). Collected data from government surveillance similarly is borderless.

In the US only a handful of states currently regulate biometrics within their legal frameworks,[9] and there is no framework regulating patents whatsoever. Unlike in Europe, privacy is not a fundamental right in the US, where it is often balanced against the Fourth Amendment. The 1974 US Privacy Act regulates how the federal government holds personal data and stores it. However, it is important to know that there currently is no single principal data protection legislation in the US. Furthermore, at the jurisdictional level, the courts use the reasonable expectations of privacy principle, which is an element of privacy law that determines in which places and during which activities a person has a legal right to privacy. Whereas this principle is used to protect against undue interference in private life, it makes the right to privacy dependent on the situation and context, giving the impression that fundamental rights are dependent on a person's circumstances.

In Europe, on the other hand, the GDPR entered into force in May 2018 and represents the culmination of Europe's efforts to be at the forefront of data protection. The scope of application of this law is limited to private organisations, companies and individuals processing personal data of EU citizens or foreigners based in the EU. Described as a very sophisticated law (Guido Raimondi 2018), the GDPR introduced a new sanctionatory structure, in which non-compliance can lead to fines of up to €20 million or 4 per cent of a company's annual worldwide turnover (GDPR 2018, art 83.5). This law applies to subjects 'whatever their nationality or place of residence' (GDPR 2018, recital 14) within the EU. It is of utmost importance since it regulates the information that could fall into the hands of private companies within the context of border-crossing. In addition, Directive (EU) 2016/680 is used for applying the GDPR when law

9 Illinois, Texas and Washington, for example, have passed biometric privacy laws subsequently since 2008.

enforcement is involved. It regulates the processing of personal data of natural persons by competent authorities, for the purposes of the prevention, investigation, detection or prosecution of criminal offences (GDPR 2018, recital 19).

The GDPR also provides a clearer definition of consent, which changed from merely 'freely given' to 'freely given, specific, informed and unambiguous'. This change was most likely prompted by the fact that privately-run companies, and sometimes governments, often hide behind the mask of consent to renounce any responsibility, as Facebook did in 2018 (*Federation of German Consumer Organisations (VZBV) v Facebook* (2018)).

In order for consent to be valid, data subjects must be given a genuine and free choice. This essentially eliminates forced consent within the borders of the EU. In other words, when two parties sign a contract and the one party has no way of declining consent without suffering a consequence, consent is fundamentally biased. This applies even more so to situations in which consent is not even explicitly given, such as in the context of border surveillance. As a consequence, the idea of consent as we know it today has led some academics to refer to consent as a myth (Degli Spotzi 2018: 177).

When the EU (as an institution) is collecting data, the regulation applicable is Regulation (EU) 2018/1725, which is fully in line with the GDPR. This regulation lays out the data protection obligations for EU institutions and bodies as they process personal data and develop new policies. It is enforced as soon as EU agencies come in contact with data. However, its scope is wider because of the protective mandate of such institutions. For example, it would regulate how Frontex deals with refugees' personal data.

In Europe article 8 of the European Convention for the Protection of Human Rights and Freedoms (ECHR) on the right to respect for private and family life is central to the privacy-security trade-off debate. The European Court of Human Rights (European Court) has balanced article 8 with conflicting interests such as private property and national security. If a state were to limit article 8, this interference would have to be 'necessary in a democratic society', meaning that there must be a 'reasonable' 'pressing social need' (Council of Europe 2019) for such intrusion in the private sphere.

This privacy-security conflict is addressed in cases such as *Klass & Others v Germany*. In this case the Court held that there had been no violation of article 8, finding that the German legislature could draft legislation empowering the authorities to monitor people's correspondence and telephone communications without having to inform them. This case was made on the grounds of national security and public interest. In *Malone v United Kingdom*, however, the Court held that there had been a violation of article 8 when the government tapped communications, and constantly monitored them without reasonable clarity or scope.

Similarly, on 6 October 2015 the European Court of Justice (ECJ) issued its judgment in the case of *Schrems v Data Protection Commissioner*, declaring the European Commission's Decision 2000/520/EC invalid, which allowed transfers of personal data from the EU to the US. While the

Schrems judgment only directly concerns data transfers from the EU to the US, its ramifications may indirectly affect cross-border data transfers more generally. In the same way, the ECJ issued Opinion 1/15 on 26 July 2017, and as interpreted in the *Schrems* judgment, the transfer of data to a third country became possible only if such country ensures an adequate level of protection.

In the *US v Jones* case (2012) the US Supreme Court established that monitoring a car through the use of GPS constitutes a violation of the Fourth Amendment, the principle that protects people against unreasonable searches. The Court ruled that the GPS monitoring was disproportionate in time and space and it was a trespass of Jones's personal effects. Similarly, in *US v Maynard* (2010) the Court established that attaching a GPS to a person's vehicle without a warrant constitutes a violation of the Fourth Amendment. The Court stated that 'a person who knows all of another's travels can deduce whether he is a weekly church goer, an unfaithful husband … and not just one such fact about a person but all such facts'.

Furthermore, while border surveillance can potentially be a threat to civil liberties, it is particularly apparent that those who have the power to control surveillance are the ones who can abuse it of their own volition. Reports claim that in 2016 Donald Trump's personal lawyer allegedly met with a KGB operative in Prague, despite the fact that his passport holds no proof of entry to the Czech Republic (Stone and Gordon 2018).· If accurate, this case may show how border surveillance, rather than merely following traces based on stamps within passports, can function as a means of transparency. Technology allows tracking to be done independently of there being evidence of a border having been crossed or not, which may result in holding elected officials accountable. Not surprisingly, border technology and surveillance is a controversial political issue, and the next part examines this political dimension in more detail.

6 Populism and digital walls: Analysing the political challenges to implementing human rights-friendly border technologies

Political will heavily influences the likelihood of border technology complying with human rights obligations, and thus determines whether smart borders amount to smart solutions. Therefore, this part examines the political playing field, focusing on the influence of right-wing populist parties. The emphasis is on the EU, but events in this region reflect the growing international support for populist leaders (Kyle and Gultchin, 2018).

Going forward the rise of populism could present a challenge to human rights protection in border technology. A central contention of this article is that the rise of the populist far-right in Europe is playing into the securitisation culture surrounding migration. The proliferation of securitisation in the EU coincides with the militarisation of its borders. It has been argued that these phenomena are inter-related as an enhanced focus on security at the border can justify the use of militaristic paraphernalia. Granted, numerous factors contribute to the increased use of security technologies on the EU's external borders, including the economic interests of arms traders and the fear of terrorism since 9/11.

Nonetheless, the connection between securitisation, militarisation and right-wing populists is worthy of consideration. It must be stated from the outset that the militarisation of borders predates the rise of right-wing populism. Moreover, until recently right wing populists did not wield any direct control over the EU so they did not have a direct impact on policy relating to the EU's external border. However, the trend demands attention for a number of reasons. First, right-wing populists are gaining international traction. Second, right-wing populist rhetoric extols the benefit of strong borders; and through repeating this, they encourage a shift to the right among other political actors.

This article argues against the idea that populism is irreconcilable with technology and instead contends that populist solutions are inextricably linked to emerging technologies. To further elaborate on the connection between rising right-wing populism in Europe and border technologies, this part first discusses a definition of right-wing populism and the centrality of borders in their politics; second, it addresses the significance of social media and the influence of populist discourse across the political spectrum; and, finally, outlines the relationship between securitisation and militarisation of migration.

In Europe, borders have become a political priority due to an unanticipated surge in immigration. Conflicts in the European neighbourhood and the Middle East led to an influx of migration over the past decade, peaking in 2015 and 2016 (Johansson-Nogués 2018: 529). A 2016 Commission Communication stated that the number of migrants globally in 2016 represented the most severe refugee crisis since World War II (European Commission 2016). The sheer volume of people entering the EU and the dangerous routes taken (via boat and on foot) undeniably resulted in a humanitarian crisis (Neville, SY, Rigon, 2016: 8). This crisis led parties across the political spectrum to look for ways to respond. The European Parliamentary Committee on Civil Liberties, Justice and Home Affairs repeatedly called for the creation of legal routes into the EU (Luyten and González Díaz 2019), whereas more conservative parties called for stricter border control.

Quite apart from these two responses was the response of right-wing populists. These groups not only call for stricter immigration controls but also argue that settled immigrants are corrupting the values and culture of their respective nations. Recently, the European Commission declared the migration crisis over, and the Commissioner for Migration, Home Affairs and Citizenship noted that irregular arrivals are now lower than before the crisis (European Commission Press Release Data Base 2019). Nonetheless, populists continue to warn against rising migration (Roth 2019). A 2011 Chatham House report (Goodwin 2011: x) stressed that anti-immigration sentiment is a defining characteristic of right-wing populism:

These parties share two core features: They fiercely oppose immigration and rising ethnic and cultural diversity, and they pursue a populist 'anti-establishment' strategy that attacks mainstream parties and is ambivalent if not hostile towards liberal representative democracy.

One reason why border control is so important to populists is that it symbolises the exercise of state sovereignty. States traditionally held the power to decide how many people could enter their territory, as well as the processes for crossing the border. However, in a globalised world, states no

longer have boundless discretion. Rather, they are restricted by international obligations and commitments. These include principles of international law such as *non-refoulement* protections (OCHRa 2018) guaranteed under international humanitarian law and standards set out in international human rights treaties (OCHRb 2018). Furthermore, states in the Schengen area pledged to cooperate with others in the area regarding how to manage the external frontier of the EU. Populist parties equate this diminution in the ability of the state to make independent decisions regarding migration, as an imposition on state sovereignty.[10]

Other features of populist agendas may seem unrelated to borders and migration at first glance. However, on further inspection the connection becomes apparent. For example, an identifying characteristic of populist parties is that they claim to represent 'the people'. Advocating greater accountability and responsiveness from democratic systems would seem to be a laudable aspiration. However, the populist conception of democracy leaves no room for pluralism. They portray 'the people' as a homogenous whole; the people are not just 'demos'; they are also 'ethnos' (Pasquino 2007: 16). In their 2017 World Report, Human Rights Watch (Roth 2017) noted:

> Throughout the European continent, officials and politicians harken back to distant, even fanciful, times of perceived national ethnic purity, despite established immigrant communities in most countries that are there to stay and whose integration as productive members of society is undermined by this hostility from above.

These points go some way towards explaining why borders are a site of utmost concern for populists. In populist discourse, migration is more than a question of policy; it is a question of transcendental import. Borders take on spiritual significance, in that they represent an answer to the most essential of human questions, 'why do we suffer?':

> Populism employs a secularised version of the myth of the fall of man to explain suffering as something more palatable to the sufferer. Things have gone wrong, suffering has come into the world with the others (the immigrants, the political elite, the established media), and what we need to do now is return to the paradisiacal State that existed before the fall (Hendricks & Vestergaard 2019: 93).

While they have built their rhetoric and agenda in this vein, populist parties have relied on emerging technologies to garner support. It has even been argued that the formats of certain sites encourage more radical perspectives (Bartlett 2018). Social media sites provide an ideal platform for populist parties. Simple messages sell online and populist outlooks attract more attention online than anything in the 'watery centre ground' (Bartlett 2018). Hendricks and Vestergaard (2019: 88-89) write:

> Populism is an efficient media strategy that plays on emotions. The narrative structure of us-versus-them, with the others being villains, is efficient when it comes to mobilising anger or fear. News stories that provoke anger (ie, indignation) and fear have a much greater tendency to go viral and suck attention on social media.

10 With that said, populist parties may be willing to support European Union cooperation if the goal is to reduce all immigration, via a method they agree with.

The fault here cannot be placed squarely on new social media platforms. Instead, these platforms just exacerbate innate human tendency to gravitate towards stories that affirm one's own world view. This tendency accounts for the success of misinformation online. As Hendricks and Vestergaard explain (2019: 80), cognitive dissonance and selection bias play an important role in this context. These methods of sharing and receiving information contribute to the polarisation of the political spectrum. Etzioni (2018: 131) explains that causes of the success of populism among traditional communities include 'fragmentation of the news, gerrymandering, self-segregation, and political polarisation'. This media landscape contributed to the growth of the populist right across Europe by reinforcing outlier perspectives.[11]

The success of right-wing populist agendas online has an impact 'in real life'. Notably, even where right-wing populists have not gained a majority, the presence of support for right-wing populists in the political arena pushes centre parties further to the right. An example of this is the German tightening of border control following Chancellor Angela Merkel's initial open response to the migration crisis (Balfour 2016: 48). It demonstrates how the influence of populist candidates changes the political arena, irrespective of whether they directly hold power or not. A 2016 European Policy Centre report (Balfour 2016: 3) argues that in the current interconnected and globalised world, the impact of domestic policy discourse extends beyond state borders. Therefore, right-wing populist groups influence EU foreign policy and border management, even though they have not enjoyed parliamentary success in all EU member states.

If one accepts that the growth of populism affects the political arena, this leads to the question of how populism will affect border policy. Right wing populism contributes to an atmosphere of securitisation which can contribute to border militarisation. This is a significant factor to take into account when discussing border technologies, because where technologies are rolled out as a part of border militarisation rather than as a part of a project with humanitarian intentions, this affects the priority given to human rights.

An atmosphere of securitisation has crept over Europe. In this context, contemporary politics often presents a dichotomy between security and human rights. For example, as was discussed in the previous part, increasing data surveillance is justified by the ends of security and peace. Granted, security plays a role in every state, but security cannot be used as a trump card nor can it be used to justify disproportionate responses to threats. Some security concerns pertaining to migration are warranted but right-wing populists play on the fears of the electorate by framing security as the predominant lens for viewing questions relating to borders.

Right-wing populists cannot be blamed for the securitisation of migration. Rather, they are merely a catalyst in a pre-existing discourse.

11 There are other factors at play. For example, populist politicians may spend more time on the ground speaking with their constituents; they express the rage that large demographics of society feel towards the liberal system of globalisation; and people may feel drawn to more radical parties as the traditional left and right hover at the centre, resulting in a deficit of meaningful opposition. Furthermore, it may just be that many people still hold xenophobic bias.

Indeed, parties of different persuasions have long framed migration policy through security terminology. Lazaridis and Konsta (2015: 184) explain:

> Security concerns have topped western political agendas since the attacks of 9/11, ... Included among the non-military threats to state security is migration, the idea being that liberal migration regimes advance cross-border risks – for example, that of terrorism – while more restrictive regimes minimise such threats and improve national and societal security.

The EU itself has played into the securitisation of migration. The 2016 European Agenda on Migration links the control of migration to security by explicitly stating that migration and border management will be a component of Common Security and Defence Policy missions ongoing in Niger and Mali (Davitti 2019: 47).

Notwithstanding the pre-existence of the securitisation paradigm, it nonetheless can be argued that populist parties are unique in the extent to which they exploit the othering of migrants to further their own political agenda. Lazaridis and Konsta point out how Golden Dawn in Greece and the British National Party in the United Kingdom 'take advantage of the securitisation of migration' (Lazaridis and Konsta 2015: 185) and how, 'via populist actions, exclusionary practices are promoted through the construction of Otherness'(Lazaridis & Konsta 2015: 185). Right-wing populists could push the discourse even further to the right which could in turn lead to more brutal approaches to border management.

But how does the paradigm of securitisation translate into the militarisation of borders? Or more succinctly, how could the rise of populism lead to the militaristic implementation of new border technologies? At first glance it may seem that right-wing populists are opposed to technologies on the border. Right-wing populists are often associated with crude tangible measures, such as building physical border walls. For example, President Trump and Viktor Orbán, Prime Minister of Hungary, are famous proponents of wall building (McTague 2017). Moreover, populist movements harken back to imagined glory days and this atavism seems at odds with the progression of technology. However, this view is overly simplistic. The populist leader of the US, President Trump, has invested in additional border security including new emerging technologies, albeit only after the idea was promoted by other Republicans (Cowen 2019). This demonstrates that populists' border policy is not mutually exclusive with emerging technology. This conclusion is corroborated by the fact that populists rely heavily on social media to consolidate their support, as was discussed above.

It may be argued that the militarisation of the EU external border is already taking place. Private military and security companies are already reaping the benefits of a culture of fear (Davitti 2019), and right-wing populism serves to fan the flames of this fear. Kraska (2007: 503) defines militarisation as

> a set of beliefs, values, and assumptions that stress the use of force and threat of violence as the most appropriate and efficacious means to solve problems. It emphasises the exercise of military power, hardware, organisation, operations, and technology as its primary problem solving tools.

This phenomenon that is taking place on the EU border as 'security threats' (Behr 2013) are framed to justify militaristic security methods

(Davitti 2019: 38). One indication that the external border of the EU is being militarised is that European military contractors, including Thales, EADS, Finmeccanica and Talos, benefit from producing technological equipment for border security (Jones & Johnson 2016: 5). Furthermore, during the migration crisis civil society called out the military style approaches of Frontex (Buxton 2016).[12]

While right-wing populism grows increasingly popular, there simultaneously is a rise in border militarisation, partly as a result of securitised discourse. It is the contention of this article that this combination could increase the potential of migrants' human rights being abused via new technologies. That is, unless developments in border technologies are monitored and leaders are made accountable for when these developments compromise the dignity of any person.

7 Conclusion

The application of new technologies in our daily life is unstoppable. As seen in this article, it can be for the good and for the bad. Due to a lack of knowledge about the workings of algorithms and missing regulations regarding transparency, technology is applied without necessarily knowing what harm it can do. Groups, especially those that are not on the frontlines of the fourth revolution and participating in the coding process, are left behind when it comes to knowing how the algorithm perceives them. Usually groups that are already vulnerable are also targeted by the bodiless algorithm. The most targeted group are dark-skinned people, especially women. In the most defenceless situations, such as at border crossing points, when applying for asylum an algorithm can not only discriminate against someone, but also massively violate other human rights. Therefore, it is more important than ever to be critical of new technologies and not to use them only because we can produce these technologies.

We are currently experiencing a shift in how security policies are made around the world. This shift carries the paradox that in order to have more security, one must trade off one's privacy. The tools theoretically used to fight terrorism and crime are the same as those used to scrutinise civilians, while convincing them that such tools are necessary and indispensable. In the long run, even when there are security-privacy trade-offs, these must be carefully assessed and weighted. As we are watching how regions shift towards a risk management approach, we will potentially witness limitations to civil rights and liberties.

For better or for worse, technology travels faster than law. Some laws that regulate privacy and data protection were created in the 1970s, such as the US Privacy Act, and have been proven to be outdated and insufficient to protect citizens against undue interference by states, and even private companies, that analyse and store such data. Although laws regulating privacy protection in Europe are a favourable step towards more data security, the mere definition of consent may have to be amended

12 It should be noted that the European Commission, in response to a parliamentary question, stated that Frontex bears no similarity to promoting the militarisation of the EU (Papadakis 2016; European Commission 2017).

worldwide. Until now, consent has operated as a legitimate basis for personal data processing and practice shows that this definition is not enough (Gonzalez Fuster 2018). The common understanding of consent needs to be revisited, as we know what happens when we agree to disclose certain types of personal information, but not what happens when we do not.

As of now, the EU is implementing adequate legal protection with Regulation (EU) 2018/1725. Until more advanced artificially-intelligent systems, such as dynamic algorithms, are applied in law enforcement, the regulation will not provide the needed protection that is required and it will only be a question of time until new types of machine discrimination occur or new ways of misusing the current technology are found. It could be that facial recognition systems will be used in a wide range of situations in the near future, such as to identify individuals at protests or in the context of border management. This can have negative effects: Individuals will be screened long before they arrive at the actual border and the decision about whether they are allowed to enter will be made in advance. This new way of using profiling may be justified through security and prevention reasons. In cases such as the Berlin truck bomber, hypothetically it could have prevented terrorist attacks and saved lives. However, in other circumstances, if policy makers decide to close borders due to predictions from algorithms, this might have negative effects, especially for the security of people travelling in large migration flows.

Alongside the legal framework, which must be up to date with technologies and include different means of application to prevent unlawful profiling and discrimination, there is also a need to fight bias and profiling on different levels in society, so as to prevent the feeding of human bias to algorithms. To the same end, algorithms have to be written by a heterogeneous team. Additionally, the algorithm should be trained using wider and more diverse datasets, gathered through different providers from all over the world. Furthermore, law enforcement units need to be diverse and specifically trained to become aware of their own biases and to learn how to regulate them. There is also a need for awareness about the shortcomings in algorithms. Summarily, a diverse society is a prerequisite. Diversity brings more knowledge, which results in more empathy. If that can be achieved, there automatically will be less bias in human decisions as well as less implemented bias in algorithms – therefore, greater data protection.

If the prospect of more diversity evokes hope about the potential positive human rights implications of border technology; then the shift in politics towards othering of migrants provides ample reason for pessimism. As was stated, populists may not have directly contributed to border policies but they do feed into the paradigm of securitisation. This article concludes with a warning. Going forward, technological solutions may seem like a more humane option than building physical barriers, but there are an array of human rights concerns associated with border technology, as laid out in this article. The aim of emerging border technology is not contradictory to the populist approach to borders. In fact, they can be complementary. If right-wing populist discourse continues to slowly push policy to the right in Europe, it increases the likelihood of border technologies being used in a manner that does not enshrine the dignity of migrants. As the EU gets ready to begin its new

mandate, it is worth remembering that new border technologies do not exist in a vacuum. Rather, how they are applied reflects political agendas. This lesson is as true in other regional contexts as it is in the EU. Ultimately, technology will change the way in which borders are managed across the world. It will impact sovereignty, migration routes, freedom of expression, privacy, surveillance and more. For this reason, considerate leadership is needed. Furthermore, it is the responsibility of scholars, human rights professionals and the media to highlight these emerging technologies and the consequences they have on vulnerable groups.

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Online assemblies between freedom and order: Practices in South-East Europe

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Abstract: *This article approaches the question of whose interests the internet serves through the prism of online assemblies in the South-East Europe (SEE) region. In order to answer this question, the article uses four connected yet different angles. The first part explores opportunities and limitations of international laws, as well as national laws in the SEE region. Furthermore, the article discusses the role of the state in providing and facilitating access to the internet, that is, enabling the space for online assemblies in the SEE region. The article takes into account the variety of actors in the field of freedom of expression and freedom of assembly online, paying special attention to internet service providers. Finally, the article analyses the surveillance of the internet activities and security and its relation with online and offline assemblies. The article uses all four these aspects to explore the situations in the SEE region. The article specifically focuses on four countries, namely, three former Yugoslav republics: Croatia – a European Union member since 2013; Serbia – a candidate country exercising control over the internet the most; Bosnia and Herzegovina – a country aspiring to become a candidate but in which progress is burdened by divisions and legacy of the war; and Turkey, which has one of the most illustrative examples of stifling freedom of expression and assembly, and the influence of which on the Balkans is also visible.*

Key words: *online assemblies; South-East Europe; freedom of assembly; freedom of expression*

1 Introduction

Freedom of expression is one of the pillars of democracy and therefore it is important to emphasise a high level of interplay between this right and other human rights. Freedom of expression not only is a constitutive right, but also an instrumental one, which is why its 'interaction with a number of other rights vouchsafed by international human rights law is notably dynamic' and it 'generates enhanced understandings and applications of the rights in question' (McGonagle 2011). 'The suggested

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principle that the government can simply ignore rights to speak when life and property are in question so long as the impact of speech on these other rights remains speculative and marginal it must look elsewhere for levers to pull.' The article explores the interaction between the right to freedom of expression and the right to assembly in South-East Europe and focuses on the online sphere and the exercise of the two rights on the internet.

The article approaches the question of whose interests the internet serves through the prism of online assemblies in the South-East Europe (SEE) region. In order to answer this question, the article uses four connected yet different angles. The first part explores opportunities and limitations of international laws, as well as national laws in the SEE region. Furthermore, the article discusses the role of the state in providing and facilitating access to the internet, that is, enabling the space for online assemblies in the SEE region. The article takes into account the variety of actors in the field of freedom of expression and freedom of assembly online, paying special attention to internet service providers. Finally, the article analyses the surveillance of the internet activities and security and its relation with online and offline assemblies. The article uses all four these aspects to explore the situations in the SEE region. The article specifically focuses on four countries, namely, three former Yugoslav republics: Croatia – a European Union (EU) member since 2013; Serbia – a candidate country exercising control over the internet the most; Bosnia and Herzegovina – a country aspiring to become a candidate but in which progress is burdened by divisions and legacy of the war; and Turkey, which has one of the most illustrative examples of stifling freedom of expression and assembly, and the influence of which on the Balkans is also visible.

2 Theoretical and legal considerations related to online assemblies and freedom of expression

2.1 The level of recognition of 'online rights'

If the policy makers were to define the right to an online assembly under the Universal Declaration of Human Rights (Universal Declaration 1948), they would have to face rigorous precision requirements set by Eleanor Roosevelt (Fazzi 2017). In addition, under article 31 of Vienna Convention on Law of Treaties (VCLT 1980), the context and the meaning of any international treaty has to be understood in a very clear context by the parties, when it comes to the implementation and interpretation of the Treaty (VCLT 1980). As of now, there is no clear definition on what exactly the right to an online assembly is in legal or social context. Therefore, we must ask how we define the right to an online assembly and the position of the citizens towards this right, and what the role played by the state would be in such predicament. In order to answer this question, this article will define the right to an online assembly by combining the already-existing theoretical and legal frameworks. Under such conditions, the hypothesis is that the internet could be approached as a form of a virtual public space, which allows groups of people to freely express their ideas and opinions, and to be able to form an assembly within the virtual public space.

In the book *Negotiating digital citizenship*' the authors define the internet as an epoch which has the potential to create a new form of relation between the citizens and the states (McCosker, Vivienne & Johns 2016). However, this relationship of the internet has to be 'characterised by openness, sharedness and free exchange' (McCosker, Vivienne & Johns 2016). Such characterisation of the internet very closely resembles the guarantee of the right to freedom of opinion and expression, which has been enshrined in article 19 of the Universal Declaration (1948). In order to exercise these rights, the citizens may 'receive and impart information and ideas through any media and regardless of frontiers' (Universal Declaration 1948). The internet may be seen as a platform which disseminates information and ideas, while it disregards obstacles of national borders. The European Convention on Human Rights (European Convention) safeguards freedom of expression in its article 10. In addition, the European Court and European Commission of Human Rights described freedom of expression as 'one of the basic conditions for the progress of democratic societies and for the development of each individual'. The European Court gives a wide interpretation to article 10, and one of the landmark statements is found in the case of *Handyside v United Kingdom*[1] where the Court said that the scope of freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population.[2] What is clear from *Handyside v United Kingdom* is that it is expected of states to give the broadest possible interpretation to freedom of expression, in the interests of promoting democratic values. The Court has interpreted freedom of expression to cover all forms of expression and it extends to all forms of opinions and views, approaching the restrictions of freedom of expression given in article 10(2) only in exceptional cases.

In order to engage in the public debate in which the citizens can freely express their ideas and opinions, a form of public space has to be provided. Habermas in his book *The structural transformation of the public sphere* has coined a term 'the public sphere,' by which he defines a zone where free discussion between the citizens and the state may take place (Habermas 1991). The setting of the public sphere is crucial for a modern and democratic society, as such practice serves the citizens to publicly criticise the state and, by doing so, to shape a narrative which is closely related to the citizens (Habermas 1991). Additionally, an open discussion within the public sphere 'refers to an attitude toward social cooperation, that of openness to persuasion by reasons referring to the claims of others as well as one's own' (Habermas 2003). Following the Habermasian line of thought, the internet may be seen as a form of the virtual public sphere, as social media, blogs and other types of forums allowed the citizens to freely and publicly express their views online, where their voices can be seen. The United Nations (UN) 2030 Agenda for Sustainable Development also recognises that the 'spread of information and communications technology and global interconnectedness has great potential to accelerate human progress' (Sustainable Development 2018). Therefore, through the internet

1 *Handyside v United Kingdom* App 5493/72 ECHR, 7 December 1976 para 49.
2 Freedom of Expression Under the European Convention on Human Rights article 10, Interights manual for lawyers, current as at October 2009.

citizens and states can collaborate together and benefit from open discussion, which should create modern democratic societies.

The crucial element to an open discussion are the citizens. Their voices are part of the productive and civil practice, which allows their participation that may be exercised online (McCosker, Vivienne & Johns 2016). However, the participation usually coincides with the action of particular groups of citizens. In the real world, the groups of citizens often opt for the creation of assembly, which is their guaranteed right according to article 20 of the Universal Declaration. The assembly may be defined as a 'temporary presence of a number of individuals in a public place for a common expressive purpose' (OSCE/ODIHR 2010). This particular definition of assembly may easily be transferred to an online public sphere. The participation and the expressive purpose of an assembly is far easier to be created online today than it is in the real world. The citizens, at least in the developed parts of the world, have an unprecedented access to a public sphere such as the internet, where they can interconnect extremely fast with other individuals or groups. Such connectivity would allow real-time interventions and innovative forms of collaboration (Soh, Connolly & Nam 2018).

Therefore, we may conclude that the right to online assembly should be finally defined, as a guaranteed right to form an assembly in any form or shape on the internet, which is a form of virtual public space. Such civil practice would allow citizens to freely participate and express their purposes and opinions, with the minimum intervention by the state or any other actor. However, the main aspect of an online assembly has to be focused on the peacefulness and the safety of assemblies, which should be a positive obligation that requires public authorities to take action. What is necessary to discuss further in depth is the role of the state and the role of the private sector, which in this case would be the owners of internet service providers. As the right to online assembly is not defined by the international legal system, there currently is a lot of space for ambiguity and uncertainty. This is especially problematic nowadays, since states and the private sector are starting to exert increasing control over the online spaces, under the excuse that they are obliged to provide peace and safety for internet users, hence the citizens. In the next few chapters we will examine to what extent states and internet service providers are primarily ensuring the safety of their citizens, or whether they are overstepping their boundaries by exerting excessive control, which may be harmful for freedom of expression and democratic values.

2.2 The role of the state to provide/facilitate internet access

Among obligations that nation states have as core actors in international politics, they also play a crucial role in providing and facilitating access to the internet for their nationals. Answers to the question of how much states should be involved in facilitating and regulating internet access vary from Hobbes's controlling monster state to Bakunin's vision of collectivist anarchy (Herold 2008). There are those who see the internet as the last truly free place, while some see it as a lawless sphere. Governments of developed states have been focused largely on creating the conceptualised international settings of the internet. States' obligations regarding the internet were mainly agreed and defined through international organisations, with the UN bodies who were pioneers in that field.

In order to understand the process of states' involvement in providing and facilitating internet access, it is necessary to overview the role that the internet plays regarding the implementation of some human rights. The UN Human Rights Committee (UNHRC) has called on states to ensure access of individuals and to foster the independence of the internet, which is interpreted as a new trend in technologies (General Comment 34 Article 19: Freedoms of opinion and expression 2011) through which freedom of opinion and expression (Universal Declaration 1948) can be implemented without interference. According to the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the internet is seen as an 'enabler' or catalyst for individuals to exercise their rights, such as the right to education of the right to take part in cultural life, as well as the rights to freedom of association and assembly (La Rue 2011). According to all relevant documents regarding the internet, all the rights individuals have offline must also be protected online, in particular freedom of expression.

Investing in information and communication technologies is one of the Sustainable Development Goals accepted by the all member states of the UN and the internet is perceived as a booster of economy and development of individuals and states (Blazhevska 2017). However, having well-being as one of the significant factors that determines who can access information communications technologies, the internet is likely to be concentrated among socio-economic elites in countries where internet penetration is low (La Rue 2011). This means that by providing and facilitating internet access, states should have in mind the costs this produces, therefore becoming an obstacle in broader internet consumption.

When examining states' approaches in providing and facilitating internet, before the mid-2000s policy makers were mostly focused on infrastructure, and by that time at least 70 per cent of the world's population lived within the range of a mobile internet signal, which makes that process successful (Internet Access for All 2016). Internet Society, an American non-profit organisation founded to provide an organisational home and financial support for the internet standards process, provides policy principles for expanding access infrastructure. Some of the most important principles are the removal of barriers to investment and competition; the creation of transparent and affordable licensing processes; collaboration with neighbouring governments in order to harmonise and coordinate regional cross-border interconnection and licensing regimes; and avoiding burdensome taxes on end-user services (Internet Access for All 2016).

The role of states in providing and facilitating internet access also includes the usage of their power concerning possible restrictions in that field. In the era of globalised fear and securitisation of politics, nation states use national laws to interpret restrictions on the internet more strictly than is the case with rather vague international norms. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states that everyone has the right to hold opinions without interference and the right to freedom of expression (OHCHR International Covenant on Civil and Political Rights 1966). Nevertheless, this article recognises certain restrictions regarding freedom of expression, which should be provided by law and are necessary for respect for the rights or reputations of others; for the protection of national security, public order, public health or morals.

These provisions gave an open door to states to interpret given exceptions in different ways through their national laws, including cutting off access to the internet entirely. The UN Special Rapporteur considers this practice disproportionate and a violation of article 19, regardless of the justification provided, including times of political unrest or even war (La Rue 2011). Practice in the states of South-East Europe shows how these states are mostly focused on control of the internet, through various forms of restrictions, rather than on infrastructure that is on a very low level compared to the other regions in Europe. This issue will be discussed more in detail in the next part.

2.3 Online as a 'space for assembly'

From the very beginning the internet was regarded as a free and inclusive space with the intention of becoming available to everyone. The period of the 1960s to the 1980s was marked by a collective spirit shared by computer scientists, professionals and others involved in the internet development. They saw it as a communal space for an 'open and non-hierarchical' culture. On the other hand, the internet also had a very anti-commercial character. This changed during the 1990s when, in the words of McChesney, the internet was transformed from a public to a 'capitalist sector' (McChesney 2013). Formally privatising the internet left it open to mysterious and non-transparent market forces, and its goals and course changed accordingly. While this process was secret and mostly 'behind the curtains',[3] it had a significant impact on the way in which online space has been further conceived as 'public' and 'private'.

Market and commercialisation changed the situation and internet service providers started to influence laws and legislation. One of the most important 'battles' has been over Net neutrality, a principle that causes internet service providers to treat all communications on the internet equally and to 'not discriminate or charge differently based on user, content, website, platform, application, type of equipment, or method of communication' (Gilroy 2011). Profit-driven internet service provider companies have an obvious financial interest in abolishing this principle, but the consequences in many countries can be rather political if 'a small handful of private concerns have a censor's power over what had become the primary marketplace of ideas' (McChesney 2013). The dangers are numerous: the pricing of the services, censorships, privacy issues and, finally, surveillance.[4] The issues regarding internet service providers are mainly assessed on a case-to-case basis. An important case is *Delfi v Estonia* which refers to whether there was an active role of the website when it comes to enabling third-party comments. In this case, the European Court of Human Rights 'acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights'. On the other hand, the Grand Chamber stated that 'Delfi cannot be said to have wholly neglected its duty to avoid

3 McChesney asserts that 'the media watch group Project Censored ranked the privatization of the Internet as the fourth most censored story of 1995' (McChesney 2013).

4 These problems so far are much more visible in non-Western parts of the world, such as China and sub-Saharan Africa (Skycoin 2018).

causing harm to third parties, but the automatic word-based filter failed to select and remove odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments'. Another case before the European Court of Human Rights which referred to intermediary liability is *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*. The Court stated that the applicants 'could foresee, to a reasonable degree, the consequences of their activities under the domestic laws. In doing so, the Court placed considerable emphasis on the fact that the Applicants were a self-regulatory body and a media publisher running 'a large internet news portal for an economic purpose.'

Overall, what changed in the exercise of the human right to freedom of expression is the number of platforms for this exercise because 'the internet has now become one of the principal means of exercising the right to freedom of expression and information'. Accordingly, the number of actors that may be liable for problematic content also increased. However, it is not necessary to introduce new, stricter provisions related to the internet, but more attention is needed when balancing freedom of expression exercised online and, for example, the rights of others (McChesney 2013).

On the other hand, the idea of transferring 'offline' rights to 'online sphere' described before has become much more vague than in the era of collective internet optimism during the 1960s and 1970s. Since most of the important human rights protection documents were written during the non-internet or early internet phase, its direct transmittance to a very specific internet field became impossible. That is one of the reasons why the Internet Rights and Principles (IRPC) Dynamic Coalition in 2010 developed the IRCP Charter and released it at UN Internet Governance Forum (IGF) in Vilnius, Lithuania. In this document, Article 7 – Freedom of Online Assembly and Association – translates article 20 of the Universal Declaration (Universal Declaration of Human Rights 1948) to online space in the following manner: 'Everyone has the right to form, join, meet or visit the website or network of an assembly, group or association for any reason. Access to assemblies and associations using ICTs must not be blocked or filtered' (IRCP Charter 2018). However, this is only part (a) of the article. The rest is still being drafted and may have a significant impact on how the conception of online space as a space for assembly will develop, especially combined with other rights provided for by this Charter. There are many perspectives to this and when all factors are taken into account, the opportunities and dangers occasioned by online space become more complicated.

2.4 Surveillance and security

After an examination of the providers and the very nature of the internet space itself, it remains critical to focus on the status and examples of protective measures and the possible abuses of the web environment. Surveillance and security on the internet define the relationship between online *freedom* and *order*, comprising both legislative and ethical practices that overlap respectively. Moreover, the relevance of the privacy of web users has become even more focal during the last decades since cyber threats are estimated by world governments and security organisations as global danger number one, thus replacing terrorism as the number one

global threat (Contreras et al 2013). In fact, one might claim that terrorism significantly generated the increase of protective measures that can further be abused for surveillance practices. Perry and Roda (2017) claim that

> with the advent of terrorist attacks worldwide, many governments have pushed through legislation permitting online surveillance policies that may violate international treaty commitments and domestic law, particularly with respect to due process and legal consent. Electronic surveillance is a controversial form of data compilation because it is by nature virtual, leaving no physical trace to the untrained eye.

The ambiguity of online security described can most clearly be seen in the fact that the guarantees of privacy protection can never be clearly defined. Web security and privacy depend both on the fragile technological factors and on the users' online habits. It follows that 'a digital system that is not secured cannot be regarded as private, while having secured privacy of the system does not guarantee it is fully secured' (SHARE Foundation 2015).

Hence, it remains crucial to explore the question of how surveillance of our internet-based activities and the security thereof relate to freedom of expression characteristic to assemblies based both offline and online. Related to the topic of providers of internet access, a legitimate question to be asked is that if someone is to ensure protection and security, whether that does not cause the internet to be supervised by someone. Finally, is surveillance a *modus operandi* of online security?

The Guidelines on Freedom of Peaceful Assemblies drafted by the Organisation for Security and Co-operation in Europe (OSCE) state that '[a]ll types of peaceful assembly – both static and moving assemblies, as well as those that take place on publicly or privately owned premises or in enclosed structures – deserve protection' (Belyaeva et al 2010). Since the official instruction to protect online assemblies is still in the drafting process (also by the OSCE panel of experts) the presumption is that online assemblies deserve the same treatment. Yet, exercising protection does not exclude the possibility of interference in the private life, guaranteed by article 8 of the European Convention of Human Rights on privacy, if the actions of an individual or a group threaten national security or the freedom of others (Council of Europe 1953).

The experiences show that surveillance, under the guise of providing protection, not only interferes with privacy, but indeed can lead to severe censorship practices. This is evident from the fact that

> electronic surveillance as currently practised by most states encroaches upon an individual's sacrosanct right to privacy, a fundamental right enshrined in Article 17 of the International Covenant on Civil and Political Rights. In many instances, electronic surveillance is a prelude to censorship. State censorship which involves the suppression of proscribed content and eventual sanctions against the user, is the next step in the digital surveillance chain (Perry and Roda 2017).

3 Online assemblies and freedom of expression in South-East Europe

When the internet arrived in Yugoslavia in 1991, it only connected three faculties of Belgrade University: the Faculties of Mathematics, Electro-

Technics and Political Science (RCUB). The network has spread further to other universities in Zagreb, Ljubljana and Novi Sad. Later on, the war in Yugoslavia slowed down the development and access to internet services. However, in 1992, in the midst of the war in Croatia, a group of human rights activists and students from Belgrade and Zagreb (and later also from Sarajevo) managed to go online, thanks to Open Society Funds and several other anti-war activists from Germany and The Netherlands. Together, they formed a platform called Zamir.net (in Serbo-Croatian at the time 'For Peace'), which was a platform that promoted anti-war efforts and other progressive ideas such as Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) rights and environmentalism. Zamir.net mainly assisted people to connect with their families in other countries, and to make sure that their family members survived attacks or were able to escape the war zones (Gessen 1995). This historic example in South-East Europe illustrates that the online assembly was formed out of the necessity for peace.

3.1 Bosnia and Herzegovina

Due to a very complex constitutional and administrative order in Bosnia and Herzegovina[5] (BiH) it is very difficult to obtain unified data about internet penetration. The most recent data is from the Communications Regulatory Agency (RAK). This agency has published its report of the annual survey of users allowed to provide internet services in BiH in 2018. According to the report, by the end of 2018 there were 67 internet providers in the territory of BiH, with a total internet usage rate of 90,49 per cent (RAK 2019). The data provided in the report shows that the use of the internet in Bosnia and Herzegovina is on a steady pace and the agency expects that further liberalisation of the telecommunications market and the introduction of new technologies will enable the presence of quality services (RAK 2019).

On the other hand, state regulations regarding the internet are not as positive as the usage rate. When the Entity of Republika Srpska (RS) passed the Law on Public Peace and Order in 2015, it caused much controversy among the public. The president of the Entity stated that no limitations were placed on freedom of speech in this Entity but neither should any form of communication be misused (Halilović 2015). Among the public in BiH it is indisputable that hate speech, paedophilia and similar criminal activities are condemned, but with this law there are no restrictions on the ability of the state to regulate social networks and regular citizens expressing themselves. This is why the general impression among the Bosnian public is that the law was passed in order to keep an eye on all those who criticise the government (Halilović 2015). These obstacles are reflected first in the very adoption of necessary legislation that is affected by political pressures, just as it is the case with the content

5 The current political system in Bosnia and Herzegovina is the product of the Dayton Peace Agreement (1995). This Agreement stopped the brutal war which occurred after this state had proclaimed independence from the Socialist Federative Republic of Yugoslavia. According to Annex 4 (the Constitution of Bosnia and Herzegovina) of the Peace Agreement, Bosnia and Herzegovina has two entities and one district: Entity of the Federation of Bosnia and Herzegovina (mostly populated by Bosniaks and Croats) and Entity of Republika Srpska (mostly populated by Serbs) and District of Brčko.

of most media outlets (even public service programming), as they cannot be said to be independent to a great extent.

Specifically, when it comes to the RS's Law on Public Peace and Order, it is particularly worrying to include social media within the definition of a 'public space'. While such legislation is familiar to Western states, such as the United Kingdom, the interpretation of this legal trend is deeply concerning: It gives power to the police and magistrates and judges to interpret the law and sanction any social media action as they see fit. This is problematic, as the law does not include concrete standards for the definition of social media, nor does it explain what constitutes 'offensive' or 'indecent' material, nor denies that citizens can be prosecuted outside of RS. Democratic societies should be void of such arbitrary provisions as they violate the freedom of expression of internet users, which has been commonly recognised under international law (European Convention on Human Rights 1950; OHCHR International Covenant on Civil and Political Rights 1966; Universal Declaration of Human Rights 1948).

The government must be able to 'establish that the expression poses a serious threat to national security' and the restriction constitutes the 'least restrictive means' available. 'Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know' (Johannesburg Principles on National Security 1996).

The government does not state any explicit reason for detaining the users of social networks. Furthermore, there is no proven causal link between any incidence of violence and posts on social networks. Such a link must be established first in order for the aim of protecting the public order to be viable (Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1984).

The contents of the posts on social networks because of which the authors were detained do not intend or seem likely to incite riot or any threat to national security, and there is no proof, only a speculative link between the posts and possible threats to public order. One of the most important cases in this connection was that of a journalist, Danijel Senkic, also a representative of an NGO 'front'. On his Facebook wall, Senkic spoke about the authorities in BiH when they arrested Bosniak returnees in RS, and called their activities acts of terror, and described some police officers as 'criminals' and Bosniak politicians as 'mute observers' (Senkić 2015). Interesting is the fact that Senkić was detained despite the fact that he lives in a part of BiH that is out of the reach of the disputable law mentioned above (Dodikova diktatura i u FBiH 2015). At the same time, the authorities did not focus on the verification of information regarding war crimes, but on prosecuting a person who speaks on their Facebook wall. Experts agree that the only way in which it would have been possible for Danijel Senkic to come before court would be for defamation, and only if he would be the person accused of committing the crime (Halilović 2015b).

The most recent case concerning the role of the state and internet restrictions in BiH occurred in April 2019. Good cooperation between the portal Klix.ba, state institutions and internet providers resulted in the arrest of three people in the territory of BiH in only five days, for writing

hate speech in comments on the news portal Klix.ba (Za pet dana u BiH uhapšene tri osobe zbog govora mržnje na internetu 2019). The portal warns about online hate speech as the crucial problem on the internet and calls for citizens/users to report it.

3.2 Serbia

It is a fact that in recent times internet users have succeeded in finding ways to avoid restrictions. However, it is clear that the physical infrastructure in the territory of a particular country cannot, at least legally, exist without the permission and consent of state authorities (Perkov 2017). The most thorough regulation in Serbia is the Electronic Communications Law. Apart from this, electronic surveillance is especially regulated by the Code of Criminal Procedure, the Law on the Military Security Agency and the Military Intelligence Agency, as well as the Law on the Security and Information Agency. All these regulations oblige operators to set up their network infrastructure in a certain way, in order to provide the ability to intercept communications and retain communications data (Perkov 2017).

The field that is the most problematic for Serbian authorities includes social networks. Media and experts close to the Serbian President often use the example of Turkey when justifying control over the internet.Under Erdogan, there is constant control over the messages sent through social networks in Turkey, and one cannot write what one wants or criticise him. In Serbia, an evironment prevails in which insults and defamations are exchanged at will (Kurjački 2017).

This is the example of how an analyst, Vuk Stanković, commented on a situation regarding the programming of the pro-government Pink TV Channel. This channel has a national frequency and has a great influence on public opinion. On the other hand, Nedim Sejdinović from the Independent Journalists Association of Vojvodina sees this statement as an open call for internet regulation, which would open up an enormous space for abuse in terms of 'banning' certain content that does not suit authorities (Kurjački 2017).

If the state intends to punish the owner or author of the platform for violating domestic regulations, such a possibility exists if the head office or representative office is located in its territory (Perkov 2017). Nevertheless, out of the 100 sites most visited, 60 per cent of sites do not have any connection with Serbia, which means that the platforms most commonly used by citizens of Serbia are wholly beyond the reach of the state (Perkov 2017).

When it comes to using the platforms for assembly, an ongoing massive weekend protest in the capital Belgrade, '#1od5miliona', mobilised through online platforms after a murder and violent attacks on politicians from the opposition, can serve as an example. Professor Đorđe Krivokapić claims that the internet is the only media platform in Serbia that can generate significant critique and mobilisation of citizens since other media is controlled by the state (Čilić 2019).

Another danger to the online sphere in Serbia is presented by the recent installation of closed-circuit television in Belgrade. Since video surveillance in public spaces is not regulated in Serbia, it remains

controversial to what degree personal privacy is protected knowing that surveillance cameras have an option of facial recognition (SHARE Foundation 2019). Moreover, similarly to the case of Croatian disclosure of personal data of insolvent persons, the numerous examples of hacking attacks in Serbia display how insecure online platforms of both governmental institutions and NGOs are. Although Serbia has an Emergency Response Team (CERT) that coordinates prevention and protection from security risks in ICT systems on the national level, (Trusted Introducer: Directory: SRB-CERT nd), the hackers' attacks remain frequent. For instance, in 2018 four centres for social work across the country were hacked in order to collect personal data of the victims of violence (FoNet 2018). The Chamber for Public Sales was also hacked, disabling the visibility of more than 20 000 public offers (021 2018). In the same year, the email addresses of the Office for Refugees and Migration were hacked and used to send messages to different recipients (DD 2018).

3.3 Turkey

The examples of Turkey under the current President Erdogan, a country not only with a historical-cultural influence on the SEE region that started with the expansion of the Ottoman empire in the fifteenth century, but also with a strong current political and economic influence on Bosnia and Herzegovina and other countries, are instructive in scrutinising practices of surveillance of the online assemblies. Followed by the 2016 *coup* attempt against the government of Erdogan's AKP (Justice and Development Party), many internet platforms and internet service providers in general faced severe surveillance and controlling strategies exercised by the government. The group of Turkish scholars examined the post-*coup* internet policies in the country and offered their key findings (Yesil et al 2017):

> The AKP's post-*coup* strategies concerning the internet are culminating in a distributed network of government and non-government actors using hard and soft forms of control. While the AKP continues to deploy existing internet law, anti-terror law and press law provisions and further expands its online hegemony by way of decree laws, its post-*coup* internet policy has also come to rely on the opaque activities of users and groups who are affiliated with government officials, party members and partisan media outlets and whose primary objective is to target and harass government critics on social media, and intimidate those who dissent.

As a consequence, in 2018 Freedom House described internet freedom in Turkey as severely manipulated by the government, which was frequently removing or blocking internet content, and because of which it was given 'non-free' internet status (Freedom House 2018).

3.4 Croatia

In Croatia, the youngest EU member and the second of former Yugoslav countries after Slovenia, two phenomena related to online assemblies and democracy dynamics can be observed. The first is the rise of populist parties, notably Živi zid (Human shield), which arose after online-supported anti-government protests. The so-called 'Facebook protests' in 2008 effectively marked the beginning of online-supported protests in Croatia. However, since more than 60 000 people confirmed their attendance, whereas only a few thousand people gathered in the capital

Zagreb, media characterised the Croats as rebels only on the internet and rightly pointed out that protests initiated on Facebook had failed (Werman 2008; Valich 2008). Yet despite the failure, the leader of the protest, Ivan Pernar, and his populist party Živi zid has increasingly become one of the most relevant political actors in the country ten years later. Their main political activity is the fight against foreclosure methods and enforced evictions with which banks deprive indebted individuals and families from their houses. Besides organising resistance towards police officers in front of the confiscated houses, they became popular also because of their strong anti-EU stance and because of the promotion, using their social media profiles, of bizarre conspiracy theories such as urging people not to vaccinate their children since, according to them and other promoters of this theory, this can cause autism and similar conditions (NACIONAL 2017).

A related phenomenon of the SEE region, namely, the foreclosure trend manifested in the myriad of executed bankruptcies, is an example of weak legal protection of personal data. With a population of around four and a half million, Croatia has more than 300 000 people/families in foreclosure status, mostly due to falling into debt using Swiss currency of which the value significantly decreased in the 2010s. Since 2013 people hit with foreclosure measures are gathered in the association Blokirani (Blokirani.hr nd). However, in the beginning of 2019 the courts were allowed to publish personal information of the bankrupted individuals and thus increase their public visibility and consequently personal and financial vulnerability. The personal data of more than 100 000 people was made public, but the Ministry of Justice claims that the right to privacy is not violated since the courts are supposed to work transparently (N1 2019).

4 Conclusion

Our research demonstrated that the internet serves different interests in the SEE region. Although one notices an increase in the online mobilisation of public protests, the interest primarily remains in the hands of the governments to exercise control and in the hands of the state-owned companies to maintain monopoly through providing their services. Further, it is important to underline that the progress in the understanding and use of the internet for civil purposes is still burdened by divisions, the legacy of the war and transition in the countries of the SEE region. Thus, rather than exercising and promoting social rights, online platforms are predominantly used by 'troll armies' to spread hatred speech based on national, ethnic, religious, political and other differences. In the context of the global scene, we noticed that regional legislation does not follow technological progress, resulting in the weakly-developed legal system of protection that is always slow to follow the increasingly fast development of new virtual instruments.

First, the article provided a detailed overview of the theory and international human rights law, in order to offer a setting in which the enjoyment of the two rights occurs. The most relevant for the region in this respect is the European Convention on Human Rights and Fundamental Freedoms (European Convention) and the practice of the European Court of Human Rights. Article 10 of the European Convention

safeguards freedom of expression in its first sub-section, and explains limitations to the exercise of this right in sub-section 2. Article 11 refers to the right to assembly, the restrictions of which are similar to the mentioned restrictions in article 10: the interests of national security or public safety; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms of others.

The article further explored the role of the state to provide or facilitate internet access. It has been acknowledged that the internet is not a specific platform which requires more regulation, which is why some actions taken by states in the region have been assessed as rather questionable. This article sifts through various examples of advantages and disadvantages regarding internet regulation, but emphasises that the UN Human Rights Committee urged states to ensure internet access to individuals, maintain its independence and its possibilities of providing more space for exercising human rights. Moreover, the fact that the internet is gaining momentum also brought numerous new actors into play, which is why the article is specifically directed at explaining the role of internet service providers, drawing the line between active and passive actors and highlighting the level of editorial liability in this respect.

The article acknowledges the dehumanisation, internationalisation and privatisation of the internet by pointing to the fact that internet service providers have a substantial influence on all aspects of the online sphere and indirectly also on new regulations. The question of net neutrality has attracted specific attention as it causes internet service providers to treat all communications on the internet in the same manner regardless of the type of communication used. The article agrees that profit-driven internet service provider companies have a certain financial interest which may present problems in terms of censorship, privacy issues, the price of the service as well as fake news. Platforms, advertising agencies, advertising networks and the networks and service providers that provide internet access to consumers benefit because they depend on consumers spending more time with a certain type of content and they track profiles of consumers, thus providing them with the content they identified as relevant for certain users.

As far as the interdependent nature of freedom of expression and freedom of assembly is concerned, the article introduces the topic of surveillance and security. The article perceives surveillance mainly as a tool of states to exercise control over the internet and explores the interplay between the two rights, in addition to the right to privacy enshrined in article 8 of the European Convention. The relevance of privacy of web users is an issue that is gaining momentum as cyber security has in the past few years often been in jeopardy. Web security and privacy depend both on technological factors and on the users' online habits. However, as they are easily tracked down, the article acknowledges that there is no guarantee to provide users with full protection, because their activities online are easily visible to network providers, advertisers and even state authorities, and because users often are unaware of the fact that in addition to their rights to be online, they also have responsibilities.

When it comes to legal restrictions placed on freedom of expression and freedom of assembly in the region of South-East Europe, one of the most recent examples is the Law on Public Peace and Order adopted in Republika Srpska – one of the two entities of Bosnia and Herzegovina. The

most problematic aspect of the law is, the lack of the definition of public space. According to local and international experts, the reason for assessing this law to be restrictive lies in its application, because on several occasions public space included social networks and their users were detained by the police. Just as in most examples referring to Bosnia and Herzegovina, the posts dealt with war and war crimes, but there was no sufficient basis to claim that their posts intended or were likely to incite riot or any threat to national security, that is, to public order. In this manner, the authorities not only exercised their control over the online sphere, but they also caused a chilling effect among social network users and made the scope of the restrictions questionable, by detaining persons who were not based in the territory of Republika Srpska, but in the Federation of Bosnia and Herzegovina, the other entity in BiH.

On the other hand, Serbia has seen a rapid decrease in freedom of expression in the past few years, because the state aims at penetrating the online sphere in terms of restrictions and monopoly over internet service providers. In Serbia only two companies provide internet services, namely, Telekom Serbia and SBB. Of these almost 80 per cent of the population uses the former connection, Telekom Serbia, owned by the state. The article explains that there is a panoply of laws referring to the online sphere: the Electronic Communications Law; the Code of Criminal Procedure; the Law on the Military Security Agency and the Military Intelligence Agency; as well as the Law on the Security and Information Agency. All these regulations oblige operators to have their network infrastructure set in a specific manner. This makes the interception of communications and the tracking down of users easy and thus the users' data are rather susceptible to misuse. Now more than ever, the right to freedom of expression and the right to freedom of assembly go hand in hand in Serbia because social networks and online groups are largely used for protests that have for months been going on in Serbia. The article identified the occasions on which these rights were violated, and acknowledged the dangers of state authorities banning certain content, spreading fake news and directly pointed at the attacks experienced by some journalists and protest organisers. The deteriorating state of freedom of expression, freedom of assembly and right to privacy in Serbia is also illustrated by the recent installation of closed-circuit television in Belgrade and the numerous examples of hacking attacks in Serbia. It is particularly disturbing that surveillance in public spaces is not regulated in Serbia, and as protests are occurring and cameras are installed, it is not known to what extent and for which purpose the facial recognition option with cameras will be used by the authorities.

Furthermore, the article discussed trends in Turkey which exercised substantial control over online assemblies. In 2016 Turkey saw an attempt at a *coup d'état* and many internet platforms, internet service providers and even 150 media experienced shut-downs and extremely strict surveillance and controlling strategies exercised by the government. This event has changed internet policies in Turkey as the government used hard and soft forms of control to a great extent all over the internet. The article also acknowledged the fact that the right to freedom of expression and the right to peaceful assembly have been casualties of internet law, anti-terror law and press law. Academics were detained when mentioning problems in the country on conferences; journalists and activists were detained due to their actions taken against the regime that oppressed basic human liberties;

authorities were denied permission to attend traditional May Day demonstrations in Istanbul; and so forth. The rights to online assembly and freedom of expression were violated with every denial of internet access during security operations, several news and citizen journalism websites were blocked, and even Wikipedia was inaccessible while most users of social networks such as Twitter and Facebook received numerous requests for content removal. The article clearly identified the problems faced by online users and pointed at censorship and a substantial level of control over internet by the authorities, which not only jeopardised their exercise of human rights, but often altogether disabled their exercise in the online sphere.

The article finally explored the current state of online assembly and freedom of expression in Croatia. As a new EU member, Croatia had to make its legislation compliant with the EU accession requirements and it has not seen serious cases of censorship or shut-downs. The activities on social networks in Croatia were, on certain occasions, precisely that – the activities on social networks only. Therefore, even though there were initiatives to mobilise protesters via the online sphere, in the offline sphere not many persons were very active. On the other hand, Croatia has seen a rather serious example of privacy violation and the misuse of data gathered through an online group. After executed bankruptcies performed by the banks, the courts were allowed to publish the personal data of over 100 000 bankrupted individuals gathered around the association Blokirani. In this manner the authorities exploited the members of the group and their data which may have had a chilling effect, because it would mean that people cannot freely join groups and thus share similar problems and work for the same cause either in the online or offline sphere, if their personal information is in jeopardy when they do so.

By analysing the examples of countries in South-East Europe, the article explored the interaction between the right to freedom of expression and the right to peaceful assembly. It showed that in the online sphere, the two rights are tightly connected because the internet opened numerous opportunities of gathering people, mobilising through social networks and provided a new space for debates. This space has become increasingly active and vibrant, much activism in the region shifted from the offline to the online world, and this trend was also recognised by the authorities. Therefore, the internet policies in these countries have undergone vast changes, and legislative frameworks have been amended or interpreted rather broadly in order to be more applicable to the online sphere. It seems that such attempts have not thus far been very successful, because instead of enabling and protecting new ways of freedom of expression and of assembly, the states limited the access, caused chilling effects or censored the online content in order to exercise more control over the internet. 'One of the great paradoxes of democracy is that if it functions well, criticism of it will thrive' (McGonagle 2011). Therefore, if public participation, assembly and expression on the internet are thwarted either by legislation, blocking, filtering or causing a chilling effect, then democracy and the enjoyment of human rights in South-East Europe seem shaky and their future rather uncertain.

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Big Brother in the Middle-East and North Africa: The expansion of imported surveillance technologies and their supportive legislation

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Abstract: *The article analyses digital surveillance companies and the possibilities that technology makes available to oppressive regimes: from monitoring centres facilitating mass surveillance on all telecommunications, to firewalls that filter what users can access, and spyware that tap into the information stored in any personal device connected to the internet. This grim picture of new technologies becomes significantly darker when taking into account the volume of this 'international repression trade' and the market value of surveillance companies operating in states self-identified as democracies.*

Key words: *digital rights; surveillance; cyber-crime legislation; right to privacy; freedom of expression; national security; cyberwar; information technology; human rights defenders*

1 Introduction

Digital rights no longer are a simple extension of human rights. They have become central components of several rights: digital media for the right to information; social media for the right to free assembly; cybercommunication for the right to privacy; and so forth. Parallel to these developments, cyberspace has become a crucial arena for political action but also for repression. Activists use it to share information and to mobilise, while repressive governments have been resorting to surveillance technology in order to suppress social movements, and to identify and apprehend activists and dissidents.

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Authoritarian governments depend on cyber-surveillance companies based in democratic countries, which are developing and exporting sophisticated software needed to monitor electronic device activities and data stored on hard drives, or intercept data transmitted over wireless or cable networks. Surveillance technologies can map relationships, recognise patterns, and analyse discourse. They can target different types of data: Audio and video surveillance tap into household and corporation surveillance camera systems. Phone monitoring gathers data communicated across mobile, fixed or next generation networks. Location monitoring intercepts the location of a target using phone identifiers or tracking devices. Internet monitoring technologies gather information communicated across the internet, often on a mass scale. This can be done through monitoring centres that hack into internet communications, telephones, computer networks and databases using several tools. Intrusion is a tool that works though the installation of spyware on communication devices that can extract data and control functions. Biometrics software allows individuals to be monitored through the identification and recognition of their physiological or behavioural characteristics. Bug detection tools allow counter-surveillance (Privacy International 2016).

Even though some parts of the Middle East and North Africa are lagging behind technologically, authoritarian regimes have generally upgraded their control and repression mechanisms through the use of sophisticated digital surveillance technologies. The restriction on digital rights, most notably freedom of expression, the right to privacy and the right to information, is further supported by new legislation that aims to silence human rights defenders and activists calling for democratisation. We will first look into the exportation and use of digital surveillance technology through the study of three companies originating and functioning in countries that are considered democratic: Amesys, Netsweeper and the NSO group, headquartered in France, Canada and Israel respectively. We next examine how some states in the Middle East and North Africa that are importing these technologies are enacting anti-cybercrime laws to reap the full benefits of these technologies, focusing on Palestine, Jordan, Egypt and Bahrain.

2 Exporting surveillance technologies

The first part of this article examines three companies based in self-identified democracies that export different types of surveillance technologies to authoritarian regimes: French Amesys produces mass surveillance technologies to monitor communications on specific networks; the Canadian Netsweeper provides technologies and services for internet content filtering and blocking; and the Israeli NSO Group infects targeted devices through spyware that extracts data.

3 Monitoring centres: The case of the French Amesys

'We are in a world now where not only is it theoretically possible to record nearly all telecommunications traffic out of a country, all telephone calls, but where there is an international industry selling the devices now to do it' (Wikileaks.org nd). This statement by Julian Assange was well

illustrated in an Amesys brochure that Wikileaks had found and published in 2011. One of its illustrations shows the difference between lawful interception that only tracks internet protocol addresses and the mass surveillance that the company proposes which allows the monitoring of the whole traffic on any given network, regardless of data format (audio, video or text). The services that this French company offers do not require the hacking of individual devices through the use of malicious software but monitors the national network, or any specific network, through the use of keywords (Wikileaks.org 2011).

Following the fall of Muammar Gaddafi's regime in Libya, an abandoned monitoring centre in Tripoli was discovered containing Amesys training manuals and posters. One of the posters about the Eagle system read: 'Whereas many internet interception systems carry out basic filtering on IP address and extract only those communications from the global flow [legal interception], Eagle Interception system analyses and stores all the communications from the monitored link [massive surveillance]' (Garcia et al 2015). The Libyan authorities had been using a Deep Packet Inspection technology and analysis software developed by Amesys. In an interview published by the French newspaper *Figaro* in September 2011 a former official of the Libyan External Security Organisation explained that the system was able to find 'targets within the country's massive flow' and to identify 'individual suspects using keywords'. This witness summed it up as follows: 'We listened in on the entire country.' The system was subsequently used to create data analysis methods that were applied to the collected data to hone keywords used for queries and to monitor the findings obtained collaboratively with Libyan authorities, in particular the Libyan military high command' (FIDH 2014).

Amesys had sold to the Libyan government the telecommunication surveillance system called Eagle, as a 'favour' on behalf of the French President (Tesquet 2017). This technology was allegedly used in the tracking and torturing of dissidents and activists. It allowed the Libyan authorities to confront dissidents and activists with private social media texts and emails (FIDH 2014). This sale took place following Libyan leader Muammar Gaddafi's visit to France in 2007. At that time, the International Federation for Human Rights and the Libyan League for Human Rights were pressuring the government not to support a regime responsible for 'serious human rights violations' by either 'tolerating' or directly committing such violations. This action did not prevent the sale or discourage the two civil society organisations from pursuing their pressure. In 2011 they filed a complaint which sparked an investigation into the sale of this technology (FIDH.org 2015). Shortly thereafter the company rearranged its operations. Stephan Salies, owner of Amesys, created two new companies with different names: Advanced Middle East Systems based in the United Arab Emirates (UAE), and Nexa Technologies in France. They improved the Eagle system and called it Cerebro with reference to a tracking device used in the X-Men science fiction series (Tesquet 2017). Their technical documentation 'promises "real-time surveillance of suspects", thanks to particularly intrusive sensors capable of tracking emails, text messages and accessing chat rooms and social media sites'. It adds that 'investigators can follow their target's activities by entering advanced criteria (email address, telephone numbers, keywords)' (Tesquet 2017). In 2017 Nexa Technologies made headlines by selling surveillance technology to Egypt. Cerebro had been gifted to Egypt by the

Emirati government. According to the French daily *Le Monde*, the UAE purchased for €10 million a monitoring system which was to be directed against the Muslim Brotherhood. 'In a nod to the pyramids, the operation was code-named Toblerone' (Tesquet 2017).

4 Canadian firewall and filters: The case of Netsweeper

Netsweeper provides internet filtering services to individuals, corporations and governments. On the website of this Canadian company, their products are associated with the rise in 'cyber-threats, cyber-crime, hacktivism, the proliferation of illicit content and attacks on critical infrastructure and intellectual property' (Netsweeper.com nd). The application of online filtering technologies determines the landscape of the internet with which the user can interact. Artificial intelligence (AI) offers 'dynamic classification and categorisation, which optimises network usage while providing a positive, productive, and safe internet experience' (Netsweeper.com nd). Indeed, the use of filtering technologies is varied. They are used by schools and universities to create a 'safe environment' for students. Internet service providers can filter websites harbouring criminal content linked to terrorist groups or child pornography. However, in all cases filtering technologies offers control over the content that is accessible on the network. This raises concerns related to freedom of thought, speech and action, with an intensity commensurate to the level to which this control is exerted.

The use of pre-set filters becomes particularly problematic when states use them to block a certain type of online content from their country. Netweeper offers multiple filtering categories from which the customer can choose. The categorisation occurs in more than 30 languages, and they are driven by AI and human review. As the Citizen Lab explained: 'A network administrator need only select a given content category – such as 'gambling' or 'hate speech' – and all content categorised as such will be blocked. Creating this database of websites and the ongoing process of categorisation is a substantial undertaking (The Citizen Lab 2018). The company claims that it has categorised over 10 billion uniform resource locators (URLs) and that it categorises 22 million new URLs each day (Netsweeper.com nd). By 2022 it is estimated that the value of the web content filtering market will be US $3,8 billion (The Citizen Lab 2018).

Netsweeper claims centralised control over its products. However, it has multiple distributing partners around the world and has branches in the Middle East, South America and the United States. Its software is installed on public networks in Bahrain, Pakistan, Qatar, Somalia, United Arab Emirates and Yemen (The Citizen Lab 2018). In the UAE, Netsweeper's filters categorise the entire World Health Organisation website as pornographic; and so are the websites of the Christian Science Monitor, the World Union for Progress Judaism, the Centre for Health and Gender Equity, and Change Illinois (Pangburn 2018). After criticisms relevant to the technologies enabling the blocking of lesbian, gay, bisexual, transgender and questioning (LGBTQ) and HIV-related content or pages categorising them as pornographic, Lou Erdelyi, Netsweeper's chief technology officer, explained that '[a]s of December 25th, 2018, Netsweeper no longer has a category titled LGBTQ+ nor does it block such content' (Pearson 2019). The company also claims less categorisation

relevant to the category of 'alternative lifestyles'. Nevertheless, there are concerns about the use of these technologies in countries considered authoritarian. While Netsweeper's technologies are often used for purposes of safe internet browsing, such as blocking child pornography websites or websites considered inappropriate for school internet, they also often are used by authoritarian regimes to block websites of opposing political views, and human rights-related content.

5 Intrusion technologies from Israel: The case of the NSO Group

In December 2018 an Israeli cyber-security company, NSO Group, gained media attention when Omar Abdulaziz, a Saudi dissident, accused it of infiltrating his smartphone. Abdulaziz pressed charges, claiming that the firm had sold its signature spyware to the Saudi government and given access to his conversations with Jamal Khashoggi. According to the lawsuit, this played a major role in 'the decision to murder' the *Washington Post* columnist and political opponent who was lured into the Saudi consulate in Istanbul and dismembered (Kirkpatrick 2018).

It was not the first time that the NSO Group came under the spotlight. In fact, after operating in the shadows for years, Citizen Lab brought it to light. Citizen Lab is an interdisciplinary laboratory at the Munk School of Global Affairs and Public Policy at the University of Toronto. It is tasked with producing 'evidence-based research on cyber-security issues that are associated with human rights concerns', using a 'mixed methods approach to research combining practices from political science, law, computer science, and area studies' (The Citizen Lab 2018). Academics at the Citizen Lab receive financial support from a vast range of donors, including the Canada Centre for Global Security Studies and Open Society Foundation. This internet 'watchdog' reported in 2016 that Ahmed Mansoor, a human rights activist living in the UAE, had received a text message with a suspicious link. Mansoor forwarded it to the task force and they were able to uncover what a cyber-security firm described as 'the most sophisticated, targeted, and persistent mobile attack ever found on iOS', and traced it back to the NSO Group (Lookout.com 2016). We will look into how a small Israeli start-up turned into one of the most controversial partners of Arab authoritarian governments in less than a decade.

The NSO Group is high-ranking among so-called 'internet mercenaries' (Mazzetti et al 2019). It was established by two high school and army friends, Shalev Hulio and Omri Lavie, who sought to break into encrypted communications by developing software that could hack smartphones. The company came into existence only two years later with the expertise of the Israel Defence Force's Unit 8200, of whom Hulio and Lavie are believed to be veterans (Brewster 2016). Unit 8200 is the equivalent of the US National Security Agency (NSA). It is an intelligence unit in the front lines of Israel's cyber-wars. According to Israeli investigative journalist Yossi Melman, one can find Unit 8200 'whenever there is a very significant or risky operation … Even days or weeks before the actual operation taking place. There is not a single major Israeli intelligence operation in which Unit 8200 is not involved' (Behar 2016). Allegedly, this unit was responsible for infecting computers at Iran's Natanz uranium enrichment

facility with Stuxnet, a worm created in cooperation with the NSA and the Central Intelligence Agency (CIA) (Behar 2016).

This unit of the Israeli army is not only involved in international warfare but also in the daily occupation of Palestinian territories. As such, it is also engaged in managing the daily lives of Palestinians living in the West Bank and under blockade in the Gaza Strip. In 2014, 43 former soldiers and active reservists spoke out, revealing how they were responsible for collecting an extensive range of electronic communications from Palestinians, such as 'email, phone calls and social media in addition to targeting military and diplomatic traffic' (Beaumont 2014). Long before experts raised doubts about the potential risks of technology use for human rights, Unit 8200 started enacting massive surveillance and espionage at the expense of 'innocent people unconnected to any military activity'. Other testimonies published stated: 'On a personal level, there is no respect for Palestinian privacy'; 'if anyone interests us, we'd collect information on his or her economic situation and mental state … in order to turn them into a collaborator or something of the sort'; and 'whether said individual is of a certain sexual orientation, cheating on his wife, or in need of treatment in Israel or the West Bank – he is a target for blackmail' (*The Guardian* 2014). The 43 *refuseniks* were quickly expelled from the Unit for crossing 'a red line' and acting 'inappropriately' (*The Guardian* 2015).

In early 2011 the company tested the first version of *Pegasus*, its signature spyware software. Its website claims that its technology 'helps government agencies prevent and investigate terrorism and crime to save thousands of lives around the globe' against 'terrorists, drug traffickers, paedophiles, and other criminals' and 'the world's most dangerous offenders'. Pegasus is spyware that acts in the background to extract private information. It usually installs itself through malicious texts and emails, or public wi-fi networks (Perlroth 2016). In late 2016 the *New York Times* received internal NSO Group correspondence and contracts from two sources close to the company. The article lists the price of surveillance: starting from a $500 000 installation fee, an extra $650 000 for access to ten iPhone users; $650 000 for ten Android; $500 000 for five BlackBerry; and $300 000 for five Symbian (Perlroth 2016). Six months later the Israeli newspaper *Haaretz* wrote that the Saudis agreed to pay 55 million for the Pegasus 3 (Harel et al 2018). For this price, Pegasus can extract text messages, contacts, e-mails, GPS locations and passwords; it can record and listen to phone calls, and even turn on the microphone and the camera on a smartphone. What is distinctive about this product is the complete absence of footprint: It is almost impossible to discover, and it has a 'self-destructive' feature that destroys all traces if detected (Franceschi-Bicchierai et al 2018).

In order to prevent the technology from 'falling into the wrong hands', NSO Group co-president Tami Shachar explained in an interview that the company has three levels of vetting (Stahl 2019). As cyber-surveillance technology sales are equivalent to arms exports, the Israeli Defence Ministry needs to approve every potential customer. However, so far there is no evidence of any rejection. The company has also created a business ethics committee, which had denied sales to Turkey but not to Mexico and Saudi Arabia (Mazzetti et al 2019). Lastly, every client must sign a

'contractual agreement' in which they declare that 'the only intended use of the system will be against terror and crime' (Stahl 2019).

Under this legal vacuum and lack of accountability, Pegasus has infected devices in possibly as many as 45 countries (Marczak et al 2018). Between August 2016 and August 2018, researchers found more than a thousand IP addresses and domain names related to the Israeli firm's 'dirty work' (Marczak et al 2018). Two important cases have revealed its *modus operandi*: one in the UAE and one in Mexico. The first case is that of Ahmed Mansoor, a world-renowned activist who is currently serving a 10-year prison sentence for expressing his criticism of the Emirati government's human rights abuses. After more than a year in prison without trial, he was condemned on charges of disseminating fake news online and jeopardising the country's reputation (Front Line Defenders 2019). His health is deteriorating and appeals from Human Rights Watch, Amnesty International, Frontline Defenders and others have so far remained unheard. In the summer of 2016, while on a *de facto* travel ban with his passport having been confiscated by the authorities (Human Rights Watch 2019), Mansoor received a suspicious text containing a link that promised 'new secrets' about detainee conditions in UAE. Mansoor did not fall for the bait. Instead, he sent the message content to the Citizen Lab that was able to trace it back to the NSO Group and their attempt to install Pegasus on the activist's iPhone.

In June 2017 the *New York Times* broke the news on how the Mexican government was using NSO Group's technology against citizens who were neither terrorists nor criminals. The media outlet revealed that Pegasus had infiltrated the devices of lawyers, anti-corruption activists, journalists and civil society representatives (Ahmed et al 2017). In the same hours, the Citizen Lab posted its comprehensive findings: Victims, including media and television personalities, non-governmental organisation (NGO) members, and even the under-age son of a reporter, received fake messages containing the spyware (Scott-Railton et al 2017). Following the public outcry, then President Enrique Peña Nieto responded with a letter to the *New York Times*, denying all accusations and stating that there was no evidence that the Mexican government was behind the surveillance (Beauregard 2017).

Throughout 2018 Pegasus's attacks increased, and so did attention from public opinion and media, which started questioning cyber-security companies and governments buying their technology. The NSO Group's products were used to infiltrate devices of Amnesty International staff (Ingleton 2018), which quickly prompted the Israeli Ministry of Defence to withdraw licences for the firm (Amnesty International 2018). Saudi Arabia was the most prolific customer, with many attempts on dissidents living abroad, such as Ghanem Almasarir, a comic in London (Stahl 2019), and Omar Abdulaziz.

Since Jamal Khashoggi's murder in the Saudi consulate in Istanbul, the NSO Group has focused all its efforts on rebranding (Franceschi-Bicchierai 2019). Under a new marketing strategy to make the company appear more appealing and transparent, co-founder and CEO Hulio declared on television that Pegasus prevents 'crime and terror' saving 'tens of thousands of people' and helping 'create a safer world' (Stahl 2019). When asked about the role of his company in the killing of the Saudi dissident, he evaded the question, saying that he was not willing to 'talk about

specific customers'. Other public relation moves consist of allowing cameras inside their once-secretive headquarters in Herzliya, creating a brand-new website, and releasing public statements after any allegation made by the media. Current estimates value the NSO Group around $1 billion (Haaretz 2018). Not all the rebranding efforts are succeeding. At the beginning of 2019, AP News broke the story of individuals using fake names and affiliations who contacted two Citizen Lab researchers investigating the NSO Group. The academics were filmed while they were being questioned about Israel, anti-Semitism and religion. Although no connection with the NSO Group was proven, these tactics recall the assignments of the Black Cube, a private Israeli intelligence agency, tasked with harassing Harvey Weinstein's accusers (Satter 2019).

Although producing different surveillance technologies, the NSO Group, Amesys and Netsweeper operate with a similar pattern. The three companies are all based in democratic countries, but that does not prevent them from selling their products to authoritarian governments with little control or accountability. In fact, most of their activity is kept hidden from public scrutiny. Nevertheless, the multiple scandals surrounding the sale of surveillance technology to authoritarian governments, especially the judicial case that was opened against Amesys, drew more attention aimed at better regulating the export of surveillance and dual-use technologies. The Wassenaar Arrangement is the main regulatory regime for such technologies. '[It] has been established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies' (Garcia el al 2015). It stipulates which military and dual-use goods (that have both military and civilian use) should be subject to licensing and has 41 participating states, including Russia, Japan, the US and the member states of the European Union. However, the list of items is also used by a large number of non-signatory states as part of their own licensing regulations, including Israel and China (Privacy International 2016).

As technology progresses, the regulation of exports of digital surveillance needs to be continuously updated. The EU Dual-Use Regulation 429/2008 restricts the export of specialised large-scale IP monitoring systems. The French government specifically pushed for export control mechanisms within the European Union that would regulate Amesys's technology and it implemented these regulations immediately after their adoption by Wassenaar in 2013 (FIDH.org 2015). Nevertheless, Amesys was granted nine other licences since the beginning of 2016: three in West Africa, two in the Middle East, one in sub-Saharan Africa, one in Europe, one in Asia and one in South America. The surveillance technologies arms race goes on. As a person in the business confided (Tesquet 2017):

> Of course the French services subcontract technical intelligence. It's either that or handing control to the Chinese or the Israelis. We aren't Care Bears. We tell ourselves we are doing it in the interests of our country. In any case, all the countries are equipping themselves, whether it's through us or elsewhere.

The exportation of digital surveillance tools sometimes is referred to as the international repression trade (Privacy International 2016). Born over four decades ago, it has expanded exponentially in the last decade, yet reliable

data remains scant. Nevertheless, the trade volume of surveillance technologies is estimated (CAUSE, 2015) between US $5 and $12 billion (Kirkpatrick 2019). This probably explains the failings of international regulations and the national legislation of countries that export surveillance technologies. However, they are also supported by the political needs of the importing governments that have been developing and upgrading their legislation in an effort to regulate the internet and cyber-space usage, but also to fully benefit from the features and results that those powerful weapons provide.

6 Domestic legal support systems for surveillance: Middle Eastern cyber-crime legislation

Governments in the Middle East and North Africa have been updating their legislation relevant to cyber-crimes following a similar repressive pattern meant to support the use of surveillance technologies. This has led to a trending practice of persecuting journalists and activists for views and posts shared on social media platforms. With the widespread use of social media in recent years, some states have dealt suspiciously with journalists, bloggers, human rights defenders and activists, and started to censor criticism towards public figures. Some authorities have detained, interrogated, prosecuted and, in some cases, physically harmed internet users due to their posts. Imported surveillance technologies play a central role in this repression as they allow the identification of critics and political opponents, and the gathering of data that can be used against them. However, in order to prosecute them a new legislation needs to be drafted, allowing the state to qualify their actions as offences. We will look into how this legislative process is unfolding in Bahrain, Egypt, Jordan and Palestine, and the specific tools used to support repression, namely, vague terminology, numerous regulatory bodies and the possibility of shutdowns.

7 Vague cyber-offences and creeping cyber-crime laws

There is a striking similarity between two cyber-crime laws enacted recently in the Middle East; those of Jordan and Palestine. The similarities go beyond their content and into the way in which they were actually adopted. Both states passed them without a public consultation or debate. However, this approach meant to bypass civil society and stifle any opposition to them. Both legislation was met with opposition from civil society organisations (CSOs) that considered them a breach to the right of freedom of expression and opinion.

In 2015, the Jordanian government introduced draft cyber-crime legislation, intended to update the Information Systems Crime Law of 2010 (House 2016). It was met with immediate condemnation from CSOs. Protests flared for two years when this legislation was used to sentence six journalists to six months imprisonment and a fine of $80 000 (Ersan 2018). The journalists had been arrested due to a complaint by Secretary-General Youssef Issawi to the Anti-Cyber Crime Unit at the Public Security Directorate for a video shared on Facebook accusing him of 'appropriating government funds and state lands to build a road to his palace'. Protestors argued that the law infringed on the right to privacy, freedom of

expression and digital rights. In December 2018 these protests resulted in the government withdrawing the 2015 law for further amendments (Now 2019). Two days later, the Jordanian government presented to the Parliament an amended law, once again without engaging with CSOs. The amendments expanded the scope of cyber-crime to encompass hate speech. It also increased the penalty from one week to three months' and up to one year's imprisonment and raised the fines for perpetrators from $140-$280 to $700-$1 400. The amendments raised concerns among human rights activists and advocates who feared that the Bill would restrict freedom of speech online. In November 2018, Jordanian activists launched a social media campaign, calling on the government to withdraw the cyber-crime law.

In February 2019, the Jordanian Parliament voted in favour of amending certain clauses of the law, in particular the clauses on hate speech and fake news. The definition of hate speech that it introduced was vague, stating that 'every writing and every speech or action intended to provoke sectarian or racial sedition, advocate violence or foster conflict between followers between different religions'.

Activists, journalists and human rights defenders perceived this vagueness of terms as an increased threat and feared that the government would use this law to prosecute its critics. It blurred the lines between hate speech, criticism of public figures and freedom of opinion and expression (Times 2019).

In Palestine the cyber-crime legislation was enacted in June 2017 through a Presidential Decree. In several of its 61 clauses, Cyber-Crime Law 16 allows disproportionate and indiscriminate infringements on several rights, including freedom of expression and opinion, the right to privacy and access to information. The Law uses vague terms to describe several offences, such as 'threat to national security', which can lead to harsh imprisonment sentences and excessive fines for online criticism. Some clauses of the Law, particularly articles 32, 33 and 34, authorise surveillance of social media users and blocking websites and pages without a court warrant. Security services can easily force internet providers to disclose their customers' data, even if this breaches the company's code of conduct and violates the customer's privacy (Advancement 2018). It has also become common practice for Palestinian security services to force civilians to disclose their passwords to access their personal pages and deliberately interfere with what they post (Watch 2018).

The enactment of the Law came about without previous consultation with CSOs or a public debate. Based on this Law, especially its article 20, journalists, activists and human rights defenders were arrested for propagating news that allegedly threatened national security (Ayad 2018). The adoption of the cyber-crime law increased the scope of repression allowing security forces to prosecute and silence voices due to loose clauses and vague terminology (Watch 2017). Immediately upon the enactment of the Law, a large-scale surveillance campaign was carried out against independent and opposition news websites in the West Bank. In one month alone, internet providers blocked 29 websites following an official order issued by the Attorney-General of Palestine, Ahmad Barrak (Odeh 2018). On 4 June 2017 Palestinian security forces detained a Palestinian journalist, Thaher Al-Shamali, for publishing an article that criticised the Palestinian President. He was charged with 'insulting higher

authorities and causing strife'. Nasser Jaradat, a media student, was also arrested for sharing Al-Shamali's article on his Facebook page. Both were detained for 15 days under the same charges (AbuShanab 2017; Abdelbaqi 2016).

Human rights organisations campaigned against the cyber-crime law and demanded its immediate suspension. This demand was raised in a session at the office of the Palestinian Liberation Organisation (PLO) in Ramallah, where a coalition of 11 organisations submitted their comments and objections to Hanan Ashrawi, the head of the PLO Department of Culture and Information (Musawa 2017). This action led to the Ministry of Justice organising governmental consultations with CSOs to discuss possible amendments to the Law. Some amendments were adopted, but these were minimal, and the Law remained vague and prone to infringe on freedom of expression and opinion and digital rights, under the pretext of combating cybercrimes (Ayad 2018).

The Palestinian anti-cybercrime legislation is not the only framework through which the freedom of expression and opinion in cyber-space is breached in Palestine. The country is not a sovereign state and is divided into two entities governed by rival Palestinian factions. The Gaza Strip is governed by Hamas and is under Israeli blockade, while the West Bank is governed by Fatah and is under Israeli occupation. This means that the Palestinian authority's legal instruments and practices are not the only ones to directly impact Palestinian lives, their digital rights, freedom of expression and access to information. In recent years, Israel has been manipulating and pressuring social media giants such as Facebook and YouTube, to remove posts and block personal and official Palestinian pages under the guise that they 'incite' against Israel (Odeh 2016). This goes contrary to the International Covenant on Civil and Political Rights (ICCPR), particularly article 19 (UN General Assembly 1966) in its General Comment 34 which states that offences 'such as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying" or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression'. The compliance of Facebook and YouTube with the Israeli government's requests undoubtedly restricts freedom of expression, reducing the role and the capacity of social media and internet platforms, and preventing journalists from accomplishing their work on informing the general public (Odeh 2016).

At the same time, criticism on social media of Fatah and Hamas among media activists, human rights defenders and the public in general is met with firm actions by Palestinian security forces (Watch 2018). These actions sometimes lead to the detention and torture of journalists and activists giving rise to self-censorship on social media and internet platforms (Odeh 2016). The Palestinian government had targeted journalists and activists who opposed or criticised the government prior to the enactment of the cyber-crime law, prosecuting them under the Penal Code. Similarly, in Gaza freedom of expression has declined sharply since the internal political divide, in 2007. Hamas uses different forms of restrictions against journalists and activists, including detention, threats and torture, to stifle any element that criticises or threatens its rule.

8 The multiplication of regulatory bodies and the instrumentalisation of internet technology companies

Some anti-cybercrime legislation in the region have relied on legal techniques other than 'vague terminology' to ensure stronger control over cyber-communication and social media. Bahrain, for example, set up several regulatory bodies to monitor and prosecute dissenters. Egypt has transformed internet service providers into control agents executing the government's policies. The establishment of regulatory bodies and the transformation of information technology (IT) companies into regulatory agents are not the only tools governments use to 'regulate' internet use. They sometimes resort to non-regulated shutdowns of local or national communication systems in an effort to silence the opposition.

In Bahrain the government has over the years gradually introduced several restrictive instruments varying from laws and regulations, governmental bodies, and surveillance software to monitor citizen activities online. These instruments are allegedly meant to safeguard national security and order. However, they resulted in a massive crackdown on internet users that reveal their intention to silence political dissidents (Bahrain Centre for Human Rights 2018).

Bahraini authorities practise surveillance and censorship through several laws and regulations. The government passed the Press Law 47/2002, which regulates both online and print media. This law allows strict control on the circulation of sensitive topics. Article 19 prohibits the publication of any content 'instigating hatred of the political regime, encroaching on the state's official religion, breaching ethics, encroaching on religions and jeopardising public peace' (Bahraini Journalists Association 2019). The Minister of Information issued Decree 68/2016, which further restricts the distribution of electronic media and empowers the state to target and prosecute content publishers (Bahraini Journalist Association 2019). In 2014 Bahrain passed its national cyber-crime legislation under Law 60/2014 on Information Technology Crimes. The Law is complementary to the Media Regulation Law of 2002, as it provides in article 23 penalties for infringing the complementary regulations (Bahraini Journalists Association 2019).

The government did not limit itself to drafting new laws and regulations. It also created governmental bodies to monitor cyber-activities: the Information Affairs Authority, established in 2010; the General Directorate of Anti-Corruption and Economic and Electronic Security, established in January 2011; and the Cyber Safety Directorate, established in November 2013. The Information Affairs Authority (IAA) is responsible for monitoring all media outlets in Bahrain, whether printed or online media, to ensure their compatibility with media regulations. It has the authority to block any website or content for allegedly 'instigating hatred of the political regime, encroaching on the state's official religion, breaching ethics, encroaching on religions and jeopardising public peace or raising issues whose publication is prohibited by the provisions of this law' (Bahraini Journalist Association 2019). The Ministry of Interior set up another monitoring authority, namely, the General Directorate of Anti-Corruption and Economic and Electronic Security. This authority tracks internet users who violate the media regulation laws, and opens an investigation of those who offend, defame and insult others online. The

Directorate has summoned and interrogated human rights defenders, political activists and social media activists over charges of insulting or offending a governmental body, the King, or a neighbouring country (General Directorate of Anti-Corruption and Economic and Electronic Security 2019). The third governmental body was set up by the Ministry of Telecommunications Affairs. The mandate of the Cyber Safety Directorate is to 'assume its role in monitoring websites and social media networks to ensure they are not used to instigate violence or terrorism and disseminate lies and fallacies that pose a threat to the kingdom's security and stability' (Bahrain Centre for Human Rights 2013). In addition, a hotline and an email address were published for the general population to report any infringement of the 'right cyber-agenda' as regulated by the laws (Bahraini Ministry of Interior 2013).

The legislation and governmental bodies that were set up to 'regulate' cyber activity actually curb freedom of expression and the right to information. Criticism of the royal family and sometimes of the political and economic situation is not tolerated. Activists were arrested for sharing satirical content opposing the regime. For example, a women's rights activist, Ghada Jamsheer, was arrested in 2014, her blog and Twitter account were blocked, and she was sentenced to a year in prison for defamation and insulting the royal family through a tweet she posted about corruption in a hospital managed by a royal family member (Bahrain Centre for Human Rights 2015). Similarly, the president of Bahrain's Centre for Human Rights (BCHR), Nabeel Rajab, was arrested in 2016, allegedly for disseminating false news on his Twitter account when he published a report on torture incidents in Bahrain's prison and violations committed by the Saudi Coalition forces in Yemen (Bahrain Centre for Human Rights 2016). This type of censorship is supplemented by another one that targets websites: Over 1 000 websites were blocked 'for sharing illegal content', and so was an encrypted messaging and Voice over IP service such as Telegram in 2011 (The Verge 2019) and prominent live streaming services broadcasting Shiite religious ceremonies such as PalTalk and Matam.tv in 2013 (Reporter-ohne-grenzen.de 2019). Not surprisingly, a United Nations (UN) spokesperson at the Human Rights Council in Geneva noted that Bahrain had failed to obey 176 of the Council's recommendations (Civicus.org 2017).

In Egypt the government not only blocked websites, but shut down all communication systems in an effort to curb the mobilisation efforts of the opposition forces and isolate the protests from the world's attention at the wake of the Arab Spring. Indeed, the government obliged telecommunication companies in January 2011 to shut down the internet, and voice and texting services. In 2014 the Egyptian government used a surveillance system called 'See Egypt' to monitor the internet activity of activists, tapping into their email accounts and Skype calls (Buzzfeed News 2018). This surveillance system penetrates laptops remotely and access personal data, such as pictures, passwords and files. It can also operate cameras and microphones to record conversations. It was used against Esraa Abd El- Fatah, a prominent human rights activist, who had her personal photos, email and phone calls leaked on Facebook. This was used to 'expose her indecency' and undermined her credibility (Freedom House 2018).

In 2018 the President of the republic ratified Law 180, an anti-cyber-crime law directed towards users and internet service providers, further restricting digital rights. Article 7, for instance, allows the blocking of websites accused of publishing content constituting a threat or a crime against national security and the economy. Also, it obliges internet service providers to block access to the website within 48 hours whenever notified. This allowed the blocking of 500 websites in March 2018 under the claim of disseminating fake news (Access Now 2018). This anti-cyber-crime legislation also focuses on regulating social media discussions. It provides that any user with 5 000 followers can be considered as operating a media platform and could be held accountable for sharing 'fake news'. Consequently, it led to the imprisonment of Facebook users for the dissemination of unfavourable opinion (BBC News 2018). Such was the case of Masoum Marzouk, a former diplomat, who had called for early presidential elections on his Facebook page (BBC News 2018). Article 9 of the Law authorises internet service providers to store their customers' information and data, such as messages, website visits and telephone calls, up to 180 days and to hand it to the authorities when requested (IFEX 2018). This provision was translated into reality when the government requested Uber and Careem car services to hand over their customers' data (Mada Masr 2018). Allegedly, the purpose of this legislation and policy is to counter terrorism. Nevertheless, they contradict article 57 of the Egyptian Constitution which states:

> The right to privacy may not be violated, shall be protected and may not be infringed upon. The state shall protect citizens' right to use all forms of public means of communications. Interrupting or disconnecting them, or depriving the citizens from using them, arbitrarily, is impermissible. This shall be regulated by law.

Internet shutdowns not only affect the social interaction and communication between individuals, but also have major negative implications on the economy. Internet disruptions caused great losses to the global economy estimated at US $2,4 billion between July 2015 and July 2016 (Brookings Institution 2016). In Egypt the five-day internet shutdown meant to disperse protesters generated a loss estimated at $90 million. In Bahrain the government shut down mobile internet services in the Duraz area following protests against the government's decision to revoke a Shiite religious leader's citizenship. This decision cost an estimated US $1,2 million to the Bahraini economy (Brookings Institution 2016).

The shutdown decision not only affects political and civil rights, but also strongly impacts social and economic rights, affecting manufacturers and service providers that rely on e-commerce, cutting them off from domestic customers and global trade (Seib 2007). Even the health sector was affected by the shutdown as it disrupted communications with its suppliers (OECD 2011).

9 Conclusion

In 2011 new technologies undoubtedly supported the wave of contestation that swept over North Africa and the Middle East. When this wave toppled three regimes and shook the foundations of many others, what was then referred to as the Arab Spring was also dubbed the 'Twitter revolutions',

highlighting the important role digital social media and, more broadly, information and communication technologies played in political mobilisation and the contestation of authoritarian rule. This reflected a certain transformation of cyber-space into a public sphere, close to Jurgen Habermas's definition of a space (albeit virtual) in which citizens gather to articulate the needs of their society. Such analysis and interpretations today are much debated, but at the time they reflected a general optimistic narrative surrounding the use of information and communication technologies and the possibilities they offered.

In this article we looked into the promises of digital surveillance companies and the possibilities that technology makes available to oppressive regimes, from monitoring centres facilitating mass surveillance on all telecommunications, to firewalls that filter what users can access, and spyware that taps into the information stored in any personal device connected to the internet. This paints a grimmer picture of new technologies, one which becomes significantly darker when one takes into account the volume of this 'international repression trade' and the market value of those surveillance companies operating in states that are self-identified as democracies.

Even when there is general agreement that these surveillance technologies are powerful weapons that can be used in both civil and military terrains, their economic value for the nations that produce them, and their political importance to the nations that import them, have deeply affected the way in which governments regulate their sale and use.

On an international level, the sale of these technologies is not regulated by a treaty, but through a voluntary agreement that does not contain provisions for enforcement and compliance. Each member state to the Wassenaar Agreement develops and enforces its own control policies and only consults with other member states. The core objectives of the Agreement, namely, the promotion of transparency and greater responsibility in transfers of dual-use goods and technologies, seem to be contradicted by the sales of surveillance systems to several countries in the Middle East and North Africa. Not only are these sales not transparent, with the public never hearing about them unless information is leaked or some evidence of their criminal use is found many years after their sale; but the governments of exporting countries seem to regularly turn a blind eye to their sale to repressive governments because of the economic importance of these transactions and the wealth generated by these companies.

At the national level the use of these technologies in the Middle East and North Africa is not directly regulated by any particular law. This means that there is no particular legislation that bans or authorises the use of mass surveillance, interception technologies or filters. However, anti-cybercrime laws indirectly authorise the use of some of these technologies (that is, monitoring, filtering and banning), and inform on the repressive intentions of the legislator and the controlling character of the regulations. We have seen four indicators that can be used to determine the repressive nature of an anti-cybercrime legislation: the use of vague terminology in the definition of cyber-offences; the absence of discussions with CSOs when passing the legislation; the multiplication of regulatory bodies; and the transformation of internet service providers into control agents. These

indicators may be used as red flags when it comes to the sale of surveillance technologies.

We have also seen that public opinion and CSO mobilisation against repressive anti-cybercrime legislation or the sale of surveillance technology to repressive regimes has not been very effective. In the case of mobilisation against legislation, they can delay the enactment of anti-cybercrime laws, but have sometimes resulted in the passing of even more problematic legislation. As far as the mobilisation against the sale of repressive technologies is concerned, the media and CSOs have played a vital role in informing the public about these sales and the use of these technologies that massively violate human rights. In this regard, there are several success stories that show the importance but also the limits of such actions. The French courts put Amesys under judicial investigation in 2012 on account of the sale of surveillance technology used against political opponents to apprehend them. In 2017 the Italian Ministry of Economic Development revoked the authorisation given to several companies to sell internet network surveillance systems to Egypt following media attention and pressure from CSOs. However, these actions have not prevented authoritarian regimes from upgrading their repressive techniques through other surveillance products proposed by other companies, most of which are equally based in self-identified democratic countries. This reveals the fragility of digital rights that remain largely unprotected in both international and domestic laws, but also how this fragility directly impacts broader human rights.

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The impact of new information and communication technologies on the enjoyment of human rights in Latin America

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Abstract: *New information and communication technologies pose different and diverse challenges to the enjoyment of human rights in Latin America. This article presents a number of case studies on challenges and opportunities connected with ICTs and their impact on social movements, litigation, politics and the enjoyment of individual rights. It also refers to the attempts to promote the legal regulation of the digital sphere. The analysis highlights the gap between citizens with access to technology and connectivity and those left behind.*

Key words: *information and communication technologies (ICT); Latin America; legal regulation; digital rights; technology; connectivity; social inequality*

1 Introduction

Latin America is the most unequal region in the world (Kliksberg 2005). It is therefore unsurprising that new information and communication technologies (ICTs) have had a differential and potentially unequal impact in the enforcement of human rights in this region. Economic, geographical, age, sex, gender, linguistic, educational and cultural gaps – as well as those concerning employment and physical integrity – erode the equality of the populations of the region at the individual and collective levels, and have an impact on the possibility of access to and use of ICTs.

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The international community is committed to ensuring effective access to ICTs as reflected in the Sustainable Development Goals (SDGs). Despite this commitment and a certain decline in economic inequality in recent years in the region, can we consider that the digital gaps are the 'new inequalities' in the region? What are the differential impacts by age, gender, social class, ethnicity, physical integrity and place of residence, caused by new technologies?

Neither digital sovereignty nor the potentialities and risks of new technologies can be addressed without reference to the structural context influencing interactions in the region.

In Latin America, as elsewhere in the world, state authority to review digital content shared through the internet and the imposition of restrictions over its use should be in line with human rights and, in particular, with freedom of expression and conscience. In order to prevent illegitimate or arbitrary decisions, any limitations imposed must pursue a legitimate aim and must be proportional. Moreover, restrictions should have a basis in law and be set in advance, with citizen awareness of the purpose and limits of state control. State control cannot be intrusive and affect the right to privacy. Companies also play an essential role in ensuring this right. Legislation on data access and judicial review of these issues is essential.

Likewise, it is relevant to highlight the link between ICTs and human rights in different relevant social areas in Latin America, such as education, health and labour. In these respects, ICTs are tools providing a larger range of opportunities to fulfil and ensure these rights. Additionally, in a number of countries the development of social media applications has created new tools for denouncing human rights violations and facilitating access to information essential to victim assistance. However, it cannot be negated that ICTs pose challenges that have an impact on people's lives and their relationship with their environment in the countries in which they reside and throughout the region. The technological revolution has fostered a virtual context where both individuals who have and who do not have access to the internet face the violation of their fundamental rights.

In this context, a critical view of the potential violation of rights that occur in the internet and the problems related to it is called for. These include new forms of violence with transnational and massive impact and new challenges in terms of crime prevention. Prosecution and sanctions are additional challenges faced by states in light of the absence of appropriate regulations and clear jurisdictions as well as a collision between rights. Similarly, another issue to address is network anonymity. Although the principle of net neutrality is a guarantee for internet users, it may turn into an obstacle when investigating, prosecuting and punishing offenders.

In view of the above, it is clear that with the current technological revolution new challenges have emerged in the face of which states must provide an effective response in order to respect and ensure the human rights of all persons/users.

2 Latin America and ICTs

In Latin America the incorporation of technologies was initially associated with the idea of development. With the expansion of the internet, the issues associated with technologies focused on inclusion. The understanding that new technologies would enhance state capabilities to exchanges information and gain benefits that would facilitate the production of knowledge (Camacho 2005).

From a historical point of view, it is possible to distinguish technological gaps from digital divides. The first refer to the distance or the existing separation between the people who have access to or manage technology and those who do not; the second refer to the limitations in application of ICTs, meaning the distance between the people who know how to use them and those who do not (Santoyo & Martínez 2003). Although initially it was thought that the gaps would be overcome as the context improved, nowadays it is clear that those gaps persist, have been accentuated, and engender new forms of inequalities.

Since the World Summits on Information Society held in Geneva (2003) and Tunis (2005), Latin America has set for itself the objective of overcoming these gaps and the exclusion they bring to the populations lagging behind in the digital era (ECLAC 2017). For this region, the digital era is turning into a new phase of inequality not only related to technological inequalities but also to a manifestation of the social gaps (Arenas Ramiro 2011).

2.1 The gaps

When speaking of the digital divide we refer to a situation where countries lack the same opportunities to access the benefits of technologies, to have access to connectivity, and to be an active part of a network, not only within national boundaries but also regionally and globally. The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) defines it as 'the dividing line between the population group that already has the possibility of benefiting from ICTs and the group that is still unable to do so' (ECLAC 2003: 16).

It is important to recognise the digital divide as a concept that, given its multidimensional and multifactorial nature, is in constant evolution and can generate different forms of inequalities. These include inequalities between countries (international digital divide) or between citizens within each country (internal digital divide), and these inequalities are generally accentuated between those who live in urban areas and those in rural areas (De la Selva 2015). When speaking about digital gaps, those relating to access, use, quality of use and technological appropriation must be taken into account.

Regarding access to ICTs and internet connection, 43,4 percent of all Latin American households were connected to the internet in 2015 (ECLAC 2016: 7). While in 2017 the percentage rose to 56 per cent, with the number of households growing by 103 per cent from 2010 to 2016, more than half the households still lacked access to the internet (ECLAC 2017).

As far as access to fixed broadband and mobile broadband is concerned, in 2010 the penetration of these was relative parity, by 6,5 per cent. It then is evident that the penetration of mobile broadband surpassed fixed penetration. In 2016 mobile broadband reached 64 per cent in relation to 11 per cent, corresponding to fixed broadband. However, mobile data traffic in the region continued to be the lowest in the world, with an average of 449 terabytes per month (ECLAC 2017).

The second type of gap relates to the ability to use ICTs and to navigate the network. It is necessary to point out that it is not enough to 'be online' if you do not know what information to look for in the network and how to identify a reliable source from one that is not. This skill is often associated with the educational level of the user, meaning that the users with high levels of education make better use of the information in the network. In Latin America, education depends on financial income available and social stratification. This will also to a large extent determine the quality of internet use, which is related to affordability and the speed of internet service.

One of the major challenges, particularly in Latin America, is the design and execution of projects aimed at digital literacy in order to effectively include all peoples, especially those belonging to populations in vulnerable situations (Camargo & Murillo 2012). In this regard, indigenous peoples are particularly affected by technology in their ancestral lands, mainly relating to extractive projects. These have brought violence against human rights defenders – some of which have lost their lives – defending ancestral lands against large private companies. An example on the use of ICTs for the benefit of indigenous communities is addressed below.

2.2 Digital gender gaps

An analysis of digital gender gaps as a consequence of asymmetric power relations involves the consideration of two elements: the dissimilarity between men and women in the use of ICTs, and that of women among themselves. In this sense, digital gender gaps must be analysed taking into account cross-cutting perspectives, meaning that access to the internet is not the same for a young professional woman living in the city, without disability, as for an older indigenous woman living in a rural community where connectivity quality and speed are not of an equal standard.

All contextual circumstances must be considered in order to understand structural inequalities in the region. These include unequal access to opportunities for women, as well as the gender stereotypes that historically have separated women from science and technology. In this sense, digital gaps are a consequence of pre-existing inequalities they generate or enhance new forms of exclusion.

In this context there are several examples of concrete actions developed to promote the incursion of girls in the world of science, mathematics and robotics, using technologies as key tools in the digital literacy process, with women/girls as creators, designers and producers of technologies.

Since 2016 Paraguay has promoted a project titled 'Girls Code', which seeks to awaken the interest of girls – in both public and private schools – in the use of technologies and inspire them in active participation through the development of skills and technical knowledge, as well as attitudes

aimed at making them feel capable of being the next generation of entrepreneurs, creators and change makers (Girls Code 2019). In order to achieve these objectives, the project carries out an active learning process through workshops and courses where girls self-pace their own learning processes, from being software consumers to software developers. These workshops provide basic notions about programming, the creation of web pages, applications for mobile phones, game design, handling of three-dimensional printers and the introduction to robotics. The workshops are held on weekends or after school, for girls from the ages of six to nine years and from ten to thirteen years. Many of the girls who participated in the workshops progress to more advanced courses, acquire confidence to share mixed spaces, and strengthen their ability to create and learn.

2.3 Digital gaps in technological appropriation

In order to address digital gaps – especially those connected with technological appropriation and the progression from technology consumers to technology developers for the benefit of the community – a number of good practices have been developed in different countries of the region.

In the Peruvian Amazon, indigenous peoples use ICTs to report oil spills in their river waters and pollution of their ancestral lands (Collyns 2018). They gather photographic evidence and record geo-referenced videos on their cell phones and drones to report oil spills and pollution, and call for state supervision and political support to monitor that the extractive companies operate under the framework of the law. Drones are also used by indigenous peoples in Colombia, Costa Rica, El Salvador, Guatemala, Honduras, México, Panamá (FAO 2016), among others in the region (UICN 2016).

Following the line of appropriation of ICTs, it is also worth mentioning the actions of Latin American governments focused on the development of the right to access information as essential in the governance modality. Thus, today open government is the way in which Latin American governments meet to ensure transparency in their efforts, participation and collaboration of citizens, with technological innovation being a cross-axis aimed at bringing people closer to state actions.

Several branches of government in the region have designed platforms enabling citizens to make online consultations, participate in activities, learn about the management, how much public officials earn, how the budget is executed of the institution, as well as access to services over the internet without having to go to the institution's headquarters, thus saving transportation costs and time.

2.4 Final thoughts

It is essential to use technologies as tools to access data, which could be transformed into information and then into knowledge. This access is key to decision making by holders of rights (citizens) and by institutions responsible for ensuring the respect, guarantee and fulfilment of those rights (states). It is also essential to identify the different types of digital gaps, the manner in which they impact on populations, and to design and implement strategies to overcome these gaps in order to ensure access to the benefits of ITC for all. Projects, programmes and initiatives on

empowerment, literacy and technological appropriation should aim to foster agile and inexpensive mechanisms to access fundamental rights, so as to contribute towards reversing inequalities in Latin American societies.

Public policies based on the principle of equality and non-discrimination are key to overcoming the gaps that reinforce the digital divide as its new face of inequalities in Latin America. These policies should strive towards quality access of technologies – that go beyond connectivity – at low cost, thus enabling accessibility and compressible capacities and contents, mainly using technology as a tool for the effective exercise of rights by individuals and communities.

3 Opportunities and challenges in the use of ICT in the area of economic, social and cultural rights

Latin America faces levels of inequality and poverty with a direct impact on the enjoyment of economic, social and cultural rights. This part will focus on the impact of ICTs either on the development of policies to ensure these rights or on the exacerbation of new types of breaches or challenges with special reference to education, health and labour.

3.1 Education

During the last two decades the implementation of ICT in the field of education has not been successful enough to achieve significant benefits for the Latin American region (UNESCO 2013). A first challenge has been the lack of sustainable policies and an adequate budget to make new devices available. A second challenge is the training of teachers in the area of ICT as a fundamental step towards the implementation of new technologies in the classroom (UNESCO 2013; Valdivia 2008). Additionally, traditional pedagogical models have not been designed in a manner conducive to the use of ICT. This creates challenges for the educational process of younger generations who are digital natives, because traditional models do not provide them with the opportunity to relate with tech devices in educational spaces (Valdivia 2008).

In response, some governments of the region have tried to implement a number of policies to improve digital accessibility and availability for populations facing socio-economic disadvantages, particularly in rural or marginal areas. One of the most successful experiences is the so-called CEIBAL – the Spanish acronym of 'Educational Connectivity of Basic Informatics for On-Line Learning' – Plan, established in 2007 to promote technological integration at the service of education to impulse processes of social inclusion and innovation and personal growth and reduce the access gap between the highest and lowest income quintiles (Plan Ceibal 2019).

Even though CEIBAL was only aimed at public education when it was first launched, after some years both public and private schools benefited from the programme. It included one laptop per student and wifi connectivity inside and outside of classrooms (Velasco 2011; Rivoir & Lamschtein 2012). The programme also provided students with equipment maintenance and repair (Plan Ceibal, 2019). The Plan has been supplemented with other projects such as Plan Ibirapitá, implemented in 2015 to promote the digital inclusion of low-income pensioners; Youth for

Programming, launched in 2017 in order to create new job opportunities for 1 000 17 to 26 year-olds by training them in programming. As a consequence, Plan CEIBAL is referred to as one of the most successful experiences in the implementation of ICT in education across populations in Latin America.

There have been other examples of innovative projects for education in the region, for instance through mobile and computer games. The Chilean game *Kokori* raises awareness on cell biology by defending human cells from the attacks of micro-organisms, so far with more than 60 000 downloads in 36 countries. *Qranio*, developed in Brazil, is a trivia interface where users answer a wide variety of questions relating to various categories with more than 12 million students registered (BID 2016).

Adaptive learning platforms – artificial intelligence-based software to understand learning needs and design personalised responses – are another strategy to be considered for the region (BID 2016; Smart Sparrow 2018). Two experiences worth mentioning are *Geekie* and the Latin-American implementation of *Aleks*. *Geekie* is a Brazilian platform aimed at providing training for university admission examinations through games and virtual tutorials. *Aleks* is a project developed by the McGraw Hill publishing house with Mexican universities, such as the UNAM and ITAM, and with a wide variety of universities in the United States. The system uses online evaluations to predict learning levels and adapt them to specific student needs (BID 2016).

3.2 Health

According to the Pan-American Health Organisation, it is estimated that 30 per cent of the population in the region lacks access to health services due to economic reasons, and 21 per cent gives up on looking for access because of geographical barriers (PAHO 2017). Additionally, the public spending in health measured as part of the gross domestic product (GDP) did not vary significantly between 1990 and 2007, with the exception of Cuba and Uruguay (Fernández & Oviedo 2010: 14). Recent data shows that only five countries – Canada (7,74 per cent); Costa Rica (5,65 per cent); Cuba (10,92 per cent); the United States (13,97 per cent) and Uruguay (6,5 per cent) – out of 34 countries of the Americas invest more than 5 per cent of their GDP in public health services (WHO 2016).

Advancements in ICTs in the area of health have been introduced at a slow pace despite their importance (Fernández & Oviedo 2010; 5G Americas 2016: 10). Additionally, the health sector currently faces two specific problems, namely, providing equitable access to quality services, and reducing or regulating the rising costs of these services (Rodrigues 2003). In this area, ICTs are particularly useful in a variety of processes such as monitoring the performance of health systems, electronic management of medical care procedures, logistical support for clinical work, and medical treatment of patients with chronic diseases or disabilities (Azevedo, Bouillón & Glassman 2011). Consequently, some governments or private research investigation groups have introduced the use of ICTs in specific programmes, with a variety of results.

One example of the implementation of ICT is the use of telehealth, involving telecommunications and virtual technology to deliver health care outside traditional healthcare facilities (WHO 2019), for example

through virtual health care or long distance professional assistance to obtain guidance in diagnosis, care and referral of patients. The use of the internet and mobile technologies is a fundamental part of the development of this type of remote help.

Especially during the last decade there have been several initiatives in the region to implement different forms of telehealth. Countries such as Brazil, Colombia, Venezuela, Mexico and Panama have implemented not only policies but also an adequate legal framework to promote teleservices. One relevant example is the programme of rural telemedicine in Panama, started in 2005. Another significant case is the Brazilian National Telehealth Programme, which started two years later and includes nine states and 900 cities. In the same year Colombia released a similar programme with a national scope (5G Americas 2016: 13).

ICT has been used to prevent unhealthy habits or to promote healthy practices with various results. Sex education programmes based on the use of the internet were offered at state schools in 21 Colombian cities. According to the research results, the majority of the participants experienced a significant improvement in knowledge and attitudes towards most of the topics taught. Among the topics were the prevention of sexually transmitted diseases (STDs); gender-based violence; and the use of condoms and other contraception methods (Azevedo, Bouillón & Glassman 2011: 135). The experience had positive results.

As far as the prevention of alcohol and drug consumption is concerned, the results were not positive enough. In Uruguay a programme was released for teenagers based on webpage access and text messages, but very few participants entered the website. Even though teenagers had raised awareness of the negative impacts of alcohol and drugs, most of them did not change their consumption habits. Researchers explained that the main cause for the disinterest in the website had been the non-structured and voluntary design of the whole programme (Azevedo, Bouillón & Glassman 2011: 136-137).

ICTs have been used for treating chronic diseases in the region. A negative experience can be also mentioned in Uruguay. In this country an experiment was developed with the main goal of helping patients with diabetes type II. The principal idea was to create a type of social network in order to access material for improving lifestyles and to interact with other patients. However, most of the participants did not enter the webpage, based on other variables such as civil status, age and education level (Azevedo, Bouillón & Glassman 2011: 138). In Peru, thanks to a video campaign directed at teenagers for the improvement of their blood iron levels, a significant majority visited healthcare centres to request iron pills (Azevedo, Bouillón & Glassman 2011: 139). In this sense, this campaign was aimed at reducing cases of poor nutrition and anaemia.

3.3 Labour

Thanks to the implementation of ICT, the labour sector has experienced a variety of consequences. On one hand, some studies have demonstrated that workplaces that have implemented ICT in their environments have created diverse necessities in the workforce (Chelala & Martínez-Zarzoso 2017: 154). In that way, companies have created new job opportunities, particularly in the higher and lower-skilled sectors (Dutz, Almeida &

Packard, 2018: 30-33). Also, the use of mobile applications – such as Glovo, Rappi, Uber, Cabify – have increased the dynamics of the economic sectors, but this has complicated the status of workers and their rights (Arreola 2019).

The major examples are two first instance judgments issued at the Autonomous City of Buenos Aires, Argentina. The first case refers to the massive dismissal by the company PedidosYa that affected 450 out of their 1 000 delivery workers, without any compensation. Labour attorneys state that delivery workers are bound by an employment relationship that is not fully recognised and protected by the company. Consequently, labour rights are not guaranteed in a context where there are no social security contributions, nor recognition of extra hours (McDougall 2019).

In the second case, companies that manage the applications Glovo, Rappi and PedidosYa – the three that offer delivery services in the country and, especially, in the capital city – were sued due to non-observance of traffic regulations. The delivery is made by bicycle, and most workers were not provided with health and safety accessories. Moreover, the companies failed to contract insurance against traffic accidents for its delivery workers who were expected to contract this themselves. For these reasons, the Court stated that it was necessary for companies to cover these costs, and that services should be suspended until regulations were complied with. It also found that companies must adopt appropriate measures to avoid workers' loss of profit during the suspension time (Iprofesional – Legal editorial staff 2019).

Both cases reflect the legal gaps in the protections for new forms of work relationships. Although in Argentina these problems are currently being reviewed by the judiciary, in the rest of the region these issues are still pending. Despite the creation of new income sources for many people across the region, regulations for this type of activities cannot only protect companies and production, but must also protect its workers who remain the most disadvantaged sector of the region.

3.4 Final thoughts

ICTs have provided an opportunity to understand new forms of protecting human rights, making education and health more accessible and available for different populational areas. In this way, some governments have potentiated its usefulness, and have developed important programmes aimed at satisfying the rights of marginal populations. Thanks to these policies, people who have traditionally been discriminated against have had the possibility of enjoying the benefits of ICT. Now, the challenge is that governments must maintain the sustainability of their projects and try to expand coverage to benefit wider groups.

However, in the work sector, ICT may be seen as a new possibility of reducing unemployment, but also as a new way of ignoring workers' rights. This is particularly serious in the region because ICT would start to create more breaches between those who are fully protected by law and those who are not. It is necessary for governments to consider this situation and to start legislating and to adopt adequate policies that avoid gaps and provide adequate protection to any kind of work relationship. In any of the cases, Latin America still needs to learn about the potentiality

that ICTs offer and applying them in diverse ways to human rights protection.

4 Social movements and ITC

When addressing ITCs and human rights in Latin America, some recent examples of social movements are relevant to the analysis, in particular those connected with the gender movement in Argentina and the anti-corruption movement in Guatemala.

4.1 Argentina's *#8M #VivasNosQueremos*

The feminist movement has gained momentum and it is spearheading in social change all around the world. In this context, the recent 'green' and 'purple' waves[1] are supported by hundreds of thousands of women in Argentina and have had an impact on social movements around the globe. Aside from its symbolism as 'international women's day', in Argentina 8 March – or #8M – has also become a reference for 8 October 2016.

In 2013 a wave of femicides, and the type of information available on these events, evidenced that there was no appropriate official data and statistics to understand and analyse the phenomenon. This led to the women's movement and civil society pushing for a debate on the issue. By 2015 the National Supreme Court's Gender Office reported that during that year 235 women were victims of femicide or gender-based violence (Registro Nacional de Femicidios de la Justicia Argentina 2015).

A number of high-profile femicides covered by the media at the time led civil society to implement a new communication strategy that was reproduced in multiple cities at the national level and abroad. This strategy included mass demonstrations, such as those carried out in connection with the so-called *miércoles negro*/Black Wednesday. *Miércoles negro* was organised in order to bring into focus the femicide of Lucia Perez, a 16 year-old student brutally raped and killed by a gang of men.[2] Multiple protests and demonstrations were organised. Over a period of four months thousands of women participated in rallies and assemblies in 105 cities in a historic social protest for women's rights (Laudano & Kratje 2018). This gender-based violence case had a significant impact on Argentinian society.

In order to spread their message, the women's movement took advantage of new technologies and social media. A massive wave of communications were spread on Facebook, Twitter, YouTube and Vimeo (Laudano & Kratje 2018). Without social media platforms, the message against gender-based violence and the call for demonstrations would have not reached a massive audience in multiple locations. As indicated by Laudano and Kratje:

1 The women's movement in Argentina is currently identified by the colour green, representing support for sexual and reproductive rights; https://www.infobae.com/cultura/2018/08/05/la-historia-del-panuelo-verde-como-surgio-el-emblema-del-nuevo-feminismo-en-argentina/ (last visited 10 April 2019).

2 See https://elpais.com/internacional/2016/10/19/argentina/1476905030_430567.html (last visited 10 April 2019).

> In the communicational sense it was very important to recognize a poetical feeling linked to the audiovisual. For example, from the group *Ni una menos* the invitation to participate in the # 8M march was addressed to women from different social levels and from different geographical origins, appealing to the breadth and diversity of values processed by a television aesthetic that uses the increasing speed of montage to transmit the urgency of the claim of # NiUnaMenos.

The social demonstrations against femicide promoted by the women's movement in Argentina was replicated in more than 70 countries, including Germany, Australia, England, France, Israel, Russia, Togo, Turkey and the rest of Latin America.

4.2 *#RenunciaYa #JusticiaYa,* the hashtags that made possible the removal of a President

Guatemala is located in the northern triangle of Central America and is considered the most unequal country in Latin America, with 0,53 points in the GINI index (ECLAC 2018). Between 1960 and 1996 Guatemala was devastated by a civil war that represents one of the darkest chapters in its political history, with more than 220 000 violent deaths and 45 000 disappearances (Historical Enlightenment Commission 1999). It was the first country in the world to request the support of the United Nations (UN) for the establishment of an international commission against impunity and illegal security forces and clandestine security gangs (Agreement between the United Nations and the Government of Guatemala regarding the establishment of an International Commission Against Impunity in Guatemala CICIG 2007).

In 2015 the country underwent a serious political crisis due to several investigations made by the CICIG. Those investigations revealed that former President Otto Perez Molina and former Vice-President Roxana Baldetti Elias were part of a criminal organisation involved in tax fraud[3] and several more corruption cases.[4] Civil society reacted with demonstrations in the central square of Guatemala City, called and organised under the hashtag #RenunciaYa.[5] #RenunciaYa started like a collective call to show the government that the urban and middle-class were angered by the corruption cases.

As a response to calls made via Facebook, more than 40 000 people participated in the demonstrations.[6] On 25 April 2015 thousands of Guatemalans demonstrated at the central park of Guatemala City, starting a cycle of protests that lasted for months until the resignation of Perez Molina and Baldetti Elias and their prosecution on corruption charges.[7]

3 See https://www.mp.gob.gt/noticias/2017/10/27/caso-la-linea-juez-galvez-envia-a-debate-oral-y-publico-a-roxana-baldetti-y-otto-perez-molina-y-26-mas-implicados/ (last visited 10 April 2019).

4 See https://elpais.com/internacional/2018/10/10/america/1539127138_240195.htm (last visited 10 April 2019).

5 See https://beersandpolitics.com/como-se-gesto-el-movimiento-renuncia-ya (last visited 10 April 2019).

6 See https://www.nytimes.com/es/2016/10/07/los-jovenes-que-aprendieron-a-hacer-politica-mientras-tumbaban-al-presidente-de-guatemala/ (last visited 19 April 2019).

7 See https://elpais.com/internacional/2015/06/14/actualidad/1434303266_370487.html (last visited 10 April 2019).

Some of the activists that organised the 2015 marches have gathered in a new social collective, popularly known as #JusticiaYa. This group is focused on battling corruption, inequality and the lack of transparency in Guatemala. As a backlash, some members of #JusticiaYa have been slandered and prosecuted as part of the challenges faced by social movements involved in the construction of a more inclusive and fair society.

4.3 The Xinka community and their campaign against open–pit mining

Guatemala's relations with the ITCs and the social movements did not end in Guatemala City and the mobilisations organised by the upper and middle urban class. The rural indigenous Xinka community is located in the south-east of Guatemala, 75 kilometres from Guatemala City in an area designated for a number of mining activities. The community is involved in an open fight against the government and Canadian mining companies due to the failure to comply with the right to a free, prior and informed consultation process with indigenous peoples in connection with the use and exploitation of ancestral lands.[8] When the Xinka community brought the matter to the courts, it faced a 'media siege' by the mining company in order to block information on the case from the public.

With the purpose of sharing information on these cases with society at large, the community set up a communication strategy running in parallel with the court litigation. The communication strategy involved explaining the cases to social media influencers and inviting them to disseminate that information through their social media outlets; meetings with leaders of other indigenous communities facing the same challenges with mining activity and litigation; using the hashtag #YoSoyXinka on Twitter, Facebook and YouTube in order to make visible their cause; promoting demonstrations in Guatemala City to attract the attention of the mainstream media; calling for the demonstrations in social media in order to avoid the mainstream media siege; calling for demonstrations on the same day the hearings were held in court; and sharing short video recordings on Facebook in order to make them viral through the social networks.

Thanks to this communications strategy, the case brought before the Constitutional Court gained media profile and was well positioned in the national debate. Newspapers and television discussed the case of *San Rafael Las Flores v Mina El Escobal* (Quezada 2013). In its decision the Constitutional Court of Guatemala found that the state had failed to respect the right to a free, prior and informed consultation process with the Xinka community and that any processes to obtain a mining licence in the territory of indigenous peoples must be guided by the consultation standards. This case shows a clear strategy to avoid the media siege and place human rights cases on the national agenda (Cabrera 2012).

8 See https://www.efe.com/efe/america/economia/la-corte-de-guatemala-ratifica-suspension-una-minera-canadiense-y-ordena-consulta/20000011-3738309 (last visited 10 April 2019).

4.4 Final thoughts

Not every relationship between social movements and social networks builds or achieves positive change in society. In fact, there have been serious cases of criminalisation and defamation of social activists and human rights defenders through social media. Social media is also used to spread fake news during electoral processes or to destroy the image or reputation of candidates. It is undeniable that social networks are powerful tools to spread political messages.

5 The dilemma of legal regulation in Latin America

Since the 1996 Declaration of the Independence of Cyberspace,[9] the neutrality of the Web and the willingness to remain exempt from any type of regulation have been a fundamental pillar. However, since 1993 Latin America has developed laws to try and regulate the possible crimes and harmful actions derived from the use of the internet. In this sense, Argentina was one of the pioneers with Law 11.723 of 1993, for the protection of copyright through the Internet. It also adopted Law 25.690 of 2003, regulating Internet providers. For its part, Brazil issued Law 9472 in 1997 regulating Internet service providers and issued Law 9610 in 1998 and Law 12270 in 2010 on the protection of copyright. Colombia with Law 1273 of 2009 and Mexico with the Federal Law on Transparency and Access to Government Public Information of 2002, have focused their legislation on the protection of personal data, in order to guarantee citizens' access to services and the security of their data.

Currently the region is debating the possibility of regulating publications on social networks (Facebook, Twitter and Instagram, among others), a question that is directly related to the limits on freedom of expression. However, it is not the only human right that could be violated. Social networks can be used to commit perjury and the right to a good name.

We will focus on three types of responses that different countries in the region have given on the possibility of regulating digital platforms, as a way to visualise from these latitudes how they are looking for answers to these new challenges.

Based on a study of both Bills and legislation in force in the region, three regulatory scenarios are discussed, namely, those of Colombia, Argentina and Ecuador: in the first place, an example where the judicial branch focuses on good practices; in the second place a Bill that, for political reasons, failed to prosper; finally, a 'negative' example in terms of freedom of expression where – due to a lack of political consensus – the legislation could not transcend the parliamentary sphere.[10]

9 See https://www.eff.org/cyberspace-independence (last visited 10 April 2019).

10 The case of Venezuela was debated in groups and it was decided not to include it in response to the complex situation the country is going through. On this occasion, it was decided to use the 'Ecuador' case as a similar reference model, even though the latter has not enacted legislation in this regard.

5.1 Colombia: Regulation by the judicial branch

The Constitutional Court of Colombia is the judicial entity responsible for ensuring the integrity and supremacy of the Colombian Constitution. This Court has received three complaints from citizens who resorted to the judicial recourse in cases of perjury and the right to a good name against them.

In the complaint the victims argue that these are crimes contemplated in the national law and that should not vary their possibility of trial because they occur online. Thus, the distinctive point in Colombia is that the possible solution could come from the judicial sphere rather than by new sanctioned legislation.

Nowadays the Constitutional Court of Colombia is studying the processes that seek the elimination of publications with libellous content as they are offences under national laws. During the last elections, there were insults among political candidates who attacked one another on social networks. Specifically, these were situations in which one person called the other a 'thief, swindler or corrupt' and the insults were disseminated through social networks with photos of the relevant individual, messages that are common to find when reviewing posts on Instagram or the Facebook wall.[11] This matter led to a public hearing on 28 February 2019. The hearing was organised as follows: first the parties and related parties (the three shareholders and the representatives of Google and Facebook); then the public authorities; and later on, the experts. The position of the representatives of the companies is that 'the administrators should not be responsible for the content made by third parties'. However, the Office of the Prosecutor of Colombia, represented by Néstor Humberto Martínez, argued that the right to freedom of expression was not absolute and when it comes into tension with other fundamental rights, '[t]here is a limitation in the expression that circulates in these highways of contemporary communication, they cannot serve as an instrument of apology to crime, they cannot serve to commit a crime'. Of course, the treatment of these matters 'cannot be a response from criminalisation' (Lorenzo Villegas Carrasquilla, Google LLC representative at the hearing).

During 2018 the Court gave eight judgments dealing with digital rights, the most relevant of these being the judgment that established that 'the guardianship judge may take measures against certain communications in a digital context always and when it is necessary to protect the right to good name and honour in specific cases' (T 121-2018).

5.2 Argentina: A good initiative with no end result

The case of Argentina represents a good initiative that failed to achieve parliamentary consideration because the political conditions to discuss such laws were not in place.

In our region, there are notable initiatives from civil society or some minority political sector that are made impossible due to unfavourable political conditions. Thus, in both the case of Argentina and Ecuador,

11 See https://www.eltiempo.com/tecnosfera/novedades-tecnologia/audiencia-sobre-redes-sociales-en-la-corte-constitucional-en-colombia-332412 (last visited 10 April 2019).

discussed below, the projects have not been approved and sanctioned by Parliament for political reasons exogenous to the initiatives.

In Argentina, the Bill[12] was promoted from the Senate by a member of the ruling coalition, Federico Pinedo (PRO), and by an opposition senator, Liliana Fellner (FPV) and obtained a half sanction. However, it was not dealt with by the Chamber of Deputies. In addition, the initiative has the support of the UN and OAS freedom of expression rapporteurs and the internet industry in Argentina, the telecommunications industry and various civil society organisations. The experts considered that it was a good Bill of responsibility of intermediaries on the internet as it states that 'intermediaries are not responsible for the contents that users upload or circulate through their platforms or services, except when they do not comply with a court order that obliges them to do so' (Project Bill number S-1865/15 y S-942/16, 2016).

Among the organisations that publicly expressed their support are Access Now; Ageia Densi; Centre for Technology and Society Studies, University of San Andrés; Datas; Faro Digital; Via Libre Foundation; and Public Knowledge. In a public letter they argue (AAVV 2017):

> Intermediaries play a crucial role in the exercise of fundamental rights on the internet and, therefore, citizens must be protected from any regulation that denatures their function and grants them the authority to remove content that is exclusive to the judiciary. It should never be the private sector responsible for resolving the legality or not of the information published by an internet user.

Among the detractors of the initiative are associations that protect copyright. The Argentine Chamber of Books (CAL), the Argentine Chamber of Publications (CAP), the Reprographic Rights Administration Centre (CADRA), and the Argentine Chamber of Producers of Phonograms and Videograms (Capif). These organisations argued that the initiative eliminates the responsibility of the service providers and that, therefore, the platforms could not download content protected by copyright without a court order.

5.3 Ecuador: Challenges to freedom of expression

The last example to analyse the situation in Latin America is the Ecuadorian case, which stands out for its errors in design, analysis and implementation. In short, Ecuador is the negative example in our region.

A day before leaving the presidency, Rafael Correa sent to the National Assembly a Bill to regulate acts of hatred and discrimination on social networks and the internet. The Bill included a provision placing an obligation on social network service providers to submit quarterly reports on claims of illegal content received from users and the actions and their own actions to prevent criminal acts. It also established a series of fines and penalties for companies that do not comply (Correa 2017).[13]

12 The Bill is available at https://drive.google.com/file/d/1EO1As7v0PNrTirzAK5o0e2x83jkIQ0I9/view (last visited 10 April 2019).

13 See https://www.eluniverso.com/noticias/2017/05/25/nota/6199663/proyecto-rafael-correa-regular-redes-sociales-llego-asamblea (last visited 10 April 2019).

Both in 2018 and 2019, PAIS Alliance Assemblyman Daniel Mendoza presented a draft Organic Law of Responsible Use of Social Networks.[14] Its objective was to engage users in the use of networks and expressly prohibit the dissemination of fake news, hate messages or information that could compromise third parties or put national stability at risk. It provides for a penalty of one to three years in prison (Bill No. 356924). However, the project does not have the support of the other political sectors in Ecuador. It has been argued that the Bill does not conform to international standards and that it violates freedom of expression. Mendoza said in an interview with the newspaper *El Comercio* that his Bill was different from that of Correa since it does not seek to censor freedom of expression, as allegedly the former President's did, but rather to regulate the platforms.[15]

5.4 Final thoughts

The examples above include different strategies developed in Latin America to move forward in a complex and current challenge: Colombia seems to move forward while Argentina has failed to do so due to the lack of a broader political agreement, and Ecuador has for the moment avoided a restrictive model of regulation due to the change of government and a failed parliamentary initiative.

6 Conclusion

Latin America must focus on eradicating social inequalities. ICTs could be an instrument to contribute to that eradication, or it may become an instrument to reproduce those inequalities and increase the gap between new categories of Latin-American citizens: those integrated into the digital world and those excluded from it. For the human rights movement this is an area of concern. A failure to integrate communities into the digital age may prove to be too difficult to revert. There are some positive, mostly isolated, examples. Progress requires change. It is not clear whether states, the private sector or civil society will be the main engines of this required change.

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Dystopia is now: Digital authoritarianism and human rights in Asia

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Abstract: *The advent of new information and communication technologies has opened up new economic opportunities, heightened the availability of information, and expanded access to education and health knowledge and services. These technologies have also provided new avenues for political, economic, social participation, and have presented new opportunities and methods for the advancement of human rights. At the same time, these same technologies can be used to violate human rights. This article queries as to how exactly states and other actors use digital authoritarianism to limit human rights. The study aims to understand what threats to human rights are presented by using new information and communication technologies. The article critically examines available literature on authoritarian practices using information and communication technologies, reports of government and intergovernmental bodies, non-governmental organisations, and various media agencies as well as by gathering first-hand data of samples of digital authoritarianism. The article argues that states and other actors practise digital authoritarianism by invading privacy, denying access to information and spreading misinformation, and limiting expression and participation, all of which violate the rights to freedom of expression, information and participation. Case studies of digital authoritarian practices are presented in the study, drawing on experiences and circumstances in several Asian countries.*

Key words: *digital authoritarianism; authoritarian practices; human rights; Asia; information and communication technology*

1 Introduction

Every move you make is watched by millions of cameras, recorders and applications around you, even inside your own home. You wish to contact your family and friends but the network is down. You go online to read the news on what is happening, but your screen says 'HTTP 404'. You post #WhatIsHappening on your social media account but the post does not go through. A few hours later, security officers knock on your door to take you away. You are never heard again.

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While the situation sounds like it is straight out of a dystopian, futuristic science fiction film, it is not. It is happening, today, in nearly all countries. New information and communication technologies (ICTs) can help bridge social and economic inequalities by opening up new economic opportunities and helping to uplift countless millions from poverty, heightening the availability of information necessary for better policy and decision making, and expanding access to education and health services. These new ways of obtaining and exchanging information and communication with other people have also provided new avenues for political, economic and social participation. Advocacy groups, in particular, are successfully making use of these ICTs, especially the internet, in working for human rights, democracy and peace in even the most closed-off, authoritarian countries.

Yet, these same ICTs must also be viewed as a double-edged sword. Political actors, particularly governments, recognise the potential of ICTs, and many repressive regimes have subsequently developed new ways of limiting human rights and democracy using ICTs in a phenomenon that the advocacy group Freedom House has dubbed the 'rise of digital authoritarianism' (Freedom House 2018). Hence, this study explores how exactly states and other actors use digital authoritarianism to limit human rights.

This article aims to better understand the threats to human rights by using new ICTs. It seeks to identify the various ways in which states and other vested actors are using ICTs to limit access to and the exchange of information and communications to stifle opposition and dissent. The article critically examines relevant literature, reports of governments and intergovernmental bodies, non-governmental organisations (NGOs) and various media agencies as well as by gathering first-hand data of samples of digital authoritarianism, the article argues that states and other actors practise digital authoritarianism by invading privacy, denying access to information and spreading misinformation, and limiting expression and participation, all of which violate the rights to freedom of expression, information and participation. After reviewing research on the current status of digital authoritarianism. The article illustrates how digital authoritarianism is practised specifically in the Asian Pacific.

2 Authoritarianism in the digital sphere

The world is currently experiencing a 'global turn to authoritarianism' (Murakami Wood 2017: 358). This trend threatens to reverse the gains made by human rights movements in the last several decades. It is important to study how authoritarianism, in all its forms, affects human rights in order to better defend human rights against it. Political studies at one point or another invariably refer to Spanish political scientist Juan Linz in defining authoritarianism. Linz (2000: 159) saw authoritarianism as a political system that has limited political pluralism, lacks a guiding ideology but with a distinctive mentality, with the limited or minimal political mobilization of and participation by the populace, and ill-defined powers of the leaders.

It is not surprising to hear that under the presidency of Xi Jinping, 'China appears more authoritarian, not less' (Ang 2018) or that there is 'a

deepening of authoritarian rule' in Thailand (Mérieau 2018). However, in supposedly democratic countries in Asia, where elections are regularly held and civil and political liberties are supposedly guaranteed by law, commentators consider that 'an authoritarian India has emerged' (Nilsen 2018) and that 'the Philippines just became more authoritarian' (Santos 2019). It seems that, currently, Linz's definition of authoritarianism no longer is as clear-cut as before.

International relations scholar Glasius (2018) suggests that instead of focusing on authoritarian regimes or leaders, the study should be one of the authoritarian practices, thus allowing an analysis of the actions of political actors once they are in power. This goes beyond state-centric or single-state analyses of authoritarianism to explore settings that transcend state boundaries, and identify and interrogate the involvement of both state and non-state actors involved in authoritarianism.

This suggestion also means that authoritarian practices can be analysed in even so-called democratic countries, where the classic definitions of authoritarianism do not apply. The study of authoritarian practices can also be utilised in analysing how ICT is being used to suppress rights and freedoms through arbitrary surveillance, secrecy and disinformation, and the violation of freedom of expression (Glasius & Michaelsen 2018).

Japanese sociologist Yoneji Masuda (1980) argues that the advent of new information and communication technologies, most especially the internet, and the post-industrial 'information age' will usher in a new era of participatory democracy and democratisation, the emergence of 'information communities', and a spirit of globalism. Indeed, at least to a certain extent and for those who can avail of these new ICTs, the storage, access, and exchange of information and communication are faster and more reliable. New economic opportunities and modes of working have opened up, learning and training has become easier, and work processes are becoming more digitised and automated.

ICT has also presented new opportunities for the advancement of human rights. Social media and messaging applications such as WhatsApp have been utilised to mobilise people in defending their rights and interests (Breuer 2012; Ruijgrok 2016; Smidi & Shahin 2017). The internet plays an important role in assisting human rights organisations to gather and disseminate information about human rights to the general populace (Halpin & Hick 2000). New information storage systems make it easier to store and transport information. Even the ordinary smartphone can be a powerful tool to record and document human rights violations.

This technology, however, is a double-edged sword. Authoritarian practices in the digital sphere using ICTs are also used to restrict and violate human rights (Michaelsen & Glasius 2018). Privacy is invaded when a person's actions are continuously monitored by state-of-the-art surveillance systems, with all the data stored in a database accessible to state security forces at any given time (Lucas & Feng 2018). Internet access is restricted – or even suspended – to limit access to information that may have a bearing on social and political issues (OpenNet Initiative 2013). Shutdowns of telecommunication services are also used to prevent communications between political dissenters and to stop political mobilisation, whether spontaneous or organised (Wagner 2018).

Contrary to popular belief, these situations occur in both repressive and democratic countries, as evidenced by Hintz and Milan's study on the use of ICT for the surveillance and monitoring of citizens by governments in the 'liberal West' (Hintz & Milan 2018). Another example would be the use of social media in manipulating public opinion through employing fake social media accounts to support the candidacy of Donald Trump when he was running for President of the United States (Mayer 2018). In this regard, Freedom House (2018) refers in its report to the 'rise of digital authoritarianism'.[1]

3 Defining digital authoritarianism

Before attempting to define digital authoritarianism as a concept, it is important to acknowledge that this article builds on the definition of authoritarian practices by Michaelsen and Glasius (2018). In their essay they introduce the twin concepts of illiberal and authoritarian practices. The former, they argue, infringes on the 'autonomy and dignity of a person' (Michaelsen & Glasius 2018: 3797). As such, it is a human rights issue. The latter, on the other hand, sabotages accountability, thereby threatening democratic processes and therefore is a democracy problem (Michaelsen & Glasius 2018: 3797).

Michaelsen and Glasius (2018: 3796) argue that threats to people in the digital sphere can be arranged into three categories: arbitrary surveillance; secrecy and disinformation; and violations of freedom of expression or disabling voice. While arbitrary surveillance is an illiberal practice and, therefore, a human rights violation, secrecy and information are authoritarian practices as it sabotages the accountability of leaders to their constituents. Violations of freedom of expression, they argue, are both illiberal and authoritarian practices (Michaelsen & Glasius 2018: 3804). This is where this article diverges from Michaelsen and Glasius. All three above-mentioned categories are human rights issues and lead to human rights abuses in the digital sphere. Each of these three categories violates specific human rights, as laid out in the major Covenants. Arbitrary surveillance violates one's right to privacy while secrecy and disinformation go against the right to information. The third category is stated as a violation of freedom of expression, but it is also a violation of the right to participation, and the right to be involved in political and public affairs. Thus, with regard to this article, it matters little whether the three categories mentioned by Michaelsen and Glasius affect the individual or sabotage accountability. What is clear is that they violate universally-recognised human rights. They are, therefore, human rights issues.

With this in mind, we define digital authoritarianism as practices using information and communication technology designed to either invade privacy, deny access to information, spread misinformation, limit expression, and limit political participation.

1 The report lacks a precise definition of what exactly digital authoritarianism constitutes. Despite this weakness, the report is useful in assessing current trends on the use of new ICTs in suppressing freedoms and rights.

4 (Digital authoritarian) practice makes perfect

In an effort to control information and communications, several Asian governments engage in digital authoritarianism, often in cooperation with government-controlled or private companies that provide information and communication technology and services. These efforts are usually backed up by draconian laws and policies that allow governments to control the ingress and outflow of information and communications where they deem fit. There are at least 29 laws and policies in 15 countries in the region that give governments the authority to access personal data, shut down communications, and limit or block information exchange, with no mechanisms available to appeal. Other countries, while not having specific policies governing information and communication, have established regulatory bodies with sweeping powers that often have little oversight and accountability. In many countries there are both regulatory bodies and the laws that empower them. National security or public safety is frequently used as a justification. However, in many instances, curbing public discontent is the underlying reason, as the examples in this part will show.

5 Invasion of privacy: Surveillance and censorship

In the past two decades Asian governments have been using technical and legal strategies to regulate online content. A confluence of technology, behavioural science and market power has been used to increase internet surveillance and censorship in many countries (Clark et al 2017). The best example is China where authorities restrict access of citizens to information, searches and applications available on the internet. Since 2018, all the internet and application providers, such as Alibaba, Baidu, Byte Dance and Tencent, are required to keep a log with information such as activities of users posting on blogs, chat rooms, short video platforms and webcasts, which the authorities can monitor or access at any time. This ruling is aimed at preventing online users from engaging in activities that would potentially influence public opinion. In April 2018, Chinese authorities ordered Byte Dance to shut down a popular social media platform where users often shared jokes, videos and GIFs, which the governments regarded as displaying improper public opinion. Later, in December 2018, Reuters reported that China has closed 1 100 social media accounts and 31 websites that it accused of unlawful activities such as trolling or blackmail (Meyer 2018).

All internet or application providers in China are Chinese companies as foreign internet sites and applications are censored and blocked. Chinese companies are required to log information for authorities to monitor at any time, giving the government absolute power to monitor its digital space. China recently developed a new high-technology surveillance system scoring its citizens, called 'social credit'. This ranking of social credit will monitor the behaviour of China's enormous population. The social credit system, which was first announced in 2014 and is due to be fully operational nationwide by 2020, is currently being piloted for millions of people across the country. A person's social score can move up and down depending on their behaviour, such as bad driving, smoking in non-smoking zones, purchasing too many video games, and posting fake

news online (Ma 2018). A high social score means that they will receive a variety of privileges, such as discounted energy bills and the ability to forgo deposits on car and rental properties. In addition, they might get better treatment at Chinese hospitals (Marr 2019). However, as far as those with low scores are concerned, China has already started punishing people by restricting their travel. *Channel News Asia* (cited by Ma 2018) reported in March that over nine million people with low scores have been blocked from buying tickets for domestic flights. Furthermore, the government can ban them or their children from enrolling in the best schools. *Beijing News* reported that 17 people who had refused to do military service were barred from enrolling for higher education, applying for high school, or continuing their studies (Xueying 2018). Individuals would also be banned from managerial employment in state-owned firms and large banks, as well as being publicly named bad citizens. The scores are to be monitored by high-technology surveillance cameras. Across China more than 200 million cameras will be equipped with facilities for facial recognition, body scanning, and geo-tracking in order to keep a constant vigil over every citizen.

China is not the only country that aims to use this high-technology surveillance system. Chinese surveillance and security start-up technology has made its foray into Malaysia, by the supply of wearable cameras with artificial intelligence-powered facial recognition technology to local law enforcement agencies (Tan 2018). In January 2018 the Chinese company Yitu opened its first overseas office in Singapore to serve Southeast Asia, Hong Kong, Macau and Oceania. The Yitu technology can identify a person from its database of 1.8 billion people within three seconds with an accuracy of 95 per cent. This technology is being used in public spaces such as airports, banks and hospitals in China (Tan 2018). Investment in AI in the Asia-Pacific region has grown in prominence as governments seek to adopt technologies for urban management. This has raised concerns over the privacy of an individual and their basic fundamental rights.

6 Misinformation and the right to information

6.1 Fake news and misinformation

States have jumped into cyberspace to create and present their information, but in many cases this is not representing factual information. For example, India, where Facebook users exceed 300 million, experienced violence incited by falsities about child abductions spread mostly via social media. WhatsApp and other social networks led to 24 deaths from mob violence (Fernandez 2019). Scores of people across the country were lynched by mobs that suspected them of being child kidnappers (Jain 2018). Unfortunately the incidence of child kidnapping is increasing, so the fake news and disinformation in this case has allowed the actual child traffickers to continue as they are not spotted by mobs.

In Thailand the military junta filed charges against Thanathorn Juangroongruangkit, the leader of the Future Forward Party (FFP), for spreading fake information under the Computer Crimes Act. Thanathorn argued that the law was used to silence and threaten opposition (Fernandez 2019). The FFP was one of the main opposition parties to the

National Council for Peace and Order (NCPO) to the Thai junta during the general election in the early of 2019. The NCPO filed a complaint with the Technology Crime Suppression Division (TCSD) against Thanathorn and two other members of FFP for feeding false information into a computer system. The NCPO claimed that Thanathorn had used his personal Facebook and Party Facebook pages to accuse the NCPO of luring former members of parliament to back the regime by using existing lawsuits against them as a bargaining chip. Thanathorn told reporters that 'the Computer Crimes Act is used to silence and threaten us and to create politics of fear in this country' (*Bangkok Post* 2018). These allegations have raised concerns that the new regulations are enabling the corrupt government to stifle political rivals and free speech in Thailand.

6.2 Hate speech, racism, discrimination

In 2014 the Minorities Rights Group International published *State of the world's minorities and indigenous peoples*, presenting case studies of 70 countries across the globe, ranking these based on the dangers of hate speech and discrimination faced by minorities. Three Asian countries, Myanmar, Afghanistan and Pakistan, are ranked in the top ten. Hate crime by definition is any crime committed as a result of hostility towards someone because of their race, ethnicity, religious beliefs, disability or sexual orientation (Anwar 2014). In Myanmar, the government continues to circulate misinformation about the Rohingya Muslims. Facebook was used by the Myanmar government to spread disinformation about tensions between its citizens to incite violence against the Rohingya people (Brown 2019). Violence has spread to other parts of the country, where the killing of Muslims has been carried out by local mobs or Buddhist groups (Seiff 2014). Discriminatory violence in Myanmar has displaced approximately one million people (OCHA 2018), and the Myanmar government has been accused of ethnic cleansing.

Similarly, in Pakistan the concept of freedom of religion and belief is sensitive and complicated. The minority faith groups in Pakistan not only suffer institutionalised discrimination but also prejudice spread through cyberspace. In April 2018, Pakistan's persecuted Ahmadi minority released an annual report that illustrated how members of the religious sect are consistently targeted by the state. Ahmadis are forbidden from calling themselves Muslims or using Islamic symbols in their religious practices. The report reveals that 77 Ahmadis were booked under discriminatory religious laws in 2017, nine of them remaining in prison, while four Ahmadis were murdered in hate crime across the country. Also, research has shown that Pakistan's media circulated 3 936 news reports and 532 editorial pieces that contained hate propaganda against Ahmadis (Ahmad 2018).

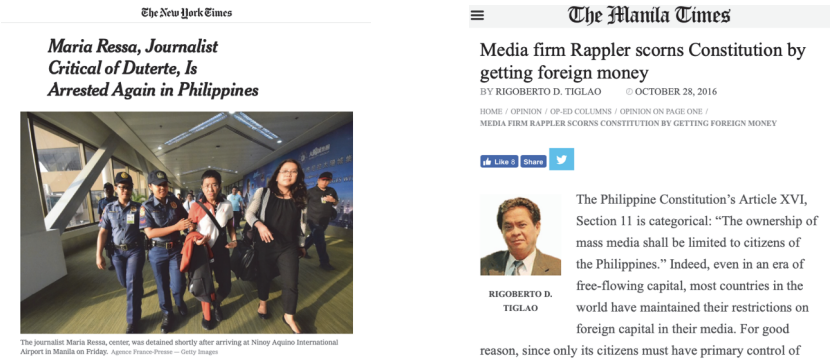
6.3 Digital authoritarianism and human rights in Asia: Freedom of expression and the right to participation

6.3.1 Troll armies on controlling freedom of expression and shaping public opinion

Cyber troops of troll armies are the new strategies for governments to control people's expression by shaping public opinion and its opponents. Moreover, the Philippines under the Duterte administration is known as

one of the countries that employ a 'keyboard army' (Palatino 2017; Titcomb 2017; Riley & Pradhan 2018; Coca 2019). There are three methods applied by troll armies under Duterte. First, the troll armies support him during the election process. Many news platforms state that Duterte uses Facebook as a weapon to build support for him and harass his opponents (Stevenson 2019; Riley & Pradhan 2018). Palatino (2017) notes that Duterte's 'keyboard army' consisted of 400 to 500 individuals during the presidential campaign in 2016. The troll army created and distributed messages for the campaign by using both real and fake Facebook accounts. As a result, Duterte dominated the political conversation a month before the vote (Etter 2017).

Second, the drug war that has killed over 20 000 people since 2016 has its policies supported by the troll armies, and criticisms countered. News were shared thousands of times on Facebook by pro-Duterte accounts that claim that Pope Francis blessed the drug war policy at a conference held in the Vatican City (ABS.CBN.com 2018). Since the majority of the population of the Philippines is Catholic, Pope Francis is widely respected. However, the Pope never mentioned the war on drugs.



Source: *The New York Times* 2019 (left) and *The Manila Times* 2016 (right).

Finally, troll armies produce hateful news to support Duterte. One example is the arrest of the journalist Maria Ressa who criticised Duterte's administration (Riley & Pradhan 2018). As of March 2019, Maria Ressa has been arrested three times (Buan 2019). Ressa acknowledged that the attacks on her increased after *Rappler* published how Duterte supporters manipulated Facebook (Stevenson 2019). The government publicly stated that *Rappler* is foreign media that wants to abolish the accountability of its government (*The Manila Times* 2016), and Maria Ressa is a foreign actor.

The Myanmar government also has a keyboard army attached to the military regime, campaigning on Facebook for ethnic cleansing against the country's Rohingya Muslim minority group (Stewart 2019). Since roughly 40 per cent of the population uses Facebook, hateful news spread rapidly.

6.3.2 Communications shutdowns

Shutdowns of communications disrupt human rights advocacy by restricting freedom of expression and participation. In December 2018, the

Bangladesh government blocked Facebook and other social media as well as 4G and 3G mobile data service during its unusual parliament elections (Taye 2019). Moreover, at the same time the government ensured slow internet connections during student protests, and also blocked Skype and shut down several essential news sites (Taye 2019). On 5 August 2018, NetBlock.org tweeted that 'internet disruptions intensif[ied] across #Bangladesh today, particularly in and around #Dhaka. Data suggests targeted, localised just-in-time blocking in response to the protest, threatening #PressFreedom and safety' (NetBlock 2018). Slow connections indirectly reduce people's participation in the democratisation process.

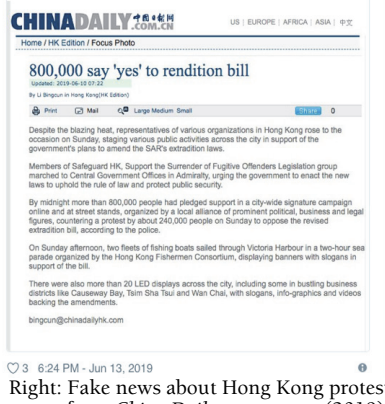
Nevertheless, internet shutdowns also prevent misinformation and hoaxes. In Sri Lanka, the government shut down the internet, including Facebook, Twitter, along with YouTube and Viber, a few hours after bombings on Easter Sunday when 300 people died and many others were injured. The next day, the government extended the shutdown by blocking the website of a VPN service (Vox.com 2019). There is no doubt that the serial bombing created panic, and Facebook could not filter out the false information. Furthermore, families who were looking for their members faced difficulties. However, some people supported this strategy. One senior said that 'what the Sri Lanka government did was authoritarian, but it is also probably what needed to be done to prevent social media from really throwing fuel onto this fire afterward' (Vox.com 2019).

In May 2019, the Indonesian government slowed down the internet and social media network, and restricted the sending of pictures and videos to prevent hoax misinformation as a consequence of a violent demonstration wherein eight people died. Supporters of Prabowo, a presidential candidate who lost the election, staged a demonstration. The National Electoral Commission declared the candidate Jokowi, the winner, leading to protests by opposition groups. There was a dispute over who killed the protestors, resulting in a lack of clarity as to who should be held responsible. To halt tensions, the government shut down the internet (*The Jakarta Post* 2019). This may be interpreted as useful in terms of restricting misinformation or it could be problematic. Furthermore, the government provided neither a report on human rights violations in respect of the demonstration, nor to justify the shutdown (Amnesty International Indonesia 2019).

Blocking and content removal: Government Cyber-Control Centres

人民日报
RENMIN RIBAO
习近平在塔吉克斯坦媒体发表署名文章
携手共铸中塔友好新辉煌
习近平抵达比什凯克
国家主席习近平任免驻外大使
(习近平谈治国理政)第一卷塔吉克文版首发式
暨中塔治国理政研讨会在杜尚别举行

Left: One of the headlines of *People's Daily,* a newspaper in Mainland China (inksstonews.com 2019)


CHINADAILY.com.cn
US | EUROPE | AFRICA | ASIA | 中文
Home / HK Edition / Focus Photo
800,000 say 'yes' to rendition bill
Updated: 2019-06-10 07:22
By Li Bingcun in Hong Kong(HK Edition)
Print Mail Large Medium Small Share 0
Despite the blazing heat, representatives of various organizations in Hong Kong rose to the occasion on Sunday, staging various public activities across the city in support of the government's plans to amend the SAR's extradition laws.
Members of Safeguard HK, Support the Surrender of Fugitive Offenders Legislation group marched to Central Government Offices in Admiralty, urging the government to enact the new laws to uphold the rule of law and protect public security.
By midnight more than 800,000 people had pledged support in a city-wide signature campaign online and at street stands, organized by a local alliance of prominent political, business and legal figures, countering a protest by about 240,000 people on Sunday to oppose the revised extradition bill, according to the police.
On Sunday afternoon, two fleets of fishing boats sailed through Victoria Harbour in a two-hour sea parade organized by the Hong Kong Fishermen Consortium, displaying banners with slogans in support of the bill.
There were also more than 20 LED displays across the city, including some in bustling business districts like Causeway Bay, Tsim Sha Tsui and Wan Chai, with slogans, info-graphics and videos backing the amendments.
bingcun@chinadailyhk.com
3 6:24 PM - Jun 13, 2019

Right: Fake news about Hong Kong protest from *China Daily* newspaper (2019)

Another practice is the blocking and removal of content, used by the Chinese government. The picture in *People's Daily* shows a Hong Kong protest in June 2019. This was never a headline on the China mainland where the media blocked the information, while the left picture shows the mainland newspaper's attempt to prejudice the protest. The two pictures above demonstrate how the China government controls information. Ziccardi (2013: 249-250) explains that China is the only country that applies a complex filtering system based on a list of several forbidden keywords, such as democracy, freedom (and all compounds and derivatives, such as Free-China and Free-Net), corruption, children of party leaders, empty chair, and all words related to hatred 'Three T's' (Tibet, Tiananmen and Taiwan) (see also King 2014: 1-10; Perry & Roda 2017: 95-129). The government also has 'The 50 cent party' which produces and manipulates content for blogs and popular media websites, and ensures censorship consistency by trolling the websites in order to find and remove any unacceptable content. They prefer to remove those questionable materials that allow dubious content to circulate freely (Ziccardi 2013: 250).

The authoritarianism in Asian governments seems increasingly to converge. In China, the government established the system decades ago by integrating its system, policy, and troll. Meanwhile, ASEAN countries and Japan started their cyber security not merely as a training programme, but also as the first step towards developing a regional system. In Thailand, the programme could help them control and block information, possibly leading to restrictions on human rights defenders.

7 Arrests, detention, gagging, killings/assassinations

This part explains the restrictions put on human rights defenders in the digital space. The previous parts outline the indirect impact on human rights defenders's rights to participation through content removal and the

misuse of information. This part discusses the direct impact caused by state and non-state actors on the lives of human rights defenders, journalists and media critics, through arrests, detentions, gagging or assassination, looking at examples from countries such as Pakistan, Laos, Vietnam and Cambodia.

Pakistan is the fourth most dangerous country in the world for journalists, with 115 having been killed since 1990, as of May 2019. (Baloch & Qammar nd). Pakistan's extremely limited digital space has led many activists and journalists to be kept in detention, arrested and even assassinated. In January 2017, the Office of High Commissioner for Human Rights (OHCHR) reported that four social media and human rights activists (Waqas Goraya, Asim Saeed, Salman Haider and Ahmed Raza Naseer) had been accused of blasphemy, a criminal offence in Pakistan (Kaye 2017). These social media activists were arrested because they were critical of the state of Pakistan.

Salman Haider delivering his poem 'Kafir', Source: YouTube

Salman Haider, a social media activist, poet and lecturer, was abducted on 6 January 2017 (Zaman 2017). Along with the other activists, he was accused of spreading blasphemous content on social media because of his poem 'Kafir', a controversial term in Islam, which in Urdu literally means 'someone who knows the truth but rejects it' (Qudosi 2017). Conservative groups in Pakistan challenged his criticism of Islam and the military rule. Haider was released after almost three weeks. However, the whereabouts of the other men arrested with him are unknown (*BBC* 2017). These arrests demonstrate Pakistan's use of digital authoritarianism on its citizens to censor contents relating to issues concerning Pakistan's state affairs, religion and civil-military relationships.

Following the disappearance of these activists and other cases of blasphemous content on online media, the Pakistan Telecommunications Authority (PTA), which is the main communication channel in Pakistan, started sending out warnings to its mobile subscribers. The PTA sent out texts to millions of users which read 'Uploading and sharing of blasphemous content on internet is a punishable offence under the law. Such content should be reported … for legal action' (Human Rights Watch

2018). The PTA also exacerbates restraints on political participation by launching media campaigns about penalties for individuals who dare express any political or religious opinions (Digital Rights Foundation 2018). This relates to freedom of expression in the digital space where individuals are not able to freely express their views and opinions on matters the state believes are criminal offences, such as blasphemy.

Activists and critics have also been arrested and detained in Laos, a one-party state that exercises absolute control over media and ranks quite low (171) in the 2019 World Press Freedom Index (Reporters Without Borders 2019). In June 2016, three Laotians were arrested for criticising the Communist State on their social media accounts through anti-Facebook comments and posts (Jha 2016). The 2014 decree on internet freedom mentions that anyone who negatively comments against the government can be arrested or jailed. In Cambodia, a young social media user, Heng Leakhena, was arrested in July 2017 for sharing a video on her Facebook account. The video suggested that the Prime Minister, Hun Sen, and his family had been involved in the killing of a prominent political analyst and scholar, Kem Ley, the previous year (Radio Free Asia 2017). Kem Ley often discussed the extent of the wealth of the family of Hun Sen, who had ruled Cambodia for more than 32 years, in Radio Free Asia (RFA) Khmer Service (RFA 2017). Heng faced arrest for speaking out against the government and criticising the Cambodian People's Party (CPP).

Vietnam is another example where digital authoritarianism practices are prevalent. According to the database of The88project.org (2019), a non-governmental organisation (NGO) that supports and encourages freedom of expression in Vietnam, reported that since 2003 at least 13 activists have been arrested. Most of these activists were the supporters of democratisation in Vietnam. One arrested activist, Nguyen Dinh Khue, often posted articles on current national issues and criticised the government on Facebook. He was arrested on 30 April 2019 during the crackdown on the occasion of Vietnam's Reunification Day along with two other activists who also actively posted on the same issues on their Facebook accounts (The88project.org 2019). Nguyen and other activists in Vietnam, who have actively spoken out against Vietnam's government through social media, were arrested and detained (The88project.org 2019).

8 Conclusion

Many Asian governments have used information and communication technologies to invade privacy, deny access to information and spread misinformation, and limit expression and political participation. States that are democratic or repressive are practising digital authoritarianism. Troll armies are used, as in the case of in the Philippines under Duterte, to create content supporting the government and to lambast critics, while communication shutdowns in Bangladesh, are more common. Internet shutdowns in Sri Lanka and in Indonesia to prevent misinformation regarding the election impacted adversely on human rights advocacy. Content blocking and removal act as barriers to human rights defenders. India and Thailand have cases of fake news and misinformation. Myanmar and Pakistan rank high in terms of the proliferation of hate speech, racism and discrimination. Critics, including human rights activists and

journalists, face arrest, detention, or even extra-judicial killings for their opinions in countries hit by terrorism, such as Pakistan.

When George Orwell wrote *1984*, few people imagined that the events he described – horrifying, threatening, distasteful – would ever materialise. Today, 70 years later, the situation has changed radically. New technologies, in the hands of well-meaning people, are useful tools in advancing human rights. In the wrong hands, however, those rights may be threatened using the very same technologies. The dystopian society Orwell imagined is here and now. The world must ensure that this is not also our future.

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Sustaining human rights in the era of new technologies: Case studies of Armenia, Belarus and the Kyrgyz Republic

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Abstract: *The development of new technologies and innovation is meant to enhance accessibility and make life easier. Due to the fast pace of development, the response of countries to new technologies is crucial to ensure their reasonable use. However, along with the development of new technologies different implications have emerged as some developing countries appear not to be capable of effectively responding to these developments. Despite the positive impact of new technologies on various aspects of life, their misuse has negative implications for the enjoyment of human rights. This article aims to explore regional challenges to human rights caused by new technologies at the national and regional levels. It also aims to identify long-term structural challenges to human rights in Armenia, Belarus and the Kyrgyz Republic with a focus on cyber security, freedom of expression, freedom of speech, access to information and data protection policies. It further aims to make recommendations to stakeholders so as to improve the situation and minimise the negative impact of new technologies on human rights. On the one hand, the study reveals that the development of new technologies increased the accessibility of people to information in terms of e-governance programmes. Moreover, it shows that political mobilisation and participation, and freedom of expression have been enhanced due to social media developments. On the other hand, it identifies the current challenges to human rights in Armenia, Belarus, and the Kyrgyz Republic in terms of increasing hate speech online, media manipulation, the spreading of disinformation, data leakage and cyber security. The study shows that despite the positive impact of the new technologies on the enjoyment of human rights, the inability of these states to effectively respond to the developments and eliminate the misuse of new technologies, and the insufficiency of strategies, legislation and policies, are negatively impacting on human rights.*

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Key words: *human rights; digitalisation; cyber security; new technologies; e-governance; freedom of speech; free flow of information; digital rights*

1 Introduction

Scientific and technical progress has led to the emergence of new information and communication technologies (ICT), which have both a positive and a negative impact on individuals' lives and on society. On the one hand, ICT have simplified access to information and significantly improved the communication landscape. People have become able to freely overcome geographic, political, and social barriers in order to build social interaction in a fairly short period of time. Moreover, the progress of ICT enhanced the concepts of e-democracy and the role of media as a facilitator of political mobilisation. In addition, the development of new technologies has contributed to the increased transparency and openness of the activities of the authorities. Of equal importance is the fact that the development of ICT has influenced the implementation and protection of a number of fundamental human rights. However, at the same time it became evident that these new technologies have become tools of manipulation, the spreading of disinformation, hate speech and data interception.

The use of social media networks, especially Facebook, Twitter, Telegram and Instagram has significantly increased over the past ten years. In this sense, online space is being actively used by different civil society organisations (CSOs) to reach a wider audience. For example, Facebook groups or pages are being created to serve as an effective tool for communication with the public to ensure timely responses in decisive situations. In addition, enhanced coverage of events by both local and international media (especially intensive live streaming) has constrained the radical actions of the government in relation to the public. However, the enhanced use of new technologies may lead to several human rights violations. What is at issue is the dissemination of hate speech, the use of individuals' personal data for unjustified purposes, and so forth. In addition, a strong relation between the rapid integration of information technology and cyber security was found, which raises questions about a number of security problems and their solutions, ranging from technical to legislative. The cyber security problem is one of the most pressing issues in the region, especially given its historical-political context. The latter refers to territorial conflicts and the geopolitical interest of major superpowers in the region.

Despite the relevance and importance of this topic, there is no comprehensive research in the field that addresses the challenges of new technologies to human rights in the region. The present research for the first time explores the impact of new technologies on the enjoyment of human rights in Armenia, Belarus and the Kyrgyz Republic. It explores possible mechanisms to prevent the violation of human rights with regard to the new technological developments.

The article aims to explore regional challenges to human rights caused by new technologies. It also aims to identify long-term structural challenges to human rights in Armenia, Belarus and the Kyrgyz Republic with a focus on cyber security, freedom of expression, freedom of speech, access to information and data protection policies, and to make

recommendations to the stakeholders to improve the situation and minimise the negative impact of new technologies on human rights.

The methodological approach adopted in the study is a mixed methodology based on the comparative and contrast analysis of the previous research on the topic, case studies and legal analysis of current legislation and regulations of Armenia, Belarus and the Kyrgyz Republic.

The main body of the report consists of three parts. Part 2 presents the Armenian case study of the topic; part 3 introduces the overall impact of new technologies on freedom of expression and freedom of speech in Belarus; and part 4 provides detailed information on the impact of new technologies on human rights in the Kyrgyz Republic.

2 Positive and negative impact of new technologies on the enjoyment of human rights: A case study of Armenia

This chapter presents how the rapid integration of ICT in the era of globalisation has affected the implementation of a number of fundamental human rights in Armenia and proceeds to describe the role of digital activism in providing even greater scope for democratic participation and decision making during the Armenia's Velvet Revolution. At the end of the section, the negative impact of the new technologies on individuals' lives and society is discussed, taking into account the historical-political context of the country.

2.1 The role of social media in political mobilisation: Armenian Velvet Revolution

The advancement of information and communication technologies in the era of globalisation has turned media into one of the most powerful factors in influencing the processes occurring in the world. This specifically refers to the fact that by means of social media it has become possible to promote a number of fundamental human rights, in particular the rights of peaceful assembly (article 21 of the International Covenant on Civil and Political Rights (ICCPR)), association (article 22 of ICCPR), freedom of opinion and expression (article 19 of ICCPR) and so forth. In this regard, social media has become a means of encouragement of a two-way political communication between the public and the authorities.

Digital activism or cyber-activism is a good example of how traditional notions of human rights have been complemented by a new phenomenon that provides an even greater scope for democratic participation and decision making. Digital activism, characterised by the substantial use of social networks as the main platforms to set up information campaigns and mobilise the masses, was the key factor of success of the Velvet Revolution in Armenia (2018).

In general, cyber-activism in Armenia touches upon many aspects of life: from controversial social principles to dissatisfaction with government policies. Activists deliberately choose social networks such as Facebook for the promotion of common ideas because of its worldwide targeting and transparency. The latter coincides with the principles for which these persons of influence are engaged in the political struggle. At the same time, Facebook is attracting the attention of political and economic elites as

many of them are active users thereof. By using Facebook, activists appeal to their multi-million diaspora. Members of the diaspora, especially those in the United States and Russia, are prominently participating in the political and financial life of Armenia. For this reason, the bulk of user-generated content is written in Armenian, English and Russian.

Over the past 10 years, numerous mass protests were staged in Armenia to express dissatisfaction with the government policies. However, the entire population did not seek to mobilise, but left the steering wheel in the hands of the youth. The case of the Velvet Revolution was somewhat different. When the protest action Take A Step was launched by the leader of the opposition, Nikol Pashinyan, both the youth and adults contributed to the common goal. The reason why in this case the majority of the population sought to take part in the country's political life was conditioned by the impact of digital activism that was causing a snowball effect.

Since the oppositionists mostly appealed to the youth, the first snowball was transmitted to them, thereby inspiring the latter to actively engage in the promotion of an online campaign on Facebook, called *Dasadul* (or 'class strike').[1] The campaign was aimed at encouraging students to skip lessons in order to participate in anti-government protests. On Facebook, special events were created almost daily to provide the interested citizens with all the necessary information as to when and where they needed to gather to start the march.

Another social network actively used during the Velvet Revolution to promote the idea of customer boycott was Telegram. By means of a special channel named Baghramyan 26, information was disseminated among its subscribers as to which supermarkets they needed to avoid using since the latter were the property of political and economic elites (for instance, Yerevan City and SAS supermarkets). The same information was shared by different groups on Facebook, mainly run by the youth.

Another form of the manifestation of discontent was the creation of a number of digital products that reflected the peaceful nature of the revolution, namely, songs (for instance 'Dukhov' ('Risk bravely'), 'Nikol Pashinyan'),[2] short documentary films, and so forth. These were necessary not only to convey key messages to authorities in a peaceful manner but also in order to gain the attention of third parties (that is, of the international community) towards domestic affairs.

The adult population did not yield to the youth. In their turn, professionals in the field of education were running online petition campaigns on their social networks, which were directed at supporting youth activists who had been arrested as a result of their participation in the protests, as this would undermine the value of a number of

1 These were the founders of the 'Restart Student Initiative', key drivers of the Velvet Revolution in Armenia, who coordinated the whole process and created on Facebook special events for the promotion of *Dasadul*, available at https://www.facebook.com/events/369494443572566/ (last visited 10 March 2019).

2 It is interesting to note that the word *dukhov* – a slogan that was very popular in social media and which was depicted on the hats and T-shirts of the protesters – became a real trend even after the revolution had ended.

fundamental human rights, including the right of peaceful assembly, association, and so forth.

Hence, the case of the Velvet Revolution serves as a good example of how new information technologies can help to exercise a number of fundamental civil and political rights and to create various digital products, capable of awakening people's politicised identity and mobilising them.

2.2 Open digital space: Fertile ground for hate speech, manipulation and the spreading of disinformation

With the development of new technologies the accessibility to information has also increased during recent years and the use of social media facilitates the spreading of this information. However; in countries where media literacy is not highly developed and where most social media users lack certain competences to differentiate real news from fake news, they easily obtain 'trapped' disinformation. As is mentioned in the Media Sustainability Index 2018 report, online media provides more varied viewpoints than the television outlets, but another problem arises here, namely, that '[t]he news feed, and the flow of fake news is so abundant that a public with quite low media literacy levels becomes ripe for manipulation' (IREX 2018: 5). Social media manipulations have escalated in Armenia, especially over the past year, when the opposition tried to bring up false agendas to discredit the previous government, which managed to win the sympathy of the vast majority in the country. Thus, the problem of media literacy, which arises with the development of new technologies and the manipulative use of social media, on the one hand, and a lack of literacy, on the other, has a negative impact on the wider public. Additionally, the manipulation leads to the hate speech towards certain groups, politicians or the government itself.

Another trend that has been very popular in Armenia, especially before the parliamentary elections in 2018, is online campaigning through fake accounts. Certain politicians or political parties make use of new technologies and social media and freedom of social media in Armenia to create fake accounts in order to manipulate the public with their false agendas. The fake accounts usually spread false information on behalf of the Prime Minister or the leading party in order to create mistrust towards the government and discredit the Prime Minister as well as to create an impression of enjoying popularity among the public. According to the investigations of the Union of Informed Citizens, a non-profit organisation, one of the major political parties (Prosperous Armenia) used 390 fake accounts on social media during its election campaign to create an impression of having a high level of support online (Fact Investigation Platform 2018).

In the post-election period more fake pages on Facebook were created on behalf of the Prime Minister and with the slogans of Velvet Revolution in order to attract more attention and get more followers who would be the target of the manipulation and disinformation. Based on the reactions of the public, who mostly believed in the disinformation provided to them as well as hate speech online and online extremisms, the Prime Minister had to ask the national security service to investigate and trace the people behind these fake accounts. Following the order, one of the fake account

users was arrested for spreading racial and ethnic hatred and discrimination online.

The extensive use of social media for political purposes could often entail negative consequences such as the spread of hate speech. In Armenia, by virtue of its strong conservative values, the representatives of the lesbian, gay, bisexual and transgender (LGBT) community often become the targets of hate speech. The social media is being 'served' for people to express their opinions about different topics and mostly the reaction of the public to the posts about LGBT activities and opposition thereto. A content review of the posts on social media about the above-mentioned targets by the most popular online newspaper shows that 82 per cent of the comments observed contained hate speech towards the LGBT community and a transgender woman who has spoken at the National Assembly, whereas 18 per cent were either neutral or combating comments without hatred. Moreover, another post on the LGBT community received 67 per cent hatred comments, and 33 per cent of combating or neutral comments without hate speech. In another case, a post about a member of the opposition, Armen Ashotyan, received hatred comments from 75 per cent of the commentators, while 25 per cent expressed neutral views on the topic and the politician itself (Table 1). Thus, the content analysis reveals that the social media is used to spread hatred towards the vulnerable groups and the opposition.

Table 1: Hate speech in the comments on social media

Facebook post content	**Total number of comments**	**Sample**	**Percentage comments containing hate speech**	**Percentage of neutral comments**
A transgender woman has spoken at the National Assembly https://bit.ly/2ULKmOb (Azatutyun TV)	1944	First 50 comments	82% (41)	18% (9)
An opposition leader, Armen Ashotyan, about the 2nd President, Robert Kocharyan, being a political prisoner https://bit.ly/2XBE9Bn (Aravot Online Newspaper)	216	First 20 comments	75% (15)	25% (5)
Article about LGBT community becoming more active in Armenia after the Velvet Revolution (Blognews.am) https://bit.ly/2Ve2xev	97	First 15 comments	67% (10)	33% (5)

It is worth noting that, in general, the regulations of hate speech in Armenia are rather limited. Article 226 of the RA Criminal Code (2003) covers only national, racial or religious hatred. The first part of the article claims that 'actions aimed at incitement of national, racial or religious

hatred, at racial superiority of humiliation of national dignity are punished' (chapter 26). However, no protection is guaranteed against incidents 'on the grounds of sexual orientation or gender identity'.

It is interesting to note that in practice, article 226 of the Armenian Criminal Code has hardly ever been applied, thereby provoking an atmosphere of impunity. During the Velvet Revolution most of the members of the national conservative party (Republic Party of Armenia) became the targets of hate speech. The latter was the ruling party of Armenia for 20 years and was often associated as a 'post-Soviet ruling party with catch-all ideology'.

When opposition leaders started their protest action Take A Step, the rhetoric of most of them was inflammatory. They were constantly emphasising the division of society into 'us' (that is, the supporters of the revolution) and 'them' (that is, those who were on the side of the Republican Party), giving rise to more incidents of hate speech and offending posts accompanied by memes.

2.3 Rapid integration of information technology in governance: Cyber security in Armenia

Considering the above-mentioned, it becomes clear that everyday society is becoming more dependent on information and communication technologies. Even more crucial is the protection of these technologies for the sake of the national interest.

The development of new technologies makes people's lives easier especially when it comes to accessing or requesting information online. However, it also presents some vulnerability in terms of cyber security. The Armenian government adopted e-governance several years ago, which gives people easier access to information. However, open access to certain information leads to the violation of human rights in terms of data protection. The latest example is Armenia's online voters' register elections.am, the aim of which is to provide citizens with information on locations of district electoral commissions (DECs). The website is developed in such a way that once a citizen (voter) enters some personally identifiable information in special columns, the voter finds information according to the residential address. At first glance this seems to be a good thing, but the problem is that any citizen of the Republic of Armenia who has the minimum information about another citizen – such as a name, surname and/or date of birth – can find the same information on his/her residential address, the DEC as well as information on that person's family members who are registered at the same address. The former in turn questions the right to privacy of this person and his/her family members (article 17 of ICCPR).

Chapter 2, article 4.2 of the Law of the Republic of Armenia on Protection of Personal Data (2015) states that '[p]ersonal data shall be processed for legitimate and specified purposes and may not be used for other purposes without the data subject's consent' (Law of the Republic of Armenia on Protection of Personal Data 2015). However, in case of elections.am, there is a problem as to whether it was justifiable to make personal information of citizens available to the public since this may also serve as a threat to a person's safety and security. In particular, if the purpose of the website is to provide information on district electoral

commissions, then the former can be developed in such a way as to replace columns with the entry of personal information (name, surname, date of birth, and so forth) with the column where the citizens will need to enter special personal codes, available only to them. The latter is of a huge importance since transparency in this case may serve no good but rather will encroach upon citizens' safety and will also serve as a threat to national cyber security as third parties can also access the information.

The development of the information society raises the issue of cyber security, which raises questions about a number of security problems and their solutions, ranging from technical to legislative.

The International Telecommunication Union (ITU) has published the annual Global Cyber Security Index (GCI) study (2017), which assesses the level of cyber security of states according to five main indicators: legal, technical (including child online protection), organisational, capacity building and cooperation. The study was conducted in 2017 in relation to 193 countries around the world. According to Table 2 it is evident that in the CIS region only Georgia and Russia had high GCI scores, and this was conditioned by their good performance in regard to all five indicators. In contrast, the performance of Armenia was unsatisfactory in all spheres except cooperation. This is the reason why Armenia only took the one hundred and eleventh place in the GCI, while neighbouring Georgia was in the eighth and Azerbaijan in the forty-eighth place (International 2017: 54).

Table 2: Global Cyber Security Index (GCI) 2017. CIS region scorecard[3]

	Legal measures	**Technical measures**	**Organi-sational measures**	**Capacity Building**	**Coopera-tion**	**GCI Score**
Armenia	Low	Low	Low	Low	Medium	Low (0,196)
Azerbaijan	Medium	High	Low	Medium	High	Medium (0,559)
Belarus	High	High	Medium	High	Medium	Medium (0,592)
Georgia	High	High	High	High	High	High (0,819)
Kazakhstan	Medium	High	Low	Low	Low	Low (0,352)
Moldova	Low	High	Medium	Low	Medium	Medium (0,418)
Russia	High	High	High	High	High	High (0,788)
Tajikistan	Medium	Low	Medium	Medium	Low	Low (0,292)
Turkmeni-stan	Medium	Low	Low	Low	Low	Low (0,133)

3 Available at https://www.itu.int/dms_pub/itu-d/opb/str/D-STR-GCI.01-2017-PDF-E.pdf.

Ukraine	High	Low	Medium	Low	High	Medium (0,501)
Uzbekistan	Medium	Medium	Medium	Low	Low	Low (0,277)

In this study, the ITU also provided information on particular countries' experiences of applying specific solutions in order to advance their cyber security.

For example, with regard to the legal sphere the importance of having cybercrime legislation was highlighted as was the case in Columbia (one of the first countries to enact law targeting cyberspace), as well as Georgia, which established their cybercrime legislation in accordance with the Budapest Convention. Another key factor mentioned was the provision of cyber security training by the government.

Another important sphere was technical (with important dimensions such as the existence of special technical institutions, online protection of children, and so forth). Referring to examples of certain countries, it was shown that the existence of special computer emergency teams (for instance Egypt's G-CERT and Brazil's CERT) is essential to support the information technology sector and to help the latter to cope with cyber security threats. Significant importance was also attached to children's online protection.

Another sphere mentioned was organisational, implying (i) the development of a cyber security strategy (for instance the UK's National Cyber Security Strategy and Russia's adopted National Security Strategy); and (ii) the creation of a special coordinating agency by a government (for instance the Cyber Security Council of Iceland). In addition, special attention was given to specially-designed public awareness campaigns, as was the case in Latvia. A national portal named CERT has been created so that people can be provided with security solutions, for example, anti-viruses, which are free of charge. Moreover, the CERT is organising a bi-annual special campaign during which people can bring their laptops or computers to establish whether they have been infected.

Thus, if the experience of Armenia is evaluated through the prism of the afore-mentioned thought-provoking practices, it would become clear why it took only the one hundred and eleventh place on the list. Armenia has cybercrime legislation which is enacted through the Penal Code and Law on Electronic Communication, and specially-designed computer emergency response team- CERT-AM, but according to the wellness profile created by ITU (2014, 1–3) it lacks (i) an officially-approved cyber security framework necessary for the implementation of cyber security standards (which are internationally recognised); (ii) a national cyber security strategy and accordingly responsible agencies responsible for its implementation; (iii) sector-specific research and development programmes or projects; (iv) educational and/or professional training on cyber security; (v) partnerships that could have contributed to sharing of cyber security assets of either other states or the public sector (it is only the member of a special ITU-IMPACT initiative); and (vi) a special agency that could have provided institutional support on child online protection (even though Armenia has legislation on children's online protection. The latter is enacted through article 263 of the RA Criminal Code.

The aforementioned illustrates most of the major omissions. This should be rectified and a cyber security commitment should be demonstrated, especially given Armenia's historical-political context. What is at issue is the territorial conflict over Nagorno-Karabakh between two former Soviet countries, Armenia and Azerbaijan. This latter was also manifested in the form of an information war, leading to the dissemination of fake news, hate speeches, and even cyber-attacks which occurred in the winter of 2000 (Arminfo 2019). The attacks were from both sides – Azerbaijan hacked 30 Armenian websites and Armenia launched a counter-attack – and the damage was mutual.

Armenian cyber security expert Samvel Martirosyan also claimed that public facilities such as power stations, gas and water supply systems are becoming vulnerable since they can also be hacked. This is of substantial strategic importance especially due to their contribution to military efficiency/capability.

Martirosyan also stressed that in Armenia there is no special agency that can provide institutional support to solve these issues. This is why Armenia needs to create a special national agency – especially for monitoring and awareness-raising purposes – which already exists in neighbouring countries (Martirosyan 2018). Another important issue to be mentioned is that a special control should be established over crucial non-governmental organisation (NGO) structures such as banking (Arminfo 2019), since most of them are in the possession of foreign investors. The latter implies that some problems may arise not only because of a lack of accountability, but also due to of the influence of third countries.

Cyber security issues and the lack of media literacy contribute to the data leakage. People with poor media literacy tend to click on all the links that they receive through email, social media, or advertisements on different unreliable web pages. This leads to the hacking of social media accounts and control over personal user information, including bank account details. This tendency recently became relevant for the applications developed for smartphones. For example, an application called GetContact recently became very popular among Armenians and in the region itself. The application identifies telephone numbers by using the user's contact list, and it emerged that the application uncovers the caller's personal data and photo from its database (Kaspersky 2018).

Hence, referring to what was said above, it becomes extremely important for Armenia to provide institutional support for the development of cyberspace protection mechanisms in conformity with international cyber security and digital regulation practices to avoid threats to the state sovereignty and human rights protection.

3 The impact of new technologies on human rights: A case study of Belarus

This part presents peculiarities of the human rights situation in the Republic of Belarus reasoned by the geopolitical position of the state. It proceeds to explain the importance of new technologies and different sides of its impact on the fulfilment of human rights of Belarusian citizens. Finally, this part emphasises the main challenges and ways to overcome them.

3.1 New technologies and freedom of expression

The Republic of Belarus is a country located between the European Union (EU) and Russia. This geopolitical peculiarity explains many events occurring in the country: on the one hand, Belarus is influenced by Russia and, on the other hand, by the EU. Thus, the impact of Russia on Belarus results in substantially identical legislative provisions regarding the fulfilment of human rights, while the influence from the West is characterised by facilitated development of the new technologies in the country.

New technologies play an important role in the life of Belarusian society in both positive and negative ways. The positive impact consists of accelerating civil engagement, facilitating the communication of the state with civil society and human rights organisations, enhancing monitoring instruments.

Indeed, in recent years engagement of civil society in political life of the state has increased significantly: the Belarusian NGOs engaged in human rights protection regularly organise lectures, seminars and training in an effort to explain how people can protect themselves while using the internet and how to make a difference between a trustworthy information and fake news; a non-commercial platform, Petitions.by, raises awareness and involves millions of Belarusians in a dialog and cooperation with the authorities in a common effort to resolve local, regional and state-level problems. The involvement is carried out through writing, promoting and signing petitions to the relevant authorities with regard to persistent problems bothering citizens of particular districts or regions. At the same time, the Belarusian authorities apply new technologies in the process of governing to facilitate communication with the citizens and make an access to state services easier. Thus, Belarus has made it to the eighteenth position in the rating of countries with the best e-government services (Artezio 2000). Moreover, increased monitoring possibilities have a positive impact on the human rights situation in the state. Now it is possible to get reliable information not just from state entities – the National Statistical Committee of the Republic of Belarus, the National Academy of Science of the Republic of Belarus – but also from civil society as well as national and international human rights organisations that have elaborated their own monitoring systems. The abundance of statistical data allows the situation to be followed and excludes the possibility of even a minute change in the human rights fulfilment going unnoticed. Therefore, it is easy for human rights and civil society organisations to attract the attention of the Belarusian authorities as well as of the international community to problems prevailing in the Belarusian society and, consequently, to accelerate their elimination.

However, enhanced possibilities and easier access to statistical data and monitoring are not the only ways in which new technologies change the human rights status for the better. New technologies applied to the different spheres of society have a very positive impact on the state's economy through the creation of new working places, the increase of incomes via improvement of effectiveness and productivity, and the attraction of investments to the country. Economic growth inevitably leads to better living conditions of society and, consequently, a fuller enjoyment of human rights. A good example of such developments might be presented by the Belarusian Hi-Tech Park, which due to a special IT

environment attracts to Belarus numerous investments in line with dozens of foreign companies, start-ups and initiatives coming to register there every year and creating working places for the Belarusian people, and improving their quality of life.

This is evidence of the positive impact of new technologies on human rights fulfilment. However, reports of international organisations often emphasise overly restrictive legislative provisions on freedom of expression, peaceful assembly and association as well as on freedom of the press. They highlight the resilience of the government to the international pressure and its unwillingness to soften the legislative framework in relation to the freedom of expression and freedom of press/media sources (Human Rights Watch 2019).

Freedom House (2018b) has classified Belarus as 'not free' in both the Freedom of the Press and Freedom on the Net 2018 indexes. Such a low score is justified by facts of massive detention of journalists while fulfilling their professional duties, in particular, covering important, even though unfavoured by the authorities, civic and political events in the country. Even though a number of the detentions has decreased by two-thirds since 2017, it remains high (Table 3).

Table 3: Detentions of journalists in Belarus[4]

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Ranking	20	30	167	60	54	29	19	13	101	31

Moreover, the government has adopted provisions that limit access of independent online media sources to official information and frequently induces them to employ self-censorship. This poses a serious problem for the fulfilment of the free flow of information. State-led media sources' coverage is insufficient and unbalanced, it mostly presents official versions of the events, which is roughly informative and does not provide any critical analysis. Thus, for example, the events of the 101st anniversary of the Belarusian People's Republic (BPR), which took place on 25 March 2019, were at least partly covered by the independent national media sources while state-run media barely mentioned the events of the day and did not present data on detentions of people and reasons of their detention – the use of the Belarusian historical flags and symbols. This means that many people, who do not regularly check online media sources but rather follow television news programmes, are unaware of what is happening in Belarus at the moment and, consequently, cannot make their informed position on the actions of government as well as those of citizens participating in civic and political activities in the country.

At the same time, in 2018 the authorities got arbitrary power to block media sources for a period of three months without a court decision for the alleged violation of restrictions on the press/media (Pravo.by 2003). Ever since there has been a degree of concern among the media, as the

4 Source: https://baj.by/en/analytics/repressions-against-journalists-belarus-2018-chart.

adoption of the Media Bill puts at risk every independent media source critical of the government. The legislative framework for the media enshrines a complicated procedure of registration and often discriminatory policies with regard to the independent resources. This often implies limited access to press briefings, government officials as well as less ability to distribute printed materials and higher costs for it (Pravo.by 2003). Moreover, journalists employed at the independent media or freelancing for international media are being detained while carrying out their duties during civil and political actions. Journalists and freelancers of international media sources face an acute problem, because the government frequently denies them accreditation and editorial certificates, putting them on the front line and leading to temporary imprisonment together with the confiscation of their equipment (Table 4).

Table 4: Fines to journalists under 22.9(2) of the Code of Administrative Violations[5]

Year	2014	2015	2016	2017	2018	04/2019
Ranking	10	28	10	69	118	14

Turning to the issue of digital freedom and security, the Belarusian government has imposed no permanent restrictions on connectivity or access to social media sources as well as communication applications. Nevertheless, the government has the ability to control the speed of internet connection due to the fact that only two entities are permitted to control connections within and outside the country – Beltelecom and National Centre for Traffic Exchange, both of which are controlled by the state. Therefore, the authorities not only control the speed of internet connection throughout the country but also monitor users' activities.

3.2 Regulation of the flow of information, digital security and freedom of speech

To understand the status of freedom of information, expression and digital security properly it is necessary to analyse how this field is being regulated. First, it should be noted that in the last few years the topics of freedom of expression, information and digital security have become very pressing and the authorities are working hard on the development of a legislative framework to regulate all activities in the sphere. Thus, in 2018 the Media Bill was revised (Pravo.by 2003), and drafted a new law on personal data protection (Forumpravo.by 2013), the adoption whereof is planned for the first half of this year. The national concept of information security was also adopted recently (President.gov.by 2019), that is the most important document providing a basis for the development of relevant legislative provisions and defining directions for the state policy.

In December 2018 the amendments to the Media Bill entered into force, raising concern in the Belarusian media sphere (Belarus.by 2009). The revised law stipulates the following:

5 Source: https://baj.by/en/content/article-229-code-administrative-violations.

- the obligation of owners of internet resources – bearing any of the national domains .BY or .БЕЛ – to identify its subscribers;
- compulsory pre-identification of the users to connect to public WiFi;
- the obligation of online media sources to register and obtain the official status of mass media resource in order to have access to the official information;
- the broadening of the list of prohibited information, which now became even more vague and open for interpretation for the authorities. In this light, it includes propaganda of unhealthy lifestyles, drug use, disrespect for different social, national, ethnic and religious groups, xenophobia, extremism, and so forth.

Moreover, the list of prohibited information is not fully presented in the Concept (President.gov.by 2019) or other legislative provisions. Several types of information are provided, but in the end it is always mentioned 'and other kinds of prohibited information stipulated in legislation of the Republic of Belarus'.

These provisions raised broad concerns in society, and particularly among the Belarusian online media sources, when they were first denounced. For the users such provisions inevitably imply a broader collection of users' personal data. This may be regarded as an infringement upon private life and freedom of expression of Belarusian internet subscribers. However, the state has a different perspective on the issue. By the identification and collection of users' data the state seeks to prevent cybercrimes and attacks and, thus, to protect society from prospective risks. It has been said that the state aims at ensuring the safety of collection, processing and storage of the users' data in order to protect their rights.

Turning to the provision on registration of online media, this was met by an even broader public discussion, because basically such provision enshrined the inequality of rights and access between state-led and independent online media sources, which even before faced numerous obstructions while doing their job and made it even easier for the state to prevent critical or objectionable independent media sources from registration by a complicated procedure of registration and a number of obstacles set in the process. Moreover, the broadened list of prohibited information and ability of the Ministry of Information of the Republic of Belarus to block websites for a period of three months without a court order poses a serious threat to all types of online resources. It is provided that one can be prosecuted for sharing false information, which is rather a vague expression and basically gives the authorities an opportunity to act based on their own interests, often not coinciding with the interests of society.

The most crucial document with regard to the information sphere regulation policy is the national concept of information security dated 18 March 2019. The concept (President.gov.by 2019) highlights an important role of IT technologies in the fulfilment of rights and freedoms of the Belarusian citizens and, at the same time, mentions the challenges to national security posed by the transition to the information society. The state reaffirms its commitment to develop effective and transparent system of governance and introduce ICT into the economic and social sectors and admits the digitisation of economy as the crucial aspect of formation of the information society. In line with that, the state emphasises its dedication to retain information sovereignty, which is not contrary to the

international principles of human rights protection, promotion and fulfilment. Information sovereignty is of paramount importance in light of the fulfilment of the strategy of national security in relation to the raising of awareness on issues such as fake news, cyber-terrorism, the imparting of false information aimed at stirring unrest among society and harming national interests and security. From this perspective, the state deems it necessary to promote critical attitudes toward information and activities that are disrespectful to the national customs, traditions, social morals, rights as well as to enhance intolerance to disinformation, information manipulations and attempts of psychological influence by the information means. In this light, the concept (President.gov.by 2019) underlines the necessity of an increase in the range and volume of the national media sources as well as their efficiency in the population. To support this statement the chart of the state budget expenses on the media development is provided in Table 5.

Table 5: State budget support to mass media in Belarus[6]

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Funding	64 mln. EUR	40 mln. EUR	54 mln. EUR	45,5 mln. EUR	60 mln. EUR	52 mln. EUR	60 mln. EUR	45 mln. EUR	47 mln. EUR	48 mln. EUR	62 mln. EUR

From the chart it is clear that the state authorities are taking steps to satisfy the necessity mentioned above and improve the quality of the national media sources functioning. However, in reality the state's increased budgetary expenses do not constitute attempts at liberalising the national information space but rather implies a dedication to enhance control over it.

In addition, the Concept (President.gov.by 2019) underlines the special place of the information and digital security. The state goes to much trouble to prevent imparting untrue information able to harm the national interest and bring unrest to society by tightening control over the information space within the country and more extensive gathering of users' personal data. These measures reaffirm governmental control over media and other information sources and further decrease anonymity on the internet (Pravo.by 2003). However, at the same time the state confirms its efforts in developing effective instruments of digital security in Belarus and ensuring the safety of users' personal data from unsanctioned access.

Eventually, it may be concluded that the national concept of information security (President.gov.by 2019) can be considered as a thorough and balanced document reflecting the reality prevailing within Belarusian society. Nevertheless, the provisions with regard to the media may be considered overly repressive and in need of overhaul. The national as well as international independent media sources should be able to operate freely and with full access to the official information and freelancing journalists must not be prosecuted for acting in their

6 Source: https://baj.by/sites/default/files/analytics/files/smi-01572019-en.pdf.

professional field. This is an essential condition of fulfilment of the freedom of expression, which implies the freedom to receive information from various resources.

Therefore, the following challenges to the full and sustainable implementation of the freedom of expression might be highlighted:

- the extensive intrusion of the government into the functioning of the national media sources;
- the overregulation of the national information space.

In order to overcome these challenges, the government of the Republic of Belarus in cooperation with civil society has to implement the following recommendations:

- to increase activism of the national civil society and human rights NGOs;
- to make the government revise the system of regulation of the information space and media sources;
- to establish the monitoring and self-regulating mechanisms for media in order to identify infringements upon freedom of expression and eliminate them with minimum level of intrusion by the state.

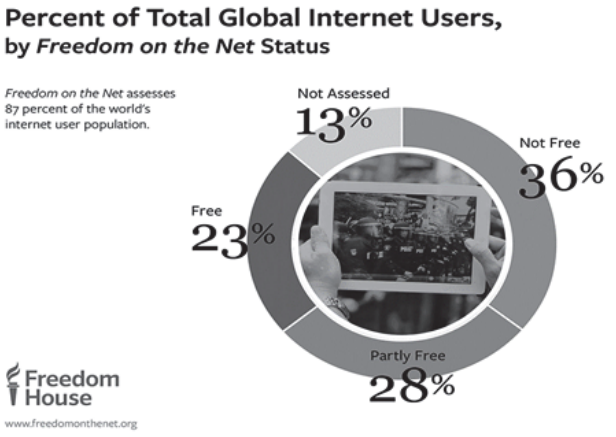
4 New technologies as a tool of protection of human rights: A case study of the Kyrgyz Republic

The case study of the Kyrgyz Republic is an analysis of the legislation, the government electronic services, and the main challenges for the state in the era of global automation. The conclusion of this part recommends the necessary actions to respect, protect and fulfil human rights through new technologies.

4.1 Analysis of national legislation and human rights protection mechanisms in digital space

Kyrgyzstan is a mountainous country in Central Asia with a population of 6 389 500 people as of 1 January 2019. According to the Freedom House Freedom on Net 2018 report Kyrgyzstan is among 28 per cent of countries with partially free internet (Image 1). Kyrgyzstan has 38\100 points in contrast to the neighbouring countries in Central Asia such as Kazakhstan (62\100) and Uzbekistan (75\100), which are among 36 per cent of countries in the category 'Not Free' (Freedom House 2018 (a)).

Image 1: Percentage of total internet users by Freedom on the Net Status



Kyrgyzstan is a developing country. Although digital processes are only beginning to gain momentum, the country aims to move towards becoming a more digital space. To improve the quality of the life of citizens, and to build an open and transparent state, a National Sustainable Development Strategy has been developed, a key component of which is the 'Taza Koom' digital transformation programme. The official launch year was 2016. Since then, it has become clear that the country was not ready for large-scale digital changes. There was no prepared platform and digital infrastructure. Digital infrastructure in Kyrgyzstan is at the medium level. Kyrgyzstan is rapidly increasing the consumption of internet services, especially of international content. However, the quality of telecom-munications and ICT is a major factor in relation to capacity of regional transit bandwidth, independence of national networks, and e-government infrastructure (National 2017).

The legislative level has limited power to regulate the digital environment. The state does not recognise the relations that are exercised in the digital space, making a connection with existing laws and referring to regular and well-known topics and articles in legislation. The Constitution of the Kyrgyz Republic enshrines fundamental rights such as the right to privacy; the protection of honour and dignity; the right to privacy of correspondence (article 29); the right to freedom of thought and opinion (article 31); and the right to freedom of conscience and religion (article 33).

The level of freedom of information is an important criterion in determining the country's compliance with democratic norms. Based on the Constitution the country has various laws related to information. A vivid example of the weak level of regulatory compliance of digital modernisation is the 'Law of the Kyrgyz Republic on guarantees and ways to access information'. This Law regulates the relations that arise in the exercise of the right to freely search, receive, research and produce, transfer and disseminate information, but it is worth noting that this Law

lacks concepts such as internet, digital environment, social networks, and so forth.

Internet resources are not officially recognised media in Kyrgyzstan, but they nevertheless feature in various lawsuits. Jogorku Kenesh (the official name of the country's Parliament) has repeatedly tried to raise the issue of Bills regulating the internet space. It is worth noting that these Bills contain rules that can cause restrictions on freedom of speech on the internet.

The mechanisms for the protection of human rights in the digital environment are not clearly defined. The main elements are written laws and the judicial system. The lack of clear concepts of human rights in the digital environment allows to adjust the letter of the law to the desired meaning. For example, the government agencies by citing anti-extremist law block websites, blogs, and music applications (Freedom House 2018 (A)).

The legislation contains the basics for digitalisation, but remains fragmented and not fully applied. To ensure the protection of rights and freedoms, the Law on the Protection and Use of Personal Data was adopted. Thus, the law equates information on electronic media to paper documents, various electronic transactions to physical transactions, electronic documents and certificates to physical documents, and digital signature to a physical signature.

For the protection of human rights in the digital sphere it is important that the mechanisms could be used. Significant challenges to the implementation of rights are out-dated rules and regulations, gaps in the country's legislation governing the ICT sector, the lack of reliable information and digital infrastructure, as well as weak guarantees in protecting electronic payments, open data and the exchange of personal data.

4.2 The concept of information security in the Kyrgyz Republic: International and regional cooperation

The concept of national security of the Kyrgyz Republic is a system of attitudes, ideas and principles for the protection of individuals, society and the state from external and internal threats to security in all spheres of life. Modern realities prioritise on the concept of security. In this regard information security is one of the most important elements of the concept. According to the Cyber Security Index 2017, Kyrgyzstan ranks 97 out of 180 countries (International 2017).

The Law of the Kyrgyz Republic on Personal Information contains an article on the obligation to provide data transmission via the internet with the necessary means of protection, while maintaining confidentiality of information. Personal data protection should be a priority item in the security concept. At present there is no concept of cybercrime in the law. Government agencies are the main holders of all personal information of citizens. Therefore, they should act as guarantors of the complete protection and security of the personal data. In recent years Kyrgyzstan has witnessed a significant increase in the number of cyber-attacks targeting public and private systems. In 2016 hackers cracked two government agencies: the official website of the State National Security

Committee and the official website of the State Committee on Defense Affairs (Kabar 2016). The hacking of two main bodies that protect personal data indicates weak digital security (Global 2017). The regulatory framework for information security is represented in Kyrgyzstan by documents such as the Constitution of the Kyrgyz Republic, the Civil Code, the Concept of National Security and other laws regulating the security sphere. The country has also developed a Cyber Security Strategy of Kyrgyz Republic 2018-2023. The Cyber Security Strategy was developed with the aim of creating a unified state policy to counter threats in cyberspace and improve the national system of protection of information. The Strategy also confirms the existing gaps in the legislative system and the absence of a cyber security policy.

International cooperation is a significant criterion for the development of states. Joint work aimed at improving human rights and ensuring safe livelihoods has an effect only if there is fruitful work by all states.

As a member country of the Eurasian Economic Union (EAEU), Kyrgyzstan contributes to the improvement of the overall digital space together with neighbouring Kazakhstan, Russia, Armenia and Belarus. The common economic space is not limited to economic relations; the member countries develop their relations in all spheres, one of which is security. Modern challenges render information security in the common space of paramount importance.

EAEU has identified a developmental path related to digital transformation and has developed a Digital Agenda for the implementation period until 2025. To create a durable and secure digital space it is important to develop institutional and legal frameworks. The EAEU Digital Agenda has as its main objective the creation of a safe and independent digital space and the development of the Digital Economy. The transition to a new technical structure taking into account national interests is focused on improving the quality of public services and creating a favourable environment for the development of innovations. While implementing the Digital Agenda, countries may be under a number of security threats, various risks including the loss of digital sovereignty, the emergence of influence and control on national digital space by external players, or the implementation of destructive cyber threats that can be a threat to personal data of states. The cooperation of the participating countries should be based on a coordinated policy of digital transformation. The relationship mechanism should include an open platform for mutual coordination, stimulation and support. The main policy and activity of the EAEU is aimed at the economic component but at the same time the human rights factor is included. The main benefits for human rights in the digital space of the EAEU is that it will serve to improve national digital systems by establishing a common security policy and assist in countering cyber-attacks so as to protect the privacy of citizens and advance economic development.

However, it remains unclear whether participating countries should have a similar legal framework with respect to internet freedom. For example, on 22 March 2019 the President of the Russian Federation introduced the concept of Digital Rights into the Civil Code of the Russian Federation. Does this mean that for equal regulation, member states must have identical laws? Also in the legislation of the Russian Federation there is a Concept for Information Security of Children adopted by a

government decree. On 24 February 2019, the draft law 'On protection of children from information harmful to their health or development' was placed on the official website of the Jogorku Kenesh for public discussion. Public Foundation Legal Clinic 'Adilet' conducted a legal analysis and came to the conclusion that the law contains a number of provisions that carry certain risks to the democratic values of the rule of law including the respect for the observance of the right to freedom of opinion and expression (Public Foundation 2019).

In addition to being a member of the EAEU, the Kyrgyz Republic is also a member of various regional organisations such as the Organisation for Security and Co-operation in Europe (OSCE), the Commonwealth of Independent States (CIS), Shanghai Cooperation Organisation (SCO), and Collective Security Treaty Organisation (CSTO). Each of these structures has developed its own policy aimed at the development of the digital space and the protection of human rights. The main criterion for evaluating the activities of an organisation and unions in this article is the presence of the implementation of the protection of human rights in the digital environment in the activities of the above mentioned organisations.

As the largest security organisation, the OSCE pays special attention to countering cyber threats and ICT security coming from non-state institutions such as organised criminal groups and terrorists, but also provides the basis for preventing states from encroaching on digital sovereignty. Conflicts between states that may arise from the use of ICT can cause a problem. In this regard OSCE member states are working on confidence-building measures.

The confidence-building measures are designed to make cyberspace more predictable and open in this regard to provide important mechanisms, such as: information openness, including discussions of a possible or existing conflict with further escalation, an educational platform, including various educational activities to exchange views, strategies and projects, a security policy that includes collective measures to protect the digital infrastructure, which will contribute to improving the cyber security resilience (Organisation 2016).

There are also other examples of regional cooperation that develop the digital space in different areas:

(1) The activities of the CIS include the provision of digital integration, the development of a digital economy and the provision of cybersecurity. CIS member states are working on a cybersecurity agreement that will facilitate the rapid exchange of information on new types of information technology crimes, also study digital security threats and propose measures to prevent and curb them.

(2) The policy of the SCO is aimed at the benefit of the economic and social development of the participating countries. The SCO also covers the digital agenda and carries out its activities related to the development of cooperation, the exchange of information and the transfer of ICT practices. The SCO also considers issues of digital security, interacting in the fight against the proliferation of various crimes, such as terrorism through the internet.

(3) The CSTO as a military-political bloc carries out its activities directly related to security. The CSTO aims to unite efforts to combat cybercrime, also to create a system of information security and strengthen inter-agency cooperation.

4.3 Development of digital technologies and e-governance in Kyrgyz Republic

Since 2016 Kyrgyzstan has started implementing a Sustainable Development Strategy. Since the beginning of 2018 Kyrgyzstan began to officially launch programmes for the digitalisation of public services. The cardinal change of the state system was met with great optimism of citizens. E-government projects are aimed at increasing state efficiency and counteracting the development of corruption. Examples of different implemented projects include various portals of state agencies, e-visa, e-trading platform, automated border control system e-gates, electronic notaries, and electronic patents.

A bright and successful project that improves the livelihoods of citizens is the system Tunduk. Tunduk is a system of electronic interaction in which ministries, departments, state enterprises, municipal authorities and other organisations (legal entities and individuals) exchange information with each other directly at the machine level. It is important to note its legal value:

- Any transaction passing through the Tunduk platform is automatically signed and becomes a document (certificate, report, information).
- Each state body has its transaction history.
- The transaction is officially signed and it can be used in court as a legal document.
- Any government agency is always aware about a transaction.
- It is impossible to create a fake document as it is automatically created.

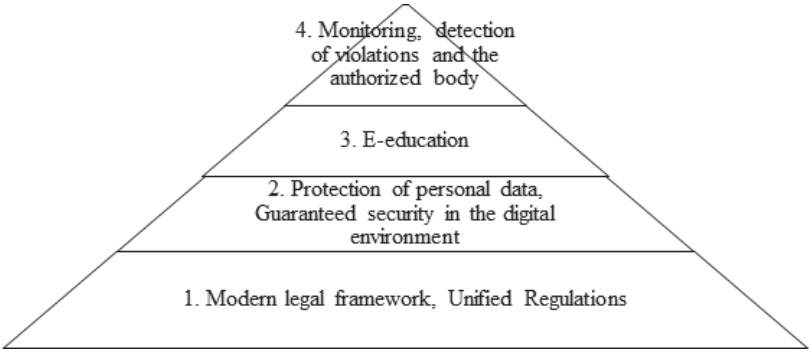
The Tunduk system is based on world practice, namely, the Estonian X-road system. According to specialists the Estonian system allows to save up to €1 billion per year. According to international experts Tunduk will allow the budget to save up to $300 million per year.

The Tunduk system has as its goal the coverage of a large number of state bodies. At this stage it is possible to identify positive changes in the implementation of E-Gov systems, such as improving the work of state bodies, making public administration more efficient, exchanging information directly, which will reduce the number of illegal documents, and reducing corruption.

4.4 Development of new technologies and protection of human rights: What is next?

To ensure the sustainable presence of human rights in new technologies states are obliged to develop a unified standard for the gradual introduction of the protective mechanism of human rights in the digital environment (Image 3).

Image 2: The pyramid of necessary actions to achieve the sustainability of the presence of human rights in the new technologies



1 Modern legal framework, Unified Regulations

Laws that clearly regulate the protection of human rights in the digital environment are required to guarantee the recognition of human rights in the digital environment. Legislation needs to conduct a timely analysis of new digital space challenges. Laws should have the same rules in relation to online and offline rights. Laws should not be duplicated, thereby creating fields for legal gaps helping to avoid legal liability for human rights violations in the digital environment. It is also important to create a sustainable regulatory system from cyber threats. The legal framework should include NGOs, civil society organisations, citizens, and so forth. By involving society forces it can be ensured that the framework does not limit freedom but instead protects human rights.

2 Protection of personal data, guaranteed security in the digital environment

Security is an important component in ensuring the protection of human rights in the digital environment. The state must guarantee the enjoyment of human rights in the digital space. The state should provide guaranteed protection of personal data. Need to develop international and regional relations to develop ways to protect cyberspace and improve cyber security.

3 E-education

Education is one of the main key components of digital processes. Standards for educational activities and educational regulations should include disciplines that teach important skills, such as digital literacy and digital skills, cyber security, human rights in the digital environment, lessons on the right use of E-Gov services, computer hygiene and other items that will contribute to the safe and proper use of digital services. It is important to introduce important principles through digital processes, highlight human rights and freedoms, contribute to the achievement of the UN SDGs, and so forth.

The example of Estonian digital revolution started in 1996 with the state programme Tiger Leap. This programme was focused on implementing technology education and technology infrastructure at schools.

E-education is an essential part of state development. The educational component of digitalisation must necessarily include projects and research in the field of digital development, information campaigns to reduce digital inequality among citizens and the development of digital censorship and etiquette. An example of a working education mechanism is the Digital Rights School in Kyrgyzstan, which includes in its activities new technologies and digital human rights. E-skills become mandatory selection criteria when applying for a job. Lack of technological skills contributes to increasing the inequality gap (The World Bank Group 2016).

4 Monitoring, detection of violations and the authorised body

A component of creating a regulatory framework focused on the digital environment is the creation of a working mechanism, the body authorised to monitor and detect human rights violations in the digital environment. A competent authority is necessary to conduct surveys, focus groups and monitoring in order to identify the causes of inequality, improve access for all categories of citizens, improve the regulatory framework, and identify weaknesses.

5 Conclusions and recommendations

This article explores the dualistic nature of ICT in a way they affect the processes occurring in the world. Based on the case studies of three former CIS countries, it was found that new technologies can significantly contribute to the fulfilment of human rights, and in this process, one of the key roles is assigned to civil society that can properly use those technologies for the achievement of democratic goals. The vivid example of the latter is the digital activism in Armenia that helped different civil society organisations to reach a wider audience and awaken the politicised identity of the major part of the population. Digital activism played a decisive role in mobilising masses and making them exercise their civil and political rights during the Armenian Velvet Revolution. However, in this case one of the challenges that CSOs may encounter on their way is the abuse of state power. Both in Belarus and Kyrgyzstan the states act as opponents for the civil society in the implementation of various activities, thereby infringing on many crucial human rights that citizens should enjoy. Therefore, what has to be done in this case is bringing the authorities and civil society to a dialogue in order to overcome the problem of extensive regulation of all the spheres of society and ensuring the best conditions for the development of a scientifically-progressive digital state.

Another major finding in this article was that the transition towards technologies may have negative impacts such as a lack of control on the content shared online, risk of being subjected to cyberbullying and so forth. Despite the fact that the social media platforms have security measures, a gap remains that allows disinformation to be spread

throughout the world. Another factor leading to the indirect negative impact of new technologies is the lack of media literacy of the wider public. Indeed, it is not the fault of new technologies, rather of the low media literacy level, that the media are being used to manipulate people through new technologies.

Thus, it can be said that as any coin new technologies have two sides: *Tails*, for example, may show how new technologies contribute to the freedom of expression and freedom of speech of people; and *heads* may show how the former may also contribute to the spreading of hatred, discrimination, and cyber bullying.

However, relying on the case studies of Armenia, Belarus, and the Kyrgyz Republic it may said that the overall sustainable and effective implementation of human rights in the context of rapid integration of new technologies requires the combination of the efforts and responsible approaches of individuals, commercial organisations, civil society, states and international organisations. Comprehensive programmes and individual decisions in the field of the protection and implementation of human rights can provide for the inclusion of a complex mechanism, the key components of which are the political will, a strong legal framework, the presence of relevant institutions, infrastructure and technical environment.

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Selected developments in human rights and democracy in 2018: Migration and asylum in Europe

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Abstract: *2018 marks a milestone year with respect to the socio-legal and political aspects surrounding the issue of migration due to the adoption of the two Global Compacts (the Global Compact on Refugees and the Global Compact on Safe, Orderly and Regular Migration). In the first part this article gives an insight into the content of the Global Compact on Migration (GCM), which led to a loss of unity of European Union representation. The article further analyses two highly controversial topics from the Global Compact, namely, the so-called 'climate migrants' and 'migrants in vulnerable situations'. Notwithstanding its soft law nature, the examination of the GCM reveals that both groups received recognition at a global level for the first time. Furthermore, the article analyses how these divergent positions on migration are being reflected in the EU's policy making. The article finds that, instead of lifting the unequal migratory burden from some member states through harmonisation, EU policies have had the main aim to prevent migrants from entering into EU jurisdiction. Crucial developments in this context are the criminalisation of search and rescue NGOs, the transfer of search and rescue responsibilities to third countries and the outsourcing of migration-related responsibilities. Overall, the lack of progress in reforming the common European asylum system resulted in the externalisation of the EU migration policies through bilateral and multilateral agreements with transit countries. Finally, although the issue of migration requires political responses, the protection of refugees and migrants has increasingly relied upon judicial institutions.*

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Key words: *Global Compact on Migration; climate migrants; migrants in vulnerable situations; search and rescue; externalisation policies; common European asylum system*

1 Introduction

In 2000 a high-profile smuggling incident caused the death of 58 migrants who, after a long journey through several countries – including three European Union (EU) member states – suffocated in the back of a truck. Their bodies were found in the British harbour of Dover. Similarly, on 23 October 2019 39 migrants were found frozen to death in the back of a refrigerated lorry in East England. Today, like 20 years ago, people seeking safer havens and better living conditions are still dying at the EU's external borders. Despite some positive developments, these episodes basically reflect the EU and its member states' longstanding failure to comprehensively address migration and refugee protection as an inherently global and transnational phenomenon.

The year 2018 is likely to go down in history as a milestone year for its great potential impact on migration-related issues. The Global Compact on Migration, the first soft law instrument to address migration globally and comprehensively, was adopted by the international community in December 2018 bringing new challenges to the attention of the international community. Simultaneously, the EU and its member states have continued developing new controversial migration and asylum policies in an attempt to address the main migration issues with which southern member states are regularly confronted.

This article critically analyses such major developments with a special focus on those areas that were disproportionately affected by migrant inflows in 2018, namely, the southern EU member states. The first part presents the Global Compact on Migration (GCM) and two of its most controversial outcomes, namely, the concept of 'climate migrants' and the notion of 'migrants in vulnerable situations'. In addition it sheds light on the EU member states' contradicting stances regarding the adoption of the GCM. Hence the article examines the issue of the loss of unity of the EU throughout the negotiation process. The second part assesses the main developments that hinder an agreement on a common EU approach to migration and asylum policies such as search and rescue and the externalisation of borders and migration management to third countries. In addition, recent case law of the EU and member states on legal responsibility for migration-related human rights violations is briefly addressed. The conclusion highlights the transversal connections between the selected developments.

2 The Global Compact on Safe, Orderly and Regular Migration: The stance of the European Union

The adoption of the United Nations (UN) Global Compacts on Migration and Refugees is one of the latest major migration-related developments and will help make the year 2018 go down in history as a milestone with regard to the protection of refugees and migrants (UNGA 2018). The process leading to the elaboration and adoption of the two Global

Compacts was set in motion by Annex I and II of the 2016 New York Declaration for Refugees and Migrants which, for the first time, brought together the international community to discuss the impelling need to jointly and comprehensively address migration (IOM 2018). The New York Declaration, adopted by all 193 UN member states, is a political declaration establishing a set of commitments upon which the Global Compact on Migration (GCM) builds. Unlike its counterpart on refugees, the GCM was more controversial and, for the different reasons analysed below, raised much concern and opposition from several state delegations.

The GCM is a 'non-legally binding, cooperative framework' (para 7) which lays down 23 main objectives reflecting commitments and a range of actions (policy instruments and best practices), as well as guidelines for implementation, and follow-up and review mechanisms (UNGA 2018). The main fundamental idea behind the GCM is that '[m]igration … is a source of prosperity, innovation and sustainable development' (para 8) but, because of the inherent transnational nature of human mobility, it is not possible for a country to 'address the challenges and opportunities of this global phenomenon on its own' (para 11) (UNGA 2018).

After almost two years of intergovernmental negotiations and consultations, the GCM was eventually adopted by 152 UN member states in Marrakesh, Morocco, on 10 December 2018. Yet, a significant number of states withdrew from the final phase of negotiations – an important factor that cannot be underestimated.

In this part, the article analyses such unfortunate developments with a special focus on the European regional level. The most controversial aspects of the Compact, namely, the GCM's inclusion of climate migrants and the new concept of 'migrants in vulnerable situations', will in particular be analysed. This functions to introduce some points that raised the concern of several participating member states. A specific national case will be considered in order to present more in depth the main arguments EU member states put forward against the Compact. In this sense, the Italian case is believed to be particularly relevant to the purpose of the article and sufficiently representative of various reasons behind member states' opposition to the GCM.

2.1 Shedding light on the nexus between climate change and migration

According to the IOM and IDMC, 17,2 million new displacements took place due to disasters and 764 000 people were displaced due to drought in 2018 alone (Ionesco 2019). At the same time, the year 2018 has marked an important year for the development of the protection and visibility of persons affected by natural disasters and the adverse effects of climate change.

As noted, the New York Declaration resulted in the adoption of two milestone global compacts, one of which was the GCM adopted in December 2018 (Piper 2018: 323). Although the GCM's main objective is to address the drivers of migration, some states argued against the inclusion of the issue of climate migrants in the Compact. In any event, climate-related migration was included in the final instrument, and for the first time the nexus between the adverse effects of climate change and migration (the so-called disaster-migration nexus) was recognised on a global multilateral level (Kälin 2018: 665).

The GCM acknowledges that people may be forced to migrate due to either sudden natural disasters or slow-onset processes that result in the uninhabitability of their homes. Some scholars argue that the term 'refugee' should not be applicable to 'climate migrants' in these situations because it exclusively means persons seeking refuge. In this regard it should be noted that the Refugee Convention of 1951 grants legal protection to persons that are being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, without including displacement in the context of environmental factors. The IOM and several other scholars prefer the term 'climate migrants' since it is able to cover not only cases in which people are forced to leave their homes immediately but also cases in which migration occurs at the early stages of slow-onset climate change effects (Behrman 2018: 6).

The GCM further enshrines the commitment of states to strengthen resilience and prevent displacement as a first step, but also to develop disaster preparedness strategies and to ensure access to humanitarian assistance. However, the crucial objective of the Compact is to enhance and facilitate regular migration pathways when people are forced to migrate (Kälin 2018: 666). When these people migrate not only internally but are displaced across borders, they will require international protection either temporarily or permanently (Kälin 2018: 664).

Furthermore, it is crucial to bear in mind that climate migration is a highly complex, heterogeneous and, most importantly, multi-causal phenomenon. According to the Refugee Convention, in order to be granted asylum, the applicant is required to flee due to the fear of persecution for *one* of the above-mentioned reasons. Yet, climate change-related mobility can be multi-causal. For example, a drought in a war-torn and failed state such as Somalia will affect its citizens differently than a drought in a country in the global north (Pilkey 2016: 129). Therefore, the reasons for leaving one's home country according to climate change can consist of multiple factors, such as a combination of drought and poverty or other vulnerability-related factors.

While the GCM has shed light on a topic that was in urgent need of being addressed, some human rights defenders condemned the soft law nature of the Global Compact. Nevertheless, the GCM could become the ground on which binding law may be interpreted or created in any follow-up process. Paradoxically, this was also an argument advanced by states for withdrawing from voting for the Compact, since many state representatives argued that they wanted to foreclose the possibility of being legally bound on the basis of customary law, which can be developed through soft law (Gammeltoft-Hansen 2017: 9).

It appears that the GCM's recognition of the nexus between migration and the adverse effects of climate change is a step in the right direction, but nevertheless more needs to be done and sooner than later.

2.2 Migrants and refugees: An out of date dichotomy? The concept of 'migrants in vulnerable situations' in the GCM

The GCM and the Refugee Compact are the result of simultaneous but

separate processes.[1] Moreover, while the Refugee Compact was drawn upon the well-established body of international refugee law, the GCM could not rely on an equally solid legal framework. Indeed, even though migrants are entitled to a wide range of existing rights and human rights protections irrespective of their administrative status, migration had never before been comprehensively and globally addressed by the international community (McAdam 2018: 573). In this sense, the GCM constitutes an unprecedented effort at the global level to develop a comprehensive response to a phenomenon as complex as human mobility. The Preamble to the GCM explicitly acknowledges the importance of this instrument by affirming that the GCM 'is a milestone in the history of the global dialogue and international cooperation on migration' (UNGA 2018: para 6).

The first international document to explicitly question the traditional dichotomy between refugees and migrants is the GCM's predecessor, the New York Declaration for Refugees and Migrants (UNGA 2016a). The New York Declaration first affirms that all refugees and migrants are rights holders, regardless of their administrative status. Then, the Declaration makes clear that '[t]hough their treatment is governed by separate legal frameworks, refugees and migrants have the same universal rights and fundamental freedoms' (UNGA 2016a: para 6). Most importantly, it acknowledges that refugees and migrants 'face many common challenges and have similar vulnerabilities, including in the context of large movements' (UNGA 2016a: para 6). The concept of 'migrants in vulnerable situations' had recently been developed at the UN level and was fully endorsed by the New York Declaration. This doctrine intended to protect the human rights of those migrants in vulnerable situations falling outside the legal category of refugees and, therefore, the scope of application of international refugee law.

Overall, the GCM accords with the New York Declaration's approach but adopts a more subtle wording likely to accommodate UN member states' concerns. While acknowledging the existence of the same rights and fundamental freedoms for both migrants and refugees, the GCM emphasises that 'migrants and refugees are distinct groups governed by separate legal frameworks' and that '[o]nly refugees are entitled to the specific international protection defined by international refugee law' (UNGA 2018: para 4). Thus, the New York Declaration and the GCM contain substantially similar provisions, which differ slightly from a more formal perspective.

The vulnerability of migrants other than refugees and their equal need for protection was ultimately among the most contested points of the GCM's negotiation phase. Similarly, the purported equivalence of migrants and refugees in the GCM was a common argument put forward by member states in their opposition. Yet, as was demonstrated above, the GCM's wording clearly differentiates migrants from refugees, rebutting this assertion. In addition, the elaboration of two separate compacts setting up 'complementary international cooperation frameworks that fulfil their respective mandates' (para 3) aligns with the existing international legal framework and dominant understanding of migration, which places

1 The drafting of the GCM was state-led while the Refugee Compact was facilitated and coordinated by the UN High Commissioner for Refugees (UNHCR).

refugees on one side and the broader category of migrants on the other (UNGA 2018).

2.3 The role and position of the European Union: Why has the European Union lost its unity of representation before the Global Compact?

As the UN Modalities Resolutions on the intergovernmental negotiations makes clear, the process of negotiations and consultations culminating in the adoption of the GCM was meant to be open, transparent, participative and inclusive (UNGA 2017). In particular, according to the UN document, the consultations would include regional groups (paras 5, 17) and examine 'regional and sub-regional aspects of international migration' (para 22(a)) (UNGA 2017). All relevant stakeholders were encouraged to contribute throughout the entire preparatory process through the 'participation in global, regional and sub-regional platforms' (para 7), as well as 'regional and sub-regional consultative processes' (para 22 (b)) (UNGA 2017). Therefore, as a major regional organisation, the EU had the opportunity to play an important role during the preparatory process of the GCM.

The EU mainly participated in the GCM negotiation process 'through the delivery of EU statements by the Union delegation at the UN', as provided by article 221 of the Treaty on the Functioning of the European Union (TFEU) (Melin 2019: 195, 203). Within the EU, however, the institutional organ leading the negotiation and drafting phase on behalf of EU member states was the European Commission pursuant to article 17 of the TFEU. This provision establishes that the Commission shall be responsible for the EU's external representation, with the exception of the common foreign and security policy. Yet, the growing discontent with the GCM by a considerable number of EU member states raises the legitimate question of whether the Commission could credibly ensure the unity of EU representation before the UN community of states.

Until May 2018 all EU member states, except Hungary, had actively participated in the consultation and negotiation process.[2] Given its government's long-standing anti-immigration position, Hungary's withdrawal from the negotiations did not come as a surprise. Hungary, however, was only the first of a long line of member states that abandoned the negotiations. Between July and November 2018, seven other member states withheld their endorsement of the GCM: Austria, Bulgaria, Czech Republic, Poland, Latvia, Romania and Italy. Additionally, the adoption of the GCM caused heated political debates in several other member states, such as Germany, France, Croatia, Estonia, The Netherlands, Slovenia and Belgium. In Belgium disputes over the GCM led to a virulent political crisis and the resignation of the Belgian Prime Minister, Charles Michel.

The potential of so many dissenting opinions to undermine the unity of EU representation and the European Commission's role is clear for a number of reasons. First, the TFEU establishes important principles that should guide member states in their actions and practices, irrespective of their potentially temporary political posturing. According to articles 4(3)

2 This clearly emerges from an EU Statement issued in May 2018 on behalf of 27 EU MSs during the GCM's fourth round of negotiations (EU Statement 2018).

and 34(1) of the TFEU, member states are obliged to coordinate their actions in international organisations and at international conferences pursuant, among others, to the principle of sincere cooperation. Accordingly, member states should uphold or at least refrain from contradicting the EU's agreed-upon common stance. In this regard, the fact that such a common position was agreed upon in Brussels behind closed doors and the lack of transparency that accompanied this make it difficult to determine whether any actual internal coordination resulted from a mutual agreement among all member states (Melin 2019: 207). In any event, the sudden withdrawal from the GCM by some member states seems to have resulted in a violation of the principle of sincere cooperation. For instance, the decision of the Austrian government, which was then holding the EU Council Presidency to withhold its support to the GCM, caused harsh reactions and has been criticised for failing to fit into its leading institutional role. Although in the last phase of negotiations the Commission was officially acting only 'on behalf of 27 member states thereby excluding the position of Hungary' (Melin 2019: 203), the subsequent withdrawal of such a considerable number of EU member states had inevitably undermined the role of the Commission and made the EU lose its unity of representation before the GCM.

The UN Modalities Resolution also demanded the effective participation of parliaments (UNGA 2017: paras 6, 8, 30). In this sense, the European Parliament is a major human rights actor within the EU system, and has since 2000 been pushing for a more comprehensive and holistic approach to migration.[3] In 2014 the European Parliament adopted a resolution 'on the situation in the Mediterranean and the need for a holistic EU approach to migration' (EP 2014). Finally, with another resolution in April 2018, the EP took a strong public stance by openly and fully embracing the GCM, its objectives, commitments and follow-up mechanisms (EP 2018).

Finally, this part analyses the stance of Italy which, as in the case of most of the other leavers, demonstrated support for the GCM until a very late phase of the negotiation process. In September 2018 the Italian Prime Minister, Giuseppe Conte, delivered a speech before the UN General Assembly where he clearly expressed Italy's support to the GCM. However, only two months later, before the virulent opposition from his government's right-wing political party, Conte referred the decision concerning the GCM's endorsement to the Italian Parliament which eventually rejected it.

Italy's main arguments against the Compact include the alleged introduction of a human right to migrate; the lack of a clear distinction between regular and irregular migration and between refugees and migrants; the establishment of new obligations for states capable to undermine their national sovereignty; and the likely increase in migration flows the Compact's endorsement would purportedly cause. These arguments can easily be dismantled by only a cursory reading of the GCM's text. First, the Compact rests on existing international frameworks and human rights standards and due to its non-binding nature cannot

3 In 2000, during the drafting process of the EU's anti-smuggling legislation, the so-called Facilitators Package, the European Parliament affirmed that '[a] common immigration and asylum policy for the Member States can only be efficient if it is comprehensive and covers all essential means of obtaining admittance' (LIBE 2000).

create new obligations on states. Second, there is no such mention of a new right to migrate and of a state's duty to receive migrants. By contrast, the GCM explicitly upholds states' national sovereignty while determining their migration policies (UNGA 2018: para 15(c)). Moreover, as demonstrated above, the existence of two separate instruments dealing with refugees and migrants respectively clearly retains the traditional dichotomy between migrants and refugees.

The majority of the other leavers used arguments similar to those of Italy while justifying either their abstention or direct opposition to the Compact. The former Commission president, Jean-Claude Juncker, while commenting on the increasing number of EU member states abandoning the Compact, stated that 'those countries that decided they are leaving the UN migration compact, had they read it, they would not have done it. [This] gives you the idea that many people do not actually know what is in there' (Carrera 2018: 2). The UN Special Representative for International Migration, Louise Arbour, also harshly condemned the leavers' decision by affirming that this 'reflects very poorly on those who participated in negotiations … it's very disappointing to see that kind of reversal so shortly after a text was agreed upon' (Carrera 2018: 2).

2.4 Concluding remarks

It may be argued that the elaboration of the Global Compacts on Migration and Refugees led the international community to take important steps forward but, at the same time, this process also confirmed the reluctance of states to progressively address issues as delicate as migration and border management.

Overall, the crucial significance of the GCM lies in the acknowledgment of the causal link between climate change and the fact that people migrate out of their home countries due to its inhabitability. Despite its soft law nature, the GCM can still have a norm-filling and interpretative role, but most importantly it constitutes the first legal step to tackle the issue of climate change-related migration for the future. Also, a (timid) step towards the extension of protection to migrants other than refugees is remarkable from a human rights perspective.

It nevertheless remains unfortunate that the EU was not able to keep a united stance when upholding the Global Compact on Migration. While the UN Modalities Resolutions had pushed for the effective participation of parliaments, at the European level the European Parliament does not seem to have had a strong voice during the negotiations. Despite the European Parliament's open support for the GCM, eventually five EU member states abstained from voting (Austria, Bulgaria, Italy, Latvia and Romania), while three member states were firmly opposed to the GCM (Czech Republic, Hungary and Poland). Although it is not clear to what extent all EU member states could initially display their position around the GCM, the leavers' behaviour could allegedly result in the violation of the principle of sincere cooperation enshrined in the TFEU. Finally, considering the superficial and fatuous arguments on which the leavers justified their positions and the impelling need to globally and comprehensively address migration, the recalcitrance of member states is alarming and demonstrates their potential to undermine the effective impact of the GCM in Europe.

3 Migration and asylum in Southern Europe: Stuck between inter-governmental politics and European Union policy making

The controversial tension between the EU and its member states in relation to their position towards migration analysed in the previous part is also reflected in the EU's own migration policy. With the so-called 'migration crisis' of 2015, the Common European Asylum System (CEAS) proved obsolete in addressing the substantially changed nature of migration flows. Consequently, in the 2015 European Agenda on Migration, the European Commission highlighted the need to move from a system disproportionately affecting frontline member states and encouraging secondary movements towards a fairer system in order to ensure the equal sharing of responsibility (Tsirogianni 2018: 13).

Although the general perception is that the negotiations for the CEAS reform launched in 2016 have been deadlocked, five of the seven proposals at stake have reached the trilogue negotiations between the European Parliament and the Council (Pollet 2019). However, the inability to reach an agreement on the reform of the Dublin Regulation, particularly regarding the criteria for the identification of the EU member state responsible for examining an asylum application and provisions such as 'safe third country', border procedures and solidarity, keeps the whole EU asylum *acquis* blocked (Nicolosi 2019). Meanwhile, member states supported by the EU have focused on keeping migrants away from their borders by implementing externalisation policies through agreements with transit third countries (Frelick 2016: 206), stepping up border security and dismantling search and rescue (Fine 2019: 8).

In this vein, the June 2018 European Council was expected to be 'the last chance to resolve the deadlock on the solidarity chapter of the Commission's proposal for a Dublin IV Regulation' (ECRE 2018: 3) and finally have the package adopted before the May 2019 European Parliament elections. However, the meeting was overshadowed by the need to address the Italian government's refusal to allow the disembarkation of migrants and Malta's ban on non-governmental organisations (NGOs) to operate at sea (ECRE 2018: 4). Far from giving the final push for the CEAS reform, the Council proposed two new concepts, namely, 'controlled centres' and 'regional disembarkation platforms' (European Council 2018b: para 5), which represents 'a new addition to the externalisation 'toolkit' which will be analysed below.

This part addresses the most relevant developments that took place throughout 2018 in the field of EU migration and asylum policies that have been – and still are – the main obstacles to a move towards a common EU approach based on human rights, solidarity and accountability. The first part focuses on Search and Rescue and particularly on the implementation of policies aimed at criminalising search and rescue NGOs, restricting European search and rescue capacities and transferring search and rescue responsibilities to third countries. The second part critically examines further developments on externalisation policies adopted by the EU and its member states in order to limit the arrival of migrants and outsourcing their migration-related responsibilities. Finally, legal developments regarding the responsibility of the EU and member states are considered in light of recent case law and cases pending before regional and international courts.

3.1 The shrinking space of search and rescue in the Mediterranean

Search and rescue in the Central Mediterranean has for some time been a matter of dispute among Southern EU member states. The disagreement has mainly concerned the nature and scope of obligations under international maritime, refugee and human rights law and has primarily involved Italy and Malta, due to their different interpretations of the 'place of safety' concept and the overlap of their respective search and rescue regions (Trevisanut 2010). In recent years the changing geopolitical context and the increased inflow of migrants from the Mediterranean Sea have substantially transformed the framework in which search and rescue takes place (Cuttitta 2018).

The developments analysed below, namely, the criminalisation of search and rescue NGOs, the disengagement of the EU and its member states from search and rescue and the shifting of search and rescue responsibilities to Libya, have to be seen in the context of a 'broader strategy of *contained-mobility*', that is, aimed at 'deterring, limiting and filtering asylum seekers' movements at different stages of their various mobility trajectories' (Carrera 2019b: 9). In this regard, serious concerns have been raised about compliance by the EU and member states with their obligations under international law, the European Convention on Human Rights (European Convention), but also EU law and national constitutions.

A major turn concerning the search and rescue operational framework relates to the March 2018 Italian elections, which resulted in the leader of the far-right League party, Matteo Salvini, becoming Interior Minister. Salvini pledged to completely stop the inflow of migrants from the Central Mediterranean. A crucial component of his tactic was to ban search and rescue NGOs, accused (without evidence) of being complicit with smuggling networks,[4] from entering Italian territorial waters. The NGO-operated Aquarius vessel was the first to be affected by the resulting so-called 'closed ports' policy. After rescuing 629 migrants in distress at sea, on 10 June 2018 the Aquarius was denied entry into Italian territorial waters by Interior Minister Salvini, who argued that Malta should take responsibility (SOS Mediterranée 2018). The diplomatic and operational impasse resulted in the prolonged accommodation of the rescued persons on board of the vessel in international waters, which was only resolved when the Spanish government allowed disembarkation in Spain (Fernandez & Rubio 2018).

Several similar cases followed, often resulting in extra-EU treaties 'disembarkation and relocation arrangements', that is, inter-governmental agreements identifying a disembarkation port and a relocation scheme for the rescued migrants among EU member states participating on a voluntary basis (Carrera 2019b: 23-30). The European Commission and EU agencies, namely, Frontex and EASO, started to become directly involved in such arrangements since early 2019 by identifying member states willing to participate, facilitating inter-governmental dialogues and

4 Such allegations, instrumentally taken up by Italian and European political parties for electoral purposes, were initially made by the EU border agency Frontex (*Financial Times* 2016) and the Public Prosecutor of Catania, Carmelo Zuccaro (Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione 2017).

providing operational support at specific steps of relocation procedures (Council of the EU 2019; Carrera 2019b: 25-28).

Meanwhile, search and rescue NGOs have come under increased scrutiny by law enforcement authorities upon politically-driven ministerial orders (Ministero dell'Interno 2019),[5] often resulting in the seizure of vessels and the prosecution of shipmasters and NGOs' representatives on account of favouring illegal immigration and violating the prohibition of entering territorial waters (FRA 2019).[6]

The criminalisation of civil society actors involved in search and rescue was facilitated by the 2017 Italian government's imposition of a controversial non-legally binding 'code of conduct' upon all search and rescue NGOs operating in the Central Mediterranean (Ministero dell'Interno 2017). Such criminalisation reached a peak on 14 June 2019, when the Italian government adopted the so-called 'Security decree *bis*', introducing administrative fines from €10 000 to €50 000 for those NGOs' ship masters and ship owners who disregarded a prohibition on entering territorial waters (Art 2 DL n 53/2019). These developments, clearly at odds with the UN Declaration on Human Rights Defenders (UNGA 2016b), have raised serious concerns among humanitarian actors to the extent that in May 2019 five UN Special Procedures of the Human Rights Council sent a joint letter urging the Italian government to refrain from criminalising civil society organisations involved in search and rescue, to withdraw the criminalising decree and to respect their human rights obligations (OHCHR 2019).

The criminalisation of search and rescue NGOs, however, is not specific to Italy. Despite the lack of media attention, Spain and Greece have also adopted similar approaches. Spain, for instance, has stopped granting ship departure permits since January 2019 and threatened the Spanish NGO *Proactiva Open Arms* with a €900 000 fine (Fine 2019: 7). As for Greece, the European Court of Human Rights (European Court) is confronted with an opportunity 'to condemn the growing trend in Greece and Europe of criminalising solidarity' after the complete acquittal of the applicant, namely, the founder of the NGO Sea-Eye, by Greek courts who arbitrarily prosecuted him and exposed him to ten years' imprisonment, 'only to suspend his life-saving activities' (GLAN 2019).

In parallel to criminalising search and rescue NGOs, the EU and member states have increasingly disengaged from their search and rescue responsibilities. EUNAVFOR-MED Operation Sophia, a military operation launched in 2015 aimed at disrupting criminal smuggling and trafficking networks in the Central Mediterranean, has been increasingly scaled down, to the extent that in March 2019, despite a six-month extension of its mandate, it was deprived of its naval means and thus of its search and rescue capabilities (ECRE 2019). Similarly, the mandate of Frontex Joint Operation Themis, which replaced Operation Triton in 2018, was also redefined and limited to the Italian search and rescue regions, leaving the Maltese search and rescue regions uncovered (Frontex 2018).

5 One of the most recent ministerial orders concerned the *Mare Jonio* vessel, operated by the NGO *Mediterranea – Saving Humans* (Ministero dell'Interno 2019).

6 None of these prosecutions however have led to a conviction (EU Fundamental Rights Agency 2019).

Italian authorities, which since the 2013 Mare Nostrum operation had taken responsibility over search and rescue operations immediately off the Libyan territorial waters, have progressively transferred these responsibilities to Libyan authorities. This was possible thanks to the Italian and EU support to Libya aimed at preventing migrants from leaving the country, disingenuously presented as part of a 'migration management' strategy designed to prevent deaths at sea and countering smuggling networks.[7] The partnership with Libya has consisted of financial, material and operational support by both Italy and the EU, aimed at strengthening the capacities of the Libyan Coast Guard (Carrera 2019b: 18). Such support allowed the Libyan interim government to declare a Libyan search and rescue region, validated by the International Maritime Organisation (IMO) in June 2018 (Euronews 2018).

This policy is patently illegitimate as it triggers the violation of fundamental principles of international and human rights law, including most notably the principle of *non-refoulement*.[8] This policy in fact has translated into the practice of 'pull-backs', that is, the transfer of migrants rescued by the Libyan Coast Guard to migrants' detention centres in Libyan territory, where they have no access to asylum procedures and are held in inhumane conditions, with a well-documented risk of being subjected to serious violations of basic human rights, including torture, sexual violence, slavery and death (OHCHR and UNSMIL 2018).

Furthermore, the Libyan Coast Guard has reportedly adopted, within search and rescue operations, practices that violate international and human rights law, including intimidation and aggression (Cuttitta 2018). A major incident occurred on 6 November 2017, when both the Libyan Coast Guard and the NGO-operated Sea-Watch III vessel were involved in a search and rescue operation (SEA-watch). Witnessed by Italian navy helicopters that were flying over the area, the incident resulted in the drowning of more than 20 migrants and the 'pull-back' of 47 others, later detained in inhuman conditions and subjected to torture and sexual violence. A group of academics and NGOs filed an application against Italy to the European Court of Human Rights, based on evidence provided by a London-based forensic agency (GLAN 2018).[9] The GLAN-ASGI case is pending and may ultimately become a landmark ruling on the issue of state responsibility (see part 3.3.).

The case of Spain is also controversial. In order to limit search and rescue responsibility, Spain has cut off funds and human resources, and ceded more ground to Morocco by limiting Spanish search and rescue operations and promoting Moroccan authorities to operate in Spanish search and rescue areas, which raises serious human rights concerns among civil society (Neidhardt 2019: 10).

7 These policies in fact have resulted in an increase in deaths per arrivals, although deaths have diminished in absolute numbers (Carrera 2019b: 5-6).

8 The principle of *non-refoulement* is enshrined in multiple legal instruments, including most notably in the 1951 Convention Relating to the Status of Refugees (Art 33(1)), the European Convention (stemming from arts 2 and 3, as developed in the jurisprudence of the European Court), and the EU Charter of Fundamental Rights (art 19).

9 The case was brought to the European Court by the Global Legal Action Network (GLAN) and the Italian Association for Migration Legal Studies (ASGI).

The political and legal unsustainability of the situation led to exploring new solutions in the attempt to comply with search and rescue obligations, on the one hand, without overlooking border states' claims. With this aim, in early 2018 the EU started to explore two highly controversial concepts. The June 2018 European Council invited the Commission and the Council, in cooperation with third countries, the IOM and UNHCR, to work on a proposal about so-called 'regional disembarkation platforms' and 'controlled centres' (respectively centres based in third countries where migrants would be brought after being rescued at sea for the processing of protection claims, and institutionalised and expanded hot spots or, in other words, quasi-detention facilities in the territory of EU member states) (European Council 2018).

The idea of 'regional disembarkation platforms' has been widely criticised due to the impossibility of ensuring respect for international and EU law by the third countries concerned, including in particular the principle of *non-refoulement* and the access to asylum procedures (and reception conditions) that would meet the minimum legal standards. A joint communication issued by UN Special Procedures warned the EU that '[o]utsourcing responsibility of disembarkation to third countries … only increases the risk of *refoulement* and other human rights violations' (OHCHR 2018b: 2). The African Union (AU) itself has recently discouraged African states to cooperate with the EU on such a proposal, as this would result in the establishment of *de facto* detention centres (Carrera 2019b: 23; Boffey 2019).

'Controlled centres' in EU territory are extremely problematic also because they result in a further institutionalisation of arbitrary detention and other human rights abuses, in particular in light of the well-documented evidence of quasi-detention practices, the forced fingerprinting of individuals, the degrading reception conditions and discriminatory interviewing within the already functioning hot spots (ECRE 2016; Danish Refugee Council 2019). In the absence of a new regulation on relocation based on equal solidarity among member states, however, Southern European member states have given the assurance that they will not allow the establishment of 'controlled centres' within their territory (ECRE 2018a: 3).

In this controversial context, the 23 September 2019 informal summit between Italy, Malta, France and Germany has been seen as a 'milestone' in the controversy over search and rescue and disembarkation (Carrera 2019a: 3). The outcome was a non-binding joint declaration of intent, the Malta Declaration, on a 'controlled emergency procedure' which proposes 'an alternative place or port of safety for disembarking rescued migrants, different from the MS that would otherwise be responsible' (Carrera 2019a: 4), heavily challenging the criteria established by Dublin Regulation. Welcomed by some NGOs, the proposal has been strongly rejected by countries such as Spain and Greece.

3.2 The 'externalisation toolkit'

The developments regarding search and rescue and relocation accord with the outsourcing of responsibility regarding migration and asylum management the EU and its member states have in recent years been promoting. Externalisation policies consist of measures aimed at preventing migrants from entering EU member states' jurisdiction. They

are based on arrangements with allegedly 'safe' third countries aiming at strengthening their border control capacities, 'pulling back' persons intercepted at sea and readmitting migrants (both nationals and non-nationals) into their territory. By avoiding contact with migrants or by applying the 'safe third country' or 'first country of asylum' concepts (that is, by sending migrants back to third countries in which they allegedly can seek asylum, without fully examining their protection needs (ECRE 2017a: 1), EU member states try to avoid legal responsibility particularly with respect to asylum procedures.

The EU has actively promoted externalisation policies, including by adopting financial instruments and directly seeking political arrangements with third countries. The EU Emergency Trust Fund for Africa (EUTFA) has been largely utilised to enhance key African countries' border management capacities in order to contain departures towards Europe (European Commission 2018a). The 2016 EU-Turkey agreement, aimed at reducing irregular migrants' departures towards – and to facilitate their return from – Greece is presented as a model for 'good' migration management (European Council 2016a; European Council 2018). In 2017 the memorandum of understanding between Libya and Italy enhanced the Italian externalisation policy through the reinforcement of the Libyan Coast Guard's interception and 'pull-back' capacities, through economic, logistic and material support.

In 2018 this externalisation trend intensified. New fund packages and negotiation tables paved the way for future arrangements with third countries to contain migration flows and keep them far away from European borders, under EU blessing and support (European Commission 2019). According to the declaration of the Spanish government, Spain looks at the EU-Turkey model for shaping its further collaboration with Morocco, in order to strengthen Morocco's border controls (Aynaou 2018). Cooperation with Morocco is supported by the European Commission which confirmed that the 'EU has been laying the foundations for a close partnership with Morocco. In late 2018, it approved EUR 140 million in support in border management and budget support,' through the EUTFA (European Commission 2019: 5). The EU also welcomed Italy's cooperation with Libya and in May 2018 it allocated €46 million to support Libyan interdiction capacity (Moreno-Lax & Lemberg-Pederse 2019: 27; European Commission 2018b).

The declared aim of externalisation policies is to ease the burden on coastal states, allowing for more controlled access to Europe while reducing migrants' incentives to undertake dangerous travel. In this sense important results have been achieved, with an overall reduction in irregular border crossings and arrivals in EU. Illegal border crossing has diminished by 95 per cent from its peak in October 2015. The decrease in arrivals corresponded also to a drop in the number of people who died or disappeared while attempting the Mediterranean crossing (in 2018, 28 per cent lower than in 2017) (UNHCR 2019).[10] These results have been presented as a positive impact that externalisation policies have had on migration. Nonetheless, this could be a Pyrrhic victory. While the results on illegal arrivals appear astonishing, they may hide a different reality. The

10 The death rate decreased in absolute terms, but increased in relative terms. See n 8.

containment of migrants within third countries implies a serious compression of their human rights.

In 2018, with Resolution 2228, the Parliamentary Assembly of the Council of Europe (PACE) expressed concerns about externalisation policies because 'the countries concerned may not have equivalent human rights standards or legal instances to uphold them, whereas asylum seekers face difficulties in holding the European Union or individual states responsible for possible human rights violations'. (PACE 2018: para 6).

In fact, the EU-Turkey statement has raised widespread criticism. The PACE questioned Turkey's capacity to ensure adequate protection, effective access to asylum procedures and remedies against return decisions, and defined the return to Turkey of non-Syrian refugees as contrary to EU and international law (PACE 2016). Several NGOs and international organisations denounced that, following the agreement, the new political collaboration between Greece and Turkey resulted in systematic 'push-backs' from Greece to Turkey and illegitimate detentions (ECRE 2017b; HRW 2018). In 2018 the European Committee for the Prevention of Torture affirmed that '[t]he delegation received several consistent and credible allegations of informal forcible removals (push-backs) of foreign nationals by boat from Greece to Turkey at the Evros River border by masked Greek police and border guards or (para-)military commandos' (CPT 2018: 6).

Similarly, 'push-back' practices have been widely documented at the border between Spain and Morocco. In 2017 the European Court condemned Spain for illegal 'push-backs' (*ND & NT v Spain* 2017: para 122). Moreover, several NGOs raised concerns about authorities taking repressive measures to stop people from reaching Spain (ECRE 2019a).

European cooperation with Libya has also been widely criticised since the possibility to consider Libya a 'safe third country' faltered. In April 2018 the Office of the United Nations Commissioner for Human Rights denounced the inhuman conditions of Libyan detention centres for refugees (OHCHR 2018a). Conditions were confirmed by reports of the United Nations Support Mission in Libya and several NGOs. Apparently, the containment of migrants in third countries comes at the expense of human rights.

3.3 Shifting responsibilities

The principal effects and, arguably, aim of externalisation policies are getting responsibility away from EU member states, while maintaining control over migration management. In other words, member states carry out migration control by proxy (Moreno-Lax & Giuffré 2019: 85). Yet, in *Hirsi & Others v Italy* (2012) and, more recently, in *ND & NT v Spain* (2017), the European Court opened a breach in the scheme of externalisation of responsibility, ruling that states are accountable every time they exercise *de facto* control over migrants, even extraterritorially, regardless of political agreements they may have concluded with other states.

As a consequence, states are adjusting their practice accordingly. Enhancing third countries' border control and pull-back practices is aimed at preventing any contact with migrants that could lead to their

accountability. This is an interesting reading when looking at the multiple EU and Italian efforts to support the Libyan Coast Guard operationally. The European Council's remark whereby 'all vessels operating in the Mediterranean must … not obstruct operations of the Libyan Coastguard' is remarkable (European Council 2018: 1). Arguably, this aims at preventing the intervention of EU member states-flagged vessels from being an obstacle to contactless control over migration, especially when these vessels carry rescued persons to Europe (Maiani 2018). This could add a new perspective to the proposal of regional disembarkation platforms, which encourages EU member states-flagged vessels to disembark rescued people in third countries.

Moreover, consistent with the attempts to avoid any contact with migrants, the EU Parliament recently voted against a resolution on search and rescue in the Mediterranean which called on states 'to enhance proactive search and rescue operations by providing sufficient vessels equipment ... and personnel; ... to make use of all vessels able to assist [search and rescue operations] including NGOs; ... to maintain their ports open to NGOs' (EP 2019).

However, international law has some guarantees to prevent states from outsourcing their responsibility (Goodwin-Gill 2007: 34). As posited by Moreno-Lax and Giuffre, the wide support and the weight of the reciprocal commitments in place (involving economic, technical, logistical and political aspects) could lead to ground the state responsibility at least on articles 16 and 17 of the International Law Commission Draft Articles on State Responsibility (DASR), respectively, 'aid or assistance in the commission of an internationally wrongful act' and 'direction and control exercised over the commission of an internationally wrongful act' (Moreno-Lax & Giuffré 2019: 100-108).

The EU Fundamental Rights Agency itself affirmed that 'state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in conduct that violates international obligations' (FRA 2016: 2). Moreover, Moreno-Lax and Giuffré pointed out that under the European Convention states have obligations not to engage in actions that imperil human rights, including the prohibition for a state to enter into agreements with other states that conflict with its obligations under the Convention (Moreno-Lax & Giuffré 2019: 105). Thus, the eventual violation by the third country 'will be jointly attributable to the [third country] and the EU MS for their independent contribution to a single harmful outcome', in line with article 47 of DASR (Moreno-Lax & Giuffre 2019: 105).

An important decision against the externalisation of responsibilities could be provided by the European Court. As mentioned, in the landmark *Hirsi* judgment the Court extended the edges of states' accountability. With its decision in *ND & NT v Spain* it appears to be willing to take a strong stance on migration control (Pijnenburg 2018: 407). The Court now has a new opportunity to lead the way for a more extensive interpretation of state responsibility. In the aforementioned *GLAN-ASGI* case, brought before the Court in May 2018, Italy allegedly was responsible for a Libyan Coast Guard operation that occurred in November 2017, involving several human rights violations. Loredana Leo, a chief lawyer of ASGI, stated that '[f]or the first time, the question of the direct responsibility of the Italian state in the Libyan Coast Guard

interventions and in the *refoulement* carried out in Libya by the latter is raised before the ECtHR' (ECRE 2018b). If the Court should rule against Italy, and depending on the legal reasoning it adopts, a historical chapter on state responsibility could be written, with great potential to have an impact on externalisation policies altogether and to further the effectiveness of human rights protection.

Another factor worth considering is whether the EU itself could be held responsible for its key role in the development and implementation of externalisation policies. In this case, a new chapter could be opened for the Court of Justice of the European Union (CJUE), which would be called upon to decide on EU responsibility for its migration control policy. In the three cases *NF, NG and NM v European Council* (2017) the Court affirmed its lack of jurisdiction over the EU-Turkey deal, holding that the deal was attributable to the Heads of State and Government of the member states and not to the EU itself. However, the involvement and proactivity of the EU in pursuing and supporting externalisation arrangements with third countries could lead to different outcomes in the future.

Importantly, under the Rome Statute the International Criminal Court (ICC) has jurisdiction over states' practices that engage (even indirectly) in internationally wrongful acts and grave human rights violations. Based on this consideration, a group of academics in March 2018 called on the ICC Prosecutor to open *motu proprio* an investigation on the role of Italian authorities into crimes against humanity committed in Libya.[11] While the ICC has since 2011 been investigating crimes against humanity and war crimes committed in Libya, including against migrants, it has been pointed out that the complicity of European actors should also be part of the investigation, under penalty of the Court's being accused of bias and conducting selective prosecution (Mann 2018).

A team of international lawyers recently submitted a communication to the Office of the Prosecutor of the ICC concerning 'EU migration policies in the Central Mediterranean and Libya', arguing that the EU and its member states enacted a 'premeditated and intentional practice of non-assistance of migrant boats in distress at sea' (Branco 2019: para 32). It is further argued that the EU's 'externalisation of maritime and human rights obligations' constitutes 'a (failed) attempt to avoid exposure to these legal responsibilities' (Branco 2019: para 450). Notwithstanding the difficult challenge of identifying the high-level officials responsible for the alleged crimes, this communication is a good opportunity for the ICC to not only enhance its credibility and wash away the accusation of being biased, but also to end the impunity of Western actors for international crimes and further the effective protection of human rights.

3.4 Concluding remarks

As observed throughout the article, the recent developments regarding European asylum and migration policies show the intrinsic tension between the aspirations of unity and harmonisation of the EU's foreign policy and the claims of sovereignty by the member states, reluctant to cede control over their national borders.

11 See the statement by 29 academics on Italy seizing the rescue boat Open Arms, http://statewatch.org/news/2018/mar/open-arms-statement.pdf.

The inability of EU institutions to respond to the needs of countries with greater migratory pressure has resulted in the search for intergovernmental solutions such as *ad hoc* bilateral and multilateral agreements (both within and beyond the EU) that not only fall outside the EU asylum *acquis*, but some of them even raise questions about its compliance with EU law (EDA 2018).

However, one must avoid misunderstandings: The EU and its member states seem to have the same priority, namely, to discourage migrants from entering the EU by keeping migration flows far away from European borders and, in so doing, avoiding legal responsibility. This is clearly reflected in the confirmation *en bloc* of the externalisation measures so far taken by the European Council, which used the June 2018 meeting – and those following – to introduce new elements to the 'externalisation toolkit' instead of pushing for a comprehensive CEAS reform, thus avoiding 'a divisive debate on internal solidarity' (Maiani 2018).

Nonetheless, important changes can arise after the May 2019 European Parliament elections. Under the 'unfinished business rule', the new Parliament will decide whether to revive the CEAS reform and whether to keep it as a package or as individual proposals. Unfortunately, since 'strengthening external controls' and 'enhancing return policies' are the key messages of the 2019-2024 European Council Agenda (Bamberg 2019), it is difficult to be optimistic about a change in the policy trend.

4 Conclusion

Migration and asylum certainly represented one of the major issues affecting Europe throughout 2018. The international process leading to the Global Compact, considered a milestone for the protection of refugees and migrants, introduced two issues of great relevance: the need for the international community to urgently address the link between climate change and migration; and the need to overcome the traditional distinction between refugees and migrants acknowledging that they are similarly vulnerable and that both categories are entitled to protection under international human rights law. These issues have been particularly controversial during the Global Compact negotiations, generating tensions within the EU and between member states and EU institutions.

These tensions are also clearly reflected in the selected developments within the field of EU migration and asylum policies. The inability of EU institutions to solve the main obstacles preventing the establishment of a truly common EU approach based on equal solidarity and the member states' unwillingness to cede control over their national borders led to the adoption and implementation of externalisation policies aimed at avoiding legal responsibility for migrants at both the national and supranational levels.

In short, there is a clear gap between the legal and political spheres, and between international and national aspirations. At the universal level there is a legal trend towards a human rights-based approach to migration aimed at ensuring the effective protection of the human rights of all migrants regardless of their legal status. On the other hand, at the national (and European) level there is a political trend to address migration through an

increasingly securitarian and border-control approach, leading to a dramatic limitation of international protection.

Despite the general trend of closure towards migration, it appears that judicial institutions at national, EU and especially regional level (European Court) could play an important role in limiting attempts by the EU and member states to outsource their responsibilities, thus ensuring more effective human rights protection. Yet, judicial decisions cannot be the answer to complex political issues. Only a political process leading to a structural change in the approach to migration can provide a truly sustainable solution. The Global Compact may be a positive step in this direction.

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Selected developments in human rights and democratisation during 2018: Could it have been worse? Mixed messages around democracy and human rights in the Asia Pacific

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Abstract: *During 2018 the downward slide in human rights and democracy across the Asia Pacific region was slowed down, but not reversed. Many of the concerns gripping the region, such as the treatment of the Rohingya by the Myanmar state, the violence of the Duterte regime in the Philippines, and China's cavalier attitude towards rights, remained shocking but did not worsen. In a few areas human rights or democracy improved. One shining light is the Malaysian election where the heavily corrupt governing party, which had been in power since Malaysia's independence, was voted out. Even though the party controlled the media, manipulated the electoral system, and used a campaign of misinformation during the election, Malaysians bravely voted for a more democratic future. Across the region concerns have been raised about China's increasing economic, political and military influence, but at the same time others have praised the development it has enabled. Global trends, such as the #metoo movement, the global conference on climate change, and the Global Migration Compact have had an impact on the region, but not enough to declare the region to be positively embracing these developments. All these factors show that there is a mixed response to human rights and democracy: The existence of serious violations and disturbing trends means that the region remains in an epoch where authoritarianism holds sway. The actions of these governments are open to condemnation by civil society and the possibility of a change in opinion about these actions. However, there is little evidence that this will happen in the near future.*

Key words: *human rights; democratisation; Asia Pacific; Rohingya; Duterte regime; human rights in China; authoritarianism*

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1 Key issues

1.1 The Rohingya crisis

For the past four years the Rohingya crisis has continued to constitute one of the most significant systematic human rights violations in the region. Historically, there has been tension between the Myanmar state and the Rohingya minority living in Rakhine state in Western Myanmar, which is one of hundreds of ethnic, minority and indigenous groups in Myanmar. The Rohingyas have always lived in this area, although they share ethnic and religious similarities with neighbouring Bangladesh, and there has been a history of migration between Bangladesh and Rakhine state. Rohingyas face discrimination and threats of expulsion primarily from Buddhist Nationalists because of being Muslim. The military also has targeted this minority as a way of empowering the programme of 'Burmanisation', a policy to ensure that Myanmar's Buddhist, Bamar[1] majority maintains dominance (Burlie 2008).

Since the campaign of ethnic cleansing started in 2017, more than 730 000 Rohingya have been forced across the border to Bangladesh, escaping persecutions, killings, enforced disappearances, sexual violence and starvation. According to Human Rights Watch (2018a), the government did not allow independent investigators to access the conflict area and also punished local journalists for reporting on military abuses. Amnesty International (2018a) also stated that evidence demonstrates that the violence in Myanmar forms part of a well-planned, systematic attack by state forces. For most people fleeing ethnic cleansing Bangladesh is the destination, with over one million refugees currently in the country, although some move on, with populations of Rohingya in Malaysia, Saudi Arabia and Indonesia. While the exodus of Rohingya has slowed down from its peak in 2017, Rohingya in the Rakhine state continue to flee. Many find the conditions of their internment camps in Myanmar unliveable. The camps, apparently constructed to ensure the safety of the Rohingyas, do not provide basic living conditions.

The United Nations (UN) initiated a three-person[2] fact-finding mission on Myanmar in March 2017. Their report, released in September 2018, called for the prosecution of five leading military figures, calling their actions 'ethnic cleansing' occurring with 'genocide intent'.[3] The report detailed war crimes, crimes against humanity and systematic rape. With support from the UN Secretary-General, Antonio Guterres,[4] the UN Human Rights Council formed the UN Independent International Fact-Finding Mission on Myanmar to investigate violations and collect evidence resulting from the findings of the first mission. Throughout this process the Myanmar government has denied all accusations, claiming that the

1 Bamar (sometimes spelt Burman) are the largest ethnicity in Myanmar, making up approximately 68% of the population, and living along the Ayeyarwadi river and in cities such as Yangon and Mandalay.

2 The members were: Marzuki Darusman from Indonesia (who previous sat on bodies investigating Benazir Bhutto's assassination and war crimes in Sri Lanka), Ms. Radhika Coomaraswamy from Sri Lanka (who previously was the special rapporteur for violence against women), and Chris Sidoti from Australia (who was once on the Chair of the Australian Human Rights Commission).

3 See the fact finding report Para 84-87 (Human Rights Council 2018).

4 See in particular Secretary General (2018)

report did not reflect the reality on the ground. Aung San Suu Kyi, once seen as the hero of the democratic movement and a leading figure in the human rights movement, faced criticism from the international community, first for her failure to act, and later for her complicity in the denial of the atrocities. Her name has been removed from various awards and is no longer praised in civil society (Goldberg 2018). Facebook was widely criticised as the platform used to spread hate speech among the Buddhist Nationalists and supporters of the ethnic cleansing. As it is one of the few social media platforms to have Burmese script, it is extremely popular in Myanmar, and for many was their introduction to the internet. However, this group of early internet users had little experience in social media, and may not have had the skills to identify the many false claims made on this platform (Mozur 2018; BBC trending 2008). By the end of 2018 little had been achieved to address the situation. Myanmar claimed that it was willing to take back refugees, and around 2 000 people were reported to have returned, but this number is low given the one million refugees in neighbouring countries. UN investigations continue, but it is unlikely that the Myanmar military generals will face trial, as Security Council members such as China indicated that they do not support an International Criminal Court (ICC) investigation. These questions of accountability of the generals will be addressed in 2019.

1.2 China's influence in the region

China's influence regarding human rights in the region is threefold. China influences the human rights standards in countries it supports either politically or economically; it influences human rights processes at UN bodies by promoting its own views on human rights, and it influences how human rights violations are reported in its own country. These will be discussed in turn. First, China's economic and social development has for some enabled development, expanded economies, and increased opportunities for trade. China has replaced the often-disliked interventionist economic policies of the World Bank and the International Monetary Fund (IMF) with less restrictive access to loans. Furthermore, the large-scale infrastructure plan of the Belt and Road Initiative (BRI) is expected to boost the economy of lesser-developed countries, such as Pakistan, Sri Lanka and Laos PDR. On the other hand, critics are concerned that China's economic influence been accompanied by territorial expansion, particularly its claim over large parts of the South China Sea (which has been rejected by the Tribunal for the Convention of the Law of the Sea). The economic expansion may also influence politics in the region, for example by propping up undemocratic states or creating a 'new form of colonialism' as stated by Malaysian leader Mahathir Mohamed (ABC 2018). For South Asia, it is asked whether Chinese diplomacy on human rights affects the adoption of the internationally-accepted rights in the South Asian countries.

Second, at the UN China has in the past few years been developing its own theory of human rights. This was elaborated at the recent Universal Periodic Review (UPR) review of China in November 2018, where China explained its new 'concept and theoretical system of human rights with Chinese characteristics' which is the title of a section in the State Under Review report to the UPR process (Worden 2018; Sinopysis 2018). This occurs alongside rising concerns about China's practice of interfering in UN human rights activities, to the extent that a Human Rights Watch

report notes that the 'Chinese delegation's actions have been described as marred by bullying, harassment, and interference' (HRW 2018: 43). The Chinese 'characteristics' of human rights are the emphasis given to the right to development over civil and political rights, alongside the emphasis put on 'national characteristics', meaning that the state's interpretation of rights has priority over the universal interpretation. This 'theory' of human rights harks back to the Asian Values debate prominent in the 1990s, where leaders such as Singapore's Lee Quan Yew and Malaysia's Mahathir Mohammed espoused the view that Asian countries should comply with a different set of human rights, where duties to the community outweigh individual freedoms, and rights only come with obedience to authority. These views were widely rejected, particularly after the 1997 economic crisis which showed that the basis of development over rights relied purely on people's willingness to remain quiet while the economy grew; once there was an economic downturn people demanded participation in politics and held their leaders to account – what should have been very un-Asian values. The key elements of Asian Values have returned in China's version of human rights.

Third, China has to defend its human rights record at home with revelations about the Uyghur re-education camps, first by Human Rights Watch in September 2017 (HRW 2017), but later noted in numerous news and diplomatic reports during 2018. The Xinjiang Uighur Autonomous Region (XUAR) has had unrest and seen separatist movements from the Uyghur ethnic minority. As a response the Chinese government has accused Uyghurs of terrorism and being an 'evil cult'. This has resulted in police harassment, torture, arbitrary detention and imprisonment (HRW 2019a). A 'De-Extremification Regulation' has been enacted in the Autonomous Region, prohibiting a wide range of behaviours labelled 'extremist', such as spreading 'extremist thought', denigrating or refusing to watch public radio and television programmes, wearing burkas, having an 'abnormal' beard, resisting national policies, and reading publications containing 'extremist content' (Amnesty International 2018b). While it is difficult to determine the exact size and function of the camps, they are estimated to have between 100 000 and three million detainees, although the BBC reports around one million detainees (BBC 2018; Stewart 2019), and they are for the function of 're-education', especially by using the thoughts of Chinese leaders such as Xi Jingpin, swearing allegiance to China, and undergo self-criticism (Jiang 2018). However, people are mostly detained arbitrarily, with males targeted and families separated. China has denied any violations and claims that the camps are used for education to change potential terrorists' views and prepare them for re-entry into the community.

Another area of concern is China's control and use of technology. China continues to block social media sites such as Facebook (and its applications of Instagram and WhatsApp), but promotes the use of its own social media platforms, although there are questions about the privacy on these platforms. China has been widely criticised for its implementation of cybersecurity law which became effective in June 2018, making it obligatory for internet companies operating in China to censor users' content, and collecting a wide range of personal information through the WeChat which is by far the dominant messaging service (Amnesty International 2018b). China's use of data for surveillance over its population, and its export of this technology to other countries raise

concern. Chinese authorities also continue to harass and detain journalists who cover issues of human rights.

1.3 Ethnic and religious extremism

There are a number of hotspots of ethnic and religious extremism across the region. One of the largest is the government response to the Uyghurs in Xingjiang province in China, as noted above. In India, according to the US Commission for International Religious Freedom report, 'in 2018 religious freedom conditions in India continued a downward trend' (USCIRF 2019). The trend may be linked to the rise in Hindu nationalism, or what the report calls 'the growth of exclusionary extremist narratives' (USCIRF 2019). The government has engaged in attacks against religious minorities by directly or indirectly conducting abuses, killings and abductions, often for supposed 'forced conversions'. There have been cow protection mobs attacking Muslim diary, leather and beef businesses. In neighbouring Bangladesh, armed groups have targeted Shi'a Muslims. Blasphemy laws that carry the death penalty are used against minority groups in Pakistan. In several countries of Southeast Asia the protection of freedom of religion is also characterised by direct and indirect contributions to the violence by the state. Myanmar has the on-going conflict and abuse by security forces of the Rohingya Muslims, and religious minorities in Vietnam face widespread discrimination. Under such conditions, members of religious minorities were vulnerable and subjected to continuous attacks.

Indonesia specifically has witnessed infringements of freedom of religion through three interrelated activities: the tolerance of hate-speech; claims of blasphemy; and the destruction of places of worship. At least 22 people experienced prosecution under the blasphemy law since Widodo took power in 2014 (Pearson 2018). Aside from the case of Ahok – an ethnic Chinese, Christian former governor of Indonesia's capital who is a well-known victim of this law – numerous other cases have emerged. In August 2018 an ethnic Chinese, Buddhist woman, Meliana, was found guilty of blasphemy and was sentenced to 18 months' imprisonment by a North Sumatran court when she complained of the speaker volume of *adhan* (or the Islamic call to prayer) from a nearby mosque being too loud. The case sparked tension between Buddhists and Muslims in the region, triggering a riot that resulted in the burning down of Meliana's house, several *Vihara* (Buddhist monasteries) and Chinese temples. Some national leaders opposed her prosecution, but others who were well-represented by Zainut Tauhid Sa'adi (Deputy Chairperson of the Council of Indonesian *Ulama* in Jakarta) argued that Meliana used sarcastic words with a ridiculous tone which can be regarded as blasphemy towards Islam.

The case of Meliana demonstrates how minor or personal disputes can rapidly escalate due to the politicisation of religion, resulting in a dangerous fault line between minority and majority social groups. The confrontation was energised by (and resulted in) hoax and provocative messages spreading on social media. According to Suryadinata (2018), ethnic-religious friction between Muslims and non-Muslims, also between Chinese and non-Chinese, persists through the long-lasting social and economic gap between the two. While Muslims blamed the non-Muslims for growing wealthier at their expense, the Chinese and other non-Muslims remain unaware of the Muslim's deep-rooted antipathy towards

them. As the tensions persist, there are no initiatives for reliable channels for communication or negotiation between the groups. In December 2018 local communities in Purbayan Village Yogyakarta, where the majority of residents are Muslims, cut off and destroyed the cross-shaped headstone on a Christian grave in a public cemetery, arguing that the religious symbol was not allowed in the village. Claiming community consensus, local people stated that the dead can be buried without any Christian symbol and that that should be done at the edge of the cemetery, insisting that the centre would in the future be for Muslims only. While religious pluralism is acknowledged, it is not substantially embraced by local communities.

According to Human Rights Watch the Widodo government has failed to realise support for human rights into substantive and meaningful policy initiatives to address religious intolerance (HRW 2019b). An earlier Wahid Foundation report from a 2016 survey noted that numerous cases of violations against religious freedoms were also actively carried out by non-state actors (Wahid Foundation 2017). Religious minorities continued to experience intimidation from government-affiliated institutions and also faced various types of threats of violence from Muslim extremist groups, specifically the Islamic Defenders Front (FPI). The Asia-Pacific Centre for the Responsibility to Protect stated that the most compelling risk in Indonesia was the potential of communal violence between religious minorities and the majority Muslim population (APCR2P 2018). However, the government tends to rely on short-term solutions rather than confronting a deeper, on-going low-level sectarian violence that divides Indonesia.

1.4 #metoo in the region

For many countries in the world the #metoo movement led to the fall of celebrities and the increased concern about women's safety from harassment and sexual violence. The response in the Asia Pacific was more muted. China's #metoo movement gained momentum as prominent academics, journalists and activists were accused on social media of sexual misconduct (Repnikova & Zhou 2018). The movement, as most social movements in China, had to proceed with caution; feminist leaders of a similar movement only three years before were detained before being released on bail, all for claiming an end to sexual harassment (Zheng 2017). China is now considering introducing measures to tackle sexual harassment in the workplace through a draft civil code, which is set to be completed by the end of 2020 (Nathani 2018). However, in neighbouring Japan there were far fewer success stories. This is not because women are better protected, as the scandal over entrance to the top medical college shows that sexism is institutionally ingrained in even the most prominent social institutions. The Tokyo Medical University admitted that for over a decade it had manipulated women's scores to prevent them from gaining entrance, which was soon followed by admissions to two other universities. Experts had suspected that this was the case as only about 30 per cent of enrolments were for women, a number that had curiously not changed even though more women were taking the examinations. The excuses given reflect the deeply-ingrained patriarchal attitude of the education officials: Women were more likely to leave to have families, or because women matured earlier it was making the examination unfair for the less biologically-developed males (Haynes 2018). A similar issue is

found in Myanmar, where the entrance score for medical college depends on gender: Women applicants must score higher marks (Soe 2014).

The #metoo movement did have knock-on effects throughout the region with women in South Korea, Thailand, the Philippines and India initiating social movements, although with limited impact. Each of these countries faces a deeply-entrenched male culture of control. This is obvious in the Philippines where the leader, President Rodrigo Duterte, is known for his sexist comments including rape jokes, cat-calling, and supporting violence against women. In Thailand the military junta oversees a government with the lowest participation of female politicians in the Southeast Asian region, and whose leader is known for sexist comments, including his statement that gender equality will lead to social deterioration and that a women's main purpose is giving birth (Coconuts 2016). India has done little to reduce the widespread violence against women, with a Thomson Reuters Foundation 2018 survey ranking it the most dangerous place in the world for women. Apart from women there has been few developments in rights on sexuality and gender identity. By the end of 2018 only Australia and New Zealand recognised same-sex marriage (although Taiwan was to recognise this right in early 2019). The Chinese government continues to disregard lesbian, gay, bisexual, transgender and intersex (LGBTI) rights, as was made evident by its appeal against the decision in April of the court of first instance ruling that the government's refusal to extend work benefits to the same-sex husband of a civil servant was discrimination based on sexual orientation. A later decision by the Court of Appeal, which ruled that the Immigration Department's refusal to grant a dependant visa to a same-sex civil partner of a foreign professional on a work visa was discriminatory, was also upheld (Amnesty International 2018).

1.5 Indigenous rights

Indigenous people in most parts of the world have been facing systemic discrimination and exclusion from economic and political power. This can be seen from complex threats to their survival such as land dispossession, oppression, as well appropriation of collective resources and knowledge (Bengwayan 2003). Even though there are various global efforts to overcome these discriminatory practices, oppression and marginalisation still occur. There is a lack of participation in decision making, and recognition of indigenous rights throughout the region. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international laws make available standards for indigenous people in Asia Pacific to demand national governments to recognise their rights to land and respect for their cultures and ways of life. The instruments provide a basis for legal protection for indigenous people and their land from global capitalism (Radcliffe 2019). However, as shown by cases in Asia Pacific, indigenous people struggle to enforce these rights on governments. It has been noted that the instruments often 'fit quite comfortably with – and was perhaps even facilitated by – neoliberal development models' (Engle 2011). In the Asia Pacific this situation is worsening with the expansion of state developmental projects and investments which demand large areas of land. In Indonesia the state has partially recognised indigenous rights to land, but only in a commercial sense with the establishment of tenured security to induce higher investments by connecting and integrating various extra-legal (or

informal) property systems with a formal legal property system. Between 2016 and 2018 Indonesia's central government handed over customary forests to 18 indigenous communities, and then launched the Complete Systematic Land Registration Programme, to formally register all land in Indonesia by 2025. Yet, the concern is that instead of protecting indigenous land, the formal registration opens this land up to be bought and sold, which may lead to indigenous lands being disposed from its indigenous owners.

In other parts of Asia indigenous people are threatened by the state seeking to expand direct control over land. In September 2018 an amendment to the Vacant, Fallow and Virgin (VFV) Lands Management Law was passed in Myanmar. According to this amendment, all people on VFV land have to apply for a permit by March 2019. Approximately one-thirds of land in Myanmar is regarded by the state as being vacant, fallow or virgin land, with most of this land being located in ethnic states. Civil society organisations in Myanmar see this law as problematic as it ignores the fact that many indigenous people have been using these 'vacant' lands under their traditional laws.

A 2018 report by UN Special Rapporteur on the Rights of Indigenous Peoples shows the increased use of physical violence and criminalisation against indigenous peoples (OHCHR 2018), practices that also take place in India and the Philippines. According to the report, there is criminalisation of indigenous leaders and community members who voice opposition to projects related to extractive industries, agri-business, infrastructure, hydro-electric dams and logging. This process often leads to 'the prohibition of indigenous traditional livelihoods and the arrest, detention, forced eviction and violations of other human rights of indigenous peoples' (OHCR 2018: 2). In the Philippines, for instance, one of the most prominent figures in the global movement for indigenous rights, Victoria Tauli-Corpuz, is included on a list of suspected terrorists by the government (Jacobson 2018). Recently, conservation projects have contributed to the worsening of indigenous human rights and many indigenous communities in Asia who rely on forests for their livelihood opposed conservation projects because the projects may convert their ancestral forests into protected areas. This can be seen, for instance, from the resistance of the Karen group in Tanintharyi Region, Myanmar, against the government's plan to establish a national park in their area in early 2018. The local communities say that the conservation plan would make it illegal for them to use forests within the designated area of the national park for their livelihood (Mon 2018). As the UN report states, 'indigenous people's ways of life and subsistence are deemed illegal or incompatible with conservation policies' (OHCR 2018: 2).

2 Democratisation

2.1 National elections: Malaysia

The victory of the opposition Pakatan Harapan (PH) coalition party in the Malaysia national election held in May was a brief moment of hope for democracy and human rights in the region. The incumbent Barisan Nasional (BN) coalition had held power in various forms since Malaysia's independence in 1955. More recently its leader, Prime Minister Najib

Razak, has been questioned for corruption mainly involving the state sovereign wealth fund, 1MBD. The details of the corruption emerged in the previous years, with between $4 to 5 billion taken from the 1MBD fund, and Razak himself having been found with $600 million in his personal bank account. Investigations into this fund were started in several countries, including the United States, Singapore and Switzerland. Regardless of these irregularities there was no investigation in Malaysia, and members of parliament, including the Attorney-General, who raised concerns were dismissed or replaced. Efforts were made to keep this news from the Malaysian public, with a compliant national media not reporting on this story, and critical news media was closed, censored or banned. In the run-up to the elections attempts were made to gerrymander the results with the BN having smaller seats, and the opposition PH party voters corralled into seats sometimes twice as large as the average BN seat (Leong & Rodzi 2018). Further complaints were lodged about the overseas votes not being counted, ballot stuffing, vote buying, and the delay of the election results. Nevertheless, the opposition party won its first election.

While this presents much hope for democracy in the region, there are caveats. The opposition party won in part because it has Mohammed Mahathir as its leader, giving a safe choice for conservative Muslim voters not to vote for BN for the first time. Mahathir is an architect of the one-party dominant system during his over 20 years as leader of the BN. Further, he cannot be claimed as a defender of rights and democracy because of his well-known socially-conservative values and opposition to human rights. This is seen in subsequent actions regarding human rights in Malaysia since the election. Soon after the election there were moves to ratify human rights treaties, with the government initially saying it would ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Rome Statute. However, both these moves have been halted, primarily because of a campaign of misinformation by the ousted political parties. Malaysia currently has policies that give preference to ethnic Malays in some areas of education, land ownership, and business that were threatened to be taken away if ICERD was ratified. Most of the claims about ICERD were untrue, but the effective social media campaign, street protests, and support from pro-Malay and Islamic groups were too effective and the ruling party pulled out of signing ICERD by late 2018, and had withdrawn from agreeing to join the ICC by early 2019.

2.2 Other elections across the region: Bangladesh, Maldives, Cambodia and Timor Leste

A disturbing trend in the region is the manipulation of the election process by authoritarian regimes as they attempt to maintain power through unfair elections. The cases of the Bangladesh and Maldives national elections demonstrate this. Bangladesh completed its eleventh general election in December 2018, where Sheikh Hasina from Awami League was elected Prime Minister, but under questionable circumstances. Her chief rival, Khaleda Zia, leader of Bangladesh National Party (BNP), was barred from contesting the elections because of a corruption conviction and the opposition alliance, the Jatiya Oikya Front (National Unity Front) was successful in securing only eight of the 300 seats up for election. The chief of Bangladesh Election Commission denied any irregularities during the election, although reports tell another story. The election soon turned

hostile with security forces arresting and intimidating opposition figures and dissenting voices. Members and supporters of opposition parties were arrested, killed or disappeared with reports indicating the involvement of the ruling party in some of these incidents. The motorcade of opposition politician Dr Kamal Hossain was attacked, and between 9 and 12 December, 47 incidents of violence were reported in which eight people were killed and 560 were injured (OHCHR 2018). Although the right to vote and a free press are essential to democracy, these were not evident during the Bangladesh election. The replacement of the Information Communication Technology Act by the Digital Security Act (DSA) in October created restrictions on freedom of expression and prohibited investigative journalism that could have prevented rigging during the election. The Rapid Action Battalion (RAB)[5] was tasked with monitoring social media for 'anti-state propaganda, rumours, fake news, and provocations' (HRW 2018c). The presence of election observers is important to ensure transparency. While they may not be able to stop the rigging of elections, they can point out existing irregularities. The Bangladesh government did not issue accreditations or visas within the timeframe necessary to conduct a credible international monitoring mission. Only seven of the 22 election non-governmental organisation (NGO) groups were approved to conduct domestic election observation (US Department of State 2018). The largest Asian independent election observing body ANFREL (Asian Network for Free Elections) terminated its decision to participate as observer because of significant delays in the accreditation approval by the Bangladesh Election Commission and visa approvals by the Ministry of Foreign Affairs (ANFREL 2018a). The 2018 elections marked the second lowest number of observers in two decades.

The 2018 Maldivian election took place among uncertainty and an unstable political landscape in the country, although there was 89,22 per cent voter turnout. Elections should give people a choice among candidates from various backgrounds, but this failed to materialise in the 2018 Maldivian election. In the run-up to the election, all opposition leaders were incarcerated through trials characterised as irregular and were barred from contesting in the election. This created obstacles to conduct fair and impartial elections since opposition candidates and parties did not have equal space and opportunity to access public facilities to organise their campaigns and political activities (Transparency Maldives 2019). ANFREL concluded that although the pre-election environment was systematically set up to favour the outgoing President, the issues observed on election day itself were not serious enough to impact the outcome of the election and called for an orderly transfer of power (ANFREL 2018b). The joint opposition candidate, Ibrahim Mohamed Solih, defeated then President Abdulla Yameen Abdul Gayoom by a wide margin in September 2018, but the outgoing President then attempted to sabotage the transfer of power. The outgoing President announced a state of emergency, suspending constitutional protections, banning public assemblies, and granting security forces sweeping powers to arrest and detain (HRW 2018d). These two examples of failed elections demonstrate the fragility of democracy in the region as entrenched interests attempt to maintain their power through manipulated election results.

5 The RAB is a paramilitary force implicated in serious human rights violations including extra-judicial killings and enforced disappearances.

National elections in several countries in Asia Pacific during 2018 show the strengthening of two phenomena: political violence and identity politics. In Cambodia political violence was intense during the election. The Cambodian government under Prime Minister Hun Sen arrested the leader of the main opposition party (Cambodia National Rescue Party/ CNRP) and dissolved it. Several political activists and the journalists who criticised Hun Sen were targeted for arrest and kidnapping. The government was also accused of involvement in four extra-judicial killings of activist and opposition members who challenged Hun Sen's leadership. This situation created fear and pressure among the Cambodian voters during the election. Without a genuine opposition, Cambodians were forced to vote for the ruling Cambodian People's Party (CPP). A HRW report details the extensive and systemic support of the military and police officers to mobilise votes for CPP in the election (HRW 2018b). As a result, CPP won all 125 National Assembly seats.

Another election in the Asia Pacific region took place in Timor Leste in 2018. Timor Leste conducted two elections within a year because the minority government of the 2017 election collapsed as the opposition thwarted the government's new budget proposal. In 2017 the Fretilin Party led by Prime Minister Alkatiri narrowly won a 0,2 per cent victory against the CNRT (National Congress for Timor Reconstruction), a party led by Xanana Gusmao. Timor Leste President Francisco 'Lu Olo' Guterres dissolved parliament in early 2018 and demanded another election. Xanana Gusmao's opposition coalition won the election. Even though the election was peaceful, there were cases of violence. Supporters of the Fretilin were in conflict with supporters of the AMP coalition party with 18 people injured and several vehicles burnt in violence in Baucau.

3 Update on regional bodies

3.1 Association of Southeast Asian Nations

Responses from ASEAN towards numerous crises and human rights violations in the region represent a weak and unreliable conflict resolution mechanism, known as 'constructive engagement'. While the responsible body in ASEAN, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009, and is known to have strong human rights advocates sitting as commissioners, it has yet to adopt significant and meaningful measures to solve the human rights crises throughout the region. There was a slight change in 2018 when ASEAN undertook its first activities: a visit to Myanmar and Bangladesh by an ASEAN delegation, and its humanitarian body, ASEAN humanitarian Assistance (AHA) was called upon to assist in repatriation. However, these measures were weak in comparison to the stronger response of individual members, most notably Malaysia and Indonesia (Tani 2018). This also reflected actions of AICHR, namely, strong responses from the Indonesian and Malaysia representatives, but no statements from the body itself. As in previous years, the norms of 'ASEAN way' have hampered the possibilities of member states to respond to human rights issues as the non-interference principle, which is rooted in the traditional concept of sovereignty, is not suitable to the current international and regional context, where AICHR has been active in working on the rights of persons with disabilities, and its thematic studies on legal aid, women affected by

natural disasters and juvenile justice. Studies and high-level meetings covered issues such as business and human rights, rights to water, and freedom of expression in the information age (AICHR 2018). AICHR also works alongside the Women and Children's Commission (ACWC) and the ASEAN Committee on Migrant Workers. While the ACWC remains an active body, the Committee on Migrant Workers, with only annual meetings, and quite divided support, has achieved little in its work over the past decade.

3.2 South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation (SAARC), the regional body for India and its neighbours, has not established a regional human rights mechanism. The principle of non-interference and the exclusion of contentious issues found in article 2 of the SAARC Charter is one reason why this has not been done. The lack of unanimity on the part of the SAARC nations to hold an already-deferred SAARC summit exhibits the lack of urgency by this body to address critical issues surrounding South Asia. SAARC last met in 2014, and is next scheduled to meet in 2020, after the 2016 meeting was boycotted by India and four other nations. While there have been meetings of SAARC administrative bodies, there have been no activities around human rights. However, SAARC is slightly more active in the field of terrorism, which has long been of crucial importance in the region given that South Asia has been the hub of Islamist extremism. Terrorism in South Asia by radical Muslims has replaced insurgencies as the primary security concern, and this occurs in the context of two nuclear powers, India and Pakistan. For more than 20 years SAARC has been known to work on peace keeping, border security and law enforcement issues since it adopted a Regional Convention on the Suppression of Terrorism that called for cooperation among its member states on extradition, evidence sharing, and other information exchanges. A SAARC Terrorists Offences Monitoring Desk (STOMD) was also established for monitoring the Convention. However, sensitivities challenge the co-operation. Although experts in the region agree that trans-border terrorism and organised crime cannot be controlled without regional co-operation, it is difficult to get agreement within SAAC on such a sensitive matter. For example, Maoist insurgents now operating across the region share many features with the Indian Maoist insurgents, the Naxalites. However, Maoists in Nepal sit in government while those still active in Central Indian tribal hills are called terrorists by the Indian Prime Minister and are 'the biggest threat to national security'.

3.3 Pacific Island Forum

The Pacific Island Forum is dominated by issues of climate change and development, and there is no body dedicated to human rights. However, on its agenda are activities on domestic violence and gender equality. The Pacific Islands nations are some of the last to ratify CEDAW, mainly because of misbeliefs around abortion and same-sex marriage, but also because of strong opposition from Christian religious groups who are politically strong in the region (WUNRN 2016). Many Pacific Island political and legal systems favour males, with Tonga, for instance, allocating a plot of land to all males over the age of 16, without any similar benefit for women (WUNRN 2016). Human rights are part of the PIF foreign policy, with its interest in human rights in West Papua a concern

noted in the Communiqué resulting from the forty-ninth forum of the PIF in Nauru in September 2018. This is the only time human rights were mentioned in the 2018 Forum.

4 United Nations update

A number of core human rights conventions were ratified across the Asia Pacific. Fiji ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Cultural, Economic and Social Rights (ICESCR), and the Marshall Islands ratified ICESCR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). While this demonstrates advancements towards the universal acceptance of human rights, two sub-regions of the Asia Pacific lag behind the rest of the world as far as treaty ratification is concerned: Southeast Asia and the Pacific Islands. For Southeast Asia, the response is mixed with some countries with a near total ratification record, but Malaysia, Singapore and Brunei DS have ratified only two or three core treaties. Across the 14 Pacific Island countries, only one, the Marshall Islands, has ratified more than 10 conventions including optional protocols, and four have ratified fewer than four conventions. A notable event was the protests in Malaysia on the ratification of the ICERD treaty, detailed above in part 3.1. In South Asia many human rights treaties relevant to the region remain non-ratified. Although Nepal sends many migrant workers abroad, it is yet to ratify the Migrant Workers Convention. Bangladesh with systematic problems with enforced disappearances and 'fake encounters' is yet to ratify the Convention for Protection of All Persons from Enforced Disappearances, while Bhutan, which is praised in the world community for its environment-friendly policy (and being the only carbon-negative country) still has not ratified ICCPR or ICESCR.

During 2018 there were periodic reviews for China, Bangladesh and Malaysia. The Chinese review was noted for its politicisation, with pro-China countries taking up much of the review time (Worden 2018), and the Chinese delegation rejecting criticisms as 'politically driven' (Kuo 2018). China supported 207 out of 284 recommendations (although it must be remembered that many recommending states were politically allied to China). The Bangladesh government accepted 167 of the 251 recommendations, although it refused to accept recommendations on the death penalty, LGBT rights and the ratification of treaties (*Dhaka Tribune* 2018; FIDH 2018). For the Asia Pacific the other significant events at the UN for the Asia Pacific were the findings of the fact-finding mission in Myanmar (described in part 1.1).

A number of important actions at the UN level occurred in 2018 in relation to migration and climate change. The Global Compact for Safe, Orderly and Regular Migration (GCM) was accepted on 10 December (Human Rights Day), and plans to implement the Paris Agreement on climate change (COP 24) were made in Poland on 15 December. The GCM did not receive universal support with five states voting against, and 12 abstaining (mainly from Europe), although the resolution passed with 164 states agreeing to the document. The trend is for governments to oppose migration, with some European states taking strong anti-immigration stances. It should be noted that from the Asia Pacific only

North Korea and Afghanistan did not vote. All countries supported the COP 24 document, but many important and difficult issues were left out of the agreement because of a lack of agreement between the participants (Carbon Brief 2018). Similarly, many states are not strongly committed to counter climate change and unwilling to make financial and policy commitments to reducing carbon emissions. In the Asia Pacific region there is strong support for countering climate change, with the Pacific Islands leading the advocacy. As the Pacific Small Island Developing States declared in their Statement before COP 24 (COP 23 Fiji 2018):

> We firmly believe that the COP24 … is a pivotal moment in human history. The world must take heed of the Intergovernmental Panel on Climate Change (IPCC) Special Report on the impacts of global warming … and take dramatic and urgent steps to decarbonise the global economy and assist those at the frontline of climate change impacts. Our future is at stake.

Even China was noted to have changed its position from recalcitrance to support of combating climate change (Hartzell 2019). It is somewhat reassuring that in these two important areas there is a support across the Asia Pacific. However, similar widespread support for human rights and democratisation is yet to be found. The region is willing to invest in problems that it sees as immediate and relevant, but not yet to put in place a longer-term infrastructure of human rights and the rule of law. The systemic problems of reduced political freedoms and discrimination are yet to be solved. While the year 2018 did not see the plummeting of rights that occurred in 2016 and 2017, there were no major reversals of human rights standards. Matters have not worsened, but they have also not improved.

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Child protection and EU cooperation between Eastern Partnership countries during 2018, with a focus on Armenia, Georgia and Ukraine

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Abstract: *This is a brief overview of progress and challenges in three Eastern Partnership (EaP) countries during 2018. The first part of the article analyses the commitments and obligations of three EaP countries under the international and regional frameworks, emphasising the relevant mechanisms and checks and balances. In this part the United Nations and Council of Europe mechanisms are considered. The cooperation framework between the European Union (EU) and the EaP countries is considered separately. Considering the fact that human rights protection has always been one of the key preconditions in developing political and economic cooperation between the EU and partner countries and the fact that the EU proclaims itself as a global actor, human rights and child protection are considered separate cooperation dimensions. In the second part the bilateral and multilateral cooperation with the EaP countries is categorised into three clauses. The clauses are built on the announced strategies and agendas of cooperation emphasising the slight deviations from the initial plans. Furthermore, the overview of selected achievements and perplexing challenges in human rights with the focus on child protection are described in Armenia, Georgia and Ukraine. Although some comparisons are drawn between the three countries, the contribution encourages the idea of considering each country individually bearing in mind the recent changes in political transformation both in domestic and international relations, economic declines and social transformations caused by the aftermath of the conflicts with Russia, as well as the advancements in fulfilling the bilateral agendas. The research shows that the announced targets and the EU's commitments and actions in developing national judiciary, human rights protection and social systems in Armenia, Georgia and Ukraine are slow. Nevertheless, the delayed achievements in human rights and child protection do not hinder the nature of cooperation between the EU and EaP countries, displaying the weak connection of human rights conditionality in the external policy of the EU with its neighbours.*

Key words: *human rights; child protection; European Union; Eastern Partnership; partnership clauses*

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1 Introduction

This article is built on three main questions: What are the challenges and what progress has been made during 2018 in the Eastern Partnership (EaP) countries, namely, Armenia, Georgia and Ukraine? What are the commitments of the European Union (EU) to human rights protection in these countries? What, more specifically, is its contribution to the field of child protection? The research objectives derive from the legal documents (partnership agreements, action plans and support frameworks concluded between the EU and Armenia, Georgia and Ukraine) and from the studies of children's rights conducted and evaluated by national and international non-governmental organisations (NGOs). The article considers the human rights commitments of the EU in general, and its interests, strategies and scope of engagement as a global actor in promotion and protection of children's rights. Furthermore, the landscape of child protection issues in the three countries is briefly elaborated upon, amplified by the EU's support in each country in that regard. The bilateral cooperation concluded between the EU and EaP countries is categorised on the basis of the country experiences with these partnership clauses, described here as 'muddling through' clauses, the 'outlier' clauses and the 'unconditional love' clauses. These agreements demonstrate that although a unified framework initially regulated the EU's cooperation with EaP countries, recent developments in respect of political, social and economic transformation in the three countries demanded an individual approach for each. Therefore, although some comparative analysis is undertaken, based on the Soviet legacy shared by Armenia, Georgia and Ukraine, the research is largely country-specific since there are relatively few similarities in the political systems and obligations derived from the international treaties to which the three countries are party.

2 International and regional frameworks on human rights and child protection

The international institution for the protection of children's rights constitutes a system of principles and norms that determines the rights and freedoms of children. It establishes the duties of states to secure and implement them, and also defines an array of international monitoring measures to secure proper implementation of the obligations under the treaties to which these states are party. Notwithstanding challenges such as poverty and a low level of development of states parties, their governments are obliged to create or reinforce the existing national or local judicial, institutional or systemic environment and to protect children against any form of exploitation and violence, abuse or harmful labour, and prevent children from being separated from their families against their will.

2.1 International standards

The Convention on the Rights of the Child (CRC) remains the most comprehensive international treaty on the rights of children, their protection and the corresponding obligations of state parties. The rights of the child may be categorised into three groups, namely (i) survival and development rights (for instance, parental guidance, survival and development, rights on registration, name, nationality, care, and

preservation of identity) (CRC arts 4-10, 14, 18, 20, 22-31); (ii) participation rights (CRC arts 12-15 on respect of the views of the child, freedom of expression, thought, conscience, religion and association); and (iii) protection rights. Article 4 of CRC provides that governments must undertake 'all appropriate measures' available at the state level for respect for, the protection and fulfilment of children's rights. 'All appropriate measures' in this regard are considered to be the social, legal, health and educational services, as well as the systems of their review and assessment, for implementing the minimum standards of child protection, further elaborated in the Optional Protocols to CRC.[1]

ILO Convention 182 of 1999 lists the 'worst forms of labour' such as slavery, the sale and trafficking of children, child prostitution and the recruitment of children into harmful activities such as drug dealing, the production of pornography, and compulsory enrolment as child soldier (ILO Convention 182: art 3). Sexual exploitation, child prostitution and pornography have been augmented in the Second Optional Protocol to CRC. This Protocol recognises the importance and promotes the implementation of the principles, commitment and the agenda for actions adopted at the World Congress against Commercial Sexual Exploitation of Children, held in 1996 (UNGA 2002). The ILO Convention condemns children's exploitation for remuneration, the transfer of organs, child prostitution and the engagement of children in forced labour (arts 2 & 3(c)).

The protection of the child's interests through family law is also provided for in the International Covenant on Civil and Political Rights (ICCPR). Among these clauses are limitations on a court to publicise proceedings concerning 'matrimonial disputes or the guardianship of the children' (art 14(1)); 'the respect for liberty of parents and legal guardians for undertaking religious and moral education' (art 18(4)); protection of children in case of divorce (art 23(4)); as well as the right of the child to be protected as 'a part of a family, society and the state', and to be 'registered at the time of birth and acquire nationality' (art 24). Other social rights of children are mentioned in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (arts 5(b), 9(2), 11 & 16).

Some non-legally-binding international standards for the protection of children from poverty, hunger and the provision of good health conditions and quality education are stipulated in the UN 2030 Agenda for Sustainable Development (UNGA 2015). The entitlement to do so, particularly financing aspects for development, was stated in the Addis Ababa Action Agenda (UN Addis Ababa Action Agenda 2015).

2.2 Council of Europe standards

Child protection is not considered a fundamental value of the Council of Europe (CoE), but instead is mentioned as one of the key areas of its work in its campaigns, projects and legal documents. The comprehensive

1 There are three Optional Protocols to the Convention: the Optional Protocol (1) on the Sale of Children, Child Prostitution and Child Pornography; (2) on the Involvement of Children in Armed Conflict; and (3) on the Communication Procedure. The latter has only 29 state parties whereas the first (173 countries) and the second (165 countries) protocols are more integrated.

approach to child protection standards is conveyed in the 1950 European Convention on Human Rights and Fundamental Freedoms (European Convention), which defines the human rights standards, freedoms and obligations of state parties. Most of the Convention provisions target the human being as a bearer of stipulated rights, thus adhering also to the rights and freedoms of children: the rights to respect private and family life; fair trial; liberty and security; prohibition of torture; and freedom of thought, conscience and religion. The European Convention establishes the European Court of Human Rights (European Court) as the only regional judicial remedy for individuals whose human rights have been violated. Based on its case law, the European Court made a distinction between 'procedural' and 'substantive' state obligations (Kombe 2007: 18).

The Convention mentions 'child', 'minor' or 'juvenile' only in three articles: deprivation of the liberty by detaining with the 'educational supervision or with the purpose to bring the minor in front of a competent legal authority' (art 51(d)); the 'right to a fair trial' defining the right of everyone to a fair and public hearing, pronouncing the judgment concerning juveniles is a limitation to the court art 6(1)). There is no specific provision on child protection in the ECHR, but it provides for the rights of general applicability such as the prohibition of slavery and forced labour, torture, rights to a fair trial and an effective remedy and other social and political rights.

The European Social Charter (Charter) was a revival of the social and protection rights and a contribution to the child protection framework within the Council. Among the contributions of the Charter, there are the rights to 'protection from sexual harassment in the workplace' and other forms of harassment (art 26); the right of workers with family responsibilities to 'equal opportunities and equal treatment' (art 27); and the right to 'protection against poverty and social inclusion' (art 30).

For the development of national strategies, the Council established Policy Guidelines on Integrated National Strategies for the Protection of Children from Violence (Council of Europe Policy Guidelines 2009). It proposes a holistic multidisciplinary and systematic framework to be adopted by member states to eradicate and respond to all acts of violence towards children. The third CoE strategy of 2016 on children's rights proposes a systematic and measurable approach based on the impact and outcome principle, evaluated once every three years. The CoE Strategy for the Rights of the Child (2016-2021) highlights five priority areas (Council of Europe Strategy for the Rights of the Child 2006): equal opportunities; participation of children; a life free from violence; child-friendly justice; and children's rights in the digital environment.

The CoE inherited the international principles on child protection mainly from the Universal Declaration of Human Rights (Universal Declaration) and CRC. The added value in the principles and standards are those relating to a more specific target group, for instance children as victims of domestic violence. However, the CoE contribution is paramount in proposing measures and tools for developing domestic and national mechanisms for child protection areas. Although the Convention and the Social Charter are legally binding, unlike the EU, the CoE lacks political conditionality, resulting in limits to its ability to efficiently and promptly leverage implementation and monitoring.

2.3 European Union standards

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in several clauses refer to human rights. Nevertheless, the Charter of Fundamental Rights of the European Union adopted by the proclamation of Nice European Council in 2000 is the main source of human rights within the EU. The Charter became binding after nine years with slight amendments brought about by the Lisbon Treaty. In 2000 the document was not perceived as part of the EU legal order; but was viewed as a catalogue of fundamental rights supplementing the *acquis* of the EU legal order. Article 6(1) of the TEU 'recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union' (EU 'Lisbon' 2016: art 6(1)) TEU). Article 6(2) links the Union with the European Convention within the competences of the EU stated in the Treaties (EU 'Lisbon' 2016: art 6(2) TEU).

Human rights as a principle of the EU was especially pivotal in the 2004 and 2007 enlargements, when the new member states that joined the EU were radically different from the conventional member states of the Community. Such a transformation of the EU with the normative convergence of post-Communist states was supposed to be safeguarded by various monitoring and observance tools harnessed by the European Commission. Respect for human rights later on became one of the key priority areas in multilateral and bilateral relations between the EU and its neighbours and partners.

The TEU, the TFEU and the Charter refer to the rights of children through general and specific aspects. Article 3(5) of the TEU mentions the protection of human rights, and particularly the rights of the child, among the EU's general goals to promote human rights values in relation to the wider world (EU 'Lisbon' 2016: art 3(1) TEU). In the TFEU, children are considered in the framework of the provisions devoted to citizenship (EU 'Lisbon' 2016: art 83(1) TEU), in measures to combat trafficking in women and children (EU 'Lisbon' 2016: art 79(2)(d) TEU), and in cross-border crimes (EU 'Lisbon' 2016: art 83(1) TEU). Only the Charter, in article 24 on 'The Right of the Child', refers to children as separate rights holders. It highlights the importance of deliberating the best interests of the child primarily in 'all actions related to children' (EU Charter 2016: art 24(2)), and considers the issue of the child's personal relations with parents, with certain limitations (EU Charter 2016: art 24(3)).

Three main documents, adopted by the EU, are important in operationalising child rights: the EU Strategy on the Rights of the Child (2006); the EU Agenda for the Rights of the Child (2011); and the EU Guidelines for the Promotion and Protection of the Rights of the Child (2007 and 2017). The last document suggests practical approaches for promoting, protecting and fulfilling children's rights in the EU's external actions. Among the operational tools, the EU promotes political dialogue, demarches, bi- and multi-lateral cooperation and partnership with international stakeholders to intensify coordination of concerted efforts in the field.

The UN Sustainable Development Goals 2030, a consequence of the refugee crisis of 2015 causing massive children's rights violations, coupled with the EU's commitment 'to leave no child behind' (EU Guidelines 2017: 3), fostered the EU's engagement in protection of children's rights. Particularly, in October 2016 the EU delegation to the UN announced, on behalf of the EU and its member states, that the EU was planning to become a major player in and contributor to the promotion and protection of the rights of children (EU Statement 2016). The Statement was followed by the updated EU Child Protection Guidelines, published in February 2017. The updated Guidelines intensify the rights-based approach and promote the concept of a 'system strengthening approach' (CRC General Comment 5).

3 The European Union human rights frameworks with European neighbourhood countries

One of the reasons for the EU not initially considering human rights its primary responsibility was the fact that a human rights-based regional organisation already existed in Europe. Human rights were considered as falling in the remit of the CoE rather than the EU, which instead was perceived as achieving political and economic objectives. Some member states such as Germany considered fundamental human rights as part of the 'general principles of community law', thus European Community law was not supposed to prevail over the fundamental guarantees of the German basic law (Craig & De Burca 2003: 269).

As mentioned, the culture of fundamental rights in the EU was adopted with the proclamation of the Charter of Fundamental Rights and the vitality of the Charter was affirmed in the law and policy making of the EU institutions. Although 'the Parliament, the Commission and the Council [should] jointly and formally recognise the existence of positive obligations to protect and promote human rights as a part of EU law' (European Commission 2012), there is no clear guidance about aligning domestic laws and policies with the Charter. Such an institutional guidance is provided by the European Union Agency for Fundamental Rights (FRA) and the European Ombudsman.

Within the bilateral track, cooperation in the field of human rights was enforced through particular instruments after the launch of the European Neighbourhood Policy (ENP) in 2004 and the Eastern Partnership in 2009.

With the extension of the ENP into the EaP of South Caucasus, the partner governments agreed on mentioning the priorities and setting the agenda in the Action Plans. The ENP includes conditionality, joint ownership, regional cooperation and deeper integration. The policy was based on the values and criteria suggested in 1993 to those willing to become member of the European Community. Both the European Neighbourhood Policy and the Copenhagen criteria restated the mandatory need of states to demonstrate political stability through institutions, guaranteeing democracy, the rule of law and human rights as prerequisites for joining the EC. The EaP is based on mutual commitment to the rule of law, good governance, respect for human rights, respect for

the protection of minorities and the principle of market economy and sustainable development.

The EU and its eastern neighbours cooperate through the establishment of multi- and bilateral tracks and various tools and projects. The bilateral track consists of Association Agreements (AA) and Deep and Comprehensive Free Trade Agreements (DCFTAs). The DCFTAs provide for convergence with the EU laws and standards of positive effects of the trade, investment liberalisation and energy security. The multilateral dimension added two more platforms, namely, (i) democracy, good governance and stability; and (ii) contact between people. Despite this framework, the question is whether the EU's political and economic interests in the region overshadows its commitment to human rights protection in the neighbourhood. Questions remain as the extent to which the EU remains vigilant to human rights advocacy in a context in which many other imperatives are at play. While the EU aims to achieve deeper and more comprehensive collaboration with EaP countries, the question arises why human rights are often neglected despite the framework for cooperation being so clearly based on human rights.

Part of the answer lies in the direct connection of these eastern countries with Russia. The EU's priority to forge a common bond based on mutual interest and stronger economic partnership with EaP countries has to a large extent overridden concern for human rights issues.

Regardless the universality of human rights promoted by UN throughout the world, the EU's interest and involvement in human rights protection is directly proportionate to the foreign policy of the countries. Over time, the European Council's agenda embraced more than economic unity, and shifted towards more political objectives. Human rights and democracy were for example included in the Common Foreign and Security Policy (CFSP). The Council's Resolution of November 1991 remains central in this policy area. It provides for financial resources to stimulate respect for human rights ('carrot'-provisions), and restrictive measures for the violation of human rights ('stick'-provisions). Different formulas have been adopted based on the communications of the Commission upon the agreements, differing from country to country in respect of the degree of harshness and flexibility. The following formulas are central while considering the EUs engagement with and interest in the human rights field of countries in this region: (i) 'democratic principle' clause – the list of concerns applied first to Latin American countries entailed the respect of democratic principles and human rights; (ii) 'essential element clause' – suggesting the insertion of a suspension mechanism with necessary legal bases provided by the Vienna Convention; (iii) the previously 'suspension' or 'Baltic clause' for suspending the agreement wholly or in part; and (iv) 'non-performance' or 'non-execution' clause.

These clauses were applied in relation to democratic and human rights principles to countries that are became members of the EU. The development of partnerships took the same path and entailed some of these clauses at the preliminary stage. Human rights protection was considered as a central issue with partners. However, in this article, the impact of three other clauses – the 'muddling through', 'outlier' and 'unconditional love' clauses – are also considered.

'Muddling through' clause: This kind of clause refers to the comprehensiveness and limitlessness of the EU partnership and foreign policy tools. Association agreements are the main legal tools to secure partnership with neighbours. Their content is quite comprehensive and is based on shared values and principles, in particular democracy, the rule of law, respect for human rights and fundamental freedoms, good governance market economy and sustainable development. As for the global strategy of the EU's foreign and security policy, it concentrates on security issues exercised in broader partnership, values, variety of stakeholders and partners involved. Conversion from partnering into a joint union, which supposes its participation in shaping agenda, represents the unit as a partnership both with states and individual units, private and civil sectors, as well as for the UN and other regional organisations. Such representation is possible if the understanding of values and goals of the unit are clear and admissible for the members of the unit themselves.

'Outlier' clause: These clauses mainly refer to EaP countries – Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Agreements with Belarus and Azerbaijan do not contain free trade agreements, as they are not members of the WTO. The main goals of these clauses are to accelerate political association and further economic integration between the EU and the EaP through DCFTAs as part of broader political AAs. The process was hampered by political crises. The EaP Summit in Vilnius in November 2013 was supposed to be the venue for signing AAs including the DCFT, with Ukraine, and for initiating similar agreements with Armenia, Georgia and Moldova. However, this attempt at EU penetration in the region provoked turmoil in the Kremlin. The Eurasian Customs Union (now the Eurasian Economic Union) was initially composed of Russia, Belarus and Kazakhstan, thus excluding Armenia, Georgia or Ukraine. In November 2013, facing strong Russian pressure, Ukrainian President Yanukovych decided to suspend preparations for the signing of the EU-Ukraine Association Agreement. In September 2013, Armenia decided to join the Russian-led initiative, thus declining the signing of its Association Agreement with the EU. In 2015, Armenia formally became part of the Eurasian Economic Union.

'Unconditional love' clause: One of the driving forces of the ENP launch was to resolve instability in the region and to provide an economic vision, for instance, for energy security the EU planned to open a direct route to Central Asia. Even if promoting European democratic values was quite central for the EU, it bent backwards to accommodate partners who were central to realise this vision. In some partnership countries such as Belarus and Azerbaijan, its 'unconditional love' appears from the dominance of the 'carrot' above the 'stick'-approach despite the existence of notable human rights violations.

With the EU's 'new response to a changing neighbourhood', the ENP countries were bound by the new approach. According to these commitments the EU will support building democracy to ensure the fulfilment of basic political, social and human rights, support inclusive economic development and the strengthening of more consistent regional initiatives in certain areas covering the EaP and the Southern

Mediterranean, as well as mechanisms and instruments for implementing these objectives.[2]

4 Child protection in Eastern Partnership countries

4.1 Armenia

Armenia ratified CRC in 1993. In 2005 Armenia ratified two Optional Protocols to CRC, namely, ILO Convention 182 and the Hague Convention on Protection of Children and the Cooperation in Respect of Intercountry Adoption. Among state obligations underlying in the treaties there is an obligation to amend legislation and policy towards the improvement of child protection in Armenia. In 1996 through the Law of the Republic of Armenia on Child's Rights,[3] Armenia adopted regulations pertaining to the public sector and determined the priority of the international law over domestic laws.

The Criminal Code envisages clauses related to the violation of certain standards of child protection, such as kidnapping (Armenian Criminal Code art 131(1)), any enrolment of the child into antisocial activities (Armenian Criminal Code art 166(1)), and child trafficking (Armenian Criminal Code art 168). There are certain discrepancies between the Law on the Child's Rights and the Criminal Code. For example, the Criminal Code provides for mitigated punishment in respect of children under 14 years of age (Armenian Criminal Code art 62(1)(4)), while the Law on the Child's Rights defines a 'child' as anyone under the age of 18. There is therefore some uncertainty about the punishment of persons 15 to 18 years old.

The Permanent Body in Parliament, the office of the Ombudsman and the Commission on the Protection of the Child's Rights are tasked with the implementation of relevant policies and laws. The Commission also secures the enrolment of the civil society representatives in the drafting and implementation of national policies.

The first Strategic Plan of 2004-2015 on the Protection of the Rights of the Child established a three-tier child protection system.[4] The system distributes obligations of the state into national, regional and community levels. However, the Government Decree determining the functions and obligations of authorities at each level, later superseded by another decree, does not provide solid grounds for efficient protection.[5]

2 EUR-Lex, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new repose to a changing Neighborhood/*COM/2011/0303 final*/, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0303 (last visited 1 April 2017).

3 National Assembly of Republic of Armenia, The Law of the Republic of Armenia on the Child's Rights, May 29, 1996, non-official translation, available at http://www.ombuds.am/resources/ombudsman/uploads/files/agreements/2d25331b2ad440a56d9e450a307813f3.pdf (last visited 30 March 2017).

4 Government of Republic of Armenia, Decree 1745 of 18 December 2003 on Adopting Child Protection National Plan of 2004-2015, Yerevan, 2003, Ch II, art 4.

5 Government of Republic of Armenia, Decree 1694 of 27 December 2012 on Protection of the Child Rights Strategic Plan of 2013-2016 and Approval of the Agenda of 2013-2016 Strategic Plan and Recognising the Decree N1745 of December 18 Invalid, Yerevan, 2012.

The absence of efficient data recruitment and database backup for children at risk or child cases by any of the institutions from three-tier protection constitutes another challenge.[6] The integrated social services, first launched in 2012 and extended in 2014, were considered to address the gaps in the previous systems. The system is defined 'as 'a complex of tasks (responsibilities) and events performed by state and local government bodies, organisations and individuals performed within the social support framework'.[7]

The Child Protection Strategy of 2017-2021 highlights the necessity of improved principles and criteria of providing alternative care (implementation and increase of fostering families), capacity-building events for social workers within the implementation of the integrated social service system.[8] It emphasises the necessity of enforcing the child protection system through a comprehensive child protection database, to create specialised services and mechanisms for preventing violence against children, operative and coordinated mechanisms for fulfilling the needs of child victims of armed conflicts, and children living in extremely difficult conditions and refugee children.[9]

Thus, although the legal framework and the systemic approach to the protection of the rights of the child are established, Armenia remains behind with the implementation of its announced strategy. According to the Child Labour National Study of 2016, among the interviewed 453 000 children of ages five to 17 years, 11,5 per cent were engaged in labour (52 000 children) and 9 per cent (39 300 children) were engaged in labour that posed physical, social and moral hazards to children.[10] According to the Child Protection Index 2016, compared to the eight other countries reviewed, Armenia performs well at the law and policy level, but has the lowest scores on the indicator of economic exploitation and violence against children.[11]

The Armenian Ombudsman in the 2018 *Ad Hoc* Public Report on the Status of Commitments under the CRC and Its Optional Protocols reviewed the implementation period from January 2013 to December 2017. It considers the need to review the Armenian strategy on child

6 Government of Republic of Armenia, Decree 1273 of the Government of the RA on Amendments in Decree 1694 of the Government of RA, Yerevan, November 2014, art 18.

7 RA, the Law of the RA on Social Support, adopted 17 December of 2014, Chapter 7 System of Social Support Services, Social Cooperation and Local Social Projects, Yerevan, 2014, art 33(1).

8 Government of Republic of Armenia, Draft of the RA Decree on Child Protection Strategy of 2017-2021 ad Action Plan of Child Protection Strategy 2017-2021, Ch VII, available at http://www.mlsa.am/forum/forum.php?sec=conference (last visited 30 March 2017).

9 Ch IX, art 30.

10 State Statistics Service of Republic of Armenia, Child Labour State Study 2015 12, available at http://www.armstat.am/file/doc/99499668.pdf (last visited 2 April 2017).

11 Child Protection Network (CPN) with the national coordination in nine countries evaluates the child protection systems to improve the protection and well-being of children. It is designed to encourage regional cooperation, stimulate better implementation of the UNCRC, and serve as a policy analysis tool for civil society governments and donors. Armenian Child Protection Network, Child Protection Index Armenia 2016, available at http://2016.childprotectionindex.org/country/armenia (last visited 15 February 2017).

protection and the effectiveness of its implementing mechanisms.[12] It found that there were no progress in health and education allocations since 2013, where the threshold on health was 1,5 per cent and 2,34 per cent of the gross domestic product (GDP) on education.[13]

Armenia announced the National Programme to attempt improving the quality of children's lives. The bold priorities are children who live in families; children who receive adequate health, education and protection services. However, in the process of creating such systems, 'even the services intended to secure equal rights and opportunities for children in difficult situations, are mostly guided by the needs rather than the best interest of children'.[14] Many of the strategic directions and approved child protection mechanisms have deficiencies and some of them, including the monitoring of child abuse in institutional settings, are not monitored effectively.

In the Annual Report of the Ombudsman,[15] the fact is highlighted that child poverty remains the reason of institutionalisation. This is considered to be a result of non-proportional coverage of the services. Restating the fact that community-based services have been improved, it indicates that 2 400 children remain institutionalised, even where the majority of these children have at least one parents. Among the negative issues mentioned in the report were child marriages and limited access to alternative services. Although the funds allocated to the improvement of children's lives as far as education, health care and legal protection are concerned remain limited, there still is a need for improving the institutional capacities of child protection bodies.

The PCA between the EU (EC) and Armenia, signed in 1999, mentions respect of human rights as part of the Agreement.[16] It also envisages respect and promotion of human rights through political dialogue.[17] Although the language of the Action Plans is neutral and not explicit, in comparison with some fields indicating certain measures of improvement, child protection, and generally the protection of the rights of the child, is mentioned in a broad formulation.[18]

12 *Ad Hoc* Public Report, Armenia: Status of Commitments under the Convention on the Rights of the Child and Its Optional Protocols, 2018, Yerevan 9-10, available at www.ombuds.am (last visited 15 February 2017).

13 *Ad Hoc* Public Report (n 12) 13. In 2018 to 2020 Medium-Term Public Expenditure Framework the fields will be reduced to 1,06 per cent for health and 1,85 per cent for education.

14 *Ad Hoc* Public Report 24.

15 Annual Communiqué on the Activities of the Human Rights Defender of the Republic of Armenia and the State of Protection of human rights and Freedoms during the Year 2017, Yerevan, 2018, available at http://www.ombuds.am/resources/ombudsman/uploads/files/publications/b738f4eb767ab62bedef29f766fa9ea0.pdf (last visited 15 February 2017).

16 European Communities 'Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part', Official Journal of the European Communities L 239/3, 9.9.1999, art 2.

17 European Communities (n 16) art 5 para 3.

18 European Communities (n 16) Priority Area 3.

The only programme reported in 2018, entitled 'EU4Citizens', which focused on the support in human rights, was the organisation of National Assembly elections and the improvements of respect for fundamental rights.[19]

Another cornerstone in the EU cooperation with Armenia was put in place with the launch of the Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia (CEPA) in 2017. In the Agreement the general provisions and principles commit the parties to work on the improvement of the human rights situation in Armenia. In this regard the explicitly mentioned targets are 'the rights of persons belonging to minorities'. The only area where children were mentioned as a specific target group is respect of the development of judiciary cooperation in civil and commercial matters.[20]

Armenia is the only country in the EaP to which a tailor-made agreement was offered, in the aftermath of its sudden membership to the Eurasian Economic Union. Considering the fact that the old government (the Republican Party) chose the Eurasian vector of external economy preference and that the new government has not yet positioned any changes in external policies, the EU remains loyal to its announced commitments within EaP. In this regard, Armenia stopped belonging to the 'outlier clause' category country. The discrepancy between the political dynamics in Armenia and the EU's reluctance of cooperation with the neighbours of this category, come to prove that the outlier clause does not support the EU's aspirations of becoming a global power. The human rights agenda for the EU and Armenia has not contributed much in the field of child protection. However, the CEPA agreement includes provisions that may inspire future changes.

4.2 Georgia

Georgia ratified CRC in 1994, and its two Optional Protocols in 2005 and 2010. Moreover, by ratifying the Vienna Convention on the Law of Treaties, Georgia undertook to give priority to international law over any conflicting national legislation. CRC principles have also been fully incorporated into national law.[21] Although there is no comprehensive data on Georgian court decisions, studies show that courts have on occasion explicitly referred to the principle of the 'best interests of the child', as contained in the CRC.[22]

Among the child protection documents, Georgia has a separate Law on Juvenile Justice Code. Moreover, in February 2019 the draft Code on the Rights of the Child was presented to the public to invite discussions on its content. The Law covers all the rights and freedoms of the child, describe the mechanisms of their protection and implementation, target the equity

19 Commission Implementing Decision of 26 November 2018 on annual programme in favour of the Republic of Armenia for 2018 (6) 2.

20 Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia in 2017, art 20.

21 Law of Georgia on International Treaties, art 6, available at https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=33442 (last visited 10 March 2019).

22 (CRIN), Access to Justice for Children: Georgia, January 2015, available at https://archive.crin.org/sites/default/files/georgia_access_to_justice_0.pdf (last visited 10 March 2019).

gaps in the realisation of their rights and strengthens the public mechanisms of accountability in realising the full protection of children.[23] This draft was adopted to address the state's low score on the 2016 Child Protection Index, with a ranking in the ninth position among nine countries (Child Rights International Network 2015). Currently Georgia has neither a coordination mechanism between central and local government for monitoring and assessing policy implementation, nor a national-level consultation mechanism to engage civil society or children directly in respect of the policy development and implementation (Child Pact, World Vision, Child Protection Index: Georgia, Measuring the Fulfilment of the Child's Right).[24] No parliamentary body has as yet been created to assess and solve child protection issues. However, the significant role of the human rights defender is mentioned. Among the positive results, Georgia is one of the front-runners in foster care, with almost 64 per cent of children separated from their families living with foster care families.[25]

As determined by the Asian Development Bank, there are four major reasons of poverty in Georgia: 'lack of economic opportunity; isolation; insufficient skills, capabilities, and assets; income shocks due to health events or disasters' (Asian Development Bank, Poverty Analysis: Georgia).[26] Poverty has a predominantly rural character (with 25 per cent of the rural population being poor), and has increased since 2003.[27]

Child poverty was reported to be one of the main issues since the war in Abkhazia and South Ossetia. After the deterioration of the Georgian economy in 2015 and 2016, the subsequent two years displayed significant progress. Although child poverty in the country is low, it has increased by 2 per cent between 2015 and 2017.[28] The welfare studies in Georgia show that children are more likely to be poorer than the general population or pensioners.[29]

Apart from the successful implementation of the Partnership and Cooperation Agreement, Georgia was ahead of Ukraine in concluding the Association Agreement with the EU in June 2014. Apart from the general statements and commitments of Georgia for the betterment of democracy, the rule of law and human rights, the Agreement stipulates the enforcement of the rights of persons belonging to minorities among its priority areas.[30] The effective abolition of child labour,[31] the

23 UNICEF Georgia The Draft Code on the Rights of the Child presented to the public in Georgia, available at https://www.unicef.org/georgia/press-releases/draft-code-rights-child-presented-public-georgia (last visited 10 March 2019).

24 Child Pact, World Vision, Child Protection Index: Georgia, Measuring the Fulfilment of the Child's Rights, available at http://www.childpact.org/wp-content/uploads/2015/06/Child-Protection-Index-Georgia.pdf (last visited 10 March 2019).

25 Child Pact, World Vision, Child Protection Index (n 24) 15.

26 Asian Development Bank, Poverty Analysis: Georgia, available at https://www.adb.org/sites/default/files/linked-documents/cps-geo-2014-2018-pa.pdf (last visited 10 March 2019).

27 As above.

28 'The share of households and the population below the relative poverty line increased from 20,7% to 22,5% and from 23,1% to 31,6%. The percentage of children living in poor households increased from 26,8% to 31,6%. UNICEF Analysis of the Georgia Welfare Mentoring Survey Data, 2017, available at https://www.unicef.org/georgia/reports/wellbeing-children-and-their-families-georgia-fifth-stage-2017 (last visited 10 February 2019).

29 UNICEF (n 28) 134.

modernisation of education[32] and judicial cooperation for protection of children[33] are inseparable parts of the Agreement. Some of these areas were also stipulated in the Action Plan of Georgia, including the commitment to reduce child poverty through social security reforms and full implementation of international obligations related to child labour and abduction.

Moreover, the Association Agenda specified a special guidance in improving child protection in the country. In particular, the Agenda urges Georgia to address children's poverty, continue juvenile justice reforms, include child rights into the National Human Rights Strategy and Action Plan, as well as to provide adequate resources for the Public Defender for undertaking ombudsmen work for children and focus measures to protect children from all sorts of violence.

Human rights were one of the pivotal points mentioned in the Association Agreement Report of January 2019. Georgia was observed to have made significant progress in upgrading the national legislation with regard to the violence against women, fighting torture, inhuman and degrading treatments in detention facilities, and in country mechanisms related to the effective human rights protection in the breakaway region of Abkhazia and South Ossetia and bordering communities. The EU remains concerned about the infant mortality rate, which is significantly higher than in Europe. It also highlighted the high rates of children who live in poor families, unregulated child protection mechanisms, and the slow-down in deinstitutionalization processes (Association agreement between EU and Georgia p 9).[34]

As reported, human rights protection in Georgia was funded by EU MFA with the first instalment of €20 million (€15 million in loans and €5 million in grants) by the end of 2018 and a second earmarked for 2019.[35] The financial contributions of the EU for the improvement of human rights are also directed from the European Instrument for Democracy and Human Rights, as part of the European Neighbourhood Instrument. Georgia remains the only state among the EaP countries that has signed the DCFTA and was the first to benefit from the visa liberalisation decision of the EU. However, despite the fact that so far Georgia has been most responsive to the EU's agenda, it remains in the 'muddling through' phase. The EU has no further mechanisms of appreciating Georgia's progress in benchmarked areas, whereas the 'everything but membership' clause is still applicable for EaP countries.

Compared to Armenia and Ukraine, the cooperation between the EU and Georgia has gone further. The EU's contribution in human right reforms in the country is significant. However, the analysis of the county's human rights and child protection reforms are motivated more by

30 Association Agreement between EU and Georgia, art 3, Aims of Political Dialogue (h).
31 Association Agreement (n 30) art 229 para 2(c).
32 Association Agreement (n 30) art 359(b).
33 Association Agreement (n 30) art 21.
34 Association Agreement (n 30) 6.
35 EEAS Association Agreement Report 2019, Georgia, available at https://eeas.europa.eu/sites/eeas/files/2019_association_implementation_report_georgia.pdf (last visited 10 March 2019).

imperatives for domestic implementation than the EU's commitment to human rights and child protection.

4.3 Ukraine

Ukraine ratified the CRC in 1991. The CRC is incorporated into national law, is directly enforceable, and has a status superior to national law. Article 9 of the Constitution of Ukraine provides for the integration of an array of treaties into national legislation as mandated by the Parliament of Ukraine.[36] Among the key domestic legislation and regulations are the Civil Code and Family Code of Ukraine (which both entered into force in 2004, thereby implementing the conclusions and recommendation of the UNCRC), the Laws of Ukraine on Provision of Organisational and Legal Conditions for Social Protection of Orphans and Children without Parental Care, and on the Main Principles of Social Protection of Homeless Persons and Street Children adopted in 2005.

The judicial system of Ukraine also provides that a child of any age can report a criminal offence to an investigator or a prosecutor. Children are also allowed to appeal to the Human Rights Commission of the Ukrainian Parliament and request judicial review by the Constitutional Court (Child Rights International Network 2014). However, there are no family or children's courts in Ukraine, and disputes are handled by the local courts of general jurisdiction.

As of September 2015, there were 99 915 children living in 663 institutions in Ukraine. The data does not include the number of institutions and children in areas over which Russia and Ukraine have ongoing disputes (Hope and Homes for Children 2015). There are 33 types of institutions which are managed by three different public authorities: 38 infant homes that function under the Ministry of Health; 50 children's care homes that are managed by the Ministry of Social Policy; and 575 residential facilities of different types that are supervised by the Ministry of Education and Science of Ukraine (Hope and Homes for Children 2015: 9). Of these institutions, 45 per cent were established in the period from 1951 to 1970. Most of the buildings are located in remote and inaccessible parts of cities.

The National Human Rights Strategy of Ukraine of 2015-2020 highlights child protection as one of its strategic areas. The goals of the strategic area are 'to create a favourable environment for the upbringing, education and development of children and set up an efficient system of the rights of the child' and 'to improve state mechanisms of observing the right of the child'.[37] Highlights within the defined Action Plan are the enhancement of child protection systems (including the juvenile justice system, provision of temporary settlements); of institutions; of the living conditions of children in the family and special facilities; and to ensure the minimal standards of security and well-being of the child.[38]

36 The list includes the Optional Protocols to CRC, conventions of the Council of Europe and Hague Conferences, cooperation agreements with CIS member states and several others.

37 Decree of the President of Ukraine 501/2015 on Approval of the National Human Rights Strategy of Ukraine, August 2015 14.

38 As above.

The priority areas of the Ukrainian child protection policies have changed after the war with Russia, with the focus falling on the social rights of children in conflict situations. According to the available resources most of the children from the contact line regions lack access to education, availability of the health facilities and there are poor mechanisms for monitoring the management of child protection issues at grassroots level. Because of the high militarisation along the Eastern Ukrainian borders, children are being engaged in the military activities, with girls above the age of 14 years often engaged in sexual relations with the military, leading to child pregnancy and a high incidence in HIV infection.

After the erupted war in the Eastern Ukraine, the human rights monitoring missions monitored human rights violations in these regions. The periodic reports state that there are massive human rights violations in conflict-affected areas, emanating in civilian casualties and economic and social deprivation. According to the Office of the United Nations High Commissioner for Human Rights the human rights violations are on-going in the conflicting areas.[39] The report points out the violations of international humanitarian law, limitations of freedoms of opinion and expression, peaceful assembly and religion/belief. According to the findings of the report of 2018, 435 individuals were deported and forcibly removed from Crimea, among them 231 Ukrainian nationals. These people were considered foreigners under Russian Federation law.[40] The entry to the peninsula is limited to journalists. No specific cases concerning particularly children's rights in these areas are mentioned in the report. However, the civilians bearing the consequences of war have limited access to fair trials, the justice system and basic needs such as water facilities.[41] The evolved situation speaks loudly about the insecure environment that undermines the best interests of children. Children and their families continue to experience significant disruption to their daily lives after more than four years of regular conflict and clashes between government-controlled areas and non-government controlled areas.

In 2017 UNICEF Ukraine initiated Country Programme 2018-2022. The main areas of importance are the adolescent mobilisation, their participation in decision making and the attention to age-responsive healthcare services.[42] Social protection was included in the EU's Single Support Framework for Ukraine 2018-2020 on assisting the social protection 'for conflict affected communities, internally displaced persons in the context of the ongoing decentralisation reform'.[43]

The Association Agreement between the EU and Ukraine was signed in 2014. Among the aims of the agreement it is mentioned 'to enhance cooperation in the field of justice, freedom and security with the aim of reinforcing the rule of law and respect for human rights and fundamental

39 Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine 16 November 2018 to 15 February 2019, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf (last visited 10 April 2019).
40 OHCHR (n 40)(d)30.
41 OHCHR (n 40)(c)34.
42 UNICEF Annual Report 2017, Ukraine, available at https://www.unicef.org/about/annualreport/files/Ukraine_2017_COAR.pdf (last visited 10 February 2019).
43 UNICEF (n 43) 8.

freedoms'.[44] Among the narrower human rights cooperation directions, the main areas defined are the cooperation on migration, asylum and border management, cooperation in fighting terrorism, trafficking protection of personal data and other reforms concerning the betterment of the rule of law and justice system. The 2018 Report on Implementation of the Association Agreement between Ukraine and the EU assessed the implementation of the scheduled activities under the Agreement as having been performed at 52 per cent.[45]

In 2017 the EU Instrument for Democracy and Human Rights allocated approximately €25 million for five recurring 'human rights lots' of the period 2014-2017. These included the human rights of indigenous people, extra-judicial killings, labour rights and slavery, the rights of persons with disabilities and support to freedom of religion and belief. The announced priority areas under the 2018 call were human rights protection agencies. The three key areas announced were '(i) to enable human rights defenders at risk (individuals, groups and organisations) to carry out their work; (ii) to enhance temporary relocation and shelter capacities; and (iii) to strengthen the coordination and synergy with other actors'.[46]

The EU's 2017-2018 agenda to promote and fulfil human rights is quite extensive. In 2017 a-two-year project to support the Ukrainian administration for setting up an early intervention and rehabilitation for children with disabilities was launched, allocating €1,3 million. A significant number of projects have been directed to the war-affected areas and internally displaced people. Among these are projects of capacity building for human rights defenders in Ukraine and Crimea (€300k, 2018); supporting recovery and Sustainable Solutions for Internally Displace Persons and Conflict-Affected Population in Ukraine (with IOM, completed in June 2018, €4 million); strengthening the capacities of CSOs and other services for improved integration of internally displaced children, completed by February 2018, €280k) and several others.[47] The EU's allocation of funds and support to a human rights sector demonstrates the political feel, competence and available resources of the EU to intervene in the EaP regions in cases of demand and cooperation with the CSOs.

Ukraine plays a pivotal role in the EU's external policy and relations with Russia. However, the slow pace of reforms and of the fight against corrupt political systems, and low indicators of human rights protection, give more incentive for the EU to further liberalise visa regimes and expand economic partnerships. In this regard, Ukraine is an example of an 'unconditional love' clause.

44 Association Agreement between the European Union and its member states, of the one part, and Ukraine, of the other part, art 1, Objectives, 2(e) 2014.

45 Association Agreement Implementation Report 2018, available at http://www.3dcftas.eu/system/tdf/association-agreement-implementation-report-2018-english.pdf?file=1&type=node&id=552 (last visited 10 March 2019).

46 European Instrument for Democracy and Human Rights (EIDHR), Reviewing the European Union Human Rights Defenders Mechanism, Guidelines for grant applicants, Restricted Call for Proposals 2018.

47 EU delegation in Ukraine, Projects, available at https://eeas.europa.eu/delegations/ukraine/area/projects_en?page=3 (last visited 10 March 2019).

5 Conclusion

The selected achievements and perplexing issues arising during 2018 in three EaP countries demonstrate that the region is in need of developing better child protection policies. These countries should strive for the eradication of poverty among children and their families, to minimise the negative consequences of conflicts on the enjoyment of childhood, and to strengthen domestic child protection mechanisms. Since the establishment of the ENP and the launch of the EaP, the EU positioned itself to be another guarantor of human rights promotion, protection and fulfilment in Armenia, Georgia and Ukraine. Despite the enthusiasm and manifold cooperative endeavours within the EU, human rights and child protection remains left behind. The demonstrated backslides from the child rights agenda should be tackled within extensive investment. Above all, the cooperation of international and regional organisations should consolidate efforts to combat child rights violations in each of the countries.

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Association Agreement between EU and Georgia, 2015

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Recent developments in sub-Saharan Africa during 2018

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Abstract: *This article highlights selected developments in democracy and human rights in Africa during 2018. While highlighting the progress that Africa has made in relation to democracy in countries such as Ethiopia, Angola, South Africa and Sierra Leone, it demonstrates how the situations in Uganda, Cameroon and Togo continued to be an attack on democracy. It also explains how, despite the lack of focus on democracy in the African Continental Free Trade Agreement, this Agreement can lead to more democratic governance with respect for the rule of law in African countries. It then focuses on developments within the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. In 2018 these judicial and quasi-judicial human rights institutions have handed down decisions or adopted soft laws with a view to better protecting human rights across the continent.*

Key words: *democracy; human rights; African Commission on Human and Peoples' Rights; African Committee of Experts on the Rights and Welfare of the Child; African Court on Human and Peoples' Rights; communications*

1 Introduction

This article highlights selected developments regarding democracy and human rights in Africa in the year 2018. It first analyses accounts of progress, recession and stagnation concerning democracy at the African level. Second, it assesses developments within the judicial and human rights institutions of the African Union (AU), including the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The final part concludes the article.

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2 Democracy in Africa in 2018: Accounts of progress, recession and stagnation

On a continent comprising 55 countries a single, overarching story is unlikely to make much sense on any theme, much less on the contested concept and practice of democracy. In 2018, as before, the tale of democracy was mixed, with some countries on the continent witnessing gains, others recession and many stagnating. Freedom House (2019: 12) captures the diverse dynamics aptly, noting both 'historic openings' and 'creeping restrictions'. According to the rankings for sub-Saharan Africa, 18 per cent of the population live in countries that are categorised as 'free', 43 per cent in 'partly free' and 39 per cent in 'not free' countries.

This part provides a snippet of the most notable accounts of democratic progress and set-back on the continent during 2018. While the focus is on countries with significant movements in the democracy spectrum, it is also important to mention developments in some countries with critical implications. In particular, in May 2018 Mozambique amended its Constitution to implement a token of decentralisation of political powers with a view to responding to regionalised political preferences and to enable the end of intractable, long-running low-level conflict (Kössler 2018). These changes could enhance political inclusivity, participation and accountability. Tunisia's local elections in May 2018 returned almost half female local council members and more than 37 per cent youth members, thanks to a new election law (Mekki 2018). In July 2018 Zimbabwe for the first time in four decades held elections without long-time leader Robert Mugabe (Feldstein 2018). Burundian President Pierre Nkurunziza has pledged to step down at the end of his current term, guaranteeing a peaceful change of faces at the top (News24 2018), despite the adoption of a new Constitution that potentially allows him to again run for office. In contrast, in May 2018 President Azali Assoumani of Comoros orchestrated a constitutional amendment allowing him to run again and concentrating power in the national government and the presidency (Parmentier 2018). He was re-elected in a controversial election in July 2019 that saw leading opposition figures arrested. While the excitement often is focused on the obvious examples, these and similar developments contribute to or undermine the reach, inclusivity and consolidation of democracy, and therefore deserve continued mention.

2.1 Hopes for democratic progress

The year 2018 witnessed notable high-profile changes of leadership in many corners of the continent, from South Africa to Ethiopia and from Angola to Sierra Leone. According to Freedom House's 2018 Freedom in the World report, three of the six countries that recorded most progress in the world are from Africa (Angola, Ethiopia and The Gambia). These changes of faces in the highest political offices have sparked hope and momentum for democratic gains.

Perhaps the most dramatic account of political transition in 2018 occurred in Ethiopia. Following months of protests and intra-party power struggle, Hailemariam Desalegn resigned as Prime Minister in February 2018, and in April 2018 Parliament confirmed Abiy Ahmed as the replacement (TRT World 2018). The new Prime Minister ordered the release of political prisoners, recognised opposition groups as legitimate

political contenders, invited exiled politicians to the country and initiated a reform drive that has captured continental and global eyes. Abiy also appointed women to half of the cabinet positions, and saw the appointment of the first women president, chief justice and head of the National Electoral Board. Crucially, an advisory council was established under the office of the Attorney-General to reform laws critical to democratic dispensation, including the election law and the law establishing the Electoral Board, as well as laws governing civil society organisations (CSOs), the media and terrorism. The much-criticised CSO law has been replaced and a new law regulating the Electoral Board has been adopted. New election and media laws are also in the pipeline and are expected to be adopted before the next elections, planned for May 2020. In the meantime, new private printing and broadcasting media have mushroomed and prominent exiled media houses have established offices in the country. The Committee to Protect Journalists announced that at the end of 2018 Ethiopia had no journalists in prison, the first since 2004 (Dahir 2018). However, the ongoing transition has not been without hiccups and its success is far from certain. The loosening of government control has led to serious instances of breakdown of law and order, mob justice, inter-ethnic competition and conflict and large-scale internal displacement. This situation has led to the postponement of the national census and has prompted calls for the delay of the May 2020 elections, with unpredictable consequences for the country's democratic trajectory. The government of Abiy Ahmed must find ways of taming unprecedented levels of ethnic nationalism and mobilisation and re-establish its monopoly of violence to provide a stable basis for democratic transition.

Another country that has seen an unprecedented change of leadership is Angola. After 38 years in power, President Dos Santos stepped down in August 2017 and, in September 2018, resigned as head of the ruling party, People's Movement for the Liberation of Angola (MPLA). After taking power under largely low expectations, his replacement, President Joao Lourenco, has taken significant measures most notably against corruption and the dismantling of the extensive economic empire of the family of the former President, as well as in enhancing the level of judicial independence (Powell 2018). Progress in the overall democratic trajectory would require measures to ease systematic pressure and disadvantages on opposition groups, CSOs and the media.

While Ethiopia and Angola's status in Freedom House's democracy index remains 'not free', the two countries received specific mention as among the most improved in 2018.

After years of scandals involving corruption and mismanagement, President Jacob Zuma of South Africa was forced to resign from his position in February 2018. The ruling party, the African National Congress (ANC), orchestrated the transition, which (re)confirmed the capacity of constitutional and political institutions to manage the contested but largely orderly transition. Zuma's replacement, Cyril Ramaphosa, who has been beleaguered by a controversial political past, notably in connection with the killing of miners in Marikana in 2012, nevertheless is seen as a reformer (Jeffery 2019). In the April 2019 elections the ANC, with Ramaphosa as the flag-bearer, won a parliamentary majority. Parliament subsequently confirmed Ramaphosa as President (Al Jazeera 2019). An advance in South Africa's democratic

credentials would require significant introspection and the dismantling of the political culture, institutional environment and impunity that has allowed and enabled the thriving of high-level corruption.

While the transitions in the above three countries occurred within the same ruling parties, Sierra Leone witnessed the ascendance into power of the main opposition party (Al Jazeera 2018). President Ernest Bai Koroma was barred from running for President due to term limits. Despite reports of attempts to remove term limits, Koroma stepped down as constitutionally required. His party therefore had to nominate a replacement to run for the March 2018 presidential election. Samura Kamara was nominated as the flag-bearer of the ruling party but lost to the main opposition candidate Julius Maada Bio in a run-off election. The Sierra Leonean story affirms the importance of term limits in enhancing the chances of democratic transition and consolidation. Evidence suggests that the chances of victory of opposition groups are higher in cases where the incumbent President does not run for election (Posner & Young 2018). Term limits help to break the 'incumbency advantage' and provide opportunities for relatively free and fair elections and democratic transitions.

2.2 Democratic stagnation and recession

The signs of progress in some African countries have been accompanied by stagnation and recession in others, especially those under long-term incumbents.

Hopes for democratic transition in Uganda have been dashed following a constitutional amendment that removed age limits on presidential candidates to allow long-time incumbent President Yoweri Museveni to run unencumbered (Ssemogerere 2018). Museveni has ruled Uganda since 1986. In 2005 he orchestrated the removal of presidential term limits to enable him to run again. The latest amendment, which the courts have found compatible with the Constitution (Biryabarema 2019), implies that Museveni is likely to lead the country for the foreseeable future. The ease with which Museveni has deployed constitutional amendment procedures to undermine limits on the presidency demonstrates the need for stronger protection of certain vulnerable constitutional provisions (Abebe 2019). In combination with attacks on opposition hopefuls, notably musician-turned-politician Bob Wine, and restrictions on the media and CSOs, Uganda has effectively cemented its authoritarian reputation, as evidenced in the transition from 'partly free' to 'not free' in the Freedom House categorisation.

Another long-time ruler, Cameroon's Paul Biya, was declared the winner of the presidential elections in October 2018 (De Marie Heungoup 2019). The 86 year-old President is now serving his seventh term and has ruled the country since 1982. Despite his old age, there are no public talks of succession and the consequences of a sudden passing of the ageing President remain unpredictable. Biya's regime has successfully undermined opposition groups and independent voices, undermining any hopes for a democratic future. These challenges to democratic progress have exacerbated tensions arising from demands for self-determination from Cameroon's Anglophone regions. The inability of the political process and state institutions to resolve the tension has led to an intractable armed conflict and a brutal state crackdown on Anglophone regions. Cameroon's

long-term stability requires significant willingness and efforts to address the related twin problems of democratisation and a level of autonomy and inclusion for all groups.

Hopes for democratic progress have also faded in Togo, which since August 2017 has seen significant popular protests. The main protest demand has been an end to the rule of the Gnassingbé family, which has governed the country for decades. President Faure Gnassingbé took power following the passing of his father, the long-time leader Gnassingbé Eyadéma. Opposition groups have been seeking the reinstatement of the 1992 Constitution which imposed two term limits on the presidency and the stepping down of Faure Gnassingbé, as well as reforms to several critical institutions, including the electoral commission and constitutional court, as a precondition for free and fair elections (Bado 2019). Nevertheless, the Togolese government resisted these reforms and instead proposed constitutional reforms that could keep Faure Gnassingbé for at least two more terms. An initial attempt to enact these amendments failed in September 2017 as the ruling party could not garner the necessary parliamentary vote to avoid a referendum on the proposals. While the government indicated that a referendum would be held, this did not materialise. Following the mediation efforts of the Economic Community of West African States (ECOWAS), plans were made for institutional reforms and delayed elections. However, the necessary constitutional and institutional reforms were not enacted and opposition groups boycotted legislative elections organised in December 2018. Under pressure from ECOWAS, the government postponed the planned referendum on constitutional amendments. Nevertheless, the opposition boycott allowed the ruling party to achieve a landslide victory in the December elections giving it the required numbers to amend the Constitution without the need for a referendum. Indeed, in May 2019 Parliament overwhelmingly approved the amendments (*Daily Mail* 2019). Under the amendments Faure Gnassingbé can run for two more terms. The amendments also give full immunity to all ex-presidents and limit the term of parliamentarians to two six-year terms. The changes have provided a veneer of constitutional legitimacy and consolidated Togo's authoritarian regime.

2.3 The African Continental Free Trade Agreement and prospects for democratisation

Perhaps the most notable progress at the African level in 2018 was the adoption of the African Continental Free Trade Agreement (AfCFTA). Following the deposit of the required number of 22 ratifications, the Agreement entered into force in May 2019. As at June 2019, 24 countries have ratified and 52 of the 55 African countries have signed the Agreement. While the principal focus of the Agreement is the facilitation of trade in goods and services, it is likely to have implications for the rule of law, democracy (Fagbayibo 2019) and anti-corruption (Iheukwumere 2019) measures. Despite the lack of explicit reference to adherence to democratic norms in the Agreement, the successful implementation of cross-border trade requires confidence in the legal systems of each country. The existence of rule of law and anti-corruption measures are necessary for the equal treatment of businesses from across the continent. In the long term, rule of law measures could facilitate the conditions for democratic consolidation. Accordingly, the potential implications of the implementation of the Agreement to democratic consolidation requires

further engagement among policy makers, academics and research institutions.

3 Judicial and human rights institutions at the African Union level

The African Union (AU) has three judicial and human rights institutions, namely, the African Court, the African Commission and the African Children's Committee. This part elaborates on selected developments within each institution during 2018.

3.1 African Commission on Human and Peoples' Rights

Following the declaration of the AU Assembly in June 2016 regarding 2017-2026 as the Human and Peoples' Rights Decade in Africa, the period under review has seen a renewed commitment by a number of states towards fulfilling their obligations under the African Charter. The various measures undertaken by member states are due in part to the active role played by the African Commission as the premier organ in the promotion and protection of human rights in Africa. However, backsliding by several states and the ensuing rise of attacks on the Commission's independence underscore the still persistent gaps in its legal and administrative structure and its tenuous footing within the broader AU framework.

For the specific period under review, several crucial developments were identified as relating to the work of the African Commission. In its biannual Activity Reports for 2018, namely, the 44th and 45th Activity Reports, the African Commission highlighted various positive and negative developments concerning human rights in Africa. Specific areas of focus in this respect concern the ratification or lack thereof of international instruments by member states to the African Charter, the adoption of national laws as well as general state conduct. Additionally, the Commission often lists communications considered during these periods and publishes the contents of those decided on the merits or otherwise finalised.

As relates to its protective mandate, specifically the consideration of communications/complaints, during the period under review the African Commission was seized of 41 communications, issuing provisional measures in seven; declared around nine communications admissible and two inadmissible for non-exhaustion of domestic remedies, among other factors; and decided two communications on the merits.

Only one of the two communications decided on the merits, *Kwoyelo Thomas v Uganda*, was publicly available. The complainants alleged therein that the victim (Thomas Kwoyelo) was a child soldier, abducted by the Lord's Resistance Army (LRA) in 1987 in Northern Uganda. The complainants further alleged that in March 2009 the victim was shot and severely wounded on the battlefield in the Democratic Republic of the Congo (DRC). The victim was also allegedly abducted from a hospital while recovering from his injuries and held at a private residence in Uganda, where he was subjected to torture and inhumane treatment for three months, and denied access to legal representation and next of kin. In June 2009 and August 2010 the victim was charged with several offences under the Ugandan Penal Code and the Ugandan Geneva Conventions Act

of 1964 respectively. Consequently, the victim applied for amnesty under Uganda's 2000 Amnesty Act. The Ugandan Amnesty Commission declared that the victim was eligible for amnesty but Uganda's Director of Public Prosecutions (DPP) refused to issue an amnesty certificate. The matter was brought to the attention of the Ugandan Constitutional Court, which decided in favour of the victim declaring that he qualified for amnesty and called for the cessation of the trial against the victim.

In response, the Ugandan government filed two applications with the Supreme Court seeking an interim order for the stay of execution of the consequential orders arising from the Constitutional Court's decision. Notwithstanding this, the International Criminal Division of the High Court of Uganda (ICD) proceeded to discontinue the victim's trial but Uganda refused to release the victim from detention. The High Court thereafter issued an order of *mandamus* to compel the Chairperson of the Amnesty Commission and the DPP to grant amnesty to the victim, to no avail. On 30 March 2012, the Supreme Court of Uganda stayed the execution of all consequential orders arising from the decision of the Constitutional Court. The complainants argued that the said decision of the Supreme Court had been adopted without reason and that the lack of quorum led to delays in finalising the appeal, thereby prolonging the victim's indefinite detention. Accordingly, the complainants alleged violations of the rights to equal protection before the law, non-discrimination, liberty and security of the person, as well as the right to be protected from torture, cruel, inhumane and degrading treatment as guaranteed in articles 2, 3, 4, 5, 6, 7(1)(a), (b), (d), 16 and 26 of the African Charter.

In its analysis, the African Commission observed that the victim had been captured while in active combat, during a non-international armed conflict, and thus the African Charter and the rules of international humanitarian law (IHL) would have concurrent application in the matter. The African Commission reasoned that in such instances it would only find violations on the African Charter but that the rules of IHL would serve as the standard for assessing the alleged violations. On the alleged violation of article 3, the African Commission observed that the victim was the only defendant before the Ugandan Amnesty Commission whose application had been rejected even though the amnesty requests of 24 000 other applicants had been granted. Additionally, the African Commission observed that Uganda's Amnesty Act provided blanket amnesty for those who 'renounced rebellion' notwithstanding the nature and seriousness of their crimes. Accordingly, the African Commission found a violation of article 3(2) of the African Charter due to Uganda's differential application of the Amnesty Act which, it claimed, occurred 'without any reasonable justification or explanation'. The African Commission also held that the state violated article 7(1)(a) and partially violated article 7(1)(d) of the African Charter due to the failure of the Supreme Court to provide reasons for staying the execution of the orders of the Constitutional Court and the unjustified delay in the hearing of the appeal before the Supreme Court. The African Commission found that the state had not violated articles 4, 5, 7(1)(b), (d), 16 and 26 of the African Charter as the complainant's claims therein were not reasonably established/supported.

Notably, the above communication is the first instance where the African Commission addressed the issue of amnesties in detail. The

African Commission in the section referenced as *obiter dictum* addressed the compatibility of the use of amnesty with the rights guaranteed in the African Charter. The Commission held that 'blanket or unconditional amnesties that prevent investigations … are not consistent with the provisions of the African Charter', particularly where perpetrators are alleged to have violated those serious crimes referred to in article 4(h) of the AU Constitutive Act. The African Commission's jurisprudence in this respect serves as an important normative development in the area of transitional justice. Additionally, the African Commission's decision to address in *obiter* a matter otherwise unrelated to the contentions between the parties provides an exciting avenue for the development of African human rights jurisprudence, specifically those issues that are rarely litigated.

3.1.1 Positive developments

As regards positive developments, the African Commission highlighted the ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) by South Sudan, Ethiopia and Tunisia as increasing the number of state parties to 42; the ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Older Persons Protocol) by the Kingdom of Lesotho; and the ratification of various United Nations (UN) instruments by state parties, including the Republic of The Gambia, which also deposited its declaration under article 34(6) of the Protocol to the African Charter on the Establishment of the African Court, enabling individuals and CSOs to directly refer matters to the Court.

Another aspect of the African Commission's work relates to the normative development of the law under the African Charter. The most important normative developments in the respective period were its adoption of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Security and Protection (Social Security Protocol); and the Study on Transitional Justice in Africa, which provides much-needed guidance to state parties on fulfilling their obligations under the African Charter during periods of transition. Additionally, the AU Assembly adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol) in January 2018. The two Protocols serve as landmark instruments and were developed in collaboration with the AU Commission. Indeed, the adoption of the Disability Rights Protocol illuminates an oft-misunderstood field of human rights while the Protocol on Social Protection, once adopted by the AU Assembly, will effectively contribute to extending coverage for the vast majority of people in Africa that are otherwise not covered by any social protection provisions. Disturbingly, however, the use of 'citizens' in the title of the Social Protection Protocol seems to exclude other classes of persons. Bearing in mind the often-deplorable conditions of non-citizens in African states, the seemingly restrictive application could have deleterious effects. However, pending adoption by the AU Assembly and subsequent publication of the Protocol, the nature and effect of the prospective qualification cannot be appropriately discussed.

With regard to national judgments and the adoption of national laws, the African Commission highlighted the abolition of the death penalty in Burkina Faso and the proposed abolition in The Gambia; the decriminalisation of abortion in Rwanda; the adoption of a law against racial discrimination in Tunisia; the decriminalisation of defamation in the Kingdom of Lesotho and Rwanda, including the enactment by Seychelles of the Access to Information Act; the promulgation of a new Mining Code by the DRC in March 2018; and the decision of the High Court of Kenya in April 2018 which held that the installation of the Device Management System on mobile phone platforms would breach privacy and consumer rights. The Commission also highlighted the peaceful presidential elections in Egypt, Liberia and Sierra Leone, including the publication of an election date in the DRC.

3.1.2 Areas of concern

The areas of concerns highlighted in the African Commission's Activity Reports were the continued non-ratification of its instruments, the low levels of state reporting under the African Charter and the African Women's Protocol and the sparse implementation of its decisions and recommendations on communications/complaints, provisional measures and letters of urgent appeal. Substantive issues included the rise in conflict-related violations in Cameroon, Mali, Somalia, Libya and other parts of the Sahel; the extension of the death penalty in Mauritania and its continued use in Botswana, Egypt, Nigeria, Somalia and Sudan; attacks on press freedom in Kenya, Benin, Gabon and Mali, including the persistent shutting down of the internet and social media in Ethiopia, Chad, Cameroon and the DRC. Other issues included the humanitarian crisis in refugee camps in Cameroon following the flow of refugees from Nigeria and Central African Republic; post-electoral protests following the recent presidential elections in Mali; xenophobic attacks in South Africa; and frequent reprisals against human rights defenders in the DRC and Egypt. Structurally, due to inadequate staffing the African Commission continues to struggle to implement its mandates, an issue that has less to do with inadequate finances and more to do with the sluggish recruitment processes at the AU Commission. Consequently, the African Commission has failed to recruit a single staff member under the Pan-African Programme (PANAF) notwithstanding funding from the European Union (EU) for this purpose. The African Commission has repeatedly requested autonomy in recruiting staff, to no avail.

Another pressing concern relates to recent questions surrounding the African Commission's independence following its withdrawal of observer status from the non-governmental organisation (NGO) Coalition of African Lesbians (CAL). The African Commission's decision was adopted pursuant to Executive Council Decision EX.CL/Dec1015(XXXIII) of June 2018 on the recommendations of the Joint Retreat of the Commission and the Permanent Representative Council (PRC) which reiterated previous requests by the Executive Council for the withdrawal of CAL's observer status. Notably, where previous Executive Council decisions had requested the same, the African Commission had responded by avowing that CAL's observer status was 'properly' obtained and that the African Commission was committed to protecting the rights in the African Charter 'without any discrimination because of status or other circumstances'. Following a backlash against the African Commission by AU policy organs over the

Commission's perceived recalcitrance, the latter was requested to hold a Joint Retreat with the PRC in June 2018 resulting in the above-referenced decision. Accordingly, during its 24th extraordinary session, the Commission adopted a decision on the withdrawal of the observer status granted to CAL and notified the latter thereafter.

3.2 African Court on Human and Peoples' Rights

The African Court is the continental court established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Its mandate is to complement the mandate of the African Commission and to monitor the implementation of the African Charter and other human rights documents ratified by African countries. In 2018 the African Court delivered 18 judgments. For the purposes of this article, the case of *the Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (*APDF & IHRDA v Mali*) is discussed since it is the first time that any institution at the AU level has made a decision on the provisions of the African Women's Protocol.

The complainants in this case, APDF and IHRDA, alleged that, measured through the lens of human rights instruments, the 2011 Malian Family Code has many defects. First, it reduces the minimum age of marriage for females to 16, while retaining 18 for males, with even an exception for a girl to be married at 15 contrary to article 2 of the African Children's Charter and article 6(b) of the African Women's Protocol. Second, the Code neither obliges religious ministers to obtain both parties' consent prior to their marriage nor requires the presence of both parties at the ceremony, which transgresses article 6(a) of the African Women's Protocol and articles 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Third, it recognises the application of Mali's Islamic law in matters of inheritance, which gives women and girls half of what men receive, contrary to article 21(2) of the African Women's Protocol. Fourth, the Code sanctions Islamic law in Mali, which takes the position that children born out of wedlock are only entitled to inheritance if their parents so desire, contrary to articles 3 and 4(1) of the African Children's Charter. Finally, the applicants claimed that by introducing the Code, Mali had failed to comply with its positive obligation in eliminating traditions and customs that are harmful towards women and children as provided under article 1(3) of the African Children's Charter, article 2(2) of the African Women's Protocol and article 5(a) of CEDAW.

Responding to the allegations, the government of Mali stressed that its laws must mirror the 'social, cultural and religious realities' in the country and argued that it would be ridiculous to adopt laws that would be difficult to execute. It also strengthened its argument by stating that the Code was flexible in that the testator is free to manage their inheritance in other ways, for instance, according to the Code rules or their will, above and beyond religious or customary law, if they wish to do so. It further contended that the discontent and strife that had halted the promulgation of the prior 2009 Family Code, which enshrined an 'equal share for men and women with the participation of the children born out of wedlock in the devolution of estate on the same footing as the legitimate child' had

created a situation of fear 'where it felt it was not able to provide greater rights to women and children in family matters'.

After hearing both sides of the debate, the Court adopted and sanctioned the allegations of the applicants entirely and pronounced that the Code had transgressed all the alleged treaty provisions. In doing so, it rejected Mali's justification concerning the flexibility of the Code, saying that 'the Family Code in Mali enshrines religious and customary law as the applicable regime in the absence of any other legal regime'. The Court also vetoed Mali's argument that 'the established rules must not eclipse social, cultural and religious realities' within the country, recalling Mali's commitments to eliminate discrimination against women and children irrespective of existing cultural and religious practices and beliefs. The Court then ordered the government of Mali to amend the Code, harmonise its law with the international treaties, and inform and educate its people as to the rights and obligations enshrined therein.

This decision of the Court is noteworthy not only for being the first pronouncement by the Court on women's and children's rights, but also for upholding the obligation of states to adopt legislation, policies and practical measures to eliminate discrimination against women and children irrespective of existing cultural and religious practices and beliefs. The judgment will also have positive implications for women and children in other African states that adopt Islamic law either partially or fully as their legal regime. Further, given that the Court's decision is binding, its willingness to rule on the African Children's Charter, irrespective of its connection to a right stipulated under the African Charter, has the potential to strengthen the effective implementation of the African Children's Charter, thereby contributing to the realisation of children's rights on the continent.

That said, given that in Mali earlier efforts to comply with the provisions of the family law with human rights standards caused large-scale civil unrest; and following the Court's judgment, the Muslim associations of Mali regarded the Court's decision as an outrage to Mali's social and religious values and called on citizens to 'take action to save the country from this danger'. The Court should open dialogue with Mali and other states as well as non-state actors to implement the decision without disturbing public order.

3.3 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee is the human rights organ of the AU that oversees the implementation of the rights and welfare of the child in Africa. This part focuses on developments within the African Children's Committee as it concerns communications, general comments and studies.

3.3.1 Communications

In terms of jurisprudence, the African Children's Committee becomes the first human rights monitoring body in the African human rights system to pronounce itself on the complicated issue of statelessness that arises in the process of state secession. The communication was submitted by two NGOs, the Centre of Justice and Peace Studies and People's Legal Aid

Centre (the complainants) on behalf of Ms Imam Hassan Benjamin against the government of the Sudan (*Iman v Sudan*).

Iman, who resides in Sudan, was born from a Sudanese mother, Hawa Ibrahim Abd al-Karim, and a South Sudanese father, Hasan Benjamin Daoud, in Alhasaheisa, a small town to the south of Khartoum. Upon completion of primary and secondary education, Ms Iman decided to apply for a university education. However, she could not do so as the university's enrolment rules required a person to have a national identity number, which she did not have. She then filed an application for a national identity card with Sudan's civil registration department. Her case was referred to the Aliens Persons department, stating that she no longer was a Sudanese citizen as her father's last name showed that he was from the Baria tribe, Yei district, what now is South Sudan, and that he would have become a South Sudanese national upon separation as per the 2011 amendments of the Sudan Nationality Act of 1994 which called for, among others, the automatic revocation of Sudanese nationality of those who *de facto or de jure* became citizens of the Republic of South Sudan with the effect that Sudanese nationality of a minor child would be rescinded when the nationality of one's 'responsible father' is revoked. The Act also proscribed dual nationality with South Sudan even though dual nationality with other countries is allowed.

The revocation of Ms Iman's Sudanese nationality occurred irrespective of the fact that her mother was Sudanese and her father, who had held Sudanese nationality and lived in Al-hasaheesa town of Sudan, where he married and served in the police force, passed away before the secession of South Sudan. So the only surviving parent at that time was her mother, who is a Sudanese.

On these bases, the complainants requested the African Children's Committee to declare that Sudan has transgressed the provisions of the African Children's Charter, specifically article 3 on the principle of non-discrimination, article 4 on the principle of the best interests of the child, and articles 6(3) and 6(4) on the right to acquire nationality and the obligation to prevent statelessness. The complainants also claimed, among others, consequential violation of the right to education.

In response, the Sudanese government contended that following the amendments made to the Act in 2005, a child was entitled to acquire Sudanese nationality from his or her Sudanese mother, on an equal footing with a Sudanese father. The respondent state further contended that section 10(2) of the Act, which provides for automatic revocation of Sudanese nationality of those who became citizens of South Sudan, does not have any discriminatory purposes, but rather is the result of political and legal arrangements, which South Sudan has also been applying.

After hearing both sides of the debate, the African Children's Committee found Sudan in violation of several obligations, notably protection against arbitrary deprivation of nationality, discrimination and against deprivation of access to education. On discrimination, the Children's Committee ruled that the Act was not aligned with the African Children's Charter as it states that every Sudanese can have dual nationality except the nationality of South Sudan, and this amounts to discrimination on the basis of country of origin. In this regard, the African Children's Committee rejected the respondent state's argument that South

Sudan is also doing the same to Sudanese nationals, stressing that state parties' obligations with regard to the African Children's Charter were not dependent on reciprocity. The African Children's Committee also found gender-based discrimination because while children of a South Sudanese mother and a Sudanese father have no difficulty acquiring Sudanese nationality, children born to South Sudanese fathers and Sudanese mothers are at risk of statelessness as they are required to go through an administrative process to be considered a Sudanese national by birth. Further, the African Children's Committee pronounced that the revocation of Iman's Sudanese nationality constituted arbitrary deprivation under articles 6(3) and 6(4) of the African Children's Charter because her father was not alive. Besides, Iman's father could not be considered a South Sudanese national *de jure* or *de facto* since at the time of his death there was no concept of South Sudanese nationality as he passed away before the secession of South Sudan. As regards education, the African Children's Committee ruled that the withdrawal of Ms Iman's Sudanese nationality denied her the opportunity to attend a higher education institution, and so violated article 11 of the African Children's Charter.

This decision of the African Children's Committee has paramount importance not only for being the first of its kind in the African human rights system to address the questions of nationality arising from the process of state secession, and providing relief to Iman, who was facing the risk of statelessness, but also for its positive implication for the rest of the children in a similar situation as the risk of statelessness in Sudan.

The African Children's Committee also made another ground-breaking judicial pronouncement in the year 2018 in the case of *Institute for Human Rights and Development in Africa and Finders Group Initiative (complainants) on behalf of TFA v the Government of Republic of Cameroon (TFA v Cameroon)*. This case concerned a 10 year-old child, identified as TFA, who was allegedly raped on 9, 12, 15 and 16 April 2012 in Bamenda, Cameroon, by Angwah Jephter, a wealthy and prominent man in the area. According to the complainants, even though TFA's family reported the crime to the local police, no measure was taken to detain the suspect, and the police took three months to file their investigation report. The examining magistrate rejected the case for lack of evidence despite the existence of convincing medical evidence that TFA had been raped and the fact that she also managed to identify the suspect's house as the crime scene. Furthermore, the examining magistrate refused to provide a copy of its written decision and hence the victim's counsel was unable to file an appeal. Moreover, TFA's counsel and her aunt were sued for defamation when they commented on the errors in the investigation. The complainants approached the African Children's Committee, asserting that the state's failure to adequately investigate the rape, or to allow an appeal against the magistrate's decision, violated several provisions of the African Children's Charter.

Even though the government of Cameroon contended that an appeal was underway to challenge the decision of the magistrate, the African Children's Committee denounced the argument stating that the appeal was unduly prolonged and was not in line with the best interests of the child. The African Children's Committee also rejected the respondent state's submission that psychosocial support had been given to the victim and her family, because in the view of the African Children's Committee the

government had failed to produce any reliable evidence to verify its claim. On these bases, the African Children's Committee declared that the respondent state's failure to bring the perpetrator to justice and provide the necessary support to the victim over the course of the five years indicated its failure to act with due diligence to investigate, prosecute and punish the perpetrator within a reasonable time and hence violated its obligation under article 1 of African Children's Charter. The African Children's Committee also found that the respondent state's lack of due diligence transgressed the non-discrimination principle of the African Children's Charter, stating that the crime of rape against the victim constituted gender-based violence, a form of gender-based discrimination in view of developments in international human rights law. It reached this conclusion considering the fact that the social subordination of women which causes and legitimises gender-based violence, which in turn affects women and nullifies the enjoyment of several of their human rights, by itself constituted gender-based discrimination. Finally, the African Children's Committee held that the respondent state contravened its obligation under article 16 of the African Children's Charter which, in its view, required state parties to undertake a thorough investigation and ensure that adequate compensation is given to the victims of child abuse and torture. The African Children's Committee therefore recommended that the government of Cameroon takes necessary measures to redress the violations of the African Children's Charter, including immediately bringing the offender to justice; paying the sum of 50 million CFA to TFA as compensation; and enacting and implementing legislation that eliminates all forms of violence against children.

The findings of the African Children's Committee in this case are noteworthy not only for being the first case of sexual violence on a minor decided at the regional level, but also for being a major plus to human rights jurisprudence in Africa. The African Children's Committee's interpretation of the due diligence standard in this communication is a deviation from the decision of the African Commission on sexual violence in the case of *Equality Now v Ethiopia*, where it held that a state's failure to investigate the sexual assault of a 13 year-old minor was a transgression of a state's due diligence obligations but did not amount to discrimination since the complainant failed to show a similarly situated person that benefited from better state protection.

3.3.2 General Comment

The African Children's Committee adopted its fifth General Comment on State Party Obligations under article 1 of the African Children's Charter in 2018. The General Comment is guided by the four core principles of the African Children's Charter, namely, non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and the right to participation of children. Given that article 1 relates to all rights and protection contained in the African Children's Charter, the role of the General Comment to ensure the realisation of children's rights, thereby improving the living realities of children in Africa is beyond doubt. While it helps the African Children's Committee to expound its understanding of state party obligations under the African Children's Charter, it is important for making the same well understood by both governmental and non-governmental actors.

The General Comment sanctions that the rights set forth in the African Children's Charter are interdependent and inextricably intertwined, and socio-economic rights are justiciable in the same way as civil and political rights. It also makes clear that there is no reference in article 1 to the 'progressive realisation of rights,' or to the degree of realisation within the 'maximum extent'. Hence, states cannot invoke a lack of resources to justify non-implementation of the rights and standards in the African Children's Charter. The General Comment calls on state parties to comply at least with previously agreed targets relating to social spending such as the Abuja Declaration, which requires 15 per cent of gross domestic product (GDP) spending on health services and the Dakar Declaration which sets 9 per cent of GDP spending on education.

The General Comment further stresses that the meaning of the terms 'shall recognise' under article 1 is peremptory, underling the rights-based approach so that the implementation of the rights set forth in the African Children's Charter should not be seen as a charitable process. Of importance is that the General Comment also explains what 'legislative and other measures' entail pursuant to article 1 of the African Children's Charter.

3.3.3 Studies

Another important promotional activity of the African Children's Committee in 2018 is the launch of its comprehensive study entitled 'Mapping children on the move within Africa'. The study was undertaken following concerns around the continuous growing movement of children within Africa and respective challenges that they are facing while on the move. The finding of the study gives a synopsis of the situation of children on the move within Africa. It specifically provides an overview of the routes that children move in to and from the continent, pushing and pulling factors of the children on the move, challenges they are facing, normative and institutional mechanisms of African states to protect children on the move, and a way forward.

Regarding migration routes, the study mapped three main routes, which are routes within the Horn of Africa and out of the region, routes through the West and Central Africa into North Africa and the West African routes. Regarding the reasons why they move, the study recognised different pushing and pulling factors including conflict and insecurity, illegal activities such as smuggling, trafficking, economic and social factors such as poverty, forced marriage, climate change and a lack of education.

As far as challenges are concerned, the study found many issues such as discrimination, economic or sexual exploitation, neglect and violence, arbitrary arrest and deportation, loss of identity, name and nationality and denial of education and health service. Furthermore, on policy and institutional mechanisms, despite some sporadic efforts, there are week legal and institutional mechanisms in various African states to safeguard children on the move. This relates to a lack of vibrant institutional standing on the concept of children on the move, the inadequacy of the legal regime to address challenges faced by children on the move, the absence of effective and efficient systems to trace children on the move, the lack of regional coordination and the existence of a one-size-fits-all method to deal with children on the move. Finally, as a solution the African Children's Committee called on member states, including state of

origin, transit and destination countries, to regard children on the move as children first irrespective of the reasons why they leave their homes, where they come from or where they are and how they got there; and to take all necessary measures, such as legislative and administrative measures, and provide all the support and facilities that children on the move need to thrive. If the recommendations of the study are effectively implemented, it has the potential to significantly improve the situation of children on the move in the African continent.

4 Conclusion

Overall, the developments in relation to democracy in Africa in 2018 reveal mixed outcomes, continuing the pre-2018 trend of what Cheeseman (2018) called the 'divided continent'. There has been evidence of a transition from authoritarianism towards a hopeful democratic beginning (Angola, Ethiopia, The Gambia); democratic progress (Sierra Leone, Burkina Faso); stagnation (Zimbabwe); and a relative decline (Tanzania and Zambia). While progress has been slow and opposition groups have faced pressure including in some of Africa's stable countries, such as Zambia, Senegal, Tanzania and Benin, and Africa's relatively low democratic standing, the continent has largely avoided the democratic recession narrative that has beset established democracies in other parts of the world. In fact, with the relative openings in some of the continents influential and formerly authoritarian states, such as Angola, Ethiopia, and recently the DRC, and potentially Algeria and Sudan, the trajectory may well be towards an African progress in democracy. Indeed, the 2019 Report of Varieties of Democracy Institute (V-Democracy), indicates that Africa is the only region that has avoided extensive 'autocritisation' in the form of substantial and significant worsening on the scale of liberal democracy. Nevertheless, the continent continues to be ranked among the worst in the world. Political leaders, regional and sub-regional organisations, civil society groups and, most importantly, the people of the continent should continue to push for the establishment and consolidation of democracy.

As for the judicial and human rights institutions at the AU level, there have been several positive developments such as cases/communications decided on issues of women's rights such as child marriage, inheritance rights and harmful practices, children's rights, statelessness, rape and discrimination. Moreover, soft laws in the form of General Comments and studies have been adopted by the institutions to guide states in the implementation of the provisions of the human rights instruments. These steps, including the progressive interpretation of the law in the case of statelessness and the obligations of the state, demonstrate that the judicial and human rights institutions at the AU level are progressing in terms of monitoring the implementation of human rights on the continent. However, these steps are minimal compared to the mountain of challenges that human rights in Africa face. Hence, these institutions must speed up their efforts to implement their mandates and keep adopting a progressive approach when interpreting the provisions of the law.

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Democracy and human rights developments in Southeast Europe during 2018

*Odeta Berberi**

Abstract: *This article provides an overview of the developments in democracy and human rights during 2018 in the countries of Southeast Europe, focusing on nine countries. Different reports have revealed that the Southeastern European region is experiencing a regression as far as democracy and human rights are concerned. According to Freedom House, democracy is in retreat in many parts of the world, including in Europe. In this article the author highlights the main developments around democracy in three European Union (EU) member states: Romania, Bulgaria and Croatia. These countries continue to be listed as the worst performers in the EU in respect of adherence to the rule of law and widespread corruption. Six countries from the Western Balkans region – Albania, North Macedonia, Montenegro and Serbia are candidate countries, and Bosnia and Herzegovina and Kosovo – are analysed in respect of the latest developments relating to democracy and human rights. Since the regional dimension is very important for the Western Balkans, a part is dedicated to bilateral relations in the framework of EU integration.*

Key words: *European Union; Southeast Europe; democracy; human rights; enlargement*

1 Introduction

This article provides an overview of the developments in democracy and human rights during 2018 in the countries of Southeast Europe (SEE). Nine countries that have shown *similarities* concerning development pertaining to democracy and human rights are the focus of the article. Nevertheless, these countries are positioned *differently* in respect of their various paths towards European Union (EU) integration, and their status varies considerably, varying between being member states, candidate countries and potential candidate countries.

Romania, Bulgaria and Croatia are EU member states; Albania, North Macedonia, Montenegro and Serbia are candidate countries; and Bosnia and Herzegovina and Kosovo are potential candidate countries. Even among the candidate countries, there are 'frontrunners' such as Serbia and Montenegro which have been promised membership by 2025. As the prospect of EU membership is a key factor for reforms in the region, this article is organised as follows: The first part describes the main developments in democracy and human rights in EU member states, followed by the second part of the article that discusses the main developments in the Western Balkans (WB).

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In contrast to other regions of the world, in SEE[1] democratic and human rights development are influenced by the EU. The EU's monitoring mechanisms and 'stick-and-carrot' approach have been very influential factors in the region. Nevertheless, since the economic crises, followed by the migration crises, and the rise of nationalism within the EU, and the Brexit, the EU has placed the Balkans 'at the end of the agenda', in this way contributing to the rise of illiberalism among the countries of the region. This gap left by the EU has strengthened the influence of other actors such as Russia, China or Turkey (Heath 2018). European Commissioner Johannes Hannes stated in an interview in July 2018 that he was most concerned about China, as the Chinese are attempting to export their way of life, entailing 'a combination of capitalism with dictatorship' (Politico 2018).

2 EU member states: Rumania, Bulgaria and Croatia

Southeast Europe is composed of countries that are members of the EU and countries that aspire to become members of the organisation. In this part the author analyses the development of democracy and human rights in three countries of SEE that are members of the EU. Democratic backsliding in the last years has become the main topic for the EU and scholars who have started researching on the reversibility of the Europeanisation achievements in the member states. Hungary was the first to be criticised for its constant attack on democratic institutions, followed by Poland. In September 2018 the European Commission had to refer Poland to the European Court of Justice (ECJ) for the adoption of a new law on the Supreme Court, which was considered in conflict with the principle of judicial independence (Marović, Prelec & Kmezic 2019: 46).

Even though Romania and Bulgaria have been members since 2007, because of concerns over certain issues, the EU monitoring mechanisms continue to work under the 'Cooperation and Verification Mechanism' (CVM) (Marović, Prelec & Kmezic 2019: 45).

Starting with Romania, the year 2018 registered developments that have further undermined democracy and the progress made by the country, especially in the field of strengthening the rule of law. The outcome of the 2016 parliamentary elections brought to power the Social Democratic Party. In February 2017 protests erupted in Romania against the government's proposed changes in judicial systems and the decriminalisation of corrupt offences. This protest was considered the largest protest since the fall of Communism. Following this massive protest, other protests were repeatedly held during 2017. The events at the beginning of 2017 created a general mistrust in the ruling party (Freedom House 2018). In December 2017 the Romanian Parliament adopted three laws reforming the judiciary system. Critics claimed that this put under attack the system of checks and balances in Romania. The most supported opinion by the

1 The geographical region of South-East Europe has experienced modifications regarding dependence of the states that are considered part of it. Following the enlargement of 2007, the EU refers to the region of South-East Europe as composed of the successor states to the former Yugoslavia (with the exclusion of Slovenia) plus Albania. Following the enlargement of Croatia in 2013, the region of South-East Europe as defined by the EU is composed of six countries of the Western Balkans.

Romanian Constitutional Court, which it adopted in October 2017, is that most of the changes proposed by the government are unconstitutional (European Parliament 2018). The Romanian Minister of Justice in February 2018 initiated the dismissal procedure for the head of the National Anticorruption Directorate (DNA), Laura Codruta Kovesi (The Romanian Journal 2018). The Superior Council of Magistracy and the President did not support this decision (The Romanian Journal 2018). The constitutional conflict between the Justice Minister and the President was 'solved' by the Constitutional Court of Romania, which decided that the President should sign the decree to recall Kovesi from office (The Romanian Journal 2018). In April the Council of Europe's Group of States against Corruption (GRECO) expressed serious concern about the laws adopted by the Romanian Parliament.

Furthermore, the Venice Commission in its opinion in October 2018 came to the conclusion that the draft could undermine the independence of the judiciary. The same conclusions by the Venice Commission and GRECO were emphasised by the Commissioner for Human Rights of the Council of Europe during her visit to Romania in November 2018. She expressed her concerns that the weakening of the judiciary could result in the weaker protection of human rights to the authorities (Commissioner for Human Rights 2018: 24). In 2018 general protests continued to oppose government changes to the judicial system. Meanwhile, the ruling party ousted the second Prime Minister in seven months and designated Viorica Dăncilă as Prime Minister. The protest of 10 August 2018, which was supported by Romanians working abroad, ended in hundreds of protesters being injured (*The Guardian* 2018). According to the human rights reports of the US State Department, more than 770 protesters filed complaints concerning violent incidents during the protest of 10 August (US Department of State 2018).

In the meantime the Social Democrat-led government survived a confidence vote in December 2018 for not reaching the required quorum 50 per cent plus one of the votes (EUROACTIV 2018). Freedom House in its report 'Freedom in the world 2019' continued to rate the country as 'free' (Freedom House 2019). However, in line with the same report in one year, the scores in civil liberties and political rights declined (Freedom House 2019: 16).

In this context of political contestation, the situation of human rights in Romania appeared problematic. Of the 82 rulings against Romania adopted by the European Court of Human Rights in 2018, 37 were for 'inhuman or degrading treatment' and 18 rulings concerned the judiciary branch (the right to a fair trial and the duration of proceedings) (ECHR 2018: 177). In the report of 2018 the Commissioner for Human Rights of the Council of Europe focused on the rights of persons with disabilities, violence against women and the reform of the judicial system. In the first two issues under consideration, the Commissioner urges the authorities to take measures in order to fight discrimination and stigma that both categories face, and for the judiciary reform the Commissioner highlighted the concerns expressed by GRECO, the Venice Commission and other internal actors (Commissioner for Human Rights 2018).

In the meantime, in the European institutions, concerns about the above-mentioned developments were voiced and discussed in different sessions of the European Parliament (EP). According to Frans

Timmermans, first Vice-President of the Commission, in his speech before Parliament in October 2018 stated:

> We are following the latest developments in Romania with concern … We have seen substantial progress in the past, but things are now moving backward in a way that would be damaging for the place that Romania has built as an EU member state in recent years.

The European Parliament in its Motion for a Resolution on the Rule of Law in Romania of November 2018 expressed concerns about the rule of law in Romania, affected by the redrafted legislation on the judiciary and the political restrictions on media freedom. Finally, the language of the European Commission on the progress in Romania under the Cooperation and Verification Mechanism for the period covering November 2017 to November 2018 was very demanding (European Commission 2018). The Commission stated (European Commission 2018: 17):

> The entry into force of the amended justice laws, the pressure on judicial independence in general and on the National Anti-Corruption Directorate in particular, and other steps undermining the fight against corruption have reversed or called into question the irreversibility of progress.

To remedy the situation, the Commission recommended to the Romanian authorities not to implement the justice laws that entered into force during 2018. However, the rule of law criterion was regarded by the EP as not linked to the Schengen Agreement. For this reason the European Parliament in November 2019 adopted a report in favour of the entrance of Romania and Bulgaria into the Schengen area and urged the Council to confirm the entrance of both countries into the area (European Parliament 2018).

Bulgaria is the second country to become a member state in the 2007 enlargement. Freedom House in its report 'Freedom in the world 2019' continued to rate the country as free (Freedom House 2019). According to the same report, in one year the scores in civil liberties and political rights did not undergo any change (Freedom House 2019: 16). The European Commission in its latest report concerning the progress of the country in CVM mentioned that 2017 was characterised by 'unfavourable conditions', listing government instability, media freedom and unpredictability in the legislative process as the main factors for undermining the reform process in Bulgaria (European Commission 2018: 1) Instead, the year under review (November 2017 to November 2018) was considered favourable as it 'helped' progress in reforms and especially in the adoption of a framework on the anti-corruption reform. The Commission mentioned media freedom as an issue of concern as it can affect the judicial reform and in a larger dimension the good governance (European Commission 2018: 2). The Commission concluded that the year 2018 was very positive in terms of implementing the recommendations of the previous report. For this reason, three benchmarks were provisionally closed (European Commission 2018: 11). Even though the Commission explained that democracy or media freedom was not the object of the CVM reporting, scholars raised concerns over the optimistic rhetoric of the EU institutions when referring to Bulgaria. The killing of a Bulgarian journalist, Victoria Marinova, also raised concerns, as her last report was about the misuse of EU funds. The Commissioner of Human Rights of CoE and Human Rights

Watch also raised concerns about the need to address violence against women and girls in Bulgaria (Commissioner for Human Rights 2018).

At the same time, concerning human rights developments, according to the European Court of Human Rights (ECHR), in 2018, in 29 rulings against Bulgaria, eight rulings concern the judicial branch (the right to a fair trial and the duration of proceedings) (ECHR 2018: 177). Human rights organisations reported widespread discrimination of Roma communities. A phenomenon mentioned by human rights organisations operating in the country was the segregation of entire schools enrolled by Romani children (US Department of State 2018).

Finally, this part concludes with Croatia, which managed to become the twenty-eighth member state of the EU and was considered a success story for the rest of the Western Balkan (WB) region. As the country had to cope beforehand, in the pre-accession period, with the concerns of the judicial sector, the Cooperation and Verification Mechanism was not availed in the case of Croatia. Freedom House in its report 'Freedom in the world 2019' continued to rate the country as free (Freedom House 2019). Nevertheless, according to the same report, in one year the scores in civil liberties and political rights declined (Freedom House 2019: 16). The World Justice Project (WJP) in its 2019 rule of law-index, lists five countries as the worst performers in the EU from the perspective of ordinary citizens (World Justice Project 2019: 21). Apart from the latest countries that joined the EU (Bulgaria, Croatia, Romania), Greece and Hungary joined the 'club' of the worst performers. In the 2019 report of the European Commission on Croatia's progress on structural reforms, it was stated that '[s]ome steps have been taken to improve the judiciary … Backlogs in the courts are decreasing, especially in respect of the oldest cases, but remain sizable' (European Commission 2019: 14). In the same Report, the European Commission stated that the fight against corruption remained an issue of concern, with no improving trend even for 2018 (European Commission 2019: 57).

3 Western Balkans: Two steps ahead and three steps backward

Freedom House in its report 'Freedom in the World 2019', which refers to the period under consideration in this article, namely, from 1 January 2018 to 31 December 2018, points out that there is a decline in democracy and human rights in Europe (Freedom House 2019). Democracy is endangered by anti-democratic leaders in Central Europe and the Balkans who continue 'undermining institutions that protect freedoms of expression and association and the rule of law' (Freedom House 2019).

Scholars argue that the EU and the enlargement process shape developments relating to democracy and human rights in the Western Balkans region. For the Western Balkans the last year has been full of significant events in many directions. I will explore the developments in the Western Balkans countries in three main dimensions: internal developments, bilateral relations, and EU-WB relations. I start with the relations between the Western Balkans region, as the changes in these relations have had their relevance in the internal developments in democracy of each country.

3.1 European Union and Western Balkans relations in 2018

As far as the relations between the EU and WB are concerned, in the last year important developments were registered. The current situation of the WB as regards EU membership is as follows: Two of the six WB countries have opened accession negotiations, namely, Montenegro since 2012 and Serbia since 2014. The Republic of North Macedonia[2] has been a candidate country since 2005 and Albania obtained candidate status in 2014. The last two countries, Bosnia and Herzegovina (BiH) and Kosovo, are potential candidates. Being two contested states, the enlargement process has encountered a further obstacle. In order to progress in this process, according to Hahn, BiH should overcome the 'Dayton logic', which remains in place in the country.

The most important developments of the relations EU-WB in 2018 started with the release in February by the European Commission of a document titled 'A credible enlargement perspective for an enhanced EU engagement with the Western Balkans', in which the EU rounded off what a clear enlargement for the WB region meant. What is to be noted from the document is the wide range of criteria formulated in this round of enlargement. European Commissioner Johannes Hannes stated in an interview in July 2018 that lessons learned from previous accessions (Rumania and Bulgaria) brought to demand sustainable democracy for the countries that wished to become EU members (Politico 2018).

Four areas were identified: the rule of law; economic development; bilateral disputes; and enlargement is a matter of choice, meaning as long as there is a clear and wide internal support of the EU perspective. In the above-mentioned document, the region was divided into the so-called 'front-runners', Serbia and Montenegro, which potentially could be EU members by 2025, leaving the other countries without a prospect date of accession.

In April 2018 the EU Commission released the Enlargement Package and the individual progress of WB countries. Recognising the efforts of Albania, especially as far as justice reform was concerned, and that of Macedonia in resolving bilateral disputes, the Commission recommended to the EU Council the opening of negotiations with both countries. Meanwhile, BiH could become a candidate country and Kosovo could benefit of visa liberalisation and advance on the path towards EU membership, only after the normalisation of the situation with Serbia.

The first half of 2018 was followed by two important events: the EU-Western Balkans Summit in Sofia, which took place in May 2018; and the London Summit of the Berlin Process which was held in July 2018. The Sofia Summit was concluded with the signing of the Sofia Declaration that reaffirmed, 15 years after the Thessaloniki Summit of 2003, the EU perspective of the Western Balkans. Meanwhile, one month before the London Summit two events took place: the Prespa Agreement, and the Council decision to postpone the opening of the negotiations with Albania and North Macedonia in 2019. These events were reflected in the London Summit and in the documents that were signed. Importance was given to

2 Following the agreement with Greece and the referendum of September, the official name of Macedonia is the 'Republic of North Macedonia'. In this article I will continue to use the shorter version of Macedonia.

the peaceful resolution of bilateral disputes in the region and the previous achievements in this direction were welcomed and defined as positive progress.

The second half of 2018 was also marked by important developments in EU-WB relations. Following years of efforts by Kosovo on visa liberalisation, the European Commission confirmed the completion of all the requirements under this process in July 2018, and in September the European Parliament voted in favour of visa liberalisation with Kosovo. Nevertheless, the finalisation of this process halted in the European Council, as it has not as yet taken any decision on this matter.

What is to be noted from the events of 2018, in the framework of EU-WB relations, is the importance given to the resolution of the bilateral disputes through peaceful means. As a matter of fact, 2018 registered important developments concerning bilateral relations in the Western Balkans region. After three decades of disagreements between Greece and the former Yugoslav Republic of Macedonia, regarding the so-called 'name issue', the two countries reached an historic agreement in June 2018. Furthermore, developments were registered between Greece and Albania.

As far as the negotiations between Macedonia and Greece were concerned, following an intense year of negotiations the two countries on 17 June 2018 reached an historic agreement. This agreement was supported by important actors of the international community, the EU and the US, as it has put an end to nearly three decades of the so-called 'name dispute'. After the agreement of June some complex and important steps followed. First it required the ratification in parliament of both countries which, considering the resistance by factors inside the countries, was not an easy process. Nevertheless, on 5 July 2018 the Macedonian Parliament ratified the agreement and a referendum was called for Macedonian citizens for 30 September. The referendum had a low turnout and those who participated voted in favour of the name change. Following the referendum, Parliament voted in favour of initiating the constitutional revisions, which required a two-thirds majority. The government started the process of drafting four constitutional amendments that were discussed in the Macedonian Parliament in December. These amendments must be adopted in Parliament by a two-thirds majority.

Meanwhile, Albania and Greece intensified the negotiations in 2018. The bilateral relations between the two countries are considered complex. Even though both countries are members of the North Atlantic Treaty Organization (NATO), Greece still formally has in force a 'state of war' with Albania. According to the former Albanian Minister for Europe and Foreign Affairs during his reporting on 28 February 2018 in the Commission of Foreign Affairs of the Albanian Parliament, Albania is negotiating with Greece a 'package' made up of different issues. The ending of the 'state of war' with Albania, which has importance for the Cham community, the delineation of the maritime border, the rights of the Greek national minority that lives in Albania, and textbook revision, are some of the topics mentioned as 'open issues' and are on the table of negotiations between the two countries. Nevertheless, in February 2018 the President of the Republic of Albania refused a government request to authorise continued negotiations with Greece on the delineation of the maritime border with the justification to have full information on the content of the negotiations (BIRN 2018). In March the President granted

authorisation for continuing negotiations with Greece. Following this decision, the two foreign ministers met several times during 2018 but it is expected that the negotiations will continue in 2019.

3.2 Internal developments of the countries of Western Balkans

In this part of the article each country is analysed in depth concerning developments around democracy and human rights. The European Parliament is the EU institution that constantly addresses shortcomings in democracy openly and directly. In November 2018 the European Parliament adopted resolutions on every country of the WB region, except for BiH, due to the country disagreements on establishing a Joint Stabilisation and Association Parliamentary Committee. What can be noted from the text of the resolution is the fact that the region still faces serious problems concerning the rule of law, corruption, state capture, organised crime and the lack of economic development.

Montenegro has been considered one of the countries that has advanced more on the European path. Nevertheless, in the EP Resolution of November 2018 on the Montenegro Progress Report, important challenges that need to be addressed immediately are 'the rule of law, media freedom, corruption, money laundering, organised crime and its associated violence' (EP Resolution 2018: 3). Following the parliamentary elections of 2016, the Democratic Party of Socialists (DPS) won 36 seats and form the majority with the other four parties. The outcome of the election was not accepted by the opposition, which initiated a parliamentary boycott that partially ended in December 2017. As the presidential elections were approaching, in February 2018 Johannes Hahn, Commissioner for European Neighbourhood Policy and Enlargement Negotiations, visited Montenegro and addressed the members of parliament of the country. The commissioner reaffirmed decisively that the accession of Montenegro was unquestionable and highlighted the role of Parliament and that of civil society to press the government to continue on the EU path (EWB 2018). After postponements and internal discussions, in March the Assembly of Kosovo ratified the Border Demarcation Agreement with Montenegro. It was considered good news by international actors, and the EU considered it one of the major achievements which could lead to visa liberalisation.

In April 2018 the presidential elections took place in Montenegro. These elections were organised in an atmosphere of parliamentary boycott by the opposition for not recognising the results of the 2016 general elections (ODIHR 2018: 3-4) Mr Đukanović won the election in the first round with a vote of 53,9 per cent. According to the final report of the OSCE/ODIHR Election Observation Mission, the elections were assessed as democratic and fundamental freedoms were respected. However, shortcomings were identified and some recommendations that needed to be addressed as a matter of priority were formulated (for instance, the review of the legal framework for the next elections, addressing all allegations of electoral violations, further reinforcing the transparency of the electoral process, taking measures to protect journalists, and so forth) (OSCE/ODIHR 2018: 21). In the Resolution adopted in November 2018 the European Parliament called on Montenegro to foster a climate of tolerance, to take measures against hate speech and to ensure the inclusiveness of minorities (EP Resolution 2018: 7).

In the case of Serbia, in the Resolution of November 2018 on the Commission Report the EP emphasised freedom of expression and the independence of the media as a serious concern (EP 2018: 3). According to the document the rule of law, the fight against corruption and the fight against organised crime remained issues of concern even during 2018. As far as the quality of democracy in Serbia was concerned, the EP emphasised the need for the Serbian Parliament to effectively conduct an 'oversight of the executive, and that the transparency, inclusiveness, and quality of the legislative process need to be further improved' (EP 2018: 6). In order to further uphold human rights in Serbia, the EP recommended that it is needed a climate of tolerance and all types of hate speech needed to be condemned. Respect for and the protection of minorities were highlighted issues on which Serbia needed to further work for an effective implementation of the strategy that has been adopted in this matter. Meanwhile, in the section of regional cooperation, the European Parliament urged Serbia and Kosovo to continue their engagement in dialogue. The EP expressed concerns about the debates on exchanges of territories as it must not affect the multi-ethnic nature of both states (EP 2018: 10) Good neighbourhood relationships are important for Serbia on its European path, meaning that the opening issues with Croatia had to be overcome. In February 2018 the two Presidents of Serbia and Croatia met in Zagreb, where salient issues such as the Danube River and war compensations that should be paid by Serbia were discussed. Both Presidents declared after the meeting that there was a common will to solve the open issues, despite their different attitudes on these matters (EWB 2018).

As far as Albania was concerned, the EP in its Resolution expressed deep concern over the *de facto* boycott of the opposition since summer 2018, which undermined the constructive political dialogue required for 'the implementation and consolidation of the reforms across all five key priorities are vital to the effort to advance the EU accession process and for the proper functioning of a democratic regime'. According to the European Commission the rule of law remained a key challenge for Albania. The justice reform initiated in 2017 continued to register good progress (European Commission 2018). The International Monitoring Operation (IMO), which conducts the vetting process of judges and prosecutors across the country, had delivered approximately 100 decisions during 2018 (Calavera 2018). In October 2018 two new organs of the judiciary were established: the High Judicial Council and the High Prosecutorial Councils.

The US Department of State in 2019 published its annual report on human rights practices in 2018 in Albania. The report identified as a big concern the 'pervasive corruption in all branches of government' and the phenomena of impunity, minority rights and the problem of property rights. During 2018 Albania updated its legislation on anti-corruption and was advancing in the establishment of the National Bureau of Investigation, the Special Tribunal and the Special Prosecution Office Against Corruption and Organised Crime (European Parliament 2018). As far as the protection of minorities is concerned, Albania was continuously improving its legislation on minority rights protection. Following the approval of the specific law on national minorities in November 2017, the country is continuing the process of approving bylaws on the implementation of the Framework Law on National Minorities. Three

bylaws have so far been approved, namely, the Council of Ministers Decision 561 dated 29 September 2018 relating to primary education; the Council of Ministers Decision 562, dated 29 September 2018 on the promotion of minority languages and culture in tertiary education; and the Decision of Council of Ministers 726 dated 12 December 2018 on the organisation of the Committee on National Minority. Instead of addressing concerns on property rights, in 2018 the Law 111/2018 'On Cadaster' was approved by Parliament. In the Law 'On Cadaster' the establishment in 2019 of the State Agency of Cadaster was foreseen which would merge with different agencies that already existed and would try to address concerns over propriety rights.

In the Republic of North Macedonia, after noticing the decisive commitment of the country on the EU path, the European Parliament remained concerned about media freedom, corruption and organised crime, even though the EP pointed out in the document that corruption and organised crime were widespread in the region and were an issue of concern even in the last two countries, namely, Kosovo and BiH. The European Parliament noticed that the country had advanced more in good neighbourly relations and had achieved a high level of *acquis* alignment (EP 2018). The second half of 2018 was dominated by the implementation of the Prespa Agreement with Greece and the preparation for NATO membership of the country. In December 2018 the leader of the Albanian party DUI, Ali Ahmeti, launched the idea of a consensual candidate for President (Radio Evropa e Lirë 2018). Ahmeti's proposition was supported by the Prime Minister, Zoran Zaev, who initiated talks with coalition parties over a consensual candidate for President. This practice was considered a very important development for democracy in Macedonia, taking into account the recent approach of President Ivanov *vis-à vis* ethnic Albanians in the country.

The last two countries, Kosovo and Bosnia and Herzegovina, because they are considered contested states,[3] this element poses a very important challenge to the Europeanisation process. Specifically in Kosovo, the EP in its Resolution adopted in November was concerned about elements of state capture, the rule of law and inter-ethnic relations. Nevertheless, what has kept the EU and international attention were the developments that had repercussions on the negotiations with Serbia. The first half of 2018 was marked by tensions, following the murder of the Kosovo Serbian politician Oliver Ivanović and the proposals of 'border corrections' between Kosovo and Serbia which could lead to a final agreement. The second half of 2018 exacerbated the relations between the two countries as both countries took initiatives that damaged the achievements of the negotiation process. The efforts by Serbian diplomacy to revoke the recognition of Kosovo's independence was followed by the government of Kosovo's decision to impose in November 2018 a 100 per cent tariff on goods emanating from Serbia and Bosnia and Herzegovina. The latest decision taken by the government in Kosovo was criticised by the EU that demanded its revocation.

3 Contested state for the purposes of this article is defined as a state that is contested internally by a segment of the population and this contestation is supported externally by an external actor (Serbia) which supports this contestation in both cases.

In Bosnia and Herzegovina the EP Resolution was adopted in February 2019. The EP emphasised the fact that ethno-nationalistic rhetoric had dominated the political discourse and had halted 'the constitutional, political and electoral reforms that would transform BiH into a fully effective, inclusive and functional state based on the rule of law'. The year 2018 was a year of elections in Bosnia and Herzegovina. According to the OSCE/ODIHR Election Observation Mission the general elections in BiH of 7 October 2018 took place 'in an atmosphere of political disillusionment with public institutions and characterised by a lack of economic growth' (OSCE/ODIHR 2018: 4-5). In his final report ODIHR listed irregularities prior to and after election day. Furthermore, *Radio Free Europe* reported multiple cases of deceased persons remaining on the voter registry, which could lead to possible electoral manipulations (Radio Free Europe 2018).

Milorad Dodik, the former President of the entity Republika Srpska for two full terms, won the elections and become a Serb member of the country's three-member presidency. His party also had a victory in the Republika Srpska's presidency and took the majority of seats in Republika Srpska's Assembly. In the Federation of Bosnia and Herzegovina, the Party for Democratic Action (SDA), representing the Bosniak ethnic group and the Croat Democratic Union of Bosnia and Herzegovina (HDZ BIH) representing Croats, won the majority. As a priority recommendation the OSCE/ODIHR mission identified the need to address the European Court's judgments regarding discriminatory ethnicity (OSCE/ODIHR 2018: 25).

4 Conclusion

The year 2018 registered important developments that questioned the reversibility of the achievements of the Europeanisation process in the cases of Romania and Bulgaria. The European Commission continued to have in place a mechanism for monitoring the situation in the two countries, because for more than a decade these countries failed to fight widespread corruption and continuing threats to the rule of law. The Western Balkans countries continued to register a decline in democracy towards an overly 'formal' version of democracy and Europeanisation, characterised by adopting norms and rules without fully implementing and enforcing these norms. In the latest report of European Commission, state capture, corruption and organised crime were considered key concerns that contributed to the decline in democracy. At the regional level, positive developments can be noted, which may contribute to the stability of the region. The historic agreement between Macedonia and Greece has opened a new era for the bilateral relations in the conflict-ridden region of the Western Balkans. It is to be expected that, during 2019, other bilateral disputes would similarly find a peaceful resolution.

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