Territorial Rights and Rights to Movement and Subsistence

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Introduction

The collection of papers that are part of this special issue is the product of a workshop held in Genoa on the 12th and 13th of December 2022. The workshop – entitled *Territorial Rights and Rights to Movement and Subsistence* – was motivated by two fundamental reasons: firstly, to welcome scholars approaching the topic of territorial rights and rights to movement and subsistence from a philosophical, sociological, historical and legal angle; secondly, and probably most importantly, to develop a debate over the concrete and urgent public need for normative work aimed at providing states, local powers and organizations with theoretical tools to orient their immigration, climate and borders-control policies.[1]

The idea of continuing the work undertaken during the workshop has to do with the second point just mentioned: if one of the aims of the conference was to take concrete action in producing updated normative material in the field of territorial rights, it seemed important to publish part of the outcomes of the workshop in order for these results to last longer and to be available to more readers.

For the workshop to embrace the topic of territorial rights from different angles, the following sub-topics were explicitly included within the conference's interests: territorial rights, displacement and climate-displacement, eviction, forced migration, territorial conflicts, refugee sta-

[1] We would like to take the opportunity of this publication to thank the keynote speakers of the conference, Sarah Fine and David Miller, who contributed exceptionally to the workshop, and all the chairs who helped in its full realisation.

tus, states' responsibilities, and immigration policies. An overview of the core issues identified and addressed during the workshop can be organized by dividing the main topics in three groups.

With respect to the first group – territorial rights and borders' control –, some of the questions that emerged as more urgent were connected to the need for a more gender-inclusive approach when dealing with the issue of territorial rights; to the problematic nature of boundaries in a world where communities are everyday more entangled; to the possibility of looking at the issue of borders control and freedom of movement from a different moral perspective; and to the possibility of expanding the scope of territorial rights to include non-human entities as potential rightsholders.

With respect to the second group – displacement, eviction, refugees protection and territorial conflicts – it is important to investigate the possibility of recognizing specific reparations for the harm of displacement suffered by indigenous groups or other minorities; the need to adopt a different perspective on the way in which the European states conceive of their responsibilities towards refugees; and the worry that the legal systems can sometimes protect from eviction only formally, but not *de facto*.

With respect to the third and final group – climate change, climate-refugees and states' responsibilities – the first pressing issue was trying to figure out how to reconcile the principle of states' absolute territorial sovereignty with their duties towards the environment and especially towards the climate refugees, and how to weight and address states' environmental responsibilities thank to a reconceptualization of the right to self-determination in eco-political terms.

This Special Issue mirrors the multidisciplinary approach of the workshop, as the three papers stand as representatives of, respectively, the first, second and third group of issues tackled during the conference.

In the first paper, "Border and Poor Migrant: An African Moral Philosophy View", Rudolph Nyamudo argues for the right of movement for the uneducated poor in a world where educational qualifications and economic capacity seem to be the only criteria to be allowed to move from one country to another. He uses the South Africa – Zimbabwe border as a case study. South Africa and Zimbabwe are neighbours, but due to strict border control – which is based on educational qualifications – poor mi-

grants from Zimbabwe find it hard to cross the South African border for a greener pasture. The author, therefore, employs ubuntu ethics to offer a solution to the problem of borders concerning poor migrants. The ubuntu ethics the author refers to is an African term that means "humanness" and connotes a person who demonstrates good moral behaviour in society. His idea of Ubuntu ethics entails sincere concern and friendliness towards other persons. In the context of the South Africa – Zimbabwe borders, he argues that living together in friendly relationships honours each other's dignity. Using ubuntu ethics, he emphasizes that welcoming one's neighbour and showing practical concern for their well-being is a fundamental value, that should be priced highly more than educational credentials. To keep impoverished migrants from being vulnerable, the author argues that we should eliminate regulations prioritizing the requirement of educational credentials on the border since such norms exclude people's capacity to honour friendly relations in society. Instead of demanding educational credentials, he insists that host nations can use good conduct certificates to measure individuals' viciousness and misbehaviour.

In the second paper, "Territorial Rights and Reparative Justice for Indigenous Displaced People", Laura Santi Amantini argues that the forced displacement of indigenous peoples raises specific reparative justice claims. According to the author, forced displacement entails four kinds of harm such as loss of control over one's bodily movement, loss of home environment, loss of social status, and damage to mental health. The author further argues that indigenous peoples lose their ancestral land and natural resources when they are displaced, and that this loss – suffered by indigenous peoples – may be irreproducible. For instance, symbolically laden sites (such as sacred lands) are not akin to fungible natural resources that materially equivalent ones could replace.

According to the author, indigenous peoples seem to have a more substantial interest in residing within their ancestral lands, using those specific natural resources, and accessing those specific symbolically laden sites. The author emphasises that they may have a particularly strong interest in being able to pursue plans within such lands. Therefore, the significance of the land they were displaced from is relevant when redressing indigenous displaced people. She argues that in repairing the harms and wrongs of the displacement of indigenous people, their ter-

ritorial rights should be considered in the following three ways: firstly, land restitution and the restoration of access to symbolically relevant sites should be accompanied by the acknowledgment of the violation of the territorial rights of the group; secondly, there should be apologies and material compensation to the whole group; thirdly, there should be increased indigenous people's control over land and resources or increased voice in future negotiations involving using those lands and resources over which jurisdiction is shared with the state.

Finally, in the third paper, "Those Fleeing States Destroyed by Climate Change Are Convention Refugees", Heather Alexander and Jonathan Simon argue that people fleeing states affected by climate change should be recognised as refugees claiming asylum under the existing refugee's law. Their argument is supported by the "two-test approach", which consist in the interpretation of the criteria stated by the 1951 Convention broadening the possibility to get asylum to whom not able to return to their states and not just to whom fearing *persecution*. The Convention of Ginevra (1951) is firstly analysed with a focus on the literal meaning of the text, and then focusing on the claims and purposes of the paper's authors. They contend that the object and purpose of 1951 Convention is to offer international protection to people who lost national protection by restoring for them fundamental rights and freedoms, in the form of asylum. They develop a new argument appealing to the principle of "systematic integration" (article 31.3.C of the Vienna Convention on the Law of Treaties, VCLT), according to which when there is ambiguity in the interpretation of a treaty, this should be considered in the broader framework of international law, including custom, general principles and, if possible, other treaties. Indeed, the authors suggest that the application of the 1951 Convention to stateless persons who were former occupants of states now destroyed by climate change is appropriate. This proposal, according to the authors, would guarantee protection to all the stateless persons who find themselves out of their country of origin and are unable to return.

Rudolph Nyamudo

Border and Poor Migrants: An African Moral Philosophy View

Abstract

The problem of substantial migration of the poor fleeing their nations into other states has continued, even though some politicians, mostly those in the host nations, are against the immense movement of people on shared state borders. In this philosophical discussion I use South Africa – Zimbabwe boundary, one of the busiest land borders in the continent of Africa and the only point of entry on land between these two African countries, as my main example. By drawing on an ubuntu/hunhu ethic, i.e., an African moral philosophy that is common among the people who live in the Southern region of Africa, I contend with the problem of borders in relation to poor migrants. Firstly, I lay out key facts pertaining to the South Africa - Zimbabwe border regulations, which invite moral reflections. Secondly, I articulate the ubuntu ethic. Finally, on the basis of the ubuntu ethos I propose concrete changes for borders. By engaging the question of borders with African moral philosophy, namely, an ubuntu ethic, and also providing concrete proposals for the problem of the border and the poor migrants, this discussion brings originality to the migration debate.

Keywords: borders, ethics, hunhu/ubuntu, immigration, migrants, poverty

Introduction

International borders are a challenge for a number of people who move across different nations. For the sake of controlling migration, governments across the world demand varying credentials such as passports

(Mongia 1999, 527-528), from those who seek to migrate. "(A) 'passport' in the modern sense is, in essence, a document of identity" (Diplock 1946, 52). Additionally, a number of governments demand proof of finances and educational documents from individuals who choose to migrate. However, most states receive migrants without the expected educational certificates (Sebola 2019, 3). Substantial migration of the needy is a problem that involves the moral debate of abolishing and regulating state borders. "(A) regime of verification includes the specific ways in which individual identity is defined, the evidence needed to verify that identity, and the authorities who could ultimately determine an individual's (official) identity" (Robertson 2010, 247). Notice that state boundaries do not necessarily entail passport control. Further, state borders have existed in moments of history without any passport control (Diplock 1946, 44-45; Gulddal and Payne 2017, 9-13). Should state borders exist? If so, who should be able to pass through and for which reasons?

I use the South Africa – Zimbabwe border as my main example in this essay. The border between South Africa and Zimbabwe, i.e., the Beitbridge port of entry, is one of the busiest land borders on the continent of Africa. However, the Beitbridge port of entry has remained as the only point of entry on land between these two African countries (Curtis 2009, 7; Moyo 2020, 3). I consider whether global justice requires this border to be removed. "Global justice" entails inquiries that "take individual human beings as of primary concern and seek to give an account of what fairness among such agents involves" (Brock and Hassoun 2023). Both South Africa and Zimbabwe control the Beitbridge port of entry.

The question of national borders is currently contentious among worldwide scholars, including those researching on Africa. Among these are Christopher H. Wellman and Phillip Cole (2011), Joseph Carens (1987; 2013), Leonardo D. de Castro and Peter A. Sy (2017), Uchenna Okeja (2021) and Emmanuel Ifeanyi Ani (2021). Ani, from Ghana, is one of the African philosophers in favour of closed borders. Focusing on the effects of brain drain resulting from global migration from poor countries, such as Zambia to richer countries in other continents for example the United States of America, Ani (2021, 182) presents an argument that attempts "to protect the economic and political health of migrant-sending countries". Though some African scholars writing on migration have challenged border regulations of host states (Mbembe 2017; 2019; Moyo

2020), I instead argue for an application of an ubuntu ethic to the issue, making some concrete prescriptions for change in policy while ultimately retaining borders. The practical changes that I propose include creation of multiple ports of entry, removal of the requirement of showing educational credentials, use of a good conduct certificate, and criteria for dealing with individuals who break the law by crossing the state boundaries.

Other scholars such as Anke Graness (2019), Mokoko Sebola (2019), and Mutsa Murenje (2020) have invoked ubuntu in the migration discussion to shed light on how states can adopt policies that exhibit hospitality towards refugees and migrants. In contrast to the above intellectuals, I apply the ubuntu ethic to the problem of borders in relationship to poor migrants.

Ubuntu/hunhu is an African philosophy that is common among the people who live in the Southern region of Africa. Christian B.N. Gade (2011) reveals the historical development of the literature on ubuntu in "The Historical Development of the Written Discourses on U*buntu*". Further, Stanlake John Thompson Samkange (1980); Mogobe Bernard Ramose (1999; 2002; 2021), Augustine Shutte (2001), Johann Broodryk (2006); Thaddeus Metz (2007; 2011a; 2022) and Pascah Mungwini (2017) are additional scholars who have contemplated on ubuntu. I highlight that hunhuism, as a philosophy of how to exist together informed by hunhu, that is to say, humanness of a person, captures the basis of morality among the Shona speaking people (Samkange and Samkange 1980; Mungwini 2017, 143). According to my interpretation, hunhu/ubuntu prescribes love (Metz 2022), where love is understood, not as a romantic feeling or a short-lived admiration of another, but rather as an enduring friendly relationship with others that involves sincere identity and solidarity.

I choose to engage African philosophy because an ubuntu ethos is concerned with breaking barriers that limit the accomplishment of loving relationships in society, a prima facie attractive moral perspective. I advance the position that one who is loving does not limit avenues that others can use to reach him or her, but instead takes first steps to reach out to those that need relationships. Thus, in response to my question, I make use of the ubuntu ethos to advance the perspective that, although borders ought to exist, they should not be used to hinder the attainment of communal relationships among different individuals, but should be altered to encourage the achievement of such ties.

By engaging the question of borders with African moral philosophy, i.e., ubuntu ethic, this discussion brings originality to the migration debate. Moreover, I provide concrete proposals for the problem of the border and poor migrants. African state borders should continue to exist, but it is important to establish changes that include the removal of laws that discredit poor migrants' worth. Although the practical resolutions I suggest for change on the borders are specifically focused on my main example, i.e., the South Africa - Zimbabwe border, the proposals can correspondingly be applied to a similar border problem on the grounds of an ubuntu ethos.

Next, I provide a brief background of the South Africa - Zimbabwe border. Afterwards, I articulate the ubuntu ethos. Fourthly, I lay out a rationale for keeping borders. In the fifth section I suggest concrete changes to borders. Finally, I conclude the discussion on the border and poor migrants.

1. B*rief background of South Africa - Zimbabwe border*

In this section, I discuss empirical issues relevant to the contemporary controversies of whether there should be borders and, if so, how they should be regulated. The Zimbabwe - South Africa border, which has a total length of approximately two hundred kilometers (Moyo 2020, 3), is my main example of the problem of borders. After a brief illustration of the background of the South Africa - Zimbabwe border, I show which criteria are currently used to determine who passes through the border. Crossing the Zimbabwe - South Africa border, in both directions, is often determined by one's possession of a passport and visa permits issued to individuals with critical skills. Additionally, I demonstrate what the consequences of using those criteria are to poor migrants by showing problems that the needy migrants encounter because of the restrictive conditions on the state boundaries.

2. M*ovement of people in precolonial Africa and the question of borders*

Could one clearly identify the borders that existed in pre-colonial Africa? Observe that some ancient African societies associated with each other without the limits of borders. For example, the people in the

Shashe-Limpopo basin, including the people of Mapungubwe, the Shona, and the Venda, were connected (Manyanga and Chirikure 2019, 74). Further, Munyaradzi Manyanga and Shadreck Chirikure argue that "it has been demonstrated by many scholars that the archaeology of southern African nations cuts across the modern political boundaries" (Manyanga and Chirikure 2019, 82). Hence, some of the contemporary African borders separate not only people who have lived together for centuries, but also "related communities who share a common past, language, belief systems, norms and values" (Manyanga and Chirikure 2019, 82). In order to shed light on the problem of the current African borders, it is revealing to briefly discuss the notion of friendliness towards migrants in precolonial Africa. People often moved from one location to another.

Precolonial migration in Africa was a consequence of different human needs. Christine Obbo (1979, 227) in *Village Strangers in Buganda Society* points out that migration is not a recent phenomenon in Africa. How should a person respond to famine or threatening hostilities in one's society? For example, struggles that took place within the Zulu state brought about "in the 1820s and 1830s, waves of migration of disaffected groups which established new African states and often came to dominate local populations in the Transvaal, Zimbabwe" and other regions within the African continent (Mackenzie 2005, 23). Hence, precolonial African communities absorbed migrants from other parts of Africa.

Historians have provided many ways of clarifying the "mfecane", a complex historical issue. The socio-political problems "and violence of the early nineteenth century in southern Africa were the result of a complex interaction between factors governed by the physical environment and local patterns of economic and political organization" (Eldredge 1992, 1). Shaka, one of the kings of the Zulu community (Cobbing 1988, 499; Hamilton 1992, 41), and Moshoeshoe, the king of Lesotho (Prozesky 2016, 10), are some of the African leaders that are often discussed by scholars who study the early history of Southern Africa.

Notice that Moshoeshoe, the African king mentioned above, won voluntary loyalty of his followers (Eldredge 1992, 1). Further, Moshoeshoe "was able to gather together and protect the shattered remnants of the disrupted chiefdoms, and gradually weld them into the Basotho nation of the future" (Prozesky 2016, 10). Hence, Moshoeshoe illustrated "the widespread African belief in the inter-relatedness of humankind" (Proz-

esky 2016, 13). Moshoeshoe's acts towards new members of his society, i.e., people from other kingdoms, demonstrate the African values of ubuntu, hospitality and concern towards others. Although Moshoeshoe's acts towards new members in his society illustrate points where ubuntu as I interpret it was present in pre-colonial Africa, I do not romanticize the tradition by supposing that it was ubiquitous.

Different scholars affirm the perspective that migrants in pre-colonial Africa became part of host communities. Among the scholars writing on the movement of people in ancient Africa is Monica Wilson, a South African anthropologist, who contemplated about strangers in Africa on the basis of archaeological evidence from Nyakyusa, Nguni, and Sotho societies. Wilson argues that the "archaeological evidence points to the arrival of strangers of differing physique with new techniques; and there is a rich and diverse oral tradition of journeys and arrivals" in different African societies (1979, 51). Hence, it is essential to emphasize the idea that migration is not new to the African continent, but an age-old thing encountered in different local societies.

Although strangers in African communities were sometimes received with distrust in particular situations, migration has usually not been understood as a threat to the African communities. For Robin Cohen (2019, 46), numerous early African societies treated "strangers as non-threatening guests", individuals who could become part of the community over time. Cohen's point of view is affirmed by African aphorisms of entertaining visitors that "imposed mutual obligations on guests and hosts" (Cohen 2019, 47). An example is "H*eri yako heri yangu*", a Swahili axiom which translates to, "your joy is my joy". Such an aphorism reflects the existence of hospitality towards individuals who moved from one society to another.

3. B*orders in colonial Southern Africa*

Most of the current state borders on the African continent are a result of the partitioning of the continent during the colonization period. In the case study under scrutiny, an agreement between the United Kingdom and the Transvaal in the Pretoria Convention set the South Africa/ Southern Rhodesia boundary towards the end of the year 1881 (Ndlovu

2012; Rukema and Pophiwa 2020, 277). Continuous negotiations among colonial governments and clashes with local indigenous populations led to changes on the colonial boundaries. Further, towards the end of 1880s and the beginning of 1890s, the African maps for political borders underwent changes in each year (Mackenzie 2005, 10). European states such as Great Britain, France and Portugal competed to possess portions of the territory in Africa. Various scholars use the phrase 'scramble for Africa' to denote the European nations' competing interest for pieces of the African territory (Mackenzie 2005, 11; Fourie 2015, 4; Oduntan 2015, 90; Nwachukwu and Ogundiwin 2020). For the sake of keeping one European state from politically interfering with another, bordered colonial territories were established. Only a few controlled ports of entries were established by the colonial governments.

On the grounds of borders, colonial government leaders established regulations that restricted the movement of people from one African state to another. Focusing on South Africa and Zimbabwe, in 1957 the Limpopo River was affirmed by the government leaders of the Federation of Rhodesia (i.e., Zimbabwe, Zambia and Malawi) and the Union of South Africa as the official border between the two colonies (Musoni 2012; Rukema and Pophiwa 2020, 277). The movement of people between the two African states, that is, Zimbabwe and South Africa, was conditioned by border regulations and the requirement of documents such as passports. Passports became a common requirement for one to move from one African state to another as they were across all other states outside Africa.

4. *Border restrictions in post-colonial Southern Africa*

Border regulations have not been removed after African nations got independence, but have actually continued to intensify at the expense of poor migrants. The attainment of independence from colonial governments has led to neither the abolition of borders nor the relaxation of the regulations that disfavour poor migrants. For example, Southern African countries such as Zimbabwe, South Africa and Mozambique have maintained almost all state boundaries that were established in the continent during the colonization period. However, the issue of colonial

borders has been challenged by Kwame Nkrumah (1969, 25), a prominent Pan-Africanist and influential political leader, and other different African scholars (Mbembe 2017; 2019; Mulindwa 2020, 603; Sanni 2020). Despite the fact that current state boundaries and border rules disfavour poor individuals, most African governments including Zimbabwe and South Africa have not addressed this problem of borders. Rather, new regulations for moving from one African state to another have been put in place. Countries like South Africa currently require migrants who are seeking to cross the border to work or learn in the African nation to have credentials that include educational certificates, finance proofs, health insurances and other documents.

Despite the border regulations that seek to limit the movement of people between countries, substantial migration of the poor fleeing their suffering nations into other states such as South Africa has continued. South Africa is the main destination for numerous Zimbabwean migrants (Crush and Tevera 2010, 4; Chekero and Morreira 2020, 36). The prospect of overcoming poverty motivates a number of poor Zimbabweans to cross the border into South Africa. Skyrocketing inflation, high unemployment, and poverty in Zimbabwe continue to make it difficult for many poor individuals to afford basic necessities.

Moreover, numerous poor individuals who have not reached tertiary education are not able to acquire visas or work permits to cross the border. In countries like South Africa, it is difficult for the poor migrants who lack appropriate education and enough funds to acquire migration documents. Further, visas and work permit fees are costly for the poor migrants. Acquiring documents such as passports or visas in economically depressed countries such as Zimbabwe is a dilemma for the poor. Hence, it is worth considering whether the current criteria of assessing who enters the borders should be changed.

Plausibly, border regulations do not only restrict the movement of people, but also discourage the achievement of friendly relationships among people from different states. Migration regulations in Africa are not only symptoms of the challenge of colonial boundaries, but reinforce the problem of restricting the movement of Africans in the continent (Sanni 2020, 20). Under the current border demands, credentials for traveling from one state to another are prized over the understanding of migrants as individuals to whom society owes hospitality. One who does

not possess the required documentation for crossing the border is often not able to cross the state boundaries in Africa. Achille Mbembe, an African history scholar, argues that "(t)he end of colonial rule has not ushered a new era characterised by the extension of the right to freedom of movement to all" (Mbembe 2017). Think of how different the movement of persons from one place to another was in ancient Africa; temporary or permanent migration was not restricted in pre-colonial African territories, as briefly explained above.

At present, there are a limited number of ports of entry on some African boundaries. Beitbridge is the only point of entry between Zimbabwe and South Africa. Additionally, observe that Beitbridge is a very busy border that facilitates the movement of huge volumes of heavy trucks and passenger vehicles (Curtis 2009, 3-5; Ngarachu *et al*. 2019). It is crucial to consider measures that could improve the movement of needy migrants.

5. H*unhu/ubuntu*

In this part of the essay, I articulate the ubuntu/hunhu ethic, a relational ethos, which is what I use to evaluate the South Africa - Zimbabwe border. What does it mean to have ubuntu? How should one relate to others? 'Hunhu/ubuntu' is an African term that means humanness, and connotes a person who demonstrates good moral behavior in society. The hunhu ethos involves sincere concern and friendliness towards other persons (Samkange and Samkange 1980, 39). Good moral behavior is demonstrated by practical loving relationships with others in the community. Individuals "manifest patterns in their actions which can be judged either as displaying or lacking humanness" (Koenane and Olatunji 2017, 267). Immoral acts hinder the attainment of loving relationships with others in society.

I choose to work with ubuntu in this research because the African ethos stresses the idea that one ought to overcome any form of disunion or separation from others to achieve genuine communal relationships that honor people's dignity, i.e., persons' capacity to engage in loving relationships with others in the community (Metz 2022). According to the ubuntu ethos, the dignity of persons is inherent, that is, the inestimable

worth of persons exists as an inborn human characteristic. To lovingly relate with another person is to relate with them in a manner that honors their human worth.

Due to the reason that we have a dignity, relationships with others demand one to be compassionate and hospitable in society. "(U)buntu as a moral theory encourages the ethic of responsibility and obligation towards others" (Koenane and Olatunji 2017, 275). A person with ubuntu is motivated to act morally by his or her sincere love for others. By emphasizing hospitality towards others, i.e., an unfeigned friendliness that is contrary to a conceited neighborliness, the ubuntu ethic pays special attention to individuals facing some predicament. The concern for accomplishing concrete associations with others, persons with a dignity, demands a reciprocal response. Hence, genuine communal associations that are prescribed by an ubuntu ethos are reciprocal in nature.

6. I*nterpreting ubuntu*

First, we, all people, are beings with a dignity. I use the term "dignity" to refer to an incalculable worth of persons. Humans have a worth that surpasses all other creatures. Consider a farm owner who is critically confronted with a shortage of fresh water for his thirsty horses, but also dehydrated workers. Further, consider that all the farm workers are so poor that none of them has money comparable to the price of a single horse. Should the farm owner give water first to horses and then the remainder, if there is any, to the farm workers? As per the ubuntu ethos, the farm owner ought to supply water first to employees and then to the animals only when people have gotten enough to drink. Our dignity deserves sincere honoring.

The idea of dignity is connected to the view that humans have rights. Across the world states and organizations such United Nations highlight that every human person has rights. For example, the constitution of South Africa points out that everyone has an innate dignity and a right to be honored (Constitution of the Republic of South Africa, Act 108 of 1996, 6). All individuals have rights due to the reason that people are beings that have a dignity.

Secondly, I briefly consider what gives people a dignity. Thaddeus Metz, a distinguished scholar rightly emphasizes the perspective that

persons' inherent capacity for friendly relationships is what bestows a moral status on humans (2022, 172). While there are domesticated animals that on the face of it engage with humans, such as cats, people have a unique capacity to engage in loving relationships, understood as dignity. Hence, according to my interpretation of ubuntu, having a "dignity" means that persons have an intrinsic quality that enables them to relate with others in the community in ways different and higher than animals, such as apes (Metz 2022, 348). A person with dignity is one who has the capacity to lovingly relate with others.

Note that striving to respectfully relate with others is key to being recognizable as a person in a typical African society. Mojalefa L.J. Koenane and Cyril-Mary Pius Olatunji, who are also noteworthy scholars, assert the perspective that an individual can be said to be a person due to the reason that "one's actions are accepted by the community as good; on the other hand, we refer to other people as 'non-persons' because they exhibit conduct that does not fit in with what is regarded as ubuntu" (2017, 267). Respecting dignity involves demonstrating an upright moral behavior in relations with others in the community. I remind the reader that the immeasurable worth of humans is inborn and shared by all persons.

Plausibly, it is hard to conceive the worth of a psychopath who has no respect towards the lives of others. The relational view considers the idea that extreme psychopaths, i.e., exceptionally brutal, violent, deformed, and life-threatening individuals, "lack a dignity equal to ours" (Metz 2022, 250). Notice that the psychopathic human's worth remains higher than that of other creatures, say, animals like horses. "We do much more for the [...] psychopathic, and incapacitated than we do animals, which is evidence of a greater ability to make them an object of a friendly relationship" (Metz 2022, 250). In contrast to animals, persons are able to incorporate the extreme psychopathic and incapacitated humans, "in a 'we', cooperate with them, act in ways likely to improve their quality of life, exhibit sympathetic emotions with them, and act for their sake" (Metz 2022, 250). Persons with ubuntu are loving towards all others in society because of their dignity.

Thirdly, it is vital not only to consider what makes persons more precious than any other creature across the entire universe, but also to discuss how we ought to treat people with dignity. A being with dignity, that

is to say, a person who has the capacity to achieve loving relationships with others (Metz 2022), merits respect. Respecting the worth of others involves sincere friendly engagements with them. To behave in the right manner towards beings with worth is to demonstrate an unfeigned friendly attitude towards others. I submit that if a relationship is unfeignedly friendly, it is necessarily respectful. A person with ubuntu is an individual who lives respectfully with others. "(I)n looking at Ubuntu (personhood or humanness, and/ or respect for human dignity) as an aspect of African hospitality, one realises that the postcolonial Africa cannot fail to uphold human dignity" (Gathogo 2008, 40). It is critical to achieve respectful relationships with all individuals in society.

Moreover, this ubuntu ethic illustrates each person's moral task of becoming an ideal individual, an upright person in society. Thus, the concept of ubuntu comprehended as a sincere friendliness towards others "enriches African philosophy by the clear and concise way in which it expresses the thinking of the ideal African person" (Gathogo 2008, 44). Moral philosophy includes laying bare what is involved in the undertaking of achieving morality. Why should a person be moral? Who is a morally upright individual? My response to the above questions is grounded on idea that we all merit loving relationships. I find compelling the point of view that "(h)umanity is a quality we owe to each other. We create each other and need to sustain this otherness creation" (Eze 2010, 190-191). Plausibly, it is critical to encourage acts that lead to loving relationships among people in the community. Therefore, becoming an ideal person involves exhibiting sincere respect for the dignity of others in society. One's capacity to relate lovingly with others ought to be promoted. Each person's role in every individual's endeavor to become moral should not be diminished, but should be encouraged.

Furthermore, ubuntu prescribes hospitality towards others. In a typical African society, it is important to exhibit hospitality towards others (Gathogo 2008, 40; Nzimakwe 2014, 31; Koenane 2018, 5; Cohen 2019, 47; Metz 2019, 140; 2022, 356). What does hospitality mean? "Hospitality" denotes welcoming another person as a potential friend (Magezi and Khlopa 2021, 18). A person with ubuntu understands that every human is an important being in the community. Observe that even individuals who are considered to be rivals deserve hospitality. Gathogo affirms the view that hospitality is not limited to a particular type of people but "is

ideally extended to all people: friends, foes and/or strangers" (2008, 40). It is through welcoming others sincerely that the right sort of relationships can be found.

Additionally, to have ubuntu/hunhu is to be able to connect with the experiences of others in the community. When people lovingly relate with each other in the community, an individual thinks "of oneself as a 'we' with another person, participating in joint activities with her, going out of one's way to help her, and doing so on the basis of compassion and for her sake" (Metz 2011b, 236). Hence, one's connection with other members of society leads to exhibition of solidarity and identity in relationships. One who is able to identify with others is a person who "participates in cooperative endeavours for reasons beyond mere prudence" (Metz 2022, 149). For example, membership in a hunting club demonstrates a person who is identifying himself or herself with fellow hunters. A person who expresses solidarity is one who "acts to improve another's condition" (Metz 2022, 151), which means meeting their needs and more generally improving their quality of life. To achieve friendly relationships with others requires revealing both identity and solidarity. Hence, an ubuntu ethic specifies how people in society can achieve unfeigned associations with each other.

7. *Reasons why my interpretation of ubuntu is attractive*

First, my analysis of the ubuntu ethos is attractive because it captures much about African values such as love, hospitality, and sincere concern towards others in the community. According to the ubuntu ethic, one ought to be respectful towards other persons. Most African values are rooted in the understanding that one needs others to fully flourish. Several scholars affirm that African moral values discourage different forms of bad behaviour (Idang 2015, 103; Koenane 2018, 5; Mbembe 2017; 2019; Gathogo 2023). "Bad behavior" entails unloving acts towards others in society. One ought to avoid colonial influences that do not promote the dignity of all. Further, the African ethic encourages all members of society to discharge their communal duties in ways that display an authentic love towards others. Hence, to demonstrate an authentic love towards others is not only to act morally, but to affirm the dignity of persons in society.

Secondly, my interpretation of ubuntu is appealing as an ethic, that is, it gives us right answers about how one ought to act to achieve enduring practical loving relationships with others in society. A person who is motivated by the ubuntu ethic understands that to be unloving towards others is to constrain the prospects of achieving practical relationships with others. Contrary to an unloving individual, a person who is prompted by the ubuntu ethic exhibits identity and solidarity. Positive associations with others involve "prizing identity and solidarity or, more carefully, the capacity of individuals to relate in those ways." (Metz 2022, 355-356). Hence, loving relationships with others in the community demand that one should be respectful towards all people.

8. *Challenges to interpreting ubuntu*

Now that I have explained the ubuntu ethic, I present two challenges that confront my interpretation of ubuntu, but also show how I overcome the issues. First, regarding ubuntu as an ethic that prescribes that one should primarily be concerned with his or her family, including relatives and political companions has "dangers in that the criterion in determining who is 'our person' and 'who is not one of us' is indeed a tricky one" (Gathogo 2008, 47). Every individual has a dignity that deserves fitting unfeigned honor.

Above I illustrated that identity and solidarity should not merely be exhibited to family members or kinsmen, but to every person in society. My interpretation of ubuntu stresses the perspective that loving relationships that are prescribed by relational ethos, i.e., ubuntu ethic, are not conditioned by kingdom or blood-relatedness (Metz 2022, 184), or affluence. Hence, I defend the standpoint that partiality towards others in the community does not reveal authentic commitment to loving relationships with others.

However, I do not totally reject a principle such as family first or that love ought to begin at one's home, for example towards a mother or brother. Rather, there are particular circumstances that demand one to favour her family before strangers. In contrast to strangers, blood relatives, workmates, and one's compatriots "are the sorts of persons who straightforwardly merit extra cooperation and help from a given agent,

because of the relationship that agent has shared with them" (Metz 2022, 312). I contend that parents are entitled to take care of their children before they contemplate going to the streets to take charge of strangers, say, street kids.

Secondly, one might challenge the idea that we should have concern for the people facing any form of predicament. Individuals should seek by themselves, from their own friends or relatives, the means to meet life challenges in society. Kindliness is owed to one's friends who are capable of returning some favours.

Contrary to the above viewpoint, I point out that concern for suffering individuals does not indicate moral weakness, but rather shows a courageous act towards others. Plausibly, when people who are in any form of misery, say the poor who live in the margins of the community, are not treated in a friendly manner, they become strangers or foes that on the face of it deserve disassociation. Instead, my relational ethos proposes an interconnection and outreach that is achieved through welcoming people with hospitality (Metz 2019, 140). Authentic love is practically demonstrated by one's willingness to relate with others. I share Gabriel E. Idang's view that African philosophy has a strong concern for morality (Idang 2015, 103). Plausibly, good moral principles, that is to say, an ethic that is firmly grounded in identity and solidarity, enhance people's capacity to lovingly relate with each other. Hence, it is crucial to highlight that "the concept of Ubuntu obliges every single person and all communities (nation states or other forms of communities) to welcome all strangers" (Graness 2019, 101). Again, I emphasize that hospitality does not weaken society, but strengthens it through practically demonstrating what it means to be friendly towards others. The African ethic, the ubuntu ethos, enables members of society to practically display compassion towards others.

9. *Rationale for keeping borders*

Across the world, borders have continued to serve as boundaries for different states. Why should states, such as South Africa and Zimbabwe that share national boundaries, keep borders that separate one African country from the other? In this section, I apply the ubuntu ethic

to the problem of borders. I provide a coherent argument for why state borders should continue to exist according to my understanding of the ubuntu ethic. "As an ideal, Ubuntu means the opposite of being selfish and self-centered. An ubuntu ethos promotes cooperation between individuals, cultures, and nations" (Nzimakwe 2014, 30). The first reason that I give for why state boundaries should remain in place is that respect motivated by the ubuntu ethos involves honouring the other's limits or confines. Furthermore, I illustrate the idea that borders offer protection to society. Finally, I point out that borders encourage decentralization of power.

10. *Respect inspired by ubuntu ethic involves honouring others' limits/confines*

First, to act in a respectful manner that is inspired by the ubuntu ethic involves honouring the others' limits/confines, i.e., boundaries that are a common feature in the everyday living of people. To have ubuntu is to have respect towards other persons (Gathogo 2008, 40; Gade 2011, 309; Koenane 2018, 4). Consider an individual who chooses to disregard boundaries on fields, homesteads, or markings that separate one African village from the other. Plausibly, choosing to neglect others' communal boundaries is a form of disrespect that unsettles the achievement of loving relationships in the community. The ubuntu ethic "affirms that the importance we give to each other is what enables us to live together and respect our differences as human beings" (Koenane 2018, 4). We are all beings with an unlimited worth.

I stress the point of view that "ubuntu" means that one exhibits concern, kindness, and friendliness towards relationships with other people (Samkange and Samkange 1980, 39). A person with ubuntu would choose not only to respect smaller boundaries, such as those of others' fields or homestead as per above example, but also to honour larger borders, for example those of a state. The ubuntu ethic prescribes that a state ought to exist in a friendly manner with neighboring nations (Samkange and Samkange 1980, 50; Gade 2011, 310). Hence, I point out that according to an ubuntu ethos, authentic respect demands that one honours others' boundaries, including wide boundaries like those of a state.

Moreover, I consider the objection that the above two kinds of cases, smaller home edges and national frontiers, are disanalogous since local confines, such as homestead boundaries, are not only very small, but are insignificant in comparison to large international borders. I stress the idea that although the above two cases consider borders with varying sizes, plausibly one ought to be respectful in the same manner to every kind of boundary. We owe respect to the confines of others. To act in a disrespectful manner towards others' boundaries, whether they are local as those of an individual's farm or are international like the state borders, is to behave against the demands of the ubuntu ethic. The ubuntu ethos stresses the notion that one ought to be respectful towards others. A person who has respect for others is one who strives to honour borders, the limits, or confines of others.

11. P*rotection for society*

National borders should be maintained because they guarantee protection of society against misconduct that could be performed by other governments. The well-functioning of a state's economy, social and political entities require supervision, but also defense from the wrongdoing of other governments or organizations. Although almost every modern society is governed by a specific administration, "(m)odern states, even rival ones, acknowledge one another's existence, if only implicitly through their own understanding of their boundaries and jurisdiction" (Morris 1998, 31). A border marks a state's own location, as well as the set of regulations that ought to be treated with respect by other governments.

Friendly cooperation between various governments continues to benefit people throughout the world. However, it is not always certain that other governments will adhere to principles of global justice. In order to protect society, using borders, an administration could decide to establish norms that ban the importation of a particular product, say, a commodity that is associated with some health risks, from another government. Borders enable states not only to separate themselves from others, but also to protect people in their jurisdiction by demanding fairness from other administrations across the world.

12. *Decentralization of power*

State borders, for example the boundaries between South Africa and Zimbabwe, enable decentralization of power. By "decentralization of power" I mean the sharing of authority among various individuals. In loving relationships, according to the ubuntu ethic, what is of paramount importance is not power, but the accomplishment of an unfeigned identity and solidarity. Borders enable the larger community to be reduced to smaller constituents where political leaders, for example lawmakers, are more able to attain identity and solidarity in the community. "Ubuntu as a philosophy can also not be seen as a one size fits all solution in the challenges that the African society faces today" (Nzimakwe 2014, 39). Living together in friendly relationships that honor each person's dignity, i.e., associations that have an authentic identity and solidarity (Metz 2022, 145-156), requires that decision making is not limited to one or only a few leaders, but that it is unrestricted to all people who are capable of executing leadership duties.

Observe that the sharing of political duties in the community is a measure that deters the emergence of a dictatorship, a political structure that contradicts the ubuntu ethos. "(I)f political and economic institutions ought to be designed to improve people's lives, then it is natural to structure them in ways likely to foster ubuntu, a plausible understanding of how best to live" (Metz 2021, 4). It is important to have a political structure that prevents one individual or a few from having unchecked power over the controlling of a number of states or societies. Hence, the decentralization of power that is caused by borders helps communities prima facie to be guided by the norms of an ubuntu ethic to establish controls that limit the emergence of a dictatorship.

13. *Concrete changes to borders*

In this section, I discuss what welcoming one's neighbor entails for the border between South Africa and Zimbabwe, the primary example in this philosophical essay. It is crucial to point out that social and political association is not permanent but "is constantly negotiated" (Mbembe 2017). I consider state boundaries from a relational ethos, i.e., an ubun-

tu/hunhu ethic understanding. It is essential to emphasize that ubuntu does not only involve welcoming one's neighbor, but includes practical concern for others. To have the moral characteristic of hunhu is to have humanness, but also to reveal virtues that make one accomplish the honouring of communal or friendly relationships with others in society (Metz 2021, 4). I advance the proposition that friendly attitudes towards others should be exhibited by concrete acts on the borders. Above, I have already pointed out that I do not propose getting rid of the border entirely. Instead, I debate what criteria should be used to regulate who crosses the state boundary.

14. M*ultiple ports of entry on border*

I do not merely consider challenges that the poor migrants face on the border, but I also lay bare the dangers involved in limiting ports of entry. Again, note that the South Africa – Zimbabwe border, which is one of the busiest in Africa, regularly experiences bottlenecks, that is, congestion of vehicles (Ngarachu *et al.*, 2019, 6-11). Consider an accident at the border involving a truck carrying mining explosives or fuels. It is essential to establish measures that encourage the safeguarding of the dignity of persons at the South Africa – Zimbabwe border. Plausibly, the creation of multiple ports of entry on borders is an important safety measure. Notice that an ubuntu moral ethic "is much more than what people do; it is also about the failure to act appropriately when obligated to do so" (Koenane and Olatunji 2017, 268). An ubuntu moral theory prescribes an obligation to honour the dignity of persons, including the life of each individual. I argue that multiple entry points would not only make it easier and cheaper for the movement of resources and migrants across states, but also make borders safe for the migrants and the states. A state that is concerned about people's safety, everywhere in the country including the border, is a government that honours people's dignity.

I consider the view that borders should exist without any alterations, such as the creation of multiple port of entries, since establishing new ports is costly. Different communities should maintain their manner of living without considering problems originating from another society. Rather than establishing modifications on the border, it is plausible to

assist the poor in their own state without allowing them to cross the border.

In response to the above objection, multiple ports of entry would ensure that individuals crossing the border are afforded protection and dignity that is fitting to humans. Although the construction of new ports is costly, protection of human life should not be avoided because of the absence of financial gains. Moral acts involve actions that increase the protection of life, hospitability, and respect towards the dignity of persons. Since in a typical African society an ideal person is hospitable to all people (Gathogo 2008, 40), one should not prevent the community from being welcoming towards others. The creation of multiple port of entries on the South Africa - Zimbabwe border, a boundary with only one lawful port of entry that is used by all vehicles including heavy industrial trucks and passenger vehicles, is an endeavour that not only increases the protection of life, but also establishes a more dignified way of crossing the border.

15. *Adjusting border restrictions*

Permission to stay in the host nation should not be limited only to individuals who possess educational or job-related credentials. Wilfred Lajul points out that controls for human movement across borders "not only increase the vulnerability of migrants, they also complicate migration policies and increase security threats by making flows invisible" (2020, 168). It is essential to keep impoverished migrants from being vulnerable. I argue that even though one's credentials are important for proving one's ability to make contributions towards the economy of the host state, educational qualifications do not show beyond reasonable doubt people's capacity to prize friendly relations with others. The dignity, i.e., the capacity to engage in respectful relations, of people is an essential characteristic of human beings (Metz 2022). Albeit lacking affluence, the poor migrants have a capacity to engage in respectful associations, a human quality that enables them to contribute towards the success of society. Plausibly, friendly relations are the foundation of the community, since genuine success of society depends on how individuals relate with each other in society. Relating with others in a "friendly manner is more

or less to enjoy a sense of togetherness, to engage in cooperative projects, to help one another, and to do so for reasons beyond self-interest" (Metz 2020, 260). Therefore, it is important to eliminate regulations that prioritize the requirement of credentials on the border since such norms exclude people's capacity to honor friendly relations in society.

Further, rather than demanding credentials, I submit that host nations can use good conduct certificates to measure individuals' viciousness and misbehavior. In a typical African society, behavior is one of the essential "attributes of stranger-host social interaction" (Shack 1979, 42). Achieving respectful relationships with others demands good behavior. Plausibly, good conduct certificates issued by relevant authorities in the sending and receiving countries are sufficient indicators of one's character at a given time. "The Ubuntu character needs to pre-dominate the approach towards treatment of immigrants and refugees in Africa" (Sebola 2019, 6). Each person has the duty to achieve good behavior. Since it is critical for a person not to shun his or her duty of accomplishing ubuntu, I argue that one who fails to get a good conduct certificate should first improve his or her character before he or she is authorized to cross the border.

A good conduct certificate would differ from the current requirement of a police certificate in that the prior primarily aims to affirm a person's good character while the latter would be generally issued if one does not have a crime. In contrast to a police certificate, a good conduct certificate would include exceptional moral acts that one has accomplished. For example, a good conduct certificate could highlight one's voluntary acts of helping the elderly in society.

One might object that scraping border restrictions such as the requirement of credentials would disrupt the poor migrants' endeavor to achieve ubuntu. The removal of educational requirements might be understood as something that makes poor migrants indifferent to striving towards high economic or political success in the host state. Hence, in this second objection, achieving ubuntu is associated with working hard, an achievement that is indicated by one's credentials.

Credentials do not make it totally probable that one would be industrious in the host state. One could be willing to work hard even without an education. According to an ubuntu ethos, it is not the acquisition of an education that makes one a moral person, but the willingness to

work hard. Although those with skills could do better for others with their labour, reliable contribution towards the success of the community requires working hard.

16. *Poor migrants no worse than skilled or rich migrants at fostering relationality*

Lastly, observe that poor migrants are no worse than skilled or rich migrants at fostering relationality. First, border regulations that do not exclude, but also involve, the poor make community relationships wealthier. Michael Eze, in his worth noting research on the problem of violence towards migrants, i.e., "I Am Because You Are: Cosmopolitanism in the Age of Xenophobia", affirms that all persons, including individuals considered to be strangers, have the capacity to enrich one's humanity (2017, 101). Although the poor migrants do not possess a considerable amount of financial resources, their capacity for loving relationships is worth considering. It is through associating with others that one attains humanity (Gathogo 2008, 46; Gade 2011, 313-314; Graness 2019, 98). The ubuntu ethic emphasizes the importance of achieving sincere communal relations, friendly associations that include all people, such as the skilled, rich, and poor. The accomplishment of genuine relationships with one another in society leads to an exchange of skills, wisdom, and political ideas.

17. *Ubuntu and borders in different continents*

The above proposals to make changes to the South Africa - Zimbabwe border, my main example in this study, stem from the contemplation of how the current worldwide problems of migration, particularly the movement of the poor on the border, could be morally resolved. The ubuntu ethic could help scholars and states to envision new concrete ways of dealing with the movement of poor migrants. Ubuntu is an ethic that contemplates not only conflict of interest, but also ways of promoting the dignity of all persons, even in relationships that do not bring about profits/financial gains. Hence, although the proposals that I make in this essay are particularly for the Southern Africa, viz., the South Africa - Zimbabwe border, the suggestions could be applied to other international

boundaries, in Africa or the world, that are problematic to states and poor migrants.

Furthermore, it is critical for states to establish policies that not only secure the borders, but also protect the dignity of poor migrants. Many different people continue to choose to migrate to richer nations. Depending on each country's capacity to engage with migrants, governments ought to establish border regulations that do not disfavour the poor migrants. I remind the reader that dignity entails the capacity to relate lovingly with others (Metz 2022, 167-170). Above, I have demonstrated that the lack of things like educational certificates and financial proof do not take away people's capacity to relate lovingly with others. Ubuntu promotes not only the worth of all persons, but also the establishment of loving relationships in the state.

Lastly, the exportation of the ubuntu ethos to other continents requires new ways of encouraging policy makers to engage with scholars who are familiar with the literature on the ubuntu ethic. Additionally, I emphasize the idea that the exportation of ubuntu ethic involves encouraging the impoverished migrants to practically exhibit their capacity is to relate lovingly with others in the host nation.

Conclusion

Substantial migration of the poor is a problem that involves the debate of whether state borders should be abolished and, if not, how they should be regulated. Using the South Africa - Zimbabwe border as my main example, in this essay I argued for an application of an ubuntu ethos to the issue of borders, making some concrete prescriptions for change in policy.

Grounded on the ubuntu ethic, I contended with the challenge of borders in relation to poor migrants. I highlighted that hunhuism, as a philosophy of how to exist together informed by hunhu, that is to say, humanness of a person, captures the basis of being among the Shona speaking people (Samkange and Samkange 1980; Mungwini 2017, 143). Additionally, I stressed that ubuntu prescribes love, understood as an unfeigned expression of identity and solidarity (Metz 2022) towards others in society.

Plausibly, an ubuntu ethos is concerned with removing barriers that limit the success of loving relationships with others in the community. Ubuntu involves exhibiting upright moral actions in relation to others in society, but also "exhibiting solidarity with or caring for others, i.e., doing what is expected to advance people's good and doing so for their sake" (Metz 2022, 201). Achieving friendly relationships in the community requires overcoming indifference towards alienated individuals.

After articulating the ubuntu ethic in the third segment of the study, I applied the African philosophy to challenges of the border in the fourth and fifth sections of the essay. By reason of the ubuntu ethic, I drew the conclusion that while colonial boundaries in African states, for example the border between Zimbabwe and South Africa, should remain for advantages such as protection and decentralized authority, it is imperative to get rid of the regulations that disfavor the poor migrants. I indicated that loving persons establish a society that is openly accessible by all individuals including impoverished immigrants.

African state boundaries should continue to exist, but it is essential to construct multiple port of entries on the national borders. Laws that discredit the poor migrants' worth should be changed. All individuals, including the poor migrants, should be able to cross the border. Ubuntu is one of the "aspects of African hospitality that clearly embodies the positive thinking of the Africans" (Gathogo 2008, 44). Notwithstanding the fact that the practical resolutions I suggested for change on borders are particularly focused on my chief example, i.e., South Africa - Zimbabwe border, the proposals can likewise be applied to a comparable border challenge on the basis of the ubuntu ethic.

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Laura Santi Amantini

Territorial Rights and Reparative Justice for Indigenous Displaced People

Abstract
Forced displacement disproportionally impacts members of indigenous minorities. Yet, the implications remain largely unexplored in the normative literature on justice in migration and displacement. In this paper, I defend the claim that the forced displacement of indigenous people raises specific reparative justice claims. Firstly, I argue that all forcibly displaced people are owed reparations for the harms and wrongs involved in forced displacement. Secondly, I assess the implications of attributing individual occupancy rights and collective territorial rights to indigenous people. I argue that, while all forcibly displaced people are wronged when their occupancy rights are violated, this violation is especially harmful to indigenous people, given the specific relevance of their ancestral land for their life plans. Moreover, when indigenous displaced people are dispossessed of land, all members of the indigenous group have their territorial rights over that land violated. Finally, I explore what form reparations should take to redress such harms and wrongs and who bears reparative responsibility. This last section offers a preliminary account of what is owed to indigenous displaced people qua simultaneously displaced individuals and members of indigenous minorities. Hence, it contributes to bridging the debates on justice for forcibly displaced people and justice for indigenous minorities.

Keywords: forced displacement, indigenous people, occupancy rights, territorial rights, reparative justice

Introduction

Forced displacement disproportionally impacts members of indigenous minorities (IDMC 2021). The lands they inhabit and the natural resources that such lands contain are often contended in armed conflicts. Moreover, the ecosystems indigenous people live in are particularly vulnerable to natural disasters and environmental degradation amplified by anthropogenic climate change. In addition, a significant proportion of those displaced by development projects are indigenous people. Yet, the implications of the disproportionate rate of forced displacement among indigenous minorities remain largely unexplored in the debate on justice in forced displacement. My main claim is that a normative theorisation of justice for indigenous displaced people should recognise them qua displaced people who may have additional claims due to their membership in indigenous minorities. More precisely, I argue that the forced displacement of indigenous people raises specific reparative justice claims. This paper does not aspire to offer a full-fledged theory of reparative justice. It aims to offer a preliminary exploration of the implications of occupancy rights and territorial rights theories in assessing the harms and wrongs that forced displacement entails for indigenous people, and in determining what they are owed, qua displaced individuals but also qua members of indigenous minorities. Hence, it contributes to bridging the debates on justice in forced displacement and justice for indigenous minorities.

Forced displacement is harmful. When it entails rights violations, it is also wrongful. Political theorists have defended the individual right not to be displaced on several grounds. For instance, Ottonelli (2020) defined it as a control right over one's body and personal space, while Stilz (2013) had previously framed it as an occupancy right based on the fundamental interest to pursue located life plans. The violation of the right not to be displaced grounds reparative justice claims. Another ground for reparations may rest on the analogy between the harms of forced displacement and human rights violations. As I argued elsewhere (reference omitted), forced displacement involves a combination of multiple harms: a loss of control, the loss of the individual's 'home environment' (including one's place of residence and properties, as well as the reliable surrounding geographical, social, and cultural environment), a

loss of social status, and damage to mental health. To the extent that such harms undermine the very conditions for a dignified human life, they are akin to human rights violations. As a result, displaced people have moral claims to redress when the harms can be debited to human agents or human-made structures and processes.

The paper is structured in three sections. In the first section, I briefly sketch my account of the harms of forced displacement and argue that, if such harms of displacement constitute human rights violations or undermine fundamental human interests, all displaced people have individual claim-rights to have such harms repaired and the subsequent needs addressed.[1] Then, I move on to the central question of the paper, i.e., what reparative justice requires when it comes to displaced people who belong to indigenous groups, for whom displacement and land dispossession can be particularly harmful.

Section 2 assesses normative theories arguing that members of indigenous groups have, at least, individual occupancy rights (Stilz 2013) or even collective territorial rights including jurisdiction over their ancestral lands (Coburn and Moore 2022; Moore 2015; Miller 2012). I conclude that individual occupancy rights provide a ground to claim that forced displacement is wrongful, but the violation of such rights is not specific to the members of indigenous groups: it affects all forcibly displaced individuals. Yet, the violation of occupancy rights, I argue, can be more harmful for indigenous individuals, to the extent that ancestral land has a specific relevance for their life plans. Based on collective territorial rights, by contrast, we can identify a specific wrong in cases where the forced displacement of indigenous people is coupled with land dispossession. Dispossession deprives the whole group of a portion of their territory. Thus, it entails the violation of territorial rights. This wrong affects all members of the indigenous group, rather than the displaced members only. Yet, this is relevant when assessing what is owed to indigenous displaced people *qua indigenous*.

Section 3 examines whether current international human rights law on the rights of displaced people and indigenous people captures the

[1] Note that this applies to all displaced people, including those internally displaced, who remain within the borders of the state of origin.

specific condition of indigenous displaced people qua simultaneously displaced people and members of indigenous minorities. I show that the specific harms and wrongs affecting indigenous displaced people are not captured by current legal frameworks, which focus on either indigenous people or displaced people. Then, I argue that occupancy rights and territorial rights theories can be useful to draw on when theorising reparative justice for the forced displacement of indigenous people. This section offers a preliminary exploration of the implications of individual occupancy rights and collective territorial rights in assessing what is owed to displaced individuals and to the whole indigenous group in cases of land dispossession. Section 4 concludes.

1. *What should be repaired? The harmful consequences of forced displacement*

As I argued elsewhere (reference omitted), being forcibly displaced from one's place of habitual residence typically entails four kinds of harm. Firstly, displaced people suffer a loss of control, which can take multiple forms. The most acute is probably the loss of control over their body (which includes the body's physical movement). This is particularly evident in cases of deportation, where displaced people are coerced into moving and typically ignore where they are moving to. However, we can identify a loss of control over one's bodily movement whenever moving is the only possible or acceptable option, and when the option of heading back is impossible or unacceptable once the move has started, although the movement is not physically coerced. Someone who moves because they have been threatened with death if they do not leave their home suffers a loss of control over their bodily movement. Forced displacement entails a second important loss of control, which concerns one's private space. Displaced people leave behind their place of habitual residence and the personal belongings it contains. They are no longer in control of what happens to their home. Moreover, once displaced they often end up in precarious shelters, which can be demolished or evacuated anytime. This perpetuates the sense of insecurity and uncertainty that losing control over their habitual place of residence provoked in the first place. Thirdly, forced displacement undermines a person's control over time. Unlike voluntary migrants for whom migrating is part of their

life plan, displaced people lose control over their future. In many cases, displacement is abrupt and unexpected (Gürer 2019, 58). It suddenly disrupts the person's usual routine, and it makes life plans collapse at once. This sudden disruption is evident when forced displacement is triggered by extreme natural disasters. However, even for those who flee generalised violence, individual persecution, or environmental degradation the decision to leave home may be sudden. The displaced person may have endured an unsafe and uncertain existential condition for a while, but over time their permanence may have become unbearable. Mass violence may have worsened, threats of individual persecution may have intensified, and subsistence may have become harder. Moreover, even when not sudden, forced displacement is not planned by the displaced person. Evictions for land acquisition and development projects, for instance, can be even communicated in advance, but the displaced people did not themselves plan to leave.

Forced displacement, thus, is harmful in that it is a forced, non-voluntary movement. Furthermore, displaced people have to leave a specific place. Besides their home, forcibly displaced people leave behind their environment, which I will call the 'home environment'. Losing the 'home environment', for the displaced individual, means being abruptly deprived of a web of familiar geographical, social, and cultural landmarks on which they could rely to carry out their daily routines and make plans.

Furthermore, the loss of one's house and 'home environment' results in a loss of social status. This loss of status depends in part on the loss of what displaced people owned and relied on to live. Displaced people not only lose material belongings but also their livelihood. Moreover, their capacity to restore it may be severely undermined outside their place of residence. For instance, the skills required for indigenous traditional fishing may be useless in a city. The loss of their job profoundly affects displaced people's social status, not only because it causes impoverishment and economic dependence, but also because it deprives them of a crucial component of their personal identity. Being displaced also means moving somewhere else, to another area of the state or abroad. To the residents of the area where they have moved, displaced people may appear as anonymous, needy strangers who came uninvited. Therefore, besides the immediate impoverishment due to the loss of their house and belongings, the severely reduced capacity to sustain them-

selves because of the loss of their livelihood, and the loss of relevance of the social relations and skills they used to have, displaced people also typically suffer an additional loss of status due to social exclusion in their host society.

In addition, displaced people experience a fourth kind of harm. This harm consists in damage to mental health, which derives from the cumulative effects of losing control, losing one's 'home environment', losing social and economic status and experiencing one or more forms of violence. Generalised violence may affect non-displaced people too. However, sometimes violence is intentionally used to force people to abandon their place of residence: displacement itself can be the aim of violence. Besides cases of ethnic cleansing (Stefansson 2006), in cases of 'land grabbing' too insurgents or paramilitary forces use threats and engage in murder to induce residents to leave their homes and lands (Steele 2017; Molano 2013; NRC/IDMC 2007). Though not equally traumatic, all forms of forced displacement may undermine the mental health of displaced people. Psychiatric research shows that many develop symptoms of post-traumatic stress disorder, major depression and generalised anxiety disorder, and these disorders often overlap (Fazel *et al.* 2005). Furthermore, compared to other people exposed to traumatic experiences, such as non-displaced war-affected civilians, displaced people face additional and specific displacement-related stressors, which undermine their ability to cope with traumatic memories (Djelantik *et al.* 2020).

As a result of the harms of forced displacement, displaced people have specific needs, in addition to basic survival needs. Besides shelter, basic food, and sanitation, they need housing that allows them to regain control over their body, personal space, and near future. Moreover, they need to rapidly recreate a sufficiently stable 'home environment' they can navigate to carry out their daily routines and make plans. To regain social status, they not only need a source of economic income but also the social recognition of both their individual identity and their existential condition as displaced persons. Furthermore, they may need specific mental health support to overcome the psychological impact of having been forced to move, to leave their 'home environment', to lose their livelihoods and social roles constitutive of their personal identity and, often, experiencing violence as a trigger or a consequence of forced displacement.

If we value general human rights, we should also recognise the analogous moral relevance of displaced people's specific needs. Both the fulfilment of general human rights and the fulfilment of displaced people's distinctive needs, indeed, share the same goal, which is to provide the conditions of a dignified, minimally flourishing life. I do not have enough space to develop this argument, here. Thus, I will merely assume that if the harms of displacement undermine the same fundamental human interests protected by human rights, displaced people have individual claim-rights to have such harms repaired and their specific needs addressed. In addition, if we consider the individual right not to be displaced as a human right, either understood as a control right as in Ottonelli's account, or as an occupancy right, as in Stilz's account, the violation of this right grounds displaced people's claim to have that wrong repaired and their displacement-related needs met.

So far, I have illustrated the harms of forced displacement and defended the existence of reparative claim-rights which all displaced people bear qua displaced people. However, displaced people may belong to minority groups, such as indigenous groups. Indeed, in several areas of the world, indigenous people have a higher probability of being forcibly displaced and are more vulnerable to the adverse impact of forced displacement and land dispossession (IDMC 2021). In the following sections, I focus on this intersectional subgroup of displaced people. In the next section, I consider whether being an indigenous displaced person entails additional specific harms and wrongs, before moving to the implications concerning reparative claims.

2. T*he forced displacement of indigenous people: how do occupancy and territorial rights matter*?

Who counts as 'indigenous' is disputed. The UN Declaration on the Rights of Indigenous Peoples does not provide a definition of an 'indigenous people'. Indeed, the Declaration was the outcome of a working group open to all those groups who self-identified as 'indigenous peoples', including white Afrikaners from South Africa (Coates 2004, 9). Scholars have proposed definitions based on different sets of conditions (see Coates 2004, ch. 1). In this paper, I consider 'indigenous' the members

of minorities who live in separate communities within the territory of internationally recognised states and differ from the majority of citizens because they share a specific language, religion, or other cultural traits, including a morally relevant relationship with a particular geographical area. Note that, while an indigenous minority may count as a national minority, not all national minorities plausibly count as indigenous. Consider the case of three groups who were collectively displaced from different contexts: the Navajo tribes removed from Arizona in the XIX century, the Sudeten Germans expelled from Czechoslovakia after World War II and the Armenians who have recently fled Nagorno-Karabakh.[2] Armenians who lived in the Nagorno-Karabakh region within Azerbaijan appear as a national community separate from the Azeri majority. However, we intuitively consider the Navajos as a typical example of an indigenous group, while it is unlikely that we would consider the Sudeten Germans or the Armenians from Azerbaijan as indigenous people, despite their ancestors may have long inhabited the territory they have been displaced from.

In the case of the Navajos, there seems to be something distinctive in the relationship with the land they occupied. Surely, one might claim that a particular place may have a symbolic value for a national community too. For instance, Miller (2012, 261-262) defends the idea of national homelands: namely, portions of territory that bear a symbolic value for a national group because of the events that occurred on it, such as battles that mark the history of a nation. However, scholars often claim that indigenous people have a particularly strong, and normatively relevant, attachment to their ancestral land (see Moore 2015). Indeed, for indigenous people, mountains, rivers or forests may be sacred and even personified. Access to these sacred sites is thus necessary for the pursuit of their religious aims. What is more, living in a particular place may be essential for their communal ways of life and traditional forms of subsistence (see Coats 2004, 47-51, Coburn and Moore 2022, 7-8). Indeed, indigenous groups typically live out of subsistence livelihoods, they are (or have long been) significantly isolated from the global market economy and kept traditional forms of social organisation and political

[2] I am grateful to an anonymous reviewer for providing the last two examples.

authority that differ from the modern state. Indigenous groups' traditional livelihoods and social organisation, in sum, are strictly dependent on the geographic niche they inhabit. For our purposes, it does not matter whether indigenous people belong to hunter-gatherer tribes, are nomadic pastoralists or aresedentary farmers.[3] What counts is their relationship with the land, which is constitutive of their traditional subsistence livelihoods and cultural practices. Outside that land, they may no longer be able to identify as a group, even in the case they were not dispersed once displaced and were able to relocate with other group members (Moore 2015, 41 and 43). The displacement of members of a national minority may entail collective harms and require specific reparations. Yet, the case of indigenous groups should be singled out, and we need to take into account the distinctive relationship that indigenous groups entertain with the land they traditionally occupy.

It is not just the symbolic meaning and the passing of time that makes the land traditionally occupied by an indigenous group an "ancestral" land. For instance, cloud forests on the Colombian Andes count as ancestral land for the U'wa people not only because they have long inhabited that area and consider the glacier-capped mountains of the Sierra Nevada del Cocuy to be sacred.[4] Members of this indigenous minority are also considered the descendants of those who inhabited that territory before the Spanish colonisation. There is a wide consensus about counting as 'indigenous' the descendants of those societies who lived on a given territory before the European colonisation and the foundation of a modern state. Though the insistence on European colonisation has been criticised as Eurocentric (see Coats 2004, ch. 1), the historical injustices involved in colonisation and their enduring effects

[3] Note, incidentally, that even nomadic indigenous people suffer the same harms of forced displacement as sedentary people. Although they periodically move, they lose control over their bodily movement when such movement is forced. Moreover, they lose their 'home environment' when they are forced to move outside their usual mobility routes and settle among sedentary people. Their social status is also harmed when they are deprived of their livelihoods, social roles, and social structures, and when they are marginalised by sedentary host communities. See Moore (2015, 42) and, for an empirical case study, Larsen (2003).

[4] See Taylor 2023.

do matter in the paradigmatic cases of indigenous minorities most considered in normative political theory, such as the case of Native Americans in the US. Particularly salient, here, are historical injustices of land dispossession, forced displacement and relocation, and forced cultural assimilation that many indigenous people experienced as a result of settler colonisation. Therefore, I use 'indigenous people' to refer to the members of minorities who live in separate communities and differ from the majority of citizens because of traditional social and cultural practices strictly dependent upon members' permanence on a particular land their ancestors occupied before settler colonisation. It is true that some members of indigenous minorities may now live dispersed amongst the non-indigenous population. However, I focus here on those who occupy portions of territory that are either recognised by the state or claimed by the indigenous themselves as 'indigenous territory'.[5]

Stilz (2013) opens her discussion of occupancy rights with the case of the Navajo Indians' removal from their homeland in Arizona in 1864. Stilz defends an interest-based individual right to occupancy which applies to all human beings. Indeed, the fundamental human interest at stake is the pursuit of one's located life plans. This, Stilz argues, grounds a pre-institutional moral right, which explains why colonial settlers committed a wrong against indigenous peoples, like the Navajos, when removing them from the territory they used to occupy. However, the occupancy right Stilz has in mind remains fundamentally a universal human right, rather than a right held by members of an indigenous group. Stilz concedes that from this individual right one can derive group rights, but several kinds of groups, such as immigrant minorities or religious minorities, may hold such group rights to occupancy (Stilz 2013, 350-351). Thus, if we adopt Stilz's account, we can surely conclude that indigenous displaced people have been wronged because their occupancy rights were violated, but this would be true for other displaced people too. The fact that Stilz chooses the Navajos case as the main illustrative case throughout her arguments seems to underline the importance

[5] I do not consider, here, whether the current extension of recognised indigenous territories is just, or whether the treaties that granted indigenous people specific rights on such territories were fair. These are important issues for justice towards indigenous minorities but will not be addressed in this paper.

of territorial occupancy for indigenous people, but her argument does not suggest that members of indigenous groups suffer specific harms or wrongs, compared to other displaced people taken qua individuals or qua members of social groups.

Stilz (2013, 327) clarifies that the right to occupancy consists of "the right to reside permanently in that place, to participate in the social, cultural, and economic practices that are ongoing there, and to be immune from expropriation or removal", which does not amount to territorial jurisdiction. However, other political theorists argued that, based on occupancy rights, indigenous people possess collective territorial rights over their lands. Coburn and Moore, for instance, have recently defended this claim using the case of the Algonquin indigenous minority in Canada. Contrary to Stilz, they attribute occupancy rights to groups, understood as collective agents whose members share a collective identity and perceive a given area as a source of such a collective identity (Coburn and Moore 2022, 7; Moore 2015, 39-40).[6] Coburn and Moore (2022, 10) assume that the territorial rights of states are based on collective occupancy rights. Then, they adopt a cantilever strategy to argue that, if the territorial rights of states are based on collective occupancy rights, the same ground applies equally or better to indigenous groups. Indigenous groups, such as the Algonquin, bear at least two key territorial rights in Coburn and Moore's account: the right to resources and the right to jurisdiction. Jurisdictional power, Coburn and Moore note, is probably the most fundamental territorial right. Indigenous groups, they claim, cannot control the natural resources on which their community relies for material and spiritual aims if they do not have the power to exercise "robust forms of self-determination" over such resources. Though jurisdiction over indigenous ancestral lands may not be exclusive and may be shared with the state (e.g., the Canadian state), this does not mean that the indigenous group does not have such a jurisdictional right in the first place.

Indigenous territorial rights have also been defended based on a nationalistic account of territorial rights. Miller (2012) argues that ter-

[6] In this account, individuals have residency rights, but the domain of individual residency rights cannot be articulated "without reference to the collective context in which people live" (Coburn and Moore 2022, 9; see also Moore 2015, 36-45).

ritorial rights are borne by transhistorical collective agents sharing a distinctive culture, namely nations. In his account, such rights are not justified "by the mere fact of occupancy" (Miller 2012, 265). Territorial rights, Miller argues, require both prolonged occupation and territorial transformation. Miller (2012, 258-262) proposes three arguments to defend the territorial rights of nations, including indigenous peoples. Firstly, he proposes a quasi-Lockean backwards-looking argument in which territorial rights depend on the creation of material value in shaping the territory. Secondly, he argues that, since the territory has been shaped to fit the needs of nation members, territorial rights are needed to sustain their way of life. Thirdly, he points to the symbolic value of territory as essential for the group identity.

My aim is not to determine whether occupancy-based arguments or nationalistic arguments succeed in grounding territorial rights, nor to determine the most persuasive. My point is to stress that, in both cases, if such arguments justify states' territorial rights, they also justify the territorial rights of indigenous groups. Besides, such rights are also included in the international human rights law. The United Nations Declaration on the Rights of Indigenous Peoples grants indigenous peoples, as a group, rights which are more demanding than the individual occupancy rights as presented by Stilz and seem better conceptualised as territorial rights (see UN General Assembly 2007). Indeed, art. 3 states that "indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This does not imply that indigenous people should form separate states but, as art. 4 clarifies, "in exercising their right to self-determination, [they] have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." Concerning the content of their rights over land and resources, art. 26 contains the right to "*own*, *use*, *develop and control* the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" (emphasis added). This seems to go beyond rights to access the resources and to amount to collective rights to resources as conceived in the territorial rights literature (i.e., including the power to manage, withdraw and make profit out of resources).

Let us assume, then, that indigenous minorities have territorial rights.[7] What do such indigenous territorial rights imply when it comes to forced displacement? When the entire indigenous group is displaced and no longer able to exercise their territorial rights, the loss involved might seem comparable to the loss that citizens of sinking island states (e.g., Kiribati and Tuvalu) face: the loss of their territory and, thus, the loss of the ability to exercise their collective self-determination. In the case of sinking island states, it has been proposed that, as a reparation for the total, irreversible, loss of territory, other states should cede portions of their territory. Those displaced, as a group, would then receive a surrogate land over which they could exercise their jurisdiction (see Buxton 2019; Dietrich and Wündisch 2015). An alternative would be the creation of artificial surrogate islands (Buxton 2019). However, if the collective self-understanding of the indigenous minority as a group depends on cultural practices that are inseparable from that specific land (e.g., traditional forms of subsistence, or religious practices), the loss suffered by indigenous groups seems even more difficult to compensate by ceding or even creating a substitute land over which they could exercise their jurisdiction. What seems relevant in the case of the displacement of an entire indigenous group is the irreproducibility of the group's social structure and collective self-understanding outside the lost land. Indeed, symbolically laden sites, such as sacred land, are not akin to fungible natural resources that could be replaced by materially equivalent ones (see Nine 2016, 328). On the contrary, they may count as constitutive of the indigenous group's self-identification. Thus, if an entire indigenous group is removed from their land and deported (as in the Navajo case), even when their members are not dispersed, there is surely a violation of their territorial rights, but also an additional wrong, a form of cultural cleansing.

We might then wonder what displacement implies for members of indigenous groups when they are individually displaced, or they are dis-

[7] We might conceive of such rights as collective rights held by the indigenous groups understood as 'nations' (Miller 2012) or as 'peoples' sharing a 'thinner' political identity (Moore 2015). Alternatively, we might conceive of indigenous people's territorial rights as group-differentiated individual rights that the members of the indigenous minorities have qua members of that group, following Kymlicka's account of national minorities' rights (Kymlicka 1995).

placed with some fellow group members, but most of the group members stay, and the group does not cease to exist. For the indigenous displaced individuals themselves, the harms involved in being displaced include the four kinds of harm of displacement I presented in section 1. The loss of the 'home environment' seems to be particularly relevant in the case of indigenous displaced people. Indeed, being unable to live in the ancestral land may mean being unable to access sites of worship which cannot be recreated elsewhere, or to practice traditional livelihoods. The loss of relevance of irreproducible social roles also impacts the degree of the loss of status suffered by the indigenous displaced people qua displaced. When they are dispossessed of land, they may suffer a loss of property if that land was private property and, even if there was no formal property title, a loss of control over their place of residence. These specific harms of displacement are not qualitatively different when the displaced individual belongs to an indigenous minority but can be deeper, due to the significance of particular geographical sites for the group and thus for the displaced individual's identity as a member of the group.

To account for the individual loss of the ability to access lands and natural resources that were essential components in the pre-displacement life of indigenous displaced people (and presumably part of their future life plans and conceptions of the good), we might also refer to the violation of occupancy rights. As we have seen, Stilz conceives occupancy rights as individual rights grounded in the fundamental human interest in the stability of located life plans. This interest is presumably stronger in the case of indigenous people, given the irreplaceable symbolic and practical value that geographical sites often have for the indigenous minority. To the extent that the human interest in the stability of located life plans lies behind the concept of occupancy rights, the violation of such a right in the case of indigenous people is not a distinct kind of wrong but might be a deeper wrong. In addition, one might consider that the ancestors of contemporary indigenous people typically suffered displacement and land dispossession as a result of settler colonisation. This historic injustice background exacerbates the wrong of occupancy rights violation when it affects a person belonging to an indigenous minority.

Occupancy rights theory seems to sufficiently make sense of the wrong at stake in forced displacement at the individual level: there seem to be

no need to claim that the indigenous displaced person individually suffered a violation of territorial rights. However, territorial rights matter if we consider the wrong of land dispossession, which often comes with forced displacement and may even motivate displacement itself.[8] If displaced individuals and families are dispossessed of lands, which are seized by other state or non-state actors, this harms the whole group: those who stay, indeed, can no longer exercise their territorial rights over the dispossessed lands. This is a kind of loss which affects the indigenous group, rather than the forcibly displaced only. This wrong is separate from the violation of property rights. As far as the violation of territorial rights is concerned, it does not matter if the dispossessed land was private property belonging to the displaced people, collective property, or common land. When the displaced are dispossessed of collectively owned or common lands, such lands are subtracted from the jurisdiction of the indigenous group, hence there is again a violation of territorial rights affecting all members of the group, either displaced or not.

To sum up, occupancy rights theories offer a ground to express what is wrong with displacement for indigenous displaced people, but the wrong implicated in the violation of occupancy rights is not specific to indigenous displaced people as members of an indigenous group: it affects all displaced people, to the extent they have an interest in the stability of located life plans. In the case of indigenous displaced people, there seems to be a difference in the degree of such wrong, rather than a qualitative difference: given the irreproducibility of social structures and religious and other cultural practices detached from particular geographical sites, we

[8] I do not consider, here, cases of voluntary land sale or relinquishing. Representatives of an indigenous community may voluntarily sell or relinquish portions of common or collectively owned land. When this is the case, there seems to be no violation of the territorial rights over the ceded land. Alternatively, individual members of an indigenous community may sell or relinquish portions of land over which they have individual property rights. If this happens with the consensus of the community, again there seems to be no violation of the territorial rights over the ceded land. Of course, normative standards should be met for land sale or relinquishment to count as a voluntary transaction rather than a forced dispossession. I cannot provide a set of normative standards here. A relevant contribution has been offered by Penz *et al.* (2011) concerning development-induced displacement.

might presume that members of indigenous minorities have a stronger interest in being able to continue residing within their ancestral lands, to use those specific natural resources and access those specific symbolically laden sites. Of course, we should not deny indigenous people the autonomy to develop plans outside their ancestral lands, but this does not exclude that they may have a particularly strong interest in being able to pursue plans within such lands. Thus, the significance of the specific land they were displaced from is relevant when it comes to redressing indigenous displaced people. In addition, if we consider members of indigenous groups as descendants of the victims of historic injustices of settler colonisation, which included displacement and dispossession, the wrong of occupancy rights violation becomes even worse.

Territorial rights theories, by contrast, allow us to identify an additional wrong that indigenous displaced people suffer qua indigenous. When displacement comes with land dispossession, it deprives the whole indigenous group of territorial rights over the dispossessed land. The violation of indigenous territorial rights is not specific to those members of the indigenous group who are displaced, it affects all the members of the indigenous group. Yet, it is specific to indigenous displaced people compared to non-indigenous displaced people. Therefore, it is again relevant when considering what is owed to indigenous displaced people not only qua forcibly displaced but also qua members of an indigenous minority.

3. *Towards reparative justice for indigenous displaced people: an exploration*

The UN Declaration on the Rights of Indigenous Peoples does not determine what is owed to indigenous people who are forcibly displaced. Art. 10 states that "indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return". However, the Declaration does not include any specific reparation for the violation of this right or specific reparative provisions for indigenous displaced people (see UN General Assembly 2007).

Legal documents containing the rights of forcibly displaced people do not specify additional provisions for those displaced people who belong

to indigenous minorities either. The Guiding Principles on Internal Displacement only mention indigenous people once, in principle 9: "States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands". However, the Principles do not mention indigenous territorial rights and do not explain how "special dependency" on and "special attachment" to land should be accounted for when redressing indigenous displaced people (see Deng 1999).

A further relevant document might have been the Principles on Housing and Property Restitution for Refugees and Displaced Persons, often known as the Pinheiro Principles (see UN Sub-Commission on the Promotion and Protection of Human Rights 2005). However, such Principles focus on the restitution of private property and only mention that "States should ensure, where appropriate, that registration systems record and/or recognize the rights of possession of traditional and indigenous communities to collective lands" (art. 15) and that indigenous people should be "adequately represented and included in restitution decision-making processes" (art. 14).

Normative political theory might then contribute to clarify what is owed to those displaced people who belong to indigenous minorities, and, in this endeavour, it is worth drawing on the literature on occupancy rights and territorial rights. As we have seen, occupancy rights are grounded on the fundamental human interest in the stability of located life plans. Located life plans, in the case of indigenous people, are strictly tied to a specific territory. Thus, when a displaced person belongs to an indigenous group, enabling return, restituting owned or otherwise occupied lands, and restoring access to symbolically relevant sites is a crucial component of reparative justice for forced displacement. Equally, public acknowledgement of the symbolic importance of that territory for indigenous displaced people and expression of apologies are needed if return and restitution are meant to be reparative. Furthermore, material reparations should be provided to ensure that returnees can restore their livelihoods and socio-cultural practices. For instance, if returned land has been made unsuitable for traditional subsistence agriculture or pastoralism, returnees are unable to resume their traditional livelihoods. Being offered alternative jobs would not recognize displaced

indigenous people as members of a distinct indigenous community. If return and restitution are not possible,[9] indigenous displaced people should be able to recreate a 'home environment' which is as similar as possible to their previous one. The importance of territory matters when assessing what a just or at least acceptable compensation could be.[10]

In repairing the harms and wrongs of the displacement of indigenous people, their territorial rights should also be considered. Land restitution to dispossessed displaced people and the restoration of access to symbolically relevant sites should be accompanied by the acknowledgement of the violation of the territorial rights of the group (namely, the violation of their rights to jurisdiction and rights to resources). Along with apologies, material compensation to the whole group may be appropriate. Reparations may also include increasing indigenous people's control over land and resources (i.e., increased jurisdictional autonomy) or increased voice in future negotiations involving the use of those lands and resources over which jurisdiction is shared with the state. These sorts of reparations are owed to all members of the indigenous group since the violation of the territorial rights did not affect the forcibly displaced only. However, returnees seem to have a particularly strong claim to be taken as interlocutors in future policies affecting the territory they had been displaced from.

Concerning who owes reparations to indigenous displaced people, normative theorists can turn to the broader debate on reparations for forced displacement (see Bradley 2013, Souter 2022). Surely, states of origin bear reparative responsibilities for their failure to protect their indigenous citizens from forced displacement. Moreover, when states of origin do not recognise indigenous people's territorial rights nor formalise property rights over the land they occupy, such states can be held responsible for this failure and the subsequent vulnerability to land dispossession. This

[9] Return and restitution may be practically impossible, for instance, when the natural environment has become uninhabitable or unsuitable for indigenous people's traditional livelihoods (e.g., due to natural disasters or irreparable environmental degradation).

[10] Note that it is not necessary that a displaced member of an indigenous community subjectively feels a certain level of territorial attachment to be owed this sort of group-sensitive compensation.

theorisation of reparative responsibility is consistent with the conception of state legitimacy as stemming from the state's protection of citizens' human rights. As Owen (2020) argued, the legitimacy of the international order of states depends on each state ensuring the protection of their citizens' human rights. When it comes to indigenous people, I argue, the state is responsible to protect their group-specific human rights too, including the right to own, use, develop and control the lands they occupy and the right not to be forcibly displaced, which are contained in the UN Declaration on the Rights of Indigenous Peoples.

The state of origin may also be complicit in facilitating or bringing about forced displacement and land dispossession, thereby directly harming and wronging displaced people. The case of the active involvement of states of origin in forced displacement brings us to consider outcome theories of responsibility for forced displacement. On outcome responsibility accounts, responsibility derives from the causal contribution in causing a foreseeable outcome.[11] Based on outcome responsibility accounts, the state of origin is not the only possible bearer of reparative responsibility for forced displacement. As I have argued more extensively in (reference omitted), external states and non-state actors, such as private companies, may be held outcome responsible for directly causing or contributing to cause forced displacement. When this is the case, they bear reparative responsibility. Consider private companies first. Companies may buy lands whose occupants lack formal ownership titles and thus are neither appropriately consulted nor compensated. In some cases, companies may even financially support paramilitary groups to clear lands from their occupants and prevent their return. Moreover, companies may cause environmental degradation leading to forced displacement. Since indigenous people typically occupy sparsely populated and remote areas, they are particularly exposed to land grabbing and environmental degradation. Although companies do not have territorial jurisdiction or institutions, they have both a duty not to harm and a duty to provide compensation and symbolic reparations (such as apologies) when they cause harm. Let us now consider external states. States may directly contribute to causing forced displacement in other states. For

[11] On the concept of outcome responsibility, see Miller 2007.

instance, states may engage in military interventions that displace civilians, and thus bear reparative responsibility towards the forcibly displaced. Furthermore, states contribute to global processes, such as climate change, that increase vulnerability to forced displacement among the citizens of other states, particularly in the most fragile states.[12] Thus, I argue, states may collectively bear reparative responsibility.

This account of reparative responsibility for forced displacement provides a general frame that does not exclusively apply to indigenous people: non-indigenous displaced people are owed reparations too. What I argue here is that reparative theories of responsibility can account for the specific case of indigenous displaced people. When displaced people belong to an indigenous minority, one might wonder whether this matters in identifying additional grounds for reparative responsibility. Here, the literature on historic or enduring injustice due to settler colonialism might provide relevant insights. Indeed, the state of origin of indigenous displaced people, or specific external states which are outcome responsible for their displacement, may have perpetrated historic injustice against the ancestors of those indigenous people. In particular, when such a historic injustice took the form of expulsion from ancestral land, this may ground special reparative obligations towards indigenous displaced people.

However, one might observe that states (and non-state actors) who are outcome responsible for bringing about forced displacement may fail to comply with their reparative obligations and leave displaced people uncompensated.[13] When this is the case, the international community of states has a duty to step in. As Owen (2020) argued, when a state is unwilling or unable to protect the human rights of their citizens, the international community has a duty to act as a substitute for that state and provide international protection. I argue that this logic extends to the group-specific human rights of the indigenous people. Based on this principle, the international community has a duty to redress indigenous displaced people when their state and outcome responsible external states or companies fail to live up to their reparative obligations.

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[12] On climate displacement, see Draper 2023.

[13] I am grateful to an anonymous referee for raising this issue.

Conclusion

This paper has argued that forced displacement is always harmful but can entail additional harms and wrongs for displaced people who belong to indigenous minorities. I have illustrated four kinds of harms that forcibly displaced people typically suffer and argued that all displaced people are owed the reparation of those harms and the fulfilment of the needs that derive from such harms. Then, I have considered how being a member of an indigenous group matters in case of forced displacement. I have assessed the implications of indigenous people's individual occupancy rights and collective territorial rights. I concluded that the violation of individual occupancy rights is not a specific kind of wrong, but the harm is especially severe in the case of indigenous displaced people. By contrast, the violation of indigenous territorial rights is a specific wrong, that non-indigenous displaced people do not suffer, but it affects all the members of the indigenous group, rather than the displaced only. Finally, I have offered an exploration of how reparative justice for forced displacement should take into account the harms and wrongs that indigenous displaced people suffer in determining what they are owed and who bears reparative responsibility. I have argued that the importance of territory and located life plans presupposed in occupancy rights theory is relevant to what is due to displaced people who belong to indigenous groups. Moreover, not only indigenous displaced people but all members of the displaced group are owed reparations for the violation of territorial rights when forced displacement entails the dispossession of indigenous lands and resources. This preliminary exploration, though not exhaustive, is intended to contribute to a normative theorisation of reparative obligations towards displaced people who belong to indigenous minorities.

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Those Fleeing States Destroyed by Climate Change Are Convention Refugees

Abstract
Multiple states are at risk of becoming uninhabitable due to climate change, forcing their populations to flee. While the 1951 Refugee Convention provides the gold standard of international protection, it is only applied to a limited subset of people fleeing their countries, those who suffer persecution, which most people fleeing climate change cannot establish. While many journalists and non-lawyers freely use the term "climate refugees," governments, and courts, as well as UNHCR and many refugee experts, have excluded most climate refugees from the Convention as a matter of legal interpretation. In our 2015 paper, "Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change", we sought to reopen the debate on "climate refugees" by arguing that some climate refugees qualify under the 1951 Convention as it is currently written: those who are stateless and are unable to return to their country of origin because climate change has rendered it uninhabitable. We rely on extensive legal analysis and the writings of experts. Our interpretation, however, has been rejected by Goodwin-Gill and McAdam (2021) and Foster and Lambert (2019), which explicitly responds to our paper. Here, we address and respond to their arguments.

Keywords: refugee, climate change, statelessness, sovereignty, small island states, 1951 Convention

Introduction

Multiple states are at risk of becoming uninhabitable due to rising seas and desertification (World Meteorological Organization 2022), forcing their populations to flee, joining millions of others fleeing war, famine,

earthquakes, and other emergencies. It is impossible to overstate the importance of the right to asylum, as guaranteed by the 1951 Refugee Convention, to those forced to flee. It provides the gold standard of international protection. The Convention, however, is only applied to a limited subset of people fleeing their countries, those who suffer persecution (UNGA 1951). Every year, millions of people fleeing emergencies are deported because they cannot meet the Convention's requirements, or they are granted an inferior legal status, one that is temporary, offers few rights, and/or can be revoked. This is the situation in which most people fleeing climate change now find themselves. The circumstances of the inhabitants of low-lying islands and desert countries are particularly dire, with many facing an existential threat, yet holding no right to enter and reside in another country unless they qualify for asylum on additional, separate grounds.

The messaging on this issue can be confusing. Many point out that small islanders do not wish to become refugees (United Nations Sustainable Development Goals Blog 2019). But wishing not to become a refugee is like wishing not to have to use your parachute. Obviously, most people do not want to be in a situation where they must use a parachute, but that is no reason not to give them one.[1]

Given its singular role in protecting those forced to flee and the dire consequences of being excluded, courts, experts, and politicians around the world debate every clause and term in the Convention. With 149 states parties and many more governments guided by its principles, any change in interpreting the Convention could mean life or death for millions of people. Guiding interpretation of the Convention is one of the main functions of UNHCR, the UN refugee agency, under its mandate, and the agency views itself as the Convention's protector in a world of states increasingly skeptical of asylum and hostile to migration (Hall 2011). The Convention is constantly under threat from governments who

[1] The real question here is whether accepting refugee status might somehow interfere with other remedies, such as compensation or reparations (Buxton 2019), e.g. the ceding of new territory to the affected states, or the continued recognition of their governments in exile. There need be no competition between these strategies: we can try to stop the plane from crashing, while also ensuring that everyone on board has a parachute.

wish to reassert their absolute territorial sovereignty and resent being constrained by a treaty drafted decades ago. As a result, there is great anxiety over the fate of the Convention among experts, academics, advocates and UNHCR, producing what can only be described as a siege mentality around the Convention.

The argument over environmental or "climate refugees" has been particularly controversial and fraught. While many journalists and non-lawyers freely use the term, governments and courts, as well as UNHCR and many refugee experts and lawyers, have excluded climate refugees from the Convention as a matter of legal interpretation, to the point where their view has become the received wisdom (see for example Stewart 2023). As a result, most climate refugees cannot currently obtain asylum unless they can prove they have been persecuted. Meanwhile, arguments that climate change is persecution have failed to gain acceptance by lawyers or courts because persecution requires intent to harm. At the same time, enacting a new convention for climate refugees is widely acknowledged to be impossible in today's political climate (McAdam 2011), so the situation is at an impasse. Proposed solutions for climate refugees in current conversations usually appeal to general principles of justice and fairness or of charity, requiring some kind of (potentially unpopular or difficult) political action from state actors.[2] We agree that such action is essential for a comprehensive political solution to the problems confronted by climate refugees, and that the 1951 Convention is not a comprehensive political solution on its own. But we argue that even in its current form, without any amendment, it helps more than many in the current conversation have recognized: some unpersecuted climate migrants in fact count as Convention refugees, interpreted according to the accepted canons of treaty interpretation, i.e. those laid out in (Vienna Convention 1969).[3]

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[2] See for discussion Bierman and Boas 2010; Buxton 2019; Cole 2022; Draper 2023; UNCTAD News 2019.

[3] Compare Lister (2014), who argues that inclusion of climate refugees is coherent with the underlying logic of the Convention, though not its language, meaning that amendments would still be required. Our aim here, in contrast, is to show that some (unpersecuted) climate refugees are included under the Convention strictly speaking, given its language as well as its logic.

We first argue for this in our 2015 paper, "Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change". There, we argue that those who are displaced because their home countries submerge beneath the sea will be stateless in the strict sense of the 1951, 1954 and 1961 Conventions (i.e., not stateless *de facto* but rather stateless *de jure*),[4] and we argue that such persons – persons who are *de jure* stateless and are *unable to return* to their country of origin (because climate change has rendered it uninhabitable), will qualify as refugees under the 1951 Convention as it is currently written.

Though, on what has become the consensus position, only persecuted persons may qualify as Convention refugees, this in fact turns on a subtle point of interpretation. On this consensus position, the interpretation suggested by the ordinary meaning (the textualist interpretation) of the Convention conflicts with the interpretation suggested by an analysis of its object and purpose (the intent of the drafters in context), and the interpretation based on ordinary meaning should be disregarded. In contrast, we offer a different reading of the object and purpose of the Convention, one on which it coheres with the interpretation based on the ordinary meaning (Vienna Convention 1969).

At issue is whether the drafters intended to specify two separate tests – one for persons with a nationality (for whom a persecution condition was necessary), and another for stateless persons (for whom a need for international protection, even absent persecution, was sufficient) – or whether they meant to specify only one test, for persecuted persons, but made basic grammatical mistakes when formulating how it applied to stateless persons.

We defend the former view. The primary evidence for the latter view (currently the consensus view) is that the drafters clearly intended to produce a second convention specifically for stateless persons. Such a document was indeed produced, becoming the 1954 Convention Relating to the Status of Stateless Persons. Moreover, state practice has emphasized on many occasions that not all stateless persons are refu-

[4] Statelessness *de facto* means having a nationality but being unable to avail oneself of its protections, say because one is persecuted. Statelessness *de jure* means not being recognized as a national under the operation of law of any nation (1954 Convention), (1961 Convention).

gees. There is also a pragmatic reason for advocating the one-test view: it renders admission criteria for the 1951 Convention more restrictive, making fewer people eligible for refugee status, minimizing the strain on host and donor countries. Some have also suggested that the two-test approach is "discriminatory" in that it singles out stateless persons for distinct treatment. Finally, one might worry that the two-test approach leads to more ambiguity in application than the one-test approach.

However, none of these are adequate reasons to support the one-test view. As we explained in our 2015 paper, a two-test criterion in the 1951 Convention is fully consistent with the fact that the drafters intended there to be distinct Conventions (Convention 1954, Convention 1961) for stateless persons. This is because, as we argue that it should be understood, the second test for stateless persons (in the 1951 Convention) is still fairly restrictive: it admits as refugees only those stateless persons who are *unable to return* to their country of former habitual residence. Much hinges on how this notion is understood. We argue (on the basis of textual and historical evidence) that it should be construed permissively enough to allow persecution as a basis for genuine inability to return, but not so permissively as to allow that difficulty obtaining appropriate paperwork renders someone 'unable' in the relevant sense. In effect, we take the spirit of the distinction to have been stated by Leon Henkin, U.S. representative to the Ad Hoc Committee (the first drafting committee for the 1951 Convention), when in a pivotal drafting session he contrasted between those whose problems were "humanitarian" in nature with those whose problems were "legal" in nature (UN Ad Hoc Committee 1950). The former were to be the purview of the 1951 Refugee Convention while the aim of the (yet to be drafted) 1954 Statelessness Convention would be to assist the latter. Note that at the time, "humanitarian" had a less technical meaning than today, covering what we now think of as "human rights" concerns (McAdam 2008). We suggest that "unable to return" as used in the 1951 Convention accordingly connotes an obstacle to returning that cannot be remedied by merely "legal" assistance (e.g. helping a claimant with their paperwork) in order to regain membership in their country of origin.

Of course, as applied to stateless persons displaced after the second world war, there would have been subtleties about how to draw this line. Many former states had lost their legal personality (owing to the fall of

fascist regimes, the fall of the Iron Curtain and the collapse of colonial empires). This meant that many persons displaced during the war (for one reason or another), holding only lost or expired paperwork from a defunct country, had no clear rights to re-enter. At the time of drafting, it would not have been clear, in many cases, whether "legal" assistance would suffice, or whether a path to citizenship in a second country of asylum would be the more just solution. But the law is full of vagaries: "persecution" also gives rise to many hard to classify cases. In any event, the record strongly suggests that the drafters resolved to treat this distinction between "humanitarian" and "legal" as guiding their construal of the proper tasks of the Refugee and Statelessness Conventions, respectively. This supports our claim that they would have intended "unable to return" to mean what it literally says: a genuine inability, rather than difficulty that one is indeed *able* to overcome with assistance. The decision to draft a second document for stateless persons who were not refugees was the recognition that this latter group required assistance of a different character, with a different goal (i.e., repatriation, rather than potentially permanent accommodation).

Thus, the two-test interpretation that we advocate does not entail that all stateless persons are refugees, and it explains why the drafters envisioned further conventions for stateless persons: because those stateless persons who would qualify as refugees under the second test would be only a small subset of stateless persons in general. The question of state practice is more delicate: some states have written national refugee laws which follow the one-test approach, some courts have found in favor of the one-test approach, and some guiding documents (like the UNHCR handbook) have made remarks in favor of the one-test approach. However, first of all, none of these authorities are beyond questioning – the UNHCR handbook is not a binding legal document, courts may overturn previous decisions, and states may change their national laws to better reflect an understanding of the international Convention that the national laws were meant to ratify or reflect. Second of all, none of these sources directly address and reply to our interpretation of the two-test approach: where there is commentary at all, it tends to commit the fallacy of inferring from "some stateless persons are not refugees" to "the one-test approach is correct". There is thus still hope that change can be achieved by those in a position to shape jurisprudence as well as UNHCR and member state policy.

Nor is there anything discriminatory in the two-test approach construed as we suggest. It is not discriminatory *against* stateless applicants for refugee status because on our reading, being outside of one's country owing to persecution entails being unable to return: thus stateless applicants lose no eligibility that they have on the one-test approach. But it is also not discriminatory *in favor of* stateless applicants and against other applicants, since, again, being "unable to return" in the relevant ("humanitarian") sense connotes being in a situation as dire as persecution, but one that no persons with a home state are even subject to. Crucially, as we argue in our (2015), as well as in our (2014) and (2017), *anyone* eligible under the exemption we carve out, owing to climate change, will be *de jure* stateless, because if your former state has been rendered truly uninhabitable, it is no longer a state, and like it or not, you are stateless.

Taken in historical context, in fact, it is the one-test approach that would have been discriminatory. At issue would have been populations of stateless persons who had fled their countries of former residence because of, say, indiscriminate bombing rather than persecution, but who then were unable to return (say, because their country of former residence had lost its legal personality and the new entity there resolutely refused to recognize them, rendering a "legal" solution impossible). The one-test approach suggests that we must go through the displaced persons camp in 1951 offering solutions only to those who initially fled, back in 1943, because of persecution, rather than bombing, even if everyone in this camp is effectively homeless and encounters precisely the same obstacles to returning. T*his* would be patently discriminatory, and it is something that our two-test interpretation avoids.

Further, as far as the pragmatic benefit of the one-test approach is concerned, we stress again that "unable to return" is still fairly stringent. On our view, it extends to those climate refugees whose countries of former habitual residence have become uninhabitable, strictly speaking. But unless host and donor countries intend to simply let those individuals die in the water, some accommodation will have to be made, so on pragmatic grounds, why not use a legal vehicle that actually covers them by intent?

Finally, as concerns ambiguity, we stress again that there is a great deal of ambiguity in the proper construal of "persecution". While the 1951 Convention enumerates the bases for which persecution renders one eligible for refugee status, the Convention says little about what

it means for there to be persecution (on such a basis), nor does it resolve all questions concerning the subtle epistemology of "well-founded fear" (Maiani 2010). Thus, while we acknowledge that it can be difficult in practice to assess whether the "legal" obstacles to return for a given population are surmountable or not, we note first that this is a contrast (between "humanitarian" and "legal" questions) that the drafting delegation already treated as of central interpretive importance, and we note second that as these things go, it is far from obvious that the second test for stateless persons is less clear than the persecution test for persons with a nationality.

But we stress that our support of the two-test reading does not hinge on pragmatic or political considerations: it hinges on a careful textual analysis of the ordinary meaning of the relevant clauses of the 1951 Convention, alongside a historical analysis of the documents surrounding the drafting of the 1951 Convention (i.e., the *travaux*) in light of its object and purpose. On our (two-test) approach, in contrast with the one-test approach, the wording of the Convention is perfectly clear, and perfectly in line with the object and purpose of the document.

Nevertheless, the status quo has been reasserted in Goodwin-Gill and McAdam (2021) as well as in Foster and Lambert (2019), which explicitly responds to our paper, challenging our interpretation and defending the consensus position that persecution is a necessary requirement of an asylum claim (though we note that Goodwin-Gill (2000), to be discussed below, forcefully defends a two-test approach). Our first aim in this paper is to address the arguments in Foster and Lambert (2019). In (§.1) we rehearse the argument from our paper (2015) for the two-test approach. In (§.2) we present and respond to the challenges to our argument found in Foster and Lambert (2019).

Our second aim in this paper, achieved in (§.3), is to develop a new argument, complementary to those we have already given, appealing to the principle of *systemic integration*, a principle enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). This principle mandates that, when there is ambiguity in the interpretation of a treaty according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose and subsequent state practice (i.e., the methods specified in 31(1) - 31(3)(b) of the Vienna Convention, which are the methods under debate in our 2015, and in

the exchange with Foster and Lambert) we must take into account the place of the treaty in the broader framework of international law and in particular "any relevant rules of international law applicable in the relations between the parties" (Vienna Convention 1969). We will argue that this principle supports our two-test view, by taking into account applicable principles of international law: article 15 of the UNDHR, and the general principle of external sovereignty.

1. U*nable to return in the* 1951 R*efugee Convention* – O*ur* 2015 A*rgument*

In this section, we summarize the arguments in our (2015). The requirements of refugee status in the 1951 Refugee Convention are contained in Article 1(A)(2), which is separated by a semi-colon into two clauses. A refugee is anyone who:

> ~~As a result of events occurring before 1 January 1951 and~~ owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
>
> or who, not having a nationality and being outside the country of his former habitual residence ~~as a result of such events~~, is unable or, owing to such fear, is unwilling to return to it (Convention 1951).

The barred clauses were removed from the definition in a 1967 Protocol aimed at making the scope of the documents universal, but they are preserved here because they give important clues to understanding the definition as a whole.

We advance several arguments for the two-test approach, first, arguments focusing on the ordinary grammatical meaning of the text, then arguments focusing on the object and purpose of its drafters.[5] Concern-

[5] We also argue in our (2015), as well as in our (2014) and (2017), that persons whose only state of nationality has become fully uninhabitable (e.g., because of submergence due to climate change) will be de jure stateless (see above note 4) Our argument begins with the Montevideo Convention which codifies that entities

ing grammar, there are not one but five points to make. Our first point is that, while informal discussions speak of a "persecution requirement for stateless claimants" really there is no reasonable construal of this as a requirement governing "unable to return". Obviously such a requirement governs "unwilling to return": it is written explicitly that stateless claimants who are not unable must instead be unwilling "owing to such fear". But there is simply no way to warp the grammar of 1(A)(2) so that the earlier occurrence of "owing to a well-founded fear", before the semi-colon, modifies "unable to return" after the semi-colon. The only serious interpretive question (which we address below) is whether "owing to a well-founded fear" before the semi-colon modifies "being outside of the country of his former habitual residence" after the semi-colon. Crucially, this means that even if we are wrong and there is a persecution requirement for stateless claimants, it is not that they be unable to return because of persecution; it is that the reason they left in the first place was because of (a well-founded fear of) persecution. This means that the evidence that the drafters intended a distinct convention for stateless persons supports our claim that "unable to return" must be read stringently, for otherwise, the 1951 Convention would have covered every stateless person in 1951 who merely needed help filing a new passport application, as long as that person had been persecuted by the nazis in 1942. But we digress: that is a point about intent, to which we return below.

We turn now to the four points of grammar which show that "owing to a well-founded fear" before the semi-colon does not modify "being outside of the country of his former habitual residence" after the semi-colon.

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lacking habitable territory are not states. As such the recognition by such an entity is not the recognition by a state (under the operation of its law): the definition of de jure statelessness. We do not argue for nor advocate that the relevant entities cease to exist entirely: it is to be desired that they retain, e.g., the rights to their territorial waters, their ability to serve as custodians of their unique cultures, or their ability to offer a type of cultural citizenship to their former nationals. Nor does it preclude other, bespoke solutions, such as bilateral treaties. Nor do we maintain that these entities cease to be states if they are ceded new land. Our claim is only that if they become fully uninhabitable (on old land or new) then whatever they are, they are not states, in the sense germane to the 1951 Convention's assessment of statelessness. However, as Foster and Lambert do not challenge our argument on these points, we do not further discuss them here.

First, there is the semi-colon: semi-colons are used to demarcate independent clauses. A comma would have suggested a greater degree of dependence of the second clause on the first.

Second, there is a lack of verb-tense agreement. The way the text is actually worded, the two clauses disagree in tense at a crucial moment: in the clause preceding the semi-colon the indicative ("is outside") is used, but in the clause following the semi-colon the gerundive ("not having a nationality", "being outside") is used, though the indicative ("has no nationality", "is outside") could have been used if the clause for stateless persons were also meant to be modified by the restriction, "owing to well-founded fear of being persecuted".

Third: "or who". Article 1(A) of the Convention begins with the clause, "For the purposes of the present Convention, the term "refugee" shall apply to any person who: .." 1(A)(1) then begins with "…(1) has been considered a refugee under the Arrangements of 12 May 1926 …". Notably, these arrangements did not involve a persecution condition. Then (2) is as given above. This means that the original "who" in 1(A) sets off a list of (unrelated) types of persons who are to qualify for refugee status under the Convention, where a persecution condition applies to some but not others. Accordingly the "or who" immediately following the semi-colon of 1(A)(2) very strongly suggests that another independent category of persons qualifying for refugee status is about to be described, in a context where we cannot take for granted that the persecution condition applies to every such category. Otherwise, a simple "or" would have sufficed.

Fourth: a point of omission. It would have been perfectly grammatical to have written "owing to a well-founded fear" again, just after "being outside the country of his former habitual residence". Thus the text might have read: "… any person who, as a result of events occurring before 1 January 1950 and owing to a well-founded fear … is outside the country of his nationality and is unable…; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events *and owing to such fears*, is unable…" This is related to an argument concerning the intent of the drafters to which we return below. The drafters actually held a vote specifically on whether to repeat the phrase "owing to such events" after the semi-colon, to avoid ambiguity, and they decided to do so (UN Conference of Plenipotentiaries 1951). They were thus fully aware of the need for such a repetition here.

In effect, they voted to repeat the "A" of "A and B", but they nevertheless make no mention of repeating the "B", and they do not do so. Of course, here we verge toward a discussion of intent. As a point of grammar, it suffices to note that there is an omission here, one that is unforced by the ordinary rules of the English language.

Thus we conclude that as concerns the plain or ordinary meaning of the document, "owing to such fears", i.e. a persecution requirement, does not apply to stateless persons unable to return: it neither modifies the reasons they fled originally, nor the nature of their inability. This is not simply a quibble over a misplaced semi-colon (as some commentators have suggested): no one has seriously suggested that such a condition modifies "unable to return", and there are four clear interlocking grammatical reasons for denying that it modifies "being outside of the country of his former residence".

Crucially, however, we maintain (contrary to popular opinion) that this does not create a conflict between a textualist interpretation and one based on the object and purpose of the Convention. To the contrary, there are several reasons to construe the object and purpose as intending two tests and thus, to construe the drafters' intent as in harmony with the words they actually wrote.

We contend that the object and purpose of the 1951 Convention is to offer international protection to those who have irreparably lost national protection by restoring to them their fundamental rights and freedoms in the form of asylum. This category largely coincided with the category of persecuted persons, but it did not perfectly coincide, and crucially the object and purpose was not to alleviate persecution *per se*; it was to address the fundamental deprivations of rights, of being entirely cut off from the protections usually provided by one's home state: a deprivation that persecution (among other things) brought on.

It is beyond our scope here to reiterate all of our reasons for thinking this: we urge readers to consult our (2015) for a thorough treatment. There, we first examine the preamble to the Convention alongside refugee documents predating the 1951 Convention, such as the IRO Constitution: finding here a focus on remedying the kinds of fundamental rights deprivations *caused by* persecution, rather than a focus on remedying persecution *per se*. We then explore the *travaux* from the first round of drafting meetings, the Ad Hoc Committee on the Reduction of Statelessness and Related Problems.

It was here that states' representatives reached the decision not to cover all stateless persons under the 1951 Convention (but instead to create a second document for those not helped by the first, which would become the 1954 Convention). Here, too, we find that the motivation for this decision was not to distinguish between those who were persecuted and those who were not, but rather to find a way to offer protection for those whose loss of national protection was truly irreparable, in contrast to those for whom the challenges were primarily administrative or bureaucratic (albeit in a way that was mitigated by concerns about clarity and enforceability). It was here that Leon Henkin, representing the U.S. delegation, contrasted between the "more urgent," "more unfortunately placed," "humanitarian" nature of the problems of refugees, contrasted with the merely "legal" problems of stateless persons (UN Ad Hoc Committee 1950).

We then explore the actual moment at which the language concerning "unable to return" in the clause following the semicolon was introduced its final form. The drafting proceeded in three stages. First there were the meetings of the Ad Hoc Committee on Lake Success, NY in early 1950. Then their working draft was presented to the General Assembly of the UN in August, 1950. This body made a few changes to the draft, before passing it on to a final committee, the Conference of Plenipotentiaries, who convened July-December 1951 (UN Ad Hoc Committee 1949). The *travaux* of the Ad Hoc Committee are full of discussions relevant to our question, but after the UNGA made its changes (to which we will shortly turn) the Conference of Plenipotentiaries did not much discuss the clause following the semi-colon of 1(A)(2), except in order to reintroduce the temporal restriction that we note above (which, again, is a point in favor of our interpretation, because it shows that they were aware of the need to repeat the "A" of "A and B" but did not even consider repeating the "B").

The most striking moment for our purposes was the change made by the UNGA. The Secretary-General declares that article 1 was the only article of the Ad Hoc Committee draft to be altered by the general assembly (UN Secretary General 1951).

The formulation that the Ad Hoc Committee presented to the UNGA by the Ad Hoc Committee was as follows:

> For the purposes of this Convention, the term refugee shall apply to any person…

> (3) Who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, as a result of events in Europe before 1 January 1951, or circumstances directly resulting from such events, and, owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality, before or after 1 January 1951, and is unable, or, owing to such fear or for reasons other than personal convenience, unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence" (ECOSOC 1959).

Note the grammar of this draft, in light of the grammatical concerns we discuss above: there is a comma rather than a semicolon, there is agreement in verb-tense, and "who" is not repeated. In contrast, the text as modified and approved by the UNGA in December of that year reads:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:…
>
> (2) As a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it" (UN General Assembly Res. 1950).

As we note in our (2015), if the purpose of the UNGA at this stage was not to capriciously introduce grammatical discrepancies to entertain future generations of interpreters, we must conclude that in making explicit that affected stateless persons must either be unable to return or unwilling, the delegates felt no need to require in addition that persons in this group who were unable to return had fled owing to a well-founded fear, since the mere fact of lacking a nationality and being unable to return is already, in the stringent sense in which we hold that they understood "unable to return," a dire enough lack of fundamental protection as to merit inclusion in the 1951 Convention. Persecution may have been the usual cause of this condition, but it is the condition, not its cause, that was the concern of the Convention.

The Conference of Plenipotentiaries only made two changes to 1(A)(2). First, they removed the phrase "for reasons other than personal convenience". There were concerns throughout the drafting process with enforceability and enumerability: this phrase was too open to multiple interpretations (Conference des Plenipotentiaries 1951). The second change is the one we have already discussed: the addition of the temporal restriction phrase "as a result of such events" after the semicolon, to clarify that it was to modify "being outside the country of his former habitual residence" just as it modified "is outside the country of his nationality." (Conference of Plenipotentiaries 1951).

Crucially, this sole change made by the final drafting body supports our argument, as it shows that the drafters were fully aware of the relevant point of grammar: if such a restriction were not made explicit following the semicolon, it would be unclear whether it was meant to apply there or not. But, as can be seen, this is equally true of "owing to a well-founded fear", which occurs in effectively the same grammatical position as "owing to such events". The omission of a second "owing to a well-founded fear" clause would have been glaringly obvious at this moment, while an actual vote was being held over a structurally related clause, so the fact that they did not add it is very strong evidence that they did not intend to add it, which in turn is compelling evidence that they understood "unable to return" stringently, signalling an irreparable inability, such that there was no need for a persecution requirement to complement it.

In our (2015) we then consider subsequent state practice, including cases such as *Adan*, *Revenko*, *Savvin*, *Diatlov*, *Thabet* and others which have come before courts around the world, in which stateless persons have applied for refugee status despite a lack of persecution. Courts have in many cases ruled against such applicants (Adan 1999; Diatlov 1999; Revenko 2000; Savvin 2000; Thabet 1998; RSAA 2002). We concur with the courts, because in the cases at issue the complainants were not "unable to return" when that phrase is construed as strictly as we suggest: rather their problems were of a primarily "legal" nature, and the proper remedy for them would be found under the 1954 Convention rather than the 1951 Convention. It is true that justices' opinions and briefs in some of these cases tend to affirm the one-test approach. However, we suggest that this has been an overstep because our construal of the two-test ap-

proach yields the same verdict as the one-test approach in the cases at issue, where there is nothing that qualifies in our sense as an inability to return. Fortunately, judicial opinions may be revisited, especially when it can be shown that the justifications for original decisions overlooked salient distinctions or arguments.

2. *Critiques of our argument*

In Chapter 4 of their 2019 book, Michelle Foster and Hélène Lambert directly respond to our 2015 paper, as well as to an earlier report by Goodwin-Gill (2000), and to earlier court rulings that concurred with our view. Foster and Lambert first acknowledge that many leading experts on refugee law have supported our position, including Atle Grahl-Madsen, whom Foster and Lambert call "the leading refugee scholar of his generation," as well as Guy Goodwin-Gill, also one of the leading refugee scholars of his generation. Foster and Lambert then offer seven distinct arguments, which we address here:

Argument 1) Statelessness conventions are not exclusively for legally admitted persons

Foster and Lambert begin by critiquing Goodwin-Gill (2000), a report Goodwin-Gill wrote in defense of a two-test approach, to inform the judiciary opinion in *Revenko v Secretary of State for the Home Department*. One of Goodwin-Gill's arguments was that the 1954 Statelessness Convention "… *covers only the situation of stateless persons admitted to residence or otherwise lawfully within State territory*" (Revenko 2000). Foster and Lambert rightly point out that this is not strictly true, as the 1954 Convention makes no such explicit restriction. We concur, and we make no claims to the contrary in our (2015) paper or here.

Argument 2) Comments from the minutes of the 23rd and 34th meetings

A second argument made by Foster and Lambert begins with a careful reading of the minutes of the 23rd meeting of the Conference of Plenipotentiaries. Considering this objection will be an opportunity for us to reflect on the subtleties involved in assessing the "object and purpose" of "the drafters" when this disparate body consists of at least three different gatherings of delegates, each with slightly different mandates

from their home states or organizations. Mr. Hoare, delegate for the UK delegation, had proposed an amendment to the language of 1(A)(2) before the 23rd meeting, which effectively reinstated the wording prior to the UNGA's changes. The meeting secretary writes, in summary of Mr. Hoare's remarks in support of his amendment, that "… *The purpose of his amendment was consequently to link stateless persons to those who were governed by the twin conditions of a date and a well-founded fear of persecution as the motives for their departure*". Later, in the 34th meeting, it was Mr. Hoare who proposed adding the language `as a result of such events' after the semi-colon.

Foster and Lambert appear to treat this as showing that "… *the drafters indeed intended symmetry between stateless persons and those with a nationality in establishing qualification for refugee status*" (2019, 95). However, we must take the context of these debates into account, and what happened between when Mr. Hoare made the summarized remark in the 23rd meeting, and when he proposed the far more limited addition to the text in the 34th meeting. The drafters had expressed a wide range of opinions about the proper scope of the Convention throughout the process, with some having favored allowing all stateless persons to be refugees. Mr. Hoare himself, immediately before his remark about "twin conditions", is summarized as having said that "… *the grammatical sequence was, so to speak, interrupted by the placing of a semi-colon between the two clauses, and although he, for his own part, having taken his stand on the wider point of view, did not object, he believed that, since the present wording represented a compromise solution, the text should truly reflect it*" (*ibidem*).

The "wider point of view" he speaks of was an even more inclusive construal of "refugee" than the one that we advocate. The UK delegation to the Ad Hoc Committee led by Sir Leslie Brass initially proposed to classify all stateless persons as refugees. What emerges here is that Mr. Hoare (in speaking of the "compromise solution") was himself attempting to *interpret* the purpose of the changes made by the UNGA, rather than, e.g., expressing some core element of his mandate, in advocating for the "twin conditions" as a means of reflecting what he interpreted the aim of the UNGA's "compromise text" to be. However, given that his amendment would have in effect undone changes the UNGA made, its credential as an interpretation of their intent can be questioned.

Also, the *response* to Mr. Hoare's remarks and his proposed amendment during the 23rd meeting was far from unilateral. Immediately after his remarks, the French, Israeli and Swedish delegates each expressed

reservations, and a desire that the matter be further assessed. Mr. Hoare then, for this reason, *withdrew* his proposed amendment (which, again, made changes well beyond simply adding "as a result of such events": in particular it resolves all four of the grammatical problems that we identify above, effectively undoing the UNGA's edit of the passage), and the amendment was never reintroduced. Crucially, the change made (in the 34th meeting) when the words "as a result of such events" were added was not a ratification of Hoare's amendment. Instead, the addition of "as a result of such events", though initiated by Mr. Hoare, was presented as a self-standing modification, without other changes. In the summary record of the 34th meeting, we have only that:

> Mr. HOARE (United Kingdom) *drew attention to the anomaly, which was really a drafting point, in sub-paragraph* (2) *of paragraph* A *resulting from the omission of a reference to events occurring before* 1 January 1951 *from the last phrase of the paragraph, which dealt with the person who had no nationality and was outside the country of his former habitual residence. He could not imagine that those who had drafted the compromise text in question had intended to make any difference between persons having a nationality and stateless persons. He therefore proposed that the words "as a result of such events" should be inserted after the word "residence" in the penultimate line of sub-paragraph* (2) *of paragraph* A.
>
> Mr. HERMENT (Belgium) *agreed that it could not have been the intention of the drafters to make such a discrimination, and supported the United kingdom proposal. The* PRESIDENT *put the United Kingdom proposal to the vote.*
>
> *The United Kingdom proposal was adopted by* 17 *votes to none, with* 3 *abstentions.*

Here care is required. While it is clear that Mr. Hoare interpreted the aim of the UNGA to have been a one-test approach, and his aim was to align the language of the draft accordingly, he by no means spoke for the consensus or even the majority on this matter of interpretation, and his interpretation can be questioned. We can agree that as concerns the temporal and causal scope of the Convention, the drafters intended it to be limited to those whose need for international protection was triggered by events that had already taken place when the Convention was ratified, and there would have been something out of synch about imposing this restriction only on persons with a nationality: this would indeed have amounted to a form of discrimination against those with a nationality.

In contrast, concerning whether persecution were the cause for which stateless persons unable to return originally fled, matters are different. Imagine, again, a Displaced Persons camp in 1951. Persons who were persecuted during the nazi regime, but no longer are persecuted in 1951, with valid citizenship documents, in general did not need international assistance, and would not be found in such a camp. It was stateless persons who remained in these camps, in need of assistance. And again, the proposal here is not that "unable to return" be construed as meaning "unable because of persecution". The "symmetry" proposal, rather, is that we discriminate amongst stateless, unable to return claimants we find in such a camp, on the basis of whether or not, in 1943, they fled because of nazi persecution or because of nazi bombing. It could not have been the intention of the drafters to make such a discrimination.

Thus, when we consider the motives of the 15 other delegates who accepted Mr. Hoare's proposal, in the 34th meeting, to add "as a result of such events" and even when we consider the motives of Mr. Herment, who brought the term "discrimination" into the discussion, we must consider that while they indeed did intend to impose the same temporal limitation, ensuring that the Convention (as written in 1951) would only address those already in need of protection at the time of drafting, had Mr. Hoare also asked for further language to further restrict the scope of the Convention to exclude stateless persons unable to return who had originally fled for reasons other than persecution (e.g. bombing) – i.e., language such as the amendment he introduced and then withdrew in the 23rd meeting – the proposal might not have been accepted, just as it was not accepted during the 23rd meeting. As interpreters, we must therefore take the committee's group action as the dispositive element: i.e., we must read them as having intended to do what they in fact did. And what they in fact did was to add the "A" restriction of "A and B" but omit the "B" restriction.

We conclude that properly understood, the minutes of the 23rd and 34th meetings of the Council of Plenipotentiaries support the two-test reading, not the one test reading. Crucially, there is a confusion in the suggestion that this construal would render the Convention's provisions "discriminatory" against persons with a nationality, or afford preferential treatment to stateless persons. That would perhaps have been the case if the two-test reading implied that stateless persons were not bound

by the same causal or temporal restriction, and it would perhaps also have been the case if "unable to return" were construed loosely, to allow even those encountering *temporary* or merely *legal* obstacles to count as "unable". But since the category of stateless persons unable to return actually denotes a category of absolutely destitute persons in need of international protection on "humanitarian" rather than "legal" grounds, there is nothing discriminatory in allowing them coverage by a Convention designed for precisely that, subject to the temporal restrictions that the drafters intended to limit the Convention's scope (which were removed by the 1967 Protocol).

Accordingly, we need not accept Mr. Hoare's interpretation of the intent of the UNGA's modifications, nor need we construe "the drafters" as having accepted it. Instead, we may construe the UNGA as having intended "unable to return" to connote a genuine need for permanent international protection, irrespective of whether such claimants originally fled because of persecution or for some other reason. And we may interpret the drafters as having for the most part accepted this construal, which is why they did not revise the UNGA's language in ways proposed by those, such as Mr. Hoare, who interpreted the text as being otherwise too permissive and allowing too many stateless persons (who really only needed "legal" assistance) to qualify.

Argument 3) The decision not to incorporate a statelessness convention into the Refugee Convention

Foster and Lambert discuss, at length, the decision of the drafters of the 1951 Convention to defer the drafting of a convention specifically for stateless persons to a later body: this led to the 1954 Statelessness Convention. Foster and Lambert also observe that this "*further confirms that [the drafters] did not intend for the Refugee Convention to support de jure stateless persons on the basis of their mere statelessness and inability to return alone*" (Foster and Lambert 2019, 95). Courts in *Revenko* and *Savvin* have also appealed to this fact in supporting the one-test approach.

Here, Foster and Lambert (and the courts) appear to be reverting to the reading of "unable to return" as synonymous with "encounters some obstacle to returning" including obstacles to do with paperwork that can be remedied by, e.g., consular assistance. Given the alternative reading that we advocate, the drafters' decision to leave the Statelessness Con-

vention to another day is best explained by Henkin's distinction between those in need of "humanitarian" assistance (the primary aim of the 1951 Convention) and those whose needs were, at least in the first instance, better described as "legal". On our reading, the drafters would reasonably have determined to create a separate agreement intended primarily for persons who, though stateless, could be given legal assistance and temporary accommodation with the ultimate aim of helping them return – even while intending to treat all stateless persons with a "humanitarian" need for potentially permanent accommodation in a country of asylum as part of the refugee agreement they were drafting.

Argument 4) The two-test reading would render the 1954 Convention superfluous

Foster and Lambert approvingly cite the ruling from D*iatlov*, in which the presiding judge, His Honour Sackville J, argues that a two-test approach would "… render superfluous much of the S*tateless Persons Convention*" (Diatlov 1999).

This again underscores the importance of "unable to return" being construed strictly rather than loosely. Indeed, if it simply meant "encounters some obstacle or other" then the two-test reading would render many provisions of the 1954 Convention superfluous, by offering all stateless persons outside of their country encountering any difficulty getting back with a path to citizenship in a country of asylum, thereby rendering superfluous provisions intended in the first instance to help those persons get home where possible. On our reading, however, "unable to return" is construed strictly, so that many or most stateless persons are not "unable to return", even though in the future some may be.

Indeed, if "unable to return" is instead construed as just meaning "needs help", so that anyone with difficulty with their paperwork counts as unable to return, then the one-test interpretation would also render the 1954 Convention superfluous for a wide range of cases. Again, return to our 1951 Displaced Persons camp. We find here many stateless persons who fled nazi persecution 8 years ago, and are now unable to return. On our two-test reading, the drafters rightly noted the need for two conventions, because some of these people, those who are genuinely unable to return, need asylum, as they have nowhere else to go, while others just need legal assistance getting their paperwork in order to go

home. But on the one-test reading where "unable to return" = "needs help", every one of these persons who was persecuted 8 years ago qualifies as a refugee, even those who just need the money and time to get a few documents notarized. But those are clearly cases that the drafters intended to cover with the Statelessness Conventions to be drafted later.

Argument 5) The semi-colon has the effect of a comma

Foster and Lambert also approvingly cite remarks from Justice Katz, presiding in *in the Full Federal Court of Australia in Minister for Immigration and Multicultural Affairs v Savvin*. His honour contends that, because the semi-colon precedes an 'or', it has the *effect* '*merely of a comma*', meaning that the definition of refugee *is* '*one complete clause*' (Savvin 2000).

Here, we stress that the grammatical evidence in favor of the two-test reading goes beyond the semi-colon. As we outline above there are four inter-related points of grammar which mutually support the two-test reading. But concerning the semi-colon alone, we stress that grammatically the effect is not that of a comma, given that it occurs in a passage where semi-colons are used to separate independent groups, among them the one listed in 1(A)(1), a clause for a group of persons who would count as refugees despite lack of persecution.

Argument 6) The removal of restrictions in the 1967 protocal was not a removal of the persecution condition

Foster and Lambert observe (though this may have been intended as a supporting remark rather than a self-standing argument) that the context of the 1967 Protocol shows that its intent was not to remove a persecution condition for stateless persons (Foster and Lambert 2019, pp.95-96). We concur: our argument does not hinge on any claim to the contrary. The aim of the 1967 Protocol was to remove the restriction that the Convention only addresses the problems of claimants that were in need of international protection prior to its drafting in 1951. The 1967 Protocol expands the scope of the Convention to address all persons who qualify, irrespective of when the events occurred in light of which they qualify.

Argument 7) Article 2(D) of the European qualification directive

Foster and Lambert also note that state practice in favor of the one test reading includes acts of legislation as well as jurisprudence. They cite ar-

ticle 2(D) of Directive 2011/95/EU as an example. Here, indeed, it is specified that stateless persons must be outside of their countries of habitual residence owing to a well-founded fear of persecution (EU Directive 2011).

We accept that this piece of legislation indeed opts for that construal. We stress, first of all, that this legislation may be revisited and modified, and we recommend as much, so that it better conform with the ordinary meaning and object and purpose of the 1951 Convention.

We add that some legislation favours our construal. Indeed, some legislation accommodates the fact that even for persons with a nationality, the persecution test may be too stringent. This is the case with the 1969 OAU (Organization of African Unity) Convention, which defines a refugee as either someone who is a refugee on Convention grounds or someone who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (OAU Convention 1969). This document, ratified by many African heads of state, is a weighty piece of state practice establishing that persecution is not the only path to refugee status.

3. *Statelessness, territorial sovereignty, and the refugee regime* – A *philosophical argument*

We take ourselves to have established that the ordinary meaning to be given to the terms of the 1954 Convention in their context and in the light of its object and purpose calls for two tests rather than one, and also that state practice favoring a one-test approach has not considered our interpretation of the two-test approach, which does as good of a job as the one-test approach of explaining why various stateless claimants (those who in our sense *are* able to return) are not refugees.

Here, we add a complimentary argument, appealing to the principle of systemic integration, a principle enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). This principle mandates that, when there is ambiguity in the interpretation of a treaty according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose and subsequent state practice,

we must take into account the place of the treaty in the broader framework of international law and in particular "any relevant rules of international law applicable in the relations between the parties".

We will argue here that this principle supports our two-test view, by taking into account some applicable principles of international law. Crucially, it is now widely accepted that the proper construal of article 31(3)(c) is that `rules' be understood to include "all of the sources of international law, including custom, general principles, and, where applicable, other treaties" (McLachlan 2005).

Thus, while we hold that there is no ambiguity concerning the proper construal of 1(A)(2) according to the provisions of 31(1),31(2), and 31(3)(a)(b) of the Vienna Convention, for those who find that there still is ambiguity on these grounds, we offer as further consideration that a reading according to 31(3)(c) of the Vienna Convention supports our approach.

Our key message here is that persons from the category at issue – stateless persons outside of and unable to return to any country of former habitual residence (in the strict sense of "unable") – would fall through the cracks of the system of international protection according to the one-test approach, while in contrast, on the two-test approach, that system more coherently divides cases according to the most salient remedy for their plight: those for whom any return is genuinely unforeseeable, and who therefore need a potentially permanent accommodation in a country of asylum are properly the subject of the Refugee Convention while those who only need temporary accommodation along with "legal" assistance for a return home are properly the purview of the Statelessness Conventions. Of course, in practice, many stateless persons languish for decades even though in principle their plight "should" be merely legal. But we can at least distinguish between cases where it is reasonable to hope for return, and cases where this would be unreasonable, say, because the home country had submerged beneath rising seas, as some south pacific island nations may soon do.

We will offer two sub-arguments to this effect, drawing on two distinct elements of the international legal system: first, article 15 of the UN Declaration on Human Rights, and second, the principle of external sovereignty at the heart of the Westphalian international legal order of territorial sovereign states.

3.1 Article 15 of the UNDHR

Article 15 of the 1948 UN Declaration of Human Rights (UNDHR), the foundational document of the post-war international human rights regime, declares:

"Everyone has the right to a nationality".

We claim that our two-test reading does more than the one-test reading to ensure that vulnerable persons' right to a nationality is honored (by a path to citizenship in a country of asylum). Stateless persons outside of and unable to return to any country of former habitual residence have no assured path to nationality under the Statelessness Conventions, and therefore they have no assured path to nationality at all if they are excluded from refugee status, as the one-test reading would do. In contrast, on our two-test reading, they have hope for a path to nationality by way of refugee status.

Importantly, the systemic integration clause is only active when there is a genuine ambiguity. Of course we could misread the Convention so that all stateless persons were refugees: this would provide even more coverage, including for those stateless persons for whom legal remedies *should* suffice to allow them to return home but for one reason or another have not done so. But there is no genuine ambiguity about whether such a reading of the Convention is correct: that it is not is obvious from the *travaux*. It is only because the two-test reading is at least *in the running* for being the correct interpretation that the systemic integration principle applies in this way. Thus, our application of it here does not prove too much.

3.2 The principle of external sovereignty

A second, more general principle of international law, indeed a constitutive principle of the international legal order, also bears on the proper construal of 1(A)(2) in light of the principle of systemic integration. This is the principle of external sovereignty.

The principle of state sovereignty is generally understood to be a founding principle of the international legal order. It is the idea that each state has supreme authority within its defined territory (internal sovereignty), and also that each state is bound to respect the internal sovereignty of other states (external sovereignty) (Philpott 1999; James 1998 and 1999). Since the Peace of Westphalia following the Thirty-Years

War, these principles have been at the basis of the international system of sovereign, territorial states.

The notion of external sovereignty finds many expressions in duties that states have toward one another, including the principle of non-intervention (the duty of states not to interfere in the internal affairs of other states), the principle of territorial integrity (the duty of states not to physically invade or occupy the territory of another) and the principle of the right to expel aliens (and the according duty of states to receive their own nationals if expelled while abroad) (Edwards 2014, 36; Brownlie 2003, 398; Simmons 2001, 308-309).

Crucially, all of the duties associated with external sovereignty speak to a unified, mutual objective shared by states in the Westphalian world order: that of maintaining a world that is comprehensively sub-divided into well-defined spheres of control, where for every piece of territory, it is clear which unique sovereign entity controls that territory, and for every person, it is clear which unique sovereign entity has ultimate jurisdiction over and responsibility for that person. This is the normative ideal that regulates every principle that appeals to sovereignty in international law (Boll 2006, 38-39 and 43-47; Brownlie 2003, 106-107; Conklin 2014, 73-74; Edwards 2014, 12; Jault-Seseke 2015, 21-22; Larkins 2010, 35; Shachar 2009, 113-114; Shaw 2008, 211 and 228; Van Panhuys 1959, 139).

The relevance here should be clear. Suppose for comparison that we are considering a treaty for the partitioning of some territory, and there is an ambiguity in the interpretation of the treaty, such that on one interpretation, there is no effective procedure for determining who has control over (some part of) the territory, while on the other interpretation there is such a procedure. Then the principle of systemic integration would favor the second, because the principle of external sovereignty that binds the entire system of sovereign states together under international law dictates that matters of jurisdiction over territory and people be unambiguously clarified where possible.

The same applies here. On the one-test interpretation, unable-to-return stateless claimants would be stuck in an unresolvable gap in coverage, obliged to seek recourse under the Statelessness Conventions which are geared towards offering temporary accommodation and help finding a way home, even though it is impossible for them to return home. These may thus be persons for whom no country bears antecedent responsibil-

ity, and thus exceptions to the basic principle that jurisdiction (over both territory and persons) be unambiguous. We thus suggest that the principle of systemic integration favors our two-test approach, according to which unable-to-return stateless claimants are to be treated as refugees under the auspices of the 1951 Convention, which ensures a procedure for securing them a stable place under the jurisdiction of the country of asylum, thereby maintaining the underlying order of territorial jurisdiction at the core of the Westphalian system.

This point also bears more directly on our arguments concerning the object and purpose of the drafters of the 1951 Convention. The original drafting sessions envisioned a broader solution for both refugees and stateless persons because the general target was a new regime of international protection. Allied governments were intensely preoccupied by the destabilizing effect of statelessness because of disappearing states. The number of people who had been persecuted and denationalized by the nazis was dwarfed by the number of people holding useless identity documents from countries that had ceased to exist. As discussed above, some who required international protection feared persecution, but many others held travel documents or identity documents from countries that no longer existed and found themselves displaced and (on at least one construal of the phrase) unable to return, more so after the fall of the Iron Curtain. The partition of Germany alone called into question the nationality of millions of displaced persons. It was the general risk of destabilization of the international order that lent urgency to the drafters' task. It is no accident that the Ad Hoc Committee's official title was "The UN Ad Hoc Committee on Statelessness and Related Problems", nor that the first work product of their predecessor, the Ad Hoc Committee on Refugees and Stateless Persons, was a document entitled "A Study of Statelessness" (UN Ad Hoc Committee 1949). But viewed from this perspective, the primary matter at hand was to determine procedures for re-establishing jurisdiction in line with general principles of sovereignty (i.e., uniquely and unambiguously). To this end the primary decision to make is whether a claimant needs a new home or help returning to an old one. This supports our other arguments that taken in context, the object and the purpose of the drafters is better realized by our two-test interpretation than by the one-test interpretation.

One final clarification. Many political solutions to the plight of climate refugees have been proposed (see above notes 1 and 2). On some, sinking states might be ceded new land, and indeed we can even envision that new laws are passed rendering this a general practice. In a world where there is such a mechanism for the continued existence of vulnerable states, would this change the question of how systemic integration applies? Indeed it would. Of course, if the relevant states continue to exist then by the lights of our arguments, their citizens are not stateless, and so the question of their eligibility for refugee status under the statelessness clause of 1(A)(2) does not apply. But more generally the systemic integration provision does not speak of integration with what we hope that the laws will one day be, but rather of integration with what the laws actually are, which is what the Vienna Convention means by the "broader framework of international law". Should the framework of international law change in some relevant way this could change what interpretations of the 1951 Convention (inter alia) best systemically integrates with that framework. But our question here is how the principle of systemic integration actually applies given the current broader framework.

Conclusion

Since our interpretation of the 1951 Convention leads to an application to a group of people, climate refugees, who did not exist at the time of drafting, our interpretation might seem out of keeping with the Convention's object and purpose. But while in some cases progressive interpretation may be justified (especially when, as here, its purpose is to extend vital protection to vulnerable groups), we maintain that our interpretation adheres strictly to the dictates of every provision of article 31 of the Vienna Convention.

Stepping back, it is vital to consider the historical context as broadly as possible. It is a mistake to think of the refugee Convention as a document for persecuted persons with a clause for stateless persons added on as an afterthought. If anything, the contrary is the case: concerns over "disappearing states," territorial sovereignty, and the issuance of nationality documents were central concerns of the drafters of the 1951 Convention. The Convention was drafted to help protect those ren-

dered stateless and displaced due to war, when countries had collapsed and been replaced across Europe, leaving millions displaced from their homes with useless pieces of paper and no valid ID.

The drafting process eventually led to three Conventions, the 1951 Refugee Convention providing international protection to many who require it, the 1954 Convention Relating to the Status of Stateless Persons, identifying stateless persons and enumerating their rights, and the 1961 Convention on the Reduction of Statelessness, which enumerates the steps to be taken by states to resolve statelessness. These conventions complement each other, though they were drafted by different groups of people as part of an extended process (which means they are not perfectly complementary). Importantly, all three conventions provide protection for stateless people. Rather than viewing persecution as the central component of the protection regime, it is statelessness that is the focus, with persecution a special exception for non-stateless persons who also require international protection. For the Refugee Convention, accordingly, the base case is that of completely lacking the protection of any home country, such that there is no path back to that country. Persons for whom that is true are paradigmatically refugees, i.e., in need of potentially permanent protection from a country of asylum. It is persecuted persons who are the exception: an extra class of individuals in need of such protection, even where in some cases this is despite *de jure* nationality in the persecuting state.

Our application of the 1951 Convention to the stateless former occupants of states destroyed by climate change is not a new use of the Convention that is out of step with its original purpose, it is in line with the object and purpose and intention of the drafters in the post-World War Two context of the Convention's drafting. Climate change is not war, but it will produce a similar effect: multitudes displaced, unable to return home, holding useless identity documents from countries that have ceased to exist. We therefore call on the international community, policy makers, judiciaries and legislatures to put the 1951 Convention to the use for which it was primarily intended and guarantee protection to all stateless persons outside of their countries of origin and unable to return.

One final question is whether the application of the 1951 Convention to remedy the statelessness of those whose states become uninhabitable owing to climate change must wait until those persons' former

states have in fact become uninhabitable (and so ceased to be states in the sense we argue in our (2014), (2015) and (2017). This is not desirable. Of course the best option would be for us all to achieve some other more comprehensive political solution that ensures the continued statehood of affected countries, by affording them new land, or preventing sea level rise. But failing that, should it become more or less inevitable that the worst comes to pass, might it be possible for the legal system to pre-emptively grant asylum to those effected before, e.g., some catastrophic storm delivers a final blow to the country in question? We suspect that the answer may be yes. Some of the principles that have been invoked to justify the doctrine of nonmootness[6] or statutes of limitations[7] in US law may be seen as precedents in the interests of supporting the orderly regulation of the judicial system as a whole. This is a topic for future work.

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[6] One example of the ways in which courts commonly adjudicate temporal problems similar to the one we face is R*oe v.* W*ade*, an abortion rights case before the US Supreme Court, where the Court declined to declare the case moot (which is usually grounds for rejecting a case) even though the claimant's pregnancy only lasted nine months, much shorter than the time it took for her case to appear before the Court. The Court held that "[*p*]*regnancy provides a classic justification* for a conclusion of nonmootness" (footnote to Roe v. Wade, 410 US 113 (1973)).

[7] "The decision about when to lower the legal curtain and extinguish a claim is a policy determination to be made by the legislature. The legislature must strike a complex balance. On the one hand, potential plaintiffs must have an adequate opportunity to bring a claim. On the other hand, defendants and the courts must be protected from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. Statutes of limitations are essential to a fair and well-ordered civil justice system" (Alec.org 2008)

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Book Review

La giustizia: che cos'è e a che cosa serve? Dialogando con Corrado Del Bo'

Francesco Pallante

1.

Che cos'è la giustizia? È una domanda senza tempo – oggetto di riflessioni e discussioni che probabilmente sempre hanno accompagnato e sempre accompagneranno la vita associata degli esseri umani – quella a cui si propone di dare risposta Corrado Del Bo' con il suo ultimo libro: *La giustizia. Un'introduzione filosofica* (Carocci, Roma, 2022). La più difficile delle domande, con ogni probabilità, a fronte della quale l'Autore ha il pregio di sapersi porre con grande equilibrio: senza soggezione né sufficienza, bensì con la pacata fermezza dello studioso che affronta l'oggetto della propria ricerca così come ha appreso a fare da Salvatore Veca, il Maestro alla cui memoria il lavoro è dedicato.

Il libro si articola in sei capitoli, a loro volta raggruppabili – ma non raggruppati dall'Autore – in due parti. I primi tre capitoli discutono i reciproci rapporti tra morale o etica (le due parole sono usate nel testo come sinonimi) (19), diritto e giustizia, esplorandone sovrapposizioni e separazioni sino a giungere all'individuazione del nucleo concettuale dell'idea di giustizia. A partire da tale prima conclusione, i successivi tre capitoli propongono una tassonomia della giustizia, incentrata sui suoi possibili impieghi al fine dell'attribuzione delle risorse o della correzione della loro attribuzione.

È possibile, insomma, suddividere il discorso di Del Bo' in due distinti passaggi: il primo dedicato a indagare *che cos'è* la giustizia; il secondo rivolto a illustrare *a che cosa serve* la giustizia.

2.

Iniziando dalla questione che il libro mette sotto indagine per prima – che cos'è la giustizia – Del Bo' compie, anzitutto, un'operazione di pulizia concettuale, volta a evitare il rischio che morale, diritto e giustizia si ritrovino aggrovigliati in una matassa inestricabile.

È un rischio concreto, perché i tre elementi servono tutti a giudicare: (*a*) i comportamenti umani rispetto alle regole che li disciplinano e (*b*) le regole che disciplinano i comportamenti umani (19). Ciò significa che non ci si può accontentare di misurare in termini di giustizia i comportamenti umani, ma che anche le regole – e, anzi, soprattutto le regole – devono, a loro volta, essere sottoposte alla medesima, attenta, misurazione. Si può sintetizzare il punto così: se la regola è giusta, il comportamento giusto è quello che rispetta la regola; se la regola è ingiusta, il comportamento giusto è quello che non rispetta la regola.

Fonti delle regole possono essere la morale o il diritto: due ipotesi che richiedono di essere trattate separatamente.

La morale riguarda ciò che va fatto e ciò che non va fatto in base a quanto stabilito in un determinato "codice" morale, a prescindere dalla liceità o illiceità giuridica di ciò che è stabilito e viene fatto (20).

Ma cos'è che, in concreto, va fatto o non va fatto per agire moralmente? Sappiamo che i "codici" morali variano a seconda dei tempi e dei luoghi e che gli stessi identici comportamenti possono essere considerati moralmente encomiabili o condannabili a seconda delle situazioni. È la delicata questione del relativismo morale: si può giudicare un "codice" morale con i criteri di un altro "codice" morale? Si potrebbe ritenere di no, perché, non esistendo parametri di giudizio oggettivi, la sola cosa cui si può dare rilievo è la coerenza interna di ciascun "codice". Ma si potrebbe, al contrario, ritenere di sì (come sembra fare Del Bo'), perché altrimenti si finirebbe per giustificare tutto, anche il nazismo, ignorando le costanti che possono invece essere riscontrate nei diversi contesti temporali o spaziali (com'è il caso, per esempio, della proibizione dell'assassinio) (31 ss).

Quel che più rileva, ai fini dell'indagine condotta nel libro, è però che i "codici" morali riguardano, tra l'altro, anche che cosa sia da considerarsi giusto e che cosa ingiusto. Se ne ricava che la morale si estende su un dominio più ampio di quello della giustizia e lo "contiene" al proprio in-

terno. Sicché: tutte le questioni di giustizia sono anche questioni morali, ma non tutte le questioni morali sono anche questioni di giustizia (20).

Il diritto, a sua volta, riguarda ciò che va fatto e ciò che non va fatto in base a quanto stabilito dall'ordinamento giuridico. Occorre, però, compiere una distinzione: i giuspositivisti ritengono che ciò sia sempre vero, a prescindere dalla moralità o immoralità dell'ordinamento giuridico; i giusnaturalisti, al contrario, ritengono che ciò sia vero se e solo se l'ordinamento giuridico è morale. Dunque, i primi slegano il diritto dalla morale, i secondi, all'opposto, ritengono i due concetti indissolubili. Tale fondamentale differenza d'impostazione conduce a formulare risposte opposte alla domanda se sia dovuta obbedienza anche al diritto immorale: i giusnaturalisti rispondono di no, i giuspositivisti replicano di sì (salvo ritengano che, almeno oltre una certa soglia, il diritto immorale non sia, in realtà, diritto, secondo l'insegnamento di Lon Fuller)[1]. In ogni caso, anche al di là della diatriba che oppone i fautori del diritto positivo a quelli del diritto naturale, non sarebbe esatto dire che il diritto è separato dalla morale, dal momento che in molti casi così non è: più corretto – spiega Del Bo' – è affermare che il diritto è *separabile* dalla morale. Posizione su cui possono convergere anche i giusnaturalisti (pur – ovviamente – traendone poi conseguenze diverse dai giuspositivisti) (38 ss).

Sarebbe stato, forse, interessante che, nel trattare tali questioni, il testo prendesse in considerazione, oltre all'ipotesi dell'inesistenza del diritto secondo Lon Fuller, anche quella della sua ineffettività secondo Hans Kelsen, a partire dall'idea che tra le cause dell'ineffettività di una norma giuridica possa altresì esservi il suo disconoscimento morale, eventualmente per motivi di giustizia, da parte dei destinatari (e, se l'ineffettività tende a diventare la regola, anche da parte degli operatori giuridici che non ne impongono l'osservanza)[2]. Si potrebbe, in altri ter-

[1] Secondo la ricostruzione di Fuller (1986, 56-59) proposta da Del Bo', un potere sovrano fallisce nel creare o mantenere un ordinamento giuridico in caso di: (1) incapacità di produrre norme, (2) mancata pubblicizzazione, (3) abuso della retroattività, (4) produzione di norme incomprensibili, (5) o contraddittorie, (6) o che impongono una condotta impossibile, (7) eccesso di cambiamenti, (8) incongruenza tra norme previste e loro applicazione.

[2] Un caso potrebbe essere il seguente. Secondo i dati dell'Organizzazione mondiale della sanità aggiornati al 2020 (https://apps.who.int/gho/data/node.main.

mini, ipotizzare una gradazione di situazioni in cui la discrasia tra diritto e morale (eventualmente sotto forma di giustizia) può condurre alla parziale ineffettività della norma o alla sua inesistenza (motivo della quale potrebbe altresì essere, oltre alle ipotesi formulate da Fuller, anche la sua totale, o quasi totale, ineffettività, così come teorizzato da Kelsen) (Kelsen 1966, 235-243).

3.

Venendo ora più da vicino alla giustizia, Corrado Del Bo' imposta il discorso a partire dalla distinzione tra giustizia non comparativa e giustizia comparativa (57 ss). La prima (giustizia non comparativa) riguarda ciò che spetta a ciascuno; la seconda (giustizia comparativa) entra in gioco successivamente, una volta stabilito che a un determinato soggetto spetta una determinata "cosa", per affermare che quella stessa "cosa" spetta altresì a tutti coloro che si trovano nella medesima condizione di quel soggetto. Occorre, dunque, distinguere un profilo di "merito" (per esempio: «"merita" di entrare gratuitamente Filippo, che non ha ancora compiuto 18 anni») e un profilo di uguaglianza (nell'esempio: «"meritano" allo stesso modo di entrare gratuitamente tutti coloro che, come Filippo, non hanno ancora compiuto 18 anni»)[3].

Ma come stabilire ciò che spetta a ciascuno e, di conseguenza, a tutti coloro che si trovano nella sua stessa condizione? Il libro in commento non discute i diversi criteri di giustizia astrattamente utilizzabili per

A1004?lang=en), solo il 15,4% degli italiani, contro il 99% dei tedeschi, obbedisce alla norma giuridica che impone di mettere la cintura di sicurezza quando ci si siede sul sedile posteriore di un'automobile e le stesse forze dell'ordine tendono a non sanzionare la violazione di tale obbligo. Si potrebbe ritenere che la sostanziale ineffettività di tale norma sia da ricollegarsi alla diffusa convinzione della sua ingiustizia, quantomeno nel senso che sarebbe ingiusto comminare una sanzione a chi siede sui sedili posteriori senza far uso della cintura di sicurezza.

[3] La parola «merito» è, dunque, usata nel libro non nel senso, più ristretto, che merita qualcosa chi ha agito in modo da meritarsela (per esempio: merita di essere curato per primo chi non fuma), bensì nel senso, più ampio, per cui merita qualcosa chi rientra nei criteri previsti per l'attribuzione di quella cosa (per esempio: merita di essere curato chi è malato) (61 ss).

dare risposta a questa domanda, come invece fa Kelsen nel suo *Il problema della giustizia* (1975)[4]. Quel che il libro si propone – a partire dalle tesi argomentate nel 1863 da John Stuart Mill nel suo U*tilitarismo* (67) – è di elaborare una definizione formale, non sostanziale, della giustizia, in base alla quale si ha una questione di giustizia tutte le volte in cui vi è un soggetto che ha il *potere sovraordinato* di attribuire (o restituire, anche per equivalente), secondo determinati *criteri*, un *bene* a qualcun'altro che ha il *diritto soggettivo* di riceverlo secondo quanto stabilito da una regola morale o giuridica (74 ss).

Vi è, dunque, giustizia tutte le volte in cui il titolare di un potere coercitivo agisce nel rispetto di criteri di giustizia di origine morale e/o giuridica (a seconda che morale e diritto non siano o siano separati) che attribuiscono diritti soggettivi morali e/o giuridici ai destinatari delle decisioni del titolare del potere coercitivo. Il fatto che l'odierna estensione dei diritti giuridici tenda, in concreto, a fare della giustizia una questione più giuridica che morale è solo un dato di realtà: idealmente, scrive Del Bo' sulla scia di Mill, il diritto soggettivo alla giustizia può essere tanto un diritto soggettivo morale, quanto un diritto soggettivo giuridico.

Inevitabile, per il giurista, porsi la domanda (65 ss): ma è davvero necessario trattare la giustizia come una questione di diritti soggettivi morali e/o giuridici? Il farlo apre, inevitabilmente, il problema di definire che cosa siano i diritti soggettivi morali e in cosa si distinguano dai diritti soggettivi giuridici. Perché utilizzare una parola del vocabolario giuridico – «diritti» – in un contesto non giuridico? Fuori dal diritto esistono diritti? Il rischio, chiaramente, è che il discorso torni a incagliarsi nella contrapposizione tra

[4] Com'è noto, i criteri di giustizia discussi da Kelsen nel libro sono i seguenti: a ciascuno il suo; non fare agli altri quello che non vorresti fosse fatto a te stesso; agisci soltanto secondo quella massima che ti consente al tempo stesso di volere che essa divenga legge generale (imperativo categorico kantiano); fa il bene, evita il male (San Tommaso); tratta gli altri nello stesso modo in cui i membri della comunità si trattano l'un l'altro per consuetudine; *in medio stat virtus* (Aristotele); il principio della retribuzione (ricompensa e punizione); a ciascuno secondo le sue prestazioni; da ciascuno secondo la sua capacità, a ciascuno secondo i suoi bisogni (comunismo); la carità (amore per il prossimo); restituire il contrario di quanto si è ricevuto (gli ultimi saranno i primi); la libertà individuale; l'autodeterminazione democratica; l'uguaglianza; l'idea di bene assoluto (divinità).

giusnaturalismo e giuspositivismo. Forse, a scongiurare tale rischio, potrebbe venire in soccorso la distinzione, oramai acquisita alla riflessione giuridica, tra princìpi e regole, una distinzione utile, nel caso di specie, a eludere ogni riferimento, anche indiretto (e cioè, nelle vesti dei diritti soggettivi morali), all'insidioso tema dei valori. Più agevole potrebbe essere affermare che esistono pretese soggettive (eventualmente anche radicate in "codici" morali) che anelano a essere giuridicamente riconosciute come diritti ma che, finché non sono giuridicamente riconosciute, diritti non sono. Se ne potrebbe concludere – senza dover tirare in ballo i diritti soggettivi – che la giustizia è, più semplicemente, quella parte della morale che si occupa di assegnare a ciascuno il suo (64-65), secondo criteri variabili e inevitabilmente soggettivi, e di farlo in modo uguale per tutti coloro che appartengono alla medesima categoria. Dopodiché, ci sarà certamente bisogno di applicare tali criteri e, dunque, di soggetti dotati del potere di farlo: ma, forse, a quel punto non si tratterà più di una questione di giustizia, bensì di governo della giustizia.

A quanto sopra si potrebbe aggiungere, muovendo dal piano del diritto in generale a quello del diritto costituzionale, qualche considerazione critica sull'odierna tendenza all'espansione della sfera dei diritti soggettivi giuridici, un fenomeno a cui il libro sembra invece guardare con favore[5]. Il motivo sembra chiaro: nella prospettiva di Del Bo', l'estensione dell'ambito del diritto implica la sua sovrapposizione all'ambito della morale (o, forse meglio, la sua giuridicizzazione), cosa che, riducendo il rischio di un conflitto tra diritto e morale, finisce col facilitare, sul piano pratico, il discorso sulla giustizia. Dal più ristretto punto di vista della Costituzione, non si può, tuttavia, evitare di porre due questioni. La prima, di carattere teorico, ha a che fare con il bilanciamento dei diritti (Zagrebelsky 1992, 170 ss); la seconda, di carattere pratico, con il costo dei diritti (Holmes e Sunstein 2000). In sintesi: poiché tutti i diritti giuridici vanno tra loro bilanciati (questione teorica) e poiché tutti i diritti giuridici costano (questione pratica), ogni riconoscimento giuridico di nuovi diritti inevitabilmente riduce il livello di tutela dei diritti già

[5] Un favore basato, dalla prospettiva del diritto costituzionale, sull'interpretazione dell'art. 2 Cost., che riconosce i diritti inviolabili dell'essere umano, come clausola aperta (su cui, criticamente, Pace 1985, 3-6).

riconosciuti. Si è sempre, dunque, al cospetto di una scelta, tra vecchi e nuovi diritti: non è anche questa una questione di giustizia?

Volendo andare più a fondo e iniziando dalla questione teorica: tra i molteplici diritti costituzionali che le diverse situazioni possono chiamare in causa non vi è (quasi) mai un solo bilanciamento possibile, ma una pluralità di soluzioni tra cui spetta al legislatore scegliere. Concepire la giustizia come una questione risolvibile nell'ambito della sfera dei diritti soggettivi giuridici non rischia di far sì che tutte le diverse soluzioni ascrivibili al quadro costituzionale siano da considerarsi come comunque giuste? L'ingiustizia verrebbe, di fatto, a coincidere con l'incostituzionalità o – il che è lo stesso – la giustizia con la Costituzione. Un'ipotesi, oltre che teoricamente discutibile, fattualmente smentita dai casi in cui una stessa disposizione di legge è risultata prima non incostituzionale e poi incostituzionale, avendo il giudice delle leggi ridefinito, in via interpretativa, i confini stessi del costituzionalmente ammissibile: si pensi al famoso caso della repressione penale dell'adulterio femminile, ritenuta non incostituzionale nel 1961 e incostituzionale nel 1968[6].

Quanto alla questione pratica, il punto è riconoscere che tutte le norme costituzionali – siano esse di regola, di principio o di programma – hanno natura giuridica e, dunque, che, anche nei casi in cui non sono traducibili in immediati vincoli ai comportamenti dei consociati, comunque vincolano il legislatore a dare loro attuazione. Il che, nel caso dei diritti costituzionali, significa un vincolo non soltanto a predisporre la normativa di dettaglio (come, per esempio, nel caso della legge sul Servizio sanitario nazionale in relazione al diritto alla salute), ma anche ad allocare le necessarie risorse pubbliche nella legge di bilancio (dal momento che senza risorse nessun diritto, nemmeno quelli tradizionalmente considerati come "negativi", può ricevere attuazione)[7].

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[6] Gli esempi ricavabili dalla giurisprudenza costituzionale sono forse più numerosi di quel che ci si potrebbe aspettare. Tra questi: la repressione penale della pubblicità degli anticoncezionali; il diritto alla salute inteso come diritto finanziariamente condizionato; il divieto di costituzione di sindacati da parte dei membri delle forze armate; l'attribuzione del solo cognome paterno ai figli; il criterio della lungoresidenza sul territorio regionale per l'assegnazione delle case popolari.

[7] Quantomeno perché, come nota Kelsen (1994, 83), un diritto soggettivo giuridico non è tale se non può essere difeso in giudizio: dunque, come minimo,

Nei termini di Del Bo', la questione teorica (bilanciamento dei diritti) rimanda alla giustizia politica («il piano dei "primitivi istituzionali" e dei fondamenti normativi di un certo ordinamento giuridico e di una certa comunità politica; le basi [...] della convivenza sociale») (46); la questione pratica (costo dei diritti) rimanda alla giustizia sociale in senso rawlsiano («il modo in cui le maggiori istituzioni sociali distribuiscono i doveri e i diritti fondamentali e determinano la suddivisione dei benefici della cooperazione sociale») (15). Ma, se è così, non è allora vero che esiste la «giustizia *tout court*» a cui pure Del Bo', smarcandosi da Rawls, dice di voler dedicare la sua riflessione (15): in realtà, tutte le questioni di giustizia, essendo questioni di diritti, sono per definizione questioni di giustizia politica e sociale (in un ordinamento costituzionale a Costituzione rigida: politica e sociale – non politica o sociale – perché, come già detto, la prescrittività di tutta la Costituzione vincola il potere politico ad attuare concretamente, sul piano normativo e finanziario, i diritti).

4.

La seconda questione trattata nel libro – a cosa serve la giustizia – è discussa in due passaggi.

Sappiamo, alla luce di quanto sin qui ricostruito, che la giustizia serve ad attribuire un bene a qualcuno secondo determinati criteri. Non tutte le attribuzioni sono, tuttavia, equivalenti: un conto, infatti, è attribuire in prima battuta, un altro correggere, in seconda battuta, eventuali distorsioni intervenute ad alterare l'attribuzione originaria. Si possono così individuare, ed è questo il primo passaggio della ricostruzione proposta da Corrado Del Bo', diverse tipologie di giustizia, classificandole a seconda che il loro scopo sia rivolto ad attribuire beni (giustizia distributiva) o a correggerne l'attribuzio-

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ogni diritto costa perché costa l'apparato giudiziario preposto alla sua tutela. Ma è chiaro che questo non basta. Si pensi alla libertà di circolazione, rispetto alla quale si dice solitamente che per goderne è sufficiente che nessuno la impedisca: in realtà, senza la costruzione delle strade, la realizzazione della segnaletica orizzontale e verticale, l'illuminazione notturna, la manutenzione ordinaria e straordinaria, il sistema di trasporto pubblico, la disciplina della circolazione, un corpo di funzionari preposti al controllo del rispetto delle regole, ecc. (tutte attività che costano) nessuno di noi potrebbe realmente circolare.

ne (giustizia correttiva). Ciascuna categoria risulta, a sua volta, articolabile in tre sottocategorie, così da ottenere il quadro seguente:

- giustizia distributiva: (1) giustizia allocativa; (2) giustizia sociale; (3) giustizia commutativa;
- giustizia correttiva: (4) giustizia rettificatrice; (5) giustizia retributiva; (6) giustizia di transizione.

Volendo osservare un po' più da vicino le diverse tipologie, la giustizia allocativa (91 ss) è quella preposta all'assegnazione di beni specifici, in relazione ai quali risulta determinante conoscere se siano abbondanti o scarsi (rispetto alla platea degli interessati), omogenei o eterogenei, divisibili o indivisibili. La combinazione delle diverse caratteristiche può dar vita a differenti, e in alcuni casi complessi, problemi di attribuzione, riassumibili in un «punto teorico»: «le questioni di giustizia allocativa sorgono sempre quando il bene è scarso, sia esso omogeneo o eterogeneo, divisibile o indivisibile, mentre, quando non è scarso, i problemi si pongono [...] se è eterogeneo», perché occorre accordarsi sull'equivalenza dei beni eterogenei, e, sia pure in misura minore, se è divisibile, perché la decisione sulla divisibilità può, a sua volta, essere motivo di conflitto (96).

A differenziare la giustizia allocativa dalla giustizia sociale (98 ss) è il fatto che quest'ultima non riguarda la distribuzione di singoli beni specifici, ma «dell'insieme dei vantaggi economico-sociali generati in una data società» (98). Ne deriva che incaricata di realizzarla non è una specifica istituzione, ma il complesso delle istituzioni operanti sul piano collettivo e che a determinarne i risultati può contribuire, *ex ante*, anche l'assetto dei rapporti di produzione. È chiaro che quello della giustizia sociale è il terreno destinato a ospitare lo scontro ideologico tra solidaristi e individualisti, di cui possono essere considerati emblemi, rispettivamente, John Rawls (1982) e Robert Nozick (2005). Al centro della contrapposizione è la questione della redistribuzione della ricchezza, che Rawls giustifica alla luce dell'arbitrarietà morale della "lotteria naturale" (il caso che ci fa nascere, senza meriti o demeriti, con molte o poche opportunità di vita) e che Nozick critica attribuendo valore assoluto alla tutela della libertà individuale. Come sottolineato da Del Bo', gli unici interventi statali ammessi da Nozick sono quelli necessari alla tutela dell'incolumità fisica e della proprietà degli individui: si potrebbe aggiungere, che questa scel-

ta di obiettivi cui destinare l'impiego delle risorse pubbliche è tutt'altro che neutra – come vorrebbe il pensiero liberista – ma comporta anch'essa una redistribuzione della ricchezza, che opera *dal basso verso l'alto*. Il silenzio sull'operare di questa redistribuzione "occulta" è, probabilmente, il più grande mascheramento ideologico del nostro tempo.

Ultima categoria di giustizia distributiva è la giustizia allocativa (104 ss), che si distingue dalle due precedenti per il fatto che, in questo caso, la distribuzione dei beni non è decisa, sulla base di criteri predefiniti, da autorità sovraordinate ai destinatari dei beni stessi, bensì è l'esito di uno scambio autonomamente deciso da questi ultimi. Qui l'elemento di giustizia consiste nell'esigenza che lo scambio risulti equo, anche se i criteri attraverso cui definire e misurare l'equità possono essere diversi. In ultima istanza, ad aleggiare è la questione dello sfruttamento del bisogno, che può celare, dietro l'apparente autonomia dello scambio delle volontà, l'obbligo di accettare l'accordo per necessità. Coerentemente, gli autori che, come Nozick e Hayek, negano ogni spazio, anche concettuale, alla giustizia distributiva in nome della libertà individuale negano altresì ogni spazio all'ipotesi che un'autorità terza possa intervenire a correggere l'iniquità dello scambio volontariamente deciso dalle parti (prescindendo, dunque, dai condizionamenti che possono averne influenzato la volontà). Al contrario, studiosi come Walzer (2008) o Sandel (2013) ritengono che gli scambi accettati sotto lo schiaffo del bisogno – gli «scambi disperati» – non possono essere considerati realmente frutto della volontà di chi li subisce.

Passando, ora, dalla giustizia distributiva alla giustizia correttiva, è sulla giustizia rettificatrice (112 ss) che il libro, anzitutto, si sofferma. Parliamo, in questo caso, essenzialmente del risarcimento dei danni ingiustamente causati, il cui compimento ideale – il ripristino della situazione *ex ante* – non sempre è realizzabile e può, dunque, necessitare di essere realizzato per equivalente. Naturalmente, la questione può investire tanto singoli individui, vittime, si potrebbe dire, di violenza privata, quanto gruppi di persone vittime di violenza politica (popolazioni che hanno subìto lo schiavismo, la colonizzazione, il genocidio, ecc.). Diverso è, inoltre, se i danni patiti dagli aventi diritto al risarcimento sono di carattere materiale o spirituale, essendo questi ultimi evidentemente più difficili da risarcire (anche per via dell'inadeguatezza, in molti casi, della loro "monetizzazione").

Di tipo differente è la giustizia retributiva (117 ss), il cui campo d'azione ha a che fare con il diritto penale. Numerose sono le questioni che

s'intrecciano in materia: l'affermazione del monopolio statale in campo punitivo, la progressiva mitigazione delle pene (a partire dal divieto delle torture e della pena di morte), la restrizione del campo del penalmente rilevante, ecc. Il punto concettualmente più delicato è la motivazione posta a giustificazione dell'inflizione della pena nei casi in cui il colpevole abbia proceduto al risarcimento del danno (tanto più se in forma specifica). Cosa giustifica, in tali casi, la comminazione della sanzione penale? Numerose sono le risposte offerte, nel tempo, a tale domanda: la sanzione serve a ripristinare l'armonia sociale violata, a mettere il criminale in condizione di non nuocere, a indurlo al ravvedimento, a dissuadere i consociati dal tenere il comportamento sanzionato, a comunicare al reo la riprovazione sociale che le sue azioni hanno provocato. In tutti i casi, osserva Del Bo', non è, tuttavia, chiaro perché la sanzione penale debba consistere nell'inflizione di una sofferenza al colpevole e, soprattutto, come ciò sia giustificabile in termini di giustizia.

A completamento della classificazione, la giustizia di transizione (122 ss) riguarda quelle situazioni in cui, in seguito a un cambiamento di regime politico (specialmente nel senso della transizione democratica), emerge la questione di come trattare gli esponenti del passato governo responsabili di atti criminali, oltre che le vittime di quegli atti, nonché di come procedere alla costruzione del nuovo ordine politico da sovrapporre a quello precedente. Modello della giustizia di transizione è quello della Commissione per la verità e la riconciliazione sudafricana, per la sua capacità di affrontare le questioni ora evocate in modo originale e pacifico (in particolare, trattare attraverso strumenti non meramente risarcitori e sanzionatori le drammatiche questioni di giustizia retributiva e correttiva scaturenti dai crimini dell'apartheid). Altri casi hanno fatto seguito all'esperienza sudafricana, specialmente in America Latina. In effetti, scopo ultimo della giustizia di transizione è accompagnare le trasformazioni sociali conseguenti al cambio di regime, per far sì che quanto accaduto in passato non possa tornare a ripetersi. È come se attraverso la transizione si compisse un investimento sulla giustizia futura, in modo tanto credibile da convincere le persone ad accettare come un fatto compiuto l'ingiustizia passata.

Il secondo passaggio del ragionamento sulla finalità della giustizia condotto nel libro riguarda lo scopo di regolazione della vita associata (vale a dire, lo scopo politico) perseguibile attraverso le diverse tipologie in cui si articola la giustizia (85 ss).

A contrapporsi sono due visioni antitetiche. Da una parte, la visione che, a partire dal Trasimaco di Platone, ritiene che la giustizia sia uno strumento nelle mani dei ceti dominanti, che lo utilizzano al fine di dare copertura ideologica al proprio potere e ottenere obbedienza senza dover fare ricorso all'uso della forza in modo strutturale. Del Bo' ascrive Rousseau e Marx a questa visione, con riferimento, per il primo, alla spiegazione dell'accettazione della disuguaglianza – costruzione sociale che altera lo stato di uguaglianza naturale degli esseri umani, secondo quanto sostenuto nel D*iscorso sull'origine della disuguaglianza* (1755) – e, per il secondo, alla distinzione tra struttura e sovrastruttura, con quest'ultima a fungere da mezzo di legittimazione della prima. A questa prima visione si contrappone, dall'altra parte, la visione, ascrivibile a Hobbes e Hume, secondo la quale giustizia e ingiustizia non esistono nello stato di natura, ma nascono per contratto artificiale o convenzione spontanea e consistono nelle strutture istituzionali atte a prevenire o risolvere i conflitti sociali – sempre a rischio di deflagrazione in guerra fratricida – tramite l'imposizione della pace.

Naturalmente, spiega l'Autore del libro, le due visioni possono convivere, e di fatto convivono nella percezione diffusa (89), operando congiuntamente in vista della realizzazione dei propri obiettivi. La cosa forse più interessante è la sottolineatura del fatto che la giustizia può servire a dare copertura ideologica ad assetti sociali giusti (oltre che, come verrebbe istintivamente da pensare, ingiusti) o a pacificare equilibri collettivi ingiusti (oltre che, come verrebbe istintivamente da pensare, giusti). Vale a dire, che, nella pratica, entrambe le visioni della giustizia possono operare producendo sia giustizia, sia ingiustizia. Se così è – e dunque, se la giustizia può essere usata anche per produrre (contrariamente a quel che pensavano Hobbes e Hume) una pace ingiusta o per produrre (contrariamente a quel che pensavano Rousseau e Marx) anche un'obbedienza giusta – allora ciò significa che, come sostenuto da Kelsen e altri, la giustizia, in sé, non esiste: quel che esiste è una pluralità di idee di giustizia differenti, che rimandano tutte o ad altri ordinamenti o a preferenze soggettive o, più radicalmente, non definiscono davvero cosa sia giusto o ingiusto (sono falsi criteri di giustizia).

Forse è proprio la consapevolezza che la giustizia, considerata nei suoi possibili criteri operativi, non è in grado di fornire una risposta che sia capace di "stare in piedi" da sola ad aver indirizzato il lavoro di Del Bo' verso un'analisi non sostanziale, ma formale del concetto di giustizia.

5.

Sia consentita, in conclusione, una breve considerazione da costituzionalista, a partire dalla convinzione che un contributo alla chiarificazione di alcuni dei problemi emersi parlando di giustizia potrebbe venire, quantomeno sul piano pratico, dal riconoscimento che anche la Costituzione è suscettibile di assumere un ruolo nel discorso.

Per un verso, la Costituzione potrebbe offrire alle riflessioni sulla giustizia quell'ancoraggio oggettivo che il discorso filosofico non riesce ad assicurare loro. Se è vero, infatti, che i princìpi costituzionali possono essere considerati la positivizzazione, per scelta politica, dei criteri di giustizia sostenuti dall'una o dall'altra componente della società, è allora altresì vero che – stante l'esistenza in tutti gli ordinamenti costituzionali di norme immodificabili, pena il passaggio di fatto a un diverso ordinamento costituzionale[8] – diventano distinguibili: (*a*) i criteri di giustizia previsti nella Costituzione: sono i soli che *devono* essere attuati anche da chi li critica; (*b*) i criteri di giustizia eventualmente introducibili nella o eliminabili dalla Costituzione con la revisione costituzionale; (*c*) i criteri di giustizia non introducibili nella né eliminabili dalla Costituzione (meglio: introducibili o eliminabili solo con un cambio rivoluzionario di ordinamento costituzionale).

Per altro verso, a scongiurare il rischio che dall'ancoraggio della giustizia alla Costituzione possa derivare un eccessivo irrigidimento del discorso – e dunque a consentire la reintroduzione di elementi di discrezionalità politica legata alle diverse soggettività sociali in reciproco conflitto – è la circostanza che nelle Costituzioni-patto tipiche degli ordinamenti democratici (contrapposte idealmente alle Costituzioni-comando) la costituzionalizzazione dei principi di giustizia ha il pregio di de-assolutizzare ogni possibile discorso sulla giustizia, perché, essendo tale costituzionalizzazione relativa a una pluralità di criteri, essa inevitabilmente implica, come visto in precedenza, la necessità logica del loro bilanciamento (e, cioè, la loro relativizzazione o – appunto – de-assolutizzazione).

Come scrive Corrado Del Bo' nelle ultime pagine del suo lavoro, «un libro sulla giustizia è un libro potenzialmente infinito» (131): lo è, certamente, perché gli argomenti riconducibili al tema sono talmente nu-

[8] Così come argomentato in Dogliani (1994).

merosi che nessun testo potrebbe realmente contenerli tutti; ma, soprattutto, lo è perché è proprio intorno al tema della giustizia che si misura la vitalità degli ordinamenti costituzionali, sempre a rischio di esaurimento nel momento in cui il conflitto sociale che dovrebbe inarrestabilmente animarli, attraverso la continua rinegoziazione degli equilibri ottenuti con il bilanciamento, viene meno. Un pericolo che oggi, in epoca di pensiero unico, ci minaccia molto da vicino e che rende particolarmente prezioso un libro, come quello di De Bo', che invita a rinnovare la riflessione in argomento a partire dai molti punti fermi che è capace di offrire al lettore.

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