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Recommended Citation

Diane Orentlicher, *The Emerging Shape of Global Justice: Retrogression or Course Correction?*, 35 Md. J. Int'l L. 61 (2021).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol35/iss1/7>

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The Emerging Shape of Global Justice: Retrogression or Course Correction?

DIANE ORENTLICHER[†]

I am honored to deliver the Gerber lecture, and doubly honored to do so along with the venerable Justice Michael Kirby.

Like many international lawyers, I have had an acute sense of whiplash in recent years. Not that long ago we saw a heady period of global institution-building, along with the conclusion of major international agreements like the Paris climate agreement and the Iran nuclear deal, which tackled critically important issues. Now, of course, the United States has left the Iran deal and set in motion the process of withdrawing from the Paris Agreement; the United Kingdom has been mired in the seemingly endless throes of Brexit; and two countries have left the International Criminal Court (ICC) while others have threatened to do so.¹

As my last example suggests, the whiplash metaphor is surely relevant with respect to international criminal justice. Recent signs of retrenchment follow a remarkable expansion of institutions, law, and practice in this sphere. In the space of just one decade:

- The United Nations (UN) Security Council created two

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1. Burundi and the Philippines have withdrawn from the ICC. The governments of South Africa and The Gambia reversed earlier decisions to withdraw. See Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>; Meritt Kennedy, *Under New Leader, Gambia Cancels Withdrawal From International Criminal Court*, NPR (Feb. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court>.

international criminal tribunals,² both cast in the mold of Nuremberg, to prosecute grievous crimes in the former Yugoslavia and Rwanda, respectively;

- We saw the advent of a new breed of court, which brought together international and national personnel and law, to try those most responsible for atrocities in Sierra Leone, East Timor, Kosovo, Cambodia, and elsewhere;
- We also saw unprecedented use of universal jurisdiction, the principle that allows States to prosecute atrocities committed beyond their borders by and against people who have no connection to their country except the bond of humanity, most famously used to secure the 1998 arrest in London of former Chilean dictator Augusto Pinochet at the request of a Spanish judge;
- And, of course, we saw the creation in 2002 of a permanent international criminal court with a potentially global remit.

Small wonder proponents of international justice were positively giddy in this period, which seemed to herald the beginning of the end of the age of impunity.

No one would describe recent developments in remotely similar terms. Already seven years ago, the *Journal of International Criminal Justice* (JICJ) devoted a symposium issue to “setbacks” in the project of international justice.³ Two developments exemplify the wider trend the JICJ symposium addressed.

First, the assertive use of universal jurisdiction, which human rights advocates had celebrated when it led to Pinochet’s arrest in 1998, provoked a forceful backlash, not least from the United States. Among other consequences, Belgium and Spain curtailed their previously robust use of this principle.

Second, the ICC drew fire from the African Union (AU) when it issued an arrest warrant against Sudan’s then president, Omar al-Bashir. In 2010, the AU called on Member States to defy the Court by refusing to arrest Bashir, and the next year it endorsed Kenya’s quest

2. S.C. Res. 827, at 2 (May 25, 1993) (establishing tribunal for atrocities in the former Yugoslavia); S.C. Res. 955, at 2 (Nov. 8, 1994) (establishing tribunal for genocide and other atrocities in Rwanda).

3. Symposium, *Recent Setbacks for International Criminal Justice Put into Perspective*, 11 J. INT’L CRIM. JUST. 501–570 (2013).

to forestall the ICC's investigation of post-election violence there. A number of AU members threatened to leave the ICC,⁴ although to date only one, Burundi, has followed through.⁵

In this setting, I want to raise three questions. First—and this will be the focus of my remarks—To what extent have these and other setbacks resulted from the broader populist challenge to the international legal order with which this symposium is concerned? Second, which of these setbacks should concern us? Finally, whatever their causes, do recent developments in the field of global justice presage the end of an era? Or, instead, do they signify an inevitable, and perhaps even constructive, period of mid-course correction?

Before I take up these questions, it might be helpful to indicate what I have in mind when I refer to populist challenges. As has often been noted, there is nothing like a consensus definition of *populism*, and I do not plan to make the case for a particular one here. My remarks will, however, be informed by several aspects of populism as it has been defined by some scholars, whose definitions include phenomena we can readily recognize even if we do not have a common understanding of what adds up to a populist movement. As will be clear, each of these characteristics reflects something of a caricature.

Individuals whom many scholars identify as members of populist movements use categories such as race, national origin, ethnicity, gender, and religion to *exclude* groups from their conception of “the people.”⁶ Further, many hold that populists are skeptical of counter-majoritarian institutions that protect minorities, whether those institutions are embedded in national governance structures or are international in nature.⁷ Finally, and perhaps implicit in the two preceding points, populist movements are said to be antithetical to the liberal values that have grounded support for many international institutions, including the ICC.⁸ It follows from these characteristics that, in countries where populist movements have established a significant measure of political influence, we would expect to see

4. See Diane Orentlicher, *Owning Justice and Reckoning with Its Complexity*, 11 J. INT'L CRIM. JUST. 521–522 (2013).

5. See Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES, Oct. 27, 2017, at <https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>.

6. See Cas Mudde, *The Populist Zeitgeist*, GOV'T & OPPOSITION 541, 544 (2004).

7. William A. Galston, *The Populist Challenge to Liberal Democracy*, 20 J. DEMOCRACY 5, 11 (2018).

8. See Erik Voeten, *Liberalism, Populism, and the Backlash against International Courts*, CAMBRIDGE UNIV. PRESS, June 2019, at 1, 1–2.

rising opposition to international courts that protect human rights, particularly those of vulnerable minorities, especially when those courts take actions likely to mobilize a country's populist leader and/or his political base.

So, then, are notable setbacks in the field of international justice attributable, at least in substantial part, to a populist backlash?

In my view, they have fundamentally different origins. To be sure, populist perspectives are deeply antithetical to the liberal commitments that underpin and sustain global justice, and have intensified a process of retrenchment already underway. It is surely no coincidence, for example, that one of the countries that has withdrawn from the ICC, the Philippines, is led by a quintessential populist who enjoys immense popularity at home despite (if not, at least in part, *because of*) his boastful embrace of extra-judicial executions as a means of crime control.⁹

Even so, it would be a mistake to suppose ascendant populism is one of the principal factors behind setbacks in the field of international justice. What, then, are the chief drivers of this trend?

First, it is no secret that the ICC's performance has been disappointing. It took a decade after it began operating for the Court to issue its first judgment.¹⁰ In several cases the Prosecutor's evidence was so thin the Court declined even to confirm charges; in other instances, cases have collapsed at trial or on appeal.¹¹ This inevitably dampened enthusiasm for the Court, the foremost emblem of global justice, and diminished States' commitment to it.

Second, while the Prosecutor bears significant responsibility, other factors have contributed to the Court's disappointing performance. Too often, State cooperation with investigations and arrests has been sorely lacking except when the Court has investigated a government's opponents, typically in cases sent to the Court by the government in question. This stands in marked contrast to the robust and necessary support enjoyed by the two ad hoc tribunals created by

9. Regine Cabato, *Duterte's Drug War Still Popular Amid Deaths, Controversy*, WASH. POST, Oct. 27, 2019.

10. See Prosecutor v. Dyilo, Case No. ICC-01/04/01/06, Judgment Pursuant to Art. 74 of the Statute (Public), (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

11. See, e.g., Dionne Searcey & Palko Karasz, *Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/world/africa/laurent-gbagbo-ivory-coast-icc.html>.

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the Security Council in 1993 and 1994.

Third, parties to the ICC's founding treaty, the Rome Statute of the International Criminal Court, have been reluctant to finance the Court at the level it needs to perform effectively. Compounding this problem, the UN Security Council has twice referred situations to the Court while refusing to allow the United Nations to fund the investigations the Council mandated.¹² The resulting mismatch between mandate and resources makes it all the more difficult for the Prosecutor to conduct effective investigations.

Fourth, governments of various political stripes—not just those falling within a particular range on the ideological spectrum—have challenged the ICC, at times aggressively, when it has targeted or moved closer to targeting their own leaders and citizens. This has been the case with States that have joined the ICC, like Kenya,¹³ and States that have not, like Sudan and the United States. This brand of self-interested opposition is of course standard fare in the wider domain of human rights enforcement.

Also illuminating are the rhetorical terms in which challenges to the ICC have been framed. Three discursive themes have loomed large such challenges, none of which I would characterize as fundamentally populist.

One of the most influential narratives holds that the Court is a neocolonial institution, dominated by Western countries yet focused overwhelmingly on African suspects. It is not hard to see why this charge gained traction. For more than a dozen years after the ICC began operating, all of the Prosecutor's investigations involved crimes committed in African States.

While this pattern alone might have evoked the charge of selective justice, it also frustrated a cherished hope on the part of many African citizens and leaders who had embraced the ICC with palpable enthusiasm. Indeed, the African commitment to the ICC was astonishing; as has often been noted, the largest regional bloc of States parties to the Rome Statute is African. A key reason is that many Africans believed—and were *encouraged* to believe—that the new court would upend the unequal distribution of power that defined the postwar international order. As espoused by many of its proponents,

12. S.C. Res. 1593, ¶ 7 (Mar. 31, 2005); S.C. Res. 1970, ¶ 8 (Feb. 26, 2011).

13. See generally Laurence R. Helfer & Anne E. Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 INT'L CRIM. L. REV. 1 (2017).

the ICC promised to treat nationals of all States equally; there would be no Great Power exemption from its jurisdiction.¹⁴ And so the Court's focus on atrocities committed in small-power States, mostly in Africa, defied expectations that had helped garner strong African support for the Court.

A second discursive challenge, which overlaps with and suffuses the others but also has independent valence, sounds in sovereignty—in this context meaning it is each State's sovereign right to decide whom and how to prosecute (or otherwise address) crimes committed in its territory and by its nationals. When, moreover, an international court asserts jurisdiction over a country's head of state, the affront to its sovereignty is acute. Not surprisingly, some of the ICC's most vexed challenges have arisen when its Prosecutor targeted senior leaders like then President Bashir of Sudan and the two top leaders of Kenya.

Sovereignty-based challenges to the Court should not surprise us. For most of the period often described in terms of the liberal international order, the right to prosecute one's own nationals was seen as a basic concomitant of sovereignty. Think about it: for at least half a century, the postwar liberal international order did not include an international body that could prosecute individuals, nor was there a widespread belief that such a court should exist. Even today, one can readily find accounts of the postwar liberal order that make no mention of the ICC or any other international criminal tribunal.¹⁵ In a similar vein, international law has long held that a State's courts cannot exercise jurisdiction over the incumbent head of state and other senior officials of another country, and the contemporary era of global justice did not change this.¹⁶

A third thematic challenge to the ICC sounds in American exceptionalism. As espoused by a succession of American leaders, this perspective is suffused with notions of sovereignty. Even so, it makes distinctive claims.

Before I elaborate, it may be helpful to note key corollaries of this perspective. Despite significant changes in U.S. policy toward the ICC over time, at no time in the Court's history has the U.S. government

14. See William A. Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM JUST. 545, 548-49 (2013).

15. See, e.g., G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFF. 7 (2017).

16. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 58 (Feb. 2002).

accepted the proposition that the Court could legitimately prosecute American nationals. (Similarly, the United States has opposed efforts by other countries, notably including Belgium, to prosecute U.S. officials for alleged war crimes.¹⁷)

The U.S. government has often explained its opposition to the exercise of ICC jurisdiction over Americans as a logical consequence of its status as a non-party to the Rome Statute. But the more salient point is that it is inconceivable the United States *would* join the Court. This follows from two core tenets of American exceptionalism as it relates to global justice. The first holds that the United States has assumed paramount responsibility for ensuring the security of the postwar liberal international order and bears a correspondingly high exposure to risks, including what U.S. officials have often described as the risk politically-motivated prosecutions of American citizens and leaders. An article in the *New York Times* published in September 2018, when John Bolton was National Security Advisor, captured this theme when it summarized Bolton's hostility toward the ICC: "The United States ... shoulders many of the West's [security] duties. Why then, Mr. Bolton and his allies argue, would the United States expose its citizens to oversight and second-guessing from nations that have benefited from a robust American military?"¹⁸

The second tenet of American exceptionalism as it relates to global justice is that the only relevant safeguards for prosecuting U.S. citizens are to be found in our constitution, not in the statutes and rules of global courts. Another article published in 2018 captured both of these themes when it described the source of American hostility to the ICC in terms of "concerns that U.S. soldiers and civilian leaders might be put on trial, without U.S. constitutional protections, by an anti-American prosecutor in a court with non-American judges."¹⁹

Earlier I intimated that, despite the continuity of American exceptionalism as it relates to the ICC, there *have* been meaningful distinctions in ICC policy among different administrations. Brief consideration of key shifts in U.S. policy illuminates how the populist orientation of President Trump joins up with longstanding sources of

17. See Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1062 (2004).

18. Matt Apuzzo & Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html>.

19. Ron Synovitz, *Explainer: Why Does the U.S. Have It Out for the International Criminal Court?*, RFE/RL (Sept. 11, 2018), <https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html>.

U.S. opposition to the ICC's exercise of jurisdiction over American citizens and, in consequence, poses a heightened challenge to the Court.

As is well known, during the first term of the George W. Bush administration the U.S. government was openly hostile to the ICC and took aggressive steps to ensure it could not exercise jurisdiction over U.S. nationals. The shift toward a more friendly relationship with the Court did not begin when President Obama took office, but rather during the second term of the Bush administration. Early in President Bush's second term, his administration allowed the UN Security Council to refer the situation in Darfur, Sudan to the ICC, and made clear its willingness to support the Prosecutor's work on that situation.

President Barack Obama built upon the shift his predecessor initiated. After undertaking an inter-agency review of U.S. policy toward the ICC, the Obama administration developed a forward-leaning relationship with the Court, actively supporting prosecutions based on a case-by-case assessment. Yet at no time did that administration contemplate U.S. adherence to the Rome Statute.

The next administration brought another major shift in policy. Although President Trump is no fan of the ICC, his administration did not aggressively attack the Court until two developments converged. First, Bolton became National Security Advisor. Second, the ICC Prosecutor moved toward announcing whether she would seek to open an investigation against Americans, among others, in Afghanistan.²⁰

Although Bolton has returned to private life, Secretary of State Mike Pompeo has continued to espouse and act upon the policy he crafted by, for example, announcing that the ICC prosecutor cannot travel within the United States outside New York, and then only for official UN business.²¹

20. See Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, GUARDIAN (Sept. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

21. See AFP, *US to Deny Visas for ICC Members Investigating War Crimes*, GUARDIAN (Mar. 15, 2019), <https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>; see also Patrick Wintour et al., *US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry*, GUARDIAN (Apr. 5, 2019), <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>. More recently—after these remarks were delivered—Pompeo publicly attacked by name, and expressed a veiled threat against, two members of the ICC Prosecutor's staff. See *Secretary Michael R. Pompeo's Remarks to the Press*, Mar. 17, 2020, at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/>.

If the Trump administration's ICC policy was defined in significant part by Bolton, whom I would not characterize as a populist, it is now suffused with the populist perspectives of the president. Trump has made no secret of his disdain for the principles of humanitarian law the ICC enforces; how often has he extolled the good old days when you could torture suspects and execute alleged traitors?²² And a president who nullifies war crimes convictions imposed by U.S. military courts²³ would scarcely abide ICC proceedings against American nationals.

In short, the current U.S. stance toward the ICC represents a robust version of American exceptionalism, now infused with a strong measure of populist sentiment. This assuredly poses a heightened threat to the ICC, already weakened by the confluence of various challenges noted earlier.²⁴

Let me now turn to the other questions I noted at the outset of my remarks. First, in a landscape of myriad challenges to the project of global justice, which should concern us?

The short and obvious answer, I believe, is that we should be far more worried about developments that threaten the core values of human security the ICC's work is designed to protect than by critiques of the Court's performance. With respect to the latter, there are perfectly legitimate questions to be raised about how well recent models of human protection, including international criminal tribunals, have worked. Indeed, it is incumbent on us to ensure that institutions designed to protect fundamental rights are working as well as possible.

In contrast, when President Trump says the United States has no reason to worry about a Turkish slaughter of Kurds in Northern Syria because "it has nothing to do with us,"²⁵ he strikes at the deepest interests of our shared humanity and at the heart of the liberal international order in which the United States provided leadership for

22. See, e.g., Jonathan Swan, *Trump Said CIA Director Gina Haspel Agreed with Him "100%" on Torture*, AXIOS (Nov. 17, 2019), <https://www.axios.com/trump-gina-haspel-cia-torture-waterboarding-f8c4b63b-7825-4cc9-9ff3-128c759f5eee.html>.

23. Dave Philipps, *Trump Reverses Navy's Decision to Oust SEAL Accused of War Crimes*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/21/us/trump-seals-eddie-gallagher.html>.

24. Matt Apuzzo & Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html>.

25. Peter Baker & Catie Edmondson, *Trump Lashes Out on Syria as Republicans Rebuke Him in House Vote*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/world/middleeast/trump-erdogan-turkey-syria-kurds.html>.

70 years. And when an American president tells leaders of murderous regimes he thinks they are doing a great job,²⁶ that too threatens the fragile fabric of global commitment to human rights, and has more far-reaching repercussions than similar comments from most other leaders.

Let me briefly address the final question I posed earlier: In light of myriad challenges I have noted, are we reaching the end of an era of global justice?

Inevitably the fate of this enterprise is tied up with wider challenges to human rights posed by populism. The degree to which the sentiments Trump has expressed strike fertile soil elsewhere is crucial in this sphere as in many others. For international justice is inextricably linked to a belief in the sanctity of every human life and recognition of a global responsibility to protect vulnerable individuals from grave harm.

The success of international justice is also tightly linked to the ability of civil society actors to advocate and organize.²⁷ Yet an alarming feature of the emerging global landscape—in particular, resurgent nationalism—is that the space for such advocacy has not only shrunk but closed in many countries.²⁸

Despite these challenges, which are very serious indeed, I believe the core enterprise of global justice has a promising future. But it needs a robust process of course correction to remain viable.

To the first point, while my previous remarks focused on challenges to core aspects and institutions of international justice, the demand for justice remains powerful. *National Public Radio (NPR)* recently aired an interview with a young man who survived brutal torture in Syria, Omar Alshogre, and lost his father, brothers and cousins to the ruthless practices of the Assad regime. Now in Sweden, Alshogre devotes his life to laying the groundwork for an eventual reckoning. As *NPR* reporter Deborah Amos put it, “his faith in justice

26. Scott Simon, *Opinion: A President in Praise of Strongmen and Dictators*, NPR (Oct. 20, 2018), <https://www.npr.org/2018/10/20/659024594/opinion-a-president-in-praise-of-strongmen-and-dictators>.

27. Cf. Karen J. Alter et al., *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 321–22 (2016) (identifying key role of civil society mobilization in containing backlashes against international courts that are not criminal in nature).

28. See Hilal Tekmen, *Populism and Closing Civic Space: A Post-Truth Challenge*, 16 TURKISH POL'Y Q. 105, 109 (June 16, 2017).

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keeps him going.”²⁹ I have seen the same determination to ensure justice, however long it takes, in many places where the pillars of human protection have collapsed.

The mobilization of victims has produced truly remarkable milestones even as the most visible institution of global justice, the ICC, has at times faltered. Think of the prosecution of former Chadian dictator Hissène Habré in Senegal: Survivors of his ruthless crimes pursued justice for a quarter century before they found justice in an extraordinary court.

Much the same determination has led to groundbreaking prosecutions before national courts exercising universal jurisdiction despite the previously-noted backlash against some countries’ use of this principle.³⁰

As for the ICC, there is important work now underway that explores how the Court can be retooled not only to conduct more successful investigations and prosecutions itself, but also to better answer the needs of victims in the places they live. The crucial idea behind much of this work involves reorienting the Court to do something many of its supporters have long claimed it should do— incentivizing and empowering *domestic* prosecutors and other actors to bring justice home, where it is most desperately needed.³¹

In closing, the model of global justice that emerged in the 1990s is now reeling from multiple blows, whose origins lie largely outside the province of ascendant populism but which now draw strength from it. For the most part those challenges are manageable—more so, I believe, than other fundamental threats posed by contemporary manifestations of populism.

29. Deborah Amos, *Survivor of Torture in Syria’s Prisons Is Telling His Story*, NPR (Sept. 24, 2019), <https://www.npr.org/2019/09/24/763679511/survivor-of-torture-in-syrias-prisons-is-telling-his-story>.

30. See, e.g., Ben Hubbard, *Germany Takes Rare Step in Putting Syrian Officers on Trial in Torture Case*, N.Y. TIMES, Apr. 23, 2020, <https://www.nytimes.com/2020/04/23/world/middleeast/syria-germany-war-crimes-trial.html?searchResultPosition=1>; Christopher F. Schuetze, *German Trial Accuses Iraqi of Genocide in Killing of Yazidi Girl*, N.Y. TIMES, Apr. 25, 2020, <https://www.nytimes.com/2020/04/25/world/europe/germany-genocide-trial-iraq-yazidi.html?searchResultPosition=1>.

31. For an excellent treatment of this issue, see Christian M. De Vos, *COMPLEMENTARITY, CATALYSTS, COMPLIANCE: THE INTERNATIONAL CRIMINAL COURT IN UGANDA, KENYA, AND THE DEMOCRATIC REPUBLIC OF CONGO* (forthcoming Apr. 2020).

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To meet these challenges, human rights advocates and other key actors will have to regroup, reconsider strategies and models in which they have heavily invested, forge new alliances, and innovate, all while keeping firmly in sight the urgent claims of our common humanity.