

# Rights Review

The International Human Rights Program (IHRP) at the University of Toronto Faculty of Law

## INCREASED VULNERABILITIES: A CRITICISM OF NORTH AMERICAN REFUGEE POLICY

Maia Rotman, 2L  
IHRP Summer Fellow (Toronto/Mexico)

In recent months, it has been difficult to miss the headlines reporting the migration crisis in Europe—a crisis often described as on a proportion not seen since the Second World War. With news outlets continuing to publish contentious headlines warning of “waves” of “illegal” migrants “invading” Europe, the political response has been varied but largely inadequate. Literal and metaphoric walls continue to be built to keep “undesirables” out, resulting in people using increasingly irregular methods of transit, more fatalities, more people in unlawful detention, and more people vulnerable to human trafficking. Countries across the globe are now faced with the dilemma of abiding by international human rights law while maintaining their sovereignty and control over their borders.

During the summer of 2015, I travelled to Mexico with supervising lawyer, Kristin Marshall, as part of an IHRP-project funded by the Elton John AIDS Foundation. Our aim was to critically examine recent changes to Canada’s refugee policies, specifically Canada’s policy of designating certain countries as “safe,” which are labeled “Designated Countries of Origin” (DCOs). Nationals from DCOs seeking asylum in Canada are subject to expedited asylum procedures. They lose access to appeal at the Refugee Appeal Division if their claim is denied (this was struck down as unconstitutional in July 2015 by the Federal Court, but the government is currently appealing the decision), and they are not entitled to a statutory stay of removal while seeking leave for judicial review. Essentially, these policies make accessing asylum in Canada more difficult for claimants from DCOs than for claimants from other countries due to the assumption that individuals from DCOs are safe from persecution in their country of origin.

Our investigation sought to take issue with this assumption. Not every individual from a DCO is safe from persecution, and we sought to highlight this by looking

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UNHCR Offices in Tapachula, Chiapas, Mexico  
(Photo credit: Maia Rotman)



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# Message from the IHRP DIRECTOR

As many of you know, I will be taking on a new challenge as the Chief Commissioner of the Ontario Human Rights Commission effective November 2, 2015. I am leaving the IHRP with many mixed emotions: both excitement and sadness.

It is impossible to express how much I will miss the IHRP community—the students, alumni, faculty advisors, community partners and supporters. I have learned so much in my time at the helm, and have become a better lawyer as a result of the energy, enthusiasm and creativity all of you have brought to my little office at 39 Queen's Park.

Some of my proudest accomplishments include creating opportunities for our alumni through our new post-graduate fellowship program, building the capacity of grassroots human rights groups to engage at the SCC and UN, and using the University of Toronto's privileged status to benefit some of the most vulnerable members of society. I like to believe that all this is just the beginning, and that I have set the stage for future growth and expansion.

Of course, I won't say goodbye since I expect to stay in touch with many of you—I will be just down the street! Instead, I look forward to working together in the years to come to make our world a better, more just place.



A handwritten signature in black ink that reads "Renu Mandhane".

**Renu Mandhane (JD 2001)**  
Executive Director, IHRP

## CALL FOR ARTICLES

We are currently accepting submissions for the Spring 2016 Edition of *Rights Review*. Please send your topic to [ihrprightsreview@gmail.com](mailto:ihrprightsreview@gmail.com) by **November 13, 2015**. Articles are due **January 11, 2016**.



# From the EDITOR'S DESK

As in years past, we are thrilled to present the Intern edition of *Rights Review*. The 2015 IHRP interns ventured to a number of countries abroad including Mexico, South Africa, Switzerland, and India to work in the field with NGOs and other international organizations. Their transformative experiences contributed to important work in expansive areas of human rights law, such as freedom of expression, refugee and migration issues, and health care.

These experiences would, in large part, not have been possible without the hard work, guidance, and support of Renu Mandhane, our Faculty Advisor and IHRP Director. For anyone who has been involved in the IHRP, whether in *Rights Review*, the IHRP Clinic, a working group, or the additional programs and events the IHRP has been involved in, Renu has had a huge

impact on all of us individually and on the IHRP as a whole.

We are very sad to see Renu go, but we are also incredibly proud of her achievements and look forward to her bringing the same passion, humility and fearlessness to her role as the Chief Commissioner of the Ontario Human Rights Commission. We wish her all the best and thank her for all of her years of support and hard work with the IHRP.

Finally, we would also like to thank all of the writers who contributed to this edition, as well as our Editorial Board for their great work!

**Katie Bresner & Jordan Stone**  
3Ls

## EDITORIAL BOARD

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*Pictured left:  
2015-16 Rights Review student Editorial  
Board. From left to right: Emma Romano,  
Kartiga Thavaraj, Jordan Stone, Diana  
Derbece, Lisana Nithiananthan and Rona  
Ghanbari.  
(Absent: Katie Bresner and Roxana Parsa)*



# 2015 IHRP INTERNS

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IHRP Summer Fellow (Toronto)

Sherna Tamboly  
International Development Law Organization (The Hague)

Sally Wong  
Defence for Children International (Geneva)

# A FAREWELL INTERVIEW WITH THE EXECUTIVE DIRECTOR

*Jordan Stone and Katie Bresner, Editors-in-Chief*

*On the eve of the departure of Renu Mandhane from her post as Executive Director of the International Human Rights Program, Jordan Stone sat down with her to reflect on her time with the Program, its impact, and her hopes for the future.*

**What has changed in the IHRP since you started in 2009 and what were your goals when you began?**

That's a great question. A lot, I think. I'll say three main things:

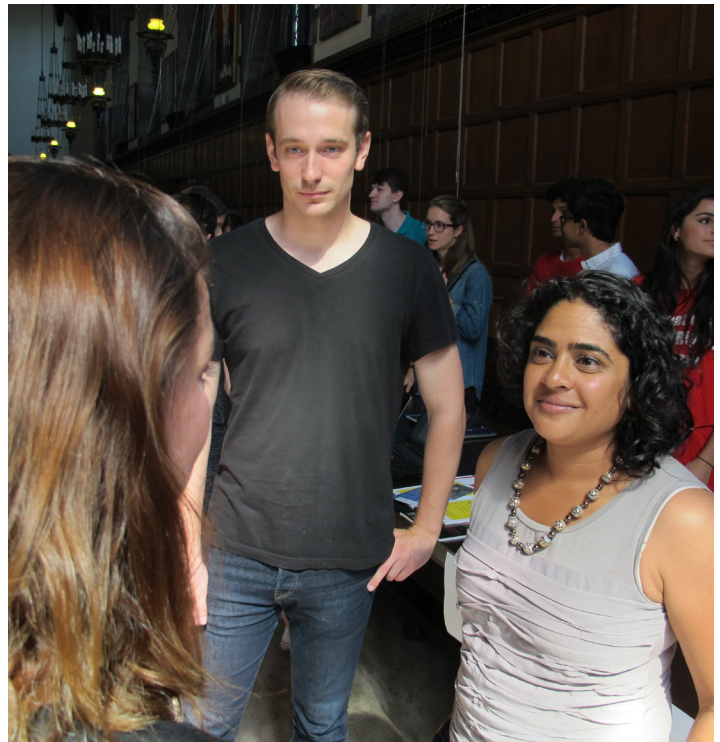
The first is a real focus on partnerships. Prior to my time, we didn't have as strong networks with civil society and now almost all of our clinic work and most of our working groups are done in partnership with civil society, whether in Canada, Canadian NGOs, or internationally. The reason I really wanted to pioneer that model was because it's great for students to be exposed to human rights lawyers beside myself. This allows students to meet people who then become mentors and contacts. Also, the IHRP is very small in terms of staff and resources and this is a real way to leverage what we have to offer and to make sure it has an impact.

Second, I think would be quality. I put a lot of work into making sure that everything the clinic, the working groups, and *Rights Review* puts out into the world is of a very high quality. We have moved away from students directly providing lawyers work, to adding layers of accountability and review so that all the work we're providing is very useful and of a very high quality. This is, too, a huge part of the pedagogical goals of the program, where students receive feedback on their work and must engage in that kind of line-by-line editing. It can be very painful, but I think students also find it rewarding to see something of a very high quality being produced at the end.

Third, is making the program accessible to all students who want to get involved. When I started, the program had a bit of a reputation of being a program really just for students who wanted to be international human rights lawyers. I've tried to really make this program welcoming to everyone who wants to be a part of it regardless of what their future career aspirations are. We have tried to create a spectrum of offerings: you can do the clinic if you're interested in advocacy, or you can write an article for *Rights Review* on a specific area of interest. We are trying to signal an openness for students to get involved, even if you don't see a career for yourself in this area.

**What has your proudest achievement been so far, whether or not that be related to the structure of the program or something it has produced?**

It is in some ways related to the structure of the program, as boring as that sounds. The program has been in existence for more than 25 years and one of the first things I did was draft our first strategic plan; that was a matter of really engaging with external stakeholders, students, and other law and human rights clinics to figure out, "what is our value-add and our brand?" I think that



*Jordan Stone and Renu Mandhane at the Faculty of Law's Clubs Fair, September 2015  
(Photo credit: Lucianna Ciccocioppo)*

was a useful process for me too, because it made me realize that this program isn't an NGO, it's something different. And what that different thing is, is that we can offer really amazing legal research and analysis. So, I think finding that focus has been a really great achievement, because I really think that is what distinguishes us from many other kinds of entities.

Another achievement has been the amount of media attention we've gotten on some of our reports and really feeling like the IHRP has a voice in the landscape of human rights work, and that it's a trusted and credible voice.

**What do you hope you might leave behind? What do you think your legacy might be?**

I think just a really, really strong foundation. My goal, from the beginning, was to increase the quality and the kinds of partnerships. And now I think those things are in place, but I think there's a lot more that could be done, especially on the international side. If somebody could bring in really deep international connections, I think that would be really great. But, I think we have a very good, solid governance structure and policies and procedures, so we have an excellent foundation to build upon.

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# REFUGEES AND ASYLUM-SEEKERS IN THE RAINBOW NATION OF SOUTH AFRICA

Hanna Gros, 3L, *UN High Commissioner for Refugees (South Africa)*

Mr. X walked into the interview room carefully, yet eagerly. He was a young man with an aged face. He seemed impatient to begin telling his story, to be listened to, but exceedingly aware that this may be his only opportunity to do so.

By the second month of my internship at the UNHCR in Pretoria, South Africa, this became a familiar scene. I interviewed dozens of refugees and asylum-seekers in order to determine their protection needs and recommend follow-up actions. These interviews involved a delicate balance between compassion and critical analysis, as the tragedies and traumas of refugees and asylum-seekers have to fit into the grounds set out in the 1951 *Convention Relating to the Status of Refugees* (Refugee Convention). Nevertheless, linking some of the world's most vulnerable individuals to the protection of this international human rights mechanism fueled my determination, even as I learned about the enormous hurdles that continue to hinder the effective implementation of the UNHCR mandate in South Africa.

South Africa is one of the major destination countries for African refugees, with many fleeing from Ethiopia, Somalia, Zimbabwe, and the Democratic Republic of the Congo. Over the past decade, the South African asylum system has become increasingly overwhelmed, with approximately 463,940 asylum-seekers and 112,192 refugees in the country as of December 2014. South Africa is party to the 1951 *Refugee Convention*, the 1967 *Protocol Relating to the Status of Refugees*, and the 1969 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*. These Conventions are implemented by way of the South African *1998 Refugees Act*, which incorporates the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services.

Despite both international and domestic legislative guarantees, however, refugees and asylum-seekers in South Africa often face extreme hardships. The social fabric



World Refugee Day celebrations in South Africa, with members of the refugee community (Photo credit: Mbaye-Yacine Thiam)

of South Africa is tremendously fragile. Racial tensions remain high, the unemployment rate is 25%, poverty and corruption are widespread, and violent crime is common. The celebration of the diverse “rainbow nation” has been strongly challenged by the practical realities that flow from sustained economic inequality.

In this context, foreign nationals, and especially refugees and asylum-seekers, are an easy scapegoat. There is a misguided perception that foreign nationals—specifically, foreign nationals from other African countries—are undermining businesses owned by South Africans and contributing to the high crime rate. This has resulted in pervasive discrimination. The refugees and asylum-seekers that I interviewed often reported being unable to access employment, housing, adequate police protection and even health care services. Beginning in April 2015, yet

another wave of violent xenophobic attacks spread throughout the country, especially in Johannesburg and Durban.

Many of the refugees and asylum-seekers that I interviewed reported being threatened, robbed, and assaulted. Many had their shops and homes looted. Several individuals reported that members of their family and communities had been brutally murdered and many barely escaped with their lives. Thousands of people who fled their countries of origin in search of a safe haven have been internally displaced in South Africa and re-traumatized.

The South African government's reaction to these events has been widely criticized as woefully inadequate. Many authority figures have treated these persistent xenophobic attacks as unexceptional

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# POLITICS OF A REFUGEE CRISIS: SYRIAN REFUGEES AND THE CANADIAN RESPONSE

*Petra Molnar, 3L, IHRP Summer Fellow - Health and Human Rights (Toronto/Jordan/Turkey)*

State responses to mass influxes of refugees are an inherently political exercise. Nowhere is this more evident than in the recent treatment of the Syrian refugee crisis, which has entered its fifth year of active conflict and has been called one of the worst humanitarian disasters of our time. It is difficult to comprehend the scale of this protracted conflict. The United Nations High Commissioner for Refugees (UNHCR) estimates that the total number of refugees will be around 4.27 million by the end of 2015, and there are more than 7 million internally displaced people (IDPs) that remain in Syria.

Neighbouring countries have shared the brunt of receiving the vast majority of Syrian refugees. As of March 2015, the Republic of Turkey became the largest recipient country of Syrian refugees in the world. Turkey has overtaken Lebanon as the country hosting the most Syrian refugees and as of August 2015, supports approximately 1.9 million Syrian refugees. Also, since the outbreak of the Syrian conflict in 2011, the small Hashemite Kingdom of Jordan has received approximately 654,000 registered refugees, with unregistered Syrian refugees bringing up the number to approximately 1.4 million. To better understand the impact of this mass influx, Jordan's large Zaatari refugee camp complex has become the country's fourth most populous city.

## **How does the response of the international community measure up to the vast scale of the Syrian conflict?**

As a Health and Human Rights Fellow at the IHRP, working on a report generously funded by the Elton John AIDS Foundation examining Canada's response to refugees who are HIV-positive or at risk, I traveled to various locations in Turkey and Jordan in May and June 2015. Over the course of over 50 interviews with

doctors, lawyers, government officials, NGO staff, and Syrian refugees themselves, it quickly became clear that the response of the international community has been greatly lacking. In particular, I keenly felt Canada's lack of response when time and time again, I would be told that we were the first Canadians that were actively doing work in the field.

As a result of the inaction of the international community, Syrian refugees have now begun to move into Europe, with countries such as Hungary and Croatia having to handle huge numbers of people that their infrastructure simply cannot support. The Syrian refugee response also continues to be a divisive political issue. For example, in June 2015 while I was in Turkey for fieldwork, the Justice and Development Party (Adalet ve Kalkınma Partisi, or AKP) led by Recep Tayyip Erdogan lost its parliamentary majority and opposition parties have begun to try and form coalitions. The key issue has been the state's handling of the Syrian refugee crisis. Opposition leaders have openly criticized the Turkish response and have called for closing the border and reducing available services in tough economic times. Unfortunately, the Turkish political landscape remains in flux as a new parliamentary election has been called and it remains unclear how this will affect service provision and border control for Syrian refugees in the region.

Since my time in Turkey and Jordan, there has finally been a surge of attention in the Canadian media on the Syrian crisis. This attention has focused particularly on the heart-wrenching photo of 3-year-old Alan Kurdi's body washed up on the shore of the Mediterranean Sea in September 2015, and the profoundly upsetting realization that his family's application for refugee status was denied by Canada. This public outcry is of course very welcome, but it also begs the question: how much will actually be done to help Syrian refugees? Is the government truly committed to making lasting changes, such as fast-tracking Syrian refugee applications and increasing its numbers to 10,000 refugees by September 2016? Or is this another hot-topic political issue, in which the Harper government wishes to soften its image in the wake of the upcoming federal election, when Canada is increasingly moving away from the so-called multicultural and welcoming haven it still purports itself to be?

What remains clear is that refugee crises are inherently political, because they force the nation state and its citizens to re-examine issues of belonging, nationality, and citizenship. In a fluid and shifting world where the mass flows of people can arrive at state borders overnight, it is imperative to think about how the politics of managing migration allow certain "welcome" people in, while keeping others out. For Canada, it remains to be seen whether the Syrian crisis be more than a hot-button political issue and whether durable solutions and sustainable policies will be implemented to deal with the massive scale of human suffering experienced by millions of people.



*Political flags line an urban street in Istanbul during the Turkish Parliamentary Elections, June 2015 (Photo credit: Petra Molnar)*



# THE DETENTION OF MIGRANTS IN CANADA

*Logan St.John-Smith, 2L, IHRP Summer Fellow (Toronto)*

Canada is a country that has historically welcomed immigrants and is known for its multiculturalism. However, Canada is also gaining a new reputation as a country that has one of the worst systems in the developed democratic world for detaining those it wants to expel from its borders. This summer, the IHRP released a report entitled *“We Have No Rights”: Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada*. The result of months of research by fellow University of Toronto law students, Paloma van Groll and Hanna Gros, this report found systematic human rights violations in a regime with an astounding lack of legal process.

This summer while working as a Summer Fellow with the IHRP, I had the chance to work on this issue and have wanted to tell one detainee’s story many times. After countless security checks and thick double doors, I finally had the chance to sit down with this person for 30 minutes or so, and hear how decades of living in Canada had led to two years of persistent lockdowns, two years of mental anguish, and two years in an orange jumpsuit. It is the kind of story you never forget, and the kind of story you wish was not set so close to home. While I unfortunately cannot tell this detainee’s story without risking his/her identification, I can speak to it in general terms to illustrate the current state of affairs for some of Canada’s migrants.

Canada detains thousands of migrants every year—some at the border on their way into the country and others after they have been ruled inadmissible and ordered deported. Many of them, like the person I met with, have not committed any crime and are not considered dangerous by the government, but are detained because they are deemed a flight risk. Around a third of migrants detained in Canada end up in provincial maximum-security jails.

The average time migrants spend in detention in Canada is 23 days. Yet a small number of them, currently just less than 60 individuals, end up being detained for years. This often happens either because the government is not sure who they are (and therefore does not know where to deport them) or because their home country will not issue travel documents. One man has been in immigration custody for more than a decade for these seemingly innocuous reasons.

**“The UN Human Rights Committee recently recommended that Canada end the indefinite detention of migrants...”**

**The government has yet to formally respond.”**

The system that administers this detention regime is broken. While in theory it is the Crown that has to justify continued detention at monthly detention review hearings, the decision-maker cannot depart from previous decisions to detain without “clear and compelling reasons.” This shift of the evidentiary burden and the reverse onus means that the longer you spend in jail, the harder it becomes to show that you should be released. Canada is something of an outlier in this regard. In the United States



*Central East Correctional Centre in Lindsay, Ontario  
(Photo credit: End Immigration Detention Network)*

and much of the European Union, release is presumed after a prescribed period in detention, absent compelling reasons from the government to keep you in detention.

The IHRP has raised this issue in the media, with Members of Parliament, and at the United Nations. Most people are shocked to learn that this happens here. The UN Human Rights Committee recently recommended that Canada end the indefinite detention of migrants and expressed concern over the insufficient mental health care available to detainees in provincial jails. The government has yet to formally respond.

It is safe to say that there is no quick fix to this problem, but the system that exists now is one that has developed piecemeal, resulting in serious gaps in law and policy that have led to seemingly unnecessary, even accidental, abuses. Canada has a responsibility to do better.



# HOW ONE IHRP ALUMNA CONTRIBUTED TO A HISTORIC WIN FOR LGBT RIGHTS

Alice Tsier, IHRP Alumna, JD 2013



Arguments at the United States Supreme Court for Same-Sex Marriage on April 28, 2015  
(Photo credit: Ted Eytan, Creative Commons)

*Editor's Note: On June 26, 2015, the United States Supreme Court ruled that the U.S. Constitution guarantees a nationwide right to same-sex marriage. In a piece written exclusively for the IHRP, Alice Tsier reflects on the unique opportunity she had to work on this historic case as an associate at White & Case in New York City.*

On April 28, 2015 the Supreme Court of the United States heard oral arguments in the case of *Obergefell v. Hodges* (*Obergefell*). In *Obergefell*, the Justices considered two questions concerning same-sex marriage: 1) does the fourteenth amendment to the U.S. Constitution require a state to license a marriage between two people of the same sex? And 2) does the fourteenth amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? *Obergefell* consolidates four cases in which plaintiffs from Kentucky, Michigan, Ohio and Tennessee challenged those states' refusal to license same-sex marriages, and/or to recognize same-sex marriages from other jurisdictions. A divided lower federal court upheld the state actions.

I was fortunate to be involved in drafting an amicus brief on behalf of Legal Services

NYC (LSNYC) in support of the plaintiffs. LSNYC is the largest provider of free civil legal service to low-income people in the United States and has served the LGBT community for over 25 years. In the brief we argued that States have created a well-defined bundle of benefits, protections, and presumptions that flow to those considered "married" under state law. In particular we focused on thirteen legal areas that touched on (i) protecting the parent-child relationship, (ii) granting rights to economic benefits or property, and (iii) providing access to justice. For example, in 43 states and the District of Columbia, a married couple can adopt a child jointly, which allows both partners to become the legal parents of the child simultaneously. This in turn establishes a legal relationship between the child and both parents. That relationship gives rise to a series of protections that maximize the resources available for the child while ensuring that the burdens of parenthood are spread evenly between the parents. Such benefits, protections, and presumptions are unavailable to those who are denied the status of being married, as well as their children. We argued that this denial imposes unique burdens on low-income LGBT couples and their families who cannot afford the cost of stitching together

the legal protections denied to them.

In order to support this argument we conducted a 50-state survey for each of the thirteen variables discussed; the advantage of working in a big firm was substantial. A large number of lawyers contributed by looking through the statutes and case law of one or two states in order to find the way in which those states treated each of our variables. With their help the team was able to gather the data for all 50 states and the District of Columbia in a week. We then worked with a graphics company to find a way to present our data that was digestible and easy to process. The Court has received over 75 amicus briefs, and we hoped to make our point in a way that was as succinct as possible. Ultimately, the final brief included a very short summary of our argument, four fold-out diagrams showing the convergence of the states on the benefits, protections, and presumptions attendant to marriage, and an appendix listing all the statutory data to support each variable in each state.

Although it was a small contribution, and one of many amicus briefs ultimately filed before the Court, getting the chance to participate in this historic case has been the highlight of my time in New York.

# TUMAINI: HOPE IN SWAHILI

Madison Hass, 2L, *The Equality Effect (Kenya)*

After completing my IHRP internship in Meru, Kenya, this summer, I spent some time travelling to other African countries. When boarding a flight out of Madagascar, I realized my wallet had been stolen. While losing all of my cards and currency was upsetting, what was most devastating was the loss of personal letters I had received during my internship. As I sat fighting tears in the airport, lamenting the loss of the goodbye letters penned by the young girls with whom I worked, I came to realize just how powerful my internship experience had been.

In Kenya, a woman or girl is defiled (raped) every 30 minutes. The average age of a girl targeted for defilement is 10. The Equality Effect is a not for profit legal organization making great strides to put an end to these troubling statistics. In 2012, the Equality Effect filed a constitutional claim, better known as the “160 Girls” project, against the Kenyan government for the failure of Kenyan police to protect girls from rape and their failure to properly enforce existing defilement laws. On May 27, 2013, Justice Makau, writing for the Kenyan High Court, held that the failure of the Kenyan police to conduct proper and professional investigations into complaints of defilement and other forms of sexual violence was a violation of

Kenyan girls’ fundamental rights and freedoms under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(d) of the *Constitution of Kenya*. In the wake of this judgement, the Equality Effect has been working with Ripples International (Ripples), an African-led and African-based Christian NGO that promotes the welfare of children, and other local partners, to ensure that this ruling is enforced.

As an intern with Equality Effect in Meru, Kenya, I worked with Ripples at The Brenda Boone Hope Centre (Tumaini), a rescue centre for physically and sexually abused girls. Much of my work required leaving my office at Tumaini to work in the field. In order to get to destinations, I relied on many forms of transportation, from unreliable cars and overloaded mini-buses, to motorbikes and the occasional ride in a court magistrate’s land rover. In one situation, I even shared my seat with a goat! From taking notes at defilement hearings in court to interviewing police officers in ongoing investigations, once at a destination, my work varied greatly.

As the fieldwork was multi-faceted and often unpredictable, I always had to adapt to changing circumstances. At one point during my internship, I accompanied a Ripples’ social worker to a meeting with police officers who had taken an abused girl into their custody. After meeting with police, I accompanied the social worker on an impromptu visit to the girl’s home to meet with her mother. This feat was challenging though, as we first had to locate her mother. Taking the only transportation available, *piki-pikis* (motorbikes), we sped through the Kenyan countryside toward the direction of the girl’s school where her mother was rumoured to work. Upon arriving at the school, we managed to track down the head teacher who informed us that the girl’s mother only worked part-time and was not at the school. Although the head teacher did not know the mother’s address, she arranged for the mother’s other children at the school to guide us. Led by five boisterous children, the eldest of whom was eight, the social worker and I raced along a beaten path in the forest to the mother’s home. Here, we conducted a thorough study of their living conditions and interviewed the mother on the extent of the young girl’s abuse. The girl was admitted to the Tumaini rescue centre for protection that day as a result of our efforts.

While I enjoyed my work in the field, the most rewarding part of my internship was my time spent with the girls at Tumaini. The 26 girls at the centre were some of the most resilient and inspiring individuals I have ever known. I quickly began to spend all of my Saturdays with the girls at Tumaini. My Saturdays with the girls were very fulfilling, as I witnessed the girls relax and enjoy life. We played tag and decorated the Tumaini courtyard with coloured chalk. The girls were particularly fond of my long hair and I spent many days simply sitting in the shade, talking to the girls as they braided my hair. Many of these girls shared memorable goodbyes with me in person and in letters. Even though my letters are now gone, the memories of the time I spent with these remarkable girls will live on with me forever.



Chalk drawing by a girl at the Tumaini Centre  
(Photo credit: Madison Hass)



# JUVENILE JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY

*Sally Wong, 2L, Defence of Children International (Geneva)*

Today, there are at least one million children in the world behind bars. They are often held in inhumane conditions and subjected to cruel or degrading treatment. Their human rights are frequently violated. The United Nations *Convention on the Rights of the Child* (CRC) was adopted in 1989 and sets out the standards for the protection of children's rights, providing a framework for governments to give priority to the best interests of the child. While almost every nation is a party to the CRC, many of them still have a long way to go before achieving compliance with the CRC. This is especially the case for juvenile justice, as there is a lack of comprehensive policy in this field at the international level.

This summer, I interned with Defence for Children International (DCI) in Geneva. DCI is one of the leading non-governmental organizations for the promotion and protection of children's rights, and was at the forefront of the drafting process and adoption of the CRC in 1989. DCI has prioritized juvenile justice at the international, regional, and national level. Defined broadly, juvenile justice aims to address root causes that bring children into conflict with the law, and is the area of criminal law applicable to those under the age of criminal responsibility.

There has been some controversy over the appropriate age of criminal responsibility. The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* ("the Beijing Rules") recommends that the age for criminal responsibility should not be fixed too low, bearing in mind the facts of emotional, mental, and intellectual maturity. Article 40 of the CRC requires State Parties to establish a minimum age, but leaves it to the individual State Party to determine the specific age. Currently, the median age for the minimum age of criminal responsibility is 12. However, there is a wide spectrum of minimum ages existing in national legislations across the world. For example, the age is as low as 7 in India and as high as 16 in Portugal. The Committee on the Rights of the Child has recommended that



From left: DCI intern, Sally Wong, and International Organization for Migration interns, Samuel Levy and Nour Bargach at the United Nations, Geneva (Photo credit: Sally Wong)

the minimum age of criminal responsibility should be no lower than 12, but emphasizes that this is an absolute minimum and encourages states to increase to a higher age level.

Any child above the age of criminal responsibility can be arrested, detained, and imprisoned. Many of these children do not have the capacity to understand the consequences of their actions. However, even where a child does have the requisite capacity to be responsible for wrongful conduct, this does not mean that the child should be subjected to adult, formal criminal prosecution. Drawing a child into the criminal justice system at an early age can have serious consequences, as it can negatively impact the child's harmonious development, exposing them to increased risks of violence, social discrimination, and the denial of their human rights. Furthermore, it tends to increase social exclusion, recidivism, and public expenditures. As a result, raising the age of criminal responsibility and having a separate justice system for children with a

focus on rehabilitation and reintegration may not only be preferable, but beneficial.

Even where the child is above the age of criminal responsibility, DCI recommends he or she should be diverted away from judicial proceedings wherever possible and redirected to alternative dispute resolution, diversion, or various community-based sentences. This is captured in Article 37 of the CRC, which stipulates that detention is always to be a means of last resort and used for the shortest period of time possible. While most children are taught the difference between right and wrong, a child cannot be expected to grasp the consequences of their actions. DCI has recommended that states bear in mind that the criminalization of children is neither in the best interests of the child nor of society as a whole. They encourage states to carefully consider the age of criminal responsibility and consider alternatives to detention first, and in this way begin helping future generations and prevent the possibility of damaging them.

## Farewell Interview, cont...

### What will you bring from this position to the Ontario Human Rights Commission?

It's funny, because when I was preparing for the interviews for the Human Rights Commission, so much of it is transferable. First, U of T as a larger entity is quasi-governmental and in some ways parallel to or as big as a municipal government. So I feel like I have pretty deep insights into these complex bureaucracies and how you get things done in a fairly rigid or bureaucratic environment.

But the second thing is just that the law school and the IHRP have so many different stakeholders, students obviously being a huge stakeholder, as well as the faculty, external university, human rights lawyers, alumni, and members of the bar. Navigating all those different stakeholders and being accountable to all of them in different ways was really attractive in terms of the commission role, because in many ways it's the same thing but at a different level.

The last thing I would say is also just taking on tough issues and being sort of, I used the word when I was interviewing, "bold" or "fearless." And I feel like the IHRP has given me a lot of room to pursue difficult issues in a very supportive way and I hope I can bring some of what I've learned when you're doing that kind of work to the Commission.

### What has been the IHRP's impact on you personally? How has it changed you?

Oh, huge. It's funny, one of the things I wouldn't have even expected is that working with students is the best antidote to being jaded and pessimistic. I'm in a field where it is quite hard to measure impact, it's hard to mark success, and I think working with students reminds you, their energy, their excitement for the law, reminds you why you got involved.

But it is also the impact. I think when I started I measured impact in my head by the projects we were working on and whether they made change. Now, I would say the main impact of the IHRP is actually students going out into the world with the kind of values this program imbues and applying them in their domestic practice and doing pro bono work and seeing, in a clichéd way, the next generation of human rights lawyers. I think that is the impact and it's made me a better lawyer, because I feel like I've learned so much from the students, because they approach issues in a fresh and unique way. It forces you to reconsider your own thinking on a particular issue.

Personally, I've had two kids in the time that I was at the IHRP. The University of Toronto, and the faculty more generally, is supportive of young women who are trying to balance career and family and I never felt pushed or pulled in one direction. They were so supportive of that balance and that's not something we see in our profession all the time. From a personal perspective, that has been something so important to me in this period of my life.

### Is there a particular project that you worked on that you felt had a really large impact? I know that the recent report on migrant detention, for instance, got huge media coverage. Are there any others that stick out for you?

That was definitely a career highlight. And it was funny, because I don't know if students always have that perspective. They don't know if what they did is always that significant and to be able to say, "no, that for me was a career highlight and you just experienced that in your second year of law school." All the Supreme Court interventions have been amazing and amazing growth opportunities, again for me personally.

Another project has been our multi-year, multiple projects with PEN International: particularly working with people who are writers. Having those two brains, the writers and the lawyers working together, and seeing the power of inter-disciplinary work and how messy and complex that work is, but in the end how great the work product can be. All of those things are highlights.

### Is there anything that you wish we asked? Anything you would like to say to the next generation of IHRPers?

This is such a unique opportunity: to go live and work abroad and to work on these amazing files. One thing I would say, and sorry this isn't gracefully framed, is students are always asking me about my career path and how I charted out this course. The short answer is, I didn't. And you do need to be able to take risks, calculated risks, but risks, and to follow your heart. This doesn't mean you have to do this within the first five years out of law school. You'll be graduating with debt and you'll have other priorities, but the people I see and the friends I see, not just in human rights, but in any area where people are doing things they loved, at some point required them to take a bit of a leap of faith. So, I would just encourage our students to, when that point comes in their career, to be bold and to take that leap and not to worry so much about charting out your career, because I don't think anyone who has an atypical career path plans it that way. It just sort of happens.

## Refugees and Asylum Seekers in South Africa, cont...

and isolated criminal incidents, insisting that South Africans are not xenophobic. Nevertheless, civil society organizations and thousands of South Africans have rallied against the violence, both on the streets and through social media. For its part, the UNHCR plays a unique role in delicately mediating between its beneficiaries, civil society organizations, and government efforts, while also promoting international law principles and standards.

Despite the immense difficulties that remain in the way of the UNHCR's mandate in South Africa, the rainbow nation remains an inspiration and a source for optimism. The recent history of apartheid fuels and mobilizes human rights activism, as the vast majority of South Africans have personally experienced the terrors of

institutionalized, legalized racism. The South African Constitution is arguably the most progressive in the world. In particular, the well-protected freedom of the press has allowed South Africa to develop one of the world's most critical media systems, which persistently (and often harshly) scrutinizes authorities who waver from Constitutional guarantees.

There are certainly many hurdles that limit or block realization of the high ideals set out for post-apartheid South Africa. However, the collaboration and efforts of the UNHCR, civil society organizations, the South African government, and South Africans themselves, are no doubt carving out a path for refugees and asylum-seekers to add yet another stripe to the rainbow nation.



## A Criticism of North American Refugee Policy, cont...

at human rights violations in Mexico against people from certain high-risk groups. This included HIV-positive individuals, members of the LGBTI community, sex workers, intravenous drug users, victims of gender-based violence, street-involved people, and indigenous peoples. These individuals, made invisible by their marginalization from the mainstream narrative of Mexico, could legitimately need asylum in Canada. However, it is more unlikely for their claims to succeed as Canada designated Mexico a “safe” country in December 2012.

Our investigation found that human rights violations against minorities are rampant and the accountability of state authorities in Mexico is practically non-existent. This reflects the misguided nature of Canada’s DCO system. We also found that Mexico is also dealing with its own migration “crisis” and it is dealing with it poorly.

The International Organization of Migration estimates that about 150,000 people migrate to Mexico annually, although some NGOs believe that number could be double. Although Mexico is a signatory

to the *Refugee Convention* and the 1967 *Protocol Relating to the Status of Refugees*, authorities detain migrants without offering the option to apply for asylum, and in fact, actively dissuade potential claimants from seeking asylum. If claimants begin the asylum process, they are not offered legal representation nor provided with an interpreter, and they become subject to the whims of an arbitrary and inconsistent system.

Without the option of accessing asylum in Mexico, most migrants attempt to cross into the United States. However, due to pressure from the United States to curb migration flows, Mexico launched *Programa Frontera Sur* in 2014. Ostensibly created to protect migrants and to ensure a secure southern border region, the result has instead been a sharp increase in detention and increased danger for individuals transiting through Mexico. In 2014, Mexican authorities detained over 100,000 migrants, a 35% increase from the year previous.

Mexican authorities have been pushing

migrants off “The Beast,” the northbound cargo train traditionally used by migrants to travel across the country, causing sometimes-fatal injuries. Migrants are forced to take more irregular and dangerous routes through the country, via precarious modes of transportation, through small towns where they do not have access to shelters or services. They are vulnerable to violent abuse, extortion, and forced involvement in gang activity – often the very activities many were seeking to escape in the first place. Female migrants, particularly transgender women, are especially vulnerable to abuse: they will likely be raped on average five times during their journey through Mexico.

Our fieldwork highlighted that migrants are yet another unsafe population in Mexico. Our fieldwork also highlighted the dangers of closing borders as a means to control mobility. Europe may be dominating the news right now, but North American policies designed to manage migration are not a model of best practice, and are only serving to make already vulnerable populations more vulnerable.

*Qunu, Eastern Cape: Nelson Mandela’s final resting place (Photo credit: Molefe Sekwele)*





# SOUTH SUDAN: PERVASIVE SEXUAL VIOLENCE, POTENTIAL WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE WORLD'S NEWEST COUNTRY

Ashley Major, 2L, *Human Rights Watch (New York)*

South Sudan became the world's newest country in July 2011. Despite this newfound independence, South Sudan has been embroiled in bitter conflicts and wars ever since. A longstanding conflict between government and rebel forces escalated in April 2015. In June 2015, investigators with Human Rights Watch began to document atrocities being committed by government forces during this conflict. One of these investigators was my internship supervisor, Samer Muscati, who is also an alumnus of the Faculty of Law. While he was on the ground interviewing survivors, I was in New York trying to piece together exactly what had occurred over the past several months.

During my internship, I became accustomed to the barrage of horrific stories of rape and assault that seemed to emerge from every conflict I was researching: South Sudan was no exception. As I pored over hundreds of news articles and reports, I learned of the systemic rapes occurring. Samer interviewed many of these rape victims, several of whom had experienced gang rapes. Such attacks were often committed in public in order to shame and terrorize the victims. Others occurred at night as women left to use the latrines or gather firewood outside of camps for internally displaced persons. Samer also recorded evidence of murders, beatings, abductions, forced labour, theft and destruction of personal property carried out by government troops.

Samer and I then worked together to craft arguments against the perpetrators of these crimes to prove that they had possibly committed war crimes or crimes against humanity. War crimes are defined as atrocities committed with a nexus to an armed conflict. Crimes against humanity are acts committed as part of a widespread or systematic attack, with knowledge, against a civilian population. An armed conflict is not a necessary condition for a crime against humanity.

I found this research to be both fascinating and incredibly frustrating. Alleging war crimes and crimes against humanity is one matter, but attempting to prove them is another. The argument that murder and rape should be considered crimes against humanity is straightforward, as both acts are included in its enumerated definition. Such acts have also resulted in convictions for both war crimes and crimes against humanity in the past. However, the arguments became more difficult for other crimes. These are some of the questions we faced: was the theft of cattle and destruction of personal property equivalent to a crime against humanity because it prevented people from practicing their livelihoods? Could this meet the requirement of "intentionally causing great suffering" under the enumerated ground of "other inhumane acts?" Could



Nyacour and her daughter were forced to flee to the UNMISS camp near Bentiu after Bul fighters burned down her home and beat her, when they attacked Koch county in May 2015.

Her husband is still hiding in the bush.

(Photo credit: Samer Muscati/Human Rights Watch)

the burning of villages be considered "forcible transfer" (another enumerated ground for crimes against humanity) because it was unlawful and left citizens with no real choice but to flee? Should we try to put forward an argument that might expand the traditional understanding of what "transfer" means? Or, should we try to

(Continued on page 15)



# eyeWitness AND THE ISSUE OF ADMISSIBILITY

Katie Bresner, 3L, *Canadian Department of Justice, War Crimes and Crimes Against Humanity Section (Ottawa)*

The investigation and gathering of evidence in international criminal matters is typically a complex and challenging endeavour, made all the more difficult when the act being investigated occurred decades ago.

This is something counsel at the Department of Justice's Crimes Against Humanity and War Crimes Section must contend with regularly. As an intern there during the summer of 2015, I learned about national war crimes investigations and the difficult evidentiary issues they regularly face. These include: the costs of investigation and building a prosecution based on evidence largely collected outside of the country; obtaining access to witnesses through co-operation arrangements with the country in which they are located; managing the different legal backgrounds and legal traditions of other countries, particularly in terms of the manner in which interviews are conducted and how evidence is collected; and managing difficulties associated with the passage of time and witness protection.

Modern technology holds vast potential to help investigators avoid problems with witness testimony. With the spread of social media and smart technologies, there is an incredible opportunity to gather evidence of crimes. Recently, the International Bar Association and the legal services division of LexisNexis developed an app called "eyeWitness to Atrocities" (eyeWitness). EyeWitness makes it easier

for the public to gather evidence in conflict situations where crimes against humanity or war crimes are occurring and to ensure that the evidence will be admissible at trial.

EyeWitness allows users to record video, photos or audio and send that information to a storage facility, secretly and securely, where an expert team analyzes the evidence. The app prevents images and sound from being distorted or altered; accurately and reliably denotes the date, time and location of recordings; and ensures that the original recordings are sent to the eyeWitness team. In addition to producing materials that are reliable, the direct link between users and the storage of metadata creates a chain of custody record that would not be possible through other means. Additionally, the app attempts to protect the user as much as possible by using false icons, a hidden storage gallery that is separate from the standard device gallery, quick delete options, and data encryption.

While eyeWitness could revolutionize the way evidence of atrocities is gathered and how courts deal with digital evidence, there are still a number of potential issues the app fails to overcome. There is an initial question about the app's reach. While it has been estimated that roughly half of the world's adult population owns a smartphone and that this number will continue to grow, this figure is largely skewed towards East Asia,

North America and Europe and to those members of the population who can afford such technology.

In addition, one of the biggest hurdles will be finding a way to make data collected through the app admissible at trial in accordance with the varying admissibility standards of the different countries where prosecutions may be carried out. For example, it is currently unlikely that the data collected by eyeWitness would be admissible in a Canadian court. While eyeWitness was designed with the intention of ensuring the reliability of potential evidence, the concern comes from the fact that the app's users can be anonymous. Without the identification of witnesses and their willingness to vouch for the evidence they transmitted, one quickly runs into the rule against hearsay. Indeed, the law on the admission of photographs, video, and audio recordings from modern smart technologies is still developing in Canada (see, for instance, *R v Bulldog* 2015 ABCA 251 and *R v Nikolovski* [1996] 3 SCR 1197).

Regardless, eyeWitness is an application with enormous potential. By understanding the legal restraints that might prevent the app from fulfilling its purpose, it can be adapted to meet those challenges as the law evolves to answer the new legal questions posed by such technological developments.

## South Sudan, cont...

argue that such destruction should fall under the broader ground of "other inhumane acts?"

These questions demonstrated to me the complexities of international human rights law, international criminal law, and international humanitarian law. Although on their face these acts seemed to offend the collective conscience, and even when there was strong evidence that a rape, murder, or forcible transfer occurred, some acts simply did not meet the criteria of a war crime or a crime against humanity.

Another difficulty with charging a state or a government with a crime

is that the political will or the legal avenues to prosecute simply may not exist. Ultimately, organizations like Human Rights Watch can only put the information out to those who have the jurisdiction to act on it. One can only hope that international institutions such as the United Nations, the African Union, and the International Criminal Court will live up to the recommendations laid out in the subsequent extensive report that Human Rights Watch authored on this conflict. While an international prosecution for possible war crimes or crimes against humanity will not mitigate the suffering that has already occurring in South Sudan, it may help prevent future acts from being committed with impunity.

# THE ROLE OF THE JUDICIARY IN PREVENTING POST-ELECTORAL VIOLENCE

*Sherina Tamboly, 2L, International Development Law Organization (The Hague)*

Elections are often seen as the cornerstone of a sustainable democratic state, especially when they are inclusive, free, fair, and transparent. However, elections can also perpetuate violence, social unrest, and oppression in fragile and post-conflict states. With the rise of multi-party elections in emerging democracies over the last few decades, election-related violence has been reported all over the world, including in Kenya, Zimbabwe, Bangladesh, the Philippines, Guatemala, and Haiti. A recent example is the controversial 2015 presidential election held in Burundi where incumbent President Pierre Nkurunziza's decision to seek a third term was criticized by the opposition for violating the Constitution, which only allows for two terms. The elections were preceded by months of demonstrations and violent clashes between the rebel soldiers and the army. The crisis claimed dozens of lives, displaced over 140,000 people, and threatened to bring the country into another civil war.

Broad structural, social, and political factors can play a key role in perpetuating electoral violence, and these are often exploited by political actors to further their interests. These factors include poor governance, exclusionary politics, socioeconomic discrepancies, class conflict, and ethnic tensions. Additionally, the electoral processes themselves, such as voter registration and poll counting, may be unfair, flawed, and vulnerable to political manipulation.

**“When the judicial system lacks the clout, capacity, or credibility to effectively intervene, it can lead to further violence, weaken the democratic institutions, and create a culture of impunity.”**

The outcomes of opaque or violent elections are often tainted by allegations of fraud and may be perceived as illegitimate by the losing parties or the general public. In such cases, an impartial judiciary can hear and peacefully resolve electoral disputes, ensure accountability, and help uphold the rule of law. Judicial independence and separation of powers can protect against undue influence from the other branches of the government and lend credibility to its decisions. The judiciary must also possess the technical competence and the political will to adjudicate such politically charged issues. When the judicial system lacks the clout, capacity, or credibility to effectively intervene, it can lead to further violence, weaken the democratic institutions, and create a culture of impunity.

Post-electoral violence and the judiciary's role in preventing it have become important topics of discussion in the international law community. I had the opportunity to explore them in-depth during my IHRP internship with the International Development Law Organization (IDLO) at their Branch Office in The Hague. The IDLO is an intergovernmental organization dedicated to promoting the rule of law. They work to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development, and economic opportunity. I interned with the IDLO's Research Unit, part of the Department of Research and Learning, which is responsible for

research program development and implementation, knowledge generation, and impact assessment. IDLO's “Lessons Learned Program” is designed to draw lessons from its own programming and disseminate these lessons within the organization for learning and future program development. My primary task at the IDLO was to support the preparation of a “Lessons Learned Brief” on the organization's work in Kenya related to judicial preparedness for electoral disputes.

The 2007 Kenyan presidential elections were heavily contested, and the ensuing violence claimed over 1,100 lives and displaced thousands of people. Two large political coalitions, led by incumbent President Mwai Kibaki and Raila Odinga, went head-to-head in what was predicted to be a very close race. Kibaki eventually won by a narrow margin but Odinga's party rejected the results and made accusations of vote-rigging and fraud. This resulted in months of widespread political violence fuelled by existing ethnic tensions and long-standing land grievances.

In the lead up to and following the 2013 elections, many national and international organizations, such as the [National Democratic Institute](#) and USAID, operated within Kenya to help ensure credible elections and build the institutional capacity to peacefully tackle electoral disputes. During this time, the IDLO provided technical

support to the Judiciary Working Committee on Election Preparations in Kenya, and supported the development and implementation of the 2010 Constitution through expert advice, institutional strengthening activities, and legal research support. The 2013 general elections were largely peaceful and Kenyan courts were able to rule on all election petitions in less than six months. Furthermore, public confidence in the judiciary was over 75% at the end of 2012, which was a stark improvement from 31% during the post-election period in 2008.

At the IDLO, I had the opportunity to work closely with the Lead Researcher to find, map, and summarize relevant literature, both Kenya-specific and international, on the lessons learned from judicial engagement with electoral disputes and on how to engage effectively with the judiciary in post-conflict environments. I also worked with the Lead Researcher to connect with colleagues in the IDLO's Kenya Country Office to collect detailed information on the IDLO's projects in Kenya, their experiences with program implementation, and outcomes. It was an incredible opportunity for me to analyze high-level research, appraise country-level programming, and learn how technical expertise can be put to practical use. Finally, it also allowed me to critically evaluate whether these lessons can be used to inform program development in other countries with a similar context.



# REFLECTING ON HUMAN RIGHTS, CULTURAL RELATIVISM AND NEO-COLONIALISM

*Philip Omorogbe, 2L, PEN International (London)*

This summer, I interned at PEN International, an NGO headquartered in London, England that advocates for free expression around the world. Working at PEN International was at times difficult, and raised conflicting thoughts in my mind. As a Nigerian-Canadian, I am aware of the harmful impact colonialism has had on my country, my culture, and my mindset. I am wary of the inferiority complex that has resulted from colonialism: many colonized societies continue to view their cultures as inferior and blindly accept the colonizer's perspective. My work at PEN International concerned protecting Kenyan and Nigerian languages, most of which have been neglected in favour of English, which is a direct result of colonialism. This work, combined with my new life in London—a city bursting with relics of Britain's colonial enterprise in its museums, its immigrant population, its affluence, and its global importance—were constant reminders of the lasting effect of colonialism.

When I began my internship, I was concerned that the work of NGOs may be a form of neo-colonialism. I questioned whether NGOs played a role similar to that of Christian missionaries during the European colonial period. Although missionaries were ostensibly independent from the colonial enterprise, missionary work was essential to colonialism—both worked interdependently, one allowing the other to proceed and succeed. Christian missionaries worked hand-in-hand with colonial authorities and formed an essential component of colonial foreign policy by humanizing the colonial enterprise. Missionary work was therefore intimately tied to the resultant harms of colonialism.

I was also concerned that many NGOs, including PEN International, portrayed Western ideals as universal ideals. During the colonial period, missionaries also portrayed Western ideals, albeit Christian values, as universal. Undoubtedly, some of these values were urgently needed: an emphasis on literacy and the rejection of some harmful cultural practices, such as twin killing, for example. However,

missionaries also imposed many harmful values. Along with the British colonialists, they introduced homophobic policies and perspectives that continue to plague and inform laws in many former British colonies including Kenya and Nigeria. Now, Britain and British NGOs vigorously oppose these laws.

**“We must ensure that we are encouraging people to critique their own systems and develop values that enable human growth.”**

While I realize that freedom of expression is urgently needed, I wondered whether our current understanding of free expression is universal. In advocating for predominantly Western values, we may deprive communities of the chance to evolve their own values, or worse, encourage these communities to reject ideals that we may later understand to be immensely valuable. The reality is that the current discourse on the limits of free expression remains unsettled. In the United States, free expression can mean an unlimited freedom to express even powerfully hateful expression. For instance, the right of holocaust sympathizers to march through Skokie, Illinois, a town with a large number of holocaust survivors, is constitutionally protected as free expression. In Canada, hate speech provisions in the *Canadian Criminal Code*, as well as provincial Human Rights Codes, substantially limit hateful expressions.

Even within the PEN network there is no consensus on the limits of free expression. In late April of 2015, the PEN American Center awarded Charlie Hebdo the Freedom of Expression Courage Award. This award led over 204 prominent PEN members to boycott the award ceremony in protest. These writers argued that Charlie Hebdo cartoons were deeply offensive and oppressive to France's minority groups, and should not be celebrated with this award.

Working with PEN International has given me an opportunity to see NGOs from a different perspective. I have seen the urgent need for human rights work. During

my internship, PEN International helped a secular Bangladeshi writer escape imminent death after his colleagues were viciously murdered. I have also seen the passion and sincerity that my colleagues at PEN International have as they advocate for free expression.

Importantly, PEN International's approach is culturally sensitive. They engage directly with independent, regional PEN centres to conduct their advocacy work, which means PEN's approach is bottom-up, rather than top-down. Nevertheless, the fact that many local centres seek funding from PEN International, begs the question as to whether PEN International and its big donors have some control in directing local advocacy plans.

As I continued working at PEN International, I have come to this understanding: as human rights advocates, we must recognize the ever-present risk of cultural supremacy and the fallibility and evolving nature of Western liberal values. As we advocate for “fundamental” freedoms around the world, we must recognize that our version and understanding of freedom is neither final nor universal. Liberal values are progressive and relative. We must ensure that we are encouraging people to critique their own systems and develop values that enable human growth, instead of impose beliefs. Additionally, as human rights advocates we must seek complete and real independence. We must operate for the sake of promoting human rights around the world and not as a tool of foreign diplomacy, even if this means questioning the sources of our funding. This is not only critical for our legitimacy; I believe it is the only way we can ensure that we are not complicit in perpetuating ideas Western supremacy and the harms that come with it. This is what will ensure that human rights advocacy does not become a form of neo-colonialism.

# IS THE RIGHT TO HEALTH FLAT-LINING IN SOUTH AFRICA? THE FAILING PROMISE OF HEALTH CARE PROVISIONS IN SOUTH AFRICA'S CONSTITUTION

Rona Ghanbari, 2L, *Section 27 (Johannesburg)*

South Africa's painful history has led the country to take great strides in protecting and promoting human rights over the past two decades. In theory, South Africa has exceptionally comprehensive human rights protections. The *Constitution of the Republic of South Africa* (South African Constitution) includes not only fundamental rights such as the right to life, but also socio-economic rights. For example, section 27 guarantees the right to health care, sufficient food and water, and social security. Unlike the *Canadian Charter of Rights and Freedoms*, the South African Constitution applies both vertically (to government action), and horizontally (to private actors, including corporations). Unfortunately, in practice these codified rights protections often fall short.

Section 27 imposes an obligation on the government to actively take steps to ensure availability of access to adequate, affordable health care for all South Africans. Because the Constitution applies horizontally, private organizations must also ensure that their actions do not infringe on the right to health care. Given that the South African Constitution is only 19 years old, however, some of the kinks have yet to be worked out.

In a dual public/private health care system, regulatory bodies must create systems and enforce regulations that help protect and promote access to health care. The dual health care system means that the efficacy of the private health care sector impacts the public health care sector, as patients are shuffled between the two. Presently, South Africans can purchase private insurance packages from medical schemes to access health care privately rather than in public hospitals. To ensure that users of the private health system are protected, the *Medical Schemes Act* provides for Prescribed Minimum Benefits (PMBs).

PMBs are a list of defined benefits that all medical scheme members must have access to regardless of the benefit option they selected. There are 270 illnesses and 25 chronic conditions listed as PMBs. These include conditions such as HIV, tuberculosis, diabetes, and certain mental health conditions and cancers. Currently, medical schemes are required to pay in full for the diagnosis, treatment, and care of PMB conditions. This means that members cannot be required to make a co-payment for the costs associated with a PMB condition.

The PMBs are an exceptionally important mechanism to ensure access to adequate health care in South Africa. Even with the regulation in place, however, many medical schemes attempt to circumvent paying for PMBs and look for loopholes to avoid

covering procedures. As a legal intern this summer at SECTION 27, a Constitutional law centre named after the South African Constitution, I heard many allegations of providers of medical schemes attempting to circumvent paying for PMB conditions.

In 2014, 2736 out of 5008 complaints to the Council for Medical Schemes were related to non-payment or co-payment of PMB conditions. Despite the fact that patient protection in the private health care sector is already shaky, there have been efforts to further dismantle protections. Genesis, a prominent South African medical aid provider, is involved in litigation with the Minister of Health to set aside Regulation 8 of the *Medical Schemes Act*, which would effectively remove any obligation on medical schemes to pay for PMB conditions in full. If Genesis is successful, it will cause serious financial hardship for patients, specifically for the many South Africans who suffer from chronic conditions such as HIV and tuberculosis. It will also cause a huge strain on South Africa's public health care sector, which is already struggling to accommodate the volume of patients who do not have private medical aid, as well as those who have private medical aid but are forced to access health care in the public sector because of their medical scheme rules (called "public sector dumping").

It is SECTION 27's hope that the ongoing litigation with Genesis will clarify and strengthen the constitutional obligations of private corporations—particularly, when their business is to provide a public good, such as health care. South Africa has the potential to be a trailblazer on the continent for protecting human rights and improving access to healthcare. The laws exist—it is simply time to enforce them.



Rona Ghanbari standing outside of the Competition Commission Office in Johannesburg (Photo credit: Rona Ghanbari)



# ANALYZING THE RIGHT TO HEALTH FRAMEWORK

Chetan Muram, 2L, *Lawyer's Collective (Delhi)*

The right to health is a complicated human right. Upon first hearing the term, many assume it refers to the right of people to always be in good health and the obligations imposed on states to realize good health for all. This is an unattainable goal. In actuality, the *International Covenant on Economic, Social and Cultural Rights* states that the right to health refers to each person's inherent right to the *highest attainable* standard of physical and mental health. The right to health was not conceived in a vacuum; it recognizes the multitude of factors that influence health outcomes, which makes a guarantee of good health impossible. Nevertheless, states have an obligation to progressively realize and fulfill the right to health. States must take deliberate action to improve access to services such as healthcare, clean water and nutritious food. This ensures individuals are able to meet their own highest possible, realistic health standard.

Lawyers Collective is one of the preeminent organizations working to uphold the right to health, and more broadly, to protect health and human rights. Established in 1981, Lawyers Collective is a public interest litigation group based in Delhi, India. The co-director and co-founder of Lawyers Collective, Anand Grover, was the former UN Special Rapporteur on the Right to Health. Mr. Grover is arguably one of the world's leading authorities in the field of health and human rights. Mr. Grover, along with his team of lawyers, has argued health-rights related matters, such as access to medicine and HIV/AIDS discrimination in the workplace, before India's High Courts and the Supreme Court of India.

Given Mr. Grover's prominence, he is often asked to speak at international lectures and conferences on topics relating to health and human rights. Often, Mr. Grover will use these platforms as an opportunity to promote the right to health and advocate for its recognition. As an intern at Lawyers Collective, I regularly assisted Mr. Grover in preparing such presentations. Working with others to develop these presentations, carrying out academic research, and

discussing constitutional recognition of health rights gave me a deeper understanding of the many facets of the right to health.

One of the fundamental principles of the right to health framework is the meaningful participation of affected communities in public health initiatives. Meaningful participation requires more than the mere inclusion of such communities in health interventions. Rather, it requires their presence and influence throughout the decision-making process. This input allows for tailored projects that are more culturally appropriate and effective, and also helps to establish trust with affected communities.

While researching the right to health framework, I came across the Sonagachi Project, a public health initiative aimed at protecting sex workers in Kolkata, India. The Project is community-based; it frames sexually transmitted diseases as a community issue and empowers sex workers as a part of that community. The result has been a dramatic decrease in the rate of transmission of sexually transmitted diseases in Kolkata, particularly in comparison to other cities in India where sex work is common.

Reflecting on the Sonagachi Project and other programs that sought to implement the right to health framework, it became evident that success went hand-in-hand

with high levels of local engagement. Building trust with communities and developing culturally appropriate policies on matters as intimate and personal as physical, mental, and sexual health, requires the active involvement of local actors. Foreign lawyers and activists alone would not have access to the knowledge and experience to ensure this initiative succeeded.

Programs such as the IHRP emphasize the importance of human rights lawyers being culturally sensitive when working in a country or region other than their own. There exists a responsibility to educate oneself on the traditions and practices of the area and gain an understanding of the historical forces that have played a role in exacerbating human rights issues.

Foreigners can play an influential role in conceiving human rights initiatives, but in order to ensure that the needs of the affected communities are addressed in the most appropriate and effective manner, local actors need to have a key role in these initiatives. To achieve the best possible outcomes for affected communities, there may be certain areas of human rights advocacy where the involvement of foreign lawyers and activists is not appropriate. In the context of the right to health, Lawyers Collective advocates that this is the best way to ensure that the highest attainable standard of health will be reached.



Humayun's Tomb, Delhi, India (Photo credit: Chetan Muram)

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