VOLUME ISSUE
06 02
MARCH 2013

RIGHTS REVIEW


Supreme Court of Canada, Ottawa. Photo by Murckramer, Wikimedia Commons

THIS ISSUE:

IHRP AT THE SUPREME COURT:
WHO IS A WAR CRIMINAL FOR THE PURPOSES OF REFUGEE LAW?

Randle DeFalco, LL.M. & Sofia Mariam Ijaz, second year student, University of Toronto, Faculty of Law

On January 17, 2013, the IHRP, in collaboration with the Canadian Centre for International Justice (CCIJ) and pro-bono counsel from Torys LLP, presented oral arguments to the Supreme Court of Canada as interveners in *Ezokola v Canada (Minister of Citizenship and Immigration)*. In that case, Congolese refugee claimant Rachidi Ekanza Ezokola appealed his exclusion from the protections owed to refugees in Canada pursuant to Article 1(F)(a) of the *UN Refugee Convention*. In 2009, the Refugee Protection Division (RPD) of Canada ordered the deportation of Mr. Ezokola, despite his refugee status, based on Mr. Ezokola's alleged complicity in war crimes committed in the Democratic Republic of Congo (DRC). The Refugee Convention's provision has been incorporated into Canadian law, and provides for the exclusion of status refugees for whom there are "serious reasons for considering" that they committed an international crime, as defined by international law.

Under the supervision of IHRP Director Renu Mandhane, IHRP Clinic students Sofia Mariam Ijaz (2L) and Randle DeFalco (LLM) conducted in-depth research into the key issue of modes of liability under international criminal law in support of the IHRP/CCIJ team's submissions to the Supreme Court. In their factum and oral arguments, the team outlined the complexities of applicable international criminal law to a very active bench, most notably Justices Abella and Moldaver. Out of the six interveners, which also included the United Nations High Commissioner for Refugees (UNHCR), Amnesty International, Canadian Council for Refugees, Canadian Civil Liberties Association and the Canadian Association of Refugee Lawyers (CARL), the IHRP and CCIJ was the only intervener group to discuss specific international criminal law cases.

The claimant, Mr. Ezokola, was a low-ranking diplomat working at the Permanent Mission of the DRC to the United Nations in New York. He resigned from his post in 2008, after it became known that he did not support the DRC President, Joseph Kabila. Fearing for his safety, Mr. Ezokola and his family (including his wife and eight children) came to Canada and sought refugee protection. The entire Ezokola family was granted refugee status upon arrival; in 2009, however, the Refugee Protection Division subsequently sought to remove Mr. Ezokola from Canada pursuant to the Refugee Convention's war crimes provision.

According to current Canadian jurisprudence, a refugee may be excluded from protection where it can be demonstrated that he/she *personally and knowingly participated* in the commission of international crimes. This broad test, with an even looser definition of "participation" that includes "complicity by association", problematically allows for the deportation of refugees to home countries where they may face persecution, without necessitating proof of a nexus between the acts of the claimant and the international crime at issue. The jurisprudence of the Federal Court and Federal Court of Appeal reveals that individuals excluded from refugee protection under this test have included a Ugandan typist working for that country's Internal Security Organization and a Sri Lankan journalist who worked for a newspaper which published Liberation Tigers of Tamil Eelam (LTTE) propaganda. The IHRP and CCIJ, along with fellow interveners, argued that the current test under Article 1(F)(a) is overly broad and dissonant from current international criminal law jurisprudence, which requires an individualized finding of criminal re-

(Continued on page 10)

UNIVERSITY OF TORONTO FACULTY OF LAW
INTERNATIONAL HUMAN RIGHTS PROGRAM

INSIDE THIS ISSUE:

GREETINGS FROM THE IHRP ACTING DIRECTOR: CARMEN CHEUNG

Welcome to the Spring 2013 edition of *Rights Review*,

the International Human Rights Program's signature publication

Welcome to the Spring Edition of *Rights Review*, the International Human Rights Program's signature publication.

It is a delight and pleasure to welcome you to this edition of *Rights Review* as the new Acting Director of the IHRP. This publication exemplifies the breadth of interests and depth of talent shown by the students involved with the Program. Many thanks to this year's editors for their hard work and to all of the contributors for sharing their insights and experiences – these pages make for fascinating reading.

As the year draws to a close, I would also like to extend my thanks on behalf of the IHRP to all of our student volunteers and community partners for their commitment to the Program. It is due to their generosity that the IHRP is able to accomplish all that it does.

IHRP Director Renu Mandhane will be on leave until February 2014; in the meantime, please do not hesitate to get in touch with me if you would like to get involved with the IHRP. I look forward to the coming year.

RIGHTS REVIEW EDITORIAL STAFF

Rights Review student editorial team from left: Sofia Ijaz, Teresa MacLean, Aria Laskin, Katherine MacDonald and Vince Wong.
Absent: Marianne Salih

Email: ihrprightsreview@gmail.com

Website: http://ihrp.law.utoronto.ca

From the Editors' Desk

Welcome to our Spring Edition of *Rights Review*! In this edition, our authors cover a wide range of subjects, including the rights of domestic workers in Bahrain and the U.S. targeted killings program. We are also pleased to present interviews with notable figures in field of human rights, including former judge at the Inter-American Court of Human Rights, Cecilia Medina, and Deputy Judge Advocate General, Colonel Michael Gibson.

In this edition, you will also find updates from students on a number of the IHRP's clinic projects and working groups, including a look at the IHRP's recent joint intervention at the Supreme Court of Canada in *Ezokola v Minister of Citizenship and Immigration.*

Through these articles, interviews, and updates, we hope you will get a taste of the broad range of interests and work engaged in by our talented student body, alumni, and faculty.

We would also like to thank all of the writers and interviewees who contributed to this edition, as well as our student Editorial Board and Faculty reviewers, Renu Mandhane, Carmen Cheung, and Andrea Russell, who made this edition possible. Their work and sustained passion is what drives *Rights Review* every year and we are honoured to be part of that team. We hope you enjoy reading this issue of *Rights Review*!

Sofia M Ijaz (2L) and Vince Wong (3L)

INSIDE THIS ISSUE:

INTERVIEW WITH ALUMNUS COLONEL MICHAEL GIBSON, CANADA'S DEPUTY JUDGE ADVOCATE GENERAL FOR MILITARY JUSTICE

Rebecca Sutton, third year student, University of Toronto, Faculty of Law

International Humanitarian Law (IHL) is the law that regulates armed conflict, and many of its rules can be found in international instruments such as the Geneva Conventions and their Additional Protocols. In the context of armed conflict, Canadian forces and military officials are expected to follow the rules of IHL. Canada's Judge Advocate General (JAG) is the senior legal officer in the Canadian Forces, and commands the Office of the Judge Advocate General (OJAG). As legal advisor to the Governor General, the Government of Canada, the Department of National Defence, and the Canadian Forces, Canada's JAG has a crucial role to play in ensuring that Canada complies with IHL when involved in armed conflicts abroad.

I recently sat down with current Deputy Judge Advocate General, Colonel Michael Gibson, to hear more about his ideas on military justice and IHL. He is responsible for Canada's military justice policy, and for legislative reform and strategic initiatives concerning our military justice system.

Q: How important is the training of armed forces in ensuring compliance with International Humanitarian Law (IHL)?

Under Additional Protocol I to the Geneva Conventions, states parties to that Protocol have an obligation to train their troops in IHL. In the modern context, the challenge is that the commander of a well-resourced deployment has so much else (aside from IHL) to train the troops in order to prepare them properly for operations, up to and including combat. Unless a given state sees training in IHL as a priority, it will take a backseat to other, more immediate, imperatives. For countries that lack equipment, funding, and training resources there is a real likelihood that training in IHL will be far less extensive than it needs to be.

Q: How hard is it to detect a breach of IHL in the combat context?

You need to have the right people investigating; they should be well trained, credible, and given sufficient investigative independence to do their job. You need to have an independent prosecutorial capacity, as well as an effective defence council capacity. These two arms also need to be completely independent from each other. Additionally, you need adequate judicial capacity and correctional capacity. The latter tends to be under-resourced, even by wealthy countries. Once this system is in place, if someone witnesses a breach by a member of the armed forces, they can engage with this system to report it and have some confidence that it will be properly dealt with.

Q: Can you tell me more about your current policy role?

From time to time, a new Bill will come before Parliament to amend the *National Defence Act.* For example, Bill C-25, which came before Parliament in 1997 and was passed in 1998, proposed the most extensive set of amendments to the *Act* since 1950. The Bill's main focus was the distinct system of penal law applicable to members of the Canadian Forces and other persons subject to Canadian military jurisdiction.

A major impetus for the Bill was the events of Somalia in the early 1990s and the resulting Commission of Inquiry into the Deployment of Canadian Forces to Somalia. For a process like

(Continued on page 21)

Incremental Changes in Women's Rights in Saudi Arabia: From the Olympics to the Shura Council

Amy Tang, first year student, University of Toronto, Faculty of Law

The London 2012 Summer Olympics set an important precedent for women's participation in international sporting events. Following several months of pressure by the International Olympics Committee, Saudi Arabia sent two female athletes, Wojdan Shaherkani and Sarah Attar, to compete in judo and track and field at the Olympic Games. With similar efforts made by Qatar and Brunei, the London Games marked the first time that all participating countries had representation from female athletes, affirming a fundamental principle set out in the Olympic Charter, namely, that "every individual must have the possibility of practicing sport, without discrimination of any kind".

Sending women to the Olympics is only the first step towards realizing this fundamental principle. Skeptics of Saudi Arabia's "11th hour change of course to avoid a ban," such as Minky Worden, Director of Global Initiatives at Human Rights Watch, point to the country's dismal record of discrimination against women and girls in sports. For instance, Saudi Arabia does not offer physical education classes for girls in public schools, despite the introduction of state schooling for girls in the early 1960s. Even in private schools, where physical education for girls is permitted, the quality of coaching and facilities are uneven. In 2011, the Saudi government announced plans to introduce physical education for girls in state schools. However, details of the plan, including the timing of its implementation, remain unclear.

Photo Credit: Manal al-Sharif

Manal al-Sharif, the woman who defied Saudi Arabia's driving ban by uploading a Youtube video of herself driving. In the video, she says in Arabic: "We are ignorant and illiterate when it comes to driving. You'll find a woman with a PhD and she doesn't know how to drive. We want change in the country."

Saudi Arabia has ratified the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) and *Convention on the Rights of the Child*. Under international law, signatories of these human rights treaties must ensure equal opportunities for women and girls. For example, Article 10 of CEDAW obliges states to "take all appropriate measures to eliminate discrimination against women … in particular to ensure, on a basis of equality of men and women, the same opportunities to participate actively in sports and physical education".

But the Saudi government entered a general reservation upon ratification of CEDAW, stating: "In case of contradiction between any term of the Convention and the norms of Islamic law, the kingdom is not under obligation to observe the contradictory terms of the Convention." This is a clear assertion of the government's use of religion to claim authority to discriminate against women and girls regardless of the requirements set by the treaty, and some would say it casts doubt on Saudi Arabia's commitment to advance women's rights.

On the other hand, others point to recent improvements in women's rights in Saudi Arabia. On January 11, the current head of state, King Abdullah, appointed 30 women to the Shura Council, a formal advisory body to the monarchy, for the first time. In addition, he made amendments to the Shura Council Statute to ensure that women make up at least 20 percent of the 150-person council and have "complete membership rights".

These changes are in line with an announcement made by King Abdullah in September 2011 regarding political reforms, such as allowing women to be appointed to the Shura Council, and to run and vote in the country's 2015 municipal elections. While King Abdullah is making advances in the area of women's rights, he appears cognizant of some domestic opposition to such 'controversial' reforms. Reconciling pressures from human rights groups with Saudi Arabia's religious traditions meant that gender-segregating measures, such as separate entrances and seating areas, needed to be introduced alongside changes to increase women's political participation.

Despite these challenges, these moves by King Abdullah have been applauded as a step towards gender equality. Najla Al Awadhi, one of the first female Members of Parliament in the United Arab Emirates, commented that "Saudi Arabia is the most conservative Gulf country when it comes to women's rights, so the appointment of women to the Shura Council, while in the short term its impact is symbolic, in the long term its impact is significant".

Just as sending women to the Olympics is only the first step, so too is the participation of women in political life only the first of many potential reforms of women's rights in Saudi Arabia. Women still do not have the right to drive in that country, despite efforts of Manal al-Sharif, an activist who took to social media platforms to advocate for women's rights. However, in a country where resistance towards progressive changes in women's rights is rampant, incremental changes in women's representation are signs that greater gender equality may follow. ♦

LACK OF INTERNATIONAL SUPPORT HINDERS SUCCESS OF PROTEST BY FEMALE PRISONERS IN IRAN

Alison Mintoff, first year student, University of Toronto, Faculty of Law

In October 2012, nine prisoners in the women's wing of Iran's notoriously brutal Evin Prison went on a hunger strike to protest abuses they faced at the hands of prison authorities and guards. The female prisoners, who included political activists and journalists, were being held in the prison on convictions related to the mass street protests which followed the disputed 2009 re-election of President Mahmoud Ahmadinejad. Faced with continuing verbal and physical abuse, the women undertook this collective action to defend their human rights and to put pressure on the prison authorities for a formal apology. Their actions, which culminated in a seven-day hunger strike, have gone all but unnoticed by the international community.

Persian community demonstrating for Nasrin Sotoudeh, The Hague, December 15, 2012.

Many of the women imprisoned at Evin face charges related to their individual participation in the Iranian women's rights movement to end discrimination against women in Iranian law. The participants of the hunger strike are serving time for offences including "insulting the Supreme Leader" and "spreading propaganda against the system", with prison sentences ranging from one to ten years. Their arrests appear to be in violation of various provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (which Iran has signed and ratified), including the right to a fair and public hearing and the right to be free from cruel, inhuman and degrading treatment.

In Evin, prisoners can be interrogated for many weeks at a time, and held in solitary confinement for months. After being released back into the main ward, women are often denied phone privileges, necessary medical care, and family visits. The hunger strike was provoked by an unannounced inspection of the women's ward, during which prisoners were allegedly subjected to humiliating and degrading body searches, physical abuse, and verbal insults. What happened during those few hours prompted a united outcry from dozens of female detainees. They wrote an open letter demanding a formal apology from the prison authorities, guarantees against similar raids in the future, and general improvements in their treatment. Nine of these women took the extra step of going on a hunger strike in an effort to achieve their goals.

The hunger strike at Evin caught the attention of human rights organizations such as Amnesty International and Human Rights Watch. However, unlike other higher profile detention cases, such as that of prominent Iranian human rights lawyer, Nasrin Sotoudeh, that were picked up by major news networks, this action went relatively unnoticed by the global media and key international political and human rights figures.

The international attention to Sotoudeh's case stands in stark contrast to that given to the nine hunger strikers. Sotoudeh was arrested in September 2010 and subsequently convicted of similar offenses as the women on hunger strike, including spreading propaganda and acting against national security. She was sentenced to six years to be served in Evin Prison. To protest against her prison conditions and sanctions placed on her family, Sotoudeh began a hunger strike on October 17, 2012. Sotoudeh's story sparked a joint call for proper treatment and her unconditional release from six major human rights organizations, U.S. Secretary of State Hillary Clinton, Nobel peace laureate Shirin Ebadi, and the UN High Commissioner for Human Rights, Navi Pillay. Major news networks such as BBC and *The New York Times* ran stories covering her hunger strike.

Ten days into her hunger strike, pressure from the international community built and Sotoudeh was awarded the Sakharov Prize for Freedom of Thought – the European Union's most prestigious human rights award, given to international figures such as Nelson Mandela and Aung San Suu Kyi. This brought much-needed attention and legitimacy to her cause.

After 49 days, the judicial authorities agreed to remove travel restrictions on Sotoudeh's young daughter. With this key demand met, Sotoudeh ended her hunger strike. Human rights activists, including Ebadi, labelled this accomplishment a major victory, not only for Sotoudeh, but for all Iranian political prisoners and prisoners of conscience.

The hunger strike of the nine women at Evin, however, did not gain such international attention. Unlike Sotoudeh, they were not successful in having their demands met. They failed to achieve more humane treatment within the prison, and did not receive an apology or acknowledgement from authorities for their alleged abuses of power. At the urging of medical officials, the hunger strike was abandoned after seven days; it has been reported that the women are instead pursuing legal action against the prison guards.

The comparison between Sotoudeh's hunger strike and that of these nine women demonstrates that, in the fight for better treatment of women in Evin prison, international support from state representatives, global media, and human rights organizations will play a significant role.

It remains to be seen what, if any, relief the Evin women's legal action will bring. Unfortunately, and maybe not surprisingly, there has not been any further media attention given to the women's progress or whether the conditions inside the notorious prison have improved for its female prisoners.♦

Education and Human Rights in Guatemala: A Conversation with an Indigenous Rights Activist

Susan Barker, Reference and Digital Services Librarian, Bora Laskin Law Library

In November, the University of Toronto Faculty of Information, along with Librarians Without Borders, presented a lecture entitled "Promoting Democracy and Human Rights through Education in Guatemala." Jorge Chojolán, founder of the Miguel Angel Asturias Academy in Quetzaltenango, Guatemala, was the featured speaker.

Jorge has an interesting background; he is a Mayan who is dedicated to furthering human rights, particularly the rights of indigenous people, through education. During his university days, he was a student activist advocating for the rights of indigenous Guatemalans. Upon receiving a death threat (written in blood), he went into exile in Mexico. On his return to Guatemala, he graduated university with an economics degree and became an educator, and an even more fervent advocate for indigenous rights and education. In 1994 he founded the Miguel Angel Asturias Academy. In 2000, he received an Ashoka Fellowship for social entrepreneurship.

I had the opportunity to speak to Jorge (through an interpreter) in Toronto about the situation in Guatemala, and the role that his school plays in advancing human rights in that country.

Education in Guatemala

Even though the indigenous people are in the majority in Guatemala, comprising over 80% of the population, they own only 20% of the land and resources. Illiteracy levels are high and education is difficult to attain. Government funding for education is minimal, public schools are overcrowded and do not attract good teachers. Private schools are out of the question for the poor. During our conversation, Jorge cited a 2011 United Nations report which stated that of those indigenous students who do attend elementary school, out of every 100 students, only 10 will go on to high school and only 1 will attend university.

The Academy

Jorge believes that education is the driving force of ideas and of social change, and he founded the Miguel Angel Asturias Academy based on those principles. The Asturias Academy is unique in that it is a private school operated on a not-for-profit basis; students come from a variety of social backgrounds and students in financial need receive scholarships to attend. The Academy bases its teaching on the philosophy of Paulo Friere, a noted educational theorist and author of *Pedagogy of the Oppressed.* Jorge describes it, this form of education involves not just transmitting knowledge, but helping the students discover their own reality and encouraging them to participate actively in developing their own understanding of the world. In addition to offering skills-based technical training, the academy also teaches an alternative curriculum based on monthly themes; some examples include: ra-

Students at the Asturias Academy enjoy some quiet reading in the library

Photo Credit: Librarians Without Borders

cism, sexism, multiculturalism, corruption, health, economy, and politics. Students are encouraged to use these themes to examine their own lives and to critically evaluate their own reality. The impetus for social change, therefore, comes from within.

Indigenous culture and languages are also included in the curriculum. In a culture where natives are often afraid to speak their own language, practice their religion, or wear traditional clothing for fear of discrimination, this is a rarity. Jorge described the farcical situation in the public schools. Students are taught in Spanish and, despite the fact that the government agreed to teach local dialects (there are over 20) in the public schools as part of the peace accords it signed in the early 1990s, there are so few teachers able to teach these languages that no such classes are held. Students in the public schools receive a mark, often 100%, in their transcripts for a course which was never taught.

Success stories

When asked about success stories generally, Jorge has noticed that his students are able to identify social problems in their homes and in themselves and are willing to make changes in those areas. They are more cognisant of issues relating to gender equality. They are more proud of their culture, and there is more interest in knowing and identifying with traditional practices. He further offered a concrete example of a success story. Earlier that day, he was speaking to a graduate of the school, a former scholarship student, who has been promoted to a management position at his place of employment. This student's dream is to use his success to provide opportunities for others.

Challenges

The biggest challenge the school faces is its lack of stable funding. As a not-for- profit entity, the school is reliant on donations which go to fund scholarships, pay salaries, and purchase materials, as well as funding other day-to-day essentials for the school. Librarians Without Borders, for example, has been involved in setting up a library and providing print resources for students at the school. His ultimate goal is to create an endowment to ensure the school's continuing existence.

For more information on the Academy go to http://www.asturiasacademy.org/. For more information about Librarians Without Borders go to http://lwb-online.org/. ♦

"Bengali Muslims" or Burmese Residents: The Proliferation of Hate Against the Rohingya in Western Burma

Lane Krainyk, third year student, University of Toronto, Faculty of Law

In June 2012, an outbreak of violence between the minority Rohingya and the majority Buddhist populations in Burma's westernmost Rakhine (Arakan) state led to the destruction of over 10,000 Rohingya homes, and left over 100,000 Rohingya individuals homeless. Unfortunately, this incident was not merely a spontaneous, one -off event. Instead, it is a particularly egregious example of the persistent persecution that has plagued the Rohingya for decades.

The Rohingya remain one of the most marginalized and misunderstood populations in the world. They are a Muslim minority group that have resided in what is now Burma (Myanmar) and Bangladesh for several hundred years. One of the primary reasons for the Rohingya's persecution is the fact that neither of these states has been willing to recognize the Rohingya as citizens with full rights under domestic law. Instead, the Rohingya have been treated as unwelcome foreigners in both states. In Burma, for example, the Rohingya are often referred to as "Bengali Muslims". This denial of citizenship, particularly in Burma, has led the Rohingya to become one of the largest groups of stateless people in the world.

The Rohingya have been at the receiving end of violence and discrimination in the region for decades. This unlawful discrimination has taken several forms. As a result of being denied full citizenship rights by both the Bangladeshi and Burmese governments, the Rohingya do not have the political and social rights afforded to them under international law. The problems stemming from being excluded from citizenship have been exacerbated by active efforts, documented by the United Nations High Commissioner for Refugees, by governments to impose restrictions on their mobility, education and marriage rights. Additionally, in Burma, the Rohingya remain largely prohibited from owning their own businesses.

The violence that broke out in June of last year began with the alleged rape and murder of a Buddhist woman by three Rohingya men in a Rakhine village. This tragic incident led to extensive and brutal reprisal attacks. In one early incident, a large group of Buddhist villagers stopped a bus and viciously murdered 10 Rohingya individuals who were on board. On a larger scale, entire Rohingya neighbourhoods in cities such as the state capital of Sittwe were burned to the ground. While the Burmese government claimed to be only an observer of the violence, several reports of the Burmese army targeting the Rohingya have surfaced. In one example, Burmese soldiers fired on groups of Rohingya protestors. A Burmese soldier claimed that his battalion killed 300 Rohingya before calling in a bulldozer to make a mass grave. Human Rights Watch noted that Burmese security forces were responsible for killings, rape and mass arrests of the Rohingya.

The question of citizenship is of particular concern. Despite the fact that the vast majority of Rohingya individuals reside in Burma, Prime Minister Thein Sein claims that his government takes responsibility only for those groups that are ethnically Burmese. He informed the UNHCR that it is "impossible to accept the illegally entered Rohingyas, who are not our ethnicity." He went on to say that the "only solution" would be to "expel the Rohingya to other countries or to camps overseen by the UN."

Even pro-democracy leader and Nobel Peace Prize laureate Daw Aung San Suu Kyi has failed to call for citizenship reform or policies that could make the Rohingya less vulnerable. Instead she has shied away

(Continued on page 11)

IHRP Clinic Projects

The IHRP clinic provides experiential learning opportunities for students and exposes them to the practice of international human rights law. It focuses on professionalism and the tools of international human rights advocacy, including research and fact-finding, litigation in domestic and international forums, grass-roots mobilization, and media engagement. The clinic encourages critical reflection on international human rights lawyering, including exploration of legal, procedural, strategic, ethical and theoretical issues. Wherever possible, the course provided students with the opportunity to interact with international human rights advocates.

SEEKING JUSTICE FOR CANADIAN VICTIMS OF TORTURE: THE EL-MAATI, ALMALKI, AND NUREDDIN CASES

Azeezah Kanji, third year student, University of Toronto, Faculty of Law

Ahmad El-Maati, Abdullah Almalki, and Muayyed Nureddin. Their cases are eerily similar to Maher Arar's: Canadian citizens investigated and labelled as terrorist threats by the Canadian Security Intelligence Service (CSIS), and subsequently detained and tortured in foreign prisons, apparently with Canadian complicity. And yet – unlike Maher Arar, whose name and story have been engraved on the conscience of every Canadian – Mr. El-Maati, Mr. Almalki, and Mr. Nureddin remain relatively obscure, their horrifying experiences unknown to many.

Ahmad El-Maati worked as a truck driver based in Toronto. In November 2001, Mr. El-Maati travelled to Syria to be married. Syrian officials knew his name and were waiting for him in Damascus. They arrested and detained him in the notorious Far' Falastin (Palestine Branch) detention centre, where he was tortured and forced to confess to crimes he did not commit. He spent over two years in prison – first in Syria, and then in Egypt – and was never charged with any crime.

Photo Credit: Joshua Sherurcij, Wikimedia Commons

Abdullah Almalki, one of three Canadian citizens tortured in Syria with alleged Canadian complicity.

Engineer Abdullah Almalki was arrested in April 2002 in Syria, where he stopped on his way home to Canada from visiting his sick mother-in-law in Malaysia. He was imprisoned in Far' Falastin for nearly two years. His Syrian interrogators beat the soles of his feet with steel cables, trying to make him confess to being a member of al-Qaeda. Mr Almalki says the Syrians told him they were getting their information from Canadian officials.

Muayyed Nureddin worked as a geologist in Toronto. He was arrested in Syria in 2003, as he was returning home from visiting family and friends in Kirkuk (northern Iraq). He spent a month in Far' Falastin, where he was tortured, the soles of his feet repeatedly lashed with steel cables.

Former Supreme Court Justice Frank Iacobucci conducted an inquiry into the El-Maati, Almalki, and Nureddin cases, concluding that Canadian officials were "indirectly responsible" for the torture and arbitrary detention of the three Canadians. Last June, the United Nations Committee Against Torture released a report condemning Canadian "complicity" in the torture and human rights violations of the three Canadians. "Their cases are similar to the case of Arar, in the sense that all of them were subjected to torture abroad and the Canadian officials were complicit in the violation of their rights," the UN report stated. The Committee urged Canada to compensate all three for the abuses they suffered. (Article 14 of the United Nations Convention Against Torture obligates State Parties to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.")

But justice has remained elusive. Unlike Maher Arar – who received an official apology and $10.5 million from the Canadian government – Messrs. El-Maati, Almalki, and Nureddin have been forced to fight a long and frustrating legal battle for recompense, mired in the secrecy of the Canada's national security policies.

Through the IHRP Clinic, I have had the opportunity to work on their cases, to help develop international legal arguments supporting their claims for compensation. Drawing on the decisions and comments of the United Nations Committee Against Torture, the jurisprudence of international criminal tribunals, and the decisions of courts in other jurisdictions facing similar cases, I researched the requisite elements in international law of State and individual complicity in torture. I also evaluated the applicability of international law to domestic Canadian claims for remedies for human rights violations. As of this writing, I am analyzing whether Canada's actions in the El-Maati, Almalki, and Nureddin cases meet the international law definition of complicity in torture.

Hopefully, these efforts will bear some fruit in the legal fight to ensure Canada compensates *all* victims of torture perpetrated with Canadian complicity. ♦

As an IHRP Clinic student, Azeezah Kanji (3L J.D.) is working with M. Philip Tunley at Stockwoods Barristers. Stockwoods is representing Messrs. El-Maati, Almalki and Nureddin in their claims against Canada.

THE FIGHT OF AFRICAN GRANDMOTHERS

Teresa MacLean, second year student & Frédérique Dupuy, LLM student, University of Toronto, Faculty of Law

No parent should have to bury his or her child, but the HIV/AIDS pandemic has severely disrupted this natural order. The pandemic has claimed the lives of over 25 million people and in some areas of sub-Saharan Africa, it has nearly wiped out entire generations, leaving behind an estimated 12 million orphaned children. Despite these tragedies, many African grandmothers – women who have suffered the loss of their own children due to HIV/AIDS – have stepped up to take care of their orphaned grandchildren and other orphans in their communities.

To raise awareness of this situation, the Stephen Lewis Foundation is organizing a "People's Tribunal". The *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan*, or the "African Grandmothers' Tribunal," is scheduled to be held in Vancouver in late 2013. At the Tribunal, six to eight African grandmothers will testify in front of leaders from the international legal community, African community-based organizations, and the broader international community, about their lives and their efforts to enjoy their human rights in the face of rampant gender, age and health status discrimination.

As part of an International Human Rights Program clinic project, we were asked to assist the Stephen Lewis Foundation in this endeavour by providing research regarding the rights of these grandmothers. We produced two memoranda regarding the right to health and the right to property, highlighting the human rights violations faced by many African grandmothers. Our team also compiled a list of potential remedies for these violations for the judges of the tribunal.

Canadian and African grandmothers marching, Toronto 2006

(Continued on page 10)

JOURNALISTS SILENCED IN CENTRAL AMERICA

Bhuvana Sankaranarayanan, second year student, University of Toronto, Faculty of Law

"If you don't shut up, we're going to shut one of your children up."

Such words would not be out of place in old-style gangster movies. Unfortunately, these lines are neither fictional nor anachronistic. Threats like these are the way of life for many journalists in Central America, including Silvia González of Nicaragua, who was forced to leave the country after receiving these and similar threats.

The police are usually the first point of contact for people who receive life-threatening messages. However, when González and her daughter complained to the police and named a suspect, her daughter was summoned to police premises, where two police officers interrogated her – under the direction of the suspect. Threatened and left unprotected by those most responsible for her protection, González was forced to flee the country, abandoning her work investigating stories of corruption.

Incidents like these may seem unrepresentative and extreme, but journalists in the region regularly live with both the threat and the reality of violence against themselves, their families, and their organizations. Between 2006 and 2011, 372 journalists who were targeted solely due to their profession died worldwide. Forty-six journalists died due their occupation in the last decade in Central America alone. Most of these victims were not international war correspondents, but local journalists covering local stories.

The targeting of journalists is not always carried out by criminal actors. In many Central American countries, such as Panama, the state is the primary threat to freedom of expression. In these countries, public officials are often protected by draconian criminal laws (called *desacato*, or "disrespect" laws) that prevent criticism of their work. According to the Organisation of American States (OAS) Special Rapporteur for Freedom of Expression, in Panama, convictions frequently result in criminal penalties including large fines, jail time, and/or a ban on continuing work in one's profession (which disproportionately affects the freedom of speech of journalists). Despite the presence of transparency legislation, access to public information remains limited.

Violence is not the only thing that has a chilling effect on freedom of expression. Death threats encourage self-censorship, but so do alternative harassment tactics such as bringing journalists to court every two weeks without charges, imprisonment, deportation, and lengthy tax audits for news organizations publishing anything related to corruption. All of these problems occur on a routine basis in many Central American countries, including Honduras, Guatemala and Panama, making the state complicit in the censorship of journalists. Other countries, such as El Salvador, are guilty by omission, as they do not take sufficient measures to protect journalists from the actions of others, including criminal gangs.

When journalists are targeted as a result of their profession, freedom of expression as a whole suffers. Without this freedom, having an informed, active, engaged citizenry is impossible; citizens cannot access quality information and individuals can no longer participate meaningfully in important decisions affecting their societies. When that happens, every democracy and every citizen of that democracy loses.

The IHRP, in conjunction with PEN Canada, is currently conducting research on freedom of expression in Central America to identify similarities between different countries and make recommendations to improve freedom of expression for journalists in Central America. The project will continue over the summer of 2013. ♦

IHRP Clinic Projects

IHRP AT THE SUPREME COURT *(Continued from page 1)*

sponsibility. Crucially, the Canadian test provides for the exclusion of individuals who could not be prosecuted at an international tribunal.

The Refugee Protection Division's decision in Mr. Ezokola's case reveals the problems that can arise under the current Canadian approach. He was excluded by the Division, even though it recognized that Mr. Ezokola "obviously did not personally commit acts of violence against civilians," and was not found to have aided, abetted, ordered, or through *any other mode of liability* under international criminal law, committed crimes. Yet he was still excluded based on his position within the overall DRC government, within which certain elements were found to have committed crimes against humanity, based partially on the fact that Mr. Ezokola failed to take sufficient steps to disassociate himself from the DRC government.

In their oral argument, the IHRP and CCIJ submitted that the "guilt-by-association" logic used by the Refugee Protection Division and upheld by the Federal Court of Appeal runs afoul of fundamental international criminal law concepts. Rather, at the international level, criminal liability determinations always require an *individualized* finding of guilt on a case-by-case analysis of all the relevant facts and with reference to how the specific acts of the individual in question fit within a larger group crime dynamic.

The language of the Refugee Convention specifically mandates that it be interpreted with reference to applicable international instruments. As such, the IHRP and CCIJ argued that Canadian law, which has incorporated this provision, cannot run afoul of the fundamental requirements of international criminal law. The Supreme Court will deliberate over the coming months on how, and to what extent, it will bring Canada back in step with international standards.

Because a large portion of refugee exclusion decisions are based on findings of complicity in international crimes, the decision can potentially have a significant impact which will reverberate throughout Canadian refugee law. It is worth recalling that the rights at stake in these cases (in which the individuals have already been found to face a serious risk of persecution and/or physical harm if returned to their home country) are those that lie at the heart of our constitutional democracy: the rights to life, liberty, and security of person. Stigmatization as a "war criminal" is also a major repercussion for refugees who are excluded from Canada. Accordingly, the IHRP and CCIJ also argued that it is inappropriate to utilize an overly broad and loose approximation of international criminal law requirements for individual liability when making determinations with such dire consequences at stake for a refugee claimant. Rather, because the Refugee Convention's Article 1(F)(a) implicates the very core of the fundamental human rights of refugees, the IHRP and CCIJ submitted that is critical for Refugee Protection Division decision-makers to adhere to baseline standards of individual culpability under international criminal law when considering exclusion. ♦

Randle DeFalco (LL.M.) and Sofia Mariam Ijaz (2L, J.D.) are IHRP Clinic students at the U of T Faculty of Law who worked extensively on the IHRP and CCIJ's intervention in the Ezokola *appeal to the Supreme Court of Canada. The IHRP and CCIJ were represented by IHRP Director Renu Mandhane and pro-bono counsel John Terry and Sarah Shody of Torys LLP.*

South Africa: Grandmother solidarity action

THE FIGHT OF AFRICAN GRANDMOTHERS *(Continued from page 9)*

These courageous women have shown astonishing resilience. They are raising children with nearly no support and helping these children through the loss of their parents. In many countries, there is a lack of documentation about the vital role that these grandmothers have played in mitigating the fallout stemming from the HIV/AIDS pandemic. As a result, grandmothers are often excluded from domestic or international institutional responses to the pandemic.

Women arguably bear the brunt of the HIV/AIDS pandemic because of pervasive gender inequality, which undermines their health, economic and political agency, as well as their ability to access education and information. Elderly grandmothers in many developing countries have typically faced gender discrimination throughout their lives. This is exacerbated by ageing as well as the discrimination, stigma and hardship associated with the HIV/AIDS pandemic. The result is that many grandmothers live in extreme poverty. Grandmothers are often denied property or inheritance because of customary law in certain States. They are not able to realize their right to health because they cannot access health services or essential medicines. States do not consider the needs of older women when creating HIV information campaigns and thus, these women often do not know how to protect themselves from the disease. They may also fall victim to sexual violence because of the belief that older women do not have HIV. All these situations lead to the denial of the full enjoyment of human rights for these grandmothers.

The ultimate goal of this Tribunal is to bring visibility and raise global awareness of the lives of these grandmothers, their important roles in their communities and the human rights violations to which they often have been subject. This Tribunal will give the grandmothers a supportive and public space in order to relate their own experiences from which the tribunal judges will be able to establish recommendations for change and redress. ♦

INTERVIEW WITH KEN ROTH, EXECUTIVE DIRECTOR OF HUMAN RIGHTS WATCH

Sarah Beamish, second year student, University of Toronto, Faculty of Law

This past October, the Executive Director of Human Rights Watch (HRW), Ken Roth, spoke at the Munk School of Global Affairs in an event co-presented by the IHRP. I had the opportunity to sit down with Mr. Roth prior to the event to discuss his thoughts on some of the major human rights issues we face today. (All questions and answers are paraphrased).

On observers equating calls for the International Criminal Court to indict Syrian President Bashar al-Assad with regime change in Syria:

Regime change is a dirty word and suggests that foreigners are coming in and telling people how to run their government. We are calling for those who commit mass atrocities to be held criminally liable for their actions. We do not believe that you should be exempt from liability just because you happen to be a head of state. So that's how I would turn it around for those who cry regime change when you threaten to indict a head of state for his involvement in mass atrocities. What they are really saying is that a president should be able to get away with mass murder.

On the future of social media and human rights activism:

I think that so far, in most countries, the users are proliferating faster than the secret police. I think the best example of that was when Assad in Syria invited in Facebook and YouTube at the height of the Egyptian Revolution thinking that this would be his way of keeping tabs on people. It totally backfired. The place where the battle is probably drawn most tightly right now is in China, where they have massive resources to put into monitoring. But even there they are losing the battle. I think that this is the key human rights battleground at the moment, and one that I am quite confident about because it has unleashed possibilities that didn't exist before.

On the difficulty of making progress on protecting women's rights:

I think that it is difficult because many people benefit from the subordination of women. It is not by accident that the world is the way it is. Many men like being able to be in superior position. We see this fight so acutely now in some of the Middle Eastern and North African countries where there is discussion about what their new constitutions are going to look like. There is this shying away from even written, legal protections of equality and non-discrimination. This is a big battle, and I think that the key is to fight against those who claim that it is somehow inherent in a particular culture that women should be subordinate. That's just a way of dressing up male domination. If a woman wants to play a subordinate role, that's her right. But that shouldn't be imposed on her.

On security and human rights in North America post-9/11:

The immediate reaction to 9/11 was terrible in human rights terms. The Bush administration played the tough guy stuff to the hilt. Now I guess the good news is that some of the worst abuses have been curtailed. But even Obama refused to investigate the Bush tortures. It is as if Obama is suggesting that even if he doesn't believe in torture, it is still a legitimate option. That is a dangerous precedent for the world's (arguably) leading democracy to have set. Of course, Obama has been disappointing in other respects. He hasn't closed Guantanamo and he has continued the military commissions. Canada hasn't been any better. There was a time when we looked to Canada to play a leadership role on rights issues, and that hasn't been the case for several years.

On the future of human rights in the BRICS [Brazil, Russia, India, China and South Africa] countries:

In global terms, the power of the West is waning. If human rights are to be a genuinely global movement, we need to make sure that regional powers have positive human rights policies wherever they are. Brazil, India, and South Africa each theoretically abide by human rights at home, but their foreign policies are still locked in a different era as if human rights are a dirty word. I think that that provides us with an opportunity because those foreign policies tend to be set by a tiny elite without much popular input. If the human rights movement can expose those foreign policy decisions to more popular scrutiny, I think they'll get better. I think that the more these are opened up to the public domain, the harder it will be for the old dinosaurs in the foreign ministry to pretend that the G77, for instance, is a viable entity and should trump human rights values.♦

Photo credit: Kai Mörk, Wikimedia Commons

Ken Roth, Executive Director of HRW

"BENGALI MUSLIMS" OR BURMESE RESIDENTS *(Continued from page 7)*

from the issue, noting that only relevant citizenship laws be "looked into" so that those "entitled" to it be granted citizenship. Instead of advocating for policies that could alleviate the plight of the Rohingya, Suu Kyi has mostly aimed to pass the buck on the Rohingya "problem" to Bangladesh.

Burma's refusal to take any steps to alleviate the insecurities caused by their status as a stateless population has left the Rohingya largely unprotected by Burmese domestic laws. Even more troubling, state propaganda has led to the proliferation of hate, rooted in longstanding prejudice, against the Rohingya. Left without citizenship and without the rights that flow from it, the Rohingya remain stateless and continue to be denied fundamental human rights. ♦

Point-Counterpoint: Should Honour Killings Be Treated as a Distinct Category of Crime?

No, Argues Azeezah Kanji

Azeezah Kanji, third year student, University of Toronto, Faculty of Law

The high public profile of several recent Canadian cases described as "honour killings" – such as the Aqsa Parvez and Shafia murders – has stimulated discussion on whether honour killings should be considered a separate category of crime. Proponents of distinguishing honour killings from other forms of intimate gendered violence argue that crimes of "honour" are uniquely characterized by premeditation, culturally- and religiously-rooted motivation, and broad-based familial and community support. Domestic violence, on the other hand, is depicted as the result of the individual psychology of the perpetrator. However, this conceptualization of murders apparently driven by notions of "honour" as a distinct species of femicide is problematic for several inter-connected reasons.

First, the starkly dichotomous framing of "honour crimes" versus "domestic violence" (or other forms of gendered violence) denies the possibility of any similarity or common ground between the two. On the distinction between honour crimes and crimes of passion, for example, legal scholar Pascale Fournier asserts that "honour and passion are ideal-types. No single act can be taken to embody one or the other, as bruised honour often involves passionate anger and vice-versa." Murders frequently described as honour killings usually involve more than just the perpetrator's offended sense of honour: in the Aqsa Parvez case, for example, reports suggested that her father (responsible for her murder) had anger issues. Attaching the label honour killing to incidents of femicide occurring in particular minority communities fixates on the supposed cultural motivation for the murder, at the expense of analysis of the other individual, familial, and societal dynamics also implicated. Conversely, as sociologist Anna Korteweg points out, "negating the pervasiveness of honour in all forms of gender violence impairs 'our' conception of ourselves, marginalizing the importance of Western gendered violence and the many common traits it shares with honour crimes."

Second, honour killings are often interpreted as being a particularly barbaric form of gendered violence – more barbaric, somehow, than other fatal forms of gendered violence. The perceived connection of honour killings with certain communities inevitably stigmatizes the men in those communities who are thought to commit honour crimes, and, by extension, the cultures thought to be responsible for producing them. As Uma Chakravarti argues, "the violence becomes associated with the uniqueness of Asian cultures, with irrational communities and aberrant and archaic patriarchal practices refusing to modernise." This creates the impression that some cultures are exceptionally misogynistic and dangerous for women. In reality, the incidence of honour killings in Canada is extremely rare: recent figures estimate that there have been 12 or 13 so-called honour killings in Canada in the last decade. (In contrast, Statistics Canada numbers indicate that, on average, 58 women were killed per year in Canada from 2000 to 2009 as a result of spousal violence. And in that same period, 67 children aged 12 to 17 were killed by relatives.) But the use of broad culturalist explanations for honour crimes tars entire communities with the same indiscriminate brush.

Finally, the portrayal of "mainstream" domestic violence as an individual, as opposed to a cultural problem – in contradistinction to honour killing – tends to prevent recognition and scrutiny of problematic Canadian cultural norms around gender. Could the "tolerated residuum" between official legal censure of gendered violence, and continuing high rates of occurrence in Canada, be maintained in the absence of supportive cultural norms? The provocation defence provides just one particularly salient example of how culturally-laden assumptions about gender, masculinity, femininity, relationships, power, emotion, and violence are incorporated into the legal system, to partially excuse certain incidents of intimate femicide which would otherwise be classified as murder.

As American legal scholar Leti Volpp observes, the "[e]xtraterritorializing of problematic behaviour by projecting it beyond the borders of 'American values' has the effect both of equating racialized immigrant culture with sex-subordination, and denying the reality of gendered subordination prevalent in mainstream white America." Volpp's comment applies with equal force to Canada and "Canadian values". The conceptualization of domestic violence as an a-cultural phenomenon – the product of purely individual psychology – permits patriarchal/ misogynistic values prevalent in mainstream Canadian culture to remain invisible. In contrast, the culture of the perpetrators (and victims) of honour killings is made hyper-visible. Both extremes are problematic. ♦

A Conversation with Cecilia Medina, Former Judge of the Inter-American Court of Human Rights

Katherine MacDonald, second year student, University of Toronto, Faculty of Law

In September of last year, Cecilia Medina Quiroga, a member of the IHRP Advisory Board, spoke to a group of students, faculty and IHRP Board members about her experiences as judge of the Inter-American Court of Human Rights (IACtHR) from 2004 to 2009, and more generally about the Inter-American human rights system, including its evolution and political context. Medina served as president of the IACtHR from 2008 to 2009 and was the first woman to hold this office. Medina also discussed her career in international human rights law and shared her reflections on the field more generally.

Medina qualified as a lawyer in her native Chile, and soon discovered that her real vocation was in teaching and research, rather than in private practice. She taught constitutional law at the University of Chile and worked as a *Rapporteur* for the Constitutional Court until the Pinochet coup sent her and her family into exile in 973. During her time abroad, Medina completed a doctorate on the Inter-American System at the University of Utrecht. Upon her return to Chile in 990, Medina was nominated to the United Nations Human Rights Committee, where she served from 995 to 2002. She chaired the Committee from 999 to 2000.

As a former IACtHR judge, Medina acknowledges that there are problems with the Inter-American system, and in particular with the effectiveness of the Court. The context in which the IACtHR operates is highly politicized. For example, Medina joked that Venezuelan President Hugo Chávez has appeared on television to label her as CIA, while the US has portrayed her as KGB. Some criticize the Court – whose decisions in cases of human rights violations are known for their boldness – for usurping the executive and legislative functions of states subject to its jurisdiction. In addition, many cases stay open for years and it is difficult to en-

YES, ARGUES ALANA PASUT

Alana Pasut, first year student, University of Toronto, Faculty of Law

In January 2012, an Ontario jury convicted Mohammad and Hamed Shafia and Tooba Yahya of first-degree murder for the deaths of four female family members. Justice Maranger's decision, which referred to the case as stemming from a "completely twisted concept of honour," revitalized the debate in Canada surrounding honour killings and their treatment in Canadian criminal law. In the past, Canada decided not to treat crimes of honour as a distinct type of violence; these cases were treated instead as murders with no reference to the element of 'honour'. Starting in 2009, with the *Sadiqi* trial, judges began to discuss honour as a motive for murder. The *Shafia* decision and its focus on honour marked another step forward in the treatment of honour killings as a distinct form of violence. The decision is a positive development towards prevention of such crimes.

According to sociologist Anna Korteweg, honour-based violence is "a family-initiated, planned violent response to the perception that a woman, as wife or daughter, has violated the honour of her family." The concept of honour is informed by cultural customs. There has been an increase in the number of honour killings in Western countries over the past twenty years. Since 1999, there have been twelve reported honour killings in Canada. While this number is small in comparison to the number of honour-based crimes seen in the United States or the United Kingdom, it still represents an increase from the three reported incidents between 1954 and 1983. The rise in honour killings makes it crucial, now more than ever, to focus on prevention of such crimes.

Many see the *Shafia* decision as a clear message that both Canadian courts and public will not tolerate such crimes. By using honour language, the courts have recognized the existence of this motivation for violent crimes.

In addition to a strong message, there are other reasons why it is useful to view honour-based crimes as a distinct type of violence in the Canadian legal system – most importantly, for prevention purposes. Honour killings differ drastically from domestic violence. For instance, domestic violence is likely to be perpetrated by the husband or partner of the woman. It lacks the cultural pattern of honour killings, which usually consist of fathers targeting their daughters or of families participating in the violence. According to research conducted by Professor Phyllis Chesler, two-thirds of honour killings are carried out by the woman's family of origin, with the father taking part in over half of the honour crimes in North America. While both domestic violence and honour killings subordinate women, domestic violence is not a reflection of cultural values. Domestic violence cases rather focus on the individual psychological pathology of the perpetrator. To treat an honour killing in the same way would be to disregard the inherent cultural and social aspects underlying the family's desire to regulate female behaviour. Acknowledging the fact that honour crimes are unique is a necessary first step to the prevention of these crimes in Canadian society.

By not correctly identifying the unique aspects of honour crimes, the legal system fails to take this type of violence seriously. Using the language of honour in the courtroom is not enough; there needs to be prevention and protection efforts made on behalf of the potential victims. For example, the United Kingdom has created a class of police and prosecutors who specialize in preventing and prosecuting honour-based crimes. Furthermore, social-services agencies, schools, and other institutions have been put in place to help women. These measures, intended to provide accessible services for potential victims, can only exist when society admits that there is a possibility of honour-based violence. To admit this possibility, society must correctly identify honour-based violence as a distinct form of violence.

Since prosecution is the sole formal recognition of honour killing, Korteweg has argued that "Canadian criminal law makes the courtroom the only place in which the state explicitly addresses this form of violence." The problem with this approach is that the courtroom deals with the violence after the fact. In order to eliminate the need for prosecution, prevention and protection policies are required. However, in order to prevent this type of violence, it must be properly identified within the entire legal system. While separate criminal code provisions may not be necessary, a state policy recognizing the problem is warranted. In absence of such measures, Canada is failing to prevent these heinous crimes that ustice Maranger stated have "absolutely no place in any civilized society." ♦

courage states to comply with judgments.

Still, Medina remains inspiringly optimistic, citing the Court's supervision procedure that allows it to convene regular meetings in which states must explain directly to victims why they have not yet complied with decisions. Other promising remedies include measures directed at the future, as in the "Cotton Field" case where the court ordered Mexico to implement police training in a campaign to change the culture of machismo that led to impunity for systematic gender-based murders (*González and Others v. México* (2009) IACtHR).

Medina's compelling career story and candid reflections provided her audience with a fascinating perspective on a unique international legal institution. ♦

Right: Former Judge of the Inter-American Court of Human Rights, Cecilia Medina

Photo Credit: IHRP Website

HUMAN TRAFFICKING WITHIN, ACROSS AND BEYOND OUR BORDERS: CANADA'S LEGAL AND POLICY RESPONSES TO MODERN DAY SLAVERY

Jessica Millar, first year student, University of Toronto, Faculty of Law

27 million slaves exist today. That is more than double the number of slaves created throughout the entire transatlantic slave trade. Fifty percent of modern slavery's victims are children and over 70 percent are female. The trade in human beings is the third most profitable international crime after the trade in drugs and weapons: a $32 billion industry that touches every corner of the planet, including Canada. Human trafficking is a $400 million industry in Canada, with over 12,000 human beings forcibly moved across its borders each year. The majority are victims of forced prostitution, while an increasing number – about one in four – are exploited for forced labour.

Human trafficking is the process by which human beings are bought, sold and enslaved, usually through deception, kidnapping or coercion. An increasing number of Canadians participate in this crime at home and abroad, with disturbing impunity. Canada is a primary source country for sex tourists, including abusers of children as young as five years old. Canada has also become a destination country for trafficking victims, primarily from Asia and Eastern Europe. Trafficking can also include domestic victims; the average age of entry into prostitution in Canada is 13, highlighting the inseparability of forced/coerced prostitution and prostitution more generally.

Canada's Existing Legal Framework

Despite the fact that 121 countries have anti-trafficking laws on the books, very few have effective enforcement mechanisms. As part of an international effort to address this issue, Canada became a signatory to the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons* (the Palermo Protocol), which came into force in 2003 and acted as a precursor to a more focused domestic response.

Domestically, human trafficking became an offence under s. 279 of the *Canadian Criminal Code* in 2005, and is also explicitly prohibited under section 118 of the *Immigration and Refugee Protection Act* (IRPA), with a maximum penalty of life imprisonment or a fine of up to $1 million.

Since 2005, two major legal reforms significantly enhanced Canada's anti-trafficking regime, both sponsored by Manitoba MP Joy Smith, whose work has been integral to improving Canada's legal and policy framework in this space. In 2010, Parliament adopted Bill C-268, which amended the *Criminal Code* to create an offence for child trafficking, accompanied by a five year mandatory minimum sentence. In June 2012, Bill C-310 made the current human trafficking offences prosecutable in Canada even when committed abroad. The Bill also enhanced the definition of exploitation under the *Criminal Code*. These changes aligned Canada more closely with other developed countries in creating a more effective legal regime to combat human trafficking.

Domestic Policy Responses

Protection

Currently, immigration officials can provide international victims with Temporary Resident Permits for 180 days, and victims can apply for work and resident permits without the standard fees. This marks a welcome shift away from detention and deportation. Furthermore, in contrast to the US, victims do not have to testify against their perpetrators to receive this protection in Canada, and are exempt from recent changes to the Interim Federal Health Program, which limits the availability of health care for those seeking refugee status. Further positive changes, such as direct financial support for victims and victim-centered organizations (through Justice Canada's Victim's Fund), came into place under a new National Action Plan, discussed below.

There is, however, room for improvement. In 2012, a federal bill expanded the discretion of immigration officials to refuse entry to foreign nationals "at risk of exploitation", even where the applicant meets the conditions of admissibility for work or study. While this change seems well-intentioned, aiming to prevent the exploitation of such persons on Canadian soil, it may have the potential to harm those already vulnerable and victimized. In addition, the lack of clarity around the factors to be used in exercising such discretion poses some concern.

National Action Plan

In June 2012, the government launched Canada's first major policy response to human trafficking in its National Action Plan to Combat Human Trafficking, based largely on Smith's earlier report "Connecting the Dots". The plan commits $25 million over four years, and includes the overdue creation of a dedicated and integrated human trafficking law enforcement team. It also promises training for enforcement officials, aiming to improve support mechanisms for victims. The Plan further aims to enhance cooperation with both local and international partners, recognizing the crucial role of civil society, NGOs, and multiple levels of law enforcement, and provides direct mechanisms of support for victims.

While it is too early to evaluate the Plan's effectiveness, NGOs, victims groups, the RCMP and First Nations Communities have overwhelmingly supported the project. Moreover, the significant dedicated resources are encouraging, and suggest that the government is serious about its commitment in tackling the issue.

Ongoing Challenges

It remains to be seen whether the legal and policy responses discussed above will lead to improved enforcement and harm reduction. As it currently stands, exploitation numbers are rising, but conviction rates are also increasing. As of April 2012, there were 28 convictions under Canada's various human trafficking provisions. There have yet to be any convictions as a result of the changes under the recently approved federal bill on this issue.

Canada also lacks a defined strategy for targeting the demand-side of the problem. With respect to sexual exploitation, some have advocated an approach employed by Sweden, Norway and Iceland. The 'Nordic Model' recognizes the intimate link between trafficking and prostitution, highlighting the fact that even in legalized contexts, some form of sexual abuse, coercion, deception or force is involved in the vast majority of prostitution. The Nordic approach assumes prostitution and trafficking are inseparable, and therefore seeks to punish the purchasers of sex acts while protecting the victims. Under this model, purchasers are targeted by law enforcement and face large fines and/or up to six months imprisonment, as well as mandatory education pro-

(Continued on page 15)

CHILD TRAFFICKING IN THE PHILIPPINES

Christine Lee, third year student, University of Toronto, Faculty of Law

At any given time, an estimated 500,000 Filipinos are prostituted in the Philippines, with 75,000 to 100,000 being children. Roughly 3 million individuals are at high risk of being trafficked, and an estimated 400,000 to 500,000 women and children are being trafficked at any given time.

Child trafficking was first officially defined in international law in the 2000 *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("Palermo Protocol"), which supplements the *Convention against Transnational Organized Crime.* Article 3(c) defines child trafficking as "[t]he recruitment, transfer, harbouring or receipt of a child for the purpose of exploitation." The objectives of the Palermo Protocol are to prevent and combat trafficking in persons, particularly women and children; protect and assist victims of trafficking; and promote cooperation among states parties in order to meet those objectives. The Philippines ratified the Protocol in 2002.

In addition to the Palermo Protocol, there are a number of other international instruments that protect children's rights and deal with child trafficking. The *Convention on the Rights of the Child* is the main international human rights treaty that sets out the various rights that children enjoy. Currently, 193 countries are party to the Convention, including the Philippines.

As part of its attempt to curb trafficking, in 2003 the Philippine government passed its own *Anti-Trafficking in Persons Act*. The Act's definition of human trafficking is consistent with that contained in the Palermo Protocol. The Act criminally prohibits trafficking for both sexual and labour exploitation. The penalties imposed for offenders are significant. For example, an individual guilty of trafficking a person under Section 4 of the Act will face imprisonment of twenty years and a fine between approximately $24,000 and $48,000 CAD.

Despite potentially heavy penalties for individuals who are convicted, the Act has actually not been very effective in curbing trafficking. Few convictions have been obtained under the Act since it was passed in 2003. The United Nations Office on Drugs and Crimes' Global Report on Trafficking in Persons helps illuminate one of the reasons why the Act was not as effective as the government may have hoped. The Report states that in practice, "many criminal justice systems find it difficult to prove some important elements of the definition of trafficking, such as deception, abuse of vulnerability or even exploitation." The Report explains that some systems instead prosecute trafficking "through offences like pandering, slavery, child protection or even by making use of labour laws to punish clear cases of trafficking in persons for forced labour." Often, the surreptitious nature of the crime makes it difficult to prove the elements of trafficking.

An even greater issue hindering the effectiveness of the Act is that corruption continues to be rampant in the country. According to Transparency International's Corruption Perceptions Index 2012, the Philippines received a score of 34 on a scale of 0-100; 0 means a country is perceived as highly corrupt, and 100 means a country is perceived as very clean. Corruption exists on multiple levels, including at various government institutions. Smuggling and trafficking syndicates pay consular officers of different embassies for entry visas. Syndicates also pay immigration, customs and police officers to facilitate victims' departure from their country of origin and entry into their country of destination. Recruiters sponsored by employment agencies and authorized by the government are also involved in recruiting individuals who may be potentially trafficked. Corruption may aid employment agencies that conduct illegal trafficking activities in acquiring licenses. Some government officials have been found to have changed the status of a suspended employment agency's license so that the agency could remain active.

Because of corrupt practices, the *Anti-Trafficking Act* is not being enforced consistently. Hundreds of victims continue to be trafficked every day in well-known, highly visible establishments, but have never been the target of anti-trafficking law enforcement action. Furthermore, a disproportionately large number of the convictions are for sex trafficking, and only a few individuals have been convicted of labour trafficking.

At present, because the likelihood of being caught and convicted for trafficking is low while potential profits are high, people have incentives to engage in the practice. Various steps need to be taken to discourage trafficking. Firstly, the government must improve the efficiency of the judicial system so that judges hear more cases and convict more individuals who are guilty of trafficking. Furthermore, education can help to reduce trafficking by involving the public in reporting individuals who engage in trafficking. Education will also help foster a culture that values honesty and integrity. Educational programs should also extend to government officials, judges and other groups who are directly responsible for promoting and administering justice. Although progress is being made to curb trafficking, more needs to be done to save children from this kind of egregious exploitation. ♦

HUMAN TRAFFICKING WITHIN, ACROSS AND BEYOND OUR BORDERS

(Continued from page 14)

grams. According to the estimates of Sweden's national human trafficking unit, the overall number of women being sold for sex in the country dropped by 40 percent between 1999 and 2003.

This debate over potential legal responses warrants increased attention from Canadians, and the legal community in particular. One can only hope that the community will become increasingly aware of the mass exploitation happening within, across and beyond our borders, and will strengthen its contribution towards shaping Canada's changing anti-trafficking regime. ♦

UPDATE ON THE HUMAN RIGHTS SITUATION IN SOUTH SUDAN

Stephanie Freel, second year Masters student, University of Toronto, Munk School of Global Affairs

Man carrying the South Sudanese flag on July 9, 2011, the day South Sudan gained independence.

Photo Credit: babasteve, Creative Commons

Following Sudanese independence from British and Egyptian rule in 1956, southern Sudanese leaders swiftly accused Khartoum of failing to create a representative political system. As such, the years following independence bore unrelenting violence. On July 9, 2011, the Republic of South Sudan gained independence from its northern counterpart, the Republic of Sudan, through an overwhelming majority referendum: 98 percent of South Sudanese voted in favour of separation. The referendum formed part of the 2005 Comprehensive Peace Agreement, which marked the end of a half century-long civil war between North and South Sudan.

Despite state autonomy, South Sudan remains fraught with ongoing territorial disputes, inter-communal violence, and human rights abuses. This article provides a window into the current situation in South Sudan by assessing the ongoing inter- and intra-state conflicts.

Since the independence of South Sudan, a myriad of conflicts with the North remain unresolved. These tensions relate to the financial division of oil proceeds, border demarcations, territorial claims over the oil-rich region of Abyei, citizenship rights, and political bolstering of rebel groups. Under the Comprehensive Peace Agreement, oil revenues were equally divided between the South (where an estimated 75% of oil reserves are located) and the North (which possesses oil refineries and the pipeline to the Red Sea). The independence of South Sudan marked the end of this revenue sharing agreement – an economic nightmare for South Sudan, given that 98 percent of its Gross Domestic Product relies on petroleum proceeds. The ongoing stalemate on oil talks resulted in South Sudanese military occupation of Abyei in early 2012, bringing oil production to a complete standstill. South Sudan soon encountered a cascade of violence in border regions and a rapidly plummeting economy, with inflation rates reaching 80 percent.

Amidst this inter-state conflict, both promising and worrying political developments have taken place. For instance, the recent withdrawal of South Sudanese military troops from the border region represents a promising step forward in negotiations between Sudan and South Sudan. On the other hand, legislation regarding oil-rich Abyei remains unresolved. In January 2013, South Sudan rejected joint governance with the Republic of Sudan over the region, which would split seats equally in the Joint Abyei Area Legislative Council (AJOC). Grim negotiation prospects have led to calls for international assistance in the process.

(Continued on page 36)

RIGHTS AND DEMOCRACY FLOUNDER IN POST-CONFLICT SRI LANKA

Simon Capobianco, Researcher with R2P, University of Toronto, Munk School of Global Affairs

Four years after the end of the 26-year Sri Lankan civil war, the discrimination and human rights abuses that gave rise to the Tamil secessionist struggle continue apace, stoking fears of renewed violence. The Colombo government's decision to renege upon its promise of limited autonomy for Tamil provinces is quashing hopes for a political solution to the long-standing tensions between Tamils and the majority Sinhalese population, leading some to fear a return to violence in the country.

In the north, traditionally a Tamil area, long-tenured government 'Sinhalization' programs have resumed in the wake of the Tamil Tigers' military defeat. The International Crisis Group (ICG) observes that the Sinhalization of primarily Tamil-dominated areas of the country is intended "to change the 'facts on the ground'... and make it impossible to claim the north as a Tamil majority area deserving of self-governance." This policy, combined with the economic marginalization of Tamils, and the obstruction of provincial elections which, according to the ICG, the Tamil National Alliance "would be nearly certain to win" in the north, are quickly eroding Tamils' hopes of realizing the modest devolution of power agreed to by the government.

Such political disempowerment, combined with the inexorability of Sinhalization is undermining the influence of Tamil moderates, and rekindling the flames of secessionism. "The de facto military occupation of the northern province and biased economic development policies", the ICG warns, confirm Tamil beliefs that it was only the guns of the Liberation Tigers of Tamil Eelam (aka the 'Tamal Tigers') that placed their concerns on the national agenda.

Democracy and civil rights are also under attack in Sri Lanka. The highly suspect impeachment of the Chief Justice of the Supreme Court in January 2013, combined with anti-judiciary propaganda in the state media, and an assault by armed thugs on a judge who criticized the government's curtailment of the rule of law, have undermined the independence of a judiciary long considered deferential to the executive. The ICG notes that the charges against Chief Justice Bandaranayake abound with "factual errors, unclear writing, and ambiguous allegations" and coincide suspiciously with her rejection of legislation consolidating yet more authority in the powerful political family dynasty under President Rajapaksa.

Freedom of speech, likewise, is under attack by Colombo. After the United Nations Human Rights Council issued a resolution in March 2012 calling on Sri Lanka to investigate allegations of war crimes committed by both sides during the war, the government clamped down on dissent. Amnesty International notes that government officials and state-run media "lashed out at human rights activists," and that the Public Relations Minister called them "traitors" and "threatened [...] physical harm." Indeed, threats against dissidents by government officials are nothing new in Sri Lanka. In June 2010, Minister Wimal Weerawansa encouraged locals to protest against the UN until a panel investigating Colombo's alleged war crimes was dissolved; the protest trapped UN employees in their offices and led Secretary-General Ban Ki Moon to temporarily withdraw the UN envoy to the country. The situation is deteriorating rapidly: in November 2012, Amnesty reported that "[t]he crackdown on dissent ha[d] extended to lawyers and members of the judiciary who speak out against abuses of power."

Sri Lanka's government is coming increasingly under the domination of the Rajapaksa family. President Mahinda Rajapaksa's two brothers are also cabinet ministers; Gotabaya Rajapaksa is Defence Secretary and Basil Rajapaksa is Minister of Economic Development. Moreover, the internationally-condemned 18th Amendment to the constitution, passed in 2010 by the Rajapaksa-dominated parliament, eliminated presidential term limits, gave the president legal immunity, and invested him with sweeping new powers, including the authority to appoint The Election Commission, the Finance Commission, the National Police Commission, the Auditor General, all members of the Supreme Court, and the Attorney General. The ICG has described the 18th amendment as a "constitutional coup", which, with the impeachment of Chief Justice Bandaranayake, is now complete.

As the government trends towards autocracy, human rights continue to retrogress. Amnesty describes a "climate of fear" and a "culture of impunity" in which citizens are detained without charge, and claims that it has received reports of prisoners being subjected to gross mistreatment in custody. "The government continues to stifle dissent through threats and harassment" notes Amnesty, which says that it "continues to receive reports of torture and resultant deaths in custody, enforced disappearances and extrajudicial executions."

While Amnesty has warned that "Sri Lanka's promises on human rights should no longer be accepted by the international community", this advice appears to have gone largely unheeded. The World Bank announced its "Partnership Strategy for Sri Lanka" weeks after the cautionary Fall 2012 Amnesty report, although it did mention that the road ahead would require significant policy changes and a commitment to peace and security by the nation. Canada continues to trade with Sri Lanka, conducting over a billion dollars of trade with the country since 2010, and also provides development assistance via the Canadian International Development Agency (CIDA). Unless international loans and development aid are made conditional upon sustained improvement in human rights and democracy, there is little reason to believe that the situation in Sri Lanka will cease to degenerate.

Photo Credit: Shaveen Bandaranayake Wikimedia Commons

43rd and first female Chief Justice of Sri Lanka, Hon. Dr. Shirani A Bandaranayake

Editor's Note: Canadian Members of Parliament are currently debating whether Canada should send a delegation to the next Commonwealth Heads of Government meeting, scheduled to be held in Sri Lanka in November; Prime Minister Harper has announced that Canada will not attend unless real progress is made towards addressing Sri Lankan impunity for rights violations. At a recent public forum held at the Law Society of Upper Canada, MPs from across Toronto debated whether Canada should in fact send a delegation to the meeting, or whether it should rather lobby for the location of the meeting to be changed. While Canada does continue to trade with Sri Lanka, the trade numbers are minimal when compared with that with other trading partners. At the forum, MPs made clear that the strongest motivation for Canada playing a role in Sri Lanka was not trade but rather the large Tamil diaspora community based in Canada. ♦

SEXUAL VIOLENCE IN THE RECENT CONFLICTS IN LIBYA & SYRIA

CANADA'S WAR CRIMES PROGRAM: AN AVENUE FOR ACCOUNTABILITY

Sylvie McCallum-Rougerie, third year student, University of Toronto, Faculty of Law

At the IHRP's recent conference on "Sexual Violence in the Recent Conflicts in Libya & Syria", prosecutor Robert Petit addressed accountability for sexual violence in those countries under Canadian law. Mr. Petit is currently counsel with the War Crimes Prosecutions Unit at the Department of Justice (Canada); he previously served as the UN international Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia and in senior legal roles at several other war crimes tribunals around the world.

Canada's War Crimes Program was created in the 1980s, after a report on the presence of Nazi war criminals in Canada sparked public outcry. In the years since, the Program has been tasked with ensuring that Canada does not become a safe haven for individuals who have committed grave international crimes. This goal is achieved through a mix of criminal prosecutions and civil remedies, including revocation of citizenship and deportation.

In his presentation, Mr. Petit spoke about recent successes of the Program. Since the passage of the *Crimes Against Humanity and War Crimes Act* (War Crimes Act) in 2000, two men of Rwandan origin living in Canada have been prosecuted for crimes committed during the 1994 Rwandan genocide. The first case, *R v Munyaneza*, led to convictions on multiple counts of genocide, crimes against humanity and war crimes. The case is now on appeal in Quebec. In the second case, *R v Mungwarere*, the accused was charged with genocide and crimes against humanity; judgment is pending before the Ontario Superior Court.

Mr. Petit was unable to disclose whether the Program has begun to investigate any individuals suspected of committing crimes in Libya or Syria. Though most cases end up being filtered through Canada's immigration and refugee system, the first such criminal case under Canada's new War Crimes Act set a strong precedent, at least at the trial level. With respect to sexualized violence, in particular, the *Munyaneza* decision followed international and domestic jurisprudence in recognizing rape and sexual violence as possible underlying acts for genocide, crimes against humanity and war crimes. Mr. Munyaneza's convictions rested in part on allegations of sexual violence.

Despite these successes, pursuing accountability in Canada for crimes committed abroad is challenging. Evidentiary issues affect the entire process, from the investigative stage to the eventual admission of the evidence in a Canadian courtroom. Language barriers, time lapses, and security concerns surrounding witnesses can all affect the Program's ability to build its case. The conflict of Canadian rules of evidence with the laws and practices of other jurisdictions is a further obstacle which may impede the process.

In light of these hurdles, a central question is whether Canada should pursue these types of prosecutions at all. Mr. Petit emphasized his personal belief in the importance of survivors seeing justice done. Whether justice for victims can be achieved in "home state" however, is debatable. Indeed, Canada's focus on deportation as a substitute for prosecution has been criticized by human rights advocates, who argue that criminals might not be held accountable in their home state, or might be subjected to an unfair or illegitimate judicial process. The violent conflicts in Libya and Syria make such questions about Canada's role particularly potent and relevant to both the conference attendees and Canadian society at large. ♦

On February 8, 2013, human rights defenders, leading academics, and policy makers from the region and around the world came together during the IHRP Conference, *Sexual Violence in the Recent Conflicts in Libya & Syria: Challenges to Protecting Victims & Pursuing Accountability.*

GENDERING THE ARAB SPRING: THE CHALLENGE OF PROSECUTING WARTIME RAPE UNDER LIBYAN TRANSITIONAL JUSTICE, *AN INTERVIEW WITH DR. HILMI ZAWATI*

Aron Zaltz, first year student, University of Toronto, Faculty of Law

As part of the IHRP's recent conference, entitled "Sexual Violence in the Recent Conflicts in Libya and Syria," Dr. Hilmi Zawati presented on the challenges under Libya's transitional justice system of pursuing accountability for wartime rape, and of protecting survivors of such crimes. Dr. Zawati is an international criminal law jurist and human rights advocate. He also currently sits as president of the International Legal Advocacy Forum (ILAF).

In his talk, Dr. Zawati discussed how the current impunity for perpetrators of gender-based crimes in Libya is compounded by a lack of stable democratic institutions and lack of security. He also spoke to the urgent need for reform of Libya's justice system. He suggested that implementing a hybrid system coordinating international and domestic justice actors could advance restorative justice by strengthening the rule of law and legal accountability. I spoke with Dr. Zawati to discuss the challenges of pursuing accountability for sexual violence in international and domestic criminal law.

Q: In recent years, major international legal instruments have been introduced, explicitly calling for the cessation of all forms of sexual violence by all parties to global armed conflict. How would you evaluate their implementation?

Legally speaking, rape was never considered or prosecuted as a crime against humanity under international humanitarian law before the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, respectively. Recently, the United Nations Security Council has realized that wartime rape needs to be addressed, and has adopted a number of resolutions, including 1325, 1820, 1888, and 1889, calling on all parties to armed conflicts to take special measures to protect women and girls from gender-based violence. Indeed, Resolution 1820 has classified rape, for the first time, as a tactic of war and a threat to international peace and security.

Despite the above statutory norms, the use of rape and other forms of sexual violence has been increasing in recent civil and transnational armed conflicts, due to several factors: poor implementation of the above laws, the abstractness of the statutory laws of the international criminal tribunals and courts, and the fact that politics overrides justice in many cases. A case in point is the failure of the Security Council to take decisive action to stop the civil war in Syria and refer the case to the International Criminal Court (ICC) under Chapter VII of the UN Charter.

Q: What have been the major challenges for supranational prosecutions in enforcing international criminal law statutes against wartime gender-based crimes?

In the last two decades or so, the international criminal justice system has achieved great progress through the recognition of several overlooked gender-based crimes and by the establishment of a number of international criminal judicial bodies. Yet, despite the incredible legal achievements and developments in the *ad hoc* tribunals and gender-specific jurisprudence, these judicial bodies have continuously failed to respond adequately to gender-based crimes committed since the armed conflicts of the 1990s in the former Yugoslavia, Rwanda, and Sierra Leone. The abstractness and lack of accurate description of gender-based crimes in the statutory laws of the international criminal tribunals and courts infringe the principle of fair labeling, leading to inconsistent verdicts and punishments. For example, though approximately 30% of the charges brought before the ICTR included rape and other forms of sexual violence, two thirds have been acquitted due to the failure of the Prosecutor to provide evidence beyond a reasonable doubt, or the withdrawal of rape or sexual violence charges from the original indictments.

Hilmi Zawati, D.C.L, Ph.D

Photo Credit: Edwin Mellen Press

However, the incorporation of the gender-based crimes listed in the *Rome Statute* [the statute which brought the ICC into force] into domestic criminal codes will help in bringing perpetrators to justice by ending the culture of impunity at the state level. Although the *Rome Statute* does not include a provision that explicitly requests [States Parties] to include international crimes [crimes against humanity, war crimes, and genocide] in their domestic criminal law, it recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. ♦

For more on the Libya/Syria Conference, including media coverage and interviews with the panelists, visit us at :

http://ihrp.law.utoronto.ca/events/sexual-violence-recent-conflicts-libya-syria

Speaking Women's Truths in Kenya: An Interview with Patricia Nyaundi of the Kenyan Truth and Reconciliation Commission

Meghan Lindo, third year student, University of Toronto, Faculty of Law

On November 21, 2012, Patricia Nyaundi stood in front of a crowded auditorium and delivered her lecture "Same Song, Different Notes: Opening Truth Commissions to Women's Truths" on Kenya's Truth, Justice and Reconciliation Commission (TJRC). Later, she shared her thoughts on women's rights, national reconciliation and human rights advocacy with *Rights Review*.

Nyaundi is a lawyer and a human rights advocate with a distinguished career. She studied law at the University of Nairobi and obtained a Master of Laws from the University of Cape Town. Among her many work experiences, Nyaundi co-founded a children's legal aid centre in Western Kenya and acted as Executive Director at the Federation of Women Lawyers Kenya, a national women's rights and legal aid organization with a strong presence across East Africa.

Nyaundi is also on the advisory committee of The Equality Effect, an organization of Canadian and African human rights advocates working to improve the lives of women and girls. I first met Nyaundi as an IHRP intern while working with The Equality Effect on a project called *160 Girls*, where the organization filed a constitutional challenge against the Kenyan government for its failure to enforce laws against child rape.

Nyaundi is a wonderful storyteller. She began her lecture with the events of 1963 – Kenyan independence – and spoke of Kenyans' great expectations for a brighter future. It was a triumph of freedom and rights for Africans, they said. The new Kenyan flag was a symbol of their achievements: the colour black represented the black majority; red represented the sacrifice made to gain independence; and green represented the fruits of independence. The shield signaled that Kenyans would guard their independence fiercely.

According to Nyaundi, after celebration came disappointment. In 1963, Kenyan independence meant freedom and rights for men, not women. However, women continued to struggle for equal rights. Often, their efforts were met with a familiar refrain, says Nyaundi: "We are Africans. Those rights are not consistent with our culture." In spite of adversity, many Kenyan women forged on to become, like Nyaundi, powerful advocates for change.

In 2007, Kenya broke into fatal violence following disputed national election results. The conflict became an outlet for pent-up frustrations related to inequality and misgovernance. It was also the impetus for the drafting of a new constitution. This was a chance to re-design the country and, for Nyaundi and her colleagues, to ensure that women were part of that design. Nyaundi approached the task from a non-traditional perspective: she became Chief Executive Officer of the TJRC.

The TJRC was established in the wake of the 2007 elections violence, and was mandated to generate a complete and accurate record of historical injustices dating back to independence. The process was intended to contribute to national unity and healing. For the record to be complete and accurate, Nyaundi explained, it must document women's experiences. Women's issues, she said, exist not only as between the state and the individual, but also between individuals, in both the public and private spheres. Thus, the record will include stories of issues such as domestic violence and the inequality of the law on women's rights to inherit property.

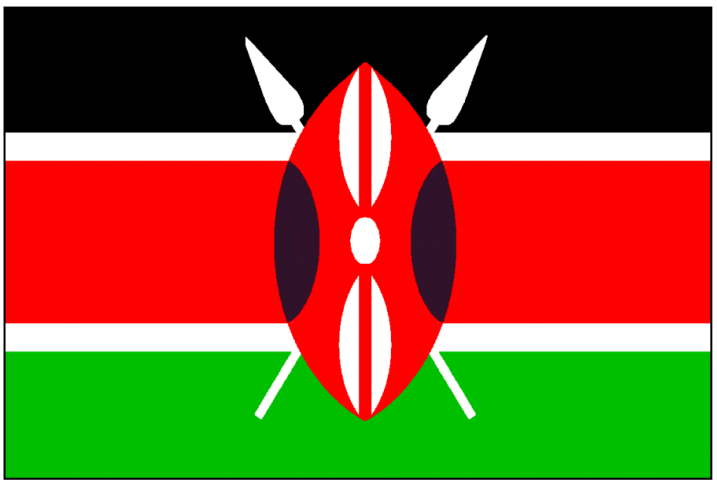
The key question for many is how the TJRC process will help to secure women's equality under the new constitution.

For Nyaundi, it all comes back to independence. Consider the Kenyan flag: black to represent the majority; red to represent the sacrifice; and, green to represent the fruits of independence. According to Nyaundi, telling women's stories at the TJRC is a public acknowledgement of women's sacrifice. It is recognition that women form at least half of the population. Telling these stories will help to facilitate change so that women may also enjoy the fruits of independence – the freedom and rights that Kenyans fought hard to secure. From a feminist perspective, these "fruits" take on a different character. Freedom, for example, includes both the freedom to make choices as well as freedom from violence, to be enjoyed in both public and private spheres.

According to Nyaundi, the TJRC is effectively re-writing Kenya's history. However, this time around, women will play a leading role. For Nyaundi personally, her work will continue in her new role on the Kenyan Human Rights Commission.

Nyaundi advises aspiring human rights advocates to take the long-term view. "Human rights – it's not easy, but it is the right place to be. There are rarely any immediate or tangible results because it is difficult to count your successes in terms of courtroom wins or dollar signs," says Nyaundi. "Now, we can look back and ask, is this the same country? If we were able to achieve this much in the last 50 years, what will Kenya look like 50 years from now?"

♦



The Kenyan flag is a symbol of Kenya's hard-won independence. Patricia Nyaundi believes that the Truth Justice and Reconciliation Commission's work will ensure that women receive recognition for their part in Kenya's history and enable women to benefit equally, but differently, from the fruits of independence. Photo Credit: Wikimedia

AN INTERVIEW WITH ALUMNUS AND THE NEXT ICC DEPUTY PROSECUTOR JAMES STEWART

Drew Beesley and Paloma van Groll, first year students, University of Toronto, Faculty of Law

James Kirkpatrick Stewart, an alumnus of the University of Toronto Faculty of Law (LLB 1975), was recently elected as the Deputy Prosecutor of the International Criminal Court (ICC). Prior to this position, Stewart worked in Toronto as General Counsel in the Crown Law Office – Criminal within the Ministry of the Attorney General. He has also served in senior legal roles at various UN tribunals, including positions in the Office of the Prosecutor at both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). He sat down with us after speaking at the Faculty about some of the main challenges facing the ICC today.

Q: What cases from your career stand out for you?

I prosecuted [violent cult leader] Roch "Moïse" Thériault. That was an interesting case from the point of view of the witnesses, people who had escaped from his cult community. Early on I was involved in a prosecution charging the Church of Scientology and a few of its members. We argued every legal aspect of the case that you could imagine, from composition of the jury, to the way in which police carried out search of premises, [to] corporate criminal responsibility.

At the ICTR, I think the one that really stands out in my mind is *Karamera*, an interlocutory appeal. We were able to convince the Appeals Chamber that the Trial Chambers should be required to take judicial notice of the fact of the genocide in Rwanda in 1994. Up until then, the prosecution teams had to prove that genocide occurred in every case.

Q: What personal challenges go along with your line of work?

Certainly, you have to be disciplined in keeping a professional distance from what happened, while at the same time engaging in an empathetic way with your witnesses. Factually, you're going to be dealing with pretty awful circumstances, which can affect you without you even realizing it. It can creep into you. That's something you have to watch out for.

You really have to have a sense of adventure, of wanting to live in different places and to engage with different people. You have to have flexibility of mind. If you come into it thinking, "it's the Canadian way or the highway", you're going to have a hard time because everybody has their own background, their own approach.

It can also be very costly to those around you if you suddenly leave and go off to do this work. That's the great downside; you are now distant from people you love dearly and can't be around. That's another loss that can occur.

Q: How do you deal with witness protection in an international criminal law (ICL) context?

The general rule is to disrupt the person's life as little as possible, but sometimes you have to take them out [of their community]. In Rwanda, we had a witness who testified, and subtle things, like people throwing a stone on his roof, was a signal to him and he got very worried. There, we moved him to another community. That's why delay doesn't serve the prosecution because the sooner you can get them to the witness box the better. Even after that, you have to consider after-care; you can't just drop them when you're done. Witness protection is a big issue in these cases.

Q: What other challenges does a prosecutor face in the field of ICL?

Evidence management and efficiency of your presentation is important. There has to be enough context for there to be [common] understanding. In the Rwanda tribunal, we used a lot of video material to show what Kigali was [actually] like at the time.

A picture is really worth a thousand words. Witnesses would talk about barriers on the streets, and you think one thing, yet it would just be a trunk of a tree; but if you looked at the people around there with their machetes and guns, you realized it was a scene from Dante's *Inferno*. It must have been absolutely terrifying to be in that environment. You wouldn't have gotten a real sense of that without the videotaped material. It made what the witnesses talked about fall into place. That kind of context

(Continued on page 24)

INTERVIEW WITH ALUMNUS COLONEL MICHAEL GIBSON

(Continued from page 3)

this, the JAG would develop a policy position on the key issues and the legal officers in JAG would get involved in the process of producing legislation. As Deputy JAG I would often appear before Parliamentary Committees in support of the Bill, helping Parliament to understand the Bill and the implications of the changes proposed. This is actually one of my favourite parts of my job, as I am participating in the creation of law.

Q: What do you think is a good route for law students who are interested in ending up where you are today?

These days, the Canadian Forces would never deploy on a major peacekeeping operation or a UN Chapter VII mission without a legal officer. So there is always going to be an interesting role for lawyers in our military. First, I would recommend that students take a look at our Office of the JAG website, or approach a Canadian Forces Recruiting Centre. It is not an absolute pre-requisite that a lawyer practice before applying to join, though it would enhance their application. Another option is to apply for an articling position with JAG. This will give a student exposure to the diverse areas of practice we engage in. Students that join later as lawyers will be sent on the Basic Officers Training Course and enter the system with the rank of Captain. Further language training may be required, and they may be posted to Ottawa, any of the bases scattered across Canada, or internationally.

Interested students should consider the following maxim: "In the military, you can ask for whatever you want, and you can go wherever you're told to". This job calls for great flexibility and adaptability, but it pays off because it's so fascinating. The motto of the Legal Branch is "*Fiat Justitia*": let justice be done. We take this very seriously, and it is a tremendously rewarding feeling to serve Canada.

Colonel Michael Gibson joined the Canadian Forces in 1980 and he flew as an Air Navigator. Later, he transitioned to the role of Legal Officer after earning his LLB from U of T, as well as an MSc in International Relations and an LLM from the London School of Economics. Since then, Colonel Gibson has served as a legal advisor in numerous operational deployments internationally, including in Bosnia, Turkey, and the Democratic Republic of the Congo. ♦

The IHRP working groups are an important means of providing experiential learning opportunities for students, cultivating student leadership, and providing legal expertise to civil society, outside of the formal clinical setting. Working Groups are led by upper year J.D., LL.M., or S.J.D students.

Celebrating the Women's Human Rights Resources (WHRR) database: An Interview with Prof. Rebecca Cook

Kiran Arora & Sheena Lessard, second year students, University of Toronto, Faculty of Law

The Women's Human Rights Resources (WHRR) database is a catalogue of annotated resources relating to women's rights in a range of contexts, from armed conflict to reproductive rights to migration. The WHRR database, created in 1995 by U of T's internationally-recognized women's rights scholar Professor Rebecca Cook, receives an extremely impressive 15,000 hits per month, with users from over 100 countries. For the past two years, the IHRP has had a student Working Group tasked with maintaining the excellence of this resource.

We had an opportunity to speak with Professor Cook about her experience in creating what has become a crucial tool for human rights defenders around the world.

Photo Credit: Daniel Wilkinson (U.S. Departmentof State), Wikimedia Commons

The WHRR Database provides access to human rights resources to women all over the world.

Q: What inspired you to create this database?

I have always been interested in helping others by exploring effective ways of making knowledge more universal. My interest emerged early on as a child who contracted polio the year before the polio vaccine came out. In addition, I grew up on a farm where my mother, the farm manager, was always trying to apply the research of a nearby agricultural research station to grow better vegetables. When I started working in the 1980s on international women's rights, I put together a bibliography of existing publications in the field, and it was only a page.

Q: How did you go from idea to fruition? What challenges did you face?

Soon after I joined the Law Faculty at the University of Toronto, I started talking with Ann Rae, the law librarian at that time, and her staff, especially Susan Barker, who maintains the project to this day. We worked to devise ways to improve access to existing publications on international women's rights beyond the academy. They had the information management skills and I had the substantive knowledge, so we formed a rewarding partnership to ensure wider access to key articles on international women's rights through the internet.

Q: Do you consider the database to be a success?

An indicator of its success is how many abstract views and downloads there are from the WHRR website. I am always staggered when Susan Barker tells me the latest statistics.

Another way of determining the success of WHRR is how much it has stimulated others to do even better research. Once people understand what scholarship exists with the help of the WHRR website, they have a better sense of what else is needed to grow the field. Of course, this is hard to measure, but I am hopeful that WHRR assists people to do a better mapping of this field.

Q: How would like to see the database expand or evolve in the future?

I am so pleased that under the leadership of Renu Mandhane, Susan Barker and the Working Group on International Women's Rights, this project has been resurrected. Going forward, a challenge is how can WHRR keep this project manageable, knowing that resources are limited and given that the scholarship now fills considerably more than the one page and is growing. I am confident that the students in the Working Group, under the able guidance of Susan Barker, will find a way to ensure this project is manageable, and therefore sustainable.

Q: What has been the most interesting outcome of this project for you?

Meeting people in different parts of the world who explain that, but for WHRR, they would have never had access to key articles on international women's rights, and how much it helped them in their work. ♦

YEAR IN REVIEW: THE IHRP'S SEXUAL ORIENTATION AND GENDER IDENTITY WORKING GROUP

Hayley Ha, second year student, University of Toronto, Faculty of Law

This year, the International Human Rights Program's Sexual Orientation and Gender Identity (SOGI) working group has been working on the creation of a free online database of domestic legislation from different countries, focusing on protective and positive laws on sexual orientation and gender identity. This new project has been facilitated by a partnership with the Geneva-based International Commission of Jurists (ICJ), and will be launched on HURIDOCS, a global network for human rights information and documentation exchange.

In previous years, SOGI had worked on producing "country conditions" reports to catalogue discrimination or criminalization on the basis of sexual orientation or gender identity as reflected in legislation, case law, state practice, and the general media. In contrast, the new database on Huridocs will focus on positive domestic legislation that protects LGBT individuals. This free, comprehensive and searchable database will respond to the largely unmet needs of human rights activists and policy makers worldwide, by assisting researchers in identifying positive precedents for legislative reform across different countries.

A group of ten first-year students, led by two upper-year student leaders, Azeezah Kanji (3L) and Hayley Ha (2L), have been working on compiling reports on legislation in countries such as Canada, Germany, Spain, Chile, Japan, Australia and Botswana, among others. The countries were drawn from different continents and are at various stages of legislative reform. Each student was responsible for canvassing the statutory landscape for LGBT rights-protective legislation in their assigned country. Once compiled, the reports are expected to provide valuable insight into the development of positive laws on sexual orientation and gender identity all over the world. Each report consists of a summary of relevant legislation in the country, such as legislation on gender change recognition, non-discrimination, same-sex parenting and adoption, military service, refugee protection, immigration for same-sex partners, and same-sex marriage or civil union. Students have also worked on obtaining full texts of actual legislation, even translating the legislation themselves, if language proficiency permits. Through this project, students gained exposure to comparative legal research, LGBT advocacy, and international human rights law. By surveying expansive statutory materials and disseminating key passages, students have learned critical research and analysis skills.

Under the guidance of Allison Jernow, senior legal advisor of the Sexual Orientation and Gender Identity project at the ICJ, and IHRP Director Renu Mandhane, the first group of reports is expected to be made available on HURIDOCS in 2013. ♦

YEAR IN REVIEW: THE IHRP'S INTERNATIONAL HUMANITARIAN LAW WORKING GROUP

James Rendell and Leah Sherriff , first year students, University of Toronto, Faculty of Law

The rules and norms of International Humanitarian Law ("IHL") are complex and derive from a number of different sources. Strengthening awareness of IHL and making the literature more accessible is an essential step to ensuring that IHL and the international legal community deliver on their promise of protecting vulnerable civilians and limiting the impacts of war on humanity. In light of these challenges, this year the IHRP established a working group focused on the study of IHL. Under the direction of third year student Rebecca Sutton, the group is partnering with the International Committee of the Red Cross ("ICRC") Library in Geneva, Switzerland to provide summaries of academic articles that address a variety of topics in the field of IHL.

The IHRP working group has been privileged to work with the ICRC, a historic and influential leader in the field of IHL. The ICRC and its Library were officially founded in 1864 with the ratification of the *First Geneva Convention*. Since that time, the organization has played a major role in the development of IHL, functioning as an independent and neutral organization to ensure humanitarian protection and assistance for victims of armed conflict.

The ICRC started the Library with the aims of gathering and conserving an exhaustive collection of the documents published at the ICRC headquarters, as well as making public material from other sources available for those working in the field. The Library's founders further hoped that it could serve as a tool to raise the profile of the ICRC, its work, and IHL more broadly.

Today, while the Library's objectives remain much the same, the number of documents managed by the staff total more than 30,000. These volumes are divided into several collections, including the "Historical Collection", a fascinating collection of works published between the founding of the Red Cross in 1863 up until the end of World War I. Its contents include the minutes of the first Red Cross Conference, publications by the ICRC's founders, and the very first international law treaties.

The efforts of the IHRP working group on IHL directly support the continued growth of the ICRC Library's "Current Collection", which includes books, magazines, and journals published since the end of World War I. As new materials are acquired by the Library, the working group creates abstracts of the articles so that patrons accessing the online catalogue can retrieve relevant results to support their research. This assistance is critical to the efficient functioning of the Library, which in 2011 responded to more than 3,500 requests for documents worldwide and welcomed 2,700 visitors.

Members of the public are keen to access the information held by the ICRC. For example, to this day, the ICRC Library and Public Archives Division receives requests for specific information regarding the men and women who participated in both World Wars. In 2011 alone, the division received 2,856 requests and replied to another 4,034 requests for official documents, such as attestations of captivity from both the victims of detention and their next-of-kin.

The Library also offers a quarterly publication called the IHL Bibliography. The Bibliography contains English and French references to a variety of IHL subjects. Many of the articles referenced have accompanying abstracts, some of which will be written by the IHRP working group.

Very few of the working group members have had any previous exposure to IHL, which means that generating these summaries has often required additional research from the student to comprehend and coherently synthesize the arguments of the publication's author. Although the work has at times been very challenging, the working group members are developing an excellent foundation for further study in IHL, which many hope to put to good use this summer while undertaking various IHRP internships. ♦

Flagging Human Rights and Environmental Standards in Investment Disputes: The Role of the *Amicus*

Ben Miller, second year student, University of Toronto, Faculty of Law

The IHRP has partnered this year with the Center for International Environmental Law (CIEL) – a Washington, D.C.-based NGO – to publish an instructional guide for public interest groups whose interests are affected by decisions of the International Centre for the Settlement of Investment Disputes (or ICSID). ICSID, a leading investor-state arbitration institution, is one of a number of arbitration institutions that adjudicate disputes arising out of international investment treaties. The guide is intended to assist public interest groups to intervene in such cases as *amicus curiae*.

While *amicus curiae* intervention has the potential to help shape international investment norms, many public interest organizations are unfamiliar with ICSID and institutions like it. Additionally, these organizations often lack the resources to obtain legal advice on whether applying to intervene would be an effective means of bringing their concerns to light. The IHRP-CIEL guide will walk potential *amici curiae* through the process of intervention, explaining to them what to expect, and how to maximize the effect of their involvement.

The field of investor-state arbitration is controversial, and is growing with the proliferation of international investment treaties. These treaties guarantee investors a certain standard of treatment in host countries. When an investor believes that its rights under these treaties have been violated, it can bring a claim against the host state before an arbitration institution, such as ICSID. These claims are regulated under a number of different arbitration regimes, including the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, the convention which created ICSID.

In many cases, states' obligations under investment treaties can conflict with their obligations to respect human rights and environmental standards. However, because institutions like ICSID are specialized arbitration venues, public interest law often takes a back seat to investment law in their decisions. As a result, a growing number of scholars, public interest groups, and even investment law practitioners are calling for increased attention to human rights and environmental issues in the resolution of investment disputes.

Amicus curiae intervention has emerged as one way to bring to light the human rights and environmental issues inherent in many investment disputes. Under certain circumstances, ICSID rules allow public interest groups to file written submissions explaining the public interest at stake in the dispute. CIEL is one of the leading organizations regularly participating in investment disputes to bring these concerns to investor-state law. CIEL has submitted *amicus* briefs in seminal cases like *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v The Argentine Republic,* the first ICSID case to accept a submission from a non-disputing party. In that case, a dispute over privatized utilities in Argentina had the potential to affect water distribution and sewage services for millions of people in the Buenos Aires area, raising human rights and public interest concerns.

Bringing human rights and environmental concerns into investment arbitration may be a challenging process, and is likely to face resistance in a number of forms. *Amicus* participation can create significant costs for investors and states in the form of added administrative and legal fees, making the process unattractive for the disputing parties who pay for ICSID arbitration. Additionally, some might argue that neither investors nor states necessarily have an interest in upholding human rights and environmental standards. However, the hope is that over time, the contributions of *amici* may help to build human rights norms into international investment jurisprudence.

With the IHRP-CIEL guide, we hope to encourage more NGOs and civil society groups to turn their attention to investor-state tribunals as a potential forum for raising human rights and environmental concerns, as well as to assist these groups in maximizing the effect of their efforts.

Benjamin Miller (2L), Jennifer Liu (2L), Jenny Yoo (3L) and Ramin Wright (2L) are involved in researching and drafting the amicus curiae intervention guide, which is currently in production. IHRP Director Renu Mandhane, U of T Law professor David Schneiderman, IHRP Acting Director Carmen Cheung and CIEL Human Rights Program Director Marcos Orellana are overseeing the drafting of the guide. ♦

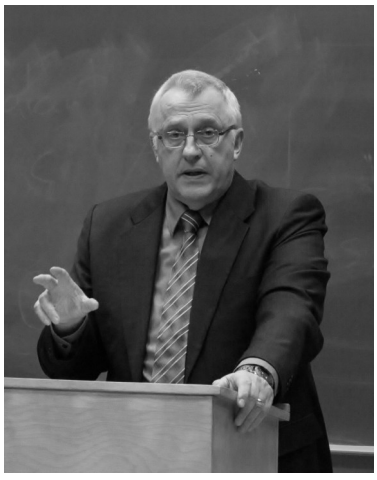
Interview with James Stewart
(Continued from page 21)

can be very important.

Often we just don't understand what people are talking about, because of different cultural references. For example, people measure distance in different ways. If you're talking about literate people or non-literate people, when you ask them "how many meters away were so-and-so," you have to remember: this isn't an educated person. We have our own frame of reference and they have theirs. When they say, "there was 1,000 people there" do they mean there were just a lot of people there? It could be 100 but for them 1,000 conveys the notion of a large group of people. You have these cultural gaps that you have to bridge [them] between witness and Chamber, and witness and yourself. You always have to be learning.

Q: What do you have to say about the criticism that ICC indictments can be a roadblock to peace?

There is always discretion. [For example,] I think [Louise] Arbour was under huge pressure when it came to indicting [Slobodan] Milošević [at the Yugoslavia Tribunal]. In the end, her feeling was: 'I will go where the evidence takes me, and you deal with the fallout. I have been given a particular mandate and that's what I'm going to do.' But she lost sleep over it; it was a huge responsibility. She of course indicted Milošević and everybody praised her, but that wasn't the story beforehand. There are sometimes immense pressures, and it will be interesting to see how that kind of calculation might play into the interests of justice. Any prosecutor would have to be very careful that whatever she did was very cleanly based on the evidence and nothing



James K. Stewart Lecture at the University of Toronto Faculty of Law
Photo Credit: Paloma Van Groll

CHANGING CANADA'S ACCESS TO MEDICINES REGIME: AN INTERVIEW WITH RICHARD ELLIOTT OF THE HIV/AIDS LEGAL NETWORK

Teresa MacLean, second year student, University of Toronto, Faculty of Law

Access to medicine, specifically to anti-retroviral (ARV) therapy, is particularly crucial in dealing with the HIV/AIDS pandemic, as it significantly reduces AIDS-related mortality and enables people living with HIV to have a higher quality of life. One of the major barriers to ARV treatment in developing nations has been the prohibitive cost associated with brand name ARVs, which cost approximately US $10,000 to $15,000 per patient per year.

In 2004, Canada's Parliament passed Canada's Access to Medicines Regime (CAMR). The aim of CAMR is to allow generic pharmaceutical manufacturers to capitalize on World Trade Organization (WTO) flexibilities in order to export cheaper generic medicines to developing countries. However, CAMR in its current form is unduly cumbersome and places heavy procedural requirements on both developing countries and generic manufacturers prior to obtaining a compulsory license to export generic medicines. As a result, it has only been used once by one generic manufacturer to provide medicines to one country.

The recent federal Bill C-398 aimed to reform the problems associated with the existing CAMR. However, it was defeated on its second reading in Parliament in November 2012 by a margin of 148-141.

Richard Elliott, the executive director of the Canadian HIV/AIDS Legal Network, has been advocating for change in this area. He spoke with *Rights Review* about the recently-defeated Bill and ongoing efforts to ensure access to medicines.

Q: UNAIDS has reported that AIDS-related deaths are steadily decreasing with the provision of free or low cost ARVs in sub-Saharan Africa. Has Canada been able to play a role in this?

Canada has been able to play a role in . . . two senses. One, there are Canadian NGOs . . . who do great work internationally supporting efforts to scale up access to treatment and two, Canada has contributed funds . . . to the World Health Organization's 3 by 5 initiative that was a key effort to jumpstart scaling up access to treatment and to the global fund to fight AIDS, TB and malaria. It is an important but modest contribution and it should be scaled up because we are nowhere near the coverage that is needed.

Q: Where does Canada stand on this issue in comparison with other WTO member states?

Nobody has actually put in place the kind of system that we proposed in the Bill [Bill C-398]. There are a number of other countries that have adopted analogues to CAMR, but they are all defective in various ways. Some are defective because they provide no operational detail about how they are going to work. This includes places like India. [Bill C-398] is on the opposite end of the scale in terms of deficiencies. Canada went overboard with all sorts of unnecessary red tape, and India basically has offered no operational details.

The government often says that Canada's is the only law that has been used in the world, so it is a success story and it just proves that it works. I think it proves no such thing because it took four years to get one shipment out and the experience has led those who attempted it to say we are not going to attempt to it again because of those problems. I don't think that can be considered a success story.

Q: Do pharmaceutical companies have human rights responsibilities in relation to providing access to medicines?

I think it is increasingly recognized in international law that non-state actors are subject to various human rights responsibilities. The extent to which non-state actors, including corporations, are duty-bearers under international human rights law . . . is still contested in terms of how far those obligations extend and what the obligations might be in any given circumstance.

I don't know that we can go so far as to say that under international human rights law corporation X has a legal obligation to donate its product or to adopt some sort of equitable tiered pricing system globally to ensure that poorer countries pay a fair price compared to richer countries. . . . I think we can say the law imposes an obligation on states to take positive measures to ensure access to the elements of the right of health . . . and over time they have to move towards realizing that objective. . . . Trade law clearly provides for the right of states to adopt tools such as compulsory licensing. So if trade law says that and international human rights law says you have a positive obligation to realize progressively the highest attainable standard of health, including access to medicines for all, then I think there is a strong argument to be made that countries should, as a matter of human rights law, take advantage of all that flexibility that they have under trade law.

Q: Finally, are there any initiatives to support local development of generics in developing states?

There are and that is important. It is part of the overall solution definitely. There are a number of countries in the developing world that have some generic production capacity [including] South Africa, Nigeria, Kenya. Brazil was trying to work with countries like Angola and Mozambique to scale up their production capacity as part of a South-South cooperation. Those are all important. It takes time . . . to do that, time that a lot of people don't have. It is not going to be realistic to assume, . . . even if you build up more production capacity in the global south, that any time soon it is going to be adequate to meet the various needs that are there even just for HIV medication, let alone all the other public health problems medicines are needed for.

Wherever we have the capacity in the world to make medicines at a lower price and make them affordable for countries that are facing huge disease burdens and limited resources, I think we need to bring that capacity online and make it as simple and straightforward to tap that capacity as possible.

Fixing CAMR isn't going to be a penance and no one has ever claimed that it is. But it is an important and necessary contribution to the overall solution. There is a lot that needs to be done and lots of places to actually get medicines to people that need them. This is one thing that we can and should do to be part of the overall effort and there are no reasons why we shouldn't. ♦

Interning at the Special Tribunal for Lebanon, the World's Newest International Criminal Tribunal

Christine Wadsworth, third year student, University of Toronto, Faculty of Law

I recently returned from a semester on exchange at the University of Amsterdam. I completed an internship at the International Criminal Tribunal for Rwanda (ICTR) in 2011, and was eager for another opportunity to work in the field of international criminal law. In addition to my studies in Amsterdam, I worked as an intern for a defence team at the Special Tribunal for Lebanon (STL) in The Hague.

Christine Wadsworth in Amsterdam's Dam Square

Photo credit: Jameson Glas

The STL opened on March 1, 2009, and its mandate is to prosecute individuals responsible for the February 14, 2005 attack in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and 22 others. The STL is the first international tribunal to deal with terrorism as a distinct international crime, and the STL Appeals Chamber is the first international judicial body to define the crime of terrorism.

The STL is unique in many respects, one of them being that it is the first international criminal tribunal to have an independent Defence Office as an official organ of the court. The STL Defence Office appointed separate teams to represent each accused *in absentia* in the main case, *Ayyash et al*. The defence team I worked for is representing Mr. Hussein Hassan Oneissi, one of the four accused in that case.

The trial phase of *Ayyash et al* is scheduled to begin on March 25, 2013. The four accused are still at large, making this the first *in absentia* trial at an international criminal tribunal. Although the accused will not be present during the *in absentia* proceedings, they will be represented by defence counsel in order to protect their right to a fair trial. The accused also have the right to appear in court even after the trial has started and have the right to ask for a retrial in which they will participate.

During my internship, the team was busy with the pre-trial phase of proceedings. I conducted legal research and drafted memoranda to assist with the litigation of preliminary motions, the preparation of the Defence Pre-Trial Brief, and planning for trial. My work involved analysing the STL's Rules of Procedure and Evidence, material from the *ad hoc* tribunals for Rwanda and the former Yugoslavia, and material from the International Criminal Court.

One of my assignments dealt with a defence motion challenging the legality of the STL's establishment. I worked on preparing counter arguments for the appeal hearing on this motion. The Lebanese government initially requested that the UN establish a tribunal of "international character" to prosecute those responsible for the February 14 Beirut attack. However, Lebanon failed to ratify the relevant agreement and the UN instead established the STL through UN Security Council Resolution 1757. The defence teams argued that establishing the STL in this manner was illegal, infringed on the sovereignty of Lebanon, and was unconstitutional under Lebanese law. While the appeal was ultimately dismissed, this assignment was a unique opportunity to contribute to what is still a developing field of law.

This internship was one of the most memorable parts of my exchange and allowed me to gain additional experience in international criminal law. Experiential learning has been a fundamental part of my law school experience. I have gained practical skills and had the opportunity to work with a diverse group of lawyers. I would encourage students interested in international criminal law to pursue an internship at one of the international tribunals or courts. ♦

Louise Arbour, Domestic Judge turned Global Activist, Speaks Freely

Louis Century, third year student, University of Toronto, Faculty of Law

What is the connection between divorce settlement and armed conflict resolution? For Louise Arbour – former justice of the Supreme Court of Canada and current president and chief executive officer of the International Crisis Group – one link comes to mind. Parents in child custody disputes often refuse to concede even where such refusal hurts their interests, but they nonetheless tend to abide by the order of a judge. State leaders in military disputes are likewise reluctant to make rational concessions, as they are often constrained by deep-seated claims to justice or history. However, at the level of global armed conflict, there is no divorce court, no third-party adjudication to resolve disputes. Might state leaders respond as amicably to conflict adjudication as parents to divorce court orders?

Arbour offered this unlikely comparison when asked about the role played by her prior judicial experience in her current work analyzing global conflict. The setting was the Sciences Po school in Paris, where I studied last term as an exchange student courtesy of an exchange program offered by the Munk School of Global Affairs, where I am pursuing the joint JD/MGA degree. Listening to Arbour address an international audience, I was struck by the strength of her renown in two wholly separate

ACCESS TO JUSTICE AS A MEANS OF PREVENTING ELECTION VIOLENCE IN KENYA

Cléa Amundsen, alumnus, J.D. 2011 University of Toronto, Faculty of Law

The Canadian Bar Association has for many years received funding from the Canadian International Development Agency to send young lawyers to work with human rights law organizations in various countries, primarily in Africa. These internships last for eight months and are intended to give Canadian lawyers international experience as well as to provide access to trained lawyers for host organizations.

I have been fortunate to have been placed this year with the International Commission of Jurists (ICJ) in Nairobi, Kenya. ICJ Kenya, established in 1959, is a national section of the International Commission of Jurists, which is headquartered in Geneva, Switzerland. ICJ Kenya has a membership of over 300 lawyers and jurists. Its mission is to promote and protect human rights, democracy, and the rule of law. ICJ Kenya focuses on four core areas: access to justice, democratization, human rights protection, and international cooperation.

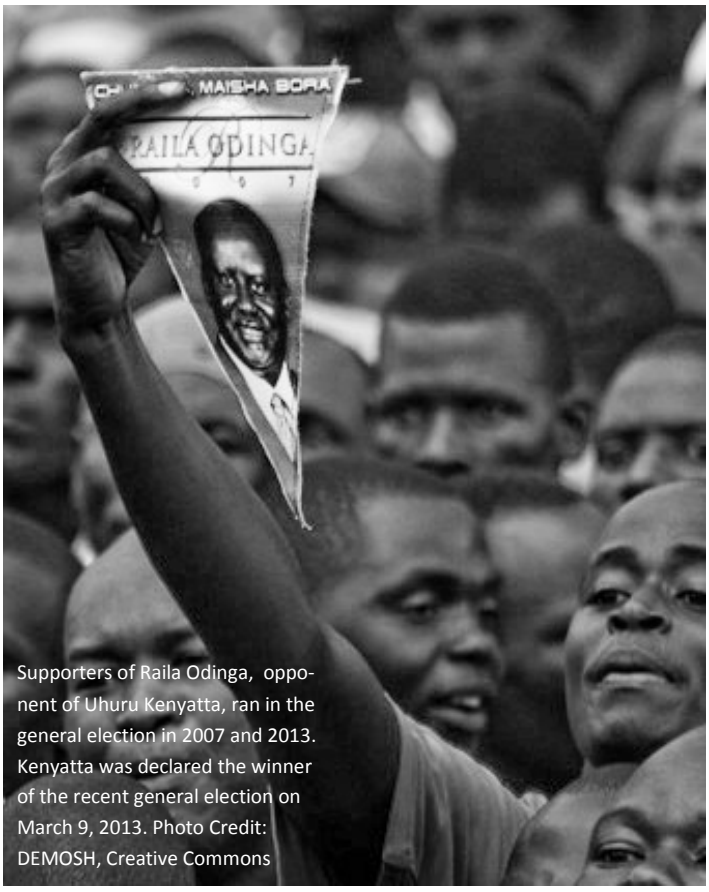
I have been working with the access to justice program, which has as its primary objective the promotion of the general public's access to courts both in Kenya and in East Africa more generally. The program promotes access to justice through advocating for an independent and accountable judiciary. It engages the judiciary and other stakeholders with a focus on the rule of law, human rights, and constitutionalism.

This is a very interesting time to be in Kenya working on these issues, in particular given that the federal elections were held in March of this year. There were significant outbreaks of fatal violence in the country surrounding the last general elections in December 2007. Shockingly, over 1,100 Kenyans died, and 660,000 Kenyans were displaced in the outbreaks prior to, during, and following the elections.

In response, numerous actors in the country have been working to ensure that similar outbreaks do not reoccur in subsequent elections. The most significant action has been the adoption of a new progressive Constitution in 2010. Kenya has also embarked on an ambitious effort to reform the judiciary, as one of the alleged reasons for the violence was that those involved in the elections did not trust the courts to fairly resolve their issues. Mistrust of the judicial process, for example, has led candidates disputing election results to take to the streets rather than filing a petition with the courts.

The general elections were held on March 4, 2013. As such, there has been a push to finalize judicial reforms in order to prevent widespread post-election violence from breaking out again. The judiciary is expecting over 500 election-related petitions to be filed after March 4. Given that there are only 64 High Court judges for a country of 43 million people (compared with 242 Superior Court judges in Ontario alone), and that ordinary court matters will continue to require attention, there is an obvious need to ensure that the judiciary has the capacity to cope with this extra work in an efficient but fair manner.

(Continued on page 33)



Supporters of Raila Odinga, opponent of Uhuru Kenyatta, ran in the general election in 2007 and 2013. Kenyatta was declared the winner of the recent general election on March 9, 2013. Photo Credit: DEMOSH, Creative Commons

worlds – few in the audience had any appreciation of her Canadian legal career. For globally-minded Canadian law students, Arbour's career trajectory is a dream.

However, for the self-deprecating Arbour, her trajectory was backwards. Instead of starting at an NGO and then finding a "real job", she began with various institutional jobs (as a law professor, international criminal prosecutor, Supreme Court judge, and UN high commissioner) before, three years ago, moving to an NGO, the International Crisis Group. Moving from judge to non-governmental advocate, Arbour now finds herself exercising something she had long sought to ensure for others, but never fully enjoyed herself – unbridled freedom of expression.

That she enjoys this new calling is evident from the frankness of her speech, unthinkable for a sitting judge or UN official. Students were fascinated to hear the former High Commissioner for Human Rights describe the UN Human Rights Council as the "forum for the disenfranchised", where talk is cheap; suggest the arming of African women as a response to sexual violence; or advocate for the outright reversal of global policy on both drugs and arms in response to spiraling Latin American violence. She equated the current "conflict prevention toolkit" to a box of antiques, and suggested that a return to traditional diplomacy may be called for in certain situations.

(Continued on page 29)

Litigating National Security Rights Violations in American Courts: A Conversation with the ACLU's Jameel Jaffer

Azeezah Kanji, third year student, University of Toronto, Faculty of Law

Jameel Jaffer is the Deputy Legal Director of the renowned American Civil Liberties Union (ACLU). Following his January 15, 2013 talk at the Faculty of Law on the American government's targeted killings program, I interviewed Mr. Jaffer, who grew up in Toronto, about the challenges and benefits of rights litigation in the national security context.

Q: Given the lack of success of *Bivens* suits [American damages suits for violations of constitutional rights] in the context of national security so far, what do you think is the ACLU's likelihood of success in *Al-Aulaqi v Panetta* [a case challenging the targeting killing of three American citizens in Yemen]?

The court has a variety of procedural mechanisms available to it to keep this case from getting to the merits. . . . But part of the point of this suit is to make it clear that the government is arguing that there shouldn't be judicial review at all [of national security policy]. The suit is also meant to be a spur for public discussion, and we try to use these lawsuits to engage the public and put political pressure on the administration, to do things that no court may ever require them to do. We can create political pressure to persuade them to do things voluntarily, like release information, or even defend the targeted killing program at more length publicly. So the lawsuit serves many different purposes. But all of that said, we wouldn't have brought the lawsuit if we thought it was a frivolous one. . . . In order to rule for the government in this case, the court would have to go considerably further than courts have gone in the past.

Q: How do you weigh the potential benefits of such suits against the drawbacks, such as the possibility of setting bad legal precedent?

I've never been that sympathetic to the argument about creating bad precedent. . . . There is a line between the national security world and everything else – sometimes a blurry line, but a line nonetheless. A lot of the precedent that we create in this area is limited to this area. . . . And so if we create bad law, it's bad law that doesn't necessarily have implications outside the national security context. Creating bad law in the lower courts often also produces momentum that is necessary for prevailing in appellate courts. This happened with the Guantanamo cases [such as *Boumediene v Bush* and *Hamdan v Rumsfeld*]: there were lower court decisions that people found so unacceptable that they created public pressure for accountability or judicial oversight, and this was necessary for the Supreme Court's eventual decisions in our favour. Obviously we would rather win in the lower courts than lose, but it's a long game, and losing in lower court is not the end of the game.

Q: Can you talk about the challenge of promoting human rights and democratic accountability in the realm of national security, when so much of America's national security policy is cloaked in secrecy?

Part of the problem with this excessive secrecy is that lawsuits can't go forward [due to the state secrets privilege]. Another problem is that we have an impoverished political debate on issues that are very consequential. We have very limited information on the targeted killings program, very limited information on government surveillance, and the questions raised by these policies are significant in a democracy. How much power should the government have to listen to your phone conversations? How much power should the government have to kill you if they believe you present a threat? And yet our political debate is a very limited one, and insufficiently informed. One consequence of that is that we are overly reliant on government officials to make decisions that really ought to be made by the democratic process. . . . If you're committed to democracy, it doesn't make sense to have some 30-year-old recent Yale graduate making these kinds of decisions behind closed doors. These are decisions that define the country.

Q: And, finally, how did you end up where you are today – challenging the American government's national security policies in court? Were you always interested in pursuing a career involving civil liberties and human rights?

I always had an academic interest in civil liberties issues – I wrote about them when I was in law school. . . . But none of this was planned out. At many different junctures, I just happened to be in the right place at the right time.

Editor's Note: On February 8, 2013, the White House directed the Justice Department to release previously confidential government documents which discussed the legality of killing Americans through drone strikes, and which had preceded the US drone strike killing of Anwar Al-Aulaqi. ♦

Right: Anwar Al-Aulaqi, an American citizen who was killed in Yemen during a targeted drone strike in 2011. The ACLU has brought a suit challenging the killing of Al-Aulaqi by the U.S. government.

Photo Credit:

Muhammad ud-Deen, Wikimedia Commons

CHALLENGING AMERICA'S TARGETED KILLINGS PROGRAM IN U.S. COURTS

Ethan Schiff, first year student, University of Toronto, Faculty of Law

Jameel Jaffer Lecture at U of T Faculty of Law. Photo Credit: Ethan Schiff

Jameel Jaffer, Deputy Legal Director at the American Civil Liberties Union (ACLU) and Director of the ACLU's Center for Democracy, detailed a disheartening future for critics of the United States government's targeted killings program. When he spoke to a packed room at the University of Toronto Faculty of Law this January, Mr. Jaffer reminisced about the 2002 controversy over whether the US executive had the power to detain American citizens as enemy combatants without due process. In response to the government's claims, Mr. Jaffer had then argued that, given such a power, there would be nothing to stop the government from unilaterally operating a targeted killing program. Though at the time, he did not believe that such a program would actually come into being, Mr. Jaffer bemoaned the fact that some 10 years later, the United States has in fact adopted such a targeted killings program. Mr. Jaffer was unable to imagine any power that the President could hold that would exceed in any way the right to kill a US citizen without judicial review.

In 2010, the ACLU, acting for the plaintiff, launched the lawsuit *Nasser Al-Aulaqi v Barack H. Obama*, challenging the placement of Mr. Al-Aulaqi's son on a CIA "hit list." Mr. Al-Aulaqi requested an injunction to prevent the government from executing its alleged plan. A mere four months later, the court dismissed his claim on several grounds, including a lack of standing. The ruling leaves little reason for hope of judicial review. Mr. Jaffer was noticeably frustrated with the holding; in his view, the judge largely avoided dealing with substantive issues in favour of protecting executive privilege.

Indeed, Mr. Jaffer appeared to be both bemused and exasperated by judges who, on one hand, acknowledge the detrimental ramifications of their holdings, while on the other, claim to be bound by precedent in holding for the government. However, Mr. Jaffer was cautiously optimistic about a case he recently argued challenging the CIA's "Glomar response", a procedural tool used by the government in refusing either to confirm or deny the existence of records regarding the targeted killing program. Though it would be a small victory, Mr. Jaffer believes it could be the first step to many more, as it would require that the CIA disclose a list of privileged documents with explanations as to why they must be withheld.

However, on February 8, 2013, shortly after Mr. Jaffer's talk, the government released its "white paper" acknowledging the existence of the targeted killing program. We may have to wait and see what effect this may have on judicial review, but it is clear Mr. Jaffer will not be found far from the action. ♦

LOUISE ARBOUR *(Continued from page 27)*

The purpose of her talk was to reflect on broad trends in global conflict, observed from her work at the helm of the International Crisis Group. These trends include:

- The global community being good at ending conflicts, but not preventing them; effective early warning mechanisms are lacking.
- An increase of conflict not linked to a political agenda, typified in Latin American drug violence.
- Civilians being disproportionately affected by conflict vis-à-vis combatants; the deployment of drones, for example, poses zero combatant risk.
- The definition of combatant being expanded; for instance in Sri Lanka, it has expanded from LTTE members, to supporters, to sympathizers, to all Tamils.
- The justifications for military action, including humanitarian intervention and broad definitions of self-defence, are multiplying.

Arbour concluded with reflections on the rule of law. She acknowledged the frenzy of "rule of law" activities in policy-making circles, which have gained primacy over previous buzzwords such as "good governance" and "accountability". Much of these "rule of law" projects are in fact euphemisms for law and order, said Arbour, prioritizing law enforcement above larger justice goals. Writing in *The New York Times* in September, Arbour described the rule of law as broader than its institutional or even procedural varieties: "It reflects the idea of equality in a substantive way: not just that no one is above the law, but that everyone is equal before and under the law, and is entitled to its equal protection and equal benefit."

Louise Arbour, NGO Advocate and former Supreme Court Justice. Photo credit Presidencia. N. Argentina, Wikimedia Commons

Here, we see Canadian constitutional principles informing the approach of one of the world's leading conflict analysts. It was a pleasure to see Arbour in this international setting, and an inspiration to learn the practical relevance of a Canadian legal foundation in responding to the challenges of global armed conflict. ♦

REVENUE TRANSPARENCY IN CANADA'S EXTRACTIVE SECTOR MAY FINALLY BECOME A REALITY

Nita Khare, third year student, University of Toronto, Faculty of Law

In September 2012, the Resource Revenue Transparency Working Group (RRWTG), comprised of NGOs and Canadian extractive industry representatives, was formed. Publish What You Pay Canada, the Revenue Watch Institute, the Mining Association of Canada, and the Prospectors and Developers Association of Canada joined forces in an effort to bring about a mandatory disclosure mechanism for the Canadian extractive industry that would require companies to disclose how much they are paying to foreign governments for access to natural resources.

The Canadian extractive sector is the largest in the world, with many of the world's biggest extractive companies listed on Canadian stock exchanges. So far however, the Canadian government and Canadian extractive companies have done little to ensure revenues paid to foreign governments for access to resources are ultimately passed down to the people of those nations. If the RRWTG is successful in pushing the Canadian Government to implement a mandatory disclosure mechanism, it would be Canada's first major step in attempting to address the phenomenon known as the "resource curse" that has plagued resource-rich developing nations.

Developing countries rich in natural resources are considered to be "cursed" when their governments receive money in exchange for providing oil, gas and mining rights to corporations, but the wealth is not used for the benefit of the people of these nations, particularly the communities affected by these extractive activities. Causes of this so-called curse are thought to include political corruption and poorly managed or inefficient government institutions. A non-profit advocacy group, Global Financial Integrity, has estimated that between 1970 and 2008, African countries lost over $850 billion due to the illicit diversion of revenues received in exchange for natural resources. Public disclosure of payments made to these governments would allow NGOs and local communities to determine how much governments are actually receiving from the sale of their countries' natural resources. Thus, revenue transparency is an essential mechanism to hold these governments more accountable.

Mandatory disclosure requirements in the extractive sector for revenue transparency have begun to garner traction in recent years. In 2010, the U.S. introduced the most robust legislation so far in the form of the *Dodd-Frank Act*, which was finally implemented by the U.S. Securities Exchange Commission (SEC) in August 2012. The Act's regulations call for public corporations listed on U.S. stock exchanges to disclose payments above a threshold made to foreign governments, on a per-project and per-country basis. The European Commission is expected to release similar draft legislation in the coming months.

The RRWTG hopes to follow in the footsteps of the U.S. and the European Commission by creating a mandatory disclosure mechanism where Canadian extractive companies would be required to disclose what they are paying to foreign governments on a country-by-country and project-by-project basis. The proposed regulations are still in the very early stages of formulation, and a number of areas remain undecided. The exact activities for which payments to foreign governments must be disclosed, as well as the threshold for disclosure, are still being developed. Whether the regulations will apply to all extractive companies, or only the public companies, remains to be decided.

The working group also faces a number of hurdles in designing the proposed mechanism and having it approved by the federal government. The RRWTG is attempting to seek feedback from extractive corporations at the outset to avoid future backlash against any proposed mechanism. But, a number of Canadian corporations have already begun to express concern over some of the recommended regulations. Companies cross-listed in the U.S. and subject to SEC regulations are opposed to policies that would be more rigorous and require greater disclosure north of the border. Smaller companies listed solely in Canada fear that the regulations may be too onerous and come at a high cost to their business.

Furthermore, formalizing approval of a proposed mechanism for public companies will likely present a considerable obstacle. The securities regulation regime in Canada presents a unique challenge. Unlike almost everywhere else in the world, where securities are federally regulated, Canada has 13 separate provincial and territorial regulatory bodies. Thus for any regulatory scheme to have a national impact, it would need to be approved and implemented by all 13 of these regulators.

Despite the challenges faced by the RRWTG, it will likely succeed in bringing greater revenue transparency to Canada. There now appears to be stronger global support for the movement in using revenue transparency as a tool to make governments in developing nations more accountable. Given Canada's position as a world leader in the extractive sector, it will continue to face more pressure to take action, and it cannot remain apathetic toward this issue for much longer. ♦

MADE IN BANGLADESH

Meaghan Parry, first year student, University of Toronto, Faculty of Law

"Made in Bangladesh" is a phrase that can be found in many closets around the world, and in the wake of recent tragic garment factory fires in Bangladesh, it is important to understand the implications of those three little words.

In the 1970s, as a result of the search for cheap labour, the garment industry emerged in Bangladesh. Today, this industry is the lifeblood of the economy, contributing approximately 13% to GDP. There are more than 4,800 garment factories in Bangladesh, and these factories directly employ over 3.5 million labourers, 85% of whom are women. Although this is one of the most vital industries in Bangladesh, the labourers responsible in part for the economic welfare of the nation are treated as disposable.

Last year I spent several months working for ActionAid in Dhaka, Bangladesh. I was responsible for writing policy documents advocating for a living wage, and I also coordinated women's cafes, where women could gather to learn about, and discuss, their employment rights.

(Continued on page 34)

A woman on way to work in Rangamati, Bangladesh. Photo Credit: Meaghan Parry

REFUGEE HEALTHCARE IN CANADA: DENYING ACCESS BASED ON ORIGIN AND STATUS

Lane Krainyk, third year student, University of Toronto, Faculty of Law

In 2012, I interned with the United Nations High Commissioner for Refugees (UNHCR) in Kampala, Uganda. In my capacity as an intern in the Protection unit, I had the opportunity to meet with refugees and asylum seekers to discuss their security and protection concerns. In some situations, the individuals I met with highlighted physical security challenges faced in Kampala. In others, they discussed issues of general insecurity. One frequent source of this insecurity was the difficulty many faced in accessing healthcare.

Refugees and asylum seekers often have difficulty gaining access to sufficient healthcare in their countries of asylum. This may be a result of insufficient resources in the country of asylum to provide for the refugees' healthcare needs. It may also be due to unwillingness on the part of the state to allocate sufficient resources for refugees and asylum seekers.

In Kampala, refugees and asylum seekers have the right to access Uganda's public healthcare system. Individuals receive government issued identification for this purpose when they register with the authorities. Most refugees and asylum seekers in Kampala access care at the busy Mulago Hospital.

In meeting with refugees and asylum seekers, I heard many frustrations with delays in accessing public care in Uganda. Without the resources to obtain care from private clinics and hospitals (as many Ugandans and foreigners do), they are left with few means of addressing their families' serious, and often imminent, health concerns.

Hearing about these frustrations made me reflect on how these issues are dealt with in Canada, where voices in government calling for reduced allocation of resources to refugee healthcare have grown louder in recent years. Since the election of the Conservative government in 2006, and, in particular, its parliamentary majority in 2011, there have been dramatic changes in Canada's refugee policy.

Recently, there have been significant cuts made to the Interim Federal Health Program (IFHP). The IFHP "provides limited temporary coverage of health-care costs to protected persons [refugees and claimants] who are not eligible for provincial or territorial health insurance plans." However, under the government's new approach, access to the IFHP has been denied to asylum seekers coming from "Designated Countries of Origin" (DCOs). This means that *all* funding for healthcare is denied to asylum seekers from DCOs (unless and until they are granted refugee status). The sole exception that has been carved out is for health situations that are deemed to threaten public health and safety. Asylum seekers from DCOs have no access to "supplemental" care (including drug coverage for necessary medications) and have even lost eligibility for basic and emergency healthcare (including maternal healthcare and life-threatening emergencies).

The creation of the DCO list invokes a number of legal issues, including the treatment of claimants on a group, as opposed to an individual, basis. This approach runs contrary to the internationally accepted standard that is endorsed by UNHCR and grounded in the 1951 Refugee Convention. Further, it fails to capture the purpose of the asylum process, namely determining whether a particular refugee claimant can be given refugee status on an individual basis.

More generally, the government's new policies have had, and will continue to have, drastic implications for refugees, asylum seekers and healthcare providers in Canada.

There has been a strong reaction to these changes from the Canadian medical community. An organization called "Doctors for Refugee Care" (CDRC) has noted that, as a result of these changes to the IFHP, many "will no longer be covered for necessary medications such as insulin, and some will be denied access to physicians unless their condition is deemed a threat to public health/safety." The organization further notes that prenatal care for pregnant women and mental healthcare (particularly important for claimants who are survivors of violence or torture) are among the healthcare services cut under the new policies. On 20 January 2013, a group of doc-

(Continued on page 33)

Palestine After the Successful 2012 UN Bid for Statehood Recognition: An Interview with Scholar Valentina Azarov

Dharsha Jegatheeswaran, first year student, University of Toronto, Faculty of Law

The Wall surrounding the Aida refugee camp in Bethlehem, Palestine. Photo Credit: Michele Benericetti, Creative Commons

On November 29, 2012, Palestine made history when the UN General Assembly voted (138 – 9, with 41 countries abstaining) in favour of upgrading its status from Non-Member Observer to Non-Member Observer *State*. Canada was one of the nine countries that voted against the resolution. This was a major victory for Palestinian Authority President Mahmoud Abbas, and an important demonstration of international support for Palestinian aspirations for statehood.

I recently had the chance to sit down with Valentina Azarov, head of the Human Rights and International Law Program at Al-Quds Bard College, Al-Quds University in Jerusalem, to discuss the Palestinian UN bid. Azarov provided insight into some of the complexities and ramifications of the UN bid.

On the reaction of Palestinians living in the West Bank towards the UN bid:

While the media portrayed a large amount of support in the West Bank for the bid, Azarov viewed the public celebration as more political in nature, lacking an informed understanding of the bid. The rallies are generally organized by the Palestinian Authority (PA) and tend to draw out supporters of Fatah, the major political party associated with the PA.

On the issues raised by the bid related to governance structures in Palestine:

Azarov believes that Palestinian governance is the single largest issue that has been raised within Palestine following attempts in the past two years at gaining recognition by the UN (first unsuccessfully at the Security Council in 2011, and recently at the General Assembly). The issues have arisen as a result of the confusion concerning the distinction between the Palestinian Liberation Organization (PLO) and the PA and their respective roles.

The PA was created out of the 1993 Oslo Accords and serves as an administrative body which, according to Azarov, most Palestinians see as being subject to Israel's political will and pressure. The PLO, on the other hand, was formed by Arab states in 1964 and serves as an independent national organization for Palestine that represents almost all Palestinian factions. Technically the PLO is the only body that can represent Palestine at the UN but confusion arises because there is large overlap in the leadership of the two organizations. Azarov emphasized that clarity in governance should be a high priority for the Palestinian people, as the confusion between the PA and the PLO will prove problematic when legal technicalities arise in upcoming treaty negotiations.

ACCESS TO JUSTICE AS A MEANS OF PREVENTING ELECTION VIOLENCE IN KENYA *(Continued from page 27)*

I have been involved in drafting rules to govern election petitions and in the subsequent training of the judges who will hear these cases. It has been very interesting to see how these sorts of rules develop. Given that some cases from the 2007 election are still working their way through the court system, while other cases were thrown out on highly technical grounds, it is clear that Kenya needs to think through its rules carefully to ensure access to the court system following elections.

At the same time, few judges have dealt with these issues. Therefore, the judiciary has undertaken a comprehensive effort to train all judges on election related issues. Some of the effort has been successful since the elections did pass without any major violence. However, there is still widespread dissatisfaction with the results, especially of the presidential election, and a number of court cases have been launched. The question now is whether judicial reforms alone are enough. Will the people accept the outcomes of these cases or is a further widespread change in perceptions also necessary to ensure long-term justice and stability?♦

REFUGEE HEALTHCARE IN CANADA *(Continued from page 31)*

tors wrote an editorial in the Toronto Star arguing that the denial of basic healthcare to claimants based on their origin makes refugee healthcare in Canada more inaccessible than that in refugee camps. Further, in February 2013, CDRC, the Canadian Association of Refugee Lawyers (CARL) and three individual patients filed a claim with the Federal Court, asking that the health care cuts be declared unconstitutional and illegal.

In addition, the IFHP has not been administered in a particularly effective or empathetic manner. On a number of occasions, asylum seekers' IFHP information was not activated in time for them to receive necessary treatments. Further, coverage for specific procedures has been rejected on a number of occasions. In one particularly dramatic example, a Toronto man was denied coverage for an eye surgery required to prevent him from going blind. Fortunately, a doctor at a Toronto hospital (who made repeated pleas that the procedure be covered), proceeded with the surgery – his own practice and hospital absorbing the $10,000 cost. In another example, an asylum seeker from Pakistan learned that he had cancer after arriving in Saskatchewan. He began treatment, but under the new policies, drugs relating to his chemotherapy were not covered. In the absence of action from the federal government, the Saskatchewan provincial government eventually intervened and paid for the treatments.

Canada has a legal obligation to provide healthcare to refugees and asylum seekers. In 1976, Canada ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 12 of the ICESCR stipulates that the "right of everyone to the enjoyment of the highest attainable standard of health" shall be guaranteed to everyone and also calls for the "provision for the reduction of… infant mortality and for the healthy development of the child… the prevention, treatment and control of… disease; and the creation of conditions which could assure to all medical service and medical attention in the event of sickness." Article 12 represents what James Hathaway, a noted refugee scholar, describes as an "affirmative entitlement" to access "on a timely basis to a system of health protection which is both of good quality and respectful of cultural and individual concerns."

The federal government has tried to dismiss the significance of the changes it has imposed. However, evidence shows that many are already suffering from the impacts of these policies. The Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, has argued that his government is merely working to ensure that refugees and claimants do not access better care than Canadians. Yet, for many affected individuals, the government's policies take away *all* coverage. As a result, the government has violated its international obligations and created a system that denies healthcare access to some of Canada's most vulnerable and marginalized populations. ♦

On the legal actions open to Palestine following recognition by the General Assembly:

Technically, Palestine has been entitled to sign international treaties since October 30, 2011, when it was awarded full membership into UNESCO. What the 2012 UN bid has accomplished, according to Azarov, is a political "awakening to all of these legalities". She believes that while the ability to sign international treaties is certainly important, as they will likely have positive ramifications on the Palestinian government's practices, their importance in terms of enforcement with regard to Israel may be overstated. Israel continues to deny the legitimacy of the General Assembly vote, and will resist any attempts by Palestinian leaders to exercise their newfound status by signing on to international treaties.

On the long-term effects of the UN bid on peace negotiations with Israel:

According to Azarov, the success of the UN bid will likely not have a meaningful effect on peace negotiations with Israel. Indeed, the bid is symbolic of a general shift over the past few years away from negotiations. Rather than returning to negotiations, it is likely that both parties will focus on the "real fight" likely to take place when Palestine renews its requests for the International Criminal Court to investigate activities on its soil.
The timing of Palestine's 2009 request for Court intervention suggested that Palestine was particularly concerned with the 2008 -9 Operation Cast Lead in Gaza. However, early last year, the Court's Prosecutor decided that the Court did not have the authority to determine whether Palestine qualified as a 'state' that could access the Court, deferring this decision to the UN. The recent General Assembly resolution has thus clearly altered the dynamics of Palestine's application to the Court to investigate activities on its territories.

On whether the UN bid will positively affect grievances regarding human rights violations within Palestine:

A positive effect of the bid is that it has resulted in a policy shift on the part of both the PA and Hamas to be more mindful of human rights. For instance, a recent Human Rights Watch report, *Abusive System: Failures of Criminal Justice in Gaza*, looked critically at Hamas's criminal justice system. Interestingly, it was met with cooperation from Hamas. Azarov believes that both the PA and Hamas are concerned with increasing their own international legitimacy in preparation of ratifying various human rights treaties. ♦

 (Continued from page 31)

I was deeply moved by the experience of one garment worker, Yeasmin, who shared her story with me. At Yeasmin's factory, several cleaners had petitioned for greater compensation. In response, management encouraged the cleaners to sign a blank piece of paper, which was later restructured as a notice of resignation. As a result of Yeasmin's participation with ActionAid, she became familiar with labour law, and convinced the management and employees to enter negotiations, which were ultimately successful.

Yeasmin's story is not meant to suggest that there is an easy solution to Bangladesh's complex issues of inequality, corruption, political turbulence, and a faltering justice system. Rather, it highlights that the empowerment of women is an essential component to justice in the Bangladeshi garment industry.

Female workers are subjected to long hours in poor conditions, while also bearing primary responsibility for family care. Labour-rights activists also face great danger in their workplaces, where they are generally bitterly resisted by management. Furthermore, the current minimum wage is 3000 taka per month (approximately $38 USD), although it has been argued that this wage does not keep pace with the ever-increasing prices of commodities.

Many women are unaware of the laws governing overtime and the minimum wage, and corruption at the managerial level often results in women going unpaid. Part of my work was to help women track their hours worked and wages paid. However, even when women are paid, factory owners can win contracts on the basis of the comparatively low wages that they pay their staff. Thus, although the economy rests upon women's shoulders, they are not valued commensurately with their contributions.

Nevertheless, it remains a common perception that having a job is better than not having one, and I met several young girls aspiring to work in a garment factory. Economists support these women's ambitions by arguing that the predominance of women in the workforce has created progress in achieving the Millennium Development Goals, which include the goal of lifting more people out of abject poverty. While

this approach may be accurate, the current employment practices leave much to be desired. For instance, the cost to feed a prisoner in a Bangladeshi jail is 1,572 taka per month (approximately $20 USD). To have access to the same amount of food, a family of four would need more than double the current minimum wage earned by factory workers.

The Constitution of Bangladesh states that the government shall adopt effective measures to remove inequality, and the Bangladesh Labour Law of 2006 exists to protect the fundamental rights of female workers. Bangladesh has also ratified the UN *Convention on the Elimination of All Forms of Discrimination Against Women*, as well as the ILO *Convention concerning Discrimination in Respect of Employment and Occupation*.

The reality is, however, that, despite legislation, women's rights are largely ignored.

Establishing the rule of law and eradicating deeply entrenched corruption is an extraordinarily complex task. The responsibility to protect human rights falls on the Bangladeshi government, major brands and retailers, factory owners, community organizations, trade unions, and the workers themselves. The lethal "low price at any cost" model must be abandoned, as it results in unsustainable poverty wages for the workers of Bangladesh.

Small, grassroots efforts can create ripples of change throughout the country. Although Yeasmin is just one woman, she became empowered through knowledge. This will have important ramifications for her colleagues, their families, and their communities.♦

Garment workers in Bangladesh. Photo Credit: Forge Research, Wikimedia Commons

Living in Fear in Other Peoples' Homes: Protection of Domestic Workers in Bahrain

Lisa Wilder, second year student, University of Toronto, Faculty of Law

"What is particularly striking about domestic workers is their invisibility. Once they come to the country, they disappear into peoples' homes."

– Liesl Gerntholtz, Executive Director, Women's Rights Division, Human Rights Watch.

Migrant workers are vulnerable to abuse and unfair labour practices because of their precarious status in host countries. However, migrant workers who perform domestic labour (such as nannies, housekeepers, and caregivers) face an added dimension of vulnerability by working in their employer's home, where they are cut off from outside help.

Abusive employer practices against domestic workers include taking passports away so that they cannot leave, making them work long hours with no time off, providing inadequate living quarters, withholding wages, and physical and sexual abuse. Migrant workers in all lines of work are at risk of similar abuses, but domestic workers are often without redress since many countries exclude domestic workers from the protection of their labour laws. For instance, in the Middle East, only one percent of domestic workers are protected under labour legislation.

There are approximately 53 million domestic workers worldwide, although there could be as many as 100 million, taking into account the underreporting of domestic work. Many women travel abroad to accept domestic labour jobs in Asia and the Middle East.

As an example, in the small island nation and Gulf State of Bahrain, which has a total population of 1.3 million, there are over 450,000 migrant workers, who comprise 77 percent of the working population. Of those, 87,400 are domestic workers. Bahrain has long been a regional leader in protecting migrants' labour rights, although it was only in July 2012 that Bahrain extended some of its labour laws to domestic workers.

Domestic workers in Bahrain are paid on average $186 per month. Many work up to 19 hours per day with few breaks, and with no days off. New protections for domestic workers introduced in 2012 include access to labour mediation, the requirement that jobs be governed by contract, and mandated annual vacations and severance pay. However, the reforms did not establish maximum work hours or days of rest.

Bahrain's immigration system is based on employer sponsorship and places significant restrictions on migrant workers' mobility. A former Minister of Labour referred to the *kafala* (sponsorship) immigration system as "near slavery". Employers who sponsor domestic workers decide whether the employee is allowed to go to work for someone else or return home.

Ministry of Labour officials in Bahrain have announced plans to introduce unified contracts for domestic workers in order to guarantee decent work and living conditions. This would be a welcome development, although enforcement may be an ongoing concern. As of 2011, the Ministry of Labour employed 57 labour, health and safety inspectors, while the head of the Ministry's Department of Inspections has said that 100 inspectors are needed.

Even with enough labour inspectors, however, employers and recruitment agencies can prevent domestic workers from leaving when their rights have been violated. For example, when domestic workers complain to the Ministry of Labour, it is common for employers to launch counterclaims alleging that the employee stole from them or ran away.

Domestic workers who flee abusive employers may seek help from their embassies, who may refer them to the recruitment agency that originally brought them to Bahrain. Since recruiters have to refund employers' expenses for an employee who is deemed "unsatisfactory," recruiters often return domestic workers to their abusive employer.

To protect domestic workers, some countries have gone as far as preventing their own female citizens from accepting contracts for domestic work abroad. Last August, the government of Nepal approved a ban on Nepalese women under 30 from going to work in Gulf countries, including Bahrain.

Banning the migration of domestic workers altogether is a drastic response to abusive employer practices. Legislative reform is a better way to protect domestic workers, who would likely find ways to go abroad despite a ban. In June 2011, the International Labour Organization's *Convention Concerning Decent Work for Domestic Workers*, which requires domestic workers to be entitled to the same protections as other workers, was opened for signature. The convention includes a right to minimum wage, daily and weekly rest time, and prohibits domestic workers from being forced to stay at their employer's home. As of January 2013, 48 countries had approved ratification or submitted draft laws adopting the convention.

Working abroad as a housekeeper or caregiver represents an excellent opportunity for women to earn money, particularly if they have families to support. Accepting that opportunity should not mean accepting intimidation, abuse, and working conditions akin to slavery. ♦

Indonesian domestic workers congregate in Victoria Park

Update on the Human Rights Situation in South Sudan
(Continued from page 16)

Beyond political issues, the high influx of South Sudanese returning to the region from the north continues to set pressure on underdeveloped infrastructure, and has resulted in tensions with host communities over natural resources. In the wake of independence, South Sudanese populations residing in the Republic of Sudan had their citizenships revoked, effectively rendering them stateless. In May 2012, the first of approximately 500,000 South Sudanese exiled from Sudan arrived in Juba, South Sudan. According to UN High Commissioner for Refugees (UNHCR) statistics, South Sudan currently hosts over 175,000 South Sudanese and Sudanese refugees either exiled or fleeing from the Republic of Sudan. The growing presence of refugees is also reducing agricultural land and sparking tensions with indigenous South Sudanese, resulting in refugee harassment, sexual abuse, and rape.

Compounding these problems are issues of inter-communal violence. Since late 2011, inter-communal violence in South Sudan increased between the Murles and Lou Nuer ethnic groups, two shepherd clans which represent 2 of 200 ethnicities in South Sudan. A 2012 report by the UN Mission in South Sudan (UNMISS) and the UNHCR estimated the death toll at 900 within just 12 days as a result of armed attacks by 6,000 to 8,000 armed youth. Since independence, inter-communal violence has claimed the lives of thousands of South Sudanese and resulted in the abduction of women and children, the destruction of homes and livelihoods, and widespread civilian displacement. These tensions are significantly aggravating internal struggles to improve infrastructural and economic development, political inclusion, and the judicial system.

Despite the initial national fervour surrounding South Sudanese independence, the government is falling short of rallying its citizens under the banner of one flag. A splintering of the population along ethnic lines is increasingly visible, as demonstrated by the growing scope of inter-communal violence. The frightening mix of weak central governance and feeble rule of law, potent non-state actors, and a predatory northern Sudanese state, lead many to question whether South Sudan will become a failed state. Bilateral negotiations in the international arena are thus pivotal in ensuring the political and economic viability of South Sudan. Most importantly, civilian protection, judicial recourse, and economic opportunity need to be cultivated in order to diffuse conflict. It remains highly questionable whether these goals will be achieved in the absence of population consultation and political inclusion. Failing to address the root causes will continue to place South Sudan at the brink of large-scale conflict and economic turmoil. ♦

In late 2011, Fatima Al Ghomous, Zainab Atoum and Amna Adam al-Dhaib fled the government bombardments -- as many as three attacks a day -- near their homes in Surkum. As a consequence of the relentless attacks, these women and others decided to flee the area and walk toward South Sudan. One day, while they rested and prepared food along the way from Surkum to Wadega, in Kormuk locality, their group was hit by what they described as a barrel bomb. The bomb killed three people, including two girls.

Photo Credit: Samer Muscati, Researcher at Human Rights Watch & U of T Faculty of Law Alumnus