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THINKING BEYOND THE ANTI-HOMOSEXUALITY BILL: THE MANY CHALLENGES TO LGBT RIGHTS IN UGANDA

Kathryn Hart, 2L, Faculty of Law, University of Toronto

Uganda has recently attracted international media attention for its Anti-Homosexuality Bill, which is currently awaiting a second reading in the Ugandan Parliament. If passed, the bill will severely punish those who engage in homosexual intercourse, as well as any individuals or organizations that “promote homosexuality,” such as LGBT activists and NGOs that are supportive of gay rights.

Despite this government action, civil society organizations in Uganda, such as the Human Rights Awareness and Promotion Forum (HRAPF), which I interned with this summer, have made considerable progress in obtaining legal recognition of basic human rights for LGBT people through strategic litigation before the courts. For instance, the Civil Society Coalition on Human Rights and Constitutional Law, of which HRAPF is a member, and Sexual Minorities Uganda (SMUG) launched two cases resulting in landmark rulings on LGBT rights in Uganda. In *Victor Mukasa v Attorney General*, the High Court held that homosexuals have the same constitutional rights as other Ugandans. The court also ruled in *Kasha Jacqueline et al v Giles Muhame and The Rolling Stone Publications Ltd* that homosexual intercourse is criminalized under the “unnatural offences” provision in the Penal Code, not homosexual identity. This ruling makes it clear that it is not a crime to identify as homosexual in Uganda. However, the ultimate benefit of such a ruling for LGBT persons is still of concern, as it left in place provisions criminalizing homosexual acts itself.

The difficulty faced by civil society organizations like HRAPF, however, is that police and prosecutors in Uganda frequently ignore these judicial rulings and arrest individuals on the mere suspicion of homosexuality, based on their physical appearance and behaviour. In the last six months, the legal aid clinic at HRAPF recorded five cases where LGBT people were charged with the offence of “homosexuality,” despite the fact that homosexuality, in the absence of evidence of homosexual intercourse, is not an offence under the Penal Code.

In addition, it is likely that many arrests remain undocumented, given that LGBT people routinely bribe police or prosecutors to evade charges and secure release from custody. In fact, both the International Gay and Lesbian Human Rights Commission and SMUG reported that “extortion is the single most common abuse facing gay men and lesbians in Uganda... [T]he police themselves often act as the blackmailer, and when they are not, they are still often complicit in the crime.” Despite the widespread occurrence of arrests of LGBT people on the basis of presumed homosexuality, there have been no recorded convictions of adult consensual same-sex conduct under the “unnatural offences” provision in the Penal Code during the past five years. This absence of successful prosecutions is likely due to the fact that the legal elements of the offence require evidence of homosexual sexual activity, which is very difficult if not impossible to prove, rather than merely a suspicion of homosexuality.

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Welcome to the 2013 Intern Edition of *Rights Review*, the International Human Rights Program’s signature publication. In my tenure as the acting Director, one of my great pleasures has been working with students readying themselves for their summer internships, and then hearing all of their stories of work and adventure around the world.

The excitement and passion for human rights evidenced in their reports and emails throughout the summer was infectious. It was something I carried with me as I travelled with the IHRP’s own summer fellow to Honduras in August as part of a fact-finding delegation researching impunity for violence against journalists in the Americas. I imagine that my experience was not unlike that of many of the IHRP interns – I had the opportunity to meet and work with individuals who are profoundly and intensely committed to the protection of human rights, often at great personal cost. It was deeply humbling, and immeasurably inspiring. The details of this project are set out in Kaitlin Owens’ article.

I hope that you enjoy this edition of *Rights Review*, which collects experiences from as far away as India, Sri Lanka, The Hague and Ghana, and as close to home as Ottawa and Toronto. As these articles show, IHRP students are working to advance international human rights law, while gaining invaluable practical skills. I hope that students reading this edition will view these stories as starting points for their own exploration of this field of law, and I very much look forward to seeing what they discover.

Carmen Cheung, Acting Director of the IHRP



From the IHRP’s summer research trip to Honduras: newspapers announcing convictions in the high-profile murders of university students by police officers. Such convictions are a rarity in Honduras, which has the highest rate of murders per capita in the world. There have been 36 documented killings of journalists since 2003. The impunity rate for these murders is a staggering 95 percent.

Welcome to the 2013 Intern Edition! The Intern Edition is always a special piece for us as editors since we have the chance to showcase the summer experiences of our classmates. We are amazed every year at the variety of the projects that the IHRP interns work on, as well as the places they travel to. The IHRP interns return to the Faculty of Law with new insights, new experiences, and new stories – many of which we are excited to share in this Edition!

This past summer, the IHRP sent students all around the world to work with grassroots NGOs, international tribunals, and UN agencies. In this Edition, you will read stories about new legal initiatives in Malawi addressing inequality, the most recent challenges facing the International Criminal Court, and other international human rights issues. Photographs captured by the interns during their travels will also give you a taste of their experiences.

It is our goal that these articles will give our readers new insight into the field work that the Faculty's students are engaged in. We also hope to inspire future generations of lawyers and activists to become a part of the important field of human rights law.

We would also like to take this moment to thank all of the writers who contributed, as well as to our student Editorial Board and Faculty reviewers, Carmen Cheung and Andrea Russell. Their diligence and dedication make it possible for us to put out this Edition each year.

Sofia Ijaz (3L) and Teresa MacLean (3L)



2013-14 Rights Review student Editorial Board. From left to right: Drew Beesley, Teresa MacLean, Sofia Ijaz, Dharsha Jegatheeswaran, Katie Bresner, Amy Tang, Alison Mintoff (Absent: Katherine MacDonald).

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ADVANCING LGBT RIGHTS IN CANADA AND AROUND THE WORLD

Keith Crawford, 2L, Faculty of Law, University of Toronto

International recognition for rights related to sexual orientation and gender identity is undergoing rapid changes. The United Nations (UN) General Assembly made its first joint statement on sexual orientation, gender identity and human rights just five years ago, and it was met with an immediate opposition statement by a group of 57 nations. Since then, the UN has dramatically increased its efforts to study and release reports on abuses of lesbian, gay, bisexual and transgender (LGBT) rights. In 2011, the UN Human Rights Council successfully passed a resolution that provided more insight into LGBT human rights, and support for their protection.

Alongside positive developments however, there has been strong opposition to the recognition of LGBT rights at international law. For instance, several resolutions introduced by Russia at the UN Human Rights Council have sought recognition for the protection of ‘traditional values’ in international human rights law. In statements to the UN Human Rights Committee (HRC) on best practices for traditional values, several countries have already stated that traditional values include a definition of marriage as between one man and one woman. Other states and civil society contributors have expressed concern that ‘traditional values’ might be used to excuse human rights abuses.

This summer, I spent 14 weeks working with Egale Canada. Egale is Canada’s only national LGBT human rights organization. Egale Canada also contributes significantly to LGBT rights internationally, through its consultative status with the UN, as a member of the International Lesbian and Gay Association, and as a registered civil society organization with the Organization of American States (OAS). It also participates in Canada’s Universal Periodic Review (UPR) at the HRC. The main project I was given at the outset of my summer was to create a database of LGBT rights developments made by international law bodies, especially those that constitute the UN and the OAS.

Egale is a small, effective team that works in many different areas related to LGBT rights. In addition to being given one substantive project, I was assigned legal research and communications projects based on many different ongoing and emerging issues. As a result, I was able to contribute to documents used by Egale Canada in its consultations with the HRC and the OAS.

During my internship, I was also able to contribute to the organization’s responses to world events which took place during the summer. For instance, during my placement, Russia passed legislation banning “homosexual propaganda,” which stirred up controversy surrounding the 2014 Sochi Olympic Winter Games. I contributed to research on the language and implication of the legislation, and participated in meetings discussing Egale’s stance and policy on the issue. The law purports to ‘protect’ minors from exposure to pro-LGBT messages. In effect, it will bar any public statement of one’s LGBT identity, or in favour of LGBT rights. This legislation is an affront to LGBT rights because of its aim and effect of violating the freedom of expression of LGBT people and their allies. It is

unclear as of yet how the legislation might be applied, both during the Olympic Games and more generally.

Another topic I was able to contribute to was Egale’s research into the effects of Canada’s Bill C-31, *Protecting Canada’s Immigration System Act*, namely on the refugee system’s ability to respond to claims based on sexual orientation and gender identity from countries listed on Canada’s Designated Country of Origin list. Of particular interest was the effect of Canada’s listing Mexico as “a safe country” of origin. In a report submitted to the HRC in 2010, Global Rights International Gay and Lesbian Human Rights Commission (IGLHRC) International Human Rights Clinic, the Human Rights Program at Harvard Law School, and Colectivo Binni Laanu stated that 76.4% of LGBT people in Mexico have experienced physical violence because of their sexual orientation or gender identity and 53.3% have been assaulted in public spaces due to their sexual orientation or gender identity. For this project, I looked at a broad range of evidence on the risk of persecution-faceted by LGBT people in Mexico, including reports prepared by the Canadian and foreign governments, academic articles, and civil society reports. I compiled my research into an internal report for use for use by Egale.

Through this internship, I gained practical insight into the work of a small and effective human rights organization. The recognition of LGBT rights has an effect on many dimensions of people’s lives, making advocacy complex and varied. It was an incredibly rewarding experience to be immersed in this area of human rights, which sits at the intersection of many other issues, and which is currently in the process of being defined at the international level. ♦



*Action against homophobia in St Petersburg in September 2013 when Russia was hosting the G-20 summit of world leaders.
(Photo Credit: Valya Egorshin, Creative Commons)*



IHRP intern Andrew Stobo Sniderman spent the summer with the **United Nations High Commissioner for Refugees** in Zimbabwe. He took this photograph during his time there, and writes: “Zimbabwe held a presidential election this summer, which meant President Robert Mugabe spent a lot of time denouncing imperialists and homosexuals. Voting was peaceful but tarnished by allegations of fraud. Mugabe claimed victory, at 89 years old, and will continue ruling, as he has since independence in 1980.”
 (Photo Credit: Andrew Sniderman)

THINKING BEYOND THE ANTI-HOMOSEXUALITY BILL... (Continued from page 1)

Nonetheless, LGBT people are routinely made the targets of police and prosecutorial harassment and often face abuse and gross mistreatment while in detention. For example, one of the plaintiffs in *Victor Mukasa* was subjected to forced undressing, sexual assault, and public humiliation by police while in custody.

Consequently, civil society organizations like HRAPF face the challenge not simply of changing the law, but rather of seeking broader societal recognition and acceptance of LGBT people in Uganda. HRAPF has engaged in advocacy work with government agencies and elected officials in order to promote better treatment for LGBT people by the government and the police. The organization also conducts outreach work in the LGBT community and

educates LGBT individuals on the current status of the law, including steps that can be followed in the event of wrongful arrest or arbitrary detention. The challenge of LGBT rights in Uganda is not as simple as defeating a Parliamentary bill; rather, it involves engaging society on multiple levels, through advocacy work, community outreach, and building connections among other human rights organizations at both the local and international level.

Civil society organizations have made impressive strides toward obtaining legal protection for LGBT people in Uganda, but these efforts require broader societal recognition to secure basic rights for LGBT individuals under the law. ♦

2013 IHRP INTERNS

Sarah Beamish | Centre for Public Interest Law (Ghana) (Brews Fellow)
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Lindsay Borrows | United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya (Arizona)
Shweta Choudhry | South Asian Legal Clinic of Ontario (Toronto) (IHRP-Asper Centre Intern)
Alexander Condon | International Organization for Migration (Geneva / Athens)
Keith Crawford | EGALE (Toronto)
Kathryn Hart | Human Rights Awareness and Promotion Forum (Uganda)
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Interested in contributing to *Rights Review*?

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For more information on the IHRP, the
Internship Program, and access to
previous editions of *Rights Review*, visit:
<http://ihrp.law.utoronto.ca>

Brews Fellow Sarah Beamish and local interpreter Rosemary Quarm interviewing a group of women in the Western Region of Ghana. Sarah worked with the **Centre for Public Interest Law**, conducting research into the impacts on the people in the region of the Western Region Gas Infrastructure Project. Thousands of people's farms and other property were destroyed during the construction of a pipeline without adequate consultation or compensation, leaving many in desperate financial insecurity and unable to meet their families' basic needs. The Centre is hoping to take pro bono legal action on their behalf.



(Photo Credit: Sarah Beamish)



(Photo Credit: Sarah Beamish)

The first segment of the onshore component of the gas pipeline, which spans 120 kilometers and impacts over 60 communities in the Western Region of Ghana. The construction of the pipeline and its right-of-way involved the destruction of well over 1000 subsistence farms and plantations, as well as water bodies, fishponds, roads, gardens, and other private and public resources. Brews Fellow Sarah Beamish and a team from the **Centre for Public Interest Law** interviewed about 300 impacted people along the length of the pipeline, and their findings are being published in a major report and may lead to legal action to seek compensation for the affected people.

A stream on the edge of a rural community in the Western Region of Ghana visited by Brews Fellow Sarah Beamish during her research into the impacts of the gas pipeline. This stream used to be an important source of freshwater for the community, which used it for drinking, washing, and harvesting food. When the pipeline was constructed, the stream became stagnant and the community could no longer use it. They had to pay for bagged water from a nearby town for six months, which was especially challenging given the severe poverty faced by the community and the fact that the pipeline construction had also destroyed their main road to town.



(Photo Credit: Sarah Beamish)

THE INTERNATIONAL ORGANIZATION FOR MIGRATION: EXPLORING ALTERNATIVES TO DETENTION OF MIGRANTS

Paloma van Groll, 2L, Faculty of Law, University of Toronto

The detention of irregular migrants is a common practice throughout the world, including in Canada. Conditions in detention facilities can, in some countries, be deplorable. Overcrowding, widespread disease, and indefinite lengths of stay are among the conditions experienced by migrants in especially terrible detention centers or jails. Many governments cite detention as a necessary means to manage migration. This practice is also frequently used for strategic political reasons, as governments believe it sends a message of border control to its own citizens, and deters additional migrants from attempting to “get around” the regular rules. However, there is a growing body of evidence supporting the fact that immigration detention does not actually deter irregular migrants and asylum seekers from arriving at borders, and is more costly than other ways of managing migrants.

In response to this phenomenon, many leading actors in the global forum, including the United Nations, NGOs including the International Detention Coalition (IDC), and prominent scholars are promoting alternatives to detaining migrants. Alternatives to detention consist of any legislation, policy or practice that allows freedom of movement for asylum seekers, refugees and migrants while their migration status is being resolved. This could include requiring a migrant to periodically report to immigration officials while allowing them to reside elsewhere in the community, or even simply requiring registration with the immigration authorities. These are but a few of the possible alternatives countries can employ instead of detention.

This summer, I interned at the International Organization for Migration (IOM) headquarters in Geneva, and a key focus of my internship was working on the issue of detention of migrants. The IOM is the world’s leading international organization dealing with migration. The agency works to assist countries in migration management, to advance global understanding of migration issues, to promote social and economic development through migration, and to uphold the human dignity and well-being of migrants. The activities that the IOM carries out are extremely varied, including working with national governments to manage migration, protecting vulnerable migrant groups such as victims of trafficking, and organizing intergovernmental conferences on specific migration topics. With offices all around the world, their activities span all aspects of migration.

At the IOM, I worked in the International Migration Law (IML) Unit. The objective of the Unit is to increase awareness and knowledge of the international legal regime dealing with migration. The Unit’s main functions are to conduct trainings and assist in capacity building for governments and other groups, and to research migration law at the international, regional and national levels. Because no comprehensive legal framework regulating migration issues exists at the international level, the IML Unit has become a valuable source of legal information on this issue for many countries.

One of my assignments during my internship involved surveying existing IOM projects that could constitute supporting “alternatives to detention.” This involved investigating projects or programs that promote and enhance a country’s ability to use means other than detention when dealing with migrants. The results included projects in which the IOM works with a government to strengthen their border officers’ screening capacity for vulnerable groups, to identify these groups and ensure they are not detained. Another project runs programs for children who are in detention, and seeks to allow them to leave detention for education and recreation purposes. Any project that could be considered as promoting or providing an alternative to detention was included.

I also created a ‘best practice’ guide for national legislation on detention of migrants. The IML Unit receives requests from countries to review their legislation and make recommendations on how to strengthen the laws and ensure they are in line with international migration law standards. The IML Unit is currently working on creating a best practice guide on border management legislation, which would be used when advising country governments on such requests. I worked on one aspect of the border management guide, namely, detention legislation. In drafting this guide, I conducted research on international standards for detention, reviewed literature on detention practices, and compared various national legislations on detention. The guide thus drew from examples of good practices on detention from many countries, and will be part of the IML Unit’s broader guide on border management practices.

My time working at the IOM was very rewarding. I learned a great deal from a team of incredibly smart and hardworking colleagues about both the inner functioning of intergovernmental organizations and the nuances of migration issues, most notably, that of detention of migrants. ♦



Paragliding in Montreux (Photo Credit: Paloma van Groll)



Monument for Alexandros Grigoropoulos, the 15-year-old boy fatally shot by an Athens policeman. The unprovoked shooting sparked violent rioting throughout Greece. (Photo Credit: Alex Condon)

GREECE IS SINKING: MIGRATION, XENOPHOBIA, AND THE EROSION OF HUMAN RIGHTS IN THE CRADLE OF DEMOCRACY

Alex Condon, 2L, Faculty of Law, University of Toronto

One of the highlights of my summer internship at the International Organization for Migration in Athens, Greece was taking a weekend visit to beautiful Santorini. Amid the hustle of vendors and honeymooners, one hears the story of Atlantis, the mythical island nation that allegedly sank after the Minoan eruption of Santorini around 1600 BCE. While the ‘lost’ city of Atlantis remains a legend, the parallels to present-day Greece are striking. In fact, the nation’s smoldering economic, social and political crises may soon erupt to sink yet another Greek civilization.

One of the central forces driving the turmoil in Greece is the current migration crisis. In 2011, the European Court of Justice found that 90 percent of all irregular entry into the European Union (EU) flows through Greece’s borders. The vast majority of these migrants enter Greece aboard ships from Turkey, the neighbouring rival that Greek officials maintain is actively encouraging irregular migration flows. Further, the Hellenic Foundation for European and Foreign Policy estimated that there were 470,000 irregular migrants in Greece in 2011, nearly double their 2009 estimate of 280,000. The rapid influx of migrants into a nation with few resources to accommodate them, and into a society which seems in need of a scapegoat for its economic problems, has brought the tensions in Greece to a crescendo.

These looming tensions are not overlooked by opportunistic groups who have used the issues of crime and immigration as a means to advance their own troubling agendas. For example, neo-Nazi political party Golden Dawn has become Greece’s third most popular party in recent years through increasing public support for

its virulent anti-migrant rhetoric. This anti-migrant sentiment has even led to the creation of vigilante groups who have taken it upon themselves to rid Greece of migrants through racist propaganda and xenophobic violence.

Faced with this growing anti-migrant sentiment, Greece’s ruling political party, the New Democracy Party, has undertaken heavy-handed migration policies in what may be an attempt to win voters back from the Golden Dawn. For example, it introduced *Operation Xenios Zeus*, a radical law enforcement initiative authorizing the police to detain anyone who is suspected of being in the country irregularly. The Operation has subverted human rights in Greece: tourists have been seriously beaten by police; migrants lawfully residing in Greece have been beaten, had their documentation destroyed, their personal belongings taken, and told, ‘If you don’t like it, you can leave the country.’ Migrants irregularly residing in Greece are being shipped to detention centers where they are imprisoned, and subjected to inhumane and degrading treatment before being deported.

A second instance where the New Democracy Party has challenged international human rights norms through its heavy-handed, anti-migrant policy is in the recently introduced regulation allowing police to detain people, especially irregular migrants, drug users, sex workers, and the homeless, for forced testing for HIV or other infectious diseases. The practice of publishing the personal data and photographs of those who test positive for an infectious disease further exacerbates the policy’s infringement of human rights. For instance, in April 2012 the photographs and information of

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A NEW TEST FOR COMPLICITY: *EZOKOLA V CANADA*

Leah Sherriff, 2L, Faculty of Law, University of Toronto

Charu Kumar, 3L, Faculty of Law & Munk School of Global Affairs, University of Toronto

This summer the Supreme Court of Canada handed down a landmark decision in *Ezokola v Canada (Minister of Citizenship and Immigration)* which altered the landscape of refugee exclusions in Canada. The Supreme Court unanimously rejected a “guilt-by-association” approach to determining complicity in international crimes for the purposes of excluding refugees from protection.

This article, which draws from our internship at the Crimes Against Humanity and War Crimes Section (War Crimes Section) of the Department of Justice in Ottawa, will briefly touch on the nature of the change in law yielded by *Ezokola*, and some of its implications.

The appellant in this case, Rachidi Ezokola, began his career as an employee of the Government of the Democratic Republic of Congo (DRC) in 1999. In 2007, he was designated as the Head of the Permanent Mission of the DRC to the United Nations in New York, and spoke before the Security Council regarding natural resources and conflicts in the DRC. While Mr. Ezokola was serving in this capacity, the government of the DRC committed crimes against humanity. In January 2008, Mr. Ezokola refused to continue to serve the government of President Kabila, which he considered to be “corrupt, antidemocratic and violent”. He resigned from his post and fled to Canada, where he sought refugee protection for himself and his family under article 1F(a) of the *1951 Convention Relating to the Status of Refugees (Refugee Convention)*. Article 1F(a) of the *Refugee Convention* is incorporated into Section 98 of Canada’s *Immigration and Refugee Protection Act (IRPA)*. It excludes individuals from the definition of “refugee” if there are serious reasons for considering that they have “committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments drawn up to make provision in respect of such crimes.”

The issue of whether refugee protection should be granted to Mr. Ezokola and his family was first presented before the Immigration and Refugee Board in 2009, which excluded him from the definition of “refugee” under article 1F(a). The matter was then brought before the Federal Court, the Federal Court of Appeal, and eventually, the Supreme Court of Canada. The chief issue before the Supreme Court was to determine what test for complicity decision makers should employ in the context of article 1F(a) of the *Refugee Convention*. The task is summed up by the Court as follows: to determine “what degree of knowledge and participation in a criminal activity justifies excluding secondary actors [i.e., not direct perpetrators] from refugee protection.”

In the decision, the Supreme Court rejected the previous test for complicity, which required “personal and knowing participation” by the refugee applicant. The Court found that in some cases, the old test had been “overextended to capture individuals on the basis of complicity by association.” The Court identified that international law, and the approach taken by other state parties to the

Refugee Convention, made it clear that Canada needed to “rein in” its practice of excluding persecuted persons for merely being associated with others who have perpetrated international crimes.” Consequently, the Supreme Court crafted a new test for complicity to align the Canadian application of article 1F(a) for exclusions with international jurisprudence. In order to be found complicit, the Court held that there must be “serious reasons for considering” that the individual has “voluntarily made a significant and knowing contribution to the organization’s crime or criminal purpose.” The Court also identified a list of six factors that must be considered when determining whether a refugee applicant made a voluntary, knowing and significant contribution.

However, despite providing this non-exhaustive list of factors, the Supreme Court failed to offer practical guidance on what type and degree of involvement is in fact necessary to satisfy the new test for complicity. More specifically, the Court offered very little clarity regarding the requirement of “significant contribution,” despite this novel (at least as Canadian jurisprudence is concerned) prerequisite being stressed repeatedly throughout the judgment. Concerning this requirement, the Court simply pronounced that it can be demonstrated only when a “requisite link” exists between the individual’s conduct and the concerned group’s crime or criminal purpose. Consequently, one is left wondering: what type of involvement would rise to the level of *contribution*? Moreover, under what circumstances would this contribution be considered *significant* enough to attract criminal liability?

From an academic standpoint, some may find the open-endedness of this new test intellectually stimulating. However, from the viewpoint of government agencies, which are henceforth required to embrace and satisfy this new complicity equation when evaluating refugee applications (i.e. the Canadian Border Services Agency), the ambiguity of the new test presents many challenges. In fact, without providing adequate parameters, the Supreme Court effectively conferred upon such agencies the monumental task of sifting through the jurisprudence of other legal systems for guidance – namely, the International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), as well as the United States and United Kingdom. This is because the Supreme Court relied heavily on these legal systems to formulate the new complicity test for Canada.

As interns in the War Crimes Section – which, among other duties, offers practical advice to Canadian Border Services Agency Officials in relation to refugee exclusion matters – we were given a shot at this challenging task.

As was to be expected, we encountered a number of hurdles in the course of our research. One such hurdle was the unfortunate fact that, although the Supreme Court extracted the threshold of “significant contribution” from the ICC, ICTY, and ICTR, an

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REFUGEE PROTECTION IN CANADA:

WORKING WITH THE REFUGEE LAW OFFICE AND THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Katherine MacDonald, 3L, Faculty of Law, University of Toronto

This summer I interned at the Refugee Law Office (RLO) of Legal Aid Ontario and provided research support to the Canadian Association of Refugee Lawyers (CARL). The RLO assists low-income refugee claimants with their immigration matters. CARL is a professional network linking around 150 lawyers, academics and students to provide a national voice on human rights and refugee law by coordinating litigation strategies and raising public awareness.

The Asper Centre for Constitutional Rights and the IHRP jointly funded my internship. As such, a significant part of my work involved constitutional issues playing out in the refugee/immigration context. There were three major cases I was involved with during the summer. The first was a constitutional challenge to the legislative provision in the *Immigration and Refugee Protection Act* (IRPA) that bars unsuccessful refugee claimants from having a “Pre-Removal Risk Assessment” (PRAA). A PRAA is an immigration procedure in which a refugee claimant may apply, before being removed, to have an officer evaluate the risk that he or she would face in their home country if deported. The recent legislative changes to IRPA bar individuals from making such an application for one year after they receive a negative decision on their refugee claim. The second case involved two potential *Charter* challenges (one involving the right to life, liberty and security, and the other involving equality rights) to the definition of “dependent” under the *Immigration and Refugee Protection Regulations*. The definition of ‘dependent’ in the regulations covers only a minor child of an applicant. This means, for example, that a refugee child cannot sponsor his or her parents. Finally, I also worked on CARL’s litigation against the 2012 government cuts to the Interim Federal Health Program (IFHP).

PRRA bar challenge (CARL and RLO)

The PRRA program was designed to ensure Canada’s compliance with its international and *Charter* obligations by ensuring that individuals are not sent back to their countries of origin without an assessment of the risks they would face. In a case involving a failed refugee claimant from Eritrea whose application for deferral of removal was denied during the period of PRRA ineligibility, RLO and CARL argued that the 12-month PRRA bar precludes individuals from a timely and fulsome risk assessment by an independent, impartial and competent tribunal. As such, the bar violates these individuals’ rights to life, liberty and security of the person as under s. 7 of the *Charter*. RLO and CARL argued that in spite of the 12-month bar on PRRA applications, where a claim to risk is made out, and it is not wholly lacking in credibility, a competent tribunal must assess this prior to removal. Anything less would violate the *Charter*.

While this case was awaiting leave for judicial review of the negative deferral decision, the claimant was granted his PRRA and became a protected person. While this is excellent news for the claimant, it also means that his case would appear resolved and become moot. However, CARL and RLO argued that the court should exercise its jurisdiction and hear the case anyway, because of the importance of this constitutional issue. We argued that CARL should be granted public interest standing as a party and therefore the case should not be considered moot. At the time my internship ended, we were still awaiting the outcome of the application for leave for judicial review.

(Continued on page 16)

GREECE IS SINKING... (Continued from page 9)

12 HIV-positive women were published in Greek newspapers. Inaccurately labeled as sex workers, these women were publically humiliated, leading one to commit suicide.

The seeming unwillingness of the EU to provide adequate assistance has further exacerbated tensions in Greece over migration issues. While the EU does provide some funding, the aid is inadequate and does not address the central issue that Greece, with only three percent of the EU’s land area, cannot accommodate ninety percent of the EU’s migrants. Meanwhile, the EU watches as each violent, anti-migration riot further unravels Greek democracy, under the same shadows of the Acropolis where it was born 2500 years ago. ♦

Graffiti Welcoming Visitors to Central Athens
(Photo Credit: Alex Condon)



CLOSING THE PROTECTION GAPS FOR ENVIRONMENTAL MIGRANTS

Kristy Warren, 2L, Faculty of Law, University of Toronto

This summer I completed an internship with the International Organization for Migration (IOM) at their headquarters in Geneva, Switzerland. IOM is the leading intergovernmental organization in the field of migration and has over 151 member states. I worked specifically within the International Migration Law (IML) Unit in the International Cooperation and Partnerships Department. One of the primary roles of the IML Unit is to gather and present relevant information on international migration law to state parties in a comprehensive and accessible manner.

As an intern, I worked extensively with the Migration, Environment and Climate Change (MECC) Division and assisted in the development of an atlas on environmental migrants. Environmental migrants, as defined by the IOM, “are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.” For the atlas, I researched national, bilateral and regional practices that offer protection for environmental migrants. I compiled my research into a report that the MECC division will draw from as they continue to develop the atlas.

I also had the opportunity to review the *Law of Georgia on Internally Displaced Persons*, the Republic of Georgia’s current legislation on Internally Displaced Persons (IDPs), and provide feedback on how the government could amend it to ensure compliance with the United Nations’ Guiding Principles on Internal Displacement. One of the primary issues with the legislation is that it only provides protection to those displaced as a result of conflict. However, the Georgian government is in the process of drafting a new law that does offer protection to persons displaced internally as a result of a natural disaster. The IOM Mission in Georgia contacted the IML Unit requesting examples of legislation from other countries that pertain to environmental migrants. I researched examples of relevant legislation and compiled a brief report for

IOM Georgia. The Georgian government will use these examples as it drafts its new law on environmental migrants.

While there are currently only a limited number of countries that provide protection to migrants displaced as a result of environmental factors, Georgia is not the only state that is beginning to take action. *The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)* has been signed by 37 states and ratified by 17. The *Kampala Convention* is a treaty of the African Union that recognizes the challenges that IDPs present within the African continent and entered into force on December 6, 2012. The *Kampala Convention* reaffirms that national authorities have the primary responsibility to assist IDPs and outlines the obligations and responsibilities of African States who have ratified or acceded to it. State parties are required to incorporate their obligations under the Convention into domestic law by enacting or amending relevant legislation.

Spain and Colombia have also taken steps to ensure that environmental migrants receive protection. These two countries provide assistance to those displaced from environmental factors through the Colombian Temporary and Circular Labour Migration Scheme (TCLM), a bilateral agreement created in 2001. While the program is not specifically designed to assist environmen-

tal migrants, international labour migration may assist people in adapting to a changing environment. The Colombian TCLM Scheme facilitates legal labour migration for communities that are vulnerable to environmental disasters. Labour migration can prevent forced displacement by reducing the vulnerability of communities to environmental disruptions. Foreign workers in Spain often send remittances to their families and community in Columbia, which can help improve their financial situation.

The United States also provides protection to environmental migrants through the *Immigration and Nationality Act (INA)*, which authorizes temporary protected status (TPS) for aliens of designated countries. Under s. 244 of the INA, the Secretary of Homeland Security may grant TPS to nationals of a foreign country based on certain conditions, which can include environmental conditions that temporarily prevent them from returning safely.

Even though many countries have enacted legislation that pertains to environmental migrants, many are left without protection. The IML Unit and MECC recognize that a protection gap exists and are hopeful that other states will follow Georgia’s lead and turn to the IOM for assistance in drafting new legislation that provides protection to those displaced as a result of environmental factors. ♦



The students completing summer internships in the IML Unit.
From left to right: Alex Condon, Paloma Van Groll, Kristy Warren and Alex Langlee.
(Photo Credit: Fanny Dufvenmark, Junior Migration Law Expert at IOM)

CANADIAN REFUGEE POLICY AND INTERNATIONAL HUMAN RIGHTS LAW

Aron Zaltz, 2L, Faculty of Law, University of Toronto

The direction of Canadian refugee policy since the ascension of the Conservative Party to a Parliamentary majority in 2011 became fully apparent with the passage of Bill C-31 in July 2012. Bill C-31 limited the conditions under which refugee claims would be accepted by the Immigration and Refugee Board (IRB), and thinned the procedural protections available to asylum seekers. In my work at the Canadian Centre for Victims of Torture (CCVT), I focused on assisting the CCVT's clients—survivors of torture, war, and political persecution—in obtaining the protection of legal status in Canada. This experience exposed me to the intensely adversarial nature of the refugee claims determination process.

As a result of Bill C-31, refugee claimants face extremely truncated timelines for the submission of basis of claim documentation (a complex initial application form) to the IRB. Those claimants designated under the newly introduced classifications of “Designated Foreign Nationals” or as being from “Designated Countries of Origin” do so without many of the appellate protections available previously, as they were eliminated via recent amendment of the Immigration and Refugee Protection Act (IRPA). In addition to these pressures, the CCVT's clients, who were often irregular arrivals as designated under section 10 of the IRPA, would often find themselves detained in prisons and jails meant for criminal detention. Any psychological trauma compelling (or resulting from) their flight to Canada was substantively exacerbated by this treatment.

The criminalization of asylum-seekers represents the logical endpoint of a shift in the policy agenda of Citizenship and Immigration Canada, from the protection of refugees to the facilitation of economic growth through the recruitment of intellectual and financial capital. While few objections can be made to the latter priorities as a goal of immigration policy, the punditry against “bogus” refugee claimants utilized to legitimize this larger shift obscures the extent to which an already antagonistic process has been made more so. Forcing traumatized and vulnerable claimants to contend with punitive measures ranging from the denial of basic healthcare benefits to the substantive denial of appeal rights represents an un-

acceptable departure from Canadian refugee policy's humanitarian traditions.

In addition to potentially violating sections 7 and 15 of the Charter of Rights and Freedoms, the provisions of Bill C-31 derogate from our international commitments. Its effects represent Canada's larger legislative failure to adequately internalize the instruments of human rights protection in the international conventions to which we are party, and by which we are bound. Specifically, the fact that an individual could be deported from Canada before even being granted leave upon an application for judicial review arguably fails to uphold the protection of the rights of asylum seekers as required by Article 33 of the Convention relating to the Status of Refugees. Even if a stay of removal is sought and granted, the violation is not resolved because of the use of a standard of reasonableness in judicial reviews of the IRB's decision. Under the reasonableness standard, the Board member's decision is to be treated with deference. This means that a decision in violation of Article 33's broad protections against refoulement to the risk of persecution could be upheld if it could be described as falling within a “range of reasonable alternatives.” Correspondingly, the precarious state in which vulnerable survivors of traumatic torture and persecution live during the determination of their refugee claims must be recognized as resulting from Canada's refusal to articulate, as a preemptory principle, the absolute prohibition on refoulement to torture. That prohibition has been held to be required by Article 7 of the International Covenant on Civil and Political Rights, and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In working with survivors of torture, it became clear that a violation of the most profound violation of human rights—that to life—requires the mobilization of multiple frameworks of protection, both at the level of domestic policy and international law. In addition, allowing for our domestic laws to diverge from international standards comes at a human cost. By failing to uphold our international obligations to uphold human rights, we do more than signal our disregard for the international rule of law—we undermine it as a system. ♦

EZOKOLA V CANADA... (Continued from page 10)

evaluation of the jurisprudence of these institutions did not allow us to sketch out the parameters of “significant contribution” as we had hoped. This was specifically because what amounts to “significant” in the context of international criminal law—where high-ranking officials are often being tried for allegedly orchestrating and/or perpetrating large-scale crimes—undoubtedly differs from the refugee exclusion context, which often involves individuals that played relatively minor roles in the concerned criminal activity. Despite at times feeling that we lacked a sense of direction, we managed to present to the War Crimes Section some practical findings, the contents of which are too lengthy for this article.

Editor's note: The IHRP, along with the Canadian Centre for International Justice, were co-interveners at the Supreme Court of Canada in *Ezokola*, where they argued that under modern international criminal law, mere membership, without more, in an organization that has been associated with or implicated in international crimes is not itself enough to constitute an international crime.

RIGHT TO HEALTH

RECOGNIZING HEALTH AS A HUMAN RIGHT

Amy Tang, 2L, Faculty of Law, University of Toronto

The United Nations Commission of Inquiry on the Syrian Arab Republic recently reported that the “deliberate targeting of hospitals, medical personnel and transports, the denial of access to medical care, and ill-treatment of the sick and wounded, has been one of the most alarming features of the Syrian conflict.” Deprivation of medical aid has been a well-documented strategy used in various conflicts around the world. Under international humanitarian law, intentionally directing attacks on hospitals and medical personnel in non-international armed conflicts is a violation of the laws of war. However, in situations where the criteria for armed conflict are not met, an understanding of the application of international human rights law is very important.

To gain such an understanding, I interned at the Office of the United Nations Special Rapporteur (UNSR) on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Right to Health) in New Delhi, India. I worked with Mr. Anand Grover, who was appointed as the Special Rapporteur

in 2008, as well as four incredible lawyers who have experience in a variety of jurisdictions.

The right to health in international human rights law is enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and other international and human rights treaties. Article 12 of the ICESCR stipulates that state parties must take the necessary steps to meet goals required for the realization of the right to health including: reducing infant mortality, preventing endemic, occupational and other diseases, and creating conditions to ensure access to health care for all. To clarify the scope of these steps, the UN Committee on Economic, Social and Cultural Rights adopted General Comment No. 14 in 2000. On a broader scale, the General Comment explains that Article 12 imposes on state parties obligations to *respect, protect, and fulfil* the right to health. More specifically, the right to health contains four elements: availability, accessibility, acceptability, and quality. ‘AAAQ’ is the essence of the right to health framework, and rarely

(Continued on page 17)



A group of women inside the Jama Masjid in Delhi (Photo Credit: Amy Tang)

THE ROOTS OF IMPUNITY: TRANSITIONAL JUSTICE FAILURES IN HONDURAS

Kaitlin Owens, 2L, Faculty of Law, University of Toronto

This summer, I spent approximately four months working with the IHRP in Toronto. My primary task involved working with PEN Canada, an organization dedicated to promoting freedom of expression worldwide, to draft a report on violence against journalists and impunity in Honduras. My internship involved conducting extensive research, which included examining NGO reports, academic articles, and newspaper articles. I also traveled to Tegucigalpa, the capital city of Honduras, where my team and I interviewed journalists, writers, NGO workers, government officials, and activists. I used all of this information to draft a report outlining the causes of violence against journalists and impunity in Honduras, and provided a list of recommendations for the Honduran government and the international community.

One of the key ideas in the report is the role transitional justice has played in relation to impunity in Honduras. Transitional justice “refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.” These can include “criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.” It is important to note that each mechanism has potential benefits and drawbacks, and that the pursuit of justice versus the pursuit of peace is an issue with which post-conflict societies continue to grapple.

While prosecutions may “serve to restore (or install) democracy, the rule of law and respect for human rights, by making it clear that certain actions are not only proscribed by law, but subject to punishment,” they may also increase resentment and suspicion of the justice system. This often stems from the fact that perpetrators may be left unpunished. Likewise, while implementing a general amnesty may help to ensure the stability of a state in which the rule of law triumphs and human rights violations cease, a government that begins its term by rejecting accountability may also undermine its own legitimacy. Truth commissions may aid reconciliation and stability, but they remain imperfect substitutes

for justice, especially when poorly implemented.

Honduras is less emblematic of the debate of justice versus peace than it is of a failure to fully implement transitional justice measures. Following serious human rights violations in both the early 1980s and the aftermath of the 2009 coup, the Honduran state embarked upon the implementation of a number of different transitional justice mechanisms.

For example, after abuses in the 1980s, the Honduran government established a Special Armed Forces Commission, the Inter-Institutional Commission of Human Rights, and the Office of the National Commissioner of Human Rights, all of which were based in Honduras. Hondurans also sought justice through domestic prosecutions and by bringing cases before the Inter-American Court of Human Rights. In July 1991, however, the Honduran Congress passed a sweeping amnesty law, reinforcing a previously declared amnesty from 1990. Overall, only two military officers were convicted for abuses during the 1980s: one sentenced to 12 years in prison for the 1983 murder of Honduran Communist Party leader Herminio Deras, and one sentenced to four years in prison for illegal detention.

Following abuses during and immediately after the 2009 coup, similar measures were implemented. The Honduran government established a Truth and Reconciliation Commission. The Human Rights Platform of Honduras, a collective of civil society groups, launched an alternative truth and reconciliation commission. Both commissions provided extensive lists of recommendations for the Honduran state, yet proportionately few have been implemented.

In January 2010, the National Congress of Honduras passed an Amnesty Decree. The law granted amnesty for political crimes and their associated common crimes attempted or committed between January 1, 2008 and January 27, 2010, but excluded crimes that constituted crimes against humanity or human rights violations. The law was criticized by a number of human rights organizations, including the Inter-American Commission for Human Rights which maintains that, in general, amnesty laws violate states’ obligations to investigate and punish human rights violations. As of October 2012, only one person had been convicted for any of the reported abuses: a police officer sentenced to eight years in prison for the illegal arrest and torture of a protestor.

(Continued on page 18)



Memorial to the disappeared at the Committee of Relatives of the Detained and Disappeared in Honduras. (Photo Credit: Carmen Cheung)

THE SHANGHAI COOPERATION ORGANIZATION'S COUNTER-TERRORISM STRATEGY: A STEP IN THE WRONG DIRECTION?

Elizabeth Severinovskaya, 2L, Faculty of Law & Munk School of Global Affairs, University of Toronto

According to the United Nations (UN) Global Counter-Terrorism Strategy, adopted by the General Assembly (GA) in 2006, “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but are mutually reinforcing.” A concern among human rights proponents, however, is that counter-terrorism strategies have the potential to seriously violate human rights. This summer, I interned with the International Federation for Human Rights (FIDH), a non-governmental organization with UN observer status. One of my major projects was to research the UN's relationship with a regional counter-terrorism alliance, the Shanghai Cooperation Organization (SCO). My work through the FIDH suggests that a gap may exist between a rhetorical commitment to protect human rights while countering terrorism and a real concerted effort to implement such commitments. This gap seems particularly evident in the UN's relationship with the SCO.

The SCO is a regional organization with observer status at the UN and is composed of six member states: China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. In addition to its member states, the SCO recognizes India, Iran, Mongolia, and Pakistan as observers. The SCO's stated goals are to maintain and strengthen peace, security and stability in its region by counteracting what it refers to as “the three evils:” terrorism, separatism and extremism. The FIDH has observed that the SCO's counter-terrorism strategy violates provisions of the *International Covenant on Civil and Po-*

litical Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), and the Convention relating to the Status of Refugees (Refugee Convention). Moreover, many SCO states have authoritarian regimes characterized by poor human rights practices that often target media personnel and human rights defenders.

According to the FIDH, at the heart of the SCO counter-terrorism strategy is the principle of mutual recognition, which requires all SCO member states to give “mutual recognition” to acts deemed as terrorist, separatist or extremist by other SCO member states, regardless of whether the member state's national legislation includes the act in the same category of crimes. Furthermore, under the SCO's 2009 Convention Article 2(2), member states shall consider terrorist acts to be extraditable offences. In practice this means that if one SCO member labels someone a terrorist, and that suspected terrorist finds himself in another SCO member's jurisdiction, the host country is bound to extradite the suspected terrorist back to the request issuing country without questioning the extradition request. Former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, testified before the Tom Lantos Human Rights Commission (a bipartisan caucus of the US House of Representatives) that the SCO's use of unconditional extradition in its counter-terrorism strategy is a clear departure from
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REFUGEE PROTECTION IN CANADA... *(Continued from page 11)*

Minor child sponsoring parent as ‘dependent’ (RLO)

I also assisted with a permanent residence application for a mother and her minor daughter. The daughter was recognized as a refugee under the international *Convention Relating to the Status of Refugees*, and can now apply for permanent residence here. Her mother's refugee claim was denied, making her subject to deportation and putting the family at risk of separation. The daughter is dependent on her mother, who is her sole caregiver and legal guardian. Furthermore, she suffers from mental health problems due to her childhood history of sexual, physical and psychological abuse in her country of origin.

RLO is trying to enable this family to stay together in Canada by including the mother as a dependent family member in her daughter's permanent residence application. This is not allowed under IRPA as minor protected persons cannot include their parents or any siblings in their applications for permanent residence in Canada as “family members.” This is because the definition of “family member” of a protected person excludes the parent and siblings of a protected person who is a minor dependent child.

I was very pleased to submit the completed permanent residence application for these clients on the last day of my internship.

IFHP litigation (CARL)

CARL is challenging the drastic cuts to the IFHP announced in the *Order respecting the Interim Federal Health Program, 2012* that came into force on June 30, 2012. These cuts will either greatly reduce or deny health coverage to privately sponsored refugees as well as to all other categories of refugee claimant. CARL is arguing that these cuts violate the Charter as well as put Canada in contravention of its international obligations under the *1951 Convention Relating to the Status of Refugees* and the *Convention on the Rights of the Child*.

My work on this project inspired me to propose a Directed Research Project under the supervision of Professor Audrey Macklin for this fall that will look into the impact of the IFHP cuts on pregnant refugees. This project will entail a feminist critique of Canadian refugee law and policy from an international and comparative law perspective.

I am very grateful to the Asper Centre and to the IHRP for this fantastic learning experience. It was a wonderful opportunity to think about larger constitutional issues within the immigration context, while also working directly with individual clients. ♦

ASIA'S LATEST AUTHORITARIAN REGIME: SRI LANKA

Dharsha Jegatheeswaran, 2L, Faculty of Law, University of Toronto

In 2009, Sri Lanka emerged from a 30-year civil war with the Liberation Tigers of Tamil Eelam. The government's victory came at large costs, and to date there are still unheeded calls for a credible and independent investigation into war crimes committed by both sides during the last stages of the war. Nonetheless, 2009 presented a unique opportunity in Sri Lankan history to bridge gaps and address some of the root issues of the decades-long ethnically-driven conflict. Unfortunately, my experience in Sri Lanka this summer illustrated quite clearly that the country has fallen into dire straits following the war. As the UN High Commissioner for Human Rights, Navi Pillay, said in her concluding statement during her visit to the country this August, "...Sri Lanka, despite the opportunity provided by the end of the war to construct a new vibrant,

all-embracing state, is showing signs of heading in an increasingly authoritarian direction."

This past summer I had the opportunity to intern in the Legal & Constitutional Unit at the Centre for Policy Alternatives (CPA), where I witnessed first-hand the authoritarian regime that is developing, or has arguably already developed, in Sri Lanka. The greatest measure of this is found in the erosion of the rule of law in the country, which was evident in trials I attended at the Supreme Court and in the research I conducted to support the CPA's public interest litigation. While the rule of law was certainly undermined during the civil war, its pronounced erosion most clearly began with the 18th Amendment to the Constitution, which passed in

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RECOGNIZING HEALTH AS A HUMAN RIGHT... *(Continued from page 14)*

did a day go by during my internship without that acronym being mentioned at the office.

The General Comment also sets out that the right to health entails not only the right to be healthy, but also that underlying determinants of health, such as adequate sanitation, access to safe drinking water, and access to health-related information, including sexual and reproductive health, are met. It further outlines that the right to health contains certain core obligations, which are minimum essential levels of the right that state parties cannot derogate from. These include the obligation to adopt and implement a national health policy in a transparent and participatory way, the obligation to provide essential primary health care in a non-discriminatory fashion, and the obligation to pay particular attention to vulnerable groups.

With all of this in mind, a human rights approach can and should be taken to address challenges to health care in conflict and post-conflict situations. For example, the principle of non-discrimination would require equal access to health facilities, goods, and services. Since health care workers are essential for ensuring the availability of health care services, state parties should provide them with adequate protection. The ICESCR also obliges all state parties to provide international assistance and cooperation. In the context of the right to health in conflict situations, this includes caring for displaced populations and refraining from policies which violate the right to health, such as deportation.

The recognition of health as a human right has garnered both support and opposition. In times of conflict where resources like food, health care facilities, and shelter may be limited, some state parties argue that it is an unrealistic expectation for state parties to be able to fulfil the right to health. While resource availability and constraints are taken into account in the General Comment through the concept of progressive realization, state parties are still required to use the maximum available resources and to take concrete and

targeted steps towards fulfilling the right to health.

Ensuring the full realization of the right to health requires a willingness to engage in dialogue from state parties, non-state actors, humanitarian aid organizations, public health professionals, and the human rights community. Through this internship, I participated in this important discussion, researched and drafted a report to be presented to the General Assembly and Human Rights Council with the UNSR Right to Health team, and drafted urgent appeals to the Ministry of Foreign Affairs in various countries. Being able to experience the vibrant culture of India was also a bonus. I am immensely grateful to the Office of the UN Special Rapporteur for the Right to Health and the International Human Rights Program for providing me with the opportunity to have such a rewarding and enriching internship. ♦



UNSR Right to Health Team (left to right): Maitreyi Misra, Suzanne Zhou, Anand Grover, Harshani Dharmadasa, Amy Tang (Missing: Lorraine Misquith) (Photo Credit: Amy Tang)

TRANSFORMATION THAT STARTS FROM WITHIN: IMPLEMENTING DUE PROCESS RIGHTS IN MYANMAR

David Zhou, 2L, Faculty of Law, University of Toronto

“The era of declaration is now giving way, as it should, to an era of implementation,” said Kofi Annan (then United Nations Secretary-General) in 2005. These words encapsulate the vision and conviction upon which Ms. Karen Tse founded International Bridges of Justice (IBJ) in 2000, with the goal of ending the use of torture as an investigative tool by the end of the 21st century. This summer I interned with IBJ in its Geneva headquarters where I had the opportunity not only to understand the IBJ model for practical implementation of rights in criminal law, but also to involve myself with their efforts to apply this model in Myanmar.

IBJ’s work is premised on the fact that the majority of countries have signed international treaties and passed domestic laws to safeguard basic rights such as the right to liberty and security of the person, the right to counsel and to a fair trial, and freedom from arbitrary arrest and detention. Therefore, when countries continue to violate these basic human rights, a gap exists between what the country has publicly and



*Uppatasanti Pagoda, a prominent landmark in Nay Pyi Taw, the new capital of Myanmar
(Photo Credit: David Zhou)*



*From left to right: Clara Feng, Karen Tse and David Zhou inside Myanmar International Convention Center during the World Economic Forum on East Asia 2013.
(Photo Credit: David Zhou)*

legally committed to and what it is doing in practice. Kenneth Cukier describes this gap as an “arbitrage opportunity.” Spotting this arbitrage gave IBJ a strong *raison d’être*; yet the organization is about more than seizing this opportunity. More significant is Ms. Tse’s belief in the power of transformative love, which underpins her consistent efforts to engage and partner with governments to help them live up to the standards they have set for themselves.

Two years ago, Myanmar ended decades of military rule and diplomatic isolation with the election of a civilian government. Now actively reintegrating into the international community, Myanmar is attracting global attention thanks to its untapped market and rich natural resources. It is therefore an excellent time to work with the government on the implementation of due process rights.

In May of this year, IBJ conducted a week-long legal aid training program in Singapore for a delegation of the Myanmar criminal justice community which included the Deputy Attorney General, police officials,

members of the Supreme Court and criminal defense lawyers. Initially, the air was thick with tension; lawyers and officials would not talk to each other and sat at separate tables during dinner. Ms. Tse decided to take the group to a Burmese temple to seek blessings and reconciliation. With this temple visit and the various training exercises, the tension eased and the two sides began to show empathy towards each other. The training culminated in an exercise where the group collectively identified Myanmar’s legal development trajectory and formulated action plans on how to move forward. On the last night, everyone sang and danced together and it was clear that a change of consciousness had taken hold.

From June 3-5, 2013, the World Economic Forum on East Asia met in the new capital of Myanmar, Nay Pyi Taw. Ms. Tse was invited to attend and I accompanied her on this 11 day trip. This trip was a great opportunity for us to build on the success of the training and lay the foundation for a full-fledged country program in Myanmar.

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ASIA'S LATEST AUTHORITARIAN REGIME... (Continued from page 17)

September 2010. The amendment removed all checks and balances regarding appointments of the judiciary, giving the President exclusive power to appoint the justices of the Supreme Court and the Court of Appeal. The final nail in the coffin occurred with the impeachment of the Chief Justice of the Supreme Court, Shirani Bandaranayake, in January 2013. The Chief Justice was impeached following several decisions she rendered that were deemed to be against the President's interests. The decision to impeach Bandaranayake was illegal (rendered so in both the Court of Appeal and the Supreme Court) and demonstrates the complete disregard the government has for conforming to the rule of law and international standards.

I had the opportunity to see first-hand the subsequent partiality and politicization of the highest court in Sri Lanka when I observed the Supreme Court trial where the CPA was challenging the appointment of Mohan Peiris as Chief Justice. Peiris formerly served as the Attorney General and is known to have close ties to President Mahinda Rajapaksa and his family, casting serious doubt on his ability to act impartially in the role of Chief Justice. The Rajapaksa family controls five of the main government ministries including the Ministry of Defence, and through the President and his two brothers, control more than half of Sri Lanka's national budget. Through informal comments from the chair of the bench ac-

knowledging the current state of affairs in the judiciary and publicly stating that certain justices did not want to hear this case, I caught a glimpse of the fear at the very heart of the judiciary. The top judges of the country had realized that they were no longer immune from the government's actions, and were acting accordingly.

Most of my time at the CPA was spent working on land issues, which form an integral component of almost all discussions on meaningful reconciliation following the war and are another example of the erosion of the rule of law in Sri Lanka. Like many Commonwealth countries, Sri Lanka's land acquisition laws are based on the principle of eminent domain and permit the Sri Lankan government to acquire private land where such land is required for a 'public purpose' as per the *Land Acquisition Act*. Sri Lankan case law actually provides a fairly stringent test for what constitutes public purpose and requires the government to demonstrate that the purpose is genuine and beneficial, both to the public at large and to the local community. Nonetheless, following the war's end, the government has undertaken acquisitions of massive swathes of land primarily populated by minority communities. The ethnic and political dimensions, in addition to being a clear violation of the law, suggest that what the government is doing amounts to 'land grabs.' Most recently, the Sri Lankan government filed notices in April 2013 to

acquire 6380 acres of land in the province of Jaffna for a purported military base. This action was taken in spite of the fact that the land in question is some of the most fertile in the North and has been in the hold of private Tamil families for generations. The acquisition has led to the continued displacement of thousands of individuals, and clearly demonstrates that the government is violating public trust and renegeing on its commitment to the UN to demilitarize the North and East.

It is hard to decide what is more frightening: the fact that there are no longer any checks for the executive in Sri Lanka, or the possibility that the only remaining opponents to the executive in the legal system may soon become too frustrated to continue their opposition. Unfortunately, both are realities under the current authoritarian regime in Sri Lanka, and both are a result of the demise of the rule of law.

My experience at the CPA was full of incredible learning opportunities and deepened my understanding of many of the human rights issues in Sri Lanka, but also my understanding of post-conflict countries generally. I am deeply grateful to the IHRP for this opportunity, to the CPA for being extremely supportive of my internship, and to all the great mentors and friends I developed that continue to work on improving the human rights situation in Sri Lanka against all odds. ♦



Viewing the ruins of my mom's former home in Tellipallai, Jaffna. May 2012 (Photo Credit: Dharsha Jegatheeswaran)



Drew standing at the lectern in the International Court of Justice (Photo Credit: Drew Beesley)

GLOBAL JUSTICE: MOMENTUM AT THE ICC FACES ROADBLOCKS

Drew Beesley, 2L, Faculty of Law, University of Toronto

This summer, I completed an internship at the International Criminal Court (ICC). I worked in the Immediate Office of the Prosecutor as a legal intern for the Chief Prosecutor, Madame Fatou Bensouda.

My work at the ICC included drafting official correspondence and executive directions to the trial and investigation teams, and participating in strategic meetings. These meetings were fascinating: I witnessed high-level discussions on a range of topics including overseas investigations, trial strategy, witness handling, legal argumentation and international relations. One of my most memorable assignments was writing a speech for the Chief Prosecutor. I spent the remainder of my time working with senior counsel drafting legal memos. This work was eventually incorporated into court filings in the *Gbagbo* (Côte d'Ivoire), *Gaddafi & Al-Senussi* (Libya) and *Ngudjolo* (Democratic Republic of the Congo) cases which involve alleged war crimes, crimes against humanity, or both.

The ICC is never free from controversy. This was made all the more poignant during my research on the case against former President of Côte d'Ivoire, Laurent Gbagbo. A group of around 30 of the accused's supporters gathered weekly, just across the street from my office window, to protest for his release. The group set up sound systems, barbecues and a make-shift platform. This scene was a routine part of working at the ICC.

My work had a weight to it that law school assignments could not replicate. These were real cases with real victims who experienced unspeakable horror at the hands of their tormentors. Even while researching the most mundane point of procedure or evidence law, I knew that I was contributing to something much greater. I was contributing to the idea that the international community would no longer tolerate impunity for such grave crimes.

One of the most active cases on the docket last summer was *Ruto & Sang*. The co-accused were facing charges of crimes against humanity for allegedly organizing widespread murders, deportations and persecution following the post-election violence in Kenya from 2007-2008. Charges were laid in 2010, but by March 2013, Mr. Sang was elected as the Deputy President of Kenya while the accused in a separate but related case, Mr. Kenyatta, was elected as President of Kenya.

This turn of events made the ICC proceedings in this case incredibly complicated. Suddenly, two of the accused were vaulted to the top echelons of power in the very country in which the ICC was investigating. A number of the witnesses have either disappeared or died. Public sentiment in some parts of Africa swung sharply against the ICC, and Kenya is currently attempting to orchestrate a mass walk-out by African Union states from the ICC.

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IMPLEMENTING DUE PROCESS RIGHTS IN MYANMAR... (Continued from page 19)

A breakthrough came when the Chief of Myanmar Police Force and Deputy Minister of Home Affairs agreed to meet us. An unmarked police car whisked us from the Conference Centre to the police headquarters far removed from the foreigners-allowed hotel zone. Dressed in blue uniforms decorated with ribbons and medals, the Chief and his deputies received us in the stately guest room. The small talk that typically consumes a large part of such a meeting such as this had gone on for hardly five minutes when the Chief politely yet suddenly asked, "Tell me Karen, what can IBJ do to help us end torture?" It was evident he wanted to enlist IBJ's help to address the problem. We proceeded to discuss the challenges faced by the police during the investigation process and agreed on three areas of collaboration: police training on proper investigation procedure, rights awareness campaigns, and duty lawyer programs. Following that meeting, I assisted in drafting a concept note and a proposed Terms of Reference agreement with the Police Force.

Later, we met with several other officials and lawyers who had attended the Singapore training. Their outpouring of camaraderie and gratitude towards us left an indelible impression on me, and confirmed that the power of a change of consciousness is truly immeasurable. In Ms. Tse's own words, "our accomplishments must stem from love, the recognition of the interconnectedness of all beings, and the inherent worth and dignity of every individual." ♦



David Zhou, Clara Feng and Karen Tse with senior officials of Myanmar Police Force (Photo Credit: David Zhou)

GLOBAL JUSTICE... (Continued from page 21)

I attended a status conference where Mr. Sang requested to be excused from being present at his own trial. The prosecution's arguments mainly revolved around statutory interpretation. Many legal experts agree that the plain reading of the *Rome Statute*, the ICC's enabling statute, states: "[t]he accused *shall* be present during the trial" (emphasis added). The Office of the Prosecutor argued based on this, and other provisions in the statute making reference to the accused's presence at trial, that presence is a requirement. The Defence argued that given Mr. Sang's elected position as head of state, he should be granted an exemption so that he may attend to his constitutional duties in Kenya; to do otherwise would be interfering in domestic politics. This raised an interesting legal question: should such an exemption be made to allow a democratically elected sitting head of state continue his or her mandate?

On June 18th, two out of three judges granted Mr. Sang a conditional exemption. While the defence championed the ruling, some international legal scholars felt that the judges had buckled under political pressure, and that their reasoning was thin. The Office of the Prosecutor is currently appealing the exemption.

Being present in the public gallery during oral arguments was inspiring. I observed some of the world's best litigators arguing complex and precedent-setting issues before the world's first international criminal court.

During my summer, I came to understand that despite external critiques, the ICC is full of some of the most passionate and brilliant legal minds the world has to offer. All of them are oriented towards a single laudable goal: to bring justice to victims where no one else is able or willing to do so. ♦



Drew and a colleague in the main boardroom in the Immediate Office of the Prosecutor, ICC. (Photo Credit: Drew Beesley)

160 GIRLS MALAWI: BUILDING ON PAST SUCCESS

Alison Mintoff, 2L, Faculty of Law, University of Toronto

At first glance, Malawi's legal regime for protecting women and girls from sexual violence seems robust. For example, defilement (the rape of girls under 16 years of age) is prohibited by the *Penal Code* and those convicted face a sentence of up to life imprisonment. The Constitution also contains strong provisions protecting rights to equality, women's rights, and children's rights. However, recent research conducted by the University of Malawi Faculty of Law brings into question the amount of protection actually afforded to young victims of sexual violence. For example, the report suggests that in practice, most cases of defilement go unreported. Furthermore, when complaints of defilement are reported to the police, findings show that the police may refuse to investigate if the complainant has no corroborating evidence.

This University of Malawi study, titled "The Legal Treatment of Defilement in Malawi" (2013, unpublished), is the first of its kind and was conducted as preliminary research to determine whether the "160 Girls" project could be implemented in Malawi. The Equality Effect, a Canadian NGO and international network of human rights advocates, began the "160 Girls" project as a legal initiative aimed at achieving justice and protection against rape for all girls in Kenya, a country where there is a well-documented prevalence of rape offences.

Led by Executive Director Dr. Fiona Sampson, The Equality Effect works to address the inequality of women and girls in Commonwealth Africa. Following two years of collaboration, research, and developing a legal strategy, a constitutional challenge was brought against the state on behalf of 160 victims of defilement in eastern Kenya.

The court action successfully challenged the failure of the Kenyan police to conduct prompt, effective, and professional investigations into defilement complaints. The High Court judge ruled in favour of the girls in a landmark decision that can arguably be followed in other jurisdictions facing a similar crisis. When partners of The Equality Effect from Malawi, Dr. Ngeyi Kanyongolo (University of Malawi) and Seodi White (WLSA-Malawi), conveyed similar experiences of women and girls in the Malawian context, the NGO decided to try to replicate their success in another country.

As the first interns for The Equality Effect in Malawi, fellow law student Silvia Neagu (McGill University) and I conducted research on the treatment of defilement victims by Malawi's legal system and the barriers preventing victims' access to justice. We attended court proceedings, interviewed prosecutors, magistrates, police officers, hospital staff, and local NGOs to gain practical insights into the treatment of defilement victims.

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From left to right: University of Malawi law student Reuben Chipeta, Alison Mintoff, and McGill law student Silvia Neagu, pictured in Zomba, Malawi. (Photo Credit: Silvia Neagu)

160 GIRLS MALAWI... (Continued from page 23)

Through our field research, a number of important facts and trends were observed. By gaining access to and interviewing a number of stakeholders responsible for different aspects of child protection, we received a variety of opinions; not the least surprising was how often people from different sectors of society nevertheless shared the same perspectives. For example, police officers, child protection NGO staff and medical personnel all identified common barriers faced by victims and their families when deciding whether to report a defilement complaint to the police. This was true even when a group was implicating itself as part of the ‘cause.’ Police officers for instance acknowledged that without medical evidence of the defilement, many victims do not bother to report an incident due to the low likelihood of successful prosecution without corroborative evidence. This problem is linked to police inaction and the lack of investigation common in defilement cases. When asked about this issue, the police claimed that they were prevented from following up with defilement complaints due to a lack of resources, including lack of personnel, vehicles, or gas money to visit the

scene of a crime. While a shortage in funds and other resources is prevalent in Malawi, it is important to note that the police will quickly mobilize when other ‘serious’ reasons arise such as murder cases, theft complaints, and the presence of the President in town.

Based on our field research and the comprehensive report from the University of Malawi, we concluded that the problems associated with the legal treatment of defilement in Malawi are prominent and widespread. In August, a team of lawyers from Canada, Ghana, Kenya, and Malawi convened to create a legal strategy and discuss the potential for a future legal challenge. Due to a significant gap in national data, more research is still needed in order to understand the complexity of the situation surrounding defilement in Malawi. However, this problem is already seeing improvement as a national strategy to gather gender based violence data is currently underway. Following the successful case in Kenya, there is an unmistakable energy of hope that change, while slow, is possible in Malawi. ♦



The “160 Girls” legal strategy meeting at Lake Malawi (Photo Credit: Jacquie Labatt)



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