Rights Review

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

STOPPING STATELESSNESS: CAUSES AND CONSEQUENCES OF STATELESSNESS IN WEST AFRICA

Catherine Thomas, 3L
UN High Commissioner for Refugees (Senegal)

As Ebola continues to spread, the world has fixed its gaze on West Africa. Images of the sick and dying, and reports on dramatic evacuations of foreigners dominate the media. Coverage of the outbreak has helped mobilize local governments and the international community to combat this horrific disease. Another critical situation facing West Africa that urgently needs to be addressed is the issue of statelessness, a denial of a fundamental human right that too often goes unnoticed. I spent three months this summer with the United Nations High Commissioner for Refugees (UNHCR) Statelessness Unit in Dakar, Senegal, addressing this issue faced particularly by the fifteen countries constituting West Africa. The UNHCR estimates that this region is home to 700,000 stateless persons, with many more at high risk of statelessness.

Nationality is the legal bond between a state and an individual, and statelessness refers to the condition of an individual who is not considered a national by any state. Article 15 of the *Universal Declaration of Human Rights* states that everyone has the right to a nationality; consequently, all people have the right to the protection that this legal bond represents. Statelessness itself is thus the violation of a fundamental human right.

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(Photo credit: Pavan Setty)

THIS ISSUE

Pictured above: Daily life in a middle class suburb of Dakar, Senegal

VOL 08 ISSUE 01
OCTOBER 2014

UNIVERSITY OF TORONTO FACULTY OF LAW | INTERNATIONAL HUMAN RIGHTS PROGRAM

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Message from the IHRP DIRECTOR

I returned from my second maternity leave at the end of March, just in time to bid farewell to our 2014 summer interns as they set forth into the world. As always, I was struck by the amazing passion and sense of adventure that our interns bring to their law school experience. It is a certain type of law student (the best type in my opinion!) that chooses to spend his or her summer grappling with some of the most challenging issues facing the world today. Our students engaged with diverse topics such as the effective prosecution of war criminals, protection of the right to health in the face of expanding intellectual property rights, and effectively ending discrimination against so-called "illegal immigrants" and sexual minorities.

Indeed, as the IHRP enters its 27th year, I am continually awed by the life-changing experiences these internships offer our students. Every year, students tell me how their internship impacted not only how they viewed the law, but how they viewed themselves. Indeed, just this year, 1994 IHRP intern, Leilani Farha, was appointed UN Special Rapporteur on the Right to Housing, while 1996 intern, Sujit Choudhry, was appointed Dean of Berkeley Law School. After reading the reflections from our 2014 interns, I am sure you will agree with me that they too are destined for great things.

Through this month and into the new year, I will be meeting with many, many students who see the tremendous value that our internship program offers and who are keen to get their feet wet in the field. Providing students with these types of opportunities is truly a privilege and pleasure.

Renu Mandhane (JD 2001)
Director, IHRP

From the EDITOR'S DESK

Welcome to the 2014 Intern Edition!

As we were putting together this special issue, we were reminded of our own IHRP internships in 2013. Similar to the experiences of many interns featured in this issue, our internships have had a transformative impact on our law school experience. Indeed, our internships came at a pivotal moment in our careers, shaping the type of advocates we aspire to be and the work we hope to pursue. We know we will look back on our involvement with the IHRP, as Rebecca Sutton so aptly reflects (Alumni Corner article, pg 17), and appreciate how well it prepared us for our own legal careers.

From Senegal to Thailand, the 2014 IHRP interns ventured to different parts of the world to work on a range of issues, including refugee protection, international justice, and freedom of expression. It is our hope that these articles will inspire others to become involved in the important field of human rights law. As our readers can imagine, these articles are just one snapshot of the experiences of each intern. We encourage current students to take every opportunity to ask the interns more about their experiences, and to consider an IHRP internship of their own.

Finally, we want to thank all of the writers who contributed, our student Editorial Board, and our Faculty Advisor, Renu Mandhane. Their hard work and diligence made this issue possible.

Alison Mintoff & Amy Tang
3Ls

Pictured left:
2014-15 Rights Review student Editorial Board. From left to right: Catherine Thomas, Katie Bresner, Lisana Nithiananthan, Roxana Parsa, Petra Molnar Diop, Amy Tang and Alison Mintoff. (Absent: Dharsha Jegatheeswaran)

2014 IHRP INTERNS

Katie Bresner
International Bridges to Justice (Geneva)

Rebecca Carr
Centre for Health, Human Rights & Development (Uganda)

Catherine Deans
Lawyers Collective (India)

Glenn Gibson
International Criminal Tribunal for the Former Yugoslavia (The Hague)

Hanna Gros
Population Council

Emma Julian
International Organization for Migration (Geneva)

Benjamin Lerer
International Criminal Tribunal for the Former Yugoslavia (The Hague)

Shannon More
The Equality Effect (Kenya)

Lisana Nithiananthan
PEN International (London)

Brenna Nitkin
International Human Rights Program, University of Toronto Faculty of Law

Evan Rankin
UN Economic Social Council for Asia and the Pacific (Thailand)

Jordan Stone
International Organization for Migration (Geneva)

Catherine Thomas
United Nations High Commissioner for Refugees (Dakar)

Paloma van Groll
United Nations High Commissioner for Refugees (Pretoria)

Ledya Yohannes
Population Council

Eleanor Vaughan
Toronto ALPHA (Canada, China)

SOUTH AFRICA'S NEW IMMIGRATION REGULATIONS

Paloma van Groll, 3L, UN High Commissioner for Refugees (South Africa)

Paloma's internship was generously funded through the support of Goodmans LLP.

Paloma (far right) and her fellow UNHCR interns, Evelyne, Nkandu, Ben and Mireille (Photo credit: Paloma van Groll)

South Africa is a party to the 1951 *Convention Relating to the Status of Refugees* (the 1951 Convention), as well as the 1967 *Protocol relating to the Status of Refugees*. The country is also a party to the 1969 *Organization of African Unity Convention Relating to the Rights of Refugees in Africa*, which adopts an expanded definition of a "refugee." However, earlier this year, the government of South Africa published its draft Immigration Regulations (the Regulations), which came into effect in May 2014. The Regulations introduced changes to the South African immigration regime and will have a significant impact on access to asylum procedures. In particular, the Regulations raise issues regarding the domestic implementation of South Africa's international human rights commitments.

"The "first safe country of asylum" principle will therefore affect those who travel far distances, often risking life and limb, to seek asylum in South Africa."

First, Regulation 22(1)(b) introduces the implementation of the "first safe country of asylum" principle. Under this principle, officials may deny issuance of an asylum transit visa to a person with refugee status in another country. Without an asylum transit visa, the person is denied entry into South Africa and therefore denied access to asylum procedures. The position of the United Nations High Commissioner for Refugees (UNHCR) remains that asylum seekers should still have the right to seek asylum in the country even if they have refuges status in another safe country.

As an intern with the UNHCR in Pretoria, South Africa this summer, I interviewed many refugees and asylum-seekers who travelled to South Africa from countries as far as Somalia and Ethiopia. This journey usually takes months, and those persons might travel through Kenya, Tanzania, Malawi, Mozambique, and Zimbabwe and may have passed through refugee camps in these countries. The "first safe country of asylum" principle will therefore affect those who travel far distances, often risking life and limb, to seek asylum in South Africa. Furthermore, while an asylum-seeker may have applied and received status in a different country, they may have faced serious security risks in that country which motivated them to continue on to another country. Denying this person would put the asylum-seeker at risk and and potentially deny them of the protection

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RESCUE AT SEA: CRISIS IN THE MEDITERRANEAN

Jordan Stone, 2L, International Organization for Migration (Geneva)

On October 16, 2013, approximately 368 migrants drowned when their boat caught fire and sank off the Italian island of Lampedusa. This is merely one example of a continuing tragedy occurring in the Mediterranean. In 2011 and 2013 respectively, approximately 2300 and 700 people died trying to reach the Italian coast alone. Moreover, these figures do not take into account migrants attempting to reach other European borders, such as Spain and Greece, or undiscovered deaths. Migration flows from North Africa to Europe across the Mediterranean have increased dramatically in 2014. Whereas 42,000 migrants arrived in Italy by sea in 2013, 60,000 arrived in the first six months of 2014. Amongst increasing migration flows, smugglers are increasingly cramming desperate migrants onto unsafe and overcrowded vessels without sufficient fuel or life jackets.

Prompted by the Lampedusa boat disaster, increasing maritime migration flows from North Africa, and the prevalence of exploitive smugglers, the International Organization for Migration (IOM) has focused increasing attention on rescue at sea. As an intern with the International Migration Law Unit at IOM this summer, I was tasked with developing, researching, and writing an information note on the law behind rescue at sea. Information notes are used by IOM to instruct field officers and staff in local offices on the law governing a given subject.

Rescue at sea involves overlapping legal obligations arising from maritime, refugee, and human rights law. In particular, non-refoulement and the extra-territorial application of sovereignty play a critical role in the jurisprudence on the subject, and the two issues often intersect.

Non-refoulement is an important aspect of rescue at sea because those rescued can often be asylum seekers and refugees. The principle of non-refoulement protects all non-nationals from being returned to countries where their lives are threatened or where they risk being subject to torture or inhuman or degrading treatment. Thus, if an asylum seeker is rescued at sea, they cannot simply be returned to their country of origin. An independent status review must be taken by a competent national authority where there is an arguable claim that the individual at issue would be exposed to persecution or mistreatment if returned to their country of origin. Moreover, it is generally inappropriate for a status determination to take place on a vessel at sea. Consequently, in the context of rescue at sea, preventing non-refoulement is often a critical issue.

However, states are often hesitant to allow status determinations to take place on their territory, because they are then responsible for the asylum seeker. This is where extraterritoriality becomes an issue. Jurisprudence on the topic reveals consensus that non-refoulement has extraterritorial application. According to the Inter-American Court of Human Rights and the European Court of Human Rights, states are responsible for preventing non-refoulement wherever the state exercises control and authority over an individual. Importantly a state exercises jurisdiction over a ship sailing under the flag of the state. Thus, if a rescuing vessel is flying under a state's flag, which will usually be the case, those rescued would fall under the jurisdiction of that state. Therefore, the flag state would have an obligation to prevent the refoulement of those rescued.

It is important to understand rescue at sea as part of a broader framework of international law. Rescue at sea is not simply a matter of maritime law: refugee law and human rights law play a critical role in guiding rescue at sea operations. At the same time, rescue at sea is much more than a legal issue. Although I had the opportunity to explore the topic from a legal perspective, devoting more attention and resources to rescue at sea operations can prevent migrant deaths more effectively. Italy, for example, has played a huge role in decreasing the number of deaths in the Mediterranean by instituting a program where rescue ships patrol the Mediterranean 24 hours a day, seven days a week. However, the program is being funded by the Italian government alone,

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WHAT'S IN A NAME: THE IMPACT OF "ILLEGAL"

Emma Julian, 2L, International Organization for Migration (Geneva)

Shakespeare once wrote, "What's in a name? That which we call a rose / By any other name would smell as sweet," construing a name as a meaningless and artificial concept. However, in the context of migration, certain terminology must be carefully chosen. Specifically, the widespread use of the term "illegal immigrant" by the media, government, and citizens alike in reference to migrants who arrive in a country through irregular channels perpetuates incorrect and harmful assumptions. Instead of this inaccurate and misleading terminology, "irregular migrant" and "irregular migration" should be used in public discourse on migration.

This summer I worked at the International Organiation for Migration (IOM) head office in Geneva. IOM is a leading intergovernmental organization on all matters related to migration. I was a legal intern with the International Migration Law (IML) unit, which works to ensure that migrants' rights are promoted, respected, and enforced.

There are many reasons to stop using the discriminatory and offensive term "illegal immigrant," particularly due to the inaccuracy

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IOM interns Jordan Stone and Emma Julian in front of the IOM head office (Photo credit: Heather Cameron)

STOPPING STATELESSNESS, cont...

Statelessness occurs for a variety of reasons and is often the result of several overlapping risk factors. The most prevalent risk factors associated with statelessness in West Africa are the conflict of nationality laws, the lack of legal safeguards, state succession, discrimination, migration, and inadequate civil registries.

For example, nationality laws typically operate on the basis of either *jus soli* (law of the soil) or *jus sanguinis* (law of the blood) or a combination of the two. In the absence of legal safeguards, a child whose parents are *from* a country where nationality is acquired by birth on State territory (*jus soli*), when born in a country where nationality is acquired by virtue of citizen parents (*jus sanguinis*), may be born stateless. Given the high levels of migration in West African countries, encountering a conflict of nationality laws is not uncommon. Statelessness may also be a consequence of discriminatory laws. For example, Liberia's Constitution restricts nationality to persons of "Negro descent" and both Togo and Sierra Leone limit women's right to transmit their nationality to their children or spouse.

Statelessness has a devastating impact on the lives of individuals. The possession of a nationality is a prerequisite to full participation in society, and essential for the enjoyment of the full range of human rights. Without a nationality, individuals in many West African countries cannot vote, run for office, travel or own land. Stateless populations often face difficulties accessing education, health care and obtaining legal employment.

Pictured below: Young girls take a break from selling peanuts and mangos on Plage Yofff in Dakar, Senegal. (Photo credit: Catherine Thomas)

Daily life in the historic city of St. Louis, Senegal. (Photo credit: Pavan Setty)

Allowing statelessness to occur or persist is also contrary to state interests. In the absence of clear procedures to prevent statelessness, disputes can occur between states over whether specific individuals or populations are nationals. Not only can statelessness cause problems between nations, it can also increase insecurity within the state. The Ebola outbreak has the potential to demonstrate this point: in increasingly interconnected communities, excluding just one person from access to health care can have wide-reaching consequences. The case of Ebola depicts similar dangers to what can arise through statelessness, where the problems caused by an individual's status can greatly affect the larger communities.

There are available measures to protect and prevent against statelessness, and I had the great privilege of contributing to UNHCR's coordinated effort to promote these measures over the summer. Ultimately, only states can bestow nationality. Thus, durable solutions to statelessness require public support and political will. UNHCR plays a key role in communicating the human story of statelessness, and articulating to governments and civil society how protecting against statelessness will benefit society as a whole.

The ability to tell the story of statelessness depends on correctly identifying stateless populations, and those at risk of statelessness. This step is complicated by the fact that many stateless persons live highly marginalized lives. One technique used by UNHCR is to work with government ministries in charge of population censuses and health surveys, so that questions related to known risk factors will be asked.

Both the protection of existing stateless persons and the prevention of new situations of statelessness are set out in the two UN Conventions on Statelessness; the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*. As such, for individual states the first step towards either of these goals is acceding to each treaty. Mitigating other risk factors, such as improving birth registration and simplifying administrative procedures used to determine nationality, are other concrete ways states can ensure all people enjoy the protection of a nationality.

"Stateless populations often face difficulties accessing education, health care and obtaining legal employment."

Although a nationality cannot be seen or heard, I have learned that the consequences of living without a nationality are inescapably felt not only by individuals, but also by the communities in which they live. Just as the world is now responding to the Ebola crisis in West Africa, there must also be a coordinated response to eliminate statelessness before it spreads to future generations.

CENSORING DISSENT: HOW TURKEY'S NATIONAL LAWS CONSTRAIN THE RIGHT TO FREE EXPRESSION

Lisana Nithiananthan, 2L, PEN International (London)

The right to freedom of expression is a fundamental human right, enshrined in international human rights instruments such as the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR). Article 19 of both documents guarantees the right to freely seek, receive and impart ideas and information. Both the content and the medium of expression, whether digital, print, or verbal, fall within the scope of Article 19.

When the UDHR was adopted by the UN General Assembly in 1948, without a single opposing vote (albeit 8 abstentions), Turkey was one of the 48 countries that voted in favour of it. Likewise, Turkey is a party to the ICCPR, having signed the treaty on August 15, 2000, and ratifying it on September 23, 2003. Nonetheless, Turkey's domestic laws, in particular the *Terörle Mücadele Kanunu* (TMK), Prevention of Terrorism Act, and the *Türk Ceza Kanunu* (TCK), Turkish Penal Code, impose unjustifiable restrictions on the right to free expression and are therefore in violation of Turkey's international obligations.

For example, Article 125 of the TCK criminalizes defamation, which can result in fines or imprisonment; the defamation of a public official in the course of their official duty results in higher fines or prison terms. Article 216 of the TCK criminalizes the insulting of religious values and Article 301 criminalizes any denigration of the Turkish government. As a result of these laws, a series of tweets challenging the understanding of 'heaven' in Islam was found to be grounds for a 10-month suspended sentence, and posting criticism of the Prime Minister on Facebook have led to a prison sentence of over one year.

Furthermore, Article 6 of the TCK defines terrorism, organized crime, and propaganda so broadly that individuals can be charged and prosecuted for legitimate forms of expression without either proof of

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RESCUE AT SEA, cont...

who cannot continue the operation without additional financial support. Hopefully, with increased attention from the international community and organizations such as IOM, enough resources will be devoted to rescue at sea operations to prevent another tragedy like the one at Lampedusa from occurring again.

Place des Nations with the United Nations with the "Broken Chair" in the foreground, a sculpture symbolising opposition to land mines and cluster bombs (Photo credit: Emma Julian)

Elephants in Pilanesberg Game Reserve (Photo credit: Paloma van Groll)

SOUTH AFRICA'S NEW IMMIGRATION REGULATIONS, cont...

to which they are legally entitled.

Second, the Regulations also have an impact on the legal framework relating to detention in South Africa. South Africa has protective legislation with regards to detention, giving legal certainty to rules and procedures for detention. For example, South Africa's 2002 Immigration Act provides procedural safeguards against indefinite detention. However, the Regulations now allow immigration officers to refuse entry to a person who presents a fraudulent passport. This grant of power is inconsistent with Article 31 of the 1951 Convention which exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence in the country. From my interviews with detainees at the Lindela Holding Facility in South Africa, it was clear to me that these persons are fleeing persecution in their own country, are often traumatized, have very little money, and are not always in complete control of their own situation. As a result of these circumstances, it is not surprising that certain asylum seekers enter the country illegally based on misguided advice received from people they encounter along their journey. Provided these individuals present themselves without delay to the authorities and show good cause for their illegal entry or presence, they should not be punished in this manner.

While South Africa currently hosts over 80% of the refugees and asylum-seekers in Southern Africa, the recent Immigration Regulations may tarnish the country's reputation as having strong legal protection for refugees and asylum-seekers.

FREEDOM OF EXPRESSION: CRIMINAL DEFAMATION AND ITS CHILLING EFFECT

Brenna Nitkin, 2L, International Human Rights Program, University of Toronto Faculty of Law

As the 2014 Summer Fellow for the International Human Rights Program, I conducted extensive research on the right to freedom of expression, and the importance of freely accessing and disseminating information. My research supported the IHRP's ongoing collaboration with PEN Canada and PEN International, the oldest freedom of expression NGO in the world.

Freedom of expression is articulated in Article 19 of the *Universal Declaration of Human Rights*, which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." It is also a right enshrined in the *International Covenant on Civil and Political Rights* (ICCPR). General Comment No. 34, which gives guidance to states on the interpretation of the freedoms of opinion and expression, highlights the importance of this right and reiterates that freedom of expression is necessary "for the realization of the principles of transparency and accountability that are ... essential for the promotion and protection of human rights."

However, this right as guaranteed by Article 19 of the ICCPR is not absolute. General Comment 34 states that freedom of expression can be derogated from in certain circumstances: in order to protect the rights or reputation of an individual, and to ensure public order, national security, and public health or morals. Strict legal tests are applied to determine whether restrictions on freedom of expression are justified: the restriction must be "provided by law" and must be both necessary and proportional. Unfortunately, many domestic legal systems create an environment where opinions that oppose the dominant state narrative can be silenced by law, often fulfilling the "provided by law" requirement.

Frank La Rue, the then-UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, has referred to the protection of free expression as essential to achieving effective political participation and democracy. In his May 2014 report, he criticized the use of regulatory and legal measures to restrict or undermine free expression in the electoral context. A particularly problematic means by which individual expression can be controlled is through criminal defamation laws. On his visit to Italy in November 2013, La Rue affirmed that, "defamation should be decriminalized completely and transformed from a criminal to a civil action, considering that any criminal lawsuit, even one which does not foresee a prison sentence, may have an intimidating effect on journalists." General Comment 34 requires that defamation laws be meticulously crafted in order to ensure that freedom of expression is not stifled, particularly since excessively punitive defamation laws can lead to self-censorship by individuals or institutions for fear of harassment and punishment. This results in a 'chilling effect' on public discourse and open dialogue.

In 2011, Margaret Sekaggya, the then-UN Special Rapporteur on the situation of human rights defenders, noted that domestic legal systems can be used to effectively impede the work of human rights defenders. Civil and criminal defamation lawsuits can be used as a tool by states to incarcerate and, in turn muzzle, journalists. As the then-Council of Europe Commissioner for Human Rights, Thomas Hammarberg, succinctly articulated, "Charges of defamation continue to put journalists in many participating states behind bars. The fact that these offences are still part of criminal law ... means that the chilling effect of the possibility of imprisonment for published or broadcast words continues to curb free expression."

If both private citizens and professional journalists fear criminal sanctions for their words and exchange of ideas, the resulting chilling effect means that the public's access to information can be severely constrained. Since freedom of expression is an essential element of democracy, ensuring its protection is of utmost importance.

Hiking in the valleys and mountains surrounding the town of Lauterbrunnen, Switzerland (Photo credit: Emma Julian)

WHAT'S IN A NAME, cont...

of the language and the harm it causes. Although the term suggests that migrants have no rights, this is incorrect. Migrants have the same rights as citizens, with the exception of the right to vote and the right to remain in the receiving country. Migrants are entitled to all internationally-recognized and inalienable fundamental human rights as entrenched in nine core international human rights treaties, including the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. These rights include the right to life, liberty, and security of the person, the right to be free from torture and slavery, the right to freedom of expression and thought, and the right to be recognized as a person before the law. These rights belong to all people, regardless of their immigration status. Articles 1 and 2 of the *Universal Declaration of Human Rights* clearly state that everyone is entitled to the rights and freedoms listed in the declaration, without distinction of any kind, including national or social origin.

In addition to being legally incorrect and misleading, there are other compelling reasons not to use the term "illegal." First, it is dehumanizing and ignores migrants' individual experiences as workers, women, men, and children by characterizing their existence as illegitimate. The term also implies that migrants are criminals, despite the fact that being undocumented does not constitute a crime in most countries. By depicting migrants as criminals, it promotes the policing of migrants and makes the use of punitive measures against them, such as systematic detention, seem acceptable. Furthermore, the term "illegal immigrant" fixates on the criminalization of migrants and prevents respectful and informed debate on migration. The public focus is diverted from important issues including the laws and policies that create, and situations in countries of origin that lead to, irregular migration. Lastly, the term undermines social cohesion by creating an "us versus them" mentality, where the divide can rest on the basis of ethnicity or race and give rise to xenophobia and racism.

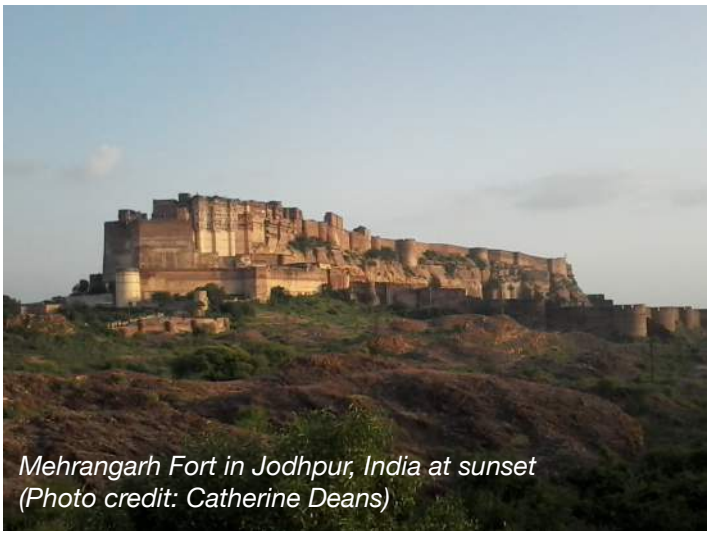
It is often situations of extreme poverty, violence, and despair that generate irregular migrants. To dehumanize these migrants by referring to them as "illegals" undermines their struggles, their stories, and their personhood. IOM, along with many other organizations including the United Nations, encourages the use of the terms "non-documented" or "irregular migrant" as opposed to the legally inaccurate "illegal immigrant." Changing the discourse can change perceptions of what is acceptable and appropriate practice. When it is widely understood that no one is illegal, perhaps there will be fewer calls for deportation and detention and more calls for beneficial and rights-respectful government action.

THE RIGHT TO HEALTH: A TRADEABLE COMMODITY?

Catherine Deans, LLM 2014, Lawyers Collective (India)

Dr. Martin Luther King, Jr. once said, "Of all the forms of inequality, injustice in health care is the most shocking and inhumane." In an effort to reduce health inequalities, the global community recognizes the right to health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, which identifies "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The right to health is interpreted in the United Nation's Committee on Economic, Social and Cultural Right's *General Comment No. 14*, which, amongst other obligations, requires states to implement measures that ensure citizens have access to essential medicines.



Mehrangarh Fort in Jodhpur, India at sunset (Photo credit: Catherine Deans)

However, the right to health is being transformed into a tradeable commodity within the international framework governing intellectual property (IP) rights. Critically, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) directs that states must implement domestic IP regimes that ensure patent protection for all new, inventive and useful products, including pharmaceuticals. Providing patent protection for pharmaceutical products grants the original creator – usually large, multinational pharmaceutical companies (Big Pharma) – monopolistic control over where drugs are distributed and at what price. Far from being altruistic, Big Pharma's business is profit-driven; as a result, life-saving essential medicines are often priced beyond the means of millions of patients.

From August to October 2014, I interned in the access to medicines team at Lawyers Collective, a public interest NGO in New Delhi, India. The NGO was started by Anand Grover, former UN Special Rapporteur on the right to health, and one of its goals is to employ legal avenues to ensure Indians have access to high-quality, low-cost healthcare and medicine. Lawyers Collective's central assertion is that TRIPS contains certain flexibilities that grant states discretion to structure domestic IP regimes in a manner that promotes access to medicines, and by implication, protects the right to health. Under Article 7 of TRIPS, states are free to formulate TRIPS-compliant laws "in a manner conducive to social and economic welfare," and under Article 8 member states may "adopt measures necessary to protect public health and nutrition." Moreover, TRIPS confirms that states can employ a number of mechanisms to keep the cost of drugs down. For example, TRIPS permits states to grant compulsory licenses to generic drug companies to manufacture and sell patented medicines cheaply, without the authorization of the patent holder.

Nevertheless, the Global North, led by the United States, have sought to increase the level of IP protection recognized globally through the use of international trade agreements. For example, many Free Trade Agreements (FTAs) promoted by the US require states to extend the 20 year patent term established under TRIPS to compensate for any "unreasonable" delays caused by governments issuing the patent or granting regulatory drug approval. Furthermore, some US FTAs confine government discretion to issue compulsory licenses only to situations of "national emergency or other circumstances of extreme urgency."

The operation of these so-called "TRIPS-plus provisions" may infringe an individual's right to health.

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CEHURD: CONFRONTING MATERNAL MORTALITY IN UGANDA

Rebecca Carr, LLM 2014, 2013-2014 CIHR Fellow in Health Law, Ethics and Policy
Centre for Health, Human Rights and Development (Uganda)

This summer, as I sat in a bare and crowded room of Nakaseke Hospital, Uganda with a client, I could not begin to imagine what he was feeling. Three years ago, he had entered that very building along with his partner, Irene; both likely anxious and excited about the imminent birth of their child. What they had not expected was that, by the end of that day, Irene would be the subject of tragic, painful and frankly horrendous circumstances that would result in both her death, and the death of their unborn child. The reason? Not one doctor or health worker in the hospital was available, at any time over an eight hour period, to provide Irene with the emergency obstetric care she required.

This client's experience is not an isolated event. In Uganda, rates of maternal mortality remain shockingly high. With an estimated 360 deaths per 100,000 live births in 2013, it is doubtful that Uganda will achieve its Millennium Development Goal target to reduce maternal mortality to 131 deaths per 100,000 births (an overall reduction of 75% from 1990 levels) by the year 2015. However, reducing the rates of maternal mortality in Uganda is not simply a lofty political aspiration; it is arguably a legal obligation that the government is required to fulfil.

The organization I interned with this summer, the Center for Health, Human Rights and Development (CEHURD), is attempting to hold the government accountable for the high rates of maternal mortality through the courts. CEHURD has taken on the above client's case as a test case to seek a declaratory judgment from the High Court that Irene's right to health was violated as a result of the acts and omissions of the state-run hospital in Nakaseke.

Uganda is a party to various international human rights treaties that recognize the right to health, including the *International Covenant on Economic, Social and Cultural Rights*. Indeed, the right to health is also identified as a principle and objective within the Constitution of Uganda (though not as an explicit right). Consequently, in compliance with the right to health and the country's national public health strategy, individuals have a right to expect certain minimum standards to be met, such as the provision of, and access to, health facilities, goods, and services on a non-discriminatory and equitable basis. However, these obligations are

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Kiboga countryside, home to some of the communities CEHURD works with (Photo credit: Rebecca Carr)

CENSORING DISSENT, cont...

actual involvement in or incitement of violence. Advocating for political ideas in a non-violent manner is captured by the provision simply if that idea has any association with certain armed organizations, regardless of an existing connection to that organization. These provisions are just a few of many in the legislation that restrict free expression in Turkey.

As a result of the TCK and TCK's broadly-worded provisions, the Turkish government is able to enforce the laws arbitrarily, censoring dissenting voices under the blanket pretense of protecting the country. The threat of incarceration pushes journalists to self-censor, and restrains the right to freedom of expression for students, lawyers, politicians, editors, journalists, human rights defenders, and civil society activists. One instance of this occurred in 2005 when the Turkish Nobel laureate Orhan Pamuk (2006) was retroactively charged with violating Article 301 for having insulted the Republic of Turkey by stating that "[o]ne million Armenians and 30,000 Kurds were killed in these lands and nobody but me dares talk about it." Almost a decade after Pamuk was charged, the provisions restricting expression remain in full force and effect. In fact, in 2012 and 2013, Turkey jailed more journalists than any other nation in the world, including Iran and China.

Mayor of Girona Carles Puigdemont and the author following the TLRC welcome reception at City Council (Photo credit: Lisana Nithiananthan)

At its first Universal Periodic Review (UPR) session (a process involving regular reviews of the human rights records of all UN member states) in 2010, the Turkish government accepted recommendations to align its laws and practices with international freedom of expression obligations. With its second UPR session looming, Turkey's efforts to make these changes have been inadequate and the situation for free expression in the nation has deteriorated.

Pictured above: The author pictured with her supervisors Paul Finegan and Sarah Clarke (Photo credit: Lisana Nithiananthan)

Civil society organizations, including Article 19, Freedom House, the Committee to Protect Journalists, and PEN International (where I interned this summer) contributed a submission to the upcoming UPR process for Turkey. These organizations are calling on the government of Turkey to cease using its national security and criminal laws to censor legitimate expression. Turkey is urged to fulfil promises made at the first UPR session to amend its national laws and practices to align with international standards for free expression. Without this change, Turkey will remain in violation of its commitment to provide and protect free expression within its borders.

MY IHRP EXPERIENCE AND THE RETURN TO SUDAN

Rebecca Sutton, JD 2013, PhD Candidate, London School of Economics and Political Science

I left Darfur in the summer of 2011, after serving as War Child Canada's Country Director for just under two years. My experience in Darfur was bookended by my life as a law student at the University of Toronto: I had completed 1L before my time in Darfur, and then 2L and 3L after.

Part of my motivation for taking a leave of absence from law school was to learn things about the world that I felt law school would not teach me. I had followed the situation in Darfur closely after violence in the region came to the world's attention in 2003. While there were debates about whether the acts of the government-sponsored Arab militias or "Janjaweed"—burning villages, killing civilians, displacing hundreds of thousands of people—constituted genocide in legal terms, it was beyond dispute that the violence was horrific and extremely destabilizing for this region of Sudan that few had previously heard of. By 2009, the initial bursts of violence had abated and in the language of the United Nations, Darfur was now somewhere between crisis and recovery. In this context, I wanted to discover first-hand what local and international actors were doing to respond, and on a personal level I sought more practical experience in managing projects, people, security, and budgets. While such skills typically fall outside the remit of a traditional lawyer role, they are central to international human rights and advocacy work, broadly conceived; my long-term ambition was to blend lawyer skills and legal knowledge with the on-the-ground operational skills required by non-governmental organizations.

A similar impulse led me to immerse myself in U of T's International Human Rights Program (IHRP) while attending law school. During my three years of involvement with various IHRP working groups, two years of engagement with the IHRP clinic, and an internship in South Africa, I met like-minded students who wanted to use their legal skills to assist vulnerable populations, and who were thinking about how to do this on a global scale. Through the IHRP I learned how to file an Access to Information complaint, conduct prison research, prepare a submission to the UN Human Rights Council, conduct a fact-finding mission, and apply the principles and precedents of international human rights law to situations of injustice domestically, in Canada. I became media savvy, learning how to write op-eds and to work with journalists to profile human rights issues in the mainstream news media. Between the IHRP and working with War Child, I also developed an appreciation of the power of art, music and film to accomplish what a legal argument sometimes cannot; that is, to capture the interest of a broader population and educate on issues that might otherwise be ignored.

This past June, I completed my term as a law clerk at the Ontario Court of Appeal and was called to the Bar. On the last day of my clerkship, I packed up my bags and boarded a plane to South Sudan. I was heading back to this part of the world to do some advocacy work for conflict-affected populations in the Sudanese states of South Kordofan (home of the Nuba Mountains) and Blue Nile. The conflicts in these two areas attract far less international attention than they merit; thousands of civilians in South Kordofan and Blue Nile continue to flee their homes under the threat of violence—either crossing borders or being internally displaced. While they struggle on a daily basis with a lack of basic health services, as well as food insecurity, their plight remains virtually invisible to the rest of the world.

Rebecca Sutton

Advocacy work in such a context may take many forms, and be performed by a variety of different actors. Examples include conducting interviews in refugee camps, building arguments based on international law, briefing policy makers, generating media

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HIV AND THE LAW: HUMAN RIGHTS ARE THE ONLY WAY FORWARD

Evan Rankin, 2L, UN Economic and Social Council for Asia and the Pacific (Thailand)

The spread of HIV can be impacted by laws in very specific and usually predictable ways. As a result, HIV activists and outreach workers must seek to intervene in cases where courts are interpreting, upholding, or altering certain legal principles. Failing to do so can allow courts to remain ignorant of the serious impacts their decisions may have on the spread of HIV and on the lives of people with a significant risk of infection (termed "key populations"). To illustrate the importance of activists' involvement, I will contrast two recent decisions of the Supreme Court of India and briefly explore why and how these decisions are likely to impact HIV and key populations.

The first decision, *National Legal Services Authority v Union of India and Others* (*NLSA*), recognizes the constitutional right of transgender individuals to live with dignity and autonomy. It requires state recognition of the gender with which one self-identifies, rather than the one which was assigned at birth. The decision

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Evan Rankin in Bagan, Myanmar, home to 3000 temples (Photo credit: Sadaf Raja)

RIGHTS ON PAPER VS RIGHTS IN PRACTICE

Shannon More, LLM 2014, The Equality Effect (Kenya)

Tsavo East National Park, Kenya
(Photo credit: Tiberio Frascari, Creative Commons)

As an intern with the Equality Effect, I had the honour of working on the "160 Girls" project this summer in Meru, Kenya; a project that focuses on increasing access to justice for child victims of defilement (the rape of a minor). In Kenya, defilement is criminalized under Section 8 of the *Sexual Offences Act*, 2006. While on paper young girls are protected, in practice there are still major obstacles to ensuring legal protection from defilement for many girls in Kenya.

In May 2013, the High Court of Kenya ruled in favour of the 160 girl petitioners, supported by the Equality Effect, in a constitutional challenge against the Kenyan government. The petitioners established that the failure of the police force to enforce existing defilement laws was in violation of domestic, regional, and international human rights law. The landmark "160 Girls" judgment called for prompt, efficient, proper, and professional police investigation in cases of defilement. This judgment was a significant achievement in the fight to reduce the incidence of sexual violence against young girls, and provides the guidance and direction necessary to ensure that girls' rights are protected in Meru County and across Kenya.

To ensure the decision is being taken seriously throughout Kenya and not just in Meru, where the case was heard, the Equality Effect has begun an initiative to monitor police action and develop and help deliver police training. Monitoring police investigation will help determine whether the police training is effective, and which regions are taking the decision seriously. My primary objective as an intern was to begin the process of monitoring police investigations, which would allow for data to be compared across and between regions. During my summer in Meru, I observed first-hand the challenges of the investigation process, as well as the lengthy delays in the judicial system; both of which create difficulties for implementing the "160 Girls" decision. Despite having positive encounters with the police and court administration, it became clear that there can be a disconnect between rights on paper and rights in practice. While there has been some compliance with the "160 Girls" decision, proving the system can work, the work continues to ensure the High Court decision is fully implemented – ensuring the full implementation of the decision is a long term project!

Without effective and consistent investigative practices by the police, the young girls of Kenya will continue to have their human rights violated and their access to justice denied. The black letter law in Kenya is equipped to uphold girls' human rights, and has been confirmed by the High Court of Kenya. From this point forward, it is a matter of ensuring that police processes are modified to allow for access to justice to take place, thus enabling the fulfillment of fundamental human rights for Kenyan girls.

CRIMINAL JUSTICE REFORM IN MEXICO: A WORK IN PROGRESS

Katie Bresner, 2L, International Bridges to Justice (Geneva)

Everyday across the globe, ordinary people are arbitrarily detained and denied access to counsel. Despite the number of countries that have ratified international conventions and passed domestic laws to protect human rights, torture is often still used in certain countries, particularly during the investigation of crimes.

International Bridges to Justice (IBJ) recognizes the gap between the commitment to protect citizen rights, on the one hand, and the implementation and enforcement of the laws that safeguard ordinary people from the violation of their rights, on the other. IBJ works to guarantee the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial. IBJ's approach to ending investigative torture recognizes that this human rights violation does not exist in a vacuum; it is the result of systemic problems within the justice system of a country as a whole. By working from the top-down – influencing and collaborating with high-level government and law enforcement officials – and the bottom-up – educating the public and legal professionals – IBJ aims to create lasting and sustainable change in the countries in which they operate.

In large part, IBJ's strategy is education-based. As an intern for IBJ this summer, I was tasked with contributing to one of IBJ's educational initiatives: the Criminal Defense Wiki (*DefenseWiki*). Lawyers in the Global South do not always have the same ease of access to even basic legal resources, such as penal and procedural codes, that we are used to in Canada. The *DefenseWiki* provides such resources to lawyers in a condensed format and utilizes the knowledge of legal practitioners and professionals, law students, and law professors to continually conduct research and keep the information up-to-date. I was assigned to work on the *DefenseWiki* page for Mexico.

Mexico's judicial system has long suffered from problems of institutional corruption. Despite the country's move from a semi-authoritarian system of control to democracy, the judicial system has been slow to keep pace. A Gallup Poll in 2007 asked whether Mexican citizens had confidence in Mexico's judicial system; of those who responded, 58% answered "no." The recent Amnesty International report "Stop Torture Global Survey" asked more specifically whether or not citizens are confident that they would be safe from torture if they were taken into custody by the authorities. Of those surveyed 64% answered "no."

Many issues plaguing the Mexican criminal justice system stem from procedural delays, a lack of police accountability, limited police resources, and significant restrictions on the accused's right to an adequate defence. Resource limitations have resulted in significant case backlogs and few cases are fully investigated. Despite the presumption of innocence, criminal accused are sometimes detained for years prior to conviction and sentencing. As David Shirk, a Global Fellow at the Mexico Institute of the Woodrow Wilson International Center for Scholars, notes: "a suspect's guilty plea is often the sole cause of indictment and conviction." As a result, torture is frequently used during pre-trial detention to extract confessions.

Mexico acknowledges the problems with its criminal justice system. Under the administration of former President Vicente Fox from 2000 to 2006, constitutional and legislative changes were made to reform the system. Significantly, this included a shift from an inquisitorial model of criminal procedure, drawn from civil law, to an adversarial model, like that of the United States. In 2008, former president Felipe Calderón instituted federal reforms to criminal procedure, including banning the use of investigative torture, increasing due process protections, and requiring that all accused persons have professional legal representation.

These federal reforms set an example for state-level criminal codes and procedures, with the goal that the justice system as a

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THE RIGHT TO HEALTH, cont...

For example, in 2001, Jordan signed a FTA with the US that included TRIPS-plus provisions. Between 2001 and 2007, medicine prices in Jordan increased by 20%; and patients were forced to pay from two to ten times more for some new medicines than patients in neighboring Egypt, where no FTA had been signed with the US. The rate of new drug launches in Jordan was also significantly lower in comparison to many other states.

Lawyers Collective is dedicated to ensuring that IP rights are not recognized at the expense of the right to health. The NGO has had considerable success in this respect, most notably as interveners in *Novartis AG v Union of India* (*Novartis*); Lawyers Collective successfully argued that India's Parliament has made legitimate use of TRIPS flexibilities by requiring that a patent only be granted for a derivative drug if it is more therapeutically efficacious than the original drug. The decision promotes the entry of cheaper generic drugs because it prohibits Big Pharma from 'evergreening': where a company makes a trifling amendment to a drug without altering the active ingredient, claiming it as a new invention, and thereby extending its patent monopoly over the active ingredient.

While Lawyers Collective won the *Novartis* battle, the war against unconscionable protection of IP rights still rages globally. Troublingly, the Trans-Pacific Partnership, a proposed FTA between twelve countries throughout the Asia-Pacific, including Canada, still under negotiation, may require states to adopt a number of TRIPs-plus provisions and reject India's enhanced efficacy standard. In addition, a leaked text of the Canadian-EU FTA reveals that the European Union is pushing for Canada to recognize TRIPS-plus patent protection and allow patent holders (i.e. Big Pharma) to pursue binding arbitration against governments if domestic laws violate their commercial rights under the FTA. Under the agreement, the entitlement to pursue arbitration could be exercised even if the infringing law is designed to protect public health.

Despite these ongoing threats to the right to health, my experience at Lawyers Collective has shown me that legal avenues can be employed to alleviate the inequalities that exist in the global distribution of healthcare. Although free trade may enhance the economic welfare of a state, it is imperative that states do not, in the process, trade away its citizens' right to health.

CRIMINAL JUSTICE REFORM IN MEXICO, cont...

whole be restructured by 2016.

By the end of 2012, of Mexico's 32 states, 22 had ratified the new criminal procedure codes, but only 12 had begun to operationalize them. While the reforms suggested are admirable, they have been criticized as attempting to do too much with too few resources in an unrealistic time frame. Current President Enrique Peña Nieto has reaffirmed his commitment to reforming the criminal justice system, but only time will tell if Mexico is able to reach its goals and end the use of investigative torture.

IBJ interns in Geneva, Switzerland. From left: Stevanne van der Velden, Joe Rich, Katie Bresner, Guillaume Fournier, Shashi Sahadew, Zoe Lo, Amelia Martinez, Solange Pittet, and Hnin Lwin (Photo credit: IBJ)

CONFRONTING MATERNAL MORTALITY IN UGANDA, cont...

generally not being respected. Insufficient resources are being allocated towards the health sector, and especially to the particular facilities where those most vulnerable and at risk of maternal mortality seek access to healthcare. For example, under the Abuja Declaration, Uganda has committed to allocating at least 15% of its budget to the health sector; yet, at present, this figure stands at around 9%. Additionally, nearly 70% of medical doctors and 40% of nurses and midwives in Uganda work in urban areas which serve only 13% of the population. Many expectant women must provide a "Mama Kit" containing basic items required for a safe and sterile birth, including a bar of soap and new razor blades to cut the umbilical cord.

Holding the government accountable through litigation is a difficult task. Unlike civil and political rights, economic and social rights, including the right to health, are subject to "progressive realization." The perception that socio-economic rights are non-justiciable is compounded by the belief that their adjudication improperly encroaches upon the (ostensibly impenetrable) sphere of the executive. Further, the lack of socio-economic rights literacy, and Uganda's complex legal framework, which does not explicitly recognize the right to health in its Constitutional Bill of Rights, have been obstacles in previous right to health litigation attempts.

However, these are obstacles to which CEHURD is devising innovative solutions. For example, the organization employs lawyers to educate the community on their rights, which has resulted in the creation of a coalition to reduce maternal mortality in Uganda. It holds training sessions with the judiciary to educate them about human rights and their application. Indeed, our visit to the hospital that day was an unprecedented 'visit to the locus' with the presiding judge in the Nakaseke case, for him to gain a better appreciation of the systemic nature of the violations alleged in the case. Finally, CEHURD connects its community and legal agendas to broader policy and legislative change. For instance, CEHURD is currently lobbying for the right to health to be included as an explicit right in the Constitution of Uganda, and is helping to draft national guidelines on the country's sexual and reproductive health policies. By approaching maternal mortality as a systemic human rights issue for which the state is accountable, CEHURD is working to prevent the occurrence of tragedies like Irene's in the future.

Pictured right: His Worship Justice Benjamin Kabito (centre) visits Nakaseke Hospital during the course of a Constitutional Court Case that CEHURD is undertaking.

Media (the majority of the others pictured) were interested in the fact that a judge was visiting the locus in a socio-economic human rights case which is something that - at least to everyone's knowledge - had never been done before.

(Photo credit: Matthias Heilke)

also classifies transgender individuals as a "socially and educationally backward class" which entitles them to additional rights, such as guaranteed spots in educational institutions, under the Indian Constitution.

In the second decision, *Koushal v Naz Foundation* (*Naz Foundation*), the Supreme Court overturned a lower court judgment and found section 377 of the *Indian Penal Code*, which criminalizes same-sex sexual behaviour, to be constitutional. Section 377 is the infamous colonial sodomy law criminalizing "carnal intercourse against the order of nature." As a result, homosexual acts will attract criminal sanctions in India. In contrast to *NLSA*, the judges in *Naz Foundation* effectively ignored the argument that rights to dignity and autonomy were violated by the provision, and rejected the use of foreign precedents ruling similar provisions unconstitutional. The Supreme Court instead used the thinly veiled justification that s. 377 could stand because Indian "social conditions" do not accept homosexuality, and that there simply are not enough LGBT persons in India who would experience victimization as a result of the application of s. 377.

"Stigma against those living with HIV in India makes it difficult for HIV programs to reach their target populations."

The key to understanding how these decisions impact HIV programming in India is through the concept of stigma: that is, the forceful social disapproval that compels people to hide their identities or behaviours. Stigma against those living with HIV in India makes it difficult for HIV programs to reach their target populations. Decreased program access means less education and empowerment, which can lead to increases in risky behaviour and higher HIV transmission rates.

Government-sanctioned stigma primarily comes in the form of laws used to violate a key population's human rights. For instance, laws that criminalize cross-dressing are often used to justify police repression of transgender people, leading to sexual exploitation (often at the hands of police themselves) and resort to drugs, both of which carry significant risk of HIV infection. Laws permitting the detention of suspected drug addicts can drive injection drug users further underground, where needle exchange programs are not available. In both cases, a violation of human rights leads to a likely increase in HIV prevalence. Thus, law and policy can interact in ways that harm already stigmatized key populations. In the case of anti-sodomy laws such as s. 377, same-sex behaviour is driven underground where anti-HIV programming (such as condom distribution) is less accessible.

For this reason, the UN and other organizations approach the HIV epidemic through the lens of human rights: if countries guarantee respect for the basic rights of key populations, they can reduce stigma and facilitate access to HIV programs. In turn, access to HIV programs will assist in halting the spread of the virus. Unfortunately, there is sometimes unwillingness on behalf of governments to formulate the necessary ameliorative policies for key populations. The result is ironic: the longer governments wait before targeting key populations with useful programming, the more likely it becomes that the epidemic will infect other members of the population. Affording basic human rights to all minorities can, as this example indicates, help to protect everybody in the society.

"Since politically motivated policy change is unlikely, activists are left with one option: the courts."

My work over the summer with the UN Economic and Social Council for Asia and the Pacific involved locating laws designed for, or abused for the purpose of, violating the rights of key populations. The array of laws used for this purpose in Asia-Pacific is staggering, and progress seems limited. Since politically motivated policy change is unlikely, activists are left with one option: the courts. Though this strategy does not always succeed, as demonstrated by *NLSA* in India, there is plenty of opportunity to challenge harmful laws. These opportunities are incredibly valuable: HIV is on the brink of degenerating into broader epidemics in a number of places, so any chance to facilitate outreach and reduce stigma is a chance we cannot afford to miss.

LIMITS TO THE RIGHTS OF THE ACCUSED AT THE ICTY

Glenn Gibson, 3L (JD/MGA), International Criminal Tribunal for the former Yugoslavia (The Hague)

A cornerstone of a just and effective criminal proceeding is the protection of the rights of the accused. The uneven application of the law undermines due process and can compromise the legitimacy of the entire legal proceedings. Some of the first international criminal tribunals that charged individuals for war crimes included limited protections for those who stood accused of committing mass atrocities resulting in so-called "victors' justice."

The International Criminal Tribunal for the former Yugoslavia (ICTY) has attempted to ensure an impartial and fair process that protects the rights of the accused through several important safeguards in the Tribunal's statute, including the right to be tried expeditiously, without undue delay, with full respect for due process rights (as enumerated in other international treaties, such as the *International Covenant on Civil and Political Rights*), and the right to have "adequate time and facilities for the preparation of his defense."

However, the law continues to evolve and new issues continue to arise. The scope of the rights of the accused was clarified in the Appeals Chamber's denial of Slobodan Praljak's request to represent himself and receive translations of the Trial Judgment and appellate proceedings in Croatian.

Slobodan Praljak held various positions in the Ministry of Defence of Croatia and was commander of the HVO (Croatian Defence Council) Main Staff during the conflict in the former Yugoslavia. In May 2013, the Trial Chamber in *Prlić et al.* found him responsible for a variety of offences in Bosnia-Herzegovina including destruction of mosques, killings, illegal detention, and attacks on members of international organizations. He was sentenced to 20 years in prison and has since appealed.

On April 28, 2014, Praljak wrote a letter to the President of the Tribunal informing him of his decision to represent himself, and requesting translations of the Trial Judgment and all appellate submissions and correspondence in Croatian. He also requested a stay of proceedings until he received all of the requested translations.

Almost two months later, the Appeals Chamber denied his request, grounding their analysis in the interests of justice. In the decision, the Appeals Chamber made several interesting points related to the scope of Praljak's rights. The Chamber recognized that the Statute creates an obligation to provide relevant material in a language which the accused can understand "sufficiently in order to allow for the effective exercise of his right to conduct his defence." On the other hand, the Chamber noted several significant practical concerns related to the translation of these documents. The Registry confirmed that the translations would take, at minimum, several years to complete.

The Chamber also emphasized the complexity of the case, and

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Glenn Gibson in the lobby of the International Criminal Tribunal for Yugoslavia in The Hague during the trial of General Ratko Mladic (Photo credit: Ullic Egan, ICTY Appeals Intern)

REDISCOVERING CANADA'S WARTIME EXPERIENCE IN ASIA

Eleanor Vaughan, 2L, Toronto Association for the Learning and Preservation of the History of WWII in Asia (Canada, China)

When I travelled to Hong Kong as an intern for Toronto ALPHA this June, I followed in the footsteps of a Canadian lawyer named Major George Puddicombe, who arrived in the city sixty-eight years before me. Puddicombe served as a prosecutor with the Canadian Army War Crimes Liaison Detachment for the Far East, and was sent to Hong Kong to help prosecute alleged Japanese war criminals following the Second World War.

In November 1941, two Canadian regiments – the Royal Rifles of Canada and the Winnipeg Grenadiers – were sent to strengthen the British garrison stationed in Hong Kong. The War in the Pacific had not yet begun and the Canadians, not expecting to see action, were ill-prepared to fight. Just three weeks after their arrival, they found themselves in the heat of battle. In a surprise attack in December 1941, coordinated with that on Pearl Harbor, Japan invaded Hong Kong. After a decisive three-week battle, Britain surrendered its colony to Japan. For almost four years, Japan occupied and governed Hong Kong. The Canadian troops who had survived the battle, along with their British and Chinese counterparts, were interned in prisoner-of-war (POW) camps. Conditions in the camp can be described as brutal: food rations were scarce, fatal disease rampant, forced labor demanded, and attempts to escape swiftly punished. As Japanese

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Hong Kong Skyline from Victoria Peak. (Photo credit: Eleanor Vaughan)

LIMITS TO THE RIGHTS OF THE ACCUSED, cont...

raised concerns about the ability of Praljak to effectively represent himself. The case involves six accused individuals, and raises complex legal and factual issues relating to crimes committed in a total of eight municipalities and a network of detention facilities across the territory of Bosnia and Herzegovina, over a period of more than two years. The Chamber determined that because Praljak does not have any previous legal training (unlike other accused people who have represented themselves at the Tribunal in the past) he would not be capable of effectively managing his appeal in an adequate and timely manner.

Finally, the Chamber noted that granting this request would in fact negatively affect the rights of the co-accused. The Chamber emphasized the importance of ensuring adequate legal representation in the context of a multi-accused case. Thus, they reasoned that the delays caused by Praljak's request would undermine the rights of the co-accused to fair and expeditious proceedings.

This decision by the Appeals Chamber highlights the challenges inherent in international criminal proceedings, where judges must balance the rights of the accused with broader considerations of justice and the context of the tribunal. At first glance it is surprising that the protection of the rights of the accused can be reconciled with an order denying a request for self-representation. However, the reasoning behind the Chamber's decision suggests that they considered Praljak's rights to be better protected by ensuring that he has appropriate representation. Although more can be done to safeguard the rights of the accused, this decision indicates that the Chamber is firmly committed to maintaining due process and a fair trial, thus ensuring the Tribunal's legitimacy and ability to contribute to the broader peace building process.

Front view of the International Criminal Tribunal for the Former Yugoslavia, in the Hague, the Netherlands. (Photo credit: ICTY Staff, Wikimedia Commons)

MY IHRP EXPERIENCE, cont...

coverage, influencing high-level actors, and securing resources to support the work of local actors. While I have only just begun to explore a few of these channels, I am certain that I would not be as effective in this role had I not participated in the IHRP as a law student. Beyond the formal training and tools I acquired, I think it is the spirit of the IHRP that is most important: I was encouraged to see myself as a global citizen, and to think creatively about what I could achieve with a law degree.

labour shortages mounted, many prisoners were transferred to camps in Japan where they were forced to manufacture Japanese war supplies. When finally freed in 1945, hundreds of Canadian POWs bore the permanent physical and psychological scars of years of unrelenting malnutrition, disease, and violence.

At the end of the Second World War, a series of war crimes trials were convened around the world. The most famous among them, namely the Nuremberg Trials and the Tokyo trials, have been extensively studied. Much less known is the story of the Hong Kong War Crimes Trials, convened under British jurisdiction beginning in 1946. Until very recently, records of these war crimes trials were not publicly available. Trial records are now becoming available to researchers, thanks to the work led by Professor Suzannah Linton, formerly of the University of Hong Kong's Department of Law. Studying this archive in Hong Kong this summer, I discovered a treasure trove of history. The Hong Kong trials are a little remembered yet crucial chapter in Canada's wartime history. Canadians prosecuted, judged, and acted as witnesses in the trials of alleged Japanese war criminals. Affidavits sworn by surviving POWs for the trials provide first-hand accounts of Canada's wartime experience in Asia.

The Hong Kong and Tokyo trials are also significant in the post-war development of international criminal law. A crucial issue in the trials was whether Japanese defendants could be prosecuted for violations under the 1929 *Geneva Convention* (the Convention), an international treaty that provided rules governing the treatment of POWs. Since Japan had signed but had not ratified the Convention, it was unclear whether Japanese military commanders held a legal obligation to adhere to it. During the war, Japan had assured Allied states through diplomatic channels that it would abide by the tenants of the Convention, under the terms *mutatis mutandis* (changing only those things which need to be changed). Japan's formal assurances to the Allies that it would adhere to the Convention, the International Military Tribunal of the Far East concluded, was sufficient to constitute a legal obligation.

Safeguarding the rights of the accused was another central issue in the trials. When a victorious party convenes a war crimes trial the process may easily devolve into "victor's justice", whereby the victorious avenge the vanquished with little regard for due process. The Hong Kong trials had a mixed record of fairness. On one hand, Japanese defendants were furnished with the legal counsel of their choice, supported by a host of translators and defense lawyers. On the other hand, defendants had no formal opportunity to appeal a conviction, relying instead on an *ad hoc* petitions process. Perhaps the most enduring legacy of the Hong Kong trials was their reassertion of legal order after the chaos of war.

As Canada and other Western nations pivot their foreign policies towards Asia, remembering our shared history is crucially important. Canadians did not fight only on the battlefields of Europe, but those of Asia as well. Canada shares deep-rooted historical ties with China, particularly with Hong Kong, which provide common ground for diplomatic engagement. By understanding the tragedy of our shared wartime experiences, we are better equipped to move towards a more peaceful future.

Canadian graves in Stanley Military Cemetary, Hong Kong (Photo credit: Eleanor Vaughan)

Rights Review is published twice a year, and profiles the interests, experiences, and achievements of students of the International Human Rights Program at the University of Toronto Faculty of Law.

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