

Rights Review

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

HUMAN RIGHTS: A FRAMEWORK TO RESPOND TO VIOLENCE AGAINST ABORIGINAL WOMEN AND GIRLS

Lara Koerner Yeo, 1L

Lara was a research assistant in the Women's Rights Division of Human Rights Watch and currently works with the Canadian Feminist Alliance for International Action.

In Canada, Aboriginal women and girls are more likely to be murdered than any other female demographic, and the rate of their disappearance is overrepresented among missing women. State failure to respond to such disproportionate violence against Aboriginal women and girls has led to one of the most egregious human rights crises in Canada's modern time.

Canada has ratified core international human rights treaties, including the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination*, which oblige states to meet comprehensive human rights standards. By ratifying these treaties, Canada is positively obliged to exercise due diligence in preventing, investigating, prosecuting, and punishing acts of violence perpetrated by non-state actors against anyone who lives in Canada, including Aboriginal women and girls.

Women's and human rights organizations in Canada have championed the human rights framework in calling for improved state and police response to violence against Aboriginal women and girls. The Canadian Feminist Alliance for International Action (FAFIA) and Native Women's Association of Canada have advocated at the UN for over ten years on the issue. In 2012 and 2013, these organizations also initiated and participated in hearings on the issue at the Inter-American Commission on Human Rights (IACHR).

Shelagh Day, the Human Rights Committee chair of FAFIA, has been engaged in FAFIA's advocacy at the UN and IACHR. When questioned about the importance of human rights law in domestic advocacy, Day highlights how human rights law inherently centers on state responsibility and thus provides an important tool for

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(Photo credit: Loretta Saunders, Creative Commons)



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Pictured above: Vigil in Ottawa for Murdered and Missing Aboriginal Women, March 5, 2014.

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Message from the EXECUTIVE DIRECTOR

The first couple of months of 2015 have been an exciting time. In February, the IHRP won the Ludwig and Estelle Jus Memorial Human Rights Prize in recognition of our groundbreaking work to end discrimination against women and sexual minorities. On receipt of the prize, Dean Iacobucci noted that the IHRP has "firmly established itself as a thought leader through its media and public engagement, as well as thorough interventions before the Supreme Court of Canada." This is important recognition of the hard work of the students profiled in these pages.

We also launched our IHRP Alumni Network with a cocktail reception for over 40 of our alumni from class years 1991 to 2017. With leadership from our IHRP **Alumni Network Committee**, the goal is to engage our over 300 alumni more deeply in the activities and advocacy of the IHRP. The launch featured an inspiring address from alumnus James Stewart (LLB 1975), Deputy Prosecutor of the International Criminal Court. James spoke passionately about the important role Canadians have played in the development of international criminal law, and the important role they are poised to play into the future ([see photos from the event here](#)).

We are also getting ready to bid adieu to our graduating students, including the two editors-in-chief of Rights Review, Amy Tang and Alison Mintoff, who themselves will become alumni in a few short months. It always fills me with momentary despair to contemplate losing my star "IHRPers", but also with renewed hope for the legal profession since I know that it will include young lawyers who care so deeply about the world.

In reading the articles for this edition of Rights Review, I learned so much about human rights issues from Ethiopia to Sri Lanka to here at home in Canada. That is what makes this publication outstanding –it gives a platform for our incredible students to shine.



Renu Mandhane (JD 2001)
Executive Director, IHRP



From the EDITOR'S DESK

Welcome to the 2015 Spring Edition of Rights Review! We are excited to share a wide variety of articles with our readers in this edition. Our authors will lead you through topics such as the (mis)treatment of mental health in Canada's immigration detention system, LGBT rights in Jamaica, and Palestine's accession to the *Rome Statute*. We are also pleased to reintroduce book and film reviews, showcase interviews with prominent human rights advocates, and chronicle some of the important events hosted by the IHRP this past year. The range of subjects is indicative of the varied interests and passions held by our student body, alumni, and faculty.

This issue of Rights Review also profiles the IHRP's 2014-2015 clinic projects and working groups, providing a small taste of the important and rewarding work that students have the op-

portunity to experience throughout their legal education.

We would like to thank all of the writers for their valuable contributions, and the student Editorial Board for their dedication in making this year's publications a success. Finally, we extend our immense gratitude to our Faculty Editor, Renu Mandhane, for her continuous guidance and support, not only in Rights Review but throughout our time at the Faculty. As our own law school careers come to an end, we are excited for the next generation of IHRPers to continue to tell the stories that rarely get heard, and to do so both critically and with sensitivity. We hope you enjoy reading this edition of Rights Review!

Alison Mintoff and Amy Tang

Welcome from the IHRP Alumni Network!

This past January, over 40 IHRP alumni gathered to launch the IHRP Alumni Network at a special event with James Stewart, LLB 1975, the current Deputy Prosecutor of the International Criminal Court. At the launch, Mr. Stewart shared his thoughts on the future of international criminal law and the role Canadian lawyers can play in its development. He also talked about his own career trajectory, from our own alma mater, to the Ministry of the Attorney General, and then on to The Hague.

This launch event captured the essence of what we hope to do with the IHRP Alumni Network – to bring together like-minded lawyers, academics and policy-makers from across the IHRP's 27-year history, and to build connections based on our shared passion for human rights work. We also envision the IHRP Alumni Network as an outlet to engage with and learn from one another, both in terms of the substance of each other's work as well as each other's professional trajectories.

As the first co-chairs of the IHRP Alumni Network Committee, we are excited about the potential of the Alumni Network, and are in the early stages of planning future events. If you have any ideas or suggestions, or if you are an alumni who wants to get connected, please reach out to us.

Finally, to fellow IHRP students: We look forward to having you join the IHRP Alumni Network soon!

Sincerely,

Sofia Mariam Ijaz and Morgan Sim

IHRP Alumni Network Committee Members:

Sofia Mariam Ijaz (co-chair)

Sarah Armstrong

Nader Hasan

Tariq Remtulla

Morgan Sim (co-chair)

Cait Sainsbury

Cory Wanless

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LIMITED LIABILITY IN *Yaiguaje v Chevron Corporation*

Alison Mintoff, 3L and James Rendell, 2L/MGA

A group of Ecuadorian villagers had their day in court on December 11, 2014, when they attempted to enforce a \$9.51 billion judgment against the oil giant Chevron Corp. and its wholly owned subsidiary, Chevron Canada. Their claim is based on extensive environmental and human rights damage in the Lago Agrio region of the Amazon rainforest.

The corporate law principle of limited liability, which typically shields corporate parents and subsidiaries from having to pay each other's debts, has the potential of preventing the villagers' claim from being enforced in Canada. As was argued by the IHRP and its joint-interveners, the Canadian Centre for International Justice and MiningWatch Canada, this case presents a critical opportunity for the Supreme Court of Canada (SCC) to correct the blanket application of this archaic principle, and provide access to an effective remedy for abuses by transnational corporations.

In today's globalized world, corporations can move easily between countries to take advantage of new commercial opportunities. However, the free movement of business has led to concerns that companies can avoid accountability for human rights and environmental harms. In particular, the separation between where businesses are incorporated and where they operate can preclude access to justice where the harm occurs. The problem is exacerbated by the legal doctrine of limited liability, which prevents corporations from being held accountable for the harms caused by their parents or subsidiaries. Limited liability can make it very difficult for victims to obtain justice if a corporation has dissolved, moved, or otherwise ceased to exist in the jurisdiction where the harm occurred.

This is the challenge currently facing the group of Ecuadorian villagers, who have taken on Chevron Corp. in *Yaiguaje v Chevron Corporation*. While the Ecuadorians won the court battle in Ecuador and Chevron was ordered to pay to remediate polluted land and set up health clinics in the area, Chevron strategically evaded the order by removing its assets from the country, making it impossible to enforce the decision. The villagers have now taken their case abroad, seeking to have the judgment of the Ecuadorian High Court enforced in the United States and other jurisdictions, including Canada.

While the evidence against Chevron Corp. is strong, enforcement in Canada will be a challenge because the doctrine of limited liability currently protects Chevron Canada from Chevron Corp.'s debts. All of Chevron Corp.'s assets in Canada are owned by Chevron Canada, a wholly-owned, but legally distinct, subsidiary. As a result, the SCC may find that the decision by the Ecuadorian Court against Chevron Corp. does not apply to Chevron Canada.

The IHRP, along with MiningWatch Canada and the Canadian Centre for International Justice (the "Joint Interveners") made submissions to the SCC that, while limited liability is an established norm in corporate law, it should not apply in all circumstances. Established in the 19th century, limited liability was initially designed to protect individual people who held shares in companies and to encourage the creation of capital markets. What was not foreseen was the emergence of wholly-owned subsidiary corporations, which could

benefit from the finances and control of the parent corporation, but would be totally distinct for the purposes of liability.

As IHRP clinic students, we assisted in preparation of the Joint Interveners' factum, mainly through conducting research to determine what, if any, policy justifications exist in favour of limited liability in this circumstance. We attended the SCC hearing in December, where Murray Klippenstein passionately argued on behalf of the Joint Interveners, and saw firsthand the interactions between counsel for the parties and inquisitive judges (Justice Abella, in particular). It was an incredible learning experience that we are both so excited and grateful to have been a part of during law school.

The SCC has an opportunity to clarify that limited liability should not apply in circumstances of parent and subsidiary corporations. If they do so, the Court will be taking a major step towards ensuring that victims of transnational corporate abuse have access to the remedies they deserve, especially those suffering at the hands of Chevron Corp. in Ecuador.

In front of the Supreme Court: Sarah Beamish, Cory Wanless, Renu Mandhane, Murray Klippenstein, Alison Mintoff, and James Rendell (Photo credit: Alison Mintoff)



LONG TERM DETENTION OF IMMIGRANTS WITH MENTAL HEALTH ISSUES IN CANADA

Hanna Gros, 2L and Paloma van Groll, 3L

In Canada, people who have serious mental health issues, and who are not serving criminal sentences, can be held indefinitely in provincial jail. Adjudicators without legal training are empowered by the state to take away these peoples' liberty without adequate due process. This cruel, inhuman, and degrading treatment is the unfortunate reality for many immigration detainees in this country.

While in the process of attaining their immigration status, individuals can be detained by Canada Border Services Agency (CBSA); people are most commonly detained for allegedly being a flight risk or danger to the public, or when their identity cannot be established.

Unfortunately, despite the serious deprivation of liberty, appropriate safeguards that are essential in criminal law are not required in immigration detention cases. The law requires monthly reviews by the Immigration and Refugee Board of the decision to detain. However, the only way the decision to continue detention can be overturned is if there are new, compelling reasons to depart from previous findings. In practice, this process too often results in indefinite detention, typically with devastating consequences.

Since 2000, at least nine people have died while in immigration detention in Canada. Their stories are peppered with unaddressed medical conditions and mental health issues. Troublingly, the CBSA failed to disclose these deaths to the public, and we only learned about most of them after in-depth investigative reporting by Canadian news agencies.

These investigations followed closely on the heels of the death of Lucia Vega Jimenez, a 42-year-old Mexican national who hanged herself in a shower stall at a detention facility at the Vancouver Airport while awaiting deportation in December 2013. However, even her death was only made public one month later, through the advocacy of the Mexican community in Vancouver.

Lucia's shocking suicide illustrates the severe vulnerability of people with mental

health issues who are held in immigration detention in Canada. In her case, the CBSA was aware that there were potential mental health concerns: Lucia was actually scheduled for a mental health assessment, but it was erroneously cancelled shortly before her death.

Unfortunately, the troubling lack of attention to issues of mental health is systemic throughout immigration detention in Canada. A leaked 2012-2013 report by the Canadian Red Cross Society (CRCS), one of the only independent monitoring bodies that has access to detention facilities, highlighted mental health as one of its key concerns.

The CRCS notes that a major issue exacerbating mental health concerns is that detainees are not always held in dedicated immigration holding facilities. When space in an Immigration Holding Center (IHC) is not available, or where a detainee cannot be effectively managed at an IHC, for example due to mental health issues, the CBSA transfers immigration detainees to provincial jails.

There are currently only two IHCs in Canada where detainees can be held for longer than 72 hours, located in Toronto and Laval. Individuals detained anywhere else are generally sent directly to provincial jails, where they are often co-mingled with criminal inmates.

In Ontario, the number of immigration detainees held in provincial jails far exceeds the number held in the Toronto IHC. Nearly two-thirds of immigration detainees in Ontario are held in jails. Nearly half of these individuals are detained for longer than 3 months.

International human rights treaty monitoring bodies consistently reject provincial and federal jails as appropriate sites of immigration detention. The International Commission of Jurists has also acknowledged that the detention of migrants in unsuitable locations (i.e., police stations or prisons) may contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.



(Photo credit: martin, Creative Commons)

Immigration detention has been internationally recognized as leading to the onset of mental health issues or exacerbating the significant deterioration of existing mental health conditions.

This is particularly dangerous for immigration detainees who are placed in provincial and federal jails. Indeed, the CRCS observes that, in provincial correctional facilities in Canada, immigration detainees face increased barriers to accessing mental health services, and are at greater risk of developing mental health issues as a result of co-mingling with the general prison population. It is particularly concerning that the CBSA claims one of the reasons it sends detainees to provincial jails is to provide them with access to necessary mental health services. Remand facilities such as provincial jails also offer immigration detainees fewer recreational opportunities, less ability to connect with family, and less ability to discuss their cases with legal counsel.

Citizenship should not be the gatekeeper of human rights. Immigration detainees with mental health issues should be treated in a way that reflects their non-criminal status and their particular sets of vulnerabilities.

EXPOSING THE “UGLY SIDE” OF CANADA’S IMMIGRATION LAWS: AN INTERVIEW WITH AMAR WALA, DIRECTOR AND PRODUCER OF *The Secret Trial 5*

Petra Molnar, 2L

The Secret Trial 5 is a fascinating film that explores the use of a problematic provision in Canadian immigration legislation. Security certificates are a legislative tool that allows the Canadian government to deport non-citizens it deems a threat to national security.

The security certificates process is one in which the allegations and evidence held against the detainees are never directly revealed, and significant parts of their trials are held in secret.

The Secret Trial 5 examines the impact of this provision on the lives of five men: Adil Charkaoui, Hassan Almrei, Mahmoud Jaballah, Mohamed Harkat, and Mohammad Zeki Mahjoub.

The film’s Director and Producer, Amar Wala, is an emerging filmmaker based in Toronto, Canada. He was born in Bombay, India, and moved to Toronto with his family at the age of 11. *The Secret Trial 5* is Wala’s first feature film. Rights Review had the opportunity to sit down with him in November 2014 to discuss the film and its wider implications.

What inspired you to make *The Secret Trial 5*?

I made a short film about one of the families while I was in film school. I was editing the film in 2007, around the time when the Supreme Court of Canada (SCC) came out with the [Charkaoui] decision that found the security certificate program unconstitutional.

As a result, the Canadian government introduced Bill C-3 in 2008 and the men who were the subjects of the litigation were moved from detention to house arrest. Everyone, including myself, thought this was a great improvement that signaled the beginning of the end of the system. Unfortunately, it was not. In 2009 one of the subjects, Mohammad Zeki Mahjoub, actually asked to be returned to prison because the house arrest conditions were so bad. This was the trigger point for the film.

Your film deals with a fairly controversial topic and yet you managed to get quite a lot of public support for it.

When you break the topic down, it’s really not controversial. We appealed to basic principles. For instance, the principle that a person should never be imprisoned without being charged with a crime. And people agreed. When we explained how convoluted and crazy the security certificate process was and the fact that this was happening here, in our country, I think that resonated with people.

The Secret Trial 5 was a very interesting portrayal of some of the tensions in Canada’s responses to migration. How do you see the security certificates regime fitting into this framework?

I think it’s definitely rooted in immigration policy as a whole. The problem is that immigration issues are not something that we talk enough about as a nation. We have marketed ourselves and convinced ourselves that we are a welcoming and multicultural society that works hard to integrate new immigrants, but that is not always true. We do a very good job of hiding the ugly side of immigration. Getting people to care about refugees and people in detention is difficult, but it is a fight we need to have.

Do you think 9/11 was a catalyst for these more draconian immigration measures?

9/11 certainly sped up some of the more draconian measures we see in the West. For example, Mohammad Mahjoub and Mahmoud Jaballah were both first arrested before 9/11. However, the first time Mr. Jaballah was arrested on a security certificate, he won his case and was in jail for seven months. In contrast, 9/11 had already happened the second time he was arrested, and he remained in jail for seven years. 9/11 definitely had an impact in exacerbating the issue, but it is not the root cause. The root goes much deeper than that.

Where do you see the role of the courts in this issue?



*The Secret Trial 5, official poster.
Printed with permission.*

(Continued on page 7)

The Secret Trial 5: A FILM REVIEW

Geetha Philipupillai, 1L

Imagine being accused of murder, and that is all you know. You do not know who you are accused of killing. You do not know when the murder is alleged to have happened. You do not know where. In fact, you have not even been charged with the crime.

Instead, you are detained and told to defend yourself.

In the documentary, *The Secret Trial 5*, this scenario is used to describe Canada's security certificate regime. Security certificates allow the Canadian government to indefinitely detain non-citizens that the government alleges are threats to national security, without charging them with a crime. Directed by Amar Wala, the film focuses on the human impact of security certificates through interviews with Mohammed Harkat, Adil Charkaoui, Hassan Almrei, and Mohammed Jaballah. (The fifth security certificate detainee, Mohammed Mahjoub, declined to participate in the film.)

Together, the men have been detained for over 30 years. They have spent a combined 50 years living under the security certificate regime and fighting deportation, all without ever being charged with a crime.

While security certificates have been the subject of multiple constitutional challenges and extensive media coverage, Wala's film examines the personal lived experience and impacts of security certificates

on the detainees, their loved ones, and their communities.

The film's greatest strength is its depiction of the mundane and banal realities of the security certificate regime that have incredibly damaging effects on the lives of the four men and their families. Under Wala's direction, the film avoids an abstract treatment of the injustice of security certificates. Rather, it illustrates the daily and ongoing effects of this regime as faced by the detainees.

Through interviews with the men themselves, their family members, lawyers, and experts, the documentary narrates the experiences of the detainees, which are both heartbreaking and surreal. In explaining his restrictive house arrest conditions, Mohammed Harkat is shown with the ankle monitor that he must wear 24 hours a day, meaning he must sit beside an electrical outlet for two hours each day while it recharges.

The film shows that despite the fact that none of the detainees were facing criminal charges, their house arrest conditions upon being released from detention were more severe than bail conditions in most criminal cases. On one occasion, the Canadian Border Services Agency searched Mohammad Harkat's house for over six hours. As Mohammed Jaballah states in the film, the punitive conditions include installing cameras in their homes, requiring approval for

receiving visitors or making trips to the grocery store, constant monitoring and banning the use of cell phones. This shows the state's continuing ability to deprive the detainees of their liberty even in their own homes.

The documentary offers a balance between showing the human toll of security certificates while providing critical legal analysis of the relationship between the security certificate regime and the systemic targeting of Muslims as terrorists pre and post-9/11. For example, Mike Larsen, one of the academics interviewed, states that when the Kingston Immigration Holding Centre (where the men were detained, also known as Guantanamo North) was built, the state consciously decided to facilitate the inmates facing Mecca under the assumption that it would be a prison for Muslims.

The documentary informs the viewer about the legal aspects of security certificates by relating the trajectory of the constitutional challenges while still centering on the stories and voices of Harkat, Jaballah, Almrei, and Charkaoui. The film's greatest success is in its representation of a complex legal issue and its empathetic treatment of lived experiences, towards which the courts and news media can be insensitive. The *Secret Trial 5* offers a unique and successful model of how documentary filmmaking can contribute to and support community, legal, and political advocacy.

Interview with Amar Wala, cont...

I was disappointed in the recent SCC [*Harkat*] decision but I found that the lawyers who argued the case and the academic community expect these kinds of decisions. They know the history of the judiciary deferring to Parliament on national security issues. But this is a problem, and judges should be dealing with precisely these types of issues. They have to deal with the rights of these people.

How did you build a rapport with the men profiled in the film?

It was just about trying to spend time with them, and not always bringing the camera. I wanted to let them know that we were there for them and they would have an opportunity to share their story; we believe it is an important story to tell. Being upfront with your goal as a filmmaker and as an artist is also really important. These are people who have often been in the spotlight in a bad way, so we had to show them that the spotlight was

theirs and it was their story. It took time to earn trust, as it is a constant process.

Was this film ultimately about returning agency to these men?

Certainly. We have heard a lot from the government's side, but what about the men's perspective? Every day that the government puts a tracking bracelet on Mohamed Harkat without charging him with a crime, it is having its say. Every day that Hassan Almrei spent in solitary confinement without having been charged with a crime, the government was having its say. In our opinion, the imbalance exists in real life, and the film was an attempt to correct this imbalance.

A preview of *The Secret Trial 5* is available for free at <http://secrettrial5.com/>.

UN CRITICISMS OF CANADA'S IMMIGRATION DETENTION POLICIES

Katie Sharp, 1L

Michael Mvogo was arrested in Toronto for drug possession on September 10, 2006. Upon his release ten days later, Mvogo was taken into custody by the Canadian Border Services Agency (CBSA) for suspected immigration irregularities. Since then, Mvogo has been in detention while the CBSA tries to determine his true identity and to which country he should be deported. Mvogo had formerly been arrested under the aliases Andrea Jerome Walker, a US citizen, and Michael Gee Hearn, a Haitian citizen. In 2011, Mvogo revealed his name as Michael Mvogo and that he is a Cameroonian national. However, Mvogo remains in detention because Cameroonian authorities have not confirmed his citizenship, and without proof of that, refuse to issue him travel documents.

Section 55 of the *Immigration and Refugee Protection Act* (IRPA) outlines the following lawful grounds for immigration-related detention: if the CBSA officer reasonably believes that (1) the person is likely to not show up for future examinations and hearings regarding a removal from Canada; (2) the person does not have adequate identification; (3) the person is considered a danger to the public; or (4) there is evidence that the person violated international human rights codes. Due to Mvogo's initial failure to provide his true identity, and Cameroon's subsequent refusal to issue travel documents, he never possessed the adequate identification to allow for his release.

The UN Human Rights Council's Working Group on Arbitrary Detention ("the Working Group") released its opinion on Mvogo's case in 2014. In the report, the Working Group declared the CBSA's original inability to uncover Mvogo's true identity and Cameroon's unwillingness to issue travel documents to Mvogo as insufficient reasons to justify his detention. The Working Group recommended that Mvogo be released immediately and that reparations should be made to him.

Esme Bailey, spokesperson for the CBSA, defended the policies that resulted in Mvogo's continuing detention by referring to Mvogo's access to due process protections. According to Bailey, the "independent review by a member of the Immigration and Refugee Board" that the "CBSA officer's decision to detain a person" is subject to ensures that detentions are lawful. Indeed, Mvogo's detention was reviewed by the Immigration and Refugee Board (IRB) every thirty days, as statutorily mandated by s. 57 of the IRPA.

However, the justifications provided by Bailey do not address the concerns raised by the Working Group. The UN considers Canada's failure both to verify Mvogo's identity in a timely manner and to secure travel documents from Cameroon as unlawful reasons for detention. The criticisms are substantive, not procedural. The criteria outlined in s.55 of the IRPA are simply too broad to protect against indefinite detentions.

The UN High Commissioner for Refugees, in its *Detention Guidelines*, recognizes that indefinite detention for immigration purposes is arbitrary as a matter of international human rights law. The solution outlined in the Detention Guidelines is to set a maximum amount of time a person can legally be detained. However, setting maximum lengths of time for detention introduces another procedural protection that does not address the concerns raised in the Working Group's opinion on Mvogo's case.

Instead, a better solution would be to adjust the evaluation criteria that the IRB uses. Mvogo's case begs the question whether his detention was ever justified. Is Canada's inability to secure the documentation required to deport an individual a sufficient ground for any length of detention? While detention is perhaps a suitable tool if public safety is at risk, it is not a suitable tool to buy time for the government to complete its bureaucratic tasks.

(Photo credit: United Nations Photo, Creative Commons)



HONG KONG'S DEMOCRACY PROTESTS, FREE ASSEMBLY AND THE RULE OF LAW

Dave Kumagai, 3L

For 11 weeks in late 2014, thousands of democracy activists set up camp on the streets of Hong Kong. Their goal was to pressure China into granting open elections for the region's municipal leadership. From the start, Chinese authorities denounced the demonstrations as illegal assemblies. The protests continued for nearly three months as police resorted to tear gas and other aggressive tactics to dismantle the occupations. In the end, more than 1,000 people were arrested.

Many fear that Beijing's influence in Hong Kong is growing, threatening to undermine the "one country, two systems" mantra adopted when Britain ceded control to China in 1997, and which has allowed Hong Kong to enjoy civil liberties not recognized in the mainland.

This is evident in the erosion of the right of free assembly in Hong Kong. Freedom of assembly is enshrined in Article 27 of Hong Kong's constitution, *The Basic Law*, as well as Article 17 of its Bill of Rights. While the right has historically been subject to various restrictions in the Special Administrative Region, the limitations have been enforced more aggressively in recent years. Freedom of assembly is particularly restricted by the controversial Public Order Ordinance ("the Ordinance").

Free Assembly ... With Permission

The British colonial leaders first implemented the free assembly restrictions in the 1960s to help police left-wing riots. The Ordinance was most recently amended by the Chinese government in 1997. It is the only law that the three main leaders of the protests – professors Benny Tai Yiu-ting and Chan Kin-man, and Reverend Chu Yiu-ming – admitted to breaking throughout the sit-in.

The Ordinance outlines a litany of restrictions that essentially require protesters to obtain the permission of the police commissioner for any public demonstration with more than 50 people. The law grants the commissioner discretion to withhold permission on the basis of a variety of factors, such as "national security or public safety, public order or the protection of the

rights and freedoms of others."

Unlike in Canada, where the burden would typically fall on the government to justify an attempt to immediately evict peaceful protesters from a public space, in Hong Kong, it is the protesters who must plead for their right to demonstrate. In the past, these permits have reportedly been easy to obtain. However, over the past few years, it has become more difficult for groups to organize public demonstrations without police interference, according to human rights watchdog, Freedom House.

In 2011, the police laid charges against 45 protesters under the Ordinance, compared with a mere 39 between all of 1997 and 2010. In total, Hong Kong police arrested 955 people in relation to the democracy demonstrations in 2014, and another 75 people turned themselves in.

Critics also claim that Hong Kong authorities selectively enforce the Ordinance against groups opposed to the government, whereas organizations such as the Hong Kong Youth Care Association and the Voice of Loving Hong Kong, government-backed groups devoted to suppressing criticism of Beijing, are given free rein to

demonstrate.

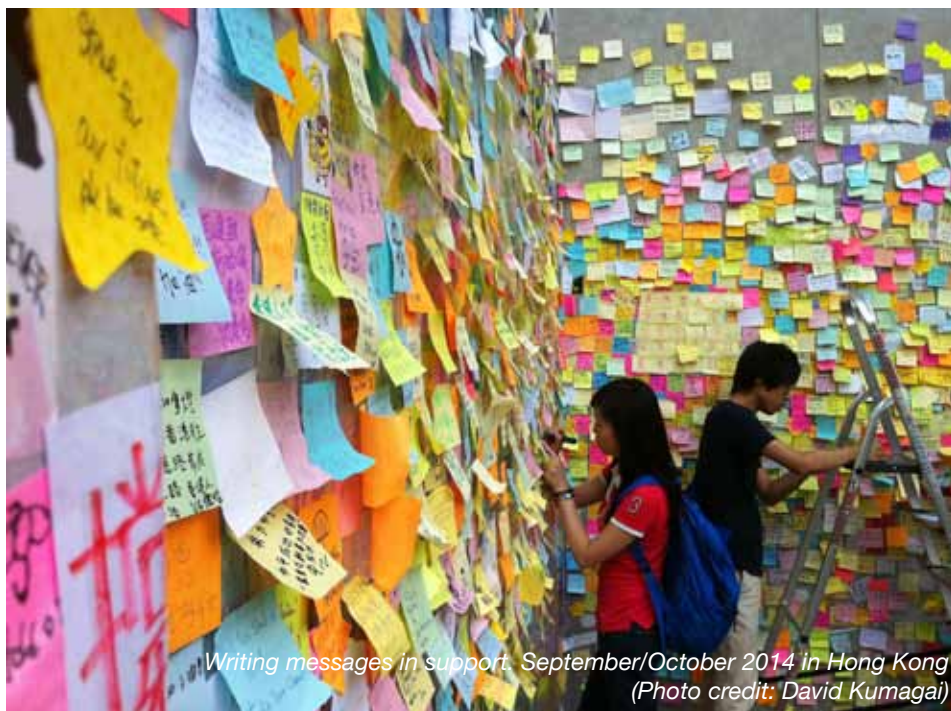
Civil Disobedience and the Rule of Law

Hong Kong's legal community appeared divided over whether to encourage or condemn the protests.

Initially, the Hong Kong Bar Association (HKBA) struck a sympathetic tone. It urged law enforcement to act with "sensitivity, restraint and proportionality," while also calling on protesters to respect the rights of other citizens and to avoid causing "excessive damage or inconvenience." However, the HKBA also argued that students should be "ready to accept the criminal consequences of their conduct."

Many legal observers grappled with the extralegal nature of the democracy protests. The HKBA quoted Chief Justice McEachern of British Columbia, who wrote that "civil disobedience is a philosophical, not a legal principle" (*R v Bridges* [1990] 78 DLR [4th] 529 at para 10). Other commentators sought to reconcile the illegal protests with a respect for the rule of law. Breaking the law, they argued, was justified as a means

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Writing messages in support. September/October 2014 in Hong Kong
(Photo credit: David Kumagai)

THE UMBRELLA MOVEMENT: HONG KONG'S QUEST FOR DEMOCRACY

Coco Chen, 2L/MBA

The IHRP and the Asian Law Society co-hosted a lunchtime talk with Jason Y. Ng (JD/MBA 2001) on October 29, 2014. Ng discussed his first-hand experiences of the Umbrella Movement and the protests in Hong Kong.

Hong Kong, a former British colony, reverted to Chinese rule in 1997. Under the so-called "One Country, Two Systems" policy, Hong Kong is to retain a degree of freedom not enjoyed in mainland China. *The Basic Law*, Hong Kong's mini-constitution, guarantees the gradual democratization of the city's electoral systems. Article 45 of *The Basic Law* promises universal suffrage for the chief executive election but falls short of specifying a timeline. In 2007, Beijing promised that Hong Kong citizens would be able to choose their leader in 2017.

The decision by China's *Standing Committee of the National People's Congress* (NPCSC) on August 31, 2014 laid down the rules on the proposed electoral reform, including a requirement that any chief-executive candidate be pre-screened by a 1,200-member nominating committee before any vote by the general public. Discontent with Beijing's broken promise, students in Hong Kong spearheaded a series of peaceful demonstrations that culminated in a large-scale street occupation, with more than 100,000 protesters at its peak.

The UN Human Rights Committee has reiterated that universal suffrage should include both the right to vote and the right to stand for election. Echoing this sentiment, guest speaker Jason Y. Ng, who had been volunteering at protest sites every day since the start of the movement, pointed to Beijing's blatant deviation from the internationally accepted understanding of universal suffrage as well as the Hong Kong Government's reluctance to act in its citizens' best interest as factors that had fueled the unprecedented political movement. Ng shared his thoughts with me on some of the pressing issues.

How long do you expect the movement to go on?

We are caught in a political impasse. On the one hand, Beijing is showing no sign of giving in for fear that doing so would encourage other parts of China to follow suit and lead to widespread social unrest. On the other hand, student protestors are digging in their heels with their demand for genuine universal suffrage. Our chief executive, Chun-Ying Leung (CYL), is not helping things. He has a reputation of being a sell-out who will always put his personal interest over that of Hong Kong. To answer your question, the movement may well go on for months. One of the ways out is for CYL to step down, which would give protestors a small victory and a reason to go home and would also give Beijing a face-saving excuse to reboot the political reform process with a new, less-divisive chief executive.

Do the people of Hong Kong view universal suffrage as a fundamental right to which they are entitled?

It depends – the income gap in Hong Kong is one of the worst in



Protestor in Mong Kok, Hong Kong, September/October 2014 (Photo credit: David Kumagai)

the developed world. Beneficiaries of the system – the establishment – have no reason to see the status quo changed. On the other hand, the working class, who work hard but are thwarted because of a lack of and upward mobility, think very differently.

There is the generational aspect as well. Young people are more adversely affected by the lack of upward mobility and at the same time more conscious of their civil rights. The older generation are less inclined to rock the political boat and worry that angering China will hamper the city's economy and ultimately their livelihoods.

The public became increasingly concerned with the excessive use of force by the Hong Kong police, and the yellow umbrella became a symbol of resistance as students used them to fend off tear gas and pepper spray from the police. What role do you think the police play?

The Hong Kong Police Force has never been more unpopular. What hurts their reputation is not so much the level of force they used on protestors but their inaction when students were physically and, in some instances, sexually assaulted by hired thugs. The police operates under the notion that if you are breaking the law by occupying city streets, then you are not entitled to protection by law enforcement. Then there was this viral video on YouTube showing a group of policemen kicking and punching a protestor in a dark alley. Many people feel that the police force has become an apparatus to crack down on the movement.

Afterword:

The Umbrella Revolution was still going strong at the time of Ng's visit to the Faculty. On December 15, 2014, 79 days after the movement started, the police made a final push clearing the last protest site in Admiralty. Vowing "We will be back," student protestors are now re-strategizing with pro-democracy political parties to work out the next steps in their fight for universal suffrage.

For more coverage of the movement, please visit Jason Y. Ng's website: www.asiseethk.com.

FREEDOM OF EXPRESSION IN JORDAN: AN INTERVIEW WITH JOURNALISTS FOR HUMAN RIGHTS

Katie Bresner, 2L and Kristina Papayotopoulos, 2L

A legal and regulatory environment that allows for an unbiased, independent, and professional media is instrumental to the exercise of freedom of expression in a democratic society. The European Court of Human Rights has stated that: “Not only does [the press] have the task of imparting...information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’”

Journalists for Human Rights (JHR) was founded in 2002 to build the capacity of journalists to report ethically and effectively on human rights and governance issues in their communities. When the media puts a spotlight on human rights, people start talking about the issues and demanding change. Authorities will be more accountable and peoples’ lives will improve.

This year, the IHRP partnered with JHR to develop rigorous curriculum on international human rights law as part of their program in Jordan. We were fortunate enough to be involved in this project as clinic student.

We sat down with JHR Senior Programs Manager Naregh Galoustian to discuss JHR’s work in Jordan and the importance of educating journalists and the public about human rights.

Why did JHR decide to initiate this project in Jordan?

Jordan was an ideal choice for JHR to launch their pilot project in the Middle East. It is a relatively stable country, one that is open to media development, and is a leader in the Middle East in this regard. However, there is still much room for improvement.

In Jordan there is widespread self-censorship and it is mostly opinion-based journalism that is produced on a daily basis. Most of the print media production is taken verbatim from press releases, and many newspapers end up looking very similar. Many topics are taboo, such as discussing the royal family, religion, or topics tied to national security. These factors prevent informed, fact-based media coverage, which jeopardizes freedom of expression and the likelihood of change in Jordanian society.

Furthermore, the state is heavily involved in regulating the media sector through laws that affect the establishment of independent journalism. The amendments to the Press and Publication Laws in 2012 requiring the licensing of online news outlets shut down 300 websites in one month. However, efforts led by a few committed media professionals and outlets to counter this heavy censorship are present. If you don’t have a space for independent journalism, you have to create it yourself.

What are the goals of the project in Jordan?

The short-term goal of our project in Jordan is to equip media and civil society with tools and skills to effectively report and communicate on human rights issues. We want to achieve this through training journalists and journalism students on how to report on human rights issues, which is the core of our work.

We are also working with human rights-based civil society organizations to help them communicate effectively with the media in order to make stronger cases for action. We want to encourage more active citizen engagement with human rights issues through the development of the first citizen reporting mobile application in the region. *Maidan* (“open square” in Arabic) crowdsources data (images, video, sounds, reports) to help the media produce compelling stories.

Combining human rights reporting with new tools and techniques, including data journalism, helps create more compelling, factual, and effective stories that can have a positive impact in Jordan and its surrounding region.

Why partner with the IHRP to teach Jordanian journalists about international law?

In some cases, journalists don’t know how to recognize human rights violations surrounding them. This is especially true when it comes to laws related to freedom of expression. We want to teach journalists about the laws and potential impediments to their work. A story is also much stronger if it references rights that are protected under binding international law.

Until now, we had not developed a solid module on international law related to freedom of expression. Jordan is a country that has signed and ratified many international treaties that deal directly or indirectly with freedom of expression. However, in practice, freedom of expression is shrinking. From 2013 to 2014, Jordan fell from 134 to 141 in the Reporters Without Borders’ Press Freedom Index. This is why we believe that it is very important to come up with a module that trains journalists on the international obligations of Jordan, and compares them with the domestic legislation in place.

International obligations can be normative and political in nature, but they are the basis for something to aspire to in order to make the government accountable. We see the module as a tool which empowers the media to take its own destiny in its hands, rather than being regulated by the government. This is essential to ensuring greater freedom of expression.



(Photo credit: Adolfo Lujan/DISO Press, Creative Commons)

ADVOCACY, RESEARCH AND CAPACITY-BUILDING AT THE 2015 PEN AMERICAS SUMMIT

Kaitlin Owens, 3L

*Kaitlin is the author of **Honduras: Journalism in the Shadow of Impunity**, a groundbreaking 2014 report published by the IHRP, PEN Canada, and PEN International which has been presented to the Inter-American Commission on Human Rights, the UN Human Rights Council, and Canada's Parliamentary and Senate Standing Committees on International Trade.*

In response to the precarious situation of freedom of expression in Central America and Mexico, PEN International recently held a major summit, with delegations traveling to Honduras, Nicaragua and Mexico to draft a regional strategy for addressing impunity and violence against journalists and writers in the region. I had the opportunity to join the delegation in Honduras and Mexico as a representative of the IHRP, and participate in advocacy, research and capacity-building initiatives.

In Honduras, the focus of the delegation was to follow-up on recommendations from *Honduras: Journalism in the Shadow of Impunity*, and meet with members of the newly-formed Honduran PEN Centre. In Honduras, the delegation met with government officials to press for decriminalization of defamation, and for inclusion of

PEN Honduras in policy dialogue on press freedom issues. The trip culminated with a press conference in Tegucigalpa, the capital city, on the need to combat impunity for violence against journalists. I was able to contribute to this important work by preparing background information on the Honduran government's recent agreement with Transparency International supposedly targeted at improving transparency, decreasing corruption and increasing civil society participation.

For the Mexican leg of the journey, the delegation increased to include over 35 writers and experts from the Americas, Europe, and Japan. The focus also broadened, including not only country-specific advocacy but also creation of a regional strategy for the Americas. The trip was the third in as many years for PEN, a demonstration of both its commitment to the region and the serious human rights crisis faced by the country. It was an opportunity to engage with NGOs, government officials, journalists and other stakeholders about attacks on freedom of expression and the legal institutions and mechanisms enabling those attacks to continue and go unpunished.

PEN Pregunta, a public protest organized

by PEN International, featured over 30 writers, journalists and poets who took to the stage to ask the Mexican government what it planned to do about the violence, corruption and impunity rampant within the country. Members of the delegation also attended meetings with senior ministers within the Nieto administration to learn more about the situation in Mexico and advocate for reforms.

In Mexico, I conducted meetings with leaders of two civil society organizations in order to follow up on the 2011 IHRP and PEN Canada report *Corruption, Impunity, Silence: The War on Mexico's Journalists*. I also delivered a presentation on collaboration in the context of drafting fact-finding reports. Finally, I helped draft advocacy documents and compile briefing packages, all the while having the chance to meet individuals from around the world also passionate about freedom of expression.

As a member of these important delegations, I have a better understanding of how NGOs operate, how to conduct advocacy at a number of different levels and how to incorporate the interests of different stakeholders into an overall human rights strategy.

Hong Kong's Democracy Protests, cont...

of highlighting the injustice of the existing legal regime.

In the wake of a series of court orders in November and December 2014 calling for the eviction of the protest sites, the HKBA urged the protesters to pack up, and warned that open defiance of the courts would send Hong Kong down "a slippery slope towards a state of lawlessness."

Many of the protesters appeared to agree that the sit-ins were no longer serving their interests. Public opinion had gradually turned against the occupation due to its ongoing disruption to daily and commercial life. When an estimated 7,000 police officers were deployed in mid-December to dismantle the protest sites, they were met with little resistance.

In the end, the demonstrations failed to win any major concessions from the Chinese or Hong Kong authorities. However, regardless of the merits of their campaign, the feat of defiantly – and illegally – assembling massive crowds in the face of China's condemnation was extraordinary. At the very least, the protests succeeded in shining a light on the limited, and arguably waning, civil liberties of the Hong Kong people.



Admiralty, Hong Kong, September/October 2014
(Photo credit: David Kumagai)

EGYPT AND THE STRUGGLE FOR DEMOCRACY: AN INTERVIEW WITH DR. WAEL HADDARA

Zacharia al Khatib, 1L



Dr. Wael Haddara, left, in a 2013 meeting with the Honourable Najib Razak, Prime Minister of Malaysia (Photo credit: Dr. Wael Haddara)

Dr. Wael Haddara is the Medical Director of the Medical-Surgical Intensive Care Unit at the University Hospital in London, Ontario. In 2012-2013, he served as a senior advisor to President Mohammed Morsi, Egypt's first democratically elected president. After the military coup of 2013, Dr. Haddara returned to Canada.

Major news networks, including the New York Times, have sought Dr. Haddara's commentary and insight into the political and social circumstances of the Middle East. He generously agreed to be interviewed about his experiences for *Rights Review*.

How did you find yourself working as an aide to President Morsi?

It was quite accidental and came about mainly because I knew two individuals – Dr. Esam Haddad and Khaled Al-Qazzaz, a University of Toronto alumnus. Khaled had recently completed graduate training at U of T. During his time he had become involved in public outreach and bridge building between the Muslim community and wider society. Post-9/11, a number of us had the same desire to reach out, and so we took media training and became point

people for media contacts in our respective communities. Khaled and I both played that role.

Khaled's time in Canada was transformative. He was always a passionate person, but he brought a newly discovered passion for education and societal development back with him to Egypt. Returning to Egypt, he changed careers from engineering to education and opened a school with his wife.

When the revolution broke in January 2011, Khaled was in Tahrir Square from day one. When the Muslim Brotherhood formed a new political party open to all Egyptians, the Freedom and Justice Party (FJP), Khaled was recommended as a media liaison. He eventually was chosen as the No. 2 man in the Foreign Relations Committee. Mohammad Morsi was the Chair of the FJP at the time, and when he became the FJP's nominee for President, Khaled moved to Egypt at the time of the elections, and through Khaled was asked if I would advise the President on communication and media. We met, hit it off, and when he won the election he asked me to join him as part of the presidential team.

It was not something I had ever planned for. I'm politically aware and keep up with local, national and international politics, but I had never envisioned myself in that realm. It was, however, an incredible chance to do outreach and narrow the understanding gap between the East and West.

Which accomplishment of the elected Egyptian government are you most proud?

Hands down, it is that we were able to sustain an atmosphere of openness and freedom during our year in office. The first act President Morsi took was to abolish pre-trial detention for journalists. In Egypt, prior to President Morsi, a journalist could (and often would) be jailed while awaiting investigation and trial whereas non-journalists could not be jailed until convicted. President Morsi abolished this intimidation mechanism and I was one of the people who helped convince him this was a key

move for Egypt early on.

The President's response to Israel's attack on Gaza in the fall of 2012 was also something of which we were all proud. I was not involved in those negotiations, but it was a hectic period with then-US Secretary of State Hillary Clinton shuttling back and forth between the Egyptian, Palestinian and Israeli sides. The President demonstrated, for possibly the first time in recent memory, principled but pragmatic Egyptian foreign policy.

Many Canadians are unfamiliar with the current state of affairs in Egypt, and why it might be important here. What would you say in response?

There is an old saying that "if you have not seen Egypt, you have not seen the world." For various historic, social, geopolitical and cultural reasons, Egypt has the capacity to inspire millions of people around the world. Egypt is the seat of the Coptic Church, the oldest Church in Christendom. It is also the seat of Al-Azhar, the oldest Islamic institution of learning.

Historically, as Egypt goes, so does the Middle East and also the broader Islamic world. Because of the decline in Egypt's standing over the past 50 years, her regional and global influence diminished. But all it took was the revolution of 2011 to see hope alive again in so many people within, and well beyond, Egypt's borders. During my travels in 2011-2013, it became normal for people in airports from Kuala Lumpur to Istanbul to Paris to tell me that their hopes are pinned on Egypt for a new renaissance in the Middle East.

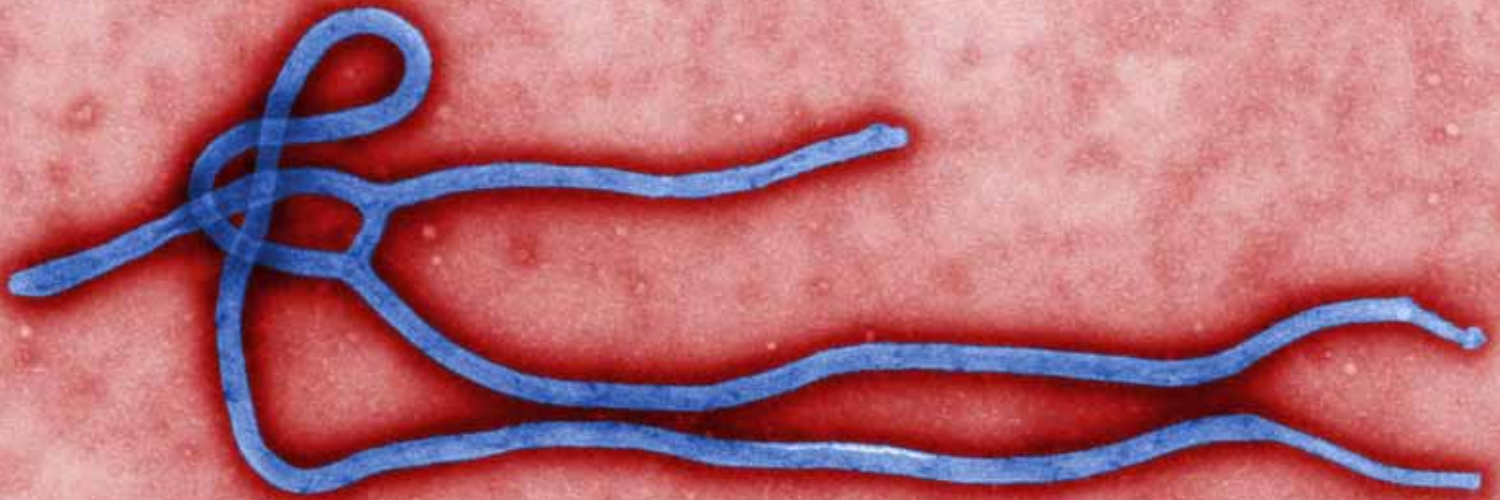
With its vast population (close to 100 million people) and natural resources, Egypt is also an important economic player. It is set to become one of the key economies in the upcoming years. It can be a true link and bridge between East and West.

We repeat the mantra ceaselessly that we now live in a global village. It is more than a mantra: it is a reality. Egypt is central to our village. If Egyptians can develop a model

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FEAR ABOVE SCIENCE: CANADA'S EBOLA-RELATED VISA RESTRICTIONS

Michelle Hayman, 2L/MSW



The Ebola virus (Photo credit: CDC Global, Wikimedia Commons)

On October 31, 2014, [Citizenship and Immigration Canada](#) (CIC) announced new travel restrictions for individuals from countries facing outbreaks of the Ebola virus. CIC stopped processing both new and existing visitor visas, as well as permanent residence applications from individuals who had been in an Ebola-affected country within the previous three months. The policy contains an exception for Canadian health workers aiding in the efforts to stop the disease. Around thirty countries, including Australia, have introduced similar Ebola-related travel restrictions.

The [World Health Organization](#) (WHO) has criticized CIC's decision and continues to recommend against travel and trade restrictions. However, Canada's ban remains in place, raising a number of international law and public health concerns.

The International Health Regulations

Canada is one of 196 signatories to the [International Health Regulations](#) (IHRs). The IHRs foster global cooperation "to prevent, protect against, control and provide a public health response to the international spread of disease in ways [...] which avoid unnecessary interference with international traffic and trade."

The IHRs require any restrictions on travel or trade related to disease outbreaks to be made based on scientific principles or a WHO recommendation. This evidence-based approach attempts to address the economic incentive some countries may have to initially hide disease outbreaks from the global community. In fact, Canada played a key role in updating the IHRs following the outbreak of SARS in 2003, when it suffered economic losses related to a WHO travel advisory against Toronto.

CIC has yet to publically provide a scientific basis for introducing the Ebola-related ban, contrary to the WHO recommendations. However, the Canadian government maintains that its measures

do not violate the IHRs, as they do not prevent Canadian medical professionals from going to Ebola-affected regions.

Regardless of this exception, travel bans such as these will likely reduce future international trust in the relevance and power of the IHRs. Countries may once again have an economic incentive to withhold information about early disease outbreaks from the WHO in order to avoid travel and trade repercussions. As a recent article in the *Canadian Medical Association Journal* argues, these bans "unravel the global social contract" central to fighting infectious diseases.

Poor Public Health Evidence

Moreover, visa restrictions are unlikely to help contain disease outbreaks. WHO representative Dr. Isabelle Nuttall released a statement cautioning against these restrictions, as "it is impossible to stop the movement of people motivated to see loved ones or seek a better life for their children." Visa restrictions simply force individuals to find new ways of travelling and make tracking disease transmission more difficult.

A recent study published in the *Lancet* found that the majority of air travellers departing Guinea, Liberia and Sierra Leone (Ebola-affected countries) travel to other low-income and lower-middle-income countries, with very few travelling directly to Canada. The study urged wealthier nations to help finance exit screening at international airports in the Ebola-affected nations, rather than imposing travel bans.

While visa restrictions may provide a false sense of security for Canadians, they ignore the greater likelihood that Ebola will travel to countries with poorly resourced public health systems, possibly leading to further spread of the disease.

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AFRICAN GRANDMOTHERS TRIBUNAL: SEEKING JUSTICE AT THE FRONTLINES OF THE AIDS CRISIS

Teresa MacLean, JD 2014

The AIDS pandemic in Sub-Saharan Africa continues to devastate families, as many children are left without parents. As a result, it is the elder women in the family who have taken on the role of primary caregivers. These so-called “grandmothers” have formed a social movement that seeks to repair the damage caused by AIDS.

Mariam Mulindwa was left to take care of seventeen orphaned children in her family. After Mariam’s older sister lost her husband, her in-laws chased her out of her marital home, a practice called “land grabbing.” With nowhere else to turn, Mariam’s sister returned to her family’s home in the Jinja District of Uganda with her children. She was ill for four years and bedridden for 18 months prior to her death from AIDS. She left behind six children, all of whom Mariam adopted. Mariam also lost her other sister to AIDS, leaving behind more

nieces and nephews. Mariam now heads a household of 17 children. With little governmental assistance, feeding and paying school fees for so many children has proved to be challenging.

Mariam joined the Pheobe Education Fund for Orphans and Vulnerable Children (PEFO), an organization partly funded by the Stephen Lewis Foundation (SLF), which provided her assistance with school lunches, fees and materials.

Organizations like PEFO, one of approximately 300 community-based organizations in sub-Saharan Africa supported by the SLF, have stepped up where local governments have not; to provide support for women and children that bear the brunt of the devastating AIDS pandemic. These organizations hold support meetings for African Grandmothers, women who have

watched their own children die of AIDS and who have become the primary caregivers for their orphaned grandchildren.

Mariam attends these grandmothers’ meetings, where challenges and achievements are shared, along with health and hygiene information. Mariam is a strong advocate for the rights of Grandmothers; she was asked to sit on her local Sub-County Land Rights Committee, and she encourages other women to get involved in politics and local councils.

On September 7, 2013, the SLF held a people’s tribunal in Vancouver to shine a public light on the denial of the Grandmothers’ human rights. Six Grandmothers, including Mariam, from across sub-Saharan Africa presented their personal testimonies

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African Grandmothers Gathering (Photo credit: Alexis MacDonald)

MULTIPLE VOICES ON REPRODUCTIVE LAW'S MOST DYNAMIC DIALOGUE: Abortion Law in Transnational Perspective, Cases and Controversies, A BOOK REVIEW

Tamara Jewett, 1L

Abortion Law in Transnational Perspective, Cases and Controversies was published in 2014, edited by University of Toronto Faculty of Law professors, Rebecca J. Cook and Bernard M. Dickens, and Joanna N. Erdman from Dalhousie University. They each contributed articles alongside thirteen other international legal scholars. The book proved to be an engaging and accessible introduction to a complex and dynamic socio-legal debate.

Cook, Dickens and Erdman describe their project as a “collaborative space for re-thinking abortion and the law” with the goal of examining both the current field, as well as the way in which new ideas are “changing the way we advocate, regulate and adjudicate on abortion.” This focus on the roots and progression of the current dialogue around abortion law simplifies the issues for readers without prior knowledge of the topic. At the same time, the book dives right into many of the complex dimensions of reproductive law.

The editors identify a shift in focus from criminal law to human rights in abortion debates over the past several decades. The book draws out the complex bundle of potentially conflicting interests and rights involved; primarily, a pregnant woman’s interest in and right to decisional autonomy, pitted against the potential that a fetus at any stage has a right to life. These conflicting interests also involve mental and physical health, ideas about gender and maternity, religion, nationalism, and scientific and philosophical ideas about personhood. *Abortion Law* draws attention to the frequently contradictory interplay between legal decisions and social policies. The essays in the book critically evaluate arguments on both sides of the debate, while generally supporting liberal access to abortion.

The book is well structured, and the separate essays work together to form a cohesive text. Reva B. Siegel’s opening article gives the reader the historical context of landmark American and German reproductive rights cases in the 1970s, which were the first constitutional challenges to abortion laws. Ruth Rubio-Marin’s article then examines an unusual interpretation of the German decision in support of more liberal abortion laws in Portugal. Rachel Rebouché’s examination of the contradictions between the court decisions and abortion access in the US and Germany shifts the book’s focus to an analysis of the relationship between formal law and attitudes or procedures that frustrate access to abortion. Finally, the book turns to narratives employed in abortion debates, and ways that law and legal arguments can shape social policy.

The editors also readily acknowledged a shortcoming of the book. *Abortion Law* does not examine all geographic regions equally, and some are left out of the discussion. The articles focus heavily on Europe and the Americas, with only limited references to Africa and Asia. This is understandable given the recent international prominence of several Central and South American cases before the UN Human Rights Committee and Inter-American Commission on Human Rights. However, it would have been valuable to include discussions on the recent situation in either China or India, where issues of sex-selective abortion and the one child policy further complicate this debate. The editors emphasize the need for more transnational engagement on the issue, and the sharing of ideas across jurisdictions and disciplines. They describe the book as a starting point, and hope to encourage more collaborative scholarship in the field. The book is interesting, balanced, and informative, and is recommended to anyone with an interest in reproductive rights and the right to health.

MAPPING GLOBAL HEALTH RIGHTS

James Rendell, 2L/MGA and Amy Tang, 3L

The right to health and related rights are of growing importance in domestic and international law. They are enshrined in numerous treaties, national laws, and constitutions, and have given rise to a significant body of case law.

In response to this growing field, Lawyer’s Collective, a leading human rights advocacy organization based in Delhi, India and the O’Neill Institute for National and Global Health Law at Georgetown University partnered to create a fully indexed and freely available website of case law, national constitutions, and international instruments that touch upon the right to health.

The [Global Health and Human Rights Database](#) serves as an important resource for practitioners and scholars engaging in

comparative legal analysis on issues related to global health and human rights. Improving the accessibility of international jurisprudence on health-related rights also benefits individuals fighting for their furtherance and protection by increasing the efficiency of the research process and demonstrating the links between the right to health and other human rights.

This year, the IHRP established a partnership with Lawyer’s Collective to support the continued growth of the Database. Dedicated members of the Mapping Global Health Rights working group provided summaries and tags to over 40 cases. In doing so, they learnt to effectively distill the facts of a case, synthesize important legal arguments, and identify key health topics.

ANTI-NGO LAW OBSTRUCTS EFFORTS TO COUNTER HUMAN TRAFFICKING IN ETHIOPIA

Hanna Gros, 2L

Human trafficking has been referred to as modern-day slavery. Human trafficking violates fundamental human rights, weakens economies, fuels violence, threatens public health and safety, and shatters families. A problem of this scale requires a multifaceted response.

However, in Ethiopia, many human rights NGOs engaging on this issue are impeded in their work due to new domestic legislation that limits foreign financial contributions to NGOs working on human rights issues. This has had a profound negative impact on the Fight against human rights trafficking of women and girls in Ethiopia.

Migration and human trafficking are often difficult to distinguish in Ethiopia. Extreme rural poverty, misconceptions about city-life, and harmful traditional practices (such as early marriage) are some of the factors that compel girls to migrate to urban centres in search of educational and economic opportunities. However, the possibility for individuals to profit from facilitating this migration, and potential subsequent exploitation, can make it difficult to assess to what extent the girls are being coerced to move.

Upon arrival in urban centres, girls are often forced, either by their circumstances or their traffickers, into domestic work. Nearly half of adolescent girls living in low-income areas of Addis Ababa are migrants. Among migrant girls in these urban areas, 87% are mainly engaged in domestic work, commonly in middle and upper-class Ethiopian households. The structure of domestic work obliges girls to reside with their



On a tour through the villages of Lalibela, Ethiopia (Photo credit: Hanna Gros)

enforcement. The risks faced by this vulnerable population are systemic and not likely solved without broader societal change. Non-governmental organizations, particularly those with legal and financial capacity to engage with the societal normative structures, are often the sole source of protection for trafficked girls and women.

Collectively, NGOs form one of the most dynamic actors in the fight against human trafficking in Ethiopia. They have the flexibility to reach out to communities, and engage the underlying norms and attitudes at the root of violence against women. Many

problematic. The law creates three categories of NGOs based on where the organization is registered and its proportion of foreign funding. This classification is crucial since only 'local charities' – those registered in Ethiopia that do not receive more than 10% of their funding from a foreign source – may work on human rights issues. The law effectively limits foreign financial assistance upon which domestic NGOs desperately depend.

Since the law came into effect, Amnesty International asserts it has crippled independent human rights activity in Ethiopia. The law's devastating effects are particularly pronounced in organizations addressing women's rights. Nearly half of "foreign" NGOs focused on promotion of gender equality have shifted away from this field since the new law was enacted. Furthermore, organizations that have maintained their focus on women's issues have had to confine their activities in the face of scarce resources. For example, after having many of its foreign assets frozen by the government, the Ethiopian Women Lawyers Association discontinued its public education initiatives and legislative reform efforts and

“Collectively, NGOs form one of the most dynamic actors in the fight against human trafficking in Ethiopia.”

employers, where they are isolated from their social networks and rendered vulnerable to abuse by employers. Domestic workers are at particularly high risk of gender-based violence and sexual assault. The combination of long work hours and low pay create a situation of dependency whereby girls are unable to pursue educational opportunities to escape poverty, and are essentially hidden from law

NGOs draw upon their international expertise in human rights, as well as their deep knowledge of local circumstances, to effectively address the patriarchal aspects of culture that contribute to violation of women's rights.

The fundamental role that NGOs play in this effort is precisely why Ethiopia's 2009 *Charities and Societies Proclamation* is so

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A VICTORY IN UGANDA?: LGBT RIGHTS AFTER THE INVALIDATION OF THE Anti-Homosexuality Act

Kathryn Hart, 3L

Ugandan human rights lawyers achieved a major victory in August 2014: the Constitutional Court in Uganda invalidated the *Anti-Homosexuality Act* (the “Act”) on the grounds that it was passed without the required parliamentary quorum. The Act imposed heavy sanctions on those who engage in homosexual acts, and on individuals or organizations that “promote homosexuality,” such as LGBT activists or NGOs that advocate for gay rights. The defeat of the Act was a triumph in a country where the President has stated publicly that his government is “at war with the homosexual lobby.”

However, even after the invalidation of the *Anti-Homosexuality Act*, the legal situation for LGBT Ugandans remains precarious. Although it is not a crime to identify as gay in Uganda, gay, lesbian, and transgender people have been charged with “indecent practices” or “unnatural offences” under the “offences against morality” provisions of the Ugandan *Penal Code*.

“The focus of the proposed legislation suggests that the threat of homosexuality perceived by the Ugandan government does not arise from the private acts of individuals, but rather from the further growth and spread of a burgeoning civil rights movement.”

Also, it appears that Ugandan legislators have not abandoned attempts to criminalize advocacy by the “homosexual lobby.” In August 2014, a Ugandan MP stated that President Museveni wanted to pass a revised version of the invalidated Act that would focus on protecting children and economically vulnerable persons from being “recruited” into homosexuality.

In November 2014, a draft copy of the proposed statute, the *Prohibition of Promotion of Unnatural Sexual Practices Bill* (the “Bill”), was leaked to international media. Unlike the *Anti-Homosexuality Act*, the Bill does not explicitly legislate against private same-sex sexual practices. Rather, the focus is on publicizing “unnatural sexual practices,” or more specifically, homosexuality as a growing social movement in Uganda.

The Bill defines “unnatural sexual practices” as encompassing same-sex sexual practices, sex with or between transsexual persons, a sexual act with an animal, and anal sex. It criminalizes acts that are related to the publicization of homosexuality through

the promotion and exhibition of same-sex sexual practices and through inducement to commit same-sex sexual acts.

The definition of “promotion of unnatural sexual practices” is extremely broad. Under the Bill, any person who disseminates information or material “intended or likely to facilitate engaging in unnatural sexual practices” will have committed a criminal offence and could face a jail sentence of up to seven years. Frank Mugisha, a gay activist in Uganda, has noted that under the Bill, his Twitter postings about LGBT advocacy could even constitute a criminal offence.

The “exhibition” of unnatural sexual practices is similarly broad. The Bill states that any person “who makes a representation through publication, exhibition, cinematography, information technology or by whatever means, of a person engaged in real or fictitious unnatural sexual practices” commits a criminal offence and is liable to imprisonment for up to seven years.

The revisions in the proposed Bill seem to be directed against the “homosexual lobby” referred to by President Museveni. The Bill appears to legislate against homosexuality as a social movement, rather than as private acts between individuals. Its widespread limitation of freedom of expression seems consistent with the Ugandan government’s recent restrictions on constitutional freedoms. For instance, the Ugandan Parliament passed the *Public Order Management Act* in October 2013, which makes it illegal for public assemblies to occur without prior permission from the police. The focus of the proposed legislation suggests that the threat of homosexuality perceived by the Ugandan government does not arise from the private acts of individuals, but rather from the further growth and spread of a burgeoning civil rights movement.

Thus, while the invalidation of the *Anti-Homosexuality Act* is indeed a victory, it is by no means the end of the struggle to achieve human rights for LGBT communities in Uganda.

Human Trafficking in Ethiopia, cont...

devoted its remaining resources to legal aid services. Involuntary restructurings like this are particularly destructive given the rampant gendered violence in Ethiopia, tolerated by patriarchal notions that essentially normalize trafficking of girls for the purpose of domestic work.

Trafficked women and girls in Ethiopia are some of the

most vulnerable victims of gendered violence. Tolerance of violence against women is embedded in traditional practices, social norms and the legal system; meaningful solutions must involve challenges to the status quo. In this context, the cost of the anti-NGO law is high as it serves to effectively cut off the lifeline of women’s advocacy and support on which victims of human trafficking desperately depend.

NOT SAFE AT HOME: HUMAN RIGHTS WATCH REPORTS ON LGBT RIGHTS IN JAMAICA

Geneviève Ryan, 2L/MA, Russian and European Studies

The IHRP and Human Rights Watch co-hosted an event on October 23, 2014, launching *Not Safe at Home*, a recent report on violence and discrimination against LGBT people in Jamaica. The launch featured Graeme Reid, head of HRW's LGBT Rights Division and Jamaican field researcher Rhon Reynolds.

Based on five weeks of field research, including interviews with 71 lesbian, gay, bisexual and transgender persons as well as various government officials and other stakeholders, *Not Safe at Home* reveals the challenges, risks, and violence faced by LGBT persons as a result of systemic homophobia in Jamaica.

Among the key recommendations of the HRW report is for the Jamaican parliament to repeal sections 76, 77, and 79 of the *Offences Against the Person Act*. Sections 76 and 77 make the commission or attempt of the "abominable crime of buggery" punishable by imprisonment or hard labour. Section 79 prohibits "acts of gross indecency" between men either publicly or privately, and is interpreted as including any acts of

physical intimacy. HRW also recommends amending the restrictive rape provisions included in the *Sexual Offences Act* of 2009, which narrowly defines rape as being the penetration of a vagina by a penis.

These provisions effectively deprive men of legal protection against rape, and force women to rely on the sodomy laws in the event of anal rape. They also perpetuate homophobic violence and disempower victims from coming forward. While none of the provisions criminalize same-sex relations between women, HRW found that they are subjected to the same stigma and attacks as men.

The criminalization of same-sex relations among men is reflective of the homophobic discourse that still pervades all aspects of Jamaican social life. Faith-based groups such as the Jamaican Coalition for a Healthy Society (JCHS) have gained prominence in recent years. The JCHS has run a media campaign disparaging "homosexual behaviour" and reinforcing its claims by misusing HIV statistics. Similar sentiments run through all mainstream media, which

largely refuses to publish material promoting LGBT rights while publishing cartoons and articles demonizing LGBT persons. Public figures such as politicians and popular musicians reinforce this discourse by condemning LGBT people in their statements and lyrics.

This climate drastically reduces the quality of life of LGBT Jamaicans. They are frequently cast out of their families or evicted due to their sexual orientation, leading to widespread homelessness. This can force them into prostitution and exposes them to increased violence. When they are ill or injured, fear of discrimination often prevents them from accessing health care. When they do seek it, they may still refuse to disclose their sexual orientation or HIV status, making proper treatment even more unlikely.

Police contribute to the problem by ignoring, permitting, or even participating in violent attacks based on perceived orientation or gender identity. Forty-four of the

(Continued on page 23)



(Photo credit: Dan Machold, Creative Commons)

INTERVIEW WITH HUMAN RIGHTS WATCH'S GRAEME REID

Charu Kumar, JD 2014

The IHRP hosted Graeme Reid, director of the LGBT Program at Human Rights Watch (HRW) on October 23, 2014. This event highlighted the launch of a new report by HRW entitled *Not Safe at Home*, a follow up to their influential 2004 report *Hated to Death*.

Not Safe at Home reveals the ongoing risks and violence faced by LGBT persons in Jamaica as a result of systemic homophobia. Graeme Reid spoke about his work with HRW and his human rights advocacy with Rights Review.

How did you get involved in the field of human rights?

My interest in the field human rights, namely LGBT issues, began developing while I was in South Africa. Before I joined Human Rights Watch in 2011, I was the founding director of the Gay and Lesbian Archives of South Africa.

As an anthropologist, I initially approached this field of work from an academic perspective. For example, I was a researcher at the Wits Institute for Social and Economic Research and a lecturer in Lesbian, Gay, Bisexual, and Transgender Studies at Yale University.

Eventually, with a desire to employ my knowledge to affect tangible change in the field of human rights, I applied for and was granted the position of Director of the LGBT Program at Human Rights Watch.

As director of the LGBT Program at HRW, what is your day-to-day work?

For me, no two days are ever the same. There are a total of six people in the LGBT Program, and as director, one of my key responsibilities is strategically identifying the countries in which HRW should become involved.

To identify these countries, HRW employs a set of criteria that assess not only need, but also the likelihood of affecting change in the region. Many countries could benefit from HRW monitoring in the area of LGBT issues, however, not all of them are appropriate for HRW involvement. This is largely the result of a weak civil society presence in the area. Since HRW works to promote dialogue among local actors (government, NGOs, etc.), it is often very important that a sufficiently stable civil society in the region exists.

For example, Jamaica was chosen in the Caribbean region because there are NGOs therewith whom HRW can work, and because the country has a notable influence over other countries in the region.

What would you say are the biggest obstacles in Jamaica concerning LGBT rights?

The two biggest obstacles are social attitudes and the existing legal framework. Many disagree on which of these two obstacles should be addressed first. Some say that, if social attitudes change, positive legal development will follow. Others argue that, if the laws are modernized, social attitudes will inevitably evolve.

In the case of Jamaica, have you noticed any positive changes since the 2004 HRW Report *Hated to Death*?

There has been significant improvement in Jamaica vis-à-vis LGBT rights since 2004. Back then, there was not one person from the LGBT community who was willing to come out to the public. However, today, many Jamaicans are open about their identities. This visibility itself serves as a catalyst for positive change.

Moreover, there is a notable shift in the nature of media discussions; while significant stereotyping and prejudice still exists, there are more balanced editorials. I believe that the 2004 HRW report played a part in propelling this change.

Additionally, the police have instituted a diversity policy prohibiting discrimination against LGBT individuals. While this is a positive step, the policy has not put an end to discriminatory practices and improper investigation of cases.

Moreover, unlike in 2004, civil society groups fighting for LGBT rights are now able to advocate more openly and are not subject to the same level of threats.

Ultimately, progress is still slow, since criminal “buggery” laws are huge impediments that remain in place.

You mentioned that one of the key tasks of HRW is to promote dialogue between local actors, including the government. What happens when the government does not respond favourably?

Thankfully, the government in Jamaica has been quite responsive in the area of LGBT rights and HIV-related issues. There continue to be many disagreements; however, the Jamaican government recognizes there is room for improvement. There is often a risk that the government will seem to be open to recommendations, but then avoid actually implementing suggested changes. In such situations, HRW attempts to monitor the country and work with local groups. This is why a strong civil society presence in the region is important.

In Jamaica, what is the current state of the legal challenge of the “buggery” laws?

There was a case challenging these laws at the Jamaican Supreme Court, but it has been withdrawn. The individual bringing the challenge felt threatened and wanted to prevent backlash against his family.

There are two cases before the *Inter-American Commission on Human Rights*. The outcomes in both cases are likely to be favourable. While the decisions of the Commission are not binding, they will nevertheless be important since they would add to the consensus that “buggery” laws are not in line with international human rights obligations and should be repealed.

IMPLEMENTING CANADA'S HUMAN RIGHTS OBLIGATIONS

Emily Bloxom, 3L/MA and Karen Bellehumeur, LLM Candidate

The [Inter-American Commission on Human Rights](#) (IACHR) released a report called [Missing and Murdered Indigenous Women in British Columbia, Canada](#) on January 12, 2015. With the report, we can add the IACHR to the growing list of organizations calling for a national inquiry into missing and murdered aboriginal women. The report contains a series of recommendations that emphasize the need for the Canadian government to comprehensively target violence against these women by focusing on underlying factors including discrimination in employment and education, poverty, and criminalization. Crucially, the report recommends the formulation of initiatives and policies in consultation with indigenous women, and improved coordination between different levels and sectors of government.

The recommendations made by the IACHR are clear, but it is unlikely that they will be implemented in any clear or transparent manner. For years the Canadian government has faced widespread criticism over its failure to effectively implement its international human rights obligations.

In 2012, prior to Canada's second Universal Periodic Review (UPR) by the UN Human Rights Council, a coalition of over 60 Canadian civil society and indigenous groups, provided a joint submission concern-

ing Canada's failure to adopt an effective mechanism to implement its international human rights obligations. This submission echoed concerns presented by a similar coalition in 2008, in advance of Canada's first UPR. As a result, a number of states recommended that Canada improve its approach to implementing its treaty obligations, and the federal government agreed to do so. Unfortunately, no improvements to address missing and murdered indigenous women have yet been made.

Reports from a number of UN human rights treaty monitoring bodies have repeatedly recommended that improvements be made to the monitoring, effectiveness, and transparency of Canada's implementation mechanisms. Calls for reform have even come from within Canada, with three different reports from the Senate Standing Committee on Human Rights since 2001 advising that improvements are required to implement its human rights obligations.

In response to these calls for reform, the IHRP partnered with [Amnesty International Canada](#) to create a model implementation mechanism, in hopes of providing a concrete basis for dialogue. As IHRP clinic students, we conducted research on domestic and international models for implementing human rights obligations. We compiled a preliminary list of best practices, and are

currently in the process of consulting with relevant domestic and international actors in the human rights field for input on developing such a mechanism.

A particular challenge in creating such a model is Canada's federalist state which grants the provinces and territories jurisdiction over areas relevant to human rights implementation, such as health and social welfare. Consequently, processes for facilitating intergovernmental cooperation between different levels of government is essential for ensuring full and meaningful implementation of Canada's human rights obligations. To address this challenge, we have looked at domestic models of intergovernmental cooperation in areas besides human rights, as well as at implementation mechanisms and processes in other federalist states.

Establishing such a mechanism is a challenging endeavor but one that could result in significant gains. Creating a publically accountable and transparent model for monitoring and implementing international human rights obligations would benefit all Canadians, including those affected by the current crisis of missing and murdered indigenous women. In a country that holds itself out as a leader of protecting human rights, we must do better to implement our human rights obligations.

IHRP in the News

[Spillover into Canada](#) (Nexus magazine, Fall/Winter 2014)

[Judges should be overseeing solitary confinement](#) (Globe and Mail, 9 March 2015)

[Nehass' case 'troubling': human rights lawyer](#) (Whitehorse Daily Star, 25 February 2015)

[Sir Elton John funds probe into Canada's treatment of refugees with HIV](#) (Toronto Star, 8 January 2015)

[Eritreans sue Canadian mining firm Nevsun over human rights abuses](#) (The Guardian, 9 December 2014)

[Access to information now beyond reach of most Canadians](#) (Globe and Mail, 13 November 2014)

[Canada: Fight for the right to sue torturers](#) (Al Jazeera, 22 October 2014)

[Human rights groups argue against Chevron in Ecuador cleanup dispute](#) (Globe and Mail, 19 October 2014)

[Exception urged as court rules torture victims can't sue foreign countries](#) (Globe and Mail, 10 October 2014)

[NWT corrections says segregation protected inmates](#) (CBC News, 12 September 2014)

[How many more Edward Snowshoes are in our prison?](#) (Globe and Mail, 13 July 2014)

Aboriginal Women and Girls, cont...

domestic advocates to hold a state accountable.

Day notes that human rights law has been agreed to by the international community and has clearer, more comprehensive protections than domestic law in regards to the state's responsibility to address violence against women. Human rights law provides women's rights advocates with a universal language, which can be used in myriad domestic contexts to understand and articulate what it means to protect women from violence and to press for improved state response.

Canada's persistent failure to prevent and respond to continued violence against Aboriginal women and girls has led to investigations by the IACHR and UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), which is indicative of the seriousness of this crisis.

The groundbreaking IACHR report, *Missing and Murdered Indigenous Women in British Columbia, Canada*, released on January 12, 2015, asserts that this violence is rooted in a history of gross discrimination and systemic social and economic marginalization of Aboriginal peoples in Canada.

The report affirms Canada's legal obligation to improve its response to the violence, including through addressing social and economic risk factors that make Aboriginal women and girls disproportionately

vulnerable to violence. The IACHR report, and the forthcoming CEDAW Committee report, focus public attention on systemic violations of rights that UN treaty bodies have commented on for years.

However, violence against Aboriginal women has not yet been embraced by the government as a crisis that requires a rights-based response. Too often the issue is framed as a number of isolated crimes and atomized failures of the criminal justice system, instead of as a systemic human rights crisis caused and perpetuated by chronic violations of women's civil, political, economic, social, cultural, and indigenous rights.

Meghan Rhoad, researcher in the Women's Rights Division of Human Rights Watch and author of *"Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada"*, considers the IACHR and CEDAW Committee reports to be important, in part, because of how they came about.

Rhoad credits the existence of the reports to the persistent, strategic work of domestic advocates, as well as to human rights reporting by domestic and international non-profit organizations.

In conversation, Rhoad reflects on how she is often asked what individuals can do to take action on this issue and contribute in

some positive way to alleviating the crisis. A starting point is the recognition of human rights as a framework for improved state response, she said.

While Canada's current federal government has stymied any rethinking or refocusing on this issue, Canadians have a collective voice and can come together to demand change. In Day's words, this is a time of contradiction. There is currently activity on social networks, in mainstream media, and on the streets. Examples include targeted Twitter activity under the #MMIW hashtag, and social media campaigns, such as #AmINext and #ImNotNext, gaining mainstream media attention. There are also annual days of action when Aboriginal women and allies take to the streets.

Aboriginal women and families have broken the silence about violence and have profoundly changed public understanding through these campaigns. They demand change and share their stories in an awe-inspiring and hope-inducing way.

Despite these efforts, there is no real institutional change, no government action to address the systemic and structural discrimination that is the root cause of the violence. It is a time of contradiction and conflict as Aboriginal women, supported by allies, continue to seek respect for, and fulfillment of, their human rights.



Stolen Sisters Memorial March,
Victoria, British Columbia, 2009
(Photo credit: glassghost, Creative Commons)

THE WHRR WORKING GROUP: IMPROVING ACCESS TO JUSTICE THROUGH ACCESS TO INFORMATION

Maia Bessemer, 2L and Kristina Papayotopoulos, 2L

The **Women's Human Rights Resources** (WHRR) database is a free, searchable, and easy to use resource, accessible from the Bora Laskin Law Library (the "Library") website. The WHRR database contains summaries of articles, documents, and treaties on women's rights and provides direct links to these resources. The database is a key resource for women's rights activists in the Global South who may not have access to a law library, and is accessed over 15,000 times per month. This year, the WHRR IHRP working group is adding to the database with a particular focus on creating content related to women's civil and political rights.

As working group leaders, we had the opportunity to interview the Library's Reference and Digital Services Librarian Susan Barker, to learn how the WHRR database was started, and why it is so important.

Barker explained that the project is deeply indebted to former Chief Librarian Ann Rae, and Faculty of Law Professor Rebecca Cook. The WHRR was founded by Professor Cook and drew heavily on her pioneering work on international women's human rights. The project began during the early days of the internet, before the Faculty of Law even had a website, which is why the database is hosted from the Library's site. When Barker assumed the role of Webmaster, she worked with Robarts Library to shift the WHRR from a flat HTML to a searchable database; a change which caused the number of users to grow exponentially. While the Li-

brary continued to maintain the WHRR database despite funding challenges, Barker was thrilled when IHRP students approached her to create a working group to update its content.

Barker is inspired to remain involved in the project because she believes making information available in an organized format is immensely valuable for those who may otherwise be unable to access it. This is especially true for the users of the database. People who face barriers in obtaining university education or gaining access to academic resources can easily access useful information about women's rights from the WHRR. The annotations help users quickly determine whether a resource is relevant, which is specifically helpful for those without access to printing or with a poor or irregular internet connection. The availability of the WHRR thus works towards global access to justice.

The importance of this project is evident in the number of users who access the site from around the world. While users from the US and Canada visit the site most frequently, users from over 88 countries have also accessed the database this past year, including Pakistan, Morocco, India and Japan. For Barker, making information on women's rights available in a clear and accessible format is the most important impact of the WHRR database. The IHRP working group is excited to be carrying this torch forward and continuing to promote international women's rights and access to justice.

LGBT Rights in Jamaica, cont...



(Photo credit: Nicholas Oren, Creative Commons)

respondents interviewed by HRW experienced a total of 56 instances of violence as a result of their perceived sexual orientation. Police records of the attacks only existed in 11 cases, and only four were known to have led to arrests. Forms of violence

recorded by HRW included beatings, stoning, mob attacks, arson, rape, and murder. Efforts to mitigate these circumstances have been few in number and limited in scope. The most notable recent development was the introduction of the Jamaican Constabulary Force (JCF) *Policy on Diversity* in 2011. The Policy dictates that all communities are to be treated "with the highest standard of dignity and human rights" and prohibits discrimination on a number of grounds, including sexual orientation. It also mandates the compilation of data when victimization on enumerated grounds occurs. Unfortunately the Policy has not been accompanied by significant training of the JCF on its contents or implementation, nor has there been much follow-up since its introduction.

In government, the Ministry of Health has been a leader in its attempts to address

discrimination and inadequate care, and the health minister publicly called for the repeal of the sodomy laws in 2012. However, unless other government actors support these initiatives, the impact of the Ministry of Health will remain limited. The Ministry of Justice's positive responses to calls for stronger legislative protection have not been matched by real action, and the Prime Minister's statements on the topic have been at best contradictory.

It will require more than simple legislative reform to resolve this issue. In order to dispel homophobic attitudes prevalent in Jamaica, training, education, and sensitivity will be needed. The HRW's key recommendations to the government and the JCF outline vital first steps which need to be taken to ensure the safety, dignity, and freedom from discrimination for all in Jamaica.

RAPE LAW AND RAPE STATISTICS IN INDIA: A DISMAL PICTURE

*Mariana Mota Prado, IHRP Faculty Advisory Committee
Associate Dean, Graduate Studies*

Poonam Kathuria, a leading feminist activist from India, spoke at the 17th Annual Dame Nita Barrow Lecture hosted by University of Toronto's Centre for Women's Studies in Education (CWSE).

"Every 20 minutes, a woman is raped in India." This is one of the powerful statistics with which Poonam Kathuria opened her lecture on July 22, 2014, at the University of Toronto. However, according to India's National Crime Records Bureau, only two incidents of rape were reported per 100,000 people in 2012. By contrast, the United States is drastically higher, with 28.6 reported rapes per 100,000 people, and reported rates in many regions of the world are not much different. According to the UN, Western Europe has rates four times higher than India, Latin America is 7 times higher and Southern Africa is 20 times higher.

But the question is, how reliable are these statistics? While Kathuria did not directly address this in her lecture, she provided enough information for the audience to understand the problematic nature of reported numbers.

Kathuria, a women's rights activist and founder and director of the Society for Women's Action and Training Initiatives (SWATI), walked us through a series of rape cases that received significant media attention in India.

In 1972, a teenage girl named Mathura was raped by two policemen inside a police station (*Tukaram v. State of Maharashtra*). In 1978, Rameeza Bee was raped by three policemen, and her protesting husband was beaten to death by the police. In 1980, Maya Tyagi was raped by seven policemen. In 1997, Bhanwari Bhateri was gang raped by five men. In 2004, a woman was raped and killed by members of the Indian Armed Forces, but there were no criminal charges because the *Armed Forces (Special Powers) Act* provides for immunity from criminal prosecution for its members. Finally, in 2012 the gang rape of a woman on a bus sparked protests and captured the attention of media worldwide.

Many of these cases were followed by important legal reforms. For example, the *Criminal Law Amendment Act* (1983) introduced new categories of sexual offences including custodial rape (e.g. rape by police officers of women in their custody), changed the burden of proof to the accused, and increased the punishment for those convicted of custodial rape. In 2013, another amendment redefined rape to include all forms of non-consensual penetration and directed the state to set up support services for survivors of sexual assault.

The underlying question is whether these legal reforms are effecting change in the prevalence of reported rapes in India: the answer seems to be negative. As Kathuria indicated by the cases mentioned above, police officers are often the perpetrators of rape crimes in India. This erodes the victim's trust in the authorities to which they are supposed to report these crimes, creating a barrier to justice for many rape survivors and leading to underreporting of rape crimes. According to the Bureau of Justice Statistics, it is estimated that only one third of rapes are reported in the United States. Estimates for India vary widely, ranging from one third to one tenth of victims ever reporting a rape. The fact that police officers are frequent perpetrators seems to provide some evidence in favour of higher, rather than lower estimates.

For this reason in particular, the prevalence of rape in India is realistically higher than

the statistics suggest. Thus, there seems to be little reason to celebrate the fact that India's per capita statistics are as low as, or lower than, other jurisdictions.

Even if the numbers are taken to be accurate, jurisdictions such as Canada have legislative provisions that include a wider variety of acts under the definition of rape, suggesting that what is being captured in India is only a fraction of what would be captured here. For instance, only in 2013 did the Indian legislation start to include in its definition of rape non-vaginal forms of non-consensual penetration. Previously, official statistics did not include many of the cases which would be admissible as rape in Canada. Furthermore, a prevalence of two incidents of rape per 100,000 people means around 25,000 cases of rape in India each year: this is simply too high.

Kathuria ended her lecture on a somber note. In his electoral campaign, India's Prime Minister Narendra Modi promised to strike down the recent legislative reforms on rape laws, which will further discourage victims from reporting rape. In addition, a member of his political party is claimed to have said that "boys will be boys" as justification for sexual crimes. Unfortunately, with this political direction it seems likely that India will continue to face challenges with respect to both the reliability of rape statistics and the prevalence of rape, at least for the foreseeable future.



*A moment in India
(Photo credit: Riccardo Romano, Creative Commons)*

EMPTY RULINGS AND EMPTY RIGHTS: ONGOING TENSIONS BETWEEN SHARIAH AND CIVIL COURTS IN MALAYSIA

Nathaniel Rattansey, 1L

In December 2014, Malaysia's Court of Appeal ruled that the police are not obliged to carry out a custody removal order awarded in civil court since family disputes concern private issues and enforcement of remedies should be limited to the public sphere. The controversial decision carries serious implications for custody disputes between non-Muslims and Muslims under the parallel jurisdictions of shariah and civil courts, both of which are constitutionally embedded.

Formally, the separation of shariah and civil courts appears straightforward. Malaysia's Constitution allows shariah courts to apply Islamic law with respect to, for example, religious and family disputes, and can exercise their jurisdiction only over individuals professing the religion of Islam.

However, in practice, there are unresolved issues when it comes to conflicting jurisdiction between the two parallel systems. For instance, what happens when one party is a Muslim and the other is non-Muslim? Which Court takes jurisdiction? If both systems have jurisdiction, which takes precedence?

Two recent high-profile custody battles in Malaysia illustrate the broader tensions within the country's unique dual legal system. Both Deepa Subramaniam and Indira Gandhi are Hindu mothers whose children were taken by their estranged Muslim spouses. In both cases, the women's spouses won custody of the children through shariah court proceedings by default; as non-Muslims, neither Subramaniam nor Gandhi had standing in shariah courts. Although both women won



(Photo credit: Esther S., Creative Commons)

“In both cases, the women’s spouses won custody of the children through shariah court proceedings by default; as non-Muslims, neither Subramaniam nor Gandhi had standing in shariah courts.”

custody over their children in separate civil court proceedings, the victory was hollow because the police – caught between two conflicting rulings – did not enforce the civil court’s custody removal order.

Subramaniam and Gandhi are left with few options and may be forced to rely on extra-judicial means to locate their children and achieve justice. Notably, extra-judicial remedies, such as hiring a private investigator, require investing even more time and resources and for these reasons are beyond the reach of many people. The women could potentially seek the help of the court bailiff to locate and recover their children, but the bailiff would require the

cooperation of local police which is precisely what the recent Court of Appeal’s ruling makes more difficult. Barring the absurd solution proposed by certain government officials that Subramaniam should convert to Islam to gain standing in sharia

courts, many women in her position may feel a sense of hopelessness of ever seeing their children again.

Dr. Shad Saleem Faruqi, Malaysian constitutional law expert, has argued that Malaysia’s civil courts generally shy away from any issue remotely linked with Islamic law and the Shariah Courts. The recent Court of Appeal ruling on the non-enforceability of custody rulings certainly lends credence to this view. If non-Muslims can pursue their custody claims through the civil court system only to have justice halted when it comes to reuniting with their children, the effect and utility of civil court rulings is greatly diminished. The failure of the civil court system to address these issues calls for a legislative solution. Otherwise women like Subramaniam and Gandhi will continue to have hollow rights and hollow remedies.

2015 IHRP INTERNS

The IHRP is pleased to announce its 2015 summer interns, who will join the ranks of the over 300 interns we have sent into the field since 1987. Congratulations to this year's amazing interns, and stay tuned for reports from the field over the course of the next few months.

Nour Bargach
International Organization for Migration (Geneva)

Katie Bresner
Canadian Department of Justice, War Crimes and Crimes against Humanity Prosecutions Unit (Ottawa)

Madison Hass
The Equality Effect (Kenya)

Philip Omorogbe
PEN International (London)

Samuel Levy
International Organization for Migration (Geneva)

Sally Wong
Defence for Children International (Geneva)

Rona Ghanbari
Section 27 (Johannesburg)

Hanna Gros
United Nations High Commissioner for Refugees - South Africa (Pretoria)

Niki Kermani
PEN International, Writers in Prison Committee (London)

Ashley Major
Human Rights Watch, Women's Rights Division (New York)

Petra Molnar
IHRP Summer Fellow - Health and Human Rights (Toronto)

Matthew Milne
Katiba Institute (Nairobi)

Chetan Muram
Lawyer's Collective (India)

Maia Rotman
IHRP Summer Fellow - Health and Human Rights (Toronto)

Sarah Rostom
Médecins sans Frontières International (Brussels)

Logan St. John-Smith
IHRP Summer Fellow (Toronto)

Sherna Tamboly
International Development Law Organization (The Hague)

HAS PALESTINE FINALLY GAINED ACCESS TO THE ICC?

Sarah Rostom, 1L

On January 6, 2015, UN Secretary-General Ban Ki-moon announced that Palestine will join the [International Criminal Court \(ICC\)](#) starting April 1.

The decision follows a significant year of turmoil in Israel and the Occupied Palestinian Territories (OPT), including: the abduction and murder of three Israeli teenagers; the murder of a Palestinian teenager; and, most notably, Operation Protective Edge, Israel's military operation in the Gaza Strip, which left more than 2,300 Palestinians and 73 Israelis dead between July and August 2014.

This, however, is not the first time Palestine has sought access to the ICC. In 2009, the Palestinian Authority (PA) declared an interest in having the ICC exercise its jurisdiction on all acts committed in the OPT since July 1, 2002. Then- Prosecutor, Luis Moreno-Ocampo, ultimately rejected this application in April 2012, citing a lack of clarity concerning Palestine's statehood.

In November 2012, only months later, Palestine was accorded non-Member Observer State status in the UN by an overwhelming majority of states (excluding Canada). This decision marked a significant moment for Palestine's international status, paving the way for the possibility of becoming a States party to international treaties, protocols, and declarations – including the *Rome Statute*, the ICC's founding treaty.

Fast-forward to 2014: international frustration with US Secretary of State John Kerry's failed peace talks, combined with international criticism of Operation Protective Edge, appeared to have garnered greater international support for the recognition of a Palestinian state.

Parliaments across Europe expressed support for such recognition, and in a significant move, the European Parliament passed a motion in support of a Palestinian state on December 17, 2014. This was, coincidentally, the same day signatories to the *Geneva Conventions* warned Israel to respect international humanitarian law in the OPT.

Still, international support for Palestinian statehood is not universal. On December 30, 2014, the UN Security Council – short by only one vote – rejected a Palestinian resolution to end the Israeli occupation of Palestinian territory within three years, and to recognize an independent Palestinian state comprised of the Gaza Strip and the West Bank, with East Jerusalem as its capital.

One day after the Security Council vote, President Mahmoud Abbas signed the application to accede to the *Rome Statute* in order to become a member of the ICC; an application Ban Ki-moon promptly approved. In its declaration on January 1, 2015, and in line with Article 12(3) of the *Rome Statute*, Palestine retroactively accepted the jurisdiction of the ICC over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.

Israel and its allies, including the US and Canada, have emphatically criticized the PA's decision to join the ICC and Ban Ki-moon's subsequent acceptance, arguing that the unilateral move undermines the potential for a negotiated solution.

Israel and the US are taking further retaliatory measures against the PA's move. Israel has promised to continue settlement expansion in the West Bank, has stated that it will never again negotiate the future of Jerusalem with the Palestinians, and withheld \$127 million in tax revenues collected on behalf of the PA on Palestinian imports; tax revenues which comprise two-thirds of the PA's monthly budget.

In the US, the Obama administration stated it was reviewing its annual \$440 million aid package to the Palestinians and days later, Republican Senator Rand Paul introduced a bill that would immediately halt US aid to the OPT in the event of ICC proceedings. Such retaliation has been widely condemned by international humanitarian organizations as punishing an already-vulnerable civilian population.

Despite the reactions of Israel and its allies, preliminary work at the ICC has already begun. On January 16, 2015, ICC Prosecutor Fatou Bensouda announced the launch of "a preliminary examination into the situation in Palestine" by the Office of the Prosecutor. In a press release, Bensouda laid out the legal scope and purpose of this examination, clarifying it as a process to determine whether there is a reasonable basis to proceed with an investigation. Issues of jurisdiction, admissibility and the interests of justice will be considered. As a result of the examination, the Office will decide whether to initiate or decline an investigation.

Though experts have questioned whether the Prosecutor's Office has the experience and bravado to pursue prominent Israeli and Palestinian suspects, Bensouda has made it clear that she intends to conduct this examination "in full independence and impartiality." As expected, Israeli leaders have condemned Bensouda's decision, with Prime Minister Benjamin Netanyahu calling it "absurd". Interestingly, leaders of Hamas have welcomed the decision.

While there is no timeline set for the results of the preliminary examination, the coming months leading up to Palestine's joining of the ICC will undoubtedly raise interesting questions at the level of international diplomacy and test the recent support by international actors for Palestinian statehood.



(Photo credit: Hisham Almiraat, Creative Commons)

DEVELOPMENTS IN GENDER-BASED CRIMES AT THE ICC: The Prosecutor v Bosco Ntaganda

Alexandra Wong, 1L

In June 2014, there were two notable developments at the International Criminal Court (ICC) concerning the investigation and prosecution of sexual and gender-based crimes.

The Office of the Prosecutor (OTP) launched the *Policy Paper on Sexual and Gender-Based Crime* – the first of its kind and the most comprehensive policy for an international court or tribunal. And the ICC's Pre-Trial Chamber II ("the Chamber") unanimously confirmed charges against Bosco Ntaganda, consisting of 13 counts of war crimes and 5 counts of crimes against humanity. This marked the first time the ICC charged a senior military figure with acts of sexual violence committed against child soldiers within the same militia group and under his military command.

The Union des Patriotes Congalais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC) was formally established in 2000 and headquartered in Bunia of the Democratic Republic of the Congo (DRC). Evidence presented to the Chamber indicated that, as early as August 2002, the UPC/FPLC adopted an organizational policy to attack the non-Hema civilian popula-

tion and expel them from the Ituri Province of the DRC. Ntaganda was Deputy Chief of Staff in charge of operations of the UPC's military wing, the FPLC. The Chamber found reasonable grounds to believe that Ntaganda was criminally responsible as a direct perpetrator, an indirect co-perpetrator, and as a military commander for crimes committed by his subordinates.

Significantly, the Chamber considered whether the ICC could exercise jurisdiction over alleged acts of rape and sexual slavery committed by UPC/FPLC members against child soldiers under the age of 15 even though they were actively participating in hostilities.

The Chamber found that child soldiers under the age of 15 years continue to enjoy protection under international humanitarian law from acts of rape and sexual slavery; to hold otherwise would contradict the rationale underlying the protection to such children against recruitment and use in hostilities. Further, the sexual nature of the crimes which involve elements of force and coercion or the exercise of rights of ownership logically preclude active participation in hostilities at the same time.

Rape and other sexual and gender-based crimes that come before the ICC must be widespread and/or used systematically used as a tool of war or repression. Article 28(a) of the Rome Statute, which allows the ICC to hold to account military commanders and other superiors for the acts of their subordinates, is an important mode of liability in the context of sexual violence where the direct perpetrators of the crimes are often relatively low on the chain of command. The recognition of elements of coercion reflects developing understandings of the notion of consent in the definition of rape, and the idea that in certain circumstances, consent cannot be implied.

The OTP elevated the issue of the investigation and prosecution of sexual and gender-based crimes in its Strategic Plan (2012-2015) and committed itself to a gender-based and victim-responsive approach in its activities. Ntaganda's trial is scheduled for June 2, 2015 and 1120 victims have been granted the right to participate in proceedings in the case. The OTP concludes in its policy paper that cooperation and complementary efforts from States and other bodies are necessary.

IHRP DEEPENS PARTNERSHIP WITH THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Glenn Gibson, 3L/MGA and Brett Lemon, 2L

Now in its third year, the IHRP's International Humanitarian Law (IHL) Working Group continues its partnership with the International Committee of the Red Cross (ICRC) to raise global awareness of the laws and principles that govern armed conflict.

As in previous years, the working group is responsible for writing summaries of IHL-related articles selected by the ICRC's Library in Geneva. These summaries are published in the ICRC IHL Bibliography, [which is available publicly on the ICRC's website](#).

The ICRC was established in 1863 and is committed to the development of IHL as part of its mission as an "impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance."

The IHL Bibliography began as a tool for ICRC field communication delegates to encourage universities to offer IHL courses and to assist those professors who were already teaching the subject. However, the

ICRC soon recognized that the resource was also useful to the broader pool of researchers, students, and legal professionals working in the area of IHL.

Through their work with the ICRC, students in the working group helped publicize diverse opinions on IHL issues while furthering their own understanding of a dynamic area of international law.

LOOKING AHEAD: FUTURE CHALLENGES TO STATE IMMUNITY FOLLOWING *Kazemi Estate v Islamic Republic of Iran*

Catherine Thomas, 3L

The Supreme Court of Canada (SCC) recently dismissed a multi-pronged challenge to the *State Immunity Act* (SIA) which prevents victims of torture from pursuing civil action against foreign government perpetrators in Canadian courts. Despite accepting as true the horrific violence committed against Canadian citizen Zahra Kazemi while working as a journalist in Iran, a definitive 6-1 majority held that neither the claim launched by her estate nor the claim brought by her son could proceed.

This article explores three possible evolutions in either domestic or international law which could contribute to defeating the objections raised by the Court and pave the way for a future victim of torture to successfully seek justice in a Canadian civil court.

The most obvious possible change is legislative reform. The SCC is clear that Parliament has the power to decide whether Canadian courts should exercise civil jurisdiction and the corresponding ability to expand the exceptions to state immunity. But this strategy is not without its challenges: if history is a reliable guide, it could be some time before Parliament acts on this issue. Bill C-483, which would have amended the SIA to eliminate immunity in civil lawsuits involving claims of genocide, crimes against humanity, war crimes or torture, was introduced in 2009 by Liberal MP Irwin Cotler. Despite enjoying the support of prominent organizations, lawyers, law professors, and survivors, the bill failed to advance and died when the 2011 federal election was called. Previous iterations of the *Justice for Victims for Terrorism Act* included torture in the definition of terrorism until that clause was amended. Objections were raised about the seeming prioritization of terrorism over torture but the narrowed exemption nevertheless became law in 2012.

Another route would involve customary international law changing to revoke immunity to a State when it violates the pre-emptory prohibition against torture. Even Canada's commitments under the *Convention Against Torture* (CAT) are insufficient for the Court to

read-in a torture exemption to the SIA absent this evolution in customary international law. However, this development is still some ways away. Customary international law is created by state practice and *opinio juris*. These sources were thoroughly canvassed by the International Court of Justice (ICJ) in its 2012 judgment concerning Germany and Italy wherein it was found that a state's entitlement to immunity did not depend upon the pre-emptory nature of the rule it is alleged to have violated. In so finding, the ICJ relied largely on Canadian cases, which exposes the circularity of international law-making. If the ICJ can point to Canada and Canada can point to the ICJ, one must wonder whether the law will ever move forward.

Fortunately, customary international law appears to be moving faster with respect to a third way forward for a future civil claim to successfully proceed. International law distinguishes between *ratione personae* and *ratione materiae*. The former shields high-ranking individuals in the state's apparatus whereas the latter restricts immunity to official acts performed by individuals on behalf of the state.

In her dissent in *Kazemi*, Justice Abella provides varied and convincing evidence that customary international law is moving steadily towards recognition that torture does not constitute an official act for the purposes of immunity *ratione materiae*. This development is significant in the Canadian context because of ambiguity stemming from definitions used in the SIA. The Court acknowledges that the scope of the grant of immunity is unclear and should be interpreted against the backdrop of international law. If the differentiation between foreign states and its officials in customary international law continues to deepen, the SIA may soon protect far less of the 'foreign state' from jurisdiction of a court in Canada.

(Continued on page 30)

Ebola-Related Visa Restrictions, cont...

Studies have shown that similar bans are ineffective at preventing the transmission of other diseases. In the 1980s, governments around the world, including Canada, created immigration and travel restrictions against persons living with HIV. As early as 1987, WHO studies found that these restrictions were ineffective and potentially counter-productive in reducing the spread of the disease. A recent systematic review by the WHO found that travel restrictions were similarly ineffective at preventing the dissemination of influenza. Thus, in addition to the Ebola visa restrictions imposed by Canada and Australia having potentially serious negative economic effects on

countries in Western Africa, studies such as the above indicate that they are also unlikely to play a positive role in combating the virus.

Even if travel restrictions were found to be effective, Canada's policy goes far beyond the least restrictive means. For instance, it blocks applications from anyone who has been in an Ebola affected country within three months prior to the date the application is received by CIC, more than four times the length of the 21 day incubation period of the virus. By contrast, the Centers for Disease Control and Prevention considers a national Ebola outbreak to be

over when 42 days have passed since the last patient in isolation became Ebola Virus Disease negative.

Canada's restrictions clearly contradict scientific evidence on disease containment. Moreover, the policy contributes to the weakening of one of the most important legal instruments supporting global cooperation in disease control, the IHRs. If the Canadian government truly wants to combat Ebola, it must overturn its damaging visa restriction policy, and instead promote the development of health infrastructure in the countries most affected by the disease.

THE INTERNATIONAL CRIMINAL JUSTICE SENTENCING GAP

Drew Beesley, 3L

Lenient sentences are becoming more common in contemporary international criminal law (ICL). A survey of the jurisprudence from the post-WWII Tribunals to date shows a trend towards increasingly lighter sentences. For example, in 2009, combatants convicted of using child soldiers received 35 to 50 year sentences from the Special Court for Sierra Leone. However, in 2012, the International Criminal Court (ICC) sentenced Thomas Lubanga Dyilo to only 14 years for assisting in the enlistment and use of hundreds of children in an armed conflict in the Democratic Republic of the Congo (DRC).

One of the longest sentences in contemporary ICL was imposed by the International Criminal Tribunal for the Former Yugoslavia. Radislav Krstić received a 35-year sentence—reduced on appeal from 46 years—for aiding and abetting genocide. The crime concerned the 1995 Srebrenica massacre that claimed as many as 7,000 to 8,000 victims.

In May 2014, the ICC handed down its second-ever sentence, against the Congolese warlord Germain Katanga. Katanga was convicted of being an accessory to crimes against humanity (murder) and war crimes (murder, attacking civilians, destruction of property, and pillaging). The tragic events at the centre of the case concerned an attack on the village of Bogoro in the DRC. Approximately 200 civilians were killed while their village was pillaged and burned. Victims were systematically targeted based on ethnicity. A militia supplied and controlled by Katanga carried out the attack. The ICC found he did this with “full knowledge” that the militia shared his ideology of creating an “ethnically pure” territory. Katanga was also aware that the militia he

supplied had committed a similar attack just months before.

The irony must have been palpable in the courtroom as the judges read out Katanga’s sentence, emphasizing that their goal was to impose a “meaningful” sentence. The Chamber cautioned, “[the] accused ... must realise that the crimes [he has] been charged with constitute the most serious breaches of international law and consequently the penalties for such crimes are severe.” The Prosecutor requested 22 to 25 years of imprisonment; Katanga received a sentence of 12 years.

ICC jurisprudence explains that the main purposes of its sentencing are to “punish crimes” and to “ensure that the sentence truly serves as a deterrent.” The ICC’s sentencing scheme directs judges to fashion a punishment that advances these two purposes while remaining proportionate to the gravity of the crime and culpability of the accused.

Punishments like that received by Katanga seem lenient considering that in many countries, life sentences are routinely imposed for single murders. The uncomfortable truth is that the measure of punishment imposed on ICL perpetrators is markedly more lenient than even the most liberal domestic jurisdictions. This begs the question of whether such comparatively light sentences are giving full respect for the human dignity of victims.

This concern comes from a tension inherent within ICL. As the gravity of a crime increases, the purposes of punishment and deterrence generally suggest that the severity of punishment should increase. However, the closer the sentence comes to

resembling a life sentence, a countervailing concern of lengthy sentences being incompatible with human rights law emerges — specifically, as violations of human dignity and the prohibition on cruel and unusual punishment. Every society and legal system must find its own balance.

The dilemma between imposing a severe punishment while respecting the human rights of the convicted person was a live debate at the drafting of the *Rome Statute*. The proper balance was never definitively settled: state delegates disagreed on where to set the proper ceiling for sentences. While use of the death penalty was rejected, drafters opted to give judges wide discretion to impose sentences from one year to life, offering very little guidance.

The puzzling consequence is this: ICL sentencing ought to demonstrate that the international community takes the protection and enforcement of basic human rights seriously, and affords a meaningful measure of dignity to victims who suffer grave violations of those rights. Yet, in practice, convicted persons seem to de facto enjoy a substantial sentencing reduction at an international court when compared to many domestic courts trying analogous crimes.

The uncomfortable alternative is that most crimes tried at the ICC are so grave that the default sentence would be life imprisonment, if not for this apparent sentence reduction. These tensions indicate that ICL sentencing principles are in need of further refinement. At the very least, there ought to be more analysis and explanation from the judges to account for the gap between domestic and international criminal sentences.

State Immunity Following *Kazemi*, cont...

There are however downsides to this narrower version of the torture exception. Enforcement is an inherent concern in actions with foreign elements and will likely be amplified when the action is limited to a lower level official. In addition, actions against individuals as opposed to states partially obscures the systemic nature of torture, thereby diminishing the deterrent value and the symbolic power of receiving a judgment against the responsible state.

Other routes may exist to overcome the SCC’s decision in *Kazemi*. Whatever strategy is chosen, what is clear is that unfortunately it will be some time before torture survivors are entitled to their day in a Canadian court.

For an overview of the factual backdrop of this case and the IHRP’s role as interveners before the SCC, please read Megan Pearce’s article in Volume 7, Issue 2 of Rights Review.

CAUTIOUS HOPE IN POST-WAR SRI LANKA

Dharsha Jegatheeswaran, 3L

Six years after the end of a brutal conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (a separatist rebel group), a surprising regime change has raised cautious optimism that the country is finally poised to move towards meaningful accountability and reconciliation, and address the underlying issues that caused the ethnic conflict.

The end of the war in 2009 saw tens of thousands of civilian deaths and numerous credible allegations of war crimes. Instead of seeking reconciliation, the former regime (led by President Mahinda Rajapaksa) exacerbated issues facing the Tamils alongside growing Sinhala Buddhist nationalism. The result for the past six years has been continued wide-scale human rights abuses and oppression of the Tamils, heavy militarization of the Tamil-populated North East, large-scale acquisitions of Tamil-owned land, growing animosity and abuses against Muslims, and a failure to account for thousands of persons who disappeared during the war.

The ‘accountability’ and ‘reconciliation’ mechanisms the government did conduct, such as the “Lessons Learnt and Reconciliation Commission” and the “Commission to Investigate Missing Persons”, were internationally and domestically criticized as superficial and corrupt.

“What Sri Lanka really needs in order to create a long-term and sustainable political solution is the dismantling of its systems and structures of oppression.”

It was in this context, after years of international pressure, that the UN Human Rights Council passed a resolution in March 2014, mandating an international investigation by the Office of the High Commissioner for Human Rights (OHCHR) into war crimes, crimes against humanity and human rights abuses committed by both sides of the conflict.

Unsurprisingly, the Rajapaksa regime categorically rejected and refused to cooperate with the OHCHR’s Investigation on Sri Lanka (“OISL”), painting the resolution as an intrusion on sovereignty and “political witch hunting.” The Sinhala Buddhist majority that formed Rajapaksa’s voter base largely supported this narrative of ‘Sri Lan-

ka vs the West’ and, up until the January election, it appeared that Rajapaksa would be domestically invincible.

However, a coalition of opposition parties jointly appointed a former high-ranking member of Rajapaksa’s cabinet, Maithripala Sirisena, to run against him. Sirisena campaigned on a proposed 100-day plan of action that would see him abolish the executive presidency in favour of a parliamentary system and restore rule of law and democracy to the country. A high voter turnout from the Tamil population in the North East and the Muslim population, both eager to oust Rajapaksa, along with a segment of the Sinhalese majority frustrated with growing corruption in government, contributed to Sirisena’s stunning win.

While Sirisena appears committed to taking steps towards restoring Sri Lanka’s democracy and rule of law, the question still remains of whether regime change will result in accountability, justice and any real political solution for the Tamils. The international community appears to think so, as evidenced by the UN Human Rights Council’s decision on February 13, 2015 to delay the release of the report from the OISL by six months to September 2015. The delay was based on the recommendation of the High Commissioner for Human Rights, who cited the “changing context in Sri Lanka,

and the signals of broad cooperation...received from the Government.”

However, during the election, Sirisena’s campaign did not differ from Rajapaksa’s in its ignorance of a political solution for the Tamils and its outright refusal to cooperate with the OISL. Sirisena’s campaign pandered to the same strain of Sinhala Buddhist nationalism that formed Rajapaksa’s voter base, with both candidates competing to seem more anti-Tamil and Sinhala nationalist than the other.

In spite of this, there is one critical difference. Unlike Rajapaksa, Sirisena’s government appears keen on repairing relations with Western powers and India. This re-

quires improving the government’s failed human rights record. Already, in the weeks following the election, the new leadership has inched away from its ultra-nationalist campaign platform and indicated a willingness to open up space for discussions internationally around accountability, justice and a political solution. However, it remains to be seen whether the government is willing to allow that conversation to actually change its positions.

Notably, at the time of writing this article, the government continues to reject any form of international accountability mechanism and remains in favour of a domestic one (with technical support from international actors), while simultaneously moving to protect the leaders most likely to be found guilty of war crimes.

For example, the government has re-appointed Sarath Fonseka to his position as Chief of Defence, despite the fact that he led the army through the last phase of the war and has publicly stated that he “planned the entire operation” and was “communicating with all levels of army persons.” Sirisena has also gone on record saying he would protect the Rajapaksas from any international prosecutions for war crimes, and the new State Minister of Defence has confirmed there are no plans to demilitarize the North East. It is clear that any space that has opened up under the new regime is extremely small and fragile, given Sirisena’s plan to hold parliamentary elections in April 2015 once he has abolished the executive presidency.

Sri Lanka is undoubtedly at a critical juncture after a year of strong international pressure and a surprising regime change. But as recent world history has demonstrated, even the most imposing regimes can crumble in days. What Sri Lanka really needs in order to create a long-term and sustainable political solution is the dismantling of its systems and structures of oppression. The true test of whether anything will come of this opportunity depends greatly on continued international pressure to move the new regime beyond simply addressing the concerns of its majority Sinhalese population, towards actually engaging in meaningful accountability, justice and reconciliation for its long-oppressed and war-affected Tamil population.

PAKISTANI CITIZENS ABLE TO ACCESS SUPREME COURT DIRECTLY THROUGH INNOVATIVE 'HUMAN RIGHTS CELL'

Shaanzeh Ataullahjan, 2L

Shaanzeh worked at the Human Rights Cell in Islamabad this past summer.

In 2009, Iftikhar Chaudhry was reinstated as chief justice of Pakistan, ending two years of mass public protests that culminated with a long march from Lahore to Islamabad. The protests began when Chaudhry, along with a number of prominent judges, was unconstitutionally removed from his post by then-President Pervez Musharraf. His successful reinstatement and President Musharraf's resignation were seen as signs of the judiciary's strength, and a triumph for its independence. Speaking about the incident to the American Bar Association on behalf of the Pakistani judiciary in 2008, former Chief Justice Tassaduq Hussain Jilani, stated, "Never before has so much been sacrificed by so many for the supremacy of law and justice."

After serving as chief justice for four more years, Chaudhry was succeeded by Jilani in 2013. A champion of human rights, particularly the rights of women and minorities, Jilani also practiced judicial restraint, recognizing that "even in the direst of human rights cases, the Supreme Court must remain conscious that its actions are not limited to a single time and space but become a source of jurisprudence for years to come."

One of Chaudhry's legacies was the creation of the 'Human Rights Cell' pursuant to Section 184(3) of Pakistan's Constitution. Section 184(3) grants the Supreme Court jurisdiction over any "question of public importance with reference to the enforcement of any of the Fundamental Rights." Use of the provision had originally been advanced in the 1980s to restore the judiciary's legitimacy in the aftermath of former President General Zia-ul-Haq's military rule. Under former President Musharraf's military regime, use of the provision fell dramatically.

Through the cell, citizens from across Pakistan can write to the Supreme Court or the Chief Justice directly with human rights complaints. During his tenure as chief justice, Jilani extended access to the Human Rights Cell to overseas citizens as well. All claims are investigated and complaints can range from pension payments, to impro-

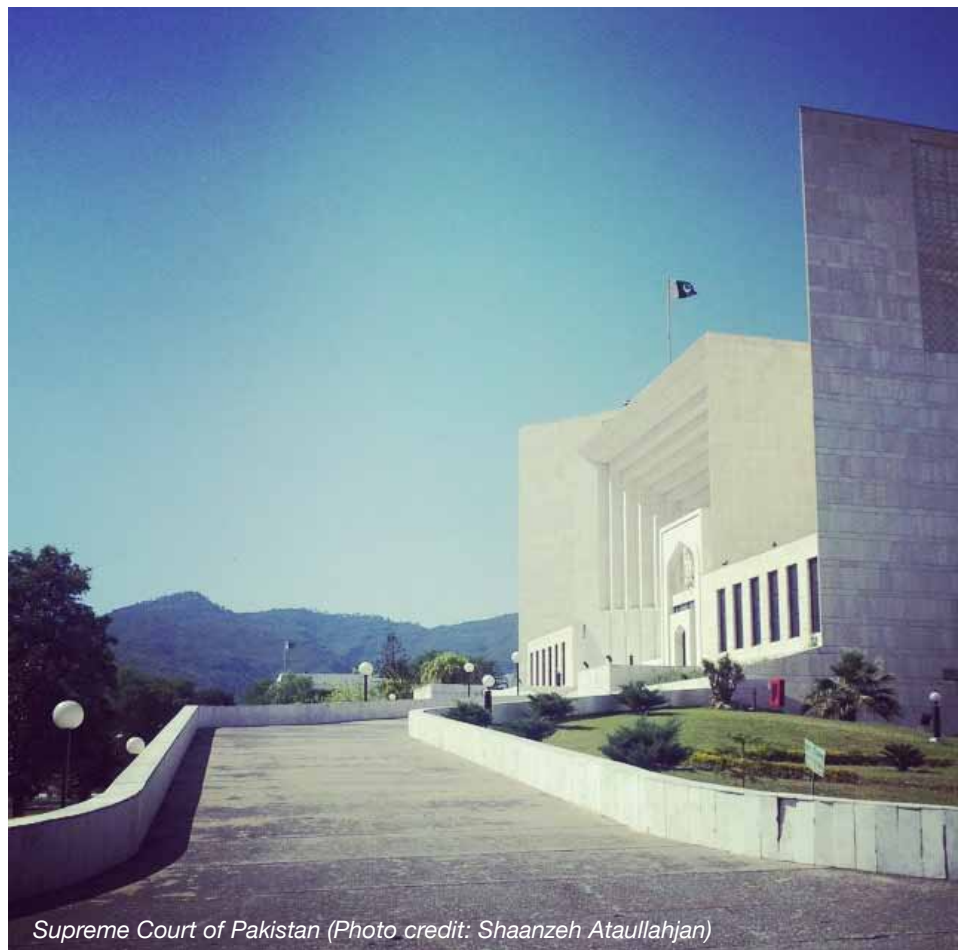
perly investigated rapes. Because there is significant respect for the Supreme Court's authority and power in Pakistan, parties are always eager to assist the court and files are generally resolved efficiently. Between January and June of 2014, over 27,000 complaints were handled by the cell.

intermediaries or bureaucratic obstacles. The people speak directly to the highest legal authority in the country. It is a combination of bottom up and top down human rights activism. In a country where allegations of human rights abuses and corruption run rampant and the political system

"Through the cell, citizens from across Pakistan can write to the Supreme Court or the Chief Justice directly with human rights complaints."

Pakistan is a young country, only three decades into its constitutional history, and is still in a state of flux. The Human Rights Cell works to address the plight of those who fall through the cracks, and is revolutionary in its simplicity. All Pakistani citizens, living domestically or abroad, can have their complaints heard and responded to by the Supreme Court. There are no

appears to be in constant turmoil, in the words of Chaudhry, "The Human Rights Cell has provided the common man of the country with unprecedented access to the highest echelon of justice in the land."



Supreme Court of Pakistan (Photo credit: Shaanzeh Ataullahjan)

THE CHALLENGES OF THE INTERNATIONAL CRIMINAL COURT

Drew Beesley, 3L

Demonstrating candour, a sharp intellect and humility, alumnus James Stewart, LLB 1975, deputy prosecutor of the International Criminal Court (ICC), dove right into a conversation addressing the challenges facing the world's first permanent court of its kind.

A sold-out crowd filled the venue to hear Stewart and Richard Dicker, director of the international justice program at Human Rights Watch, with moderator Rita Maxwell, JD 2001, a local prosecutor and former ICC visiting professional. The event on January 29, 2015 was hosted by the Faculty of Law's **International Human Rights Program**, Munk School of Global Affairs, and **Human Rights Watch** (HRW). The audience included notable figures such as John Ralston Saul, Bob Rae, and two of Canada's advisers during the drafting of the *Rome Statute*, Darryl Robison and Valerie Oosterveld.



From left: International Human Rights Program Director Renu Mandhane with ICC Deputy Prosecutor James Stewart and University of Toronto Faculty of Law Dean Ed Iacobucci (Photo credit: Kathleen Davis)

On the lack of state cooperation in finding and arresting those facing indictment, Stewart admitted that there is always room for improvement. He spoke of the uniqueness and challenges of each situation before the court (from Koni to Kenyatta), while pointing to efforts to enhance strategic planning between States parties. Most of all, he encouraged patience and reminded us that the Court is a relatively new institution still in its early days. Dicker echoed Stewart's comments and said NGOs and governments have a stronger role to play in encouraging support for the ICC.

On the role of the United Nations Security Council, Stewart spoke of the need for follow-up after situations are referred to the ICC. Dicker was more blunt. He called the Security Council's silence after the referral of Libya and the fall of Gaddafi "shameful." Dicker cited a need to increase the political cost associated with a lack of support.

When asked if there was any feasible means of the ICC establishing an independent police force to get around the problem of relying on state cooperation for investigations and arrests, both speakers said the *Rome Statute* is clear that a police force is not in the cards. However, Dicker suggested a more prominent role for United Nations peacekeepers should be explored.

Stewart and Dicker spoke of the difficulty in addressing allegations of victor's justice. Often the international media is quick to criticize when the ICC indicts only members from one side of a conflict. They agreed patience and a better understanding of how ICC investigations unfold would dispel many of these criticisms. For instance, the other side of a conflict is often simultaneously investigated. However, there are good reasons to keep investigations and indictments secret due to political sensitivities. Revealing an investigation too soon can prematurely jeopardize critical state assistance.

Stewart and Dicker highlighted the lack of understanding about the Court's jurisdictional restraints to dispel criticism that the ICC is picking on Africa. "It is not African victims that are complaining of our presence in the region," said Stewart, noting they deserve justice when their local courts and institutions cannot provide it.

On the concern that prosecutions often stymie or derail the peace process, both speakers agreed the purported contradiction is often greatly exaggerated. Dicker gave the example of the "doomsday" scenario predicted after indicting Sudan's President, Omar Al-Bashir, on the North-South peace process. What transpired was far from it. In Stewart's experience, if feel-

ings of injury on the part of victims are unaddressed through justice, they fester. This can undermine the peace process in the long run, with renewed cycles of violence.

The pair faced questions on whether ICC prosecutions are actually having a deterrent effect on other would-be perpetrators. Stewart, a seasoned Canadian prosecutor before his international career, said the deterrent effect is very difficult to measure even in domestic criminal law. Dicker sees deterrence as an aspirational goal of the ICC but cautioned against its overemphasis. Both speakers cited encouraging anecdotes from Syria and the Central African Republic where people are starting to take note of the ICC and invoke its profile to those who may be considering committing atrocities. Dicker mentioned signs held by Syrian protesters that read: "Assad to the Hague."

Of course, the elephant in the room was the ICC's opening of a preliminary investigation this January into last summer's Israeli-Palestinian conflict. Dicker predicts the Prosecutor's Office is facing a highly divisive and politicized "tsunami." Stewart said in some ways, it feels like the Office of the Prosecutor is in the eye of a storm. He stressed his office will approach the

(Continued on page 36)

INTERNATIONAL CRIMINAL LAW AT A CROSSROADS: A CONVERSATION WITH JAMES STEWART

Kathleen Davis, SJD Candidate

In late January, I had the pleasure of sitting down with Deputy Prosecutor of the International Criminal Court (ICC) James Stewart, LLB 1975, to hear about his experiences as a prosecutor in the field of international criminal law over the past two decades. While his chosen profession is anything but ordinary, what struck me most about our discussion was the refreshingly simple and straightforward approach he takes to tackling some of the world's most complex and controversial situations.

Stewart began his legal career as an assistant crown attorney at the Crown Attorney's Office in 1979. In 1985, he joined the Crown Law Office – Criminal, where he worked on appeals before the Ontario Court of Appeal and the Supreme Court of Canada. During his long service with the Ministry of the Attorney General, which spanned more than three decades, Stewart took leaves of absence to work as an international criminal prosecutor – first in Arusha, Tanzania and later in The Hague.

Stewart credits the Honourable Louise Arbour for sparking his interest and facilitating his entry into the international legal field. After serving as a judge at the Ontario Court of Appeal, Arbour was appointed to serve as chief prosecutor of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). Stewart, who had appeared before Arbour on numerous occasions when she was a judge in Toronto, was inspired by her leadership and decided to follow in her footsteps in contributing to the development of the field of international justice throughout his career.

In our conversation, Stewart recalled the fascinating experiences he had as a senior trial attorney and appeals counsel at the ICTR, and as chief of prosecutions at the ICTY. He described the complexities, challenges, and rewards of working with colleagues from different countries and different legal systems. He also described the sense of satisfaction he felt as a result of some landmark decisions he helped to achieve. Among them, Stewart includes the recognition of sexual violence as a weapon of war and a tool of genocide as one of the most significant achievements of these tribunals, following centuries of impunity for such horrific crimes.

Following three overseas assignments at the ICTR and ICTY, Stewart believed he had completed his final deployments abroad and returned to Toronto. However, far from reaching retirement, he was about to be given his most challenging assignment yet. In November 2012, Stewart was elected to serve as deputy prosecutor of the International Criminal Court for a term of nine years. Based in The Hague, Stewart is responsible for overseeing the work and managing the staff of the Office of the Prosecutor of the ICC, under the leadership of Prosecutor Fatou Bensouda. It is a role that brings both responsibility and controversy, but one that James is able to fulfill with ease and enjoyment.

In describing his experience at the ICC thus far, James said that he and his team have been working diligently to strengthen the credibility of the Office of the Prosecutor and the ICC through careful, measured steps. Despite the inescapable challenges and controversies that arise in relation to the ICC, James seems able to keep

a remarkably cool head and calm mind in approaching some of the most complex situations facing the Court. When asked about the recent and hotly contested decision of the Government of Palestine to accept the jurisdiction of the ICC in relation to alleged crimes that took place in Gaza last summer, Stewart exhibited his signature straightforward approach: "As with any other situation that comes our way, we will do our best to approach this case in the most ordinary way possible, despite the extraordinary political context in which we must operate."

Stewart similarly spoke of the long-term strategy he and his team have for many of the other complex situations with which the ICC has been tasked, including the situations in Darfur and Kenya. Despite numerous challenges and several recent setbacks, he nonetheless believes that the goals of international justice can be achieved, one small step at a time. It is a belief that Prosecutor Bensouda has also expressed on numerous occasions. Although this optimistic outlook may be surprising, given the uphill and treacherous terrain the ICC must navigate, it is exactly this long-term, steady approach that demonstrates that the Office of the Prosecutor is in good hands.



*James Stewart, speaking to University of Toronto law students and alumni about his experience in international criminal law
(Photo credit: Kathleen Davis)*

INTERVIEW WITH RICHARD DICKER OF HUMAN RIGHTS WATCH, AN ARCHITECT OF MODERN INTERNATIONAL CRIMINAL LAW

Andrea Russell, adjunct professor of International Criminal Law at the Faculty of Law

Richard Dicker, Director of Human Rights Watch's International Justice Program, is extremely well-placed to assess the achievements of the International Criminal Court (ICC) to date.

Dicker was in Rome in 1998 for the “tumultuous” diplomatic conference at which representatives from nearly 150 states attempted to agree upon the creation and structure of what would ultimately become the ICC. Dicker has been a long-time observer and “hopefully constructive” critic of the Court, and was thus the ideal foil for ICC Deputy Prosecutor James Stewart, LLB 1975, in a recent ‘public conversation’ hosted by the IHRP. Just prior to the event, I engaged Dicker in a wide-ranging interview for *Rights Review*.

Dicker confessed that if one had put the ICC's achievements and current prominent profile to him in 1998, he would likely have thought it something out of “science fiction.” He recalls that many at the Rome Conference questioned the length of time it would take for the ICC to achieve the requisite number of state ratifications for it to begin its work, and whether, once it did open its doors, it would ever have any cases on its docket.

Today, the ICC has active investigations in eight varied geo-political situations, and is conducting preliminary examinations in numerous other situations in states ranging from Colombia to Afghanistan. The ICC, Dicker surmised, has “given criminal accountability a permanent address” – a “crucial development” for those seeking justice for gross human rights violations.

Demonstrators and activists around the world are now quick to call upon the Court to intervene. Dicker recalled placards during demonstrations in Damascus demanding ‘Assad to The Hague’, and the many inquiries that he received regarding the ICC's ability to investigate the downing of flight MH17 last summer. Similarly, the North Korean regime's reaction to a possible ICC investigation into its rights violations demonstrates the level of awareness of the ICC, even in otherwise closed societies.

These examples, Dicker emphasized, “speak volumes to what the existence of the Court has given rise to in expectations and the prominent placement of justice as a necessary objective where horrible crimes have occurred.”

Yet despite these successes, Dicker believes that the ICC faces “deeply worrying” challenges, with relatively limited resources and the lack of consistent diplomatic commitment foremost among them. For instance, the Security Council's unanimous referral to the ICC of the suppression of the demonstrations in Libya was not accompanied by an increase in financial resources or continuing diplomatic support to ensure arrests. The “on-again, off-again” support provided to the ICC by the Security Council and many of the world's most powerful nations is “troubling”, and certainly not, Dicker emphasized, “the robust support that the Court needs if it is to be effective.”

The US is one such wavering supporter, with its commitment to the Court seemingly entirely “situation specific”, depending on political interests at stake. State Department indications of displeasure at Palestine's accession to the Rome Statute, and statements that there could be resulting “implications” for aid to Palestine aptly illustrate this point.

Dicker also confessed that he was “dismayed” to see Canada's commitment to the ICC being so politically focused, such as then-Foreign Minister John Baird's recent statement that Palestine “made a huge mistake” and “crossed a red line” by approaching the ICC.

Dicker recalled the leading role that Canada played at the Rome Conference, with future ICC judge Philippe Kirsch chairing the Conference, and then-Foreign Minister Lloyd Axworthy flying in to bolster the chances of the treaty being approved on the last night of the Conference. “Without Canada's efforts,” Dicker surmised, it's “very likely” that the Court may in fact never have come into being-- or at least “not a Court worth having”.

The recent surrender to the ICC of Lord's Resistance Army (LRA) commander – and former child soldier—Dominic Ongwen will present the Court with a new set of challenges, Dicker believes. Ongwen confirmed at his initial ICC appearance that he had been kidnapped from his Ugandan village by the LRA when he was just 13 years old. He then rose through the ranks of the notorious group, allegedly leading its members in several of its most gruesome incursions. Dicker predicted that the “fascinating” legal issue of prosecuting former child soldiers who were forcibly conscripted into a life of ruthless crimes will no doubt figure prominently in Ongwen's defence.

And what is Dicker's advice to law students eager to embark upon a career in international criminal justice? He encourages young lawyers to follow their passion, but to envision various pathways to engaging in satisfying work, particularly given that jobs in international criminal justice are relatively limited in number. Junior lawyers, he cautioned, may realistically need to spend periods in an “acceptable weigh station” while aiming for that dream job at the ICC.

INSPIRATION AND ENTERTAINMENT FROM A TRUE NATIONAL AND GLOBAL LEADER

Kathleen Davis, SJD Candidate

As I made my way to the Bram & Bluma Appel Salon at the Toronto Reference Library, it was the noise that first caught my attention. Despite concerted efforts to constrain conversations to permissible whispers under the watchful guise of library staff, there was an uncontrollable buzz emanating throughout the library from the second floor. As I ascended the stairs, the murmur grew louder and was accompanied by a palpable atmosphere of excitement and anticipation. Only once I reached the top step, did I see the massive crowd that had already formed, while harried volunteers attempted to corral individuals into some semblance of a line-up. Having arrived uncharacteristically early, over an hour before the event was set to start, I could not believe the mass of people who had already begun to gather inside the theatre. For whom or what we were we all waiting for, you might ask? For the opportunity to listen to the Honourable Louise Arbour deliver the third annual Bluma Lecture.

Like everyone else in attendance, I was eager to hear what Arbour would share about her experiences in the fields of human rights and global justice, and the state of those fields today.

The discussion was led by the Honourable Marc Lalonde, who himself is a respected leader and former politician, both in Canada and abroad. Having participated in countless events of this sort throughout their careers, the two sparred and jested with an ease and mastery that is so rarely exhibited by leaders today. To offer just one example, at the outset of the event, Lalonde noted how lucky we all were that he had been asked to provide the questions, rather than the answers, given the tendency of politicians to talk on at great length. Without a moment's hesitation, Arbour responded with perceptible satisfaction that while politicians might be known for their lack of brevity, it is clear from recent events that it is judges who always get the last word. Such effortless and amusing exchanges continued to enliven the discussion throughout the evening, to the audience's delight.

The conversation proceeded chronologically, following the arc of Arbour's illustrious and fascinating career from a young law stu-

dent in Montreal to serving as a law professor at Osgoode Hall, a trial judge in Ontario, a justice on the Ontario Court of Appeal, Chief Prosecutor for the International Criminal Tribunals in the Former Yugoslavia and Rwanda, a justice on the Supreme Court of Canada, UN High Commissioner for Human Rights, and President and CEO of International Crisis Group. Closer to home, Arbour also serves on the Faculty's IHRP Advisory Board.

With great humility, Arbour submitted that she was "unqualified" for many of the positions to which she was appointed. While most in the audience likely disagreed, it was refreshing (and often hilarious) to hear her explain the learning curve and hurdles that she faced at the outset of many of these roles. For instance, she entertained the crowd with stories of her first experiences as a trial judge, noting that she had "at least watched enough T.V. to know where [she] was supposed to sit." She told about how she had requested the arraignment of the accused in her first case, only to be informed that the man she was referring to was actually the accused's counsel – as she described, "he just had 'that look'." She again had the audience in stitches describing the efforts (and indeed needlework) that had to go into the tailoring of her robe at the Supreme Court, to take it from a tall model to one that would befit her modest frame. She recalled how she had assured the exasperated tailor not to worry – that "the short model was here to stay."

While it was clear from some of her comments that she was somewhat disappointed by the stilted development of human rights and justice mechanisms, both at home and abroad, it is equally evident that Arbour remains an ardent defender of human rights, international law, and social justice, both in Canada and the world at large. Following the conclusion of the lecture, numerous audience members noted with enthusiasm their wish that she will continue to lead efforts to reform these systems and defend human rights – some expressing their hope that she would run for politics, while others noting that she should be nominated to serve as UN Secretary-General. Although she has devoted more time and energy to such efforts than can be expected from any individual, I can't help but hold the same hope myself.

The Challenges of the ICC, cont...

preliminary investigation like any other: with objectivity, impartiality, and independence. Stewart lamented that this message, and an understanding of the investigatory process sometimes gets lost amidst the rhetoric swirling around the Court. He reminded us that States are not indicted before the ICC, but rather individuals.

Still, in the end, Stewart and Dicker celebrated the ICC's achievements in advancing the international justice project.

This article originally appeared on the IHRP website



ICC Deputy Prosecutor, James Stewart and University of Toronto Faculty of Law Dean, Ed Iacobucci (Photo credit: Kathleen Davis)

Interview with Dr. Wael Haddara, cont...

of democratic, inclusive governance that is true to their culture and faith, Egypt can be an important stabilizer in a world that needs stability and peace. Alternately, if the Egyptian experiment in “government by the people” perishes, then Egypt will become a huge source of instability. And in a global village, instability spreads quickly. So there is a lot more at stake here than just what’s happening in one country in the Middle East.

What kind of trajectory do you foresee for this situation (or the Middle East more broadly), in light of what is happening in Egypt)?

Unfortunately, I think that the most likely trajectory for the Middle East is more conflict. We have two large groupings - one represented by old power structures and their beneficiaries (oligarchs, regional and international businesses) and the other represented by ordinary citizens in groups like the FJP, labour unions, and student groups.

For the past 70+ years, most people in the Middle East were content to allow the older power structures to dominate life - social, political, economic and cultural - in the hope that things would improve eventually. These authorities promised change through nationalism, pan-Arabism, socialism and various ideologies.

Here in 2015, people have realized the total failure of those regimes to bring about a better life for their citizens and people are fed up. They want freedom and dignity, as well as better living conditions and economic opportunities.

What happened in Egypt was not only the overthrow of a democratically elected president but a full counter-revolution that brought back an even more repressive statist system. This time around, the people are not taking it lying down. We see this struggle in different forms across almost all countries of the Middle East, and so we will

either have a South Africa moment - the emergence of a Frederik Willem de Klerk who can negotiate the end of repression and convince the old guard to share power, or we will see more violent confrontation erupt.

If you could give Canadian law students some advice, what would it be?

Pay close attention to the Middle East. Lots will happen there in the next few years and the Middle East will continue to have an important effect on the rest of the world.

The other piece of advice is to develop a near-sacred respect for the rule of law. This principle should be cherished and guarded because it is the only true guarantee of a free society. Not all laws are correct, or even moral. But the rule of law is the only way through which a just society can be organized.

African Grandmothers Tribunal, cont...

before the Tribunal’s judges, which consisted of Theo Sowa, Mary Ellen Turpel-Lafond, Joy Phumaphi, and Gloria Steinem.

These judges issued a series of recommendations in the Tribunal Report related to protecting Grandmothers’ rights to income security; housing, land and property; healthcare; freedom from gender-based violence; and to advancing their leadership in their communities.

Following the Tribunal, a documentary entitled African Grandmother’s Tribunal: Seeking Justice at the Frontlines of the AIDS Crisis was screened across Canada to raise awareness about the key role that Grandmothers play in societal recovery from the AIDS pandemic.

The Tribunal and film emphasized the resilience and strength of African Grandmothers, and the political shift that is occurring in parts of sub-Saharan Africa where the AIDS pandemic has had the biggest impact.

Grandmothers, such as Mariam, are actively seeking policy reform. Mariam’s role on the Sub-County Land Rights Committee was highlighted in the Tribunal and in the film. Since she sat on the Committee, five cases regarding land grabbing were decided in favour of the Grandmothers. Prior to this, many Grandmothers subjected to land grabbing and refusal of inheritance would not bring cases forward because they felt no one would listen to them. Now, with Mariam on the Committee, they are able to bring forth their issues.

I recently spoke with Lee Waldorf, Director of Policy at the SLF, about the film and the shifting narrative surrounding the AIDS pandemic in sub-Saharan Africa. She stated:

“We are seeing an evolution in what is happening with the Grandmothers themselves. Initially the support was provided by community-based organizations and it was really about survival; direct humanitarian assistance. Over time, their own capacity got rebuilt, their sense of agency in the world, and also the strength that they had collectively. They were working together and getting into income generating projects. People were getting more interested and more capable at shaping the world they were in. Mariam is a wonderful example of that. We are seeing more of the Grandmother’s organizations and individual Grandmothers trying to have some influence on their environment and right some of the wrongs they have been subjected to. This is part of the process. The film is a snapshot about what is happening and continues to happen.”

This momentum for a rights-based approach to combatting the AIDS pandemic is now in full force. Following the Tribunal, the Grandmothers issued a Call to Action, stating “[O]ur labour, with all of its struggles, challenges, knowledge and triumphs, has gone unheeded for too long. We will not let the AIDS pandemic defeat us, but we cannot prevail alone. Africa cannot survive without us. We call on you to act with urgency to support our efforts to secure justice.”

CONSTITUTIONAL DESIGN AND OTHER ADVENTURES: A CONVERSATION WITH PROFESSOR RICHARD STACEY

Quinn Keenan, 1L

The Faculty of Law welcomed Assistant Professor Richard Stacey to its ranks in 2014. I spoke with him during his first semester about some of his formative experiences in constitutional design, the Arab Spring, and why students who want to make a career in human rights should dive in head first.

Stacey, who hails from South Africa, is a constitutional scholar whose career began as a law clerk to two justices of the Constitutional Court of South Africa. While subsequently teaching at the University of Cape Town, he became involved in Parliament-related work; drafting legislation, dealing with complaints against legislation, developing policy, and translating government policy into legislation.

Stacey then studied at New York University, where as a student, he was invited to volunteer in Kenya to assist with Kenya's constitutional design process. Stacey reminisced that going to Kenya was one of the best decisions he ever made, because opportunities to have a measurable impact are rare. As he put it, "[o]ne of the problems with constitutional development and design, is that there is a lot of attention paid to human rights, and getting human rights into your constitution. There is a lot less attention paid to structures of government, judicial appointment, and appointment mechanisms for the structures that support democracy, and that has a tendency to undermine the efficacy of human rights." Stacey considers institutional design and human rights as inextricably linked, but sees his work as falling more on the side of the former.

Among the elements of Kenya's constitutional design process that Stacey became involved in was the electoral system: "I came up with options for what an independent electoral commission should look like." He generated ideas on what powers and limitations it should have, what functions it should perform, and what the system of elections should be, for what turned out to be a presidential system rather than a parliamentary system. Stacey's work also included briefing the various parties drafting the constitution on the development and structure of different constitutional de-

mocracies in countries where it had existed for a longer period. "But," he adds ruefully, "many of my recommendations never saw the light of day."

Stacey also points out his hesitations about foreigners showing up "in a country that's going through its own constitutional design process and tell[ing] them what they should be doing. If anyone thinks that's what the process of constitution building is, then they would be wrong." He explains, "[i]t's fine that the recommendations we produced end up not being acted upon, because it's quite likely that we've had an impact in one way or another."

When asked what he believed to be the biggest challenge facing human rights lawyers, Stacey's replied "most human rights lawyers come from the West, and most human rights problems are in the non-West. It's very difficult to shed the colonial arrogance that I think many of us are tarred, or painted with." He added that it is "difficult to arrive in a country with the best of intentions and offer any kind of advice without that advice being undermined by the view that we are Western know-it-alls."

Stacey admits that when it comes to his career, he does not have a master plan. After contributing to the constitutional design process in Kenya, Stacey became engaged with the Arab Spring revolutions, advocating for the strengthening of the structures surrounding human rights because "[t]hat's the work that needed to be done."

For Stacey, the most important cases right now are Tunisia and Egypt: "they both emerged in 2014 out of the Arab Spring. Tunisia now has a really admirable constitution that is coherent with most of the principles of constitutional democracy around the world, and they just elected a Parliament which is not dominated by the Islamist Party, which I don't think is something anyone expected, given the role they played in the 2011 Arab Spring and the elections that happened after that." Then there is Egypt "where th[e] constitution empowers the military to basically control the direction of policy, at least for the next eight years; and where the current president assumed power six months ago in a military

Professor Richard Stacey
(Photo credit: U of T Faculty of Law)



coup. The country seems to be pretty much in the same situation that it was in the seventies, when the president was the leader of a military coup. So two very similar experiences of constitutional transition with two very different outcomes."

For these reasons, Stacey believes "those are two cases to watch to see what happens; whether constitutional democracy can take root or slides back into authoritarianism and oppression and the infringement of human rights."

As for his advice to other aspiring human rights lawyers, Stacey's message is simple: just do it: "My advice would be, if you have an opportunity, take it, even if it costs you money... This is me speaking from my own experience, having made the decision to insert myself into the constitutional design process in Kenya. I didn't have an official title, I didn't get paid... It was my own decision to go there at great personal cost, but it was a unique and hugely educational experience that opened many doors for me. So my advice is, just take the opportunities that present themselves, make opportunities for yourself, and exploit them for everything they're worth."

RELIGIOUS FREEDOM IN THE POST-9/11 WORLD: A CONVERSATION WITH PROFESSOR ANNA SU

Debbie Shyama Talukdar, 1L



Professor Anna Su (Photo credit:
U of T Faculty of Law)

Professor Anna Su joined the Faculty of Law in July 2014. She is an expert in religious freedom and is teaching first year constitutional law. *Rights Review* spoke with her about her background in human rights, Canada's role in encouraging religious freedom, and her advice to students.

How did you get involved in the field of human rights?

Having been born and raised in the Philippines, I was interested in the pressing human rights issues in the country, specifically the Muslim insurgency in the south. I was interested in how to bridge differences between people of different faiths.

From a young age, I wanted to "save the world". As I grew older that interest evolved. I was involved in a variety of political causes during my undergraduate studies. For example, I was an activist in the protests that called on then-Filipino President Joseph Estrada to resign. I come from a middle class Chinese family. My parents had a "keep your head down and work hard" mentality but I often didn't see things that way. I think in order to understand the current conflicts in the world, particularly in the Middle East, it's important to understand the role religion plays in politics.

What was your most interesting experience in the human rights field?

My two major practical experiences in the human rights field are the highlights of my career. In the summer of 2009, I worked for an Israeli NGO named Gisha, which advocates for free movement of Palestinians. The situation in Israel was fascinating. I would see the same people at all the rallies which made me realize the human rights field is pretty small.

My second experience was in Manila, where I participated in the peace negotiations between the Philippine government and the Islamic insurgency. The experience was not what I imagined when I dreamed about "saving the world." Apparently, saving the world involves a lot of paperwork! While it wasn't glamorous, everyone has to do their part in these negotiations so it was still a fulfilling experience.

What do you think will be the most important developments in the field of human rights in the near future?

I think the use of drones is going to be a big development. The US is starting to develop rules and norms surrounding the deployment of drones in wars as well as in humanitarian missions. This raises important questions, like what is the future of warfare? Are drones totally new in terms of the laws of war? Or is it just another weapon in the progression of technological development?

In your opinion, are the conflicts and crises facing the world today fundamentally different than those of the past ten or twenty years?

I don't think the conflicts are all that different. Lots of the current conflicts are incarnations of past colonial wars. The form of asymmetric warfare in the Middle East, where the insurgents don't have uniforms and hide amongst civilians, echo the guerilla-style wars in Vietnam and the Philippines in the 1950s and 1960s. I think the difference is ideology. Religion is more of a factor now, whereas communism was the driving ideology during the Cold War.

What is Canada's role in the world in regards to encouraging religious freedom and freedom of speech?

I think middle powers like Canada can step up to assume some of the American responsibilities, particularly in regards to America's role as the "world policeman." I think the US still has a role to play in promoting religious freedom but in a way that is more accountable and sensitive to local circumstances. Canada can probably promote religious freedom more effectively because it doesn't suffer from the same PR baggage as the US. There has been a conscious branding of Canada as a country concerned with human rights so Canada might be more effective at promoting religious freedom abroad. A lot depends on how the Canadian Office of Religious Freedom performs its role. Currently, Canadians are not aware of the undertakings of that Office.

If you could give law students who wish to work in the field of international human rights one piece of advice, what would it be?

Human rights is a big field so figure out which area you feel most strongly about. I would suggest the following three-pronged test to figure this out.

1. What do you really want to do?
2. Where are you most needed?
3. How can you benefit other people?

Also, I would recommend that students take advantage of the resources at the law school – take human rights classes, network with practitioners, get in touch with professors who are doing work in the field you're interested in. Get as much experience as you can. Law school is the time to experiment and figure out if human rights is actually the field you're interested in pursuing.

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