

# RIGHTS REVIEW

University of Toronto Faculty of Law International Human Rights Program

CANADA CLOSES THE DOOR TO REFUGEES, SUPREME COURT LOCKS IT

Volume II, Spring 2009

Commentary on *Canadian Council for Refugees et al v. Her Majesty The Queen*  
*Tony Navaneelan*

Does the United States knowingly render individuals to countries which practice torture? Does the US detain refugee claimants and other aliens in a manner which violates international law? Can a Canadian court sit in judgment of the human rights practices of Canada's closest ally? These are the questions which the Supreme Court showed no appetite for answering when they denied leave in the case of *Canadian Council for Refugees v. Her Majesty the Queen* in February 2009.

The case concerned a challenge to the *Safe Third Country Agreement* (STCA) signed between Canada and the US, which came into force in December 2004. The STCA affects third-country nationals who have travelled to Canada or the US via their common land border. It allows Canada to immediately deport such persons back to the United States without ever hearing their claim for refugee protection – normally an entitlement under Canadian and international law. The US is likewise allowed to deport individuals back to Canada without hearing their claims.

The STCA is premised on the notion that both Canada and the United States are countries which adhere to the *Refugee Convention* and the *Convention Against Torture* (CAT). The Canadian Government argues that individuals should be expected to make their claim for protection in the first country they enter into, instead of travelling onward to the other.

Refugee advocates, however, have decried that there are substantial differences in the protections afforded claimants in Canada and the US. Many lawyers attest that clients who would have received protection in Canada have instead been returned to the United States, which then deported them (*refouled* in the legal parlance) back to their countries of persecution.

In the case before the Supreme Court, two contrasting pictures of the STCA were placed at odds with one another. Was the Agreement an administrative arrangement to deal with secondary movers or a backdoor means of *refoulement* contrary to Canada's international human rights and *Charter* obligations? Enter the courts.

A legal challenge to the STCA was brought in the Federal Court of Canada by the Canadian Council for Refugees, Amnesty International and

the Canadian Council of Churches. Their claim was based on public interest standing in the case. It was joined by an anonymous refugee claimant from Colombia who was hiding in the US and seeking entry to Canada. In a decision which came as surprise to many refugee advocates – not to mention the Government of Canada – the Federal Court struck down the STCA in November 2007.

Justice Phelan's judgment turned entirely on his finding that the [continued on page 14]

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## SEMESTER IN REVIEW

### THE INTERNATIONAL HUMAN RIGHTS PROGRAM'S CLINICAL LEGAL EDUCATION

*Judith Rae*

The International Human Rights Program's clinical legal education program engages in many forms of human rights advocacy. We are bringing forward the case of a client to an international judicial body, the European Court of Human Rights. We have intervened as *amicus curiae* in Canadian courts in cases like Omar Khadr's that involve an international human rights dimension. We are writing a manual to explain how the Inter-American regional human rights system can be used to advance a particular rights issue, the right to health. Myself, I am researching a report on the troubling use of doctors, psychologists and other health professionals in interrogations at places like Guantanamo, Afghanistan and Iraq.

Human rights work is not straightforward, and it does not always look like traditional forms of legal advocacy. The clinic gives us the chance as students to add to our own toolbox of skills and experiences that we can use working in the international human rights field, and advances some important projects along the way. The clinic's 4-credit course wrapped up in December, but students who completed it can enrol in the practicum course



in the spring semester for one or two credits.

For example, Robyn Switzer and I provided research support for a project called Current Violations in Iraq, an initiative of the International Human Rights Law Institute in Chicago. The project gathered

the personal testimonies of 1,900 Iraqis who were victims or perpetrators of human rights violations in Iraq since 2003. These are harrowing accounts of violence, but by sharing them, the project's directors and participants aim to build greater understanding among Iraqis and others about what the conflict has meant for people on the ground.

But what concrete support is actually available for the victims?

Robyn is now building on her work from last semester to look further into the mechanisms for reparations and redress for victims of human rights abuses in Iraq. Unfortunately, the limited mechanisms that are currently available are inadequate, inaccessible and often unfair. What is more, there is hardly any literature available on post-2003 reparations.

Working with new information collected in Iraq by the International Human Rights Law Institute and by gathering up the scattered information available elsewhere, Robyn is writing a paper on this subject that will fill a significant gap. It's just one example of the way the IHRP works collaboratively to further the protection and enforcement of human rights. ■

### GLOBAL ANTI-TRAFFICKING WORKING GROUP

*Nicole Simes and Allison Sephton*

Human trafficking is a grave problem both nationally and internationally. It is defined as the movement of peoples by deception or other fraudulent means for the purposes of exploitation. The Global Anti-human Trafficking Working Group [GAT] has been addressing this issue as part of the IHRP for several years. This year, the group focused on two areas of human trafficking which are often overlooked - the domestic trafficking of Canadian Aboriginal women, and the purchasing of "Fair Trade" food products as a means of preventing child and adult trafficking for forced labour.

Because of the clandestine nature of the crime, it is hard to quantify the scope and severity of human trafficking globally, let alone internally. However, it has been recognized by several sources including Amnesty International that Aboriginal women are trafficked within Canada. There is thought to be trafficking routes from northern and/or rural to southern and/or urban areas within the country, as well as specific trafficking routes within provinces like BC and Alberta. It is clear that the problem of domestic trafficking, as faced by Aboriginal communities, must be addressed by understanding its systemic root causes in order to develop effective measures for prevention. As such, the GAT Working Group has focused on the intersection of human trafficking, root causes of poverty and violence, and lack of support by the Canadian government to develop recommendations for this area.



Because the crime of forced labour is often disregarded in the literature and legal responses to human trafficking, the GAT Working Group has endeavored this year to have Fair Trade products, like coffee, offered at the Faculty of Law. The Fair Trade movement aims to end exploitation and associated trafficking by ensuring that workers are paid fairly and work under humane and safe conditions. By removing intermediaries and bringing producers and consumers closer together in the global supply chain, it endeavours to provide the producers of these goods with a more equitable share of the profits. Our project is intended to allow students to make a statement against human rights violations with their purchasing power.

The aims of the GAT Working Group are to raise awareness about the problem of human trafficking, to add to the research and literature on the issue, and to advocate for change. If you would like more information about the GAT Working Group or human trafficking please email [Nicole.simes@utoronto.ca](mailto:Nicole.simes@utoronto.ca) or [Allison.sephton@utoronto.ca](mailto:Allison.sephton@utoronto.ca). ■

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# HUMAN RIGHTS AND DEVELOPMENT: CAN THIS DIALOGUE BE MORE PRODUCTIVE?

*Professor Mariana Mota Prado*

Law students interested in human rights are often interested in development issues as well. In the three years that I have been at the Faculty, I have observed that those who sign up for my law and development courses often did internships with the IHRP or are working at the IHRC.

“...the common concerns and motivations of these two areas suggest that they can and should join efforts.”

This shared interest in human rights and development is not a mere coincidence: there is a great deal of overlap between these two areas. A more holistic concept of development, embedded in the Human Development Index (HDI), has been recently adopted by the United Nations. The HDI replaced the traditional focus on income per capita that guided much of the development efforts for decades. This index incorporates a concern with people's ability to live a long and healthy life and to be knowledgeable, building up on Amartya Sen's notion of development as freedom. As the 2000 Human Development Report acknowledges, "the basic idea of human development – that enriching the lives and freedoms of ordinary people is fundamental – has much in common with the concerns expressed by declarations of human rights. The promotion of human development and the fulfillment of human rights share, in many ways, a common motivation, and reflect a fundamental commitment to promoting the freedom, well-being and dignity of individuals in all societies."

Largely because of these common concerns and motivations, these areas also share some common challenges. For instance, both the human rights and the development enterprises have to deal with charges of Eurocentrism or Imperialism, i.e. accusations that their goals are the imposition of Western values upon non-Western societies.

Despite these overlaps, human rights and development have significant differences, as Peter Uvin shows in his book, *Human Rights and Development* (Kumarian Press, 2004). For instance, the development enterprise has been better funded: by the mid 1990s, there were US\$ 50 billion of funds allocated to development and less than 1 percent of that amount was allocated

to human rights.

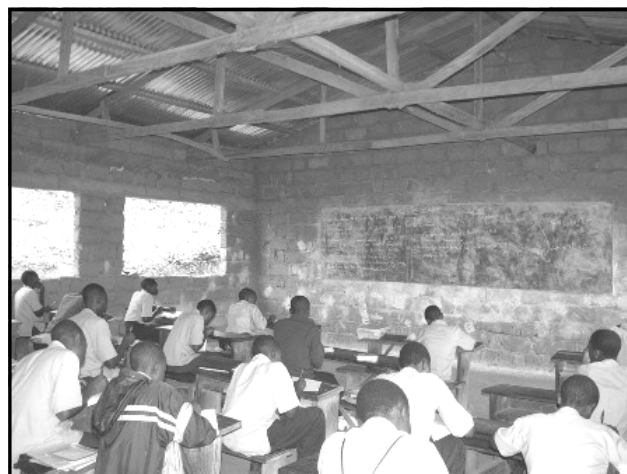
There are major differences in their approaches as well. While the Human Rights discourse has focused on legal arguments (state's international and legal obligations) to achieve many of its goals, the development discourse does not have that option. Those in the development field have nothing that resembles the 1948 Universal Declaration of Human Rights or the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. In 1986, the UN adopted the Declaration on the Right to Development, stating that "the right to development is an inalienable human right", but as a resolution the document has no binding force.

Another important difference is that the development enterprise is more open to an incrementalist approach, i.e. it is more concerned with avoiding a break from the past. It accepts that reformers need to be mindful of social, political, cultural and economic constraints and work within the limits imposed by them. According to Uvin, "at the level of daily practice the development community has gone much farther in this direction of incremental change than has the human rights community." Perhaps one reason for that is the fact that an incrementalist approach asks how to bring about change and its answer is with pragmatism. To a certain extent, it abandons claims of universality that are often present in the development discourse and even more often present in that of human rights. This reduces the political nature of the development enterprise (at least on appearance). It may also potentially explain, according to Uvin, the disparities in funding.

Due to these differences, some development efforts are conceived, designed, and pursued independently of those connected to human rights. But the opportunities offered to U of T law students have not reflected this. Despite providing students with a wealth of prospects for international work, our faculty has thus far focused only on human rights projects. We need to go beyond that. There should be more space for law students at U of T to work with development related projects that are not restricted to those offered by the IHRP or IHRC. For this reason, I have designed a project to increase the opportunities for students to get involved

with law and development issues while in law school. The project will start in the fall of 2009 with a student-run website and a speakers' series.

Of course, my project is not meant to compartmentalize and disconnect human rights and development concerns and initiatives within the school. On the contrary, the common concerns and motivations of these two areas suggest that they can and should join efforts. As the 2000 Human Development Report suggests, the development enterprise can largely benefit from a human rights approach because "human development, if combined with the human rights perspective, can indicate the duties of others in society to enhance human development in one way or the other." By the same token, the human rights enterprise can benefit from a discussion on "how different policy choices will affect the prospects for fulfilling the right.() Scarcity of resources and institutional constraints often require us to prioritize concern for securing different rights for the purposes of policy choice. Human development analysis helps us to see these choices in explicit and direct terms".



Moreover, human rights can be a useful tool to assess the limits of development projects. For instance, the right to water has been used to question the limits of the losses that individuals can be allowed to bear in privatization reforms, which were designed to promote valuable development goals. The 2000 Human Development Report states that "although human development thinking has always insisted on the importance of the process of development, many of the tools developed by the human development approach measure the outcomes of social [Continued on page 14]

# JUSTICE VS. PEACE: OMAR AL-BASHIR AND THE ICC

*Ben Kates*

On March 4, the International Criminal Court (ICC) took the unprecedented step of ordering the arrest of Sudanese President Omar al-Bashir for atrocities committed in Darfur between April 2003 and July 2008. The Court's Pre-trial Chamber I found that

**"The ironic question that beckons is whether the ICC's decision will come at too high a cost to the very people it is attempting to vindicate."**

there were reasonable grounds to indict the Sudanese president on charges of crimes against humanity and war crimes but not on the crime of genocide.

A three judge panel, ruling nearly eight months after Chief Prosecutor Luis Moreno-Ocampo applied for a warrant of arrest, found reasonable grounds not only that war crimes and crimes against humanity had occurred in Darfur but also that Bashir was criminally responsible for them.

Bashir stands accused of five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape) and two counts of war crimes (intentionally directing attacks against a civilian population or against individual civilians and pillaging). The court determined by a 2-1 margin that the prosecution's evidence failed to provide reasonable grounds for the crime of genocide. Following the indictment Sudan is legally obliged to arrest and surrender its president, as are all 108 State Parties to the Rome Statute.

Ad hoc international tribunals have previously indicted Slobodan Milosevic and Charles Taylor, but the warrant is the first



ever issued by the Court against a sitting head of state. Although the order strengthens the legitimacy of the ICC while striking at impunity, it is not without controversy. The Sudanese government ejected thirteen aid groups from the country - including the International Rescue Committee, Oxfam,

Care and the Dutch contingent of Médecins Sans Frontières - as an immediate reaction to the decision.

With the warrant, the Court sends a clear message that, notwithstanding the principle of state immunity, even the most senior officials will be held accountable for the egregious crimes subject to its jurisdiction. Most importantly, its notice that the violation of human rights is no longer a political strategy that can be exercised with impunity serves a vital deterrent function to future Bashirs.

Highfalutin ideas of accountability, however, will be of cold comfort to the hundreds of thousands of Darfuri refugees dependent upon these thirteen banished aid organizations for food, medicine and water supplies. For them what matters is not the response of future Bashirs but that of the current one. The ironic question that beckons is whether the ICC's decision will come at too high a cost to the very people it is attempting to vindicate.

In indicting Bashir, the Court has risked alienating the principal belligerent in Sudan. The Sudanese government's expulsion of aid groups may be representative of a new approach to both the conflict in Darfur and to implementing the 2005 Comprehensive Peace Agreement (CPA) that ended the twenty-year civil war between the country's north and south. There is also the possibility of renewed violence. In an ominous statement, Salah Gosh, head of Sudanese intelligence, called for the "amputation of the hands and the slitting of the throats of any person who dares bad-mouth Bashir or support the International Criminal Court's allegations against him."

Much of the warrant's impact will depend on whether or not it turns Bashir into a pariah both domestically and internationally. Criminal proceedings precipitated the downfall of Milosevic and Taylor, in Yugoslavia and Liberia, respectively, and the hope is that the same will occur in Sudan. Bashir enjoys the continued support of the African Union and Arab League, as well as that of China and Russia, and would have much to lose if any of those parties declared it politically infeasible to have friendly relations with an indicted war criminal. Moreover, international pressure could convince either those in government supporting Bashir or the people of Sudan themselves that it is in their own best interest to turn against him.

Conversely, Bashir may use the indictment to consolidate his support. The president has already made a showy visit to Dar-

fur to decry the imperialist nature of the Court. Given that, in its short lifespan, the ICC has undertaken proceedings only in Sudan, Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), it is susceptible to criticism as a court exclusively for African leaders. Bashir is sure to draw on the experience in Iraq to raise the specter of Western designs for regime change in yet another Muslim country.

The debate surrounding the indictment of Bashir is deserved, considering its potential to further destabilize one of the world's most horrendous humanitarian crises. Controversy is displaced, however, insofar as it pertains to either Moreno-Ocampo or the Court itself; rather it should be directed at the United Nations. Whereas Uganda, DRC and CAR themselves sought justice at the ICC, the matter of



Darfur was referred to the Court by way of the UN Security Council, with Resolution 1593. It is thus the Security Council that must take responsibility for what flowed from that decision.

Once allotted jurisdiction, the Court is right to have exercised its mandate based purely on the rule of law. Rightly, Moreno-Ocampo and the Court were driven by evidence and jurisprudence, rather than by political considerations. The ICC would have been shown to be a flawed institution had Bashir's indictment been withheld for fear of destabilizing Sudan.

Under Article 16 of the Rome Statute, the Security Council has the capacity to defer prosecution for a year, subject to renewal, if it is deemed to pose a threat to international peace and security. It is with this provision, and not in the internal mechanisms of the ICC, that the political climate surrounding Sudan should be accounted for. In the present climate, any attempt to enact the provision will surely be vetoed by either France, Britain, or the United States, but this would not be the case if it were interpreted as something other than an attack on the legitimacy of the ICC.

[Continued on page 14]

## ICTR FINDS BAGOSORA GUILTY OF GENOCIDE

Sabrina Bandali

On December 18, 2008, Colonel Théoneste Bagosora and two other senior officers in the Rwandan army were sentenced to life imprisonment for their roles in the 1994 Rwandan genocide. Bagosora, and his fellow officers, Major Aloys Ntabakuze and Colonel Anatole Nsengiyumva were convicted of genocide, crimes against humanity, and war crimes. General Gratien Kabiligi was acquitted of these charges. The International Criminal Tribunal for Rwanda (ICTR) held that there was insufficient evidence for the court to conclude beyond a reasonable doubt that the four accused conspired to commit genocide before it unfolded from April 7, the day that Rwandan Armed Forces and Hutu paramilitary forces (the Interahamwe) set up roadblocks and began killing thousands of Tutsis and moderate Hutus.

Bagosora was born on August 16, 1941 in Gisenyi prefecture, west Rwanda. He graduated as an officer in 1964 and then attended advanced military studies in France. In June 1992, he was appointed cabinet director of the Rwandan Defence Ministry; although he retired from the army in 1993 he retained his cabinet position until he fled Rwanda in July 1994.

The conviction of Bagosora is particularly significant as he was the highest authority in the Rwandan Ministry of Defense with authority over the military in the days following the April 6, 1994 killing of President Habyarimana. After Habyarimana's death, Bagosora assumed control of military and political affairs in Rwanda. He has been described as the "mastermind" of the genocide, which began with the killing of the Prime Minister, Agathe Uwilingiyimana, several leaders of the opposition party, as well as Belgian peacekeepers on April 7, 1994. In the hundred days of killings that followed over 800 000 people were murdered.

During the trial, Bagosora's lawyer argued that the prosecutors failed to prove that the slaughter was organized, and therefore that it fit the legal definition of "genocide". According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide is defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

In its decision, the ICTR observed that it was implausible that elite units of the Rwandan army would have undertaken the killing of the Prime Minister, senior opposition leaders and UN peacekeepers unless it was part of an organized military operation authorized by higher military officials. The ICTR further found that since Bagosora was the highest authority in the Ministry of Defence, exercising effective control of the Rwandan army and gendarmerie until the Minister of Defence returned to Rwanda (April 6 to 9, 1994), he was responsible for the killings described above as well as "extensive military involvement in the killing of civilians in Kigali during this period". (*The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva* at Para. 25). ■



## CANADA EXERCISES ITS UNIVERSAL JURISDICTION

Javier González

The ruling on Canada's first prosecution under the Crimes Against Humanity and War Crimes Act (CAHWCA) is expected to be issued soon. Canadian authorities charged Désiré Munyaneza under the Act with counts of genocide, crimes against humanity, and war crimes allegedly committed during the 1994 Rwandan genocide.

The 2005 arrest of Munyaneza followed a five-year RCMP investigation of his involvement in the Rwandan atrocities. It also took place five years after the enactment of the CAHWCA, which was drafted to ratify Canada's obligations as a signatory to the Rome Statute of the International Criminal Court.

This case is interesting as the alleged crimes did not occur in Canada, and neither the accused nor the victims had any connection to this country. A Canadian court was nevertheless able to hear this case under the CAHWCA because the Act incorporates as grounds for jurisdiction the principle of "universal jurisdiction", which allows Canada to prosecute anyone present in this country for crimes

listed in the CAHWCA, including genocide and war crimes.

Prosecutions under universal jurisdiction are not a new phenomenon. Adolf Eichmann, known as "the architect of the Holocaust", was famously tried in Israel under this basis. The rationale for this jurisdiction is that the crime committed is a crime against the entire global community, so anyone should be able to prosecute.

Nevertheless, there have been objections to the fact that the trial took place in Canada. A *Montreal Gazette* editorial, for instance, posited that Munyaneza

should have been extradited to Rwanda, which has developed "a robust legal and social process for handling accused killers," or else tried at the International Criminal Tribunal for Rwanda (ICTR). The lengthy and costly trial, the newspaper argued, had no place in the Canadian justice system.

The son of an affluent Hutu family in Butare, Munyaneza is accused of taking active leadership in the rampant murder and sexual violence against the Butare Tutsi population. Known as "Scar" in his hometown, he allegedly directed roadblocks and massacred and raped Tutsis during the genocide that took 800,000 lives.

The Quebec Superior Court trial began in March 2007. It has presented extraordinary witness testimonies. A Tutsi woman told the Montreal court that her head was slashed with a machete, she lost consciousness, and awoke lying on top of her dead sister. She smeared her sister's blood on herself and pretended for three days to be dead. Other women testified that Munyaneza had raped them multiple times. "I was in despair and didn't want to live anymore," a rape victim said.

Witnesses also included other victims, RCMP investigators, and people who were in Rwanda during the genocide, including Senator Roméo Dallaire, who commanded the United Nations peacekeeping forces at the time. Over 65 witnesses also took the stand in France, Kenya, and Rwanda as part of the trial.

The defence concentrated on alleged contradictions and inaccuracies in witness testimonies. For instance, they argued that many witnesses could not identify Munyaneza's prominent facial scar. They also noted that several of the witnesses did not mention Munyaneza when they gave extensive [Continued on page 15]



## SRI LANKA'S IMPEDIMENTS TO PEACE

Shannon Neill-Sword

The recent military action in Sri Lanka has brought global attention to rights infringements in that country. The military assault on Tiger-controlled areas in the northeast have led to the death of thousands and the displacement of hundreds of thousands of people, of whom most are Tamil. Tamils are the largest ethnic minority in Sri Lanka and form the communal base for the well-known Liberation Tigers of Tamil Eelam (LTTE), which is a designated terrorist organization in many countries, including Canada. The recent violence

“... a successful solution must build confidence among the Tamil people that the government is capable of representing their interests.”

is the result of the Sri Lankan government's renewed commitment to the complete elimination of the LTTE. Despite this group's terrorist status, the government's actions have also come under significant criticism. Tamils are a large majority in the areas where the recent attacks have focused, leading to accusations as strong as genocide. Across the world, diaspora Tamils and human rights organizations are urging their national governments to encourage a cessation of hostilities.

While there are possibilities for successful short-term assistance, peace building and human security are hindered by long-standing ethnic tensions that are unlikely to be calmed by any outcome of the present crisis. While other divisions exist, the main conflict has been between the Tamil minority and the Sinhalese, who make up a large majority of Sri Lanka's population. The two groups are divided along linguistic and religious lines; the majority of Sinhalese are Buddhists, while the Tamils are predominantly Hindu. The tension between the groups has its origin in the colonial period, when the British rulers favoured the Tamil minority for educational and therefore administrative opportunities. These preconditions for resentment were further exacerbated by the Sinhalese ethnic nationalism that developed during the push for independence and remained a divisive force in the years after.

During the decade that followed independence, the govern-

ment - controlled by the Sinhalese-dominated Sri Lanka Freedom Party (SLFP) - made legislative changes that were in part attempts to rectify the inequalities produced by the colonial order, but which had the effect of giving huge advantages to the linguistic and religious majority. The 1956 *Sinhala Only Act* took away Tamil's official language status, creating a barrier to Tamil advancement in government jobs. The government also put quotas on the proportion of Tamil to Sinhalese people who would be admitted to post-secondary programs. While there is vague rationality to this policy, the intense competition among the children of the educated Tamils created huge disparities between the entrance requirements for each ethnicity. These early developments built upon the Sinhala nationalism of the independence period and established the state as a representative of one side of the growing ethnic dichotomy (Nadarajah and Sriskandarah, 2005).

In 1970, the SLFP returned to power after a five-year hiatus and in 1972 the government drafted a new constitution, which replaced the liberal religion clause with one recognizing 'the foremost place' of Buddhism, although it claimed to preserve the right to freedom of religion. Increasing unrest in the late 1970s, including the founding of the LTTE in 1976, led to the 1979 passage of a 'temporary' measure called the *Prevention of Terrorism Act*, which gave the police and military extraordinary arrest and detention powers; in 1982 the Act was adopted permanently. One of the most important acts of the conflict was the burning of the Jaffna library. In June of 1981, in response to terrorist violence, the police in Jaffna burnt the public library to the ground. The library was a cultural and educational beacon for the Tamil people and contained

masses of irreplaceable works that were destroyed.

In July of 1983, the government amended the constitution to outlaw advocacy for any separate state within the territory of Sri Lanka. The effect was to force resignation of all of the members of Parliament from Tamil majority areas, who were all elected to advocate the creation of Tamil Eelam. The LTTE responded by bombing a military vehicle, an attack that killed thirteen Sri Lankan soldiers. Sinhalese civilians retaliated by killing thousands of Tamils and burning the homes of thousands more. These events, known as 'Black July', elevated violent unrest to armed conflict between the government and various Tamil militants, primarily the LTTE.

In light of the historic development of the conflict in Sri Lanka, a successful solution must build confidence among the Tamil people that the government is capable of representing their interests. One commendable effort was the 1987 (thirteenth) amendment to the constitution, which reintroduced Tamil as an official language, although some limitations were placed on its role as a language of governance. The courts have also moved to increase the protection of rights by interpreting the aforementioned PTA in light of the constitutional right to freedom from arbitrary arrest and detention (*Rodrigo v. Secretary of Defence*, 1997). This admirable step resulted in the unconditional release of thousands of detainees, but it was contested by the government and fails to indicate any change in their attitude towards the rights of citizens. The government did create a Human Rights Commission in 1994, with a very liberal mandate that would allow it to seek out and inquire about systemic abuses.

Regrettably, Human Rights Watch downgraded the commission to bare 'observer' status in 2006, due to uncertainty about its independence. Today the government's website is dominated by articles from international sources and even from Tamil rights activists arguing that continued fighting against the LTTE is the best way to protect the interests of the innocent citizens they are holding hostage. While the argument against the LTTE has significant

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# ¿CUBA LIBRE? THE TERRA UNDER GUANTÁNAMO'S 'TERRORTORY'

Sarah Hamilton

U.S. President Barack Obama's first act as president was to proscribe the use of torture by U.S. personnel, close "black site" prisons operated by the C.I.A. in eastern Europe, and close the U.S. military prison at Guantánamo Bay – America's own little piece of "terrortory."

This seeming coup for human rights has invited the urgent question of how to manage (in the Foucauldian sense) Guantánamo's 248 remaining detainees, including Canadian Omar Khadr. Deprived by a sleight of diction of *Geneva Convention*

"Given the bay's history and its subjection to U.S. "jurisdiction and control" in perpetuity, it is optimistic to expect Guantanamo to remain closed forever."

protections for "prisoners of war," and renamed "enemy combatants" by the Bush administration, the detainees pose an internal security risk if domesticated.

Former President Bush "strongly disagreed" on January 12 "with the assessment that [U.S.] moral standing has been damaged" by Guantánamo: "[P]eople still understand America stands for freedom; that America is a country that provides such great hope."

But is there "such great hope" for the detainees? Guantánamo interrogators were trained in 2002 in communist China torture techniques used during the Korean War to extract false confessions from Americans. Collectively, the detainees have endured dogs, waterboarding, sleep and sensory deprivation, stress positions, and the forced consumption of American culture by means of death metal as torture and McDonald's Happy Meals as rewards for good behaviour.

Policy analysts and journalists have been quick to point out that being found innocent through a fair trial on American *terra* is unlikely to restore a sense of justice to individuals systematically deprived of their *habeas corpus* rights and subjected to torture for as long as seven years. There are also embarrassments: 17 Uyghur Chinese men, offered up by Pakistani bounty hunters in exchange for \$5000 rewards provided by the U.S., have been deemed innocent by the Pentagon since 2004, but the U.S. is unlikely to open its borders to them for

security reasons – reasons that may be material now, if not at the time of initial detainment. Other countries are similarly reluctant to accept them.

Pres. Obama's orders are to close the prison, but what of the naval base? Will the town of Guantánamo be dismantled, with its permanent McDonald's, KFC, bowling alley, Taco Bell, and Starbucks etc., all installed by the Navy Morale, Welfare, and Recreation department since 2002 to promote the good humour of the troops? Will Lynx Air be forced to repackage its Caribbean holiday destination website, removing ads for flights to Guantánamo alongside images of starfish and beach chairs at sunset with fruity drinks? Will Scuba Spy, an internet listing of scuba diving locations in Guantánamo, drown as its clientele dries up?

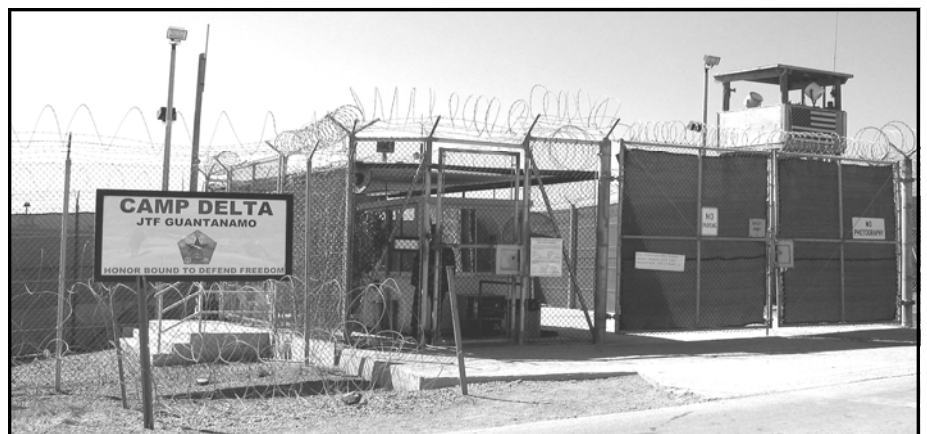
The prison was built by former Halliburton subsidiary Kellogg, Brown & Root for a contract "not to exceed \$300,000,000," and includes the 416-unit long-term incarceration facility Camp Delta. When the prison closes, will its infrastructure be dismantled?

The history of the bay suggests not. From ostensible *terra nullius* to a thriving port for the African slave trade and exports of sugar and molasses, Guantánamo Bay, Cuba, was ironically a strategic point in *la revolución* for a *Cuba libre* begun by poet and national hero José Martí in early 1898. Martí died in battle in May, and the U.S. consolidated its "liberation" of Cuba from Spain by planting an American flag in the *terra* of the bay on Jun. 12<sup>th</sup>. The New York Times declared: "GUANTANAMO TOWN SHELLLED; Buildings and Shipping Twice Bombarded by Our Ships. DAMAGE WAS VERY HEAVY. Dense Clouds of Smoke Seen Where the Projectiles Exploded. Our Forces Now Practically in Full Possession of the Bay." Guantánamo Bay, Cuba (Spanish colony) was now Gua-

tanamo Bay, U.S.A. (no accent).

The 3-year American occupation that followed the "liberation" ended with the addition of the Platt Amendment to the nascent Cuban constitution. It gave the U.S. a military right to intervene in Cuban sovereignty, and ensured the leasing or sale of land for coaling and naval stations, in order to "enable" the U.S. "to maintain the independence of Cuba." This became the right to lease Guantánamo from Cuba in 1903. Platt was repealed in 1934, but in exchange the U.S. was granted the right to occupy Guantánamo in perpetuity. Former President Fidel Castro took issue with this stipulation, cut off water and supplies to the base in 1964, and peppered its perimeter with fields of cacti.

The base had a low profile until 1991, when 34,000 asylum-seeking Haitian refugees "passed through" Guantánamo, according to GlobalSecurity.org. Amy Kaplan in "Where is Guantánamo?" states that these migrants were intercepted at sea and held when repatriation proved politically sensitive. "Many were held up to three years in makeshift barbed wire camps [at the notorious Camp X-Ray], exposed to heat and rain in spaces infested with rats and scorpions, with inadequate water supplies and sanitary facilities." Black Haitian bodies were marked as "the bearers of contaminated blood," and "a separate camp was built for those who, through forced testing, were found to carry HIV." G.S.org notes that in 1994, under Clinton, "Operation Sea Signal" "provid[ed] humanitarian assistance to [upwards of 45,000] Haitian and Cuban migrants." Jane Franklin differs in emphasis. In "How Did Guantánamo Become a Prison?" she states that "[m]iserable conditions led some Cuban detainees to attempt suicide. [Continued on page 15]



## ISRAEL'S RIGHT TO RESPOND

Sean Thibault

*Sean Thibault is Communications Director at the Religious Action Center of Reform Judaism in Washington DC. The views expressed herein are those of Sean himself and not of either the Religious Action Center or the Reform Movement.*

For those who reflect with some frequency on the (inherent) rightness of a given armed conflict, the two guiding principles for conversation centre around the right to go to war at all and just conduct within warfare. The weighting of these factors varies on how much "we care" and what "our interests" are in the conflict. While the justness of the warfare depends somewhat on the justness of the war itself, when civilians die and families are broke, tragedy invariably upends justice.

Obviously, if an entity fails to assert an effective or just rationale for war, its conduct within that war is doubly scrutinized; for example, the 2004 siege of Fallujah may have been less controversial had the premise for War in Iraq not been so troubling. Further, bombing civilian targets in Berlin was less troubling because bombs were



falling in London at the same time – underscoring the relativity of "moral" wartime conduct

In parts of the world where violent conflict occurs with greater frequency than the largely peaceful experience in Canada, scrutiny of wartime conduct varies relative to the assumptions and consensus with regard to the relative rightness of the underlying conflict. Violence in Zimbabwe, for instance, not only has different characteristics than violence in Palestinian territories, but the difference in the narrative premise of the conflict bears on its relative "acceptability."

Israeli military operations against the Palestinian militants that implicate the civilian population may not meet a morality

test, though not because the conflict itself does not merit warlike operations. Indeed, in the abstract, the idea that sometimes war is justified barely needs defence.

In Israel's Gaza operation this past January, there was much forceful rhetoric on her tactics and strategy – was it "war crime" like to let so many die in the name of "hunting terrorists"? This very debate is

"Analyzing Israeli security policy involves a healthy amount of existential paranoia..."

healthy and should be encouraged, ongoing and meaningful in any period of wartime. This conflict's prominence in Western and Arab media surely makes for more sensitive and often more passionate debate, than say, the conflict in Burma that has raged for over 40 years with little Western intervention to bring about peace.

The end result of most military conflict is not some Versailles-esque, winner-take-all treaty; and doves in Israel and Palestine know that compromise is the lifeblood of hope for a peaceful resolution. In the meantime, however, there is the nouveau war-of-attrition between the militants in Gaza and the Israeli Army. The question to ask is, do Israelis and Palestinians have a right to respond to each other's violence (and non-violence)?

Analyzing Israeli security policy involves a healthy amount of existential paranoia - something that Palestinians are also painfully familiar with. Security policy is the defining political issue in both communities, with meaningful, largely unregulated debate going on throughout the Israeli and Palestinian media.

While one might advocate for a given strategy, or for given tactics in the military arena of this political and cultural conflict, he or she cannot reject violence in all circumstances and adopt a pacifist position. The position that asserts nonviolence in response to all conflicts would have let the Nazis win, Canada join America in 1812, slavery continue, etc. Compassion dictates that some argument and perspective will exist to support military or police solutions to injustice in a given situation.

The debate over strategy has been particularly divisive in the Palestinian community, with a split in governance and two different approaches to peace playing out in a strange geopolitical Kabuki theatre; and with the political horse-trading taking place among Israelis still underway, the

Israeli population is transparently divided.

While the security stranglehold Israel has over the Palestinian community may reinforce the currency of guerilla violence, peace negotiations have yet to guarantee either security or statehood. Even when negotiations established Palestinian self-governance structures ahead of eventual statehood with the Oslo process, there were those criminals who pursued violent subversion and disruption. They seem to have succeeded so far; the response of the security community has been to mobilize and leverage military assets in the hopes of asserting the conditions for peace.

There is always a choice being made to engage in violence even if it is "reactive," but it is naïve to ignore the coercive effects of victimization in the political and moral calculus of Israelis and Palestinians as they carry out this war. That is, Israelis and Palestinians are repeatedly faced with existential security questions, and their leaders are under enormous pressure to "solve it." This often means security services are mobilized, in an ongoing cyclical "tit-for-tat."

We take as a given that when a legitimate social and political entity suffers injustice that it have a right to respond. The lack of full democratic rights for all those within Israel's de facto borders, the "Apartheid" that designates the Arab population of "Greater Israel" as unequal denizens, is grounds for a Palestinian response (of some kind) is it not? That this oppression warrants opposition is the basis for a legitimate Palestinian resistance movement. To deny Israel this most basic right in reciprocal fashion is to deny its legitimacy as a whole.

If there is a legitimate Palestinian resistance that includes some violence as part of



the strategy, then there must be some Israeli responses, sometimes violent, that are acceptable. To reject Israel's option to use her military to respond to the rockets from Gaza therefore rejects Israel on existential grounds. Any rejection of nationalism must cut all ways.

If indiscriminate rocket fire, or other guerilla warfare is not 'grounds' for an Israeli response (of some kind) then does this not also reject the two-state solution?

[Continued on Page 15]



# BOKHIM VE-YORIM... CRYING AND SHOOTING: LEGAL QUESTIONS ON ISRAEL & GAZA

Mai Taha

“Palestinians wanting to go from the Gaza Strip to the West Bank, or vice versa, can in theory do so without crossing through Israel. [They] can enter Egypt through the Rafah crossing, go by taxi to the airport in el-Arish or Cairo, and fly to Amman, in Jordan. From there, they can take a taxi to the Allenby Bridge, and then go to anywhere in the West Bank.” (2005 B’Tselem report). Piece of cake!

This statement demonstrates the limitations inflicted on basic freedoms of the Palestinian people such as a harmless act of visiting a friend or even a spouse or a

“Clearly, no one would *like* to be attacked by a rocket in his/her home. At the same time, no one would *like* to be occupied for nearly 42 years...”

daughter. These restrictions were exacerbated since June 2006 when Israeli helicopters fired rockets at Gaza’s power plant to retaliate for the capture of an Israeli soldier, leading to 8-hour power cuts per day. Israel has placed severe restrictions on the Gaza borders preventing entry of basic goods that are essential for the survival of a population, rendering Gaza, as is conventionally referred to, an ‘open-air prison’.

This background is essential in contextualizing the recent attacks on Gaza. Israel has claimed its right to self-defence from the home-made rockets fired by Hamas.



Evidently, no one would *like* to be attacked by a rocket in his/her home. At the same time, no one would *like* to be occupied for almost 42 years, particularly if it is an occupation that prompted the building of settlements, the construction of a Wall (2004 ICJ Wall Decision), influx of refugees, home demolitions, population transfer, land seizure, blockade, starvation, and imprisonment. All these factors play a fundamental role in the internationally-proclaimed right of self-determination of the Palestinian people as one unit. The ‘celebrated’ withdrawal from Gaza is, on one level, insignificant because it strengthened the occupation in the West Bank, enforced a blockade regime on Gaza and undermined the Palestinian right to exist as one people. It is questionable how the two-

state solution is still on the horizon in the context of two isolated territories, not only from each other but also from the rest of the world; one of which is in a constant blockade and the other “hosts” a large settler population with a Wall snaking through the territory.

Nevertheless, it is important to address in light of the recent attack, the self-defence concern of the Occupying Power. The UN Charter has a general prohibition on the use of force in Article 2 (4), however Article 51 of the Charter permits the use force only in the case of self-defence against an “armed attack.” Perhaps one of the most cited cases on self-defence predates the Charter, the *Caroline Case* (1837). In this case, the Court found that the party must “show a necessity of self-defence, instant, over-whelming, leaving no choice of means, and no moment for deliberation.” One would wonder why ending the blockade (which in and of itself is considered an act of war in Article 3 (c) of General Assembly resolution 3314 (1974)) was not seen as one of the possible ‘choices’ that could have been resorted to by Israel. Or more optimistically, and perhaps naively, ending the occupation can be another ‘choice’. This is especially significant since the “Gaza truce [was] broken as Israeli raids kill[ed] six Hamas gunmen” on November 4<sup>th</sup> (The Guardian, 5 Nov. 2008). It is important to note that Hamas is portrayed to have broken the cease fire. Nevertheless, the sequence of events suggests the contrary. Three weeks after the November 4<sup>th</sup> incident and with the tightening of the blockade, Hamas refused to renew the truce; it was only then that Hamas announced the official end of the truce (The Guardian, 19 Dec. 2008). This sequence demonstrates Israel’s pre-meditated decision to wage a military aggression on Gaza.

In 1996, the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* emphasized the two pre-requisites for the application of the self-defence rule, precisely necessity and proportionality which were deemed to be principles of customary international law (Kindred & Saunders, Int. Law, 1139). I need not recount the causality statistics of the war waged on Gaza but invoking the principle of proportionality questions whether 13 Israeli casualties can be matched with more than 1,300 Palestinians. On a more general level, can a long-standing occupation (an act of war in international law) be considered proportionate to the actions of Palestinian resistance (and even before the

establishment of Hamas in 1988)? No; the excuse was first Arafat and now it’s Hamas. Significantly, the 1970 UN GA Resolution on Friendly Relations calls upon states to refrain from any forcible action which deprives a population from *resistance* in pursuit of their right to self-determination.

In the famous *Nicaragua* case, the ICJ made a distinction between military operations that can be classified as ‘an armed attack’ and “mere frontier incident[s].” Specifically, the Court states that an armed attack carried out by “armed bands, groups...” had to be “of such gravity as to amount to an actual armed attack conducted by regular forces.” It is questionable whether the actions undertaken by Hamas can be considered ‘an armed attack’ that would be imminent enough to wage a large-scale war. Notably, according to statistics from the UN Organization for Co-ordination of Humanitarian Affairs, in the last three years before the December 27<sup>th</sup> attack on Gaza, 11 Israelis were killed by



rocket attacks while 1,250 Palestinians were killed during the same period.

The conduct of the Israeli forces during the war on Gaza (*jus in bello*) also falls short of the basic pre-requisites: necessity and proportionality. Israel attacked the UNRWA school which hosted Palestinian families with their children. Additionally, there were serious allegations from Human Rights Watch that white phosphorous (which eats into the flesh of those injured by it) was used in the conduction of military operations in Gaza. Was this necessary? Was it proportionate?

I would like to end by recognizing the tragedy of killing civilians whether Israeli or Palestinian. Yet, despite the limitations and inherent problems in public international law, it lends support, even if minimal, to the occupied peoples. On a more personal level I find it difficult to expect an occupied population to assume the role of the three wise monkeys. I don’t expect a suffocating, starved, occupied and isolated population to ‘see no evil, hear no evil, speak no evil’ and *act* no evil. ■

## ACID ATTACKS: AN ONGOING TRAGEDY

Abrar Huq

Acid attacks or vitriolage, the act of throwing acid at a person, has become a problem rampant throughout South Asia. It is estimated that 80% of victims of acid throwing are women, and that 40% are under the age of 18. The attackers are often men motivated by family disputes. Women who reject sexual advances, marriage proposals, or somehow “dishonour” their family such as by dressing “immodestly” are commonly victimized.

Victims of acid throwing often suffer significant psychological and physical damage. The physical disfigurement that arises can have serious repercussions. Victims are often subjected to prejudice and are stigmatized by their community. Many victims are never fully integrated into society. Often, these attacks occur in rural communities, where domestic violence is commonly used to settle disputes. Cases frequently go unreported, as much of the South Asian rural population is unaware of available avenues of recourse. Moreover, where the avenues are known, many rural victims are too poor to litigate such matters. Education levels in the region are very low, with many children not attending school at all, making awareness a difficult proposition. There are efforts to raise awareness through television advertisements demonstrating what to do when somebody has acid thrown on them, and where to get medical treatment and legal assistance. However, these efforts do not reach rural communities lacking electricity.

Legislation attempting to mitigate the problem has been introduced in several South Asian states. In 2002, Bangladesh began to enforce capital punishment for acid throwers, charging perpetrators with attempted murder. Bangladesh has also begun to regulate the distribution and availability of acids and similar substances in the market through its *Acid Control Order*. In Pakistan, perpetrators suffer the same fate as their victim under Qisas law. As a result, Pakistani acid throwers have been subjected to acid drops in the eye. India has recently made moves towards including specific clauses regarding acid attacks in its penal code. *The Prevention of Offences (By Acids) Bill 2008* provides for minimum sentences and the creation of a board to monitor the control of acid attacks country-wide and decide on relief and rehabilitation for victims. The bill has yet to be adopted.

Despite the introduction of some legislation, acid attacks on women continue to persist in South Asia. Many observers describe the enforcement of the legislation in Bangladesh as “weak” or “ineffectual”. Even with control efforts on the availability of acid in Bangladesh, a large underground market exists. The ruralised nature of the problem contributes to the ineffectiveness of the legislation. .

Several NGOs are attempting to promote awareness of the problem and the avenues of recourse available for victims, in rural areas. Bangladesh-based NGOs BRAC (Building Resources Across Communities) and Ain o Salish Kendra have human rights awareness programmes starting at the grassroots level in rural areas. Both also have expansive legal aid programmes for rural communities. NGOs in Bangladesh are also involved in the training of Sheboks and Shebikas, known as barefoot lawyers. These are influential rural community members trained to advocate for human rights and promote justice-seeking behaviour. The Bangladesh National Women Lawyers Association also provides legal aid for victims of acid attacks.

[Continued on page 15]

## IMPRISONED IN PARADISE

Elyssa Orta Convey

Cuba. In the midst of Canadian winter, the word conjures up images of shimmering beaches and a whirlwind of sun and sand. While this may be a reality for many spring-breakers, for the over 200 people imprisoned without cause in Castro’s Cuba, sunshine is an unattainable luxury. Thrown in jail for non-violently exercising the rights to freedom of expression and association, opponents of the Castro brothers’ brutal regime face faux charges, sham trials, and long, abusive sentences. Amnesty International officially recognizes 58 of these prisoners as ‘prisoners of conscience,’ who are detained not on the basis of crime, but because of their “their political or religious beliefs or because of their sex, nationality or ethnicity”.

In the spring of 2003, termed the ‘Black Spring’, the Cuban government imprisoned 75 activists and independent journalists in a furious attempt to crush civil society. Dr. José Luis García Paneque was sentenced to 24 years in prison for defending the Universal Declaration of Human Rights. Once a healthy 42-year old, the prisoner of conscience now weighs less than 100 pounds, and suffers from potentially fatal bleeding; a result of the conditions in prison. Tragically, Dr. Paneque’s story is shared by many.

Last February, Cuba signed on to both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Cuba is thus obliged to ensure the protection of human rights, and to “take the necessary steps to adopt such legislative or other measures as may be necessary to give effect” to these rights. Although the ICCPR states that, “the freedom to seek, receive and impart information and ideas of all kinds” must be respected, Cuba’s Foreign Minister Felipe Perez Roque asserted that the government only accepted the covenants with reservations.

The continued detention of prisoners of conscience may have been exactly the kind of reservation to which Roque referred. The Cuban government has long restricted the free movement of its citizens, prohibiting travel and independent political gatherings outside of the Communist Party. As the ICCPR guarantees the right to peaceful assembly, freedom of religion, freedom to leave a country, and equal protection before the law, there was hope that the transfer of power to Raul Castro would usher in democratic liberalization; however, brutal police violence against civil society activists persists. One year since the signing, over 50 prisoners of conscience have yet to see the light of day.

With the gaze of the international community fixed on the Guantánamo detentions, it is imperative that we acknowledge the similar brutal and repressive mechanisms in the Cuban state. Led by Raul Castro, the government has flagrantly violated the international covenants which it volitionally signed. Cuban prisoners of conscience have lost their liberty for peacefully pursuing democratic change. While Cubans take great pride in the natural allure of their homeland, a popular refrain bemoans the ocean waters that physically keep hostage even those that are not behind bars, ‘Tourists pay to go, but Cubans are not free to leave.’ In solidarity with the Cuban population, and out of respect for the democracy we enjoy, Cuba should not evoke sultry images of unmarred beaches and open waters. The real image of Cuba is one of dank detention centers, danger in every public gathering, and a pervasive lack of freedom. ■



## IHRP SPEAKER SERIES REVIEW

### LEFT OUT IN THE HUMAN RIGHTS COLD

Rebecca Sutton

As part of the International Human Rights Program's Speaker Series, Osgoode Hall Law School Professor Obiora Chinedu Okafor gave a lecture at U of T on January 15, 2009 on 'Attainments, Eclipses, and Disciplinary Renewal in International Human Rights Law'. Professor Okafor, who has been working for decades on issues relating to human rights and whose most recent work involves a study of human rights activism in Nigeria, candidly shared his critical perspective of international human rights law. He described the growing acceptance of, and interest in, human rights in International Law in the last twenty years, noting the ever increasing number and diversity of states and peoples across the world who now speak in the language of rights. To fully appreciate the attainments of human rights, Okafor argues, we must shift the lens away from focusing merely on state compliance and examine how human rights norms have extended beyond state boundaries into the domestic realm.

The importance of shifting the lens also emerges with respect to the 'eclipses' of the human rights discipline. As Okafor explained, the story of the origin of the discipline is more often than not told in a way that excludes and alienates the struggles of people in the very places we would like it to have an effect. That is, in seeking to locate the discipline's origins in a western place or event, we obscure from sight the human rights struggles that individuals and groups in Africa, Asian, Latin America and beyond were waging for years before the Universal Declaration of Human Rights. By placing in the background that which should be in the foreground, and vice versa, we create obstacles for the discipline to achieve that which it seeks to achieve: universality. This is compounded by the tendency to treat third world culture (if it exists) as something that is oppositional and that is to be abolished, erased, and obscured. Okafor finds the embedded assumption that there is no dissent within a culture particularly problematic, and draws attention to the depiction in mainstream human rights discourse of the human rights 'savior' as almost always Western, and the human rights 'savage' as almost always non-Western.

From Okafor's perspective, regardless of how far human rights law has expanded its zone of protection, someone has always been left out in the human rights 'cold'. While those who are powerful are allowed to displace suffering by shifting the boundaries of human rights protection, Okafor contends that this mere displacement fails to fundamentally transform the nature of the suffering, global social life, or the nature of the human rights discipline.

While Okafor remains doubtful that the discipline will be transformed in the near future, he strongly believes in its possibilities for renewal. He points to Human Rights Watch's U.S. program (which focuses internally on the U.S. itself as a human rights actor) as an example of radical change, and also notes a promising shift at Amnesty International toward focusing on economic, social and cultural rights. The message Okafor leaves us with is that in order for the deeper structure of the discipline to be renewed—with the ultimate goal being its fundamental transformation—the growing acceptance of and interest in human rights law internationally must be accompanied by an enhanced appreciation for those who have truly built its foundation, and increased attention to those who continue to struggle in the human rights cold. ■

### GUANTÁNAMO FROM THE INSIDE

Anna Pippus

An unlikely activist to speak out against Guantánamo, former Lieutenant-Colonel Darrel Vandeveld used humour and self-deprecation to tell his personal story as a prosecutor in the notorious military commissions.

Vandeveld captured the attention of a near-capacity crowd in FLB on February 26. By taking us through his personal journey from once-ardent military prosecutor to revelations that caused him to completely restructure many of his views, Vandeveld offered his story—sacrificing his own ego—to demonstrate some of the systemic issues and atrocities taking place at Guantánamo.

The PowerPoint flashed image after image of Al-Qaeda attacks: Kobart Towers, the USS Cole, the Limburg, and Daniel Pearl to name a few. These devastating images were meant to provide the context from which someone like Vandeveld could become so passionately mobilized against the terrorist organization. He freely admits that, after working in war-torn countries and seeing many friends injured, he had become degenerated and partisan and was seeking revenge.

The *Military Commissions Act* was legislated quickly and quietly following 9/11. It was written by some of the country's brightest and best young minds who, according to Vandeveld, were sadly being put to the wrong use.

Upon arriving at Gitmo, Vandeveld's first task was to review cases. Immediately it became clear to him that something was amiss. The name on the first file he examined was Hajji Bismullah – this first name is not a given name, but an honour title bestowed on those who have undertaken the spiritual pilgrimage to Mecca, the Hajj. Vandeveld realized that a lack of cultural understanding may have contributed to what would turn out to be a grievous error. When he delved further into this file, he found no evidence whatsoever that this alleged terrorist had done anything wrong. Vandeveld wrote a letter stating that Hajji Bismullah should be released immediately with US apologies. In fact, he was held until just last month—after five years in Guantánamo—without ever having access to a lawyer.

Altogether, Vandeveld prosecuted six cases. The only one not subject to classification, and the case that has received a great deal of media attention, is that of Mohammad Jawad.

Like Omar Khadr, Jawad was only a teenager—sixteen years old—when he was arrested for throwing a grenade at American soldiers. He was charged with three specifications of attempted murder, and apparently confessed several times. However, when Vandeveld saw his signed confession, it was written in Farsi. Not only does Jawad speak Pashtu, not Farsi, but he is functionally illiterate.

Jawad's defence counsel, law professor David Frakt, aggressively raised every conceivable motion and inundated the prosecution with supplemental filings. At first, Vandeveld said he found Frakt to be an "overgrown adolescent" who simply did not understand the realities of war. [Continued on page 15]



Col. Vandeveld

## ALUMNI INTERVIEW: HANNAH ENTWISLE

*Hannah Entwisle, (J.D. 2004) worked as a policy officer at the United Nations High Commission for Refugees (UNHCR) on issues of internally displaced persons (IDPs). She is presently a policy officer in the UN Office for Coordination of Humanitarian Affairs, working on issues related to food security and humanitarian affairs.*

### **What did your position entail day to day?**

My job varied between work in Geneva and extended field missions. In Geneva I worked on developing UNHCR's internal policies on providing protection and assistance to IDPs including drafting papers for Member States on UNHCR's 28 IDP operations, writing talking points and briefing notes for UN officials, as well as looking at legal issues related to the protection of IDPs in both conflict and disaster situations. During field missions in Kenya and the Middle East I helped coordinate UNHCR's work with other humanitarian partners and governments, and provided advice on IDP legal and protection issues.

### **What was your work experience prior to this position?**

I worked previously with the United Nations Office for the Coordination of Humanitarian Affairs, first as an intern as part of the International Human Rights Internship program, and later as a Desk Officer for the 2004 Indian Ocean Tsunami, and in the Internal Displacement Division. I also worked with other non-governmental organizations in Uganda, Israel, and the United States prior to and during law school.

### **What law school classes did you find helpful in your work?**

I found a number of classes useful. First year law courses inevitably come in handy, particularly Property Law (because displaced people often face land and property issues when they are forced to flee, and then later want to return), Tort Law, Criminal Law, and Constitutional Law. However other useful classes have been Public International Law, International Human Rights Law, the Human Rights Law Clinic, Migration Law, Administrative Law, and Poverty Law.

### **What are the major challenges or frustrations in your position?**

Because I work on policy issues, I was sometimes frustrated by the distance between myself and the displaced people that UNHCR assists. It could be difficult to see the immediate value of my work. Visits to the field operations helped to maintain my enthusiasm and connection to the issues and communities.

### **Do you feel like you are impacting people's lives and/or the furtherance of human rights? How?**

Through my work I am contributing to the international humanitarian community's efforts to improve assistance to people displaced by war or natural disasters. Since I began working with the UN, I have seen a real and substantial improvement in the UN's responsiveness to providing protection and assistance to those most in need.

### **What advice do you have for law students who wish to work in international human rights?**

I would encourage law students to take advantage of the International Human Rights Law Clinic and Internship programme to gain practical experience. In particular, I would suggest that students seek opportunities with small non-governmental organizations and legal aid clinics that will provide exposure to human rights work at the grass-roots level. ■

## CONGRATULATIONS TO THE 2009 IHRP INTERNS

Luiz Bihari  
Ashoka, Innovators for the Public (India)

Milton Castelen  
Canadian HIV/AIDS Legal Network  
(Toronto)\*

Maria Mercedes Cavallo  
The Irish Family Planning Association  
(Ireland)\*

Sandra Dughman  
Canadian HIV/AIDS Legal Network  
(Toronto)\*

Bahaa Ezzelerab  
Egyptian Initiative for Personal Rights  
(Cairo)

Erin Hallock  
United Nations High Commission for  
Refugees (Nepal)

Natasha Kanerva  
United Nations High Commission for  
Refugees (South Africa)

Ryan Liss  
Coalition for the International Criminal  
Court (New York)

Amanda Montague  
Justice of Children and Youth (Toronto)

Brendan Morrison  
Zimbabwe Lawyers for Human Rights  
(Harare)

Wade Poziomka  
International Labour Organization  
(Geneva)

Eileen Rhein  
The India Centre for Human Rights Law  
(India)

Nicole Simes  
United Nations High Commissioner for  
Human Rights (Geneva)

Rebecca Sutton  
Forced Migration Studies Program (South  
Africa)

Laura Tausky  
United Nations High Commissioner for  
Refugees (Geneva)

Aneesa Walji  
Human Rights Watch (New York)

Josephine Wong  
United Nations Development  
Programme (Geneva)

\*Interns with the support of the International Reproductive and Sexual Health Law Program

## BOOK REVIEWS

### KAREN CONNELLY'S *THE LIZARD CAGE*

*Erin Hallock*

Living in confinement and deprivation, the world of a political prisoner is rarely seen with his eyes but is rather experienced in every minute detail by way of his other heightened senses. Through the words of Karen Connelly in *The Lizard Cage*, there are particular sensations from within this world that are experienced acutely by her readers. For example, they can hear the reverberation as the man without a tongue beats out the hour on the prison's iron timekeeping pole and feel the pit of hunger swelling within the stomach and throughout the entire body of the solitary prisoner when he realizes his nightly meal will inexplicably not be served. It is with a consistent focus on these coarse and unrelenting realities that *The Lizard Cage* transports its audience into Teza's teak coffin, an isolated cell of a Burmese prison under the control of the military dictatorship; the place where "the Singer" has already spent seven years, and hesitantly anticipates the thirteen more that will follow.

In Connelly's tale, we meet the prisoner Teza and his constant prison companions: from cockroaches and a spider reliably weaving its web, to the memories of his family and Buddhism's Eight Precepts demanding his observance. In addition, however, the Singer's sentence in solitary confinement is punctuated by the interaction that he has with the cast of prison inhabitants, from fellow prisoners to the guards who carry the keys. And then there is the unexpected character who has found his way into the cage and made his home there voluntarily, because he feels he has nowhere else to go. At first glance, there is an obvious way to classify these characters as being either good or evil, especially when some exhibit the innocence of youth and others wield an interrogator's fist. On a closer examination, however, Connelly invites readers to relate themselves and their situations to the challenges being faced by people in a country where a military dictatorship rules. And she asks them to imagine a world in which prison warders and convicted criminals are constantly and actively making choices between good and evil, and their choices will not always conform to the roles that they are intended and expected to fulfill. Readers end up asking themselves whether they would have the strength and the courage to sacrifice themselves, to endure and a loss of liberty and the severest of torture, for the sake of a revolutionary movement or on behalf of a fellow member of humanity.

*The Lizard Cage* tells the story of revolution that the powerful are attempting to suppress with iron bars and an attack on the endurance of the human spirit. At the same time, it provides a commentary on the strength of the communication of such stories, recognizing the power that can be gained by extrapolating meaning from a few words on scraps of newspaper or simply wielding a pen. Karen Connelly portrays both messages artfully and has provided a work of fiction that has the potential to resonate with all of its readers. ■

### KERRY PITHER'S *DARK DAYS*

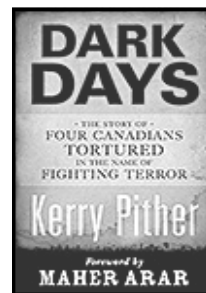
*Laura Brittain*

Maher Arar is a household name in contemporary Canadian human rights advocacy. *Dark Days* tells his story, along with three other stories that, while disturbingly similar, have not become so commonplace. Ahmad El Maati, Abdullah Almalki, Maher Arar, and Muayyed Nureddin, four Canadian Muslim men, give personal accounts of their torture abroad. While heartbreaking at points, *Dark Days* is surprisingly easy to read, presenting a fair, balanced, engaging, human and unexpectedly hopeful treatment of one of Canada's most sinister failures.

Pither has artfully toed the line between advocacy and responsible journalism. Written to lend our ears to these four men, it is their voices that ring throughout the book, whose goal is undeniably to expose Canada's involvement in torture. Yet while reading, the audience is not presented with wild accusations nor conspiracy-laden theories. Pither uses media accounts, press releases, interviews, law, accurate geographical descriptions, government projects reports, and the findings of the Arar Inquiry to weave a balanced and responsible presentation of events. With an astounding knack for organizing information and timelines, Pither leads her readers through her research, poses poignant questions, and then leaves us to draw our own conclusions.

In doing so, she advocates for accountability, supports the proceedings of the Arar Inquiry as a means of securing justice but asks for further fingers to be pointed at those who designed and executed an anti-terrorism investigation that ended in torture abroad.

What might have been an angry and sanctimonious condemnation is simply an account of the lamentable shattering of these four men and their courageous and aching human reclamations of themselves. What sticks with me are not the descriptions of torture but of the humanity and grace of its victims in its face. Mr. El Maati considers himself one of the lucky ones, simply for having the right to ask questions and the possibilities of receiving an answer. These men are concerned with resuming their lives, seeking justice, and admirably ensuring that Canada as a collective learns from this grave mistake. ■



### HUMAN RIGHTS IN FOCUS

Karen Connelly and Kerry Pither are scheduled to speak next semester at *Human Rights in Focus*, an event to support the IHRP summer internship program. The goal of the event is to celebrate and share the work of interns with students, alumni, faculty, and members of the community. In addition to the speakers, the event will include a photo auction exhibiting pictures taken by previous IHRP interns, and an opportunity for people interested in human rights issues to mingle in an atmosphere of food, drinks and musical entertainment. All of the money raised from the event will be used to increase the number of students who can participate in the internship program. Hope to see you there!



## UPCOMING HUMAN RIGHTS EVENTS

### Munk Centre

#### **The State of Democracy in Africa**

Friday March 20  
2:00-4:00  
108N, North House

#### Speakers:

Kwaku Sakyi Ado – TV3 and former correspondent for BBC and Reuters  
Antoinette Handley – University of Toronto  
John Ejobowah – Wilfred Laurier University  
Thomas Tiekou – University of Toronto

#### **Bosnia's Genocide Case: Moral Claims and the Politics of Statebuilding in a Divided Society**

Friday March 27  
12:00-2:00  
108N, North House

#### Speaker:

Maja Catic – Doctoral Candidate, Political Science Brandeis University

### Ryerson

#### **2<sup>nd</sup> Annual Aboriginal Awareness Day**

Tuesday March 24  
9:10am-10:15am – Traditional Teachings  
11:00pm-2:00pm – Dancing  
2:00pm-3:00pm – Movie  
3:00pm-4:00pm – Traditional Teachings  
SCC 115, Student Campus Centre, 55 Gould St.

### York

#### **Third Annual York University Oputa Lecture on Governance in Africa**

Friday March 27  
12:30-2:00pm  
106 Osgoode Hall Law School

#### Speaker:

Right Honorable Dimeji Bankole – Federal House of Representatives (Parliament), Federal Republic of Nigeria

## REFUGEES [FROM PAGE 1]

United States failed to comply with key obligations under the *Refugee Convention* and the *CAT* – a finding which rendered the STCA unlawful on both administrative and *Charter* grounds.

Following the predicted uproar from Ottawa, the Federal Court of Appeal (FCA) issued a stay of Justice Phelan's decision until it could hear the appeal. Many refugee advocates were concerned the FCA would erode some of Justice Phelan's determinations, watering down the impact of the decision. In fact, the FCA went much further. With language that was quite disparaging of Justice Phelan's reasoning, the FCA reversed the Federal Court's findings on both the administrative and constitutional law grounds.

On the administrative law ground, the FCA held that the statutory provision requiring Cabinet to 'consider' a country's conformity with the *Refugee Convention* and the *CAT* prior to designating it a 'safe third country' had one plain and ordinary meaning. That is, it simply meant 'consider.' The term could not, as Justice Phelan reasoned, be stretched by constitutional and international law considerations to require that a country *actually* comply with the relevant human rights treaties prior to designation. According to the FCA, so long as Cabinet 'considered' and was satisfied of US conformity with the treaties, the *vires* of the Agreement was unaffected by whether or not the US *actually* complied with them.

The FCA's *Charter* analysis was even more technical and curt. In fact, it failed to conduct any analysis at all. Rather, the FCA stripped the human rights organizations who brought the case of their public interest standing. The FCA noted that a refugee claimant who was denied entry at the border could her/himself launch a judicial review of the decision. Thus, the Applicants failed to meet the key component of the public interest standing test: that there be no other reasonable or effective manner to bring the issue to court. The John Doe from Colombia was also barred from bringing a *Charter* challenge since the US had already granted him protection by the time the FCA heard the case – rendering his claim moot.

In denying the application to appeal the FCA's decision, the Supreme Court's continued a number of trends in its human rights jurisprudence in recent years. None of these can be termed rights-friendly but each is increasingly common.

Firstly, the Court once again signalled its extreme reluctance to judge the human rights practices of other countries and especially those of the United States. This trend was most apparent in the Court's decision in *Canada v. Khadr* last year but is also evident in its stubborn refusal to grant leave in any of the so-called 'US War Resisters' cases.

Secondly, the Court has side-stepped another promising opportunity to clarify the relationship between the *Charter* and international human rights law. While the Court recently signalled a heightened role for international human rights law in interpreting the *Charter* (*R. v. Hape*, *Canada v. Khadr*), the jurisprudence in this area has left the government and rights-advocates completely at odds over what the law is.

Lastly, the Court's refusal of leave in this case continues the steady erosion of *Charter* protections for non-Canadians. While the Court shunned the notion of differential rights regimes for nationals and non-nationals in the early *Charter* era, recent jurisprudence has steadily reversed this trend (*Charkaoui v. Canada*; *Medovarski v. Canada*). Most tellingly, the Supreme Court has not heard a case concerning refugee law in seven years.

In denying leave in *Canadian Council of Refugees*, the Court missed an opportunity to stall, if not reverse, these trends. But this case may not be the last time the STCA comes before the courts. Here, the FCA dismissed the *Charter* arguments brought by the Applicants in this case on a matter of standing; it never considered the merits of the challenge. As such, it is still open for advocates to find a refugee claimant who did approach the border and was denied entry (and thus would almost certainly be in US detention) and to launch a *Charter* challenge in her/his name. In other words, the STCA has closed the door to refugees and, by denying leave, the Supreme Court has locked it. But the key has been left in the door. ■

## HUMAN RIGHTS AND DEVELOPMENT [FROM PAGE 3]

arrangements in a way that is not sensitive to how these outcomes were brought about. Human rights thinking offers tools that amplify the concern with the process of development."

Thus, in addition to creating room for development in the faculty, my project also intends to provide an institutional space for students to explore these connections between development and human rights, making the dialogue more productive for both sides. For this purpose, my project will collaborate and interact as much as possible with the IHRP and the IHRC. If you are interested in taking part in this initiative, please come to our first meeting. A date will soon be announced on Headnotes. If you are not able to come to the meeting, please contact me directly ([mariana.prado@utoronto.ca](mailto:mariana.prado@utoronto.ca)) and I will be very pleased to meet and discuss how you can get involved. ■

## BASHIR [FROM PAGE 4]

Postponement should be viewed as a viable policy option to mitigate the potential damage arising from the indictment. A one-year deferral would not remove the threat of bringing Bashir to trial, yet its renewal would serve as a potential bargaining concession to offer Bashir in exchange for compliance on Darfur. The Security Council took bold steps to pass Resolution 1593. It should either be held accountable for the human consequences of that decision or have the political courage to take a more nuanced approach that will facilitate both peace and justice. ■

## **MUNYANEZA [FROM PAGE 5]**

testimony in the trial of Arsene Shalom Ntahobali, with whom he is alleged to have carried out the atrocities.

Munyaneza's arrest took place several years after his 1997 arrival in Canada. He travelled here with a forged Cameroonian passport, and made an unsuccessful refugee claim. Based in large part on RCMP testimony, the Immigration and Refugee board denied Munyaneza's application under a strong suspicion that he had participated in the genocide. The 1951 Convention Relating to Refugees excludes from protection persons about whom there are "serious reasons" to believe that they have committed such a crime.

The details of Munyaneza's case have sparked anger as they have been promulgated through the media. A 17-year-old fellow inmate severely beat Munyaneza in his Montreal jail upon learning about the case. The teenager broke his nose and caused facial lacerations and head trauma.

Final arguments were made in December 2008. Justice Andre Denis is expected to take several months to make his final rulings. Whatever the outcome of the trial, appeals are expected, and the case is likely to reach the Supreme Court of Canada. ■

## **SRI LANKA [FROM PAGE 6]**

merit, the government needs to do more to restore its legitimacy in the eyes of the Tamil people. While not all Tamils believe that the only solution is a separate state, most do not trust the government and their concerns are reasonable. Any effort to build peace in Sri Lanka will need to involve prolonged good behaviour on the part of the government, which will undoubtedly require a change in the legal status quo, not just observance of it. Even if the government is willing to agree to some form of Tamil self-governance (short of independent statehood), absent other indicia of genuine goodwill such an offer will lack credibility to many Tamil people.

The world must remain concerned about the intentions of Sri Lanka's government and recognize the danger that attends the decimation of the Tiger forces. This is a crucial time for the small nation; the government may be led to violate the rights of its citizens in a hopeless effort to completely eliminate the LTTE, or it may recognize the opportunity to offer a real alternative to its Tamil minority. If Canada and other nations involve themselves in any way, it should be to pressure the government to concede the institutional protections that will make a one-state solution realistic. ■

## **CUBA LIBRE? [FROM PAGE 7]**

Their numerous uprisings were met by U.S. troops in riot gear with fixed bayonets." Eventually, most Cuban detainees were airlifted to Florida, while the majority of the Haitians were repatriated. Guantánamo's history is marked by the politics of what Barry Hindess calls "terroritory," the use of terrorist tactics by state governments to assert sovereignty over territory. While the prison may be closing, there is no indication that the Obama administration will close the base or dismantle the prison infrastructure. Given the bay's history and its subjection to U.S. "jurisdiction and control" in perpetuity, it is optimistic to expect

Guantanamo to remain closed forever.

Cuban president Raul Castro maintains this optimism, however. In an interview with actor Sean Penn, he stated that he and Obama "must meet and begin to solve our problems, and at the end of the meeting, we could give the president a gift. We could send him home." with the American flag that waves over Guantanamo Bay." ■

## **ISRAEL [FROM PAGE 8]**

Does it not reject the idea that there should be a Jewish state at all? While there is broad global consensus that this conflict is best resolved diplomatically, belligerents on either side of the Wall are seeking greater security. Those who deny Israel such a right, and allow for an unchecked Palestinian resistance should explicitly acknowledge this. How could it be acceptable that one would reject a people's option to organize violent resistance?

If we take part in a discussion, though, of how Israel chooses to pursue security policy, then we acknowledge that she has a right to exist of some kind. The same debate over Palestinian security policy that is common in the Gazan and West Bank Palestinian community is largely absent in the international "Solidarity" community of anti-war, pro-Palestinian and anti-US Imperialist activists, where debate over Israel's security policy is commonplace (of course, Israelis debate their security policy ad infinitum).

Accepting that Palestine and Israel must both exist, with sovereign governments, means accepting that there will be security policy discussed in the public sphere in both communities. Moreover it means knowing that the basis of the war being fought is both existential and behavioural – challenging specific security policies shouldn't mean rejecting statehood for both peoples. ■

## **ACID ATTACKS [FROM PAGE 10]**

Despite admirable efforts of NGOs, they cannot meet the needs of people who have been spurned by their communities. Implementation of stricter regulations and enforcement is needed. It is time to put pressure on South Asian governments not to ignore the egregious human rights violations being committed against the people in rural communities within their borders. ■

## **GUANTÁNAMO [FROM PAGE 11]**

But it wasn't long before his views changed. Vandeveld had a revelation: Frakt was not pursuing an ideology at all, but rather just wanted the truth to come out.

Vandeveld became disturbed by what he was beginning to realize was a deeply flawed system that often targeted the wrong individuals. He felt like he was "losing a part of [him]self" by being involved in the military commissions. However, he admits that he "is ashamed to say it took [him] too long to separate [him]self from this process." Upon seeking the advice of his priest, who encouraged him to quit, Vandeveld finally mustered the courage to walk away.

Vandeveld's final message to us was a reminder that in our Western land of plenty, nothing bad can really happen to one who dis-sents. Though he has been shunned by his military colleagues and threatened with ethics investigations, he is free and well. He is now able to do what is truly in Jawad's best interest, which is to speak out. Mohammad Jawad is currently still in Guantánamo. ■

IF YOU'RE INTEREST IN CONTRIBUTING TO FUTURE ISSUES OF *RIGHTS REVIEW* OR IN LEARNING MORE ABOUT THE FACULTY OF LAW'S INTERNATIONAL HUMAN RIGHTS PROGRAM CONTACT US AT [IHRRIGHTSREVIEW@GMAIL.COM](mailto:IHRRIGHTSREVIEW@GMAIL.COM)



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**VOLUME 2 SPRING 2009**