

RIGHTS REVIEW

OUT OF THE CLASSROOM AND INTO THE FIELD

Volume 3 Issue 1, Spring 2010

Rebecca Sutton

During first year orientation week in September 2009, I participated in a group dinner hosted by Professor Arnold Weinrib, the Chair of Admissions at UofT law school. With a seemingly photographic memory of every new student's application package, Professor Weinrib turned to me and said, "So, why aren't you in Afghanistan?" This was a fair question: up until just a few days earlier, my plan had been to take a position in Afghanistan working for War Child Canada. However, as Labour Day weekend approached — and with it the realisation that one more year of deferring law school had passed — I felt a strong pull to begin legal studies.

By the good graces of the administration at UofT, I was permitted to join the entering class. I felt quite confident about my decision, but nonetheless I quietly filed away the off-hand remark Professor Weinrib made later at dinner that I could call him if I ever needed a break from law school.

I had craved an opportunity to do field work in a conflict context since working at the Canadian headquarters for War Child, a humanitarian NGO that works with youth in conflict and post-conflict countries throughout the world. After completing 1L, I headed to South Africa on an IHRP internship and it was mid-way through this experience that I found out War Child was hiring a new Country Director in Sudan. When I saw the job posting, I remember thinking: "Oh! Here it is!" quickly followed by, "But I'm in law school." The conversation with Professor Weinrib resurfaced in my mind and somehow, miraculously, after a series of emails, discussions, and interviews, I was offered the job in Darfur and was granted permission to take a temporary leave of absence from UofT.

I headed to Sudan in September 2009. After a few weeks of orientation in the capital (which struck me as being infinitely safer than Johannesburg) I flew to West Darfur on a UN Humanitarian Air Service flight to take up residence in the town of El Geneina, where War Child's Sudan programming is based.

When Internally Displaced Persons (IDPs) began fleeing to El Geneina in the fall of 2003, the town had a population of around 100,000. While some individuals settled with relatives in the town, most moved into one of the twelve IDP camps that sprung up on its

outskirts. Apart from World Food Program and Sudanese Red Crescent food distributions, outsider involvement was initially quite limited and IDPs settled with little site planning or camp management. Services and facilities in the camps increased markedly in the ensuing years, as international attention on Darfur mounted and most of the major players in international aid set up operations. The continuous growth of the humanitarian presence was reversed in March 2009, when the International Criminal Court announced its plans to arrest Sudanese President Omar Al-Bashir and the government responded by expelling 13 aid agencies from Darfur.

Fortunately, War Child was not expelled from Darfur, and, by virtue of being composed almost entirely of Sudanese staff (it currently employs two expats and 55 national staff) its programming has continued with relatively little interruption since 2005. The organization's work is based in four of the largest IDP camps surrounding El Geneina, in the town itself, and throughout rural areas of West Darfur. Programming is focused on three main areas: Youth Development, Livelihoods, and Education. Youth Development supports youth committees and builds their skills in areas such as project implementation and conflict management. Livelihoods aims to increase the self-reliance of older youth by providing them with vocational training and small business training within the urban context, as well as agricultural services within the rural context. Lastly, Education delivers accelerated learning programs to facilitate the (re-) entry of youth into the formal education system in Darfur. [Continued on page 19]

INSIDE

Editors' Note	2
Khadr & Prerogative Power	3
Assessing Human Rights	4
Polygamy in Bountiful	5
Homophobia in Uganda	6
Switzerland's Minarets	7
Transgender Momentum	8
Head of State Immunity	9
Developments in Iran	10
Who is an Ivorian?	11
Burmese Elections	12
Transnational Justice	13
Alumni Interview	14
Inside the ICTY	15
Injustice for First Nations	16
SOGI Update	17
IHRP Speaker Series	17



NOTE FROM THE EDITORS

The release of our fourth and final issue as editors of *Rights Review* seems to be an appropriate moment to reflect upon the newsletter's progress in the two years since its inception. Bearing in mind that our objectives have always been to foster a human rights community at the Faculty of Law, to inform our readership on issues pertaining to international human rights, and to encourage debate among our audience, there is value in considering our achievements and where we have fallen short.

Rights Review began as an exercise in putting together a newsletter. With little in the way of instruction, precedent, or ability to navigate Publisher, we set out to create the first edition from scratch during the Fall Term of 2008. The result (at least by our standards) was less-than ideal. The articles were too few, the font was too large, and the pictures too dark. But we had made progress. We generated a name, a template and had opened channels between authors, IHRP stakeholders, and our readership. Perhaps most importantly, we provided a forum to pay tribute to Gurnam "Sunny" Sodhi, a valued law student and dedicated IHRP participant who died tragically in September 2008.

In our opinion, *Rights Review* has made considerable, if modest, strides in the interim. We hope you will agree that the articles within this issue are diverse, informative, and substantive. Our authorship has broadened beyond the small network that produced the inaugural issue. In these pages you will find articles by faculty, regular contributors, the IHRP community, as well as authors from outside the law school. *Rights Review's* readership continues to grow and is likely to expand with the long-overdue launch of the IHRP's new website (<http://utorontoihrp.com/>).

Nothing in these pages will change the world, and we never intended as much. *Rights Review* has succeeded, however, in becoming a compendium of facts, perspectives, and insights that occasionally makes an impression among a student body that is continually bombarded with information. This newsletter has also created links between current students and the alumni who read it to inform themselves of developments both in international human rights law and within the IHRP.

We did not succeed in all we set out to do. It seems that we have yet to create sufficient "buzz" to draw interest from those who are not already active in the IHRP. This limited both our audience and our contributor base, which, while wider than they once were, remain smaller than we would like them to be. We have also under-achieved our goal of fostering debate. The fact that we have never received a "letter to the editor", suggests a failure to engage the student body on the level we had envisioned. After two years, *Rights Review* has yet to become the self-sustained dialogue that it can be.

Two years is a blink of an eye in the life of a law school, and we are confident that *Rights Review* will reach its full potential with time. Whatever its failings and however incremental its advances, the newsletter is on the right track to becoming yet another of the Faculty's many enduring institutions.

The *Rights Review* is the semi-annual newsletter of the International Human Rights Program at the Faculty of Law, University of Toronto. Submissions regarding issues pertaining to human rights, whether informational or editorial, are welcome from any and all interested parties. If you are interested in contributing to the *Rights Review* or in commenting on anything you have read in these pages, contact us at ihrprightsreview@gmail.com.

— Ben Kates & Nicole Simes

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KHADR AND PREROGATIVE POWER

David Schneiderman

David Schneiderman is Professor of Law at the University of Toronto.

What one might call “older” constitutional law has been very much in the news lately with the two controversial prorogations by Prime Minister Harper; the government’s failure to disclose documents relating to Afghan detainees being released by Canadians to face torture; and the Supreme Court of Canada failing to provide a meaningful remedy for the ongoing breach of Omar Khadr’s *Charter* rights. Khadr, a Canadian citizen, has been held at Guantanamo Bay since 2002 on terrorism and related charges after being captured on Afghan soil. The Court found a serious breach of Mr. Khadr’s *Charter* rights, yet chose not to tread into the realm of foreign affairs by directing the government of Canada to seek his release from US custody. Though I focus solely here on the *Khadr* case, the thread common to all of these events is that they all concern exercises of the royal prerogative.

What is the royal prerogative? It is the unfettered discretion that once ran the machinery of government — Charles I described it as absolute and beyond reproach and was later beheaded — of which little remains. Despite the whittling away by statute and practice, what remains of the Crown prerogative is, nevertheless, significant.

Subjects such as treaty-making, diplomacy and the deployment of armed forces are matters within the realm of the Crown’s prerogative. They have been taken over entirely by the Prime Minister and his cabinet. Foreign affairs and national security remain, then, subjects for the exercise of Crown prerogative and so seemingly within the exclusive purview of the Prime Minister. This is one of the principal sources for the concentration of authority in the Prime Minister’s office.

Prerogatives continue to exist, however, only to the extent that they have not been disrupted by practice (such as disuse) or statute. No “modern lawyer,” wrote English constitutional authority A.V. Dicey in 1885, “would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of Parliament.” The conventions that have been built up around the Crown’s prerogatives ensure the supremacy of the House of Commons, Dicey wrote. Not to preserve power for its own sake, but to serve

the needs and demands of the people as expressed through their representatives in the House of Commons.

What role did the prerogative play in the *Kadr* decision? It forestalled any meaningful vindication of the continuing violations of Khadr’s *Charter* rights. As the prerogative over foreign affairs has not been displaced by statute, the Court preferred to defer to “the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account broader national interests.” The Court opted to “leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*” (para. 39).

In response the government merely requested that the US not use any evidence in proceedings against Khadr that was generated by Canadian officials. This provides little in the way of a meaningful remedy to a Canadian citizen who has spent eight years languishing in US custody.

Opposition parties outnumber the government in the House of Commons and can thereby direct the exercise of the royal prerogative by ordering the Minister to seek the release of Mr. Khadr. They must commit to do so, however, by statute. It is no small feat to proceed by way of a private members’ bill, but it is not impossible. The only danger lies in Canada’s unelected Senate where, by reason of recent appointments, Conservative senators enjoy a majority. However, independent senators hold the balance of power. Gathering the political will in the face of some hostile public opinion — the Khadr’s are described as “Canada’s first family of terrorism” — may prove the more difficult element.

Now is also an opportune moment to begin cataloguing and cabining all prerogative power. This is what the U.K. House of Commons Public Administration Select Committee recommended in 2004 and the House of Lords recommended in respect of the prerogative of deploying troops in 2006. These recommendations were on the heels of Prime Minister Blair’s decision to participate in the invasion and occupation of Iraq.

Two last things to note: First, the Court’s deference to the prerogative power over foreign relations is in stark contrast to other cases where the Court has ordered Canada to seek assurances that the death

penalty will not be pursued when an individual is extradited. The Court distinguished these earlier intrusions into Crown prerogative on the basis of “specific facts.” In the *Burns* case, for instance, “there was nothing to suggest that seeking such assurances would undermine Canada’s good relations with other states” (para. 42). Yet, the Court refers to no evidence tendered in the *Khadr* proceedings that suggests an order requesting his return would undermine Canada-US relations. The Crown

“This decision encourages secrecy and non-transparency in the exercise of the Crown prerogative by rewarding the government for not producing evidence regarding the possible release of Omar Khadr.”

instead conceded in the lower courts that it was not alleging that relations with the US would be damaged by a court order to make a request for the return of Khadr. Because the Crown adduced no such evidence, the Federal Court of Appeal issued a more meaningful remedy by directing the government to request Khadr’s return.

Second, and relatedly, this decision encourages secrecy and non-transparency in the exercise of the Crown prerogative by rewarding the government for not producing evidence regarding the possible release of Omar Khadr. The Court deferred entirely to the government’s claim under the prerogative as, otherwise, they were “in the realm of speculation.” It is “unclear” whether the proposed remedy would be effective — there being an “inadequate record” regarding a situation that is “ongoing” that “continues to evolve,” and that “signals caution” (paras. 43-45). The Federal Court of Appeal drew the opposite inference because the Crown adduced no evidence that requesting Khadr’s return would damage US-Canada relations. The Supreme Court preferred simply to defer, suggesting that there was something else going on here other than judicial anxiety over damaging foreign relations. What may have been at work is the Court’s perennial anxiety concerning its own legitimacy and how public opinion could turn against it, given the ire directed at the Khadr family, if it were to provide Omar Khadr with a meaningful remedy.■

WHEN HUMAN RIGHTS ARE WRONG

Benjamin Tallis

Having worked as a political and strategic advisor for the EU in the Balkans and the former Soviet Union, Benjamin Tallis is currently a graduate student in International Politics at the University of Manchester. Tallis' research is focused on security, subjectivity and solidarity in the post-socialist world, with particular regard to the impact of the EU and processes of "Europeanisation".

The Wrong Uses of Rights?

From Gaza to Guantanamo, Haiti to Halifax, human rights are being violated. We can say with equal certainty that those having their rights violated, as well as others claiming to speak on their behalf, are demanding action to stop these violations.

So far, so simple: the world is not as nice as we would like it to be, but, thankfully, we have a framework for saying what rights each human has, regardless of race, colour, or creed, and we thereby know when something needs to be done. Human rights are widely perceived as one of the ultimate expressions of our civility and the *sine qua non* of modern, multicultural liberty and tolerance. They are enshrined in the UN *Universal Declaration on Human Rights*, the *European Charter of Fundamental Rights*, and countless other constitutional and legal documents around the world.

After "the end of history", when the big battles had supposedly been fought and we could all be happy that the "West" had "won", the focus of Great Powers (The International Community) supposedly shifted focus from superpower standoffs to the safety and prosperity of people. Coinciding with the ascendancy to power of the 68-generation, the personal became political on a global scale, providing a new, post-socialist cause for "progressives", liberals and much of "the left".

Now, as we survey the wreckage of "humanitarian" interventions that have laid waste to Iraq and Afghanistan, allowed Kosovo to become a permanent protectorate and trapped Bosnia in political purgatory, many of those progressives feel betrayed. It seems to many that a main pillar of their hope for changing the world for the better — human rights — has also been used to justify war and imperial practices, parasitizing our solidarity for survival in order to preserve the current global order. This critique is well rehearsed, but may miss the real point: that human rights themselves are the wrong way of approaching the world and the people in it.

One World, One Human?

Human rights are problematic at the very level of their conception. Presumably, human rights should apply to all humans, without exception. Otherwise it effectively means that those who create the rights also give themselves the power to determine who is considered human. In exemplar, Judith Butler shows that "illegal combatants' 'fundamentalism'" has been used to dehumanize their rationality to justify withholding their human rights.

Diverse views of individuals and societies do not necessarily prevent a legitimate consensus on rights being reached, but make it unlikely without a globally representative political sphere that transcends current power imbalances. Without this, particular groups impose their power and prejudices on others who do not have access to the agenda-setting fora where these ideas are shaped. This permits narrow, legalistic liberty, but curtails political being to the detriment of individual and community self-determination and reifying a particular *weltanschauung*.

Such narrow, legalistic views of what it is to be human dismiss other ways of being and becoming and idealize particular ideas about what "we" — almost always conceptualized as individuals — should want to be. Those who would dismiss this argument as a form of cultural relativism may want to consider how they would feel if it wasn't their "civilization" that was calling the shots from a position of economic dominance within the sham sphere of international politics. A humanitarian intervention in Northern Ireland at the height of 'The Troubles' seems inconceivable and points to the paradox that while appealing to universalism and higher principle, we reserve the right to unidirectional enforcement.

Law is Never Unto Itself

Rights-centred approaches can extend overly legalistic views of people and communities, speeding us from social contracts to contracting societies. This casts us as depoliticized actors, clinging to fixed expression of our "rights", over which we have little say as they are granted by untouchable others.

As International Relations theorist David Chandler has noted, this viewpoint can "fetishise the legal framework to the exclusion of the public sphere." Laws and the legal framework can never be neutral. As historian E.H. Carr observed, "Law is a

function of a given political order and is not self contained." Thus, laws reflect a political constellation or the imposition of a particular political will and therefore cannot be seen as a guarantor of liberty.

This has been the experience in the Balkans, where the international community — frustrated with the locals — has endeavoured to neuter political processes, robbing people of the chance to shape their own individual and collective destinies. They are cast instead as rights-bearers and now have governments, which are more accountable to the EU than to their own people.

Equally worryingly, as Butler, Giorgio Agamben and Michel Foucault have highlighted, law is often deployed as a tactic with certain actors able to revoke it when it suits their interests. This power to create exceptions is crucial in understanding contemporary recourse to legalistic strategies of governance.

Domestic examples from the War of Terror are legion, from Binyam Mohamed to Maher Arar. The outcry in certain countries over Russia's "defence" of its citizens in South Ossetia contrasts sharply with these countries' response to NATO's 1999 bombing of the former Yugoslavia, despite NATO running roughshod over UNSC Resolution 1244. Unless they are held accountable, the makers of law not only determine its content, but are also free to decide when and to whom it applies. Consequently, they are able to use it as a mask for exercising their power.

Rights and Responsibility

As Jacques Derrida has powerfully argued, we are only acting responsibly in relation to ethics when we must decide something that cannot simply have a rule applied to it. If a rule or law can be applied, it implies that this was not an ethical issue in the first place and that to satisfy justice, rather than merely confirm the law, we need to experience the "aporia" of uncertainty.

Addressing the systematic injustice inherent to much of our current socio-economic arrangements requires genuine politics, not legalistic quick fixes. We need to strive to create a contestable realm in which different voices can be heard and competing visions of societies and subjectivities can be offered. This is our true responsibility to humans of all kinds. ■

CANADIAN HARBOUR FOR SEXUAL EXPLOITATION: BOUNTIFUL

Josephine Wong

Following Canada's ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981, the State is legally bound to make efforts to modify legal, social, cultural and familial patterns to eliminate prejudices and practices based on the inferiority of women. Canada is not fulfilling its CEDAW obligations by failing to prosecute perpetrators and to take appropriate measures to address issues of gender discrimination in Bountiful, British Columbia.

Since 1990, when a number of women fled Bountiful, the practice of polygamy in the community has received extensive media attention. In the summer of 2004, the RCMP launched an investigation into allegations of child abuse, forcible marriage and sexual exploitation. In January 2009, leaders of two factions of the Fundamental Church of Jesus Christ of Latter-day Saints in Bountiful, Winston Blackmore and James Oler, were charged with practicing polygamy under section 293 (1) of the *Criminal Code*. In September 2009, the charges were dropped.

There are two major obstacles to prosecuting Blackmore and Oler. Firstly, Blackmore has stated that he will challenge the constitutionality of the prohibition of polygamy under the s. 2(a), freedom of religion of the *Canadian Charter of Rights and Freedom*. Secondly, women in Bountiful are unwilling to testify about sexual exploitation in the community.

Harmful Effects of Polygamy

The type of polygamy practiced in Bountiful is exclusively *polygyny* where only men have more than one wife, but women may have only one husband. This creates an inherent inequality between genders, and a social structure that is conducive to the coercion and abuse of both women and children. Girls are taught at a young age that they can only gain entry to heaven through their husband.

Freedom of Religion

Under CEDAW, religion, customs and traditions cannot justify gender discrimination. Article 2(f) requires Member States to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Further, the Committee on the Elimination of Discrimination against Women's (the Committee) General Recommendation 21 states that "...Whatever the legal system,

religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people."

Jurisprudence from the United Nations Human Rights Committee (HRC) affirms that legislative measures that are reasonable and directed towards purposes compatible with the Covenant in question will be justified, even if they violate particular religious norms. In *Bhinder v. Canada*, the HRC upheld a Canadian law requiring workers to wear hardhats under the International Covenant on Civil and Political Rights, despite the fact that persons religiously obligated to wear a turban could not comply with the law.

The prohibition of polygamy is justified under CEDAW's objective to promote women's equality rights and to protect women from gender-based violence, despite its infringement upon Fundamentalist Mormon practices.

"Bountiful is, and will continue to be, a black mark on Canada's commitment to international human rights unless appropriate measures are taken..."

Evidentiary Threshold

One of the reasons why leaders in Bountiful have not been prosecuted for sexual assault and exploitation is the unwillingness of potential witnesses to testify. However, prosecution is not the only way to extricate women from these abusive situations. In General Recommendation 25, the Committee noted that purely legal approaches are not sufficient to achieve substantive gender equality. In fact, Article IV and General Recommendation 19 state that Canada is obliged to establish institutions or temporary special measures to protect women against gender-based violence. Measures of this nature could include regulatory instruments and outreach or support programs to complement legal approaches.

Recommendations

Canada is not fulfilling its obligations under CEDAW with regard to the situation in Bountiful. Two aspects of the discrimination against women in Bountiful must be addressed: the practice of polygamy in and of itself, and the gender-based

violence (including sexual abuse, sexual exploitation and domestic violence) that arises from it.

Canada has a legal obligation to prosecute polygamy under both domestic and international human rights law. Polygamy is a criminal offence in Canada and the Committee explicitly condemned polygamy in General Recommendation 21. If the State feels that the anti-polygamy laws are ineffective in their current form, then it must enact new legislation that can, and will, be used to effectively prosecute perpetrators and to protect women against this practice. It is important to note that although people cannot be prosecuted retroactively under new laws, the practice of polygamy in Bountiful is ongoing. Effective legislation is necessary to curb ongoing and future discrimination in the community.

Even if prosecution is impossible due to the freedom of religion protection under the *Charter*, Canada can, and should, take further action to address the continuing practice of polygamy in Bountiful. For example, the government could develop community education programs, provide accessible safe houses, establish counseling clinics and outreach programs that inform women of their legal, political, civil, social, economic and cultural rights.

Currently, Bountiful's schools offer only sewing and cooking classes to girls, yet the schools receive 50% of their funding from the provincial government. The Ministry of Education must ensure that Bountiful's education system meets minimum standards in terms of its academic curriculum as well as sex education and career planning.

Bountiful is a geographically and culturally isolated community where gender discriminate values have been religiously indoctrinated for generations. In the short term, Canada must extricate women from this abusive environment through prosecution, sanction of perpetrators, and support services that empower women to come forward as witnesses and to leave the community. In the long term, the State must eradicate systemic discrimination through comprehensive education programs. The Canadian government has done *none* of these. Bountiful is, and will continue to be, a black mark on Canada's commitment to international human rights unless appropriate measures are taken to address these issues effectively. ■

LEGALIZED HOMOPHOBIA IN UGANDA

Morgan Sim

When Scott Lively, American evangelical and self-proclaimed expert on “the Gay Agenda”, addressed a group of Ugandan parliamentarians in March 2009, he may not have realized that his remarks would make headlines in North America one year later. Lively, who boasts a Certificate of Human Rights from the International Institute of Human Rights in Strasbourg, spoke at a Family Life Network conference in Uganda. Topics included “The Gay Movement’s Agenda for Control of Society”, “The Gay Movement’s Blue Print for Transforming a Nation”, and “An Effective Response to the Gay Agenda”. He also spoke to parliamentarians who were drafting what later became a controversial private member’s bill. The bill proposes unprecedented criminal sanctions for those participating in and promoting homosexuality.

Homosexuality is already criminalized in Uganda. However, the proposed bill would significantly worsen the situation for homosexuals in the country by radically expanding state-sponsored discrimination and persecution. Most widely reported has been the inclusion of a clause that creates the offense of “aggravated homosexuality” punishable by lifetime imprisonment or death. Government officials have, in the face of international pressure, remarked that the death penalty will not be included in the final version of the bill. Nonetheless, its expected passage will still have devastating effects on the GLBT community and those who support them.

Homosexuals must be caught, more or less, “in the act” to be charged under existing law, but this would change with the proposed legislation. The bill expands the definition of homosexual acts to include touching “...with the intention of committing the act of homosexuality,” making it much easier to attain a conviction. Those convicted of the offence of homosexuality would be liable to imprisonment for life.

Aggravated homosexuality, punishable by death in the original text, may be charged in instances when the accused is a “serial offender”, when the “victim” of the offence has a disability, or when the offender is a person living with HIV. HIV testing for those accused of homosexuality would likely be mandated so as to determine guilt of the aggravated offence. As has been made obvious by the outpouring of international admonishment, the proposed “offence” has affronted and to some

extent galvanized activists and leaders across Europe and North America.

One less-publicized but equally alarming aspect of the bill is that it would not only criminalize acts of homosexuals *themselves*, but also the exercise of fundamental rights such as speech and assembly by those who *support* the rights of homosexuals in Uganda. As written, the bill makes it an offence to “aid, abet, counsel or procure another to engage in acts of homosexuality.” Punishable by imprisonment for seven years, this offence would presumably be interpreted broadly so as to include any “counseling” that is approving of homosexuality. This broad interpretation would effectively criminalize the actions of those involved in the few support networks that do exist for homosexuals in Uganda.

Similarly, the proposed offence of “Promotion of Homosexuality” as outlined in the draft bill would undermine free speech by criminalizing the use of electronic devices for the purpose of promoting homosexuality; the funding or sponsorship of activities related to homosexuality; and the offering of premises or other assets for the purposes of promoting homosexuality. Any organizations advocating for the rights of the GLBT community in Uganda would be *de facto* criminalized by the inclusion of this offense, and this consequence has clearly been contemplated in the language of the statute. The proposed bill actually stipulates that, when the accused under the offence of Promotion of Homosexuality is a corporate body, business, association, or non-governmental organization, its certificate of registration will be cancelled on conviction, and the director or proprietor shall be liable on conviction to imprisonment.

The bill claims to have extraterritorial jurisdiction over all Ugandan citizens and contains clauses mandating the extradition of gay Ugandans from foreign countries for prosecution in Uganda. Moreover, the bill contains a provision that would void all international treaties, agreements, and human rights obligations with which it conflicts.

Even the liberty and security of persons entirely without affiliation to the GLBT community are jeopardized by the proposed legislation. They may be imprisoned for failure to take positive steps to inform authorities of known homosexual activities. According to the bill, those who are aware of the commission of any of the

offences contained in it but who fail to report the offence to the authorities within 24 hours are liable to imprisonment for three years.

Because of this provision, the bill, if passed, would have a chilling effect on homosexuals’ ability to access health care in the country. Health professionals who, while talking to and examining patients, are made aware of homosexual acts that have taken place, would face criminal sanctions for failing to pass this information on to the proper authorities.

In light of all these far-reaching consequences, it is not surprising that Ugandan HIV/AIDS activists presented a petition against the proposed bill to Speaker Edward Ssekandi. The petition, containing nearly half a million signatures from both inside and outside Uganda, was presented by a group calling themselves “Aids service providers, spiritual mentors and counselors”. This daring endeavour places participants at risk, as the petition could foreseeably be used as a black list.

The bill has also sparked protests in London, New York, and Washington. High-level officials from Canada, the United States, the UK and other European countries have been in contact with Uganda’s president, Yoweri Museveni, to express their displeasure with the proposed bill. Museveni in turn expressed concern that the bill is becoming a “foreign policy issue”.

Uganda relies heavily on aid received from the very states whose leaders have voiced their concern. In 2008, the country received over \$400 million in aid from the United States alone. Uganda has long been a darling of Western donors, but this bill tarnishes the government’s reputation which, according to USAID, was once as a state which has “achieved many political, economic and social advances.”

With an impending election, Museveni’s government is in a precarious position, needing to appease both voters and foreign donors. Furthermore, many Ugandans see Mr. Lively’s brand of “American Christianity” as carrying significant normative weight: a potent reminder that homegrown intolerance can have severe repercussions abroad.■

SWITZERLAND'S MINARETS

Samreen Beg

Minarets are a distinct architectural feature of the Muslim world. Whether one is viewing the Blue Mosque in Turkey or the Taj Mahal in India, minarets form an important part of the aesthetic appeal of these structures. However, their existence in Switzerland of late has not been as well received. In 2009, minarets were centre stage in a Swiss debate that resulted in a ban on their construction.



The Swiss Federal Constitution

The unique amendment provisions of the Swiss Federal Constitution enabled the ban. The constitution provides that it can be amended through a popular initiative. The first step in amending the constitution is for the leaders of an initiative to gather 100,000 signatures of Swiss citizens who are in favour of the proposed change. Once the requisite signatures are collected, Parliament scrutinizes the proposal and declares it valid or invalid. If the initiative is valid, it is put to a popular vote in a national referendum. Finally, if the result of the referendum is in favour of the initiative, the constitution must be amended to reflect the initiative.

The Minaret Debate in Switzerland

The minaret debate arose from an initiative launched in April 2007 by individual members of the rightist Swiss People's Party, known for their anti-immigrant policies. The members proposed adding the sentence "The construction of minarets is forbidden" to Art. 72 of the Swiss Constitution. The required 100,000 signatures were gathered by July 2008.

Although the initiative violated freedom of religion under the Swiss Constitution, the *European Convention on Human Rights* (ECHR) and the *International Covenant on Civil and Political Rights* (ICCPR), the government did not have the power to declare the initiative inadmissible, because popular initiatives can only be inadmissible if they violate *jus cogens*. Therefore, although the initiative would result in a violation of international law, it was allowed

to stand because it did not fall within the narrow definition of *jus cogens*.

When the initiative was put to a popular vote on November 29, 2009 the result stunned those inside and outside of the country. Just over 57% of those who voted endorsed a constitutional ban on the construction of minarets. The UN High Commissioner for Human Rights and the UN expert on religious freedom spoke out against the result of the vote, while organizations like Human Rights Watch found the result to be a "worrying expression of growing intolerance towards Muslims in Europe" and that it "galvanized far-right parties across Europe."

At the time of the ban there were only four minarets in Switzerland.

Arguments against the Ban

Three legal arguments can be made against the ban: First, it violates freedom of religion. Second, it violates freedom of expression. Third, it is discriminatory.

Freedom of Religion

Those opposing the ban commonly argue that it violates Swiss Muslims' freedom of religion. Article 15 of the Swiss Constitution guarantees freedom of religion and states that all persons have the right to profess their religious convictions in community with others. Article 9 of the ECHR asserts that everyone has a right to freedom of religion and to manifest their religious beliefs. The only limitation to manifestations of religion are those "prescribed by law [that are]...necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protections of the rights and freedoms of others." Article 18 of the ICCPR contains a similar provision. Switzerland has ratified both the ECHR and the ICCPR.

Professor Anne Peters of the University of Basel in Switzerland argues that the minaret ban is not "necessary" because laws already exist to protect the public, such as Swiss laws on planning and construction. The absolute prohibition in the constitution is thus overbroad and not "necessary", as required by the Swiss Constitution.

Freedom of Expression

Advocates of the minaret ban argue that the ban does not violate freedom of religion because Islamic law does not require the construction of minarets. While

this is true, Prof. Peters asserts that this is "immaterial" as long as Muslims themselves consider the minaret as part of the *expression* of their religious beliefs.

Article 9 of ECHR and Article 18 of the ICCPR contain the provision that everyone has the right to *manifest* their religion in public or private. In addition, Article 16 of the Swiss Constitution explicitly guarantees freedom of expression, as does Article 10 of the ECHR.

Discrimination

Article 8(2) of the Swiss Constitution provides that no one may be discriminated against on the grounds of religious convictions. Article 14 of ECHR also provides that the rights and freedoms of the Convention shall be secured "without discrimination on any ground", including religion. Article 26 of the ICCPR contains a similar provision. A number of organizations and groups such as Human Rights Watch, Amnesty International and the UN Commissioner for Human Rights asserted that the ban was discriminatory.

Discrimination reached far beyond the result of the vote. According to Human Rights Watch, the campaign was "marked by rhetoric" against Muslims. For example, a campaign poster in favour of the ban showed minarets on top of the Swiss flag that looked like missiles ready to launch alongside a woman wearing a niqab (full face veil showing only the eyes). Human Rights Watch expressed concern that initiatives like these stigmatized Muslims and fed into "routine discrimination against Muslims", especially in light of the finding by the European Union Agency for Fundamental Rights that, in the fourteen countries analyzed, one in three Muslims faced some kind of discrimination over the last 12 months.

Next Steps

The ban may face legal challenges in Switzerland because it conflicts with guarantees in the Swiss Constitution and international law. Prof. Peters argues that if the ban is examined by the European Court of Human Rights it would likely rule against the ban, forcing Switzerland to bring its constitution in conformity with the ECHR. A potential challenge to the ban by the Islamic community of Langenthal, which applied for planning permission to build a minaret in 2005, could be the avenue for an examination under international law. ■

INTERNATIONAL TRANSGENDER MOMENTUM

Sarah Hamilton

Canada has built an international reputation as a liberal and tolerant society, especially with recent advances in human rights for queer communities. Yet an anachronism remains: Canada is lagging behind the international community in a neglected area of gender rights — that of trans rights. The average Canadian overlooks trans rights, and I believe that the law school — despite programs such as Meal-Trans and SOGI — does not do enough to counter this fact. A recent performance at Law Follies underscored this, because, from my perspective, its humour was operationalized through the perceived absurdity of a man in “women’s” lingerie in satirising a 2009 Follies skit. I was reminded that such a performance can be perceived by its audience as entertaining without anyone realizing that its key element, the imitation of a trans identity out of context, might offend a small but proud minority. Lack of Trans rights remains a deep-rooted and systemic problem in Canadian society that is manifested at the level of the individual, the legislature, and most of what lies in between.

Canadian legislation, including human rights codes, does not protect against discrimination on the grounds of gender identity, which is not usually included within protections for “gender” or “sex.” Going beyond the bifurcation of female and male, “transgender” usually refers to a gender identity that does not align with biological sex. “Transsexual” often refers to someone who has altered his or her biology to match his or her gender identity. A transvestite is someone who dresses in “opposite sex” clothing, often for reasons other than gender identity. Gender identity does not imply a particular sexuality, although it may broaden the scope of one’s vocabulary in this regard (the term “bisexual” may become problematic, for example).

While Canada falls behind international trends, other countries and the international community are starting to specifically recognize the rights of trans folks. The UN Committee on Economic, Social and Cultural Rights became the first treaty body to reference gender identity with the Yogyakarta Principles advocating gender-identity-based rights protection in a General Comment on 25 May 2009. In statements delivered to a UN General Assembly panel on 10 December 2009, religious figures from locales as diverse as Zambia

and the Holy See condemned state complicity in violence against sexualized and gendered minorities.

Some jurisdictions have enacted legislation prohibiting discrimination on the grounds of gender identity. Bolivia’s constitution guarantees the right to have gender identity respected. The city of Bogota guarantees the right to “build” a “self-definition” with respect to one’s body, gender, and sexual orientation. Sweden protects “transgender identity or *expression*,” capturing gender identities like “butch” and “femme”.

Pro-active local entities have also enacted policies. Health services in Buenos Aires address trans people by their chosen not legal names, while a Japanese transit company allows trans people of all genders to ride in “women-only” subway cars designed to prevent harassment during commutes.

Many countries, including Canada, allow name or gender/sex to be changed on identity documents in affirmation of gender identity. Name changes, if not tied to a change in legal gender, may result in increased discrimination, inability to find work, and increased risk of prostitution or suicide. Ecuador recognizes “trans image” in civil registries, so that the gender of one’s photograph need not match the gender of one’s legal name, reducing insults, humiliation, and forced alterations of appearance for photo purposes.

The right to change legal gender often requires as a prerequisite that a person undergo gender-affirmation or reassignment surgery (become transsexual), as in Romania and Canada. In Brazil, surgeries are covered by health care, while Australia protects the right of trans people to obtain passports reflecting their lived-sex to facilitate travel to other countries to obtain surgery. Regardless of surgery status, legal gender can be changed in the UK, South Africa, Spain, Poland, and the Philippines, but may first require a medical diagnosis of gender dysphoria and several years on hormones. These requirements inhibit trans rights in less severe fashion than Canada’s requirement of irreversible surgery.

Once progressive, Germany continues to require surgery as well as permanent infertility in order to access name and legal gender change protections, violating the physical integrity of German trans folk. The Netherlands will grant legal gender change if physical sterility and adaptation

to lived-gender can be shown and children of trans parents may update their identity documents to reflect the change in their parents’ status.

Nowhere is the sorry state of trans rights more evident than with Sweden, which is considering a requirement proposed in 2007 (shortly after a trans man gave birth there) of mandatory castration for anyone who undergoes gender-reassignment surgery. Although hormone treatment will eventually induce sterility, if it is discontinued before that point then reproduction remains possible. Canadians should be aware that this could happen here, too, and would impact real Canadians — like my friend James, the first Canadian trans-man to give birth. In addition to being discriminatory, the Swedish proposal overlooks negative health effects: removal of the ovaries, for example, can seriously increase bone density loss. In Japan, legal sex change requires that one be single with no children, forcing a choice between marriage and gender affirmation.

Improvements to gender-identity protections must be accompanied by comprehensive rights legislation. While many countries specifically allow post-transition marriage rights, in others gender-identity protections may run afoul of, or collide with, prohibitions on same-sex marriage. In South Korea, if a trans-woman marries a bio-man, her legal status automatically changes to female. In Germany, non-operative trans people have been caught between legal regimes, prevented from marrying a person of the “same” gender (because of a prohibition on same-sex marriage) or registering a partnership with a person of the “opposite” gender (because registered partnerships are only available to same-sex couples). Post-operative married people have had to choose between changing legal gender and dissolving their marriage.

Other problems remain. Legal name or gender change alone do not entitle a person to be accommodated within their lived-gender in a hospital or prison. In addition, many of the current protections are contingent upon citizenship. Such omissions may compound the precarious situations of trans migrants and refugees already at greater risk of detention and criminalization than citizens. Nonetheless, international pressure on Canada to introduce gender identity protection will undoubtedly continue to mount. ■

LIMITING HEAD-OF-STATE IMMUNITY: THE CASE OF CHARLES TAYLOR

Hana Dhanji

In light of Charles Taylor's ongoing trial in The Hague, it is worth considering how courts navigated Head of State immunity in order to get him on the dock. On 4 June 2003, world leaders gathered in Ghana to participate in joint United Nations and African Union peace talks to strategize an end to the internecine civil war in Liberia. Among the attendees was President Charles Taylor of Liberia. In the midst of the proceedings the Prosecutor of the Special Court for Sierra Leone (SCSL) served Taylor with an arrest warrant. The warrant followed an indictment of Taylor for a total 11 counts of crimes against humanity, war crimes and serious violations of international humanitarian law. Ghanaian authorities refused to cooperate with the SCSL and provided Taylor with passage to Monrovia, the capital of Liberia, and the epicenter of the conflict.

On 23 July 2003, an application was filed on Taylor's behalf to challenge the indictment, raising the issue of Head of State immunity as part of the defence. Immunities afforded Heads of State are categorized under two subdivisions: "functional immunity", attaching to official actions of foreign states regardless of who performs them, and "personal immunity", which attaches to people while in office, irrespective of the nature of their actions. State immunity is founded upon international legal norms that emphasize peaceful and pragmatic relations between States. Taylor's claim to personal immunity as acting Head of State – historically considered indisputable – brought this legal principle into conflict with that of liability for serious breaches of international law.

The Appeals Chamber of the SCSL ruled unanimously (*Decision on Immunity from Jurisdiction*) on 31 May 2004 that Taylor was not exempt from prosecution for the crimes he had committed as Liberia's President. The ruling was a landmark decision that balanced state interest in personal immunity against the wider interest in prosecuting crimes against humanity. In doing so, the Appeals Chamber applied the framework established in 2002 by the International Court of Justice (ICJ) in its case *Democratic Republic of the Congo v. Belgium*. While the ICJ reaffirmed the principle of state immunity in that decision, it stated in obiter that "an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts", including the

International Criminal Tribunals. The SCSL relied on this case, as well as the historical precedent *Regina v. Bartle and the Commissioner of Police for the Metropolis Ex Parte Pinochet (Pinochet)*, the Statutes of Nuremberg, and the Tokyo International Military Tribunals, to justify its restriction of Taylor's claim to personal immunity.

Legal scholars have questioned the

"No longer shielded by absolute immunity, Heads of State must now contend with an ongoing shift towards greater accountability and greater legal consequences for their actions."

legitimacy of international courts to supersede legal norms that have practical foundation in international relations. They contend that international courts are state-led constructs, and no state alone, or in collaboration, has the power to diminish the immunities of Heads of State. However, international courts are empowered beyond their compositions as combined state power for two principal reasons: political legitimacy based on legal precedence and the principle of universal jurisdiction.

In the indictment of Charles Taylor, the SCSL referred to the ICTY's interpretation of Article 7(2) of its enabling statute, which provided leverage for the indictment of former President of the Federal Republic of Yugoslavia, Slobodan Milošević. In the *Decision on Preliminary Motions* (8 November 2001) the ICTY upheld the comprehensive validity of 7(2), which states, "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment". Notwithstanding his status as a former Head of State, Milošević was not exempt from criminal prosecution for acts committed in his official capacity that contravened international humanitarian law. The ICTY's affirmation sent a strong message to the international community that meaningful action could be taken against seemingly insulated perpetrators of crimes holding the highest offices. The decisive

interpretation placed the rule of law above the political interests of Heads of State.

The SCSL further abrogated Taylor's personal and functional immunities by recognizing that war crimes, crimes against humanity, genocide and torture are subject to universal jurisdiction. This was in keeping with the position of the British House of Lords in the *Pinochet* decision concerning the arrest of Augusto Pinochet, former Chilean Head of State. The Pinochet litigation marked an important moment in international law that extended the consequences for violating human rights beyond the State in which they occurred. The SCSL's decision to strip Taylor's of immunity must, therefore, be seen as a culmination point of these prior legal watersheds.

The progress of international law toward revocation of immunities for heads of state continued with the 2009 arrest warrant of President Omar Al-Bashir of Sudan by the International Criminal Court (ICC) for crimes committed against the people of Darfur since 2003. The prosecutor at the ICC, Luis Moreno-Ocampo, issued a request for an arrest warrant in July 2008, stating that there were reasonable grounds to believe that Al-Bashir was criminally responsible under article 25 (3) of the Rome Statute for war crimes and crimes against humanity. (*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*). This marks the first prosecution of a Head of State by the ICC. Arguably, the Taylor indictment and the preceding Milošević and Pinochet trials provided the court with the political support and will to advance the warrant against Al-Bashir.

Head of State immunity — personal and functional — continues to add some value by facilitating important international relations. It upholds the Westphalian model upon which the traditional practice of international relations is predicated, and maintains the primacy of state sovereignty. Confronted with the growing trend toward the international enforcement and protection of human rights, it becomes increasingly important to delineate the limits of Head of State immunity in order to reconcile the perceptible tension between human rights and sovereign rights. No longer shielded by absolute immunity, Heads of State must now contend with an ongoing shift towards greater accountability and greater legal consequences for their actions. ■

THE UN, TWITTER, & YOU: RECENT DEVELOPMENTS IN IRAN

Pam Shime and Ali Bangi

Pam Shime is the Founding Director of the Global Advocacy & Leadership Institute (GALI) and Ali Bangi is the Director of Campaign (Cycling) for Human Rights in Iran (CHRI).

Imprisoned in Iran for participating in last June's peaceful anti-government protests, 24 year-old Ibrahim Sharifi spent four days in a crowded cell, handcuffed and blindfolded, while being beaten to the point of vomiting blood. On the fourth day, two guards took him to a room and, while laughing and mocking him, sexually assaulted him to the point of unconsciousness. Fearing he would die in custody, they then left him by the side of a highway in Tehran.

Mr. Sharifi was in hiding in Turkey when he spoke to reporters in September 2009. After his family was threatened as a result of his telling his story, Mr. Sharifi fled Iran. He is one of the few who have spoken openly about sexual assault of protesters in prison, though rights groups believe his case is one of many on the basis of numerous reports by people unwilling to go public. Human Rights Watch has confirmed the credibility of Mr. Sharifi's account.

The charges of rape and sodomy of imprisoned protesters such as Mr. Sharifi, brought to light by opposition leader Mehdi Karroubi, shook the regime. Even government supporters have responded with shock to these methods of torture. A government judicial investigating committee rushed to reject the validity of the documents supporting accounts of rape and other abuse in prison. Mr. Sharifi continues to fear for his life, even in Turkey.

The timing, then, could not be better for an international review of human rights in Iran. On February 15, 2010, in Geneva, the UN Human Rights Council heard from Iran in its Seventh Session of the Universal Periodic Review. As part of Iran's presentation, Mahmoud Abbaszadeh Meshkini, Director General of the Ministry of the Interior, conceded that there were some "minor illegal actions" taken against detained protesters last year. Other representatives of Iran, including Deputy Minister of Justice Judge Seyed Ali Raeis Sadati, extolled the independence of the judiciary, the "reasonable conditions" in the prison system, and the fairness of the elections. In June, the Council will consider the outcome of the review. The Iran Human

Rights Documentation Center has condemned the presentation of the delegation and "urges the international community to not accept the delegation's representations. At the very least, United Nations human rights experts must immediately investigate Iran's prisons, including allegations of rape, torture, and the detention of people

**"I will not let them
force me into silence."**

for peacefully exercising their rights to freedoms of expression and assembly."

The majority of the victims of the rape, torture, and detention of protesters by Iran have been young people. 70% of Iran's population is, like Mr. Sharifi, under 30 — a result of the then-new, post-Shah Islamic government encouraging Iranian couples in the early 1980s to bear more children. The irony of these young people turning on the government cannot be lost on those in power. However, those in power have other concerns as well. There are cracks at the highest level of the power structure in Iran today, something that distinguishes this disruptive moment from earlier ones. Furthermore, despite extensive knowledge of the vicious torture of anti-government protesters in prisons across Iran, opposition to the government continues to be expressed in different forms.

The age of the majority of the protesters in Iran has meant that much of the democracy movement has taken place via new technology and social networking tools — cell phones, Twitter, Facebook and YouTube. Cell phones and the internet are essential elements of communication among protesters and from them to the outside world.

This is why the pervasive use of technology and internet blocking by the Iranian government is of significant concern. Since June, in addition to censoring the media, arresting 65 Iranian journalists, and expelling foreign journalists from the country, the government has also cut off cell phone services and access to the internet.

In June 2009, 16 days after the contested elections, Iran's Cyberspace Criminal Law came into effect. The law criminalizes the use of circumvention tools to bypass internet filters put in place by the government, as well as accessing banned websites, among other acts. Affected websites

include Gmail, Twitter, Facebook, YouTube, Skype, Human Rights Watch, The Citizen Lab at the University of Toronto, The Berkman Center for Internet and Society at Harvard Law School, Iranian opposition groups and online newspapers, among many others. Anyone convicted of violating this law can be imprisoned for up to two years.

Circumvention tools, referred to as "filter breakers" in Iran, allow users access to blocked (or filtered) websites. These tools are very popular in Iran and young people there are often among the first to use new circumvention products and technologies, including Psiphon, a censorship circumvention software created by the Citizen Lab at the University of Toronto. According to Patrick Lin, who offers a circumvention technology called Puff, 40% of Puff's daily users are in Iran.

Time will tell whether this relatively young law will facilitate even further repression of young protesters. Young people continue to defy government sanctions, censorship and repression, much like their predecessors in South Africa and South Korea in the 1980s, who helped lead their countries into a new era of democracy. They continue, despite internet blocking, to get the word out about the unfolding movement in Iran. They appear fearless in the face of unimaginable state brutality.

Students around the world are now organizing to support those risking their lives in Iran. With support from students on campuses across Canada and beyond, we believe we could see a global student movement for democracy in Iran in alliance with the protesters inside the country. Such a movement could build on the example and success of the student movement outside and inside South Africa that mobilized the world against the apartheid regime and ultimately was a key player in its downfall. Over many years, Iranians inside and outside Iran have developed strong networks and international reputations that could play an important role in such a movement.

We will leave the last word to Mr. Sharifi, whose stunningly brave response at the age of 24 to his nightmarish experience a prison in Tehran makes him a worthy inspiration for us all. "I think they are following me to kill me," he said recently, "But I will not let them force me into silence." ■

WHO IS AN IVORIAN?

Marco Chown Oved

Marco Chown Oved is a freelance journalist working in Abidjan, Côte d'Ivoire. His work has been published in newspapers including The International Herald Tribune, USA Today and The Toronto Star.

Who has the right to vote? In Canada, the answer is entirely determined by nationality, so it is simple. However, in Africa, where current states were carved up by colonial mapmakers and preserved by a first generation of (largely) corrupt dictators, nationality is a complex and confusing issue.

In Côte d'Ivoire, where current president Laurent Gbagbo has been ruling without a constitutional mandate since 2005, the allocation of voting rights turned from debate to political struggle and ultimately led to a civil war that divided the country in two. Beyond the problem of voting along ethnic lines — which is all too common in African states — Ivorian electoral politics are further complicated by an uncommonly large immigrant population.

Côte d'Ivoire's migrant influx began during the colonial period. Under French rule, hundreds of thousands of workers were forcibly moved from neighbouring Mali and Upper Volta (now Burkina Faso) to work in the colony's massive cocoa and coffee plantations. Forced labour was outlawed just before independence, but the immigration continued. The country's independence leader, Felix Houphouët-Boigny, opened his borders to the largely uneducated and impoverished masses of neighbouring countries. Houphouët knew this cheap labour would be essential to economic success and famously proclaimed that "the land belongs to anyone willing to cultivate it." What ensued was a 20-year economic boom and population explosion. From independence in 1960 until 1998 (the last year statistics are available), the population exploded, rising over five-fold, from 3 million to 16 million people.

The rapid economic progress ended in the 1990s, when cocoa prices collapsed and Houphouët's death left power in the hands of the much less welcoming Henri Konan Bédié. Ivorian finances were further hampered by a crippling debt and the constraints imposed by international lending institutions. Strikes broke out across the country and civil dissent — rarely seen during Houphouët's years of plenty — spilled out into the streets. In a tried and

tested strategy to consolidate power, Bédié blamed the disturbances on "foreigners in our midst." He began, for the first time in this country of 60 ethnicities and 3 major religions, to speak of "Ivoirité" or "Ivorianness".

Judith Rueff, a French journalist stationed in Abidjan in the early 2000s, noticed the destructive power of Bédié's campaign. At the time she wrote, "This web of peoples lends itself easily to all sorts of political manipulation. The multiple oppositions (North/South, Christian/Muslim, foreigners/Ivorians) have been exploited in every imaginable way."

Bédié rewrote the constitution and tightened the definition of "citizens" to include only individuals with two Ivorian parents. This clause was specifically crafted to exclude his political opponent, Alassane Ouattara, as well as masses of voters from the north of the country. While Bédié succeeded in getting himself re-elected without a real opponent, his xenophobic rhetoric took its toll: the inventor of "Ivorianness" was overthrown in the country's first military coup in 1999. Laurent Gbagbo rode popular mistrust of the junta into electoral success in 2000, but his welcome was short lived. He too trumpeted the doctrine of "Ivorianness," prompting the Dioula from the north, fed-up of being targeted as "foreigners" in their own land, to attempt another coup in 2002.

Côte d'Ivoire has been divided in two ever since. The New Forces rebels control the northern half of the country, while Gbagbo's government controls the South. Following the peace deal signed in 2007, New Forces representatives entered government, and their leader, Guillaume Soro, was named Prime Minister.

The path to peace, reconciliation and a return to democratic rule has proven elusive, however, given the lingering issue of "Ivorianness". Gbagbo's camp has recruited and armed bands of youth, who spent the years preceding the peace deal carrying out urban pogroms upon those deemed to be foreigners. In the agricultural west, "foreign" farmers — often born in Côte d'Ivoire and second-generation cultivators — have been chased from their land by angry mobs. This ethnic cleansing is carried out in the name of the constitution, which limits land ownership to citizens. The old Houphouët maxim of rewarding elbow grease has been replaced by a policy

of repossession. The government is now embarking on a mission of westernizing land ownership, issuing deeds and titles — but only to those who can prove their nationality.

There is no formal eviction policy for the hundreds of thousands of second-generation immigrant farmers. The government has made it known, however, that they will be prohibited from passing their title onto their children. The state will take possession of the farm at the time of their death, and then sell it to a "real" Ivorian, leaving their children without inheritance, without citizenship and without a support network "back home" — a land they've most likely never seen.

As the complex political negotiations continue in an attempt to organize the long-overdue presidential elections, xenophobia constitutes one of the few grounds of consensus. All parties agree that foreigners need to be found, identified and prevented from "stealing" what belongs to the rightful citizens of this country: their land and their votes. This includes the representatives of the northern populations, who are frequently taken to be foreigners themselves.

In Côte d'Ivoire, official estimates put the number of non-citizen residents at 26 per cent of the population, but they continue to have no political representation. "Ivorianness" is in the eye of the beholder. Some consider the rebels controlling the north to be little different than foreigners, yet the rebels themselves claim to represent only "real" Ivorians. The definition of citizenship is so convoluted that no one can say with certainty who is and is not Ivorian. While there is optimism that electoral rolls can be drawn up and an election can be held soon, the prospect of a renewed conflict cannot be ruled out.

Westerners should take note. A parallel can be drawn between the situation in Côte d'Ivoire and the state of immigrants in the United States. In the US, there are an estimated 20 million undocumented immigrants. They provide an essential, exploitable class of workers to the US economy. Arriving at a rate of 500,000 per year or more, these populations are only going to become more entrenched in American society. Eventually the question of whether basic rights can be denied to almost 10 per cent of the population is going to have to be broached. ■

BURMESE ELECTIONS: A ROADMAP TO NOWHERE

Pete Smiley

On May 4, 2009, a middle-aged Misourian named John Yettaw swam across Lake Inya in Yangon to the house where Burmese pro-democracy leader Aung San Suu Kyi has been held for 14 of the past 20 years. Given that Yettaw was motivated by visions of himself as a defender of the oppressed, his misguided mercy mission ironically gave the State Peace and Development Council (SPDC) — the junta that rules Burma (Myanmar) — a convenient pretext to extend Suu Kyi's house arrest. As a consequence, Suu Kyi will still be imprisoned when the junta holds elections sometime later this year.

"The Constitution itself is an odd mixture of mind-numbing procedural detail and glaring omissions, with paranoid nationalist rhetoric sitting awkwardly beside content-free commitments to democratic principles."

Without Yettaw, the junta would likely have found another excuse to extend Suu Kyi's detention. Yet by commuting her initial sentence of 3 years of hard labour to 18 months of house arrest, the SPDC projects lenience while achieving the desired outcome. This is consistent with its "progressive" adoption of the trappings of democracy and the rule of law in an ongoing charade of constitutional conventions and referendums that will culminate in this year's elections. In reality, however, Burmese voters will presumably have little choice but to make what ruling General Than Shwe ominously described as "the correct choices".

In 1990, Suu Kyi's National League for Democracy (NLD) won Burma's last election in a landslide, with 82 percent of the vote. The ruling party, then known as the State Law and Order Restoration Council (SLORC), annulled the results and placed Suu Kyi under house arrest. It then announced plans to create a new constitution through a National Convention Process. This was aborted in 1996, but reconvened in 2003 as part of the junta's 7-step "Roadmap to Democracy". A completed draft was put to a referendum in May 2008. The junta's propaganda claimed a 98 percent turnout, with 92 percent voting in favour. This was an implausible result considering that the country was still reel-

ing from Cyclone Nargis, which had devastated the country and killed well over 100,000 people a week earlier. The Constitution itself is an odd mixture of mind-numbing procedural detail and glaring omissions, with paranoid nationalist rhetoric sitting awkwardly beside content-free commitments to democratic principles.

Firstly, and somewhat unsurprisingly, the Constitution enshrines the role of the Burmese military (Tatmadaw) in the affairs of the nation. 25 percent of seats in both national legislatures and all provincial legislatures are reserved for the Tatmadaw. As the constitution requires a vote of over 75 percent of the legislature for amendment, this effectively gives the military a veto over any future amendments. The Army Commander-in Chief, who can neither be disciplined nor impeached, has the power to appoint key ministers and assume power in "times of emergency". Also of concern, given the military's past tendency to forcibly enlist civilians, is section 340, which gives the military the authority to "administer the participation of the entire people in the Security and Defence of the Union."

Secondly, the Constitution makes no allowance for judicial independence. The judiciary's ability to issue writs is suspended in areas where a state of emergency is declared. The President has full control over the appointment of the Chief Justice, and the grounds for judicial impeachment are broad and easily satisfied. In any case, the Supreme Court's power is limited, as the constitution grants it no jurisdiction over constitutional matters. These are left to a "Constitutional Tribunal", over which the President has even broader powers of appointment.

Thirdly, the Constitution contains provisions justifying the curtailment of basic human rights. For example, section 354, which grants citizens freedom of expression and assembly, contains the proviso that says freedoms are subject to limitation on the basis of "union security, prevalence of law and order, community peace and tranquillity or public order and morality." It is hard to conceive of a government action that could not be justified by reference to such a broad limitations clause, even before a genuinely independent judiciary.

Fourthly, the Constitution enshrines gender apartheid. Military experience is a prerequisite for all positions of power, and,

as women cannot serve in the Tatmadaw, they are effectively disqualified from holding any major government offices or from holding any of the legislative seats reserved for the Tatmadaw. Section 352, enshrining anti-discriminatory principles in the civil service, is qualified by the phrase: "nothing in this Section shall prevent appointment of men to the positions that are suitable for men only."

The UN, international media organizations and foreign governments will be treating this year's election with cautious optimism. Earnest statements will be made welcoming these tentative steps towards democracy, and the SPDC will be hoping to use the positive publicity to attract foreign investment and encourage the lifting of sanctions. That being the case, the absolute illegitimacy of the "Roadmap for Democracy" and the Constitution in particular cannot be over-emphasized. The NLD have yet to announce whether they will participate in the poll and are presumably weighing the risks of legitimizing the process against the benefits of a strong showing. The international community should calibrate its response to the NLD course of action. In the interim, it should continue to press for the immediate release of all political prisoners, including Aung Saan



Suu Kyi, and for the junta to be referred to the ICC for investigation.

Burma is not a signatory to the Statute of Rome, so the International Criminal Court (ICC) can gain jurisdiction only by way of a Security Council referral, as it did with Sudan. There is little doubt that the SPDC has perpetrated sufficient atrocities to warrant the attention of the ICC, but a referral would require a tremendous amount of political will, especially in the face of the Chinese veto. In the meantime, the junta's latest exercise in democracy theatre should be watched with a healthy dose of cynicism. ■

TRANSITIONAL JUSTICE IN CONTEXT: THE CASE OF BOSNIA-HERZEGOVINA

Lauren McAlister

Lauren McAlister has recently returned from working as a United Nations Volunteer with the United Nations Development Programme in Bosnia-Herzegovina, where she implemented activities on transitional justice and human rights with field-based civil society organisations. She previously conducted research into community-based transitional justice initiatives in the divided community of Mostar, Bosnia-Herzegovina, and has partnered with a variety of local and international non-governmental organisations in the country. She holds a Master of Arts in Conflict Analysis and Management from Royal Roads University.

Transitional justice developed from the assumption that post-conflict societies require comprehensive measures to promote human rights, generate accountability and foster stable democratic institutions. Transitional justice's methodology includes legal justice, reparations, truth-telling, memorialization, and reforms. The processes undergone are ideally nationally sanctioned, involving the institutionalization of transparency and accountability, and, when possible, can help foster reconciliation. The transitional justice paradigm involves a multi-dimensional approach, acknowledging that societal justice is a *process* rather than an outcome, and needs comprehensive and consistent focus in order to contribute to socio-political restoration within fractured societies.

It is understandable that there is some ambiguity as to the objectives of these processes in what is a relatively new field with an ambitious agenda. There is much to learn, then, from what is happening in practice. Two mechanisms of transitional justice used with respect to Bosnia-Herzegovina — prosecutions and truth telling — lend valuable insight into the developing relationship between these mechanisms and the overall objectives of transitional justice.

Legal justice continues to focus on the past in Bosnia-Herzegovina, predominantly through the ICTY and the War Crimes Chamber in the State Court of Bosnia-Herzegovina. Conducting trials in the country itself has had a significant impact in garnering legitimacy for the process, while delineating crimes by region, irrespective of ethnic entity, assists in minimizing the ability to invoke ethnic rhetoric regarding the accused. However, prosecutions are time-consuming and costly. The cost of this process cannot be fully borne by the country without creating an unman-

ageable economic burden. While the State Court has received a great deal of external assistance, donor funding for these institutions is dwindling as geopolitical interests shift elsewhere.

The sheer scope of crimes committed necessarily means that a large number of perpetrators will never be prosecuted. Yet, given the heightened attention and funding to legal institutions, victims have come to expect prosecutions as *the* tool for ensuring accountability. The legal justice focus has fomented unmanageable expectations at times and also leads to a level of suspicion towards other transitional justice processes that could complement legal justice.

That being said, the ICTY and the War Crimes Chamber in the Court of Bosnia-Herzegovina are integral in reducing impunity and contributing to re-legitimizing the rule of law, which was severely undermined as a result of the conflict. This process is not, however, one that necessarily contributes to fostering peace and stability within the country.

The establishment of a truth commission is another transitional justice initiative that has been discussed in Bosnia-Herzegovina, predominantly within the non-governmental sector. Recently, this dialogue has stretched across state boundaries with the objective of forming a regional truth commission. This is an incredible challenge given the institutionalized variations in narratives in the respective nations, further exacerbated in Bosnia-Herzegovina by the competing rhetoric within the two entities in the country. Nevertheless, initiating dialogue within civil society that can further political awareness of the role of alternative justice mechanisms and their contribution to the future of the country is an important step for the country.

Divisive politics have made it difficult to incorporate the government in any thoughtful or mediated discussion of an officially sanctioned truth commission or truth telling initiative. However, nurturing this dialogue within civil society can provide largely isolated population groups with access to non-nationalist narratives. In turn, this can help reduce civic susceptibility to ethno-political manipulation by challenging accepted narratives within a public space. This is a long-term objective, and its lack of institutional and political support should not be allowed to derail it. There is a continuing discussion centered

on what the objectives of a truth commission should be and how it can contribute to broader restorative processes, both in the country and the region. That said, the current socio-political challenges render a potential truth commission vulnerable to manipulation and appropriation by nationalist agendas. This danger must be guarded against, as it carries with it the potential to cause damage to the already fragile collective relationships between ethnic groups.

A key objective of conducting truth commissions is to contribute to a nationally arrived at "truth". The entrenched divisions that linger in the country, however, indicate that it may be impossible to create a reifying narrative acceptable to all parties. Furthermore, fostering a communally arrived upon narrative necessarily implies the subjugation of other narratives, which are currently framed in non-negotiable ethnic terms.

The Research and Documentation Center in Sarajevo has initiated a project to collect the number of casualties disaggregated by ethnicity and thereby reduce the ability of this data to be manipulated for political purposes. Given the current tensions, this may be an appropriate step to foster an environment conducive to truth telling. Anything more drastic might be contentious, as it would involve both compromise and a re-evaluation of ethnic identity, which would in turn result in a backlash against alternative discourse.

It is almost trite to say that there are massive challenges for societies to address in the wake of conflict. Transitional justice frameworks can act as effective guides and assist in conceptualizing the types of processes that have the potential to assist in the most effective manner. However, we should be wary in assuming what the outcomes of these mechanisms are prior to understanding the objectives of the process. These mechanisms are effective only when there is a systemic analysis of the contextual aims of transitional justice. They are stripped of their true utility when employed in a superficial manner to provide a facade of accountability in dealing with the past. Transitional justice can be a deeply meaningful process if it is addressed at the right moment, in the right manner, and for the right purpose, and must acknowledge and condemn the human rights abuses during a conflict in a way that envisages moving towards a functional and peaceful post-transitional society. ■

ALUMNI INTERVIEW: JOHN VON KAUFMANN

The following opinions are solely those of John von Kaufmann. They do not necessarily reflect those of his employer the Department of Foreign Affairs and International Trade

Present job title: Counsellor and Head of the Human Rights Section, Permanent Mission of Canada to the UN, Geneva since August 2006.

Year of call: 1997

International Human Rights involvement while at school: I studied International Human Rights Law with Professor Cook, did an internship at the Canadian Civil Liberties Association, participated in Model UN competitions, and did an exchange in Lyon, France for my final semester.

What does your position entail day to day?

Our objective in the Human Rights Section at the Mission is to promote Canadian values of freedom, democracy, human rights and the rule of law through the human rights mechanisms of the United Nations in order to contribute to a more peaceful, secure, and prosperous world for Canadians and to improve the lives of people around the world.

Every day when I go to work, I keep this in mind. But there is no typical day. With the 2006 reform of the UN and the creation of the Human Rights Council, the human rights work of the UN has exploded in volume. We have gone from one annual session of the Commission on Human Rights to three annual sessions of the Human Rights Council. In addition, we have an average of three special sessions per year to address urgent human rights crises, such as the situations in Darfur, Burma, and the Democratic Republic of the Congo. On top of this we have three sessions per year of the Universal Periodic Review, a new mechanism by which the Council is reviewing the human rights performance of every UN Member State on a regular basis, currently every four years. Canada has participated in every review to date, making recommendations to countries on how they can improve respect for human rights. Canada itself was reviewed in February, 2009.

There are about 30 weeks a year of meetings alone. Every meeting of the Council is webcast and archives are available at www.ohchr.org. So, a typical day can involve researching and preparing for or analyzing and reporting on a Council meeting, planning our strategy in consultation with Ottawa, advising the Ambassador and the Deputy Permanent Representative, attending Council meetings and making statements on behalf of Canada, negotiating resolutions or new instruments with States from around the world, or organizing and chairing meetings on human rights situations with NGOs and other States. It's a fast-paced and exciting job, and I spend a lot of time out of the office at the UN advocating Canada's positions with colleagues from different cultures and backgrounds. It is always interesting, because we are dealing with a wide range of human rights issues everywhere around the world.

Prior to this position, what work experience did you have?

After completing my articles with Fasken in Toronto, I joined the Department of Foreign Affairs and International Trade in 1997. I worked on Asia-Pacific issues, trade law, and international law in Ottawa before being posted to cover human rights and humanitarian affairs at the Permanent Mission of Canada to the UN in New York from 1999-2002. This was an incredible experience and a privilege to help represent Canada at the UN while we were a member of the Security Council. I gained experience negotiating resolutions, including the first resolution on humanitarian assistance to East Timor after the crisis. When I returned to Ottawa, I had the opportunity to work in the Legal Bureau on international human rights law. This was a very stimulating and rewarding experience. I provided legal advice to clients in the Department and helped to negotiate treaties including the Convention on Enforced Disappearances and the Convention on the Rights of Persons with Disabilities. The legal training and analytical skills I gained at UofT were tremendous assets in this position. While in Ottawa, I also had the opportunity to teach a course on international human rights law as a part-time professor at the Faculty of Law of the University of Ottawa for two semesters, which was a challenging and richly rewarding experience. I gained renewed respect for the amount of work a professor has to put into preparing each class!

At law school, did you see yourself in this type of position?

I think I had wanted to be a diplomat since high school. I studied international relations in university and participated in Model UN. I was an avid reader of the *New York Times* international section and still loyally subscribe to the *Economist*. It was definitely a career path that appealed to me because it offered the possibility of making a difference to the world we live in. In law school, I wanted to explore all options, and I think it was a valuable experience to work in a law firm. But when I had a chance to join Foreign Affairs, I could not pass it up, despite the pay cut! I've had a fantastic experience with Foreign Affairs. I've been incredibly lucky to have had the positions I've had and to have the privilege of serving the people of Canada. It's an incredible career, in which you have the opportunity to do a variety of interesting and exciting things and to live around the world. I wouldn't trade it for a job in a firm!

What are the major challenges of your position?

There are many challenges in promoting human rights. Many States in the Human Rights Council are hesitant to address urgent human rights crises. There is resistance to promoting human rights on the part of governments that are not yet fully democratic. Respecting rights like freedom of expression, freedom of assembly and association is a challenge for some governments because it would pose a threat to their survival, so they seek to undermine international human rights standards and to weaken the UN's human rights systems. Often they argue that certain rights, like freedom of religion or belief, or equality and non-discrimination, are inconsistent with their religion and need to be interpreted in accordance with their cultural norms. But human rights are universal. Everyone in the world wants to be free to

INSIDE INTERNATIONAL CRIMINAL JUSTICE

Allison Sephton

think and believe and say what they want, and to be safe from arbitrary arrest and to be treated equally and with dignity. So we keep working to move forward, but it can be painfully slow at times and sometimes there are setbacks.

Do you feel that you are impacting people's lives? How?

It is difficult to measure the impact on the ground of work at the multilateral level. We work to establish international human rights standards, to monitor their implementation, and to promote implementation and compliance by States. Sometimes there are positive steps, such as when a State ratifies a human rights treaty or invites one of the Human Rights Council's special procedures to visit. Sometimes a political prisoner is released, or a perpetrator of torture is prosecuted, or a newspaper is allowed to re-open because of pressure by a Council resolution or the work of one of its special procedures. It is difficult to measure, but I think our work does have a positive impact on the lives of real people. There has been immense progress in promoting respect for human rights since the adoption of the Universal Declaration of Human Rights in 1948. An entire international human rights law framework and system of monitoring mechanisms has been built at the UN. This has changed the way States talk about these issues. People everywhere want their human rights respected, and many brave people on the ground take real risks to defend their rights. Meeting with victims and human rights defenders in Geneva helps provide the inspiration to keep up the fight.

What law school classes best prepared you for this work?

The course on international human rights law was extremely interesting and helpful for what I'm doing now. I wish I had taken more courses on international humanitarian law and international criminal law. But I've benefited from the whole experience at UofT law. Learning to think analytically, to see all sides of an issue, to develop rational arguments, and to speak and write clearly are very valuable skills that UofT Law excels in teaching.

What advice can you offer law students who wish to work in international human rights?

Take every course on international law that's offered. And go work in the field. Volunteer with the UN or an NGO and spend a summer or the year after graduation getting some field experience promoting human rights. I didn't do this and I really regret it. There are a lot of NGOs doing excellent work promoting human rights around the world. There are some excellent organizations of lawyers and NGOs which offer legal services to human rights victims which would be good places to start. If you are interested in diplomacy, write the Foreign Service exam, but remember that while many positions at Foreign Affairs and abroad involve a human rights component, a career as a diplomat is much broader than human rights. And don't give up.■

This term, four 3Ls (Samreen Beg, Allison Sephton, Nicole Simes and Aneesa Walji) travelled to The Hague in The Netherlands to observe trial proceedings at the International Criminal Tribunal for the Former Yugoslavia (ICTY). The students had assisted the defence team in *The Prosecutor v. Ante Gotovina* (ongoing at the ICTY) as part of their work with the International Human Rights Clinic. General Gotovina is indicted for war crimes and crimes against humanity alleged to have been committed during *Operation Storm*, the military campaign ending Serbian control over Croatia. The students had the opportunity to meet with Defence Counsel of the case, Greg Kehoe and Luka Misetic. The Hague visit was a chance for the students not only to meet their mentors and to see the impact of their work, but also to learn from experienced and renowned litigators about the unique challenges and benefits of working on the defence side of an international criminal trial, as well as working in the field of international criminal law, generally.

The students were also able to observe a motion hearing of *The Prosecutor v. Radovan Karadzic*. A prominent Serbian politician during the violent breakup of the Former Yugoslavia, Radovan Karadzic was indicted for crimes committed against Bosnian Muslims and Bosnian Croats during the Siege of Sarajevo, and for crimes committed in the massacre at Srebrenica. Karadzic appeared without counsel for the hearing (as he has chosen to do throughout the trial), and the trial illustrated the dynamics of international criminal trials with self-represented accused.

While in The Hague, the students visited the International Criminal Court (ICC) to observe *The Prosecutor vs. Charles Ghankay Taylor* at the Special Court for Sierra Leone (SCSL). Taylor, the former President of Liberia, was indicted for crimes against humanity and war crimes committed during the civil war in Sierra Leone in 2003. Seeing this trial was a unique opportunity, as Taylor was testifying for the Defence as to his version of the events that occurred in Sierra Leone.

Besides observing trials, the students were able to meet with lawyers from Chambers, Prosecution, and Defence at the ICTY, ICTR and SCSL. It was fascinating to gain insights into the trials and the field of international criminal law from such diverse perspectives. The students

also had the chance to speak with Judge Kimberley Prost, the only Canadian judge presently appointed to the ICTY. Judge Prost provided insight into the challenges of adjudicating such high-profile cases, including the challenge of working with a panel of judges of both civil and common law backgrounds, as well as working at a Tribunal where procedural and evidentiary rules can be created ad-hoc. Finally, the students met lawyers of the UN Permanent Court of Arbitration while visiting the Peace Palace in The Hague.

Overall, the trip was an incredibly valuable experience, providing the clinic students with both exposure to the realities of working in international criminal law, and a chance to see their work for the IHRC in action.■



INJUSTICE FOR ONTARIO'S FIRST NATIONS

Natasha Kanerva and Ryan Liss

Throughout Canada, Aboriginal people living on reserves endure conditions akin to those in some of the poorest developing countries in the world. 73% of First Nations are in need of affordable housing; 12% have to boil their drinking water; and the unemployment rate among First Nations is nearly four times greater than it is for the rest of Canadians. Since 1996, the federal government has maintained an arbitrary 2% cap on spending increases for core services for Aboriginal peoples — less than one-third of the average 6.6% increase that most Canadians enjoy. In 2005, average Aboriginal per capita funding from the federal government was approximately \$8500, whereas non-Aboriginal per capita funding from municipal, provincial and federal governments was approximately \$15,188.

The 2005 Kelowna Accord was designed to address some of these disparities. However, Stephen Harper's government came into power days after the Accord was finalized and cruelly reneged on the commitment, slowing down our capacity to remedy the situation, lowering the standard of living on reserve communities, and weakening Canada's already tenuous com-

"The social and economic conditions on all reserves in Canada not only violate the Constitution of Canada, they also represent grave violations of civil, political, social, economic and cultural rights enshrined in the international human rights conventions."

mitment to improving the social and economic conditions of First Nations.

The social and economic conditions on all reserves in Canada not only violate the Constitution of Canada, they also represent grave violations of civil, political, social, economic and cultural rights enshrined in the *International Covenant on Civil and Political Rights*, the *International Covenant on Social, Economic and Cultural Rights*, the *International*

Convention on the Elimination of Discrimination of All Forms of Racial Discrimination, and the *Convention on the Rights of the Child*. Canada is party to these treaties and, as such, bears international legal obligations to comply with their terms.

Indian and Northern Affairs Canada (INAC) funding is essential to the protection of the civil, political, social, economic and cultural rights enshrined in the international treaties to which Canada is a party and is further mandated by s. 35 of the *Constitution Act*, 1982. INAC funding is crucial to the social and economic development of reserve communities, as delineated in *Delgamuukw v. British Columbia*. It is critical to the protection of the social and economic interests that are integral to the distinctive cultures of First Nations, as defined in *R. v. Van der Peet*. Also at stake is the honour of the Crown in living up to its treaty obligations that structure Canada's constitutional relations with Reserve communities, as established in *R. v. Simon* and affirmed in *R. v. Badger*.

This situation has been aggravated for select First Nations in Ontario by arbitrary funding formulas. The funding formulas used by INAC were the subject of a 2008 study by PricewaterhouseCoopers LLP, which found that the five largest First Nations receive substantially less funding per capita than smaller First Nations. The study concentrated on four areas in which there are significant discrepancies in per capita funding between larger and smaller First Nations: education funding, major capital funding, minor capital funding, and infrastructure funding. The study established that even after accounting for economies of scale and urban proximity, significant funding gaps remain between the per capita funding of larger and smaller First Nations.

Significantly, the study demonstrates that there is no justification offered by or available to INAC for these significant funding gaps resulting from the distribution formulas. Instead, they distinguish between members who belong to larger and smaller First Nations in arbitrary and unjustifiable ways. This constitutes discriminatory treatment in relation to the provision of funding that is essential to the protection and promotion of international and domestic civil, political, social, economic, cultural and indigenous rights of Ontario's First Nations.

In October 2009, Natasha Kanerva,

Ryan Liss, Joss Opie and Nicole Simes began working with Professor Patrick Macklem and First Nations in Ontario to determine how the discriminatory treat-

"Even after accounting for economies of scale and urban proximity, significant funding gaps remain between the per capita funding of larger and smaller First Nations."

ment could be brought to light and remedied. As a result of this work, they founded an NGO called The Injustice Project — Advocating for Indigenous Justice, and filed two complaints on behalf of four of the five largest First Nations in Ontario — the Mohawks of the Bay of Quinte, Oneida Nation of the Thames, Wikwemikong Unceded Indian Territory, and Six Nations of the Grand River.

The first complaint was filed with the United Nations Special Rapporteur on the Rights of Indigenous People, requesting that he review Canada's international and constitutional obligations to remedy the social and economic conditions of reserve communities.

The second complaint was filed with the Canadian Human Rights Commission, requesting that the Commission work with the UN Special Rapporteur in his review. Despite the government's open hostility to the UN *Declaration of the Rights of Indigenous Peoples*, the Canadian Human Rights Commission recently endorsed the UN *Declaration* and the work of the UN Special Rapporteur. Hopefully, these initiatives will begin to hold the government to account for its discriminatory underfunding of First Nations. ■

To learn more about these initiatives and The Injustice Project, visit its Facebook page at:

<http://www.facebook.com/pages/The-InJustice-Project-advocating-for-indigenous-justice/285421587179>.

SOGI UPDATE

Amanda Montague

This marks the end of the third year of operation of the Sexual Orientation and Gender Identity Working Group (SOGI), and the second year of the group's Refugee Law Project. Our group has enjoyed great success this year, and we hope to continue to build on that success in the future.

The genesis of this Working Group arose from the myriad human rights abuses and challenges faced by sexual minorities all over the world. Persecution on the basis of sexual orientation and gender identity is likely unmatched in the world today: over 80 different countries currently have operating legislation that criminalizes homosexual activity, and discrimination and violence against sexual minorities is commonplace in many parts of the world. The deplorable state of human rights for queer persons in so many countries makes sexual minority rights an important element to include in the work of the International Human Rights Program, and the SOGI group has attempted to fill that role for the past three years.

The main focus of our group for the past two years has been the Refugee Law Project, through which we assist lawyers in research for refugee claims based on sexual orientation and gender identity. This work provides a valuable service for sexual minority claimants — due to the restrictions on Legal Aid certificates for refugee claims, most lawyers have insufficient time to do the onerous research on the country conditions of their claimants. We thus fill a gap in the service provided to refugee claimants, helping to ensure that their claims are determined with as complete an evidentiary record as possible.

This past year has seen an expansion in both the size of our group and of the number of requests we have received. We currently have over twenty active members of the group, all of whom have participated in multiple research assignments over the course of the year. Thanks to their dedicated efforts, SOGI has responded to more than a dozen requests from refugee lawyers for country condition research. The group has completed reports on countries spanning five continents. Students have researched questions as diverse as the Anti-Homosexuality legislation in Uganda, and the possibility of Internal Flight Alternative in Hungary. Always, we have strived to provide excellent and comprehensible research in a timely fashion to assist refugee claimants in need of assistance.

Given the growing number of students interested in SOGI, we have several ideas to expand the scope of our group's work in the coming year. One of those ideas relates to the group's website — while the site has worked fairly effectively for lawyers seeking research, we would like to incorporate other elements into the website, including a database of all of our completed reports, and a section with links to recent news stories in the area of sexual minority rights and refugee issues. Our group has also discussed adding a second research project to our work next year, addressing another major issue facing sexual minorities through a longer research report.

On behalf of the SOGI Executive, our sincere thanks and congratulations goes out to all our hardworking members, who have made the group such a success this year. We are thrilled to have contributed to the success of vulnerable refugee claimants, and look forward to continuing this important work in the future.■

AXWORTHY ON R2P

Lauren Rock

On January 28, 2010, the Honourable Lloyd Axworthy spoke at the Faculty as part of the IHRP speaker series. Drawing upon his extensive experience in Canadian politics and international relations, Dr. Axworthy delivered an optimistic message, conveying a strong faith in the potential of global institutions to respond to the challenges of this century. He grounded this perspective in candid anecdotes from his days as Canada's foreign affairs minister.

Dr. Axworthy began by recounting his expectations as to what the job as Minister of Foreign Affairs might involve: he had foreseen a role as 'caretaker' of national interests, responding to the urgency of immediate current affairs. What unfolded, however, would be a remarkable blend of historical circumstance and urgent issues.

When Dr. Axworthy assumed the role as Minister of Foreign Affairs, national governments, including that of Canada, began to prioritize the protection of their citizens traveling abroad. At the time, there was a growing consensus that a framework convention was needed to protect and repatriate citizens — be they members of the foreign service, tourists, or aid workers — in dangerous situations abroad. This emerging issue came to be known as "human security". Dr. Axworthy took a broader view, suggesting that 'global citizens' were the basic subjects of concern. Whether nationals of developed states or weak and unstable states, all deserve "human security". Dr. Axworthy brought this notion to the United Nations Security Council (UNSC) of which Canada was then a member. He was able to shift the UNSC's focus away from states and towards human beings. This was a remarkable step forward in prioritizing the protection of universal human rights at the highest echelon of global governance.

Another circumstance that lent itself to positive change was the fall of the Berlin wall. This ended the historic stalemate between East and West and allowed some long dormant initiatives to bloom. Most notably among the ensuing progress was the writing of the Rome Statute which created the International Criminal Court (ICC). Dr. Axworthy provided a first hand account of Canada's central role in the negotiations surrounding the drafting of that treaty.

Dr. Axworthy also addressed the ongoing debate about possible tension between peace and justice. A firm believer that there can be no lasting peace without justice, Dr. Axworthy provided an example of the ICC's peace building capacity. He discussed how NATO negotiations with Slobodan Milosevic were stalled until Louise Arbour, then lead Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, indicted Milosevic for war crimes. Faced with the weight of the indictment, Milosevic capitulated to NATO demands.

Dr. Axworthy emphasized the indispensable and growing influence of NGOs in public international law and relations. During his time as Canada's Minister of Foreign Affairs, Dr. Axworthy said, leaders of the NGO community provided essential direction and advice on what Canada could be fighting for

Finally, Dr. Axworthy cautioned that for all the potential to create a more just and peaceful world order, international relations, much like the human brain, are driven by primal emotions and instincts. All the more reason, then, to be grateful for capable and intelligent Canadians like Lloyd Axworthy, who dedicate their lives to working in the "frontal cortex", channeling these volatile drives.■

"A DEMOCRACY NEXT DOOR?"

Nicole Simes

Professor of International Law at McGill University, and board member for the Iran Human Rights Documentation Center, Payam Akhavan spoke to a crowded room at UofT law on February 2, 2010. Professor Akhavan examined the current events in the Islamic Republic of Iran and the effect that Iran's civil movements may have on the wider Middle Eastern region.

Just over one year ago, at the mark of the 30th anniversary of the fall of the Shah in Iran, the thought of a grassroots movement undermining the legitimacy of the Islamic Republic of Iran was unimaginable to political analysts. Only several months later, the green movement — Iran's "Ghandian" moment, as Prof. Ramin Jahanbegloo has coined it — began. Analysts did not foresee the establishment of the green movement due to their focus on the power factions of the elite. As opposed to being an elite power struggle, the green movement has been driven from the grassroots. This is the reason why, as Prof. Akhavan explained, it is a profound and genuine social movement.

While the green movement in Iran began in the lead up to the contested election on 12 June 2009, its focus is not on who won the election. Rather, Prof. Akhavan noted, the soul of the movement is non-violent resistance and accountability. While there have been individual clashes with police and security forces, throughout the past year, the green movement has maintained the characteristic of non-violence and has gathered strength and legitimacy by representing a broad cross-section of Iranian society. The true diversity of the movement was evidenced in the thousands who turned out to show their support following the death of Ayatollah Montazeri. Prof. Akhavan told the audience that today the green movement is a civil force for political, social and cultural change through coalition building. It represents the desire of the Iranian people to move away from authoritarian absolutist ideologies to more broad-based democratic politics.

As the green movement challenges the status quo of the political landscape in Iran, it also has the potential to affect the wider Middle Eastern region. Prof. Akhavan maintained that the example of Iran's burgeoning Green Movement could also transform neighbouring states like Egypt and Saudi Arabia. Their elites may fear a 'democracy next door.' Prof. Akhavan explained that successful non-violent resistance in Iran and the push from Iranian civil society for true democracy and accountability from the leaders is a threat to many states in the wider Middle Eastern region, which also govern through absolutist regimes. While the months ahead will likely bring challenges, risks, and potential bloodshed, Prof. Akhavan assured the audience that within the green movement lies tremendous promise for a brighter future for Iran and the Middle East. ■



PROTECTING THE INTERNALLY DISPLACED

Laura Tausky

Internally displaced people (IDPs) face serious humanitarian issues: lack of access to shelter, separation of families, loss of livelihood, and exposure to risks like armed conflict. However, unlike refugees, they do not have a specific international regime to protect their rights. The IHRP Speaker Series recently addressed these issues in a lecture by Erin Moody.

Ms. Mooney — an international expert on IDPs who has worked for the UN Representative of the Secretary-General on IDPs and was Deputy Director of the Brookings Institute's project on internal displacement — discussed the evolution of international protection for IDPs.

Ms. Mooney explained that the recognition of internal displacement is relatively novel. Its spot on the international agenda is the result of an advocacy campaign prompted by the post-Cold War increase in the number of IDPs around the world. Advocates lodged their concerns with the Human Rights Council, which ultimately designated a Representative of the Secretary-General (RSG) to report on the issue. Unlike a Special Rapporteur, the RSG mandate invokes the language of dialogue and discussion, rather than monitoring and reporting. Francis Deng was appointed as the RSG in 1992.

The RSG formalized a definition of IDPs in 1998. Notably, an IDP is not defined solely as someone compelled to move by armed conflict, and an IDP's movement must be within the borders of a citizen's own state. The definition, however, excludes internal economic migrants and does not connote a legal status triggering an entitlement to certain benefits.

As RSG, Deng also recast sovereignty as a responsibility that a government has toward its own citizens to meet their basic material and security needs. If a government is unable to comply with this obligation, it is expected to seek assistance from the international community, which has a corresponding duty to fill the protection gap if a government fails. This reconceptualization of sovereignty set the foundation for a new discourse around humanitarian intervention and ultimately fed into the Responsibility to Protect agenda.

Ms. Mooney also described the development of a normative framework for IDPs. A massive study by the RSG revealed that there were significant gaps in the protection that international law could offer them. Instead of pressing for an international treaty on IDPs, the RSG decided to formulate guiding principles. The guiding principles are connected to existing rights in international law and provide content to these recognized international legal rights in the context of internal displacement. The RSG felt that guiding principles would better direct those on the ground. Exceptionally, the RSG worked outside of the UN framework to draft the principles through deliberations of international experts in lieu of multilateral negotiations.

While the guiding principles gained acceptance quickly among international actors, including UN agencies and the Security Council, domestic implementation remains the final frontier. Seventeen countries have incorporated them into domestic legislation, and others have issued national policies on internal displacement.

Ms. Mooney concluded by noting that while there are encouraging trends toward responsibility for IDPs, it is still necessary to give voice to displaced communities, since they remain the best advocates for their own cause. ■

LETTER FROM SUDAN

Rebecca Sutton

[continued from page 1]

As Country Director, I am ultimately responsible for the planning, monitoring, and evaluation of our programs, as well as all operational, financial, logistical, and administrative aspects of programming. While there is no such thing as a “typical” day in Darfur, I often move from the office to one of the programming sites (usually one of the camps, and sometimes a day-trip to a more remote field location), to a meeting (e.g. the International INGO forum, the UNHCR weekly Protection Working Group, or the UN Department of Safety and Security weekly security update). This routine is interspersed with donor visits from overseas, security concerns that affect my or the organization’s movement on the ground, and any number of daily “fires” that require putting out.

I have now been here for almost six months, and whenever I take stock of the experience I marvel at how little I knew or understood just several months, weeks, or days ago. The learning curve is steep and there is little time for rest. This is perhaps what makes the work so interesting. I find myself constantly grappling with pragmatic concerns relating to issues that have lain mostly in the theoretical realm for me in the past. How do you get three bids for a supply request in a small rural market? How do you get a written invoice from someone who cannot read or write? How do you get donors to be as interested in teacher training as they are in funding school construction? On the more abstract end of the spectrum lie questions relating to the nature of the context in which we are working. Is it still emergency/relief, or have we entered the early recovery phase, or perhaps even reached post-conflict development? While in one sense this seems to be merely a taxonomical — and thus somewhat tiring — exercise, the distinction may have important implications for the flow of funds and consequently the nature of programming in Darfur.

In all of this, I see my key task as understanding the communities here and making informed decisions about how to adapt our programming to the ever-shifting reality on the ground. The coming months are looking to be particularly momentous for Sudan: elections are planned for April 2010, followed by a referendum on independence for South Sudan in 2011. In addition, the hesitant and seasonal movement of individuals from the IDP camps to their communities of origin or to new communities may become more permanent, resulting in the shrinking or closing of the camps. How these events will play out and what trends will unfold remains to be seen; however, one thing is certain: Darfur is always in flux and the best anyone working here can do is watch, learn, and do, and then reflect on the doing. ■

CONGRATULATIONS TO THE 2010 IHRP INTERNS

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Heather Burnett

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Joanna Kyriazis

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Chris Lewarne

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Adam Posluns

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Mary Roberts

Justice Study Centre of the Americas (CEJA) (Chile)

Lauren Rock

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Emily Shepard

Centre for Spanish Speaking Peoples (Toronto)

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