RIGHTS REVIEW

CHARTER TRUMPS UN PROGRAM AND BRINGS CANADIAN HOME

Volume II, Issue 2, Fall 2009

Cathleen Powell

Introducing his judgment in *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada*, Justice Russel Zinn of the Federal Court describes the applicant, Abousfian Abdelrazik, as "as much a victim of international terrorism as the innocent persons whose lives have been taken by recent barbaric acts of terrorists." The *Abdelrazik* story is a stark reminder of the dangers of anti-terrorism, demonstrating the human rights abuses which can result from both domestic and international anti-terrorism measures. However, this story also helps to build a groundswell of resistance to these abuses, joining recent domestic and regional cases which have extended their critique of anti-terrorism measures to the international regime. (See, for example, the case of *Kadi v. Council and Commission* before the European Court of Justice).

The anti-terrorism measure in this case was the "listing" system of the United Nations Security Council. Originating in Security Council Resolution 1267 of 1999, this mechanism imposes sanctions on individuals and entities connected to the Taliban and Al-Qaeda. The founding resolution set up a committee, commonly called the "1267 Committee", to determine which entities should be listed, to monitor states' compliance with the sanctions against them, and to grant exemptions from the sanctions on humanitarian grounds. Once persons or entities have been listed by this committee, states are bound under the UN Charter to implement a number of sanctions against them. Amongst these sanctions is a travel ban, designed to prevent listed persons from entering into or passing through the territory of any state.

Born in Sudan, Abdelrazik fled the country after a military coup by Omar al-Bashir in 1989. He was granted refugee status in Canada and subsequently acquired Canadian citizenship. Returning to Sudan in August 2003, he was arrested by the Sudanese government at the request of the Canadian government, detained and tortured. After being released in July 2004, he was re-arrested in November 2005 and released again in July 2006. Immediately afterwards, he was listed by the 1267 Committee of the Security Council.

Abdelrazik took refuge from the Sudanese authorities in the Canadian Embassy in Khartoum. He found himself unable to travel back to Canada, mainly because the Canadian government refused to issue him a passport. In early 2009, Abdelrazik brought a claim against the Minister of Foreign Affairs and the Attorney General of Canada in the Federal Court of Canada.

Abdelrazik's constitutional claim was based solely on his right, as a citizen of Canada, to enter Canada; a right guaranteed by s. 6(1) of the Charter. In countering this claim, the Minister of Foreign Affairs and the Attorney General of Canada brought two substantive arguments: first, they argued that s. 6(1) did not require any positive performance from the government of Canada; second, they claimed that they were prevented by the Security Council sanctions regime from allowing Abdelrazik to return to the country.

Justice Zinn dismissed all the respondents' objections. In response to the government's contention that s. 6 (1) bound it merely to permit Canadian citizens to enter the country (rather than to take the positive steps of providing a passport), Justice Zinn cited *Canada (Attorney General) v. Kamel* as saying the right to enter one's country is meaningless in the absence

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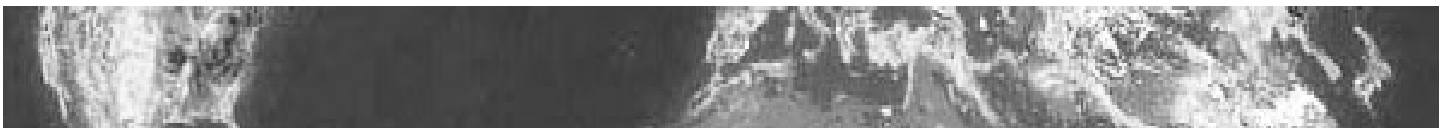

NOTE FROM THE EDITORS

At home and abroad, Canada has long been associated with liberal internationalism and the promotion of human rights. Our psyche is informed by ideas of social democracy and a progressive middle power. We live in the land of Lewis, Dallaire, Orbinski, and Barlow. We invented peacekeeping and banned landmines. It may be, however, that this self-perception, so central to the Canadian conscious, needs to be revisited.

Canada will be a leading antagonist at the upcoming Copenhagen conference on climate change, having stated months in advance that it does not anticipate negotiations to be fruitful. Our mining companies are vilified for their heavy-handed and insensitive extraction activities in the developing world. Our government's well-documented refusal to ask for the repatriation of Omar Khadr is complemented by proposals for an increasingly restrictive immigration policy. Canada's upcoming moment in the world's spotlight – the Vancouver Olympics – will be hosted at the expense of vulnerable populations in British Columbia.

We cannot rest on our laurels, nor should we. Yet, if Canadian values are in fact changing, they should not do so absent debate. We would do ourselves a disservice to sleepwalk blindly through this shift. As the Canadian political landscape becomes redefined by a Westward lean in economic power and federal deadlock in Quebec, the time is ripe to delineate the contours of 21st Century Canada.

It may be that important issues are discussed on the fringes, what with mainstream media seemingly preoccupied with sensationalizing the H1N1 virus and detailing the soap opera that is the dysfunctional Liberal Party of Canada. Now in its second year of existence, the *Rights Review* has the capacity to become a space for such discourse. In addition to our mandate of helping to foster an International Human Rights community at the Faculty of Law by reporting on developments in the field, the *Rights Review* endeavours to be a forum of opinion and ideas.

In reality, the Canadian identity is nuanced, and any unitary perception thereof is likely to have been arrived at by way of oversimplification. The geographic and cultural diversity that defines us is also what makes consensus so difficult. Ultimately, we are the country of both David Suzuki and Talisman Energy, and our identity results from attempts to reconcile that fact. As law students, we are in a unique position to understand this nuance while possessing the energy to advocate for what we think is right.

Human rights should remain central elements of the Canadian existence, but this does not mean that they should be accepted uncritically. The study of law teaches us that rights and priorities often conflict. Moreover, it teaches us that answers are based less in formula than in principle. It is only through the rigorous analysis human rights issues that we can see where they fit among competing interests.

Canada's contemporary human rights record – discussed in part on the pages that follow – suggests that our country is reassessing its role in global citizenry. That re-evaluation is an important one requiring a wide range of input, particularly from those most knowledgeable of the constraints upon government action. This publication will have attained its objective if it is able to facilitate participation in that process.

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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THE DENIAL OF FREEDOM OF EXPRESSION IN VIETNAM: FROM BANNERS TO BLOGS

Erin Hallock

In today's information age, there are an increasing number of means by which ideas and opinions can be disseminated. Such modes of communication, whether old or new, often facilitate the exercise of individuals' fundamental human rights, in particular their freedom of opinion and expression as laid out in Article 19 of the Universal Declaration of Human Rights. However, in response to advancements in the proliferation of information, states that view free speech as an increasing threat have also developed new methods for curtailing the dissemination of information.

In Vietnam, denying political activists and dissidents the freedom of expression is not uncommon. According to Amnesty International, expression has been strictly controlled in the country for many years. Since 2006, there has been a resurgence in the arrest and detention of activists, particularly in response to expanding hubs of web-based criticism of the ruling Communist Party. Authorities have employed a variety of sanctions against dissidents, including surveillance by police, restrictions on movement, and interference with home utilities such as phone lines and internet access. As Vietnamese citizens have fought to find ways to exercise their rights, the state has continued to curtail their efforts in an attempt to silence opposition to the ruling regime.

The Case of Vu Hung

For over a year, Vu Hung, a married father of two and former high school physics teacher, has been detained in Vietnam as a prisoner of conscience. Prior to his incarceration, he was a known pro-democracy activist, having participated in peaceful protests against government policies since 2006. In April 2008, Vu Hung was arrested along with 13 others involved in peaceful demonstrations against Chinese policies during the Olympic torch relay through the city of Hanoi. He was beaten during the course of his detention before being released. In July 2008, Vu Hung was also dismissed from his job as a high school teacher due to his involvement in pro-democracy activities.

On September 18, 2008, Vu Hung was arrested again with 8 others in connection with a planned peaceful protest. He was charged under Article 88 of Vietnam's *Penal Code*, which criminalizes "conducting propaganda against the Socialist Republic of Viet Nam." His offence consisted of joining with others to hang banners calling for improvement in their country's social situation and making declarations related to a territorial dispute between Vietnam and China over ownership of the Spratly Islands. According to a report of the BBC, Vu Hung suspended a banner 3 meters long over a bridge in Hanoi that called for an end to corruption and inflation and demanded that the Vietnam Communist Party immediately adopt democratization and multi-party rule.

"In Vietnam, denying political activists and dissidents the freedom of expression is not uncommon."

For over a year, Vu Hung was held in pre-trial detention. Amnesty International reports that the conditions of his detention included physical beatings during interrogation sessions, leading to deterioration in his health. Vu Hung's family has not been permitted to see him throughout the course of his detention and his current location is unknown.

On October 7, 2009, over a year after his arrest, Vu Hung stood trial in Hanoi for the charges laid against him. He was convicted and sentenced to three years imprisonment, followed by three years probation. The judge at trial reportedly declared Vu Hung's behaviour to have constituted a "danger to society." In response to this verdict, Amnesty International immediately called for urgent action in support of Vu Hung's unconditional release, and the detainee himself has engaged in a hunger strike in protest of his strict sentence.

The Case of 'Bloggers'

Along with the persecution of dissidents, another emerging trend in Vietnam over the last two years is the crackdown on the use of the internet — specifically blogs — to disseminate opposition to the state. There are now more than 20 million internet users registered in Vietnam, and among those, two to three million participate in 'blogging' everyday. The internet's popularity has grown in part due to the silencing of the official media regarding controversial issues related to the rule of the Communist Party. Bloggers often post and share information not available in the traditional media.

Internet censorship is Vietnam's response to the perceived threat of the internet and public access to uncensored information. Some commentators posit that the Vietnamese Communist Party has taken the lead from the Chinese Communist Party in how to exert control over the media. A study by the OpenNet Initiative of Harvard, Oxford, Cambridge and Toronto Universities found that Vietnam's internet censors mostly block political content on the web, rather than the obscene or sexually explicit content that the state alleges is its intended target.

On December 18, 2008, Vietnam introduced new legal regulations focusing specifically on blogs. According to the Ministry of Information and Communications, the regulations are intended to deal with ideological, social and foreign issues related to blogs. The regulations prohibit bloggers from discussing subjects that the government deems sensitive or inappropriate, and also restrict the content of blogs to writings on personal issues. They encourage the use of only "clean, healthy Vietnamese language." The rules specifically ban blog posts that undermine national security, incite violence or crime, disclose state secrets or present inaccurate and defamatory information.

Officials wasted no time in enforcing these new regulations. Most recently, three bloggers were detained between August and September of 2009 for alleged national security reasons. While all three individuals have since been released, the most recent, Nguyen Ngoc Nhu Quynh, was reportedly freed only after promising she would discontinue posting on her blog. Based on the extensive scope of the censorship on blogs contained in Vietnam's year-old regulations, these arrests and infringements of freedom of expression will not be the last.

Conclusion

For the time being, the situation in Vietnam of censorship of all varieties of media, old and new, leaves peaceful activists and dissidents without clear prospects for the recognition of their fundamental right to free expression. It appears that Vu Hung's plea, made at his October 2009 trial, is destined to go unanswered: "I just want to contribute my little voice to make society better." ■

THE KENNAPOCALYPSE OF FORTRESS CANADA

Sarah Hamilton

On 23 October 2009, fifty "No One Is Illegal" protesters cornered Jason Kenney, Canada's Minister of Citizenship, Immigration and Multiculturalism. They asked him for a statement regarding the recent murder in Mexico of a Mexican woman, known as Grise, who had twice sought refugee status in Canada but was ultimately deported to her death. When a protester told Kenney that his policies scapegoat migrants and pander to racists, Kenney quipped, "I plead guilty, I'm a racist." Such is the environment surrounding the recent changes to the refugee and immigration regime initiated by Kenney, dubbed the "Kennapocalypse" by Toronto refugee and immigration lawyers.

Kenney's changes have both positive and negative elements. They include the threatened overhaul of the Refugee Appeals Division and a general "streamlining" of the refugee process. Last July, he outraged Mexico and the Czech Republic by imposing visa requirements on visitors originating from those countries. The Minister has also modified a program notorious for facilitating the abuse of susceptible parties.

Canada's live-in caregiver program allows for the importation of foreign domestic workers, but renders that gendered labour force vulnerable in the process. Caregivers are required to live in their place of employment, exposing them to overtime without pay and potentially to abuse or mistreatment. Their immigration status is temporary, their work permits specific to a single employer, and they must work as caregivers for 24 out of 36 months to remain in Canada.

"Kenney would have us believe that Canada has a moral stake in restricting the claims of Czech and Mexican nationals, because it will free up the system for more 'genuine' refugees."

Altogether, these conditions force caregivers to remain with abusive employers or risk losing their status. Kenney introduced reforms following the high profile allegation in May 2009 that Liberal MP Ruby Dhalla was herself an abusive employer. The proposed legislation would prohibit the confiscation of a worker's documentation and prevent recruiters from charging recruitment fees to potential employees. While these improvements will benefit Ontario's 21,000 live-in caregivers, they fail to address the fundamental cause of caregiver vulnerability. It is the link between immigration status and a specific employer that facilitates the exploitation of these foreign workers.

Kenney's partial improvements to the caregiver program stand in contrast to other, predominantly negative reforms to the Canadian refugee and immigration system. A soon-to-be-announced "proposed overhaul" of the refugee appeals system targets the fact that claimants are permitted to stay in Canada while their claims are being processed. Reforms will increase the level of scrutiny at the intake stage in order to prevent bogus claims at the outset, perhaps by bypassing the Immigration and Refugee Board entirely. One potential model is the British system, which grants discretion for first refusal to an immigration officer instead of a tribunal. This raises serious concerns about the trade-off between administrative efficiency and due process.

With the effects of his reforms a long way off, Kenney has turned to measures that will immediately stem the flow of refugees. This summer, Citizenship and Immigration Canada (CIC) suddenly revoked the Temporary Resident Visa exemption for nationals of Mexico and the Czech Republic, the first and second ranked points of origin for refugee claims made in Canada. This attempt to exclude claimants on the basis of quantitative excess is arguably without legal basis since Canada's immigration system does not impose quotas by source country. The exclusionary criteria of visa requirements means that those most in need of protection are unlikely to make it to Canada in the first place.

Temporary Resident Visas are presumptively required for all visitors to Canada, with the CIC making exemptions based on policy. Amongst the criteria considered in granting exemptions to a country are the numbers of its national making claims in Canada or who are in Canada illegally and certain domestic socioeconomic conditions. In other words, countries with poor living standards whose populations seek to come to Canada are the very ones forced to get a visa.

A paradox results because the measures used to allocate visa requirements are equally indicative of pressures to escape. Potential refugees are denied a visa because they would otherwise be likely to succeed in claiming refugee status. Kenney furthers this perverse result by interpreting data regarding refugee claimants in the most unfavourable manner possible. Kenney cites the huge increase in Mexican and Czech claims in recent years without considering the possibility that it is based in the need of persecuted peoples from these

countries to take shelter in Canada.

Indicative of the Minister's bias is the fact that he construes both the low acceptance rate of Mexican refugees and the high acceptance rate of Czech refugees as proof that the claims of each are illegitimate. Addressing the success rate for Czech refugees of Roma origin, the Conservative Minister stated, "The relatively higher acceptance rate of refugee claims originating in the Czech Republic masks the troubling fact that more than half of the claims are abandoned or withdrawn before a final decision is made by the Immigration and Refugee Board." While the CIC cites this fact as evidence that "many claimants may not be genuine refugees," it is equally likely that the frequency of abandonment results from the delays in processing claims.

Kenney would have us believe that Canada has a moral stake in restricting the claims of Czech and Mexican nationals, because it will free up the system for more "genuine" refugees. The problem is that Kenney uses a blunt instrument that indiscriminately prohibits entry to Canada. The imposition of a visa requirement means that any potential visitor who cannot persuade a visa officer of the temporariness of and funding for their visit will be denied entry. Yet these criteria exclude all potential refugees, genuine or not. As with his approach to domestic workers, Kenney would be better to discard the quick-fix in favour of more meaningful policy that cuts to the source of the issues in play. ■

FREEDOM OF ASSEMBLY VIOLENTLY SUPPRESSED IN GUINEA

Morgan Sim

On September 28, 2009, a peaceful opposition rally in the Guinean capital of Conakry was interrupted when hundreds "red berets" - members of the elite Presidential Guard - propelled canisters of tear gas into the stands and opened fire on the crowd of 50,000. The brutal gang rape of dozens of women followed the attack. Women attempting to flee the stadium housing the protest women found it to be surrounded and blockaded by members of the Presidential Guard, as well as gendarmes, Anti-Riot Police, and dozens of civilian-clothed irregular militias. These events occurred in the middle of the day, in public, in front of thousands of witnesses. The alleged crimes were even recorded on cell phones and the grotesque photos have since splashed onto the internet.

"*C'est du jamais vu, c'est du jamais vu*," was the common refrain amongst victims and witness interviewed by the BBC in the days following the massacre. "We've never before witnessed such a thing in Guinea." Guinea has been under the power of a junta government, called the National Council for Democracy and Development (CNDD), since the death of former President Lansana Conté on December 22, 2008. Hours after Conté's death, a group of military officers led by Captain Moussa Dadis Camara seized the government and declared the dissolution of the former institutions of the Republic.

Camara took power and immediately suspended constitutional rights, political activity, and union activity. Initially, the junta government garnered support by promising a smooth transition to democracy, which some saw as a welcome change from Conté's 24-year long authoritarian rule. However, the junta quickly lost popularity due to Camara's dictatorial and abusive behaviour, along with repeated violence from his forces. The September 28 protest was a reaction to Camara's retraction of his promise to not run in the next presidential election, set for January 2010.

Human Rights Watch (HRW) has published a summary report of its findings following a 10-day research mission to Guinea. The report reveals new evidence that the killings and sexual violence were both organized and premeditated, and that the armed forces attempted to hide evidence of the crimes by seizing bodies from the city's morgues and burying them in mass graves located on army bases.

"What is needed now is a prompt, independent and open investigation into both the criminal acts and the cover-up."

Guinean authorities are blaming the killing on rogue soldiers and opposition provocation. However the preliminary investigations and evidence, including video footage of the rally, suggest that crowds were unarmed. This claim is bolstered by the finding that no military authorities were harmed during the confrontation. Perhaps even more devastating for the authorities is the proof of the premeditation of the crimes. Before the Presidential Guard entered the stadium and opened fire, the arena was surrounded and victims found that most exits were blockaded as they attempted to flee.

HRW's summary report includes devastating witness testimony, particularly with regards to the sexual violence. More than 150 witnesses were interviewed and many said they witnessed women being shot or bayoneted following gang rapes by five or six of the red berets. Other women tell of how they were forcibly taken from the stadium to endure several days of gang rape in private residences.

Another shocking discovery illuminated in the report is the ethnic dimension of the attack. The vast majority of the estimated 150 killed were from the Peuhl ethic group, which is exclusively Muslim, while most of the key members of ruling junta and the commanders at the stadium come from an ethnic group from the southeastern forest region which is largely Christian or animist. According to witnesses, many of the killers and rapists verbally attacked their victims on the basis of their ethnicity, suggesting that the Peuhl needed to be "taught a lesson" or even exterminated.

If these finding are correct, the ethnic element of the massacre may strengthen the position being advanced by a number of groups, including HRW, that crimes against humanity took place. Article 7, section 1(h) of the Rome Statute delineates that persecution of any identifiable group in connection with any of the other acts named in the section (including murder, rape, and other forms of sexual violence) is a crime against humanity.

Importantly, if crimes against humanity are found to have taken place, the principle of "Command Responsibility" will apply in the prosecution of those crimes. This principle holds that a military leader cannot be absolved of responsibility for crimes against humanity or war crimes committed by a subordinate if the superior knew, or ought to have known, that the subordinate was committing or about to commit this type of crime, and did not take all feasible measures to prevent, repress, or punish the subordinate's actions.

As such, an investigation of Camara, as leader of the ruling junta and commander of the Presidential Guard should take place. Furthermore, Camara's personal aide de camp and head of his personal bodyguard, Lieutenant Abubakar "Toumba" Diakité was in command of the red berets at the stadium and should also be investigated, according to HRW.

What is needed now is a prompt, independent and open investigation into both the criminal acts and the cover-up. An investigation was commenced by UN Assistant Secretary General Haile Menkerios, who met with Camara, Prime Minister Komara and members of the opposition. The Economic Community of West African States (ECOWAS) has imposed an arms embargo on Guinea, France has suspended military ties with Conakry, and the EU is considering both a travel ban and freezing the financial assets of the leaders of the junta.

Currently, the Office of The Prosecutor at the International Criminal Court is conducting preliminary examinations on the situation in Guinea, a phase which could precede the opening of an investigation. These initial steps give hope that the international legal system will respond quickly and effectively to the violations of human rights perpetrated in Guinea.■

THE KEY TO MOVING FORWARD IN SRI LANKA: GOOD GOVERNANCE

Josephine Wong

On May 19, 2009, the government of Sri Lanka officially declared victory in its civil war against the Liberation Tigers of Tamil Eelam (LTTE) after more than 25 years of conflict. In October 2009, the government said that early presidential and parliamentary elections would be held by April 2010, as opposition Muslim and Tamil parties formed a political alliance.

The Sri Lankan civil war resulted in a massive displacement of civilians and the confinement of those civilians to internally displaced persons (IDP) camps. The camps once held nearly 300,000 Tamils, but now 2,000-3,000 leave every day. Some IDPs go to host families, some to relatives, and others to farmlands, which may or may not have been their original homes. A Sri Lankan government minister reported that 80,000 people have now been resettled and that about 190,000 remain in camps. Family visits and outsiders' access to the camps have been severely restricted. The government has said the incarceration is necessary in order to screen the remaining refugees for possible links with the Tamil Tiger rebels.

Challenges to Good Governance

The Sri Lankan government's task of building sustainable peace is intricate and complicated. Issues requiring immediate attention include resettlement and the restoration of economic and social rights, as well as civil liberties. If the government does not move quickly, the ethnic conflict could continue for many more years to come.

Regarding the political situation, it is uncertain how the relationship between the current government and the Tamil minority is going to play out. In particular, one cannot predict the degree of power Tamils will be allowed to exercise under the current regime. The government refers to "devolution" when speaking about the governance of Tamils, while Tamil representatives have expressed that they want a governmental system largely based on a federalism model. Additionally, there is uncertainty surrounding the future political organization of the Tamils following the defeat of the LTTE. Potentially, Tamils from the north and east could form a coalition for greater negotiating power.

On the economic and social front, the country – in particular the majority Tamil areas – is destitute from war. Seventy percent of the 190,000 Tamils in the north live below the poverty line. This situation was exacerbated when the government blocked international aid agencies from accessing areas in the north. Clearly, economic advancements could have a significant role in improving the overall wellbeing and status of Tamils.

In addition, civil liberties, such as media freedom, minority rights and security of the person, need to be protected. The *Prevention of Terrorism Act* of 1979 allows suspects to be detained indefinitely without charge. Under this Act, detainees have no right to contact legal counsel or family members, and are offered no protection against torture. Sri Lankan security forces have abducted, detained and tortured numerous political activists, journalists and Tamil civilians pursuant to it.

Sri Lanka holds the record for the highest number of disappearances reported to the United Nations. Moreover, reports indicate that private television networks have been raided and editors assassinated. Finally, the country's fundamental democratic institutions are compromised. There are no institutional safeguards against corruption, and there is no separation of powers. The Presidential Executive controls the judiciary and uses Parliamentary legislature to approving policies without scrutiny.

The Road to Peace

Fragile states emerging from conflicts require the support of the international community to overcome the profound challenges of reconstructing infrastructure and recreating institutions specific to the needs of a post-conflict society. Good governance not only promotes economic, social and human development, but also prevents the state from relapsing into violence.

Although it appears that the government of Sri Lanka has emerged from conflict as a victor, it is important to note that the Tamils enjoyed extensive political and financial support, locally and abroad, during the years of civil war. Improved governance is feasible only if all former parties in the war, including Tamil civilians, have a guaranteed minimum level of security and do not have to fear the resumption of conflict. Otherwise, the nation runs the risk of resurgent violence.

"The good governance that yields an independent judiciary and rule of law is an invaluable element of peace building."

Economically and socially, the government needs to open up on two fronts. Firstly, a minimum level of economic protection must be provided. The government should encourage private investment to boost local businesses in order to allow IDPs to fully participate in the nation's recovery. Secondly, an open door policy to international aid agencies is important in expediting social and human development programs, such as demining, developing subsistence farming and reconciling child soldiers and war veterans into society.

Another decisive factor in achieving sustainable peace is the protection of civil and political liberties, particularly those of vulnerable groups. It is crucial to re-establish the rule of law. This involves security sector and judiciary reform. Functioning courts, as well as alternative means of dispute resolution, can avoid violence by settling volatile property disputes in a principled and orderly manner. This is particularly important during resettlement in post-conflict Sri Lanka. Equal treatment before the law and access to justice helps reduce the marginalization of minority groups. Finally, effective institutions for the rule of law can protect the security of minority groups and ensure the implementation of human rights standards for the prisoners of war and detainees held without charge during the course of conflict.

The good governance that yields an independent judiciary and rule of law is an invaluable element of peace building. It can protect civilians' economic, social, civil and political rights, diffuse ethnic conflicts and limit the appeal of radicalism. Institutional safeguards that protect civilians' rights are essential to building the road to peace in Sri Lanka.■

GLOWING HEARTS AND FREEZING HANDS

Elyssa Orta Convey

"With Glowing Hearts" is the official motto of the 2010 Vancouver Winter Olympic Games. Designed to evoke images of athletic excitement, international unity and Canadian pride, the warmly hued phrase belies the chilling reality facing British Columbia's indigent population. Prior to the Olympics coming to Canada, the plight of the poor in B.C. was severe. Homelessness and poverty in Vancouver's Downtown Eastside went hand in hand with pervasive malnutrition, addiction, and disease. The average income for poor B.C. parents was $11,000 below the poverty line. The city's HIV prevalence rate, estimated at 30 percent, was equivalent to that of Botswana, according a U.N. Population Fund report. Preparation for the Games has exacerbated an already desperate situation. As the city is groomed and polished in anticipation of the upcoming festivities, it is the 10,000 homeless people of B.C.—2,000 of whom reside in Vancouver, that bear the cost of glowing hearts.

The U.N. Population Fund describes the Downtown Eastside as "a world of violence and desperation that is literally steps away from some of the most expensive and coveted real estate in North America". As Vancouver prepares to welcome the international community, the uncomfortable proximity between rich and poor has been managed primarily through rent increase evictions. Whereas the provincial shelter allowance for income assistance is $375, few accommodations remain in Vancouver for less than $425. The Vancouver 2010 Bid Corporation crafted the *Inner City Inclusive Commitment Statement,* vowing to protect low-income housing; however, human rights advocates highlight the Olympics' effect on real estate speculation as a major contributor to growing homelessness.

Since winning the Olympic bid in 2003, Vancouver has lost over 1,000 units of low-income housing. As the number of displaced persons grows, the city has developed creative approaches to ensure that the homeless do not mar the pristine image of the Games. New by-laws have criminalized begging for money and sleeping outdoors, and dumpsters and benches have been removed. The most recent strategy for the ousting of poor downtown residents is the Assistance to Shelter Act. The legislation, which took effect November 11, 2009, gives law enforcement the power to compel the homeless into shelters, or as a last resort, into jail, in the event of an extreme weather alert. In most cases, the homeless are removed from the downtown and from the network of social services upon which they rely.

Cold snaps and Vancouver rains thus serve as a "great way to force the homeless off the streets, and get them out of the view of visitors for the Olympic Games" states one CBC journalist.

Calling to mind the vagrancy laws of the 19th century, the effect of Vancouver's Olympic beautification agenda has been to criminalize the poor for being poor. Not only has homelessness increased dramatically since the advent of these changes, but the latest Act has also lent justification to the use of force to corral their swelling numbers away from the sight of society. In the past 30 years, the Olympic Games have triggered the displacement of over 2 million people. The relationship between the Olympics and homelessness is by no means a new phenomenon for international human rights, but the continuation of this trend within Canada reveals that we need not look outside our borders for human rights transgressions. ■

MAXIMUM SENTENCE FOR WAR CRIMINAL

Javier González

On October 29, 2009, a Canadian court convicted Désiré Munyaneza of genocide, crimes against humanity and war crimes for his role during the 1994 Rwandan genocide that killed 800,000 Tutsis. He was sentenced to this country's maximum penalty: life in prison with no chance of parole for 25 years.

Justice André Denis of the Quebec Superior Court handed down the sentence, which put an end to a two-year trial in which 66 witnesses testified in four different countries. The historic verdict represents the first conviction under Canada's Crimes Against Humanity and War Crimes Act (CAHWCA), which allows Canada to prosecute anyone present in this country for genocide, war crimes, and other atrocities.

This case is controversial because Munyaneza did not commit the crimes in Canada, and neither he nor the victims had any connection to this country. Under the CAHWCA, however, Canada has adopted the principle of "universal jurisdiction". This is a principle whereby any country has jurisdiction to prosecute crimes that are so wicked that they are considered crimes against all persons, regardless of where they are committed. The goal is to prevent those who commit such crimes from hiding in "safe havens". The Munyaneza conviction presumably demonstrates that Canada does not provide shelter for war criminals.

By enacting the CAHWCA, Canada became the first country in the world to incorporate its obligations under the Rome Statute into its domestic law. The Rome Statute, which established the International Criminal Court, has provisions against genocide, crimes against humanity, and war crimes.

Justice Denis's conviction, the first of its kind in Canada, provides a forceful indictment of a war criminal seeking immunity in a foreign land. He described in vivid detail Munyaneza's participation in the plans to destroy the Tutsi population in his hometown of Butare. The decision systematically reviews the testimony of witnesses who lived through the atrocities; for instance, one woman spoke of having been raped five times by Munyaneza.

Munyaneza was one of the leaders of the genocidal movement against the Tutsi people. According to the Justice Denis, this man "intentionally killed Tutsi, seriously wounded others, caused them serious physical and mental harm, sexually assaulted many Tutsi women and generally treated Tutsi inhumanely and degradingly." Munyaneza played a key role in planning and carrying out the destruction of the Tutsi population in Butare.

Little over a week after the conviction, a second Rwandan man living in Canada was charged with an act of genocide under the CAHWCA. The RCMP arrested Jacques Mungwarere on November 7, 2009 for his suspected involvement in the mass killings in the region of Kibuye in western Rwanda.

Critics of universal jurisdiction argue that the principle undermines national sovereignty, and that it can be easily abused to pursue ulterior motives, such as political ends. The fear is that states could turn the process into show trials against the state's opponents. Canada hopes, however, that the prosecutions against Munyaneza and Mungwarere will act to deter others who plan to commit war crimes and seek shelter in this country.■

BABY TEETH FOR THE MINING SECTOR: BILL C-300 ON CORPORATE ACCOUNTABILITY

Pete Smiley

Bill C-300 on Corporate Accountability for the Activities of Mining, Oil or Gas Corporations in Developing Countries is an unprecedented attempt to make Canadian mining companies accountable for their actions overseas. Currently winding its way through Parliament, the bill reflects a growing imperative that players in one of Canada's principal economic sectors should respect their country's values when operating abroad. Obstacles to its passage, originating both from industry and government, indicate that this moral impetus is far from unanimous.

It is no secret that Canadian mining and extraction firms have been implicated in human rights abuses abroad. Last year, Norway's Ministry of Finance divested $245 million in Barrick Gold stock from its sovereign wealth fund, citing ethical concerns over the environmental impact of Barrick's Papua New Guinea operations, particularly regarding the dumping of millions of tons of mercury-laced tailings into the Porgera River. This comes after the long-standing complaints of NGOs of human rights abuses – including torture and killings – by Barrick employees at the mine.

Parties concerned about the activities of Canadian mining companies overseas have traditionally had no domestic legal recourse. Canada has no equivalent of the U.S. Alien Tort Claims Act, and, consequently, the *forum non conveniens* rule ensures that such allegations rarely find their way before Canadian courts. The Canadian government's failure to address this lacuna is being confronted by private member's bill introduced by Liberal MP John McKay.

If passed, Bill C-300 would make the Minister of Foreign Affairs and the Minister of International Trade responsible for holding corporations accountable for their practices overseas. The legislation would enable complaints against Canadian resource companies operating in developing countries to be brought directly to the federal government irrespective of the complaint's origin.

A successful complaint would prompt an investigation, which would have to be completed within eight months. Should that investigation yield a finding of environmental or human rights abuse, the corporate perpetrator would be rendered ineligible for financing from Export Development Canada (EDC) or the Canada Pension Plan Investment Board (CPP). In addition, the Ministers would be required to table an annual report to Parliament detailing the findings of any investigations and their reasons for dismissing any complaints.

In response to Bill C-300, the government has announced its own corporate social responsibility (CSR) initiatives, including the appointment of Marketa Evans as its first CSR Counsellor for the extractive sector. Evans was previously the founding Executive Director of the Munk Centre for International Studies, namesake of its philanthropic patron, Barrick founder Peter Munk.

Bill C-300 on Corporate Accountability is an unprecedented attempt to make Canadian mining companies accountable for their actions overseas.

The Counsellor is a Governor-in-Council appointment reporting to the Trade Minister. She has limited powers: she cannot review the activities of a Canadian company on her own initiative or without the company's consent, make binding policy or legislative recommendations, create new performance standards, or formally mediate between parties.

In creating the position, the government has managed to infuriate both ends of the CSR spectrum. The mining industry claims it is being unfairly singled out, while interested NGOs claim that the position is toothless and are outraged by the perceived conflict of interest arising from Evans' relationship with the Munk Centre.

In an interview for the *Rights Review*, I asked McKay for his thoughts on the CSR Counsellor. He suggested that the position is an attempt by the government defuse the issue, but noted that it had the ironic effect of confirming for Canadians that a problem exists. He added that, in a further irony, C-300 complements the CSR position by providing it with the teeth it needs to be effective.

The bill nonetheless faces vocal opposition. Peter Foster, writing in the *National Post*, described it as "a nail-biting private member's horror scenario that threatens to overwhelm the Canadian mining industry," and argued that it would force Canadian mining companies to continually fend off trivial and vexatious allegations from NGOs fundamentally opposed to the extractive industries. I put these criticisms to McKay, who argued that it is increasingly a competitive advantage for companies to be perceived as leaders in corporate social responsibility.

"Ethical funds make up their minds about investment on a whole range of issues, not much of which has to do with evidence," he said. "They hear reports, hearsay, rumour, gossip, and they redline these companies based on it. But where's the actual evidence? Have they visited the site? Have they investigated? No. So it's peculiar that companies would prefer to take their chances on trial by media than on ministerial investigation."

McKay also rejected the argument that C-300 would put Canadian mining companies at a competitive disadvantage, arguing that the bill would simply give the CSR Counsellor the power to withdraw government funding for companies in breach of guidelines. "The companies can do whatever they want," said McKay, "just not on the taxpayer dime."

C-300 is currently before the Standing Committee on Foreign Affairs and International Development. McKay has had success with Private Members' Bills in the past, and is cautiously optimistic about C-300's chances of becoming law. However, it is unclear well the bill would operate in practice under a government fundamentally hostile to its objectives.

A major concern is that the government would reject legitimate complaints as frivolous, vexatious or made in bad faith as per s.4(3) of the Bill. Some transparency is granted by the provision that the government would publish the reasons for such a finding in the *Canada Gazette*, but much work would still be required from the NGO community and the public to hold the government to account.

Another concern is that the mechanisms by which investigations would be conducted are left unspecified. The bill gives the minister substantial discretion in how he or she is to examine the matter in question, and in the hands of a hostile or apathetic minister this would seem to be a recipe for inaction.

Nonetheless, for all its imperfections, were C-300 to pass it would be an important first step in reforming the activities of Canadian resource companies.■

SECONDARY LIABILITY IN ALIEN TORT LITIGATION

Ben Kates

It just got that much harder to find corporations liable under America's Alien Torts Claim Act/Alien Tort Statute (ATCA/ATS). On October 2, 2009, the Second Circuit upheld a grant of summary judgment in favour of Talisman Energy, Inc., a Canadian oil and gas firm. The decision effectively ended an attempt by local villagers to pursue Talisman for aiding and abetting human rights abuses that facilitated the development of oil concession by its affiliates. In upholding the summary judgment, Judge Dennis Jacobs also affirmed a higher *mens rea* standard for corporations that aid and abet violations of international law.

Presbyterian Church of Sudan v. Talisman Energy focused on acts perpetrated in furtherance of a Sudanese oil consortium 25% owned by Talisman. Plaintiffs alleged that the Sudanese government injured and displaced civilians to create a "cordon sanitaire" surrounding the oil projects. Although cloaked in security objectives – Talisman's operations took place against the backdrop of the Sudanese civil war – the buffer zone allegedly furthered the commission of genocide, war crimes and crimes against humanity. It was also alleged that government forces used infrastructure built by Talisman and its partners to attack villagers in the south.

Plaintiffs brought suit under the ATCA, an antiquated law that allows foreigners to be sued in US courts for violations in international law. A mere sentence long, the ATCA itself is vague and offers very little guidance regarding litigation brought pursuant to it. Courts have disagreed how to implement a statute written over two hundred years ago to address issues like piracy in today's modern and complex realm of international law.

Courts have clarified that corporations may be sued under the ATCA, and multinationals including Unocal, Royal Dutch Shell and Pfizer have all faced claims. What is less clear, however, is how the law should treat corporations that do not themselves commit human rights abuses but rather help facilitate abuses perpetrated by the governments with whom they do business.

The point of contention in this regard is whether US courts should look to international or domestic law when deciding claims of secondary liability. The Supreme Court's lone statement on the ATCA, *Sosa v. Alvarez-Machain*, confirmed that courts should use customary international law to determine and interpret causes of action brought under the Statute. Until now, however, it has not been clear whether customary international law need be used to evaluate allegations derived from a principal underlying act, such as aiding and abetting.

The first appellate decision to consider aiding and abetting liability was rendered three years prior to *Sosa* in *Doe I v. Unocal.* In that Ninth Circuit decision, which concerned a motion for summary judgment, the majority judgment by Judge Harry Pregerson drew on international law – in particular post-World War II jurisprudence and the ad hoc criminal tribunals for Rwanda and the Former Yugoslavia – to develop a standard of knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.

This was rejected in a concurring judgment by Judge Stephen Reinhardt, who saw no reason to depart from the standard rules of statutory interpretation when addressing liability derived from a violation of customary international law. Turning to federal common law, Judge Reinhardt held that the allegations should be evaluated using domestic jurisprudence on joint venture liability, agency liability and reckless disregard.

Following *Sosa*, the Second Circuit considered secondary liability in *Khulumani v. Barclay National Bank*, which, too, regarded a motion for summary judgment. Mirroring *Unocal,* but with the benefit of a Supreme Court opinion, concurring judges disagreed upon the appropriate source of law on aiding and abetting.

Judge Robert Katzmann, relying on international jurisprudence, maintained the *actus reus* of "substantial effect" expressed by the majority in *Unocal*, but he adopted a more stringent *mens rea* standard, borrowed from the Rome Statute, of acting "for the purpose" of facilitating the commission of a crime. Judge Peter Hall, drawing on domestic law, articulated a less rigorous *mens rea* standard of "knowing" assistance. Because a third judge dissented on other grounds, the split between Judges Katzmann and Hall meant that *Khulumani* lacked the majority required decide the issue.

Talisman Energy was the first appellate decision on aiding and abetting after *Khulumani*, and the Second Circuit settled the question by adopting the reasoning of Judge Katzmann. Given the different *mens rea* standards articulated by Judges Katzmann and Hall, the court in so doing decided not only the procedural issue of the appropriate source of law but also the substantive issue of the *mens rea* standard to be used.

This has real consequences. There is a meaningful difference between a corporation aiding a government that it knows is likely to perpetrate human rights abuse and one that provides aid for the express purpose of perpetrating such abuse. Because (one would hope) the former is far more common than the latter, the result of *Talisman Energy* will likely be a significant decrease in ATCA suits that survive a motion for summary judgment.

"Courts have disagreed how to implement a statute written over two hundred years ago to address issues like piracy in today's modern and complex realm of international law."

Whether this is a positive or negative development is a matter of debate. It is without question that corporations should not be able to operate with impunity in the developing world. Moreover, the knowing assistance of an abhorrent government likely to commit human rights abuse is an immoral act for which multinationals should be held accountable. That said, alien tort litigation is hugely problematic from the standpoint of democratic principles. As an enabling statute, the ATCA gives little guidance and is being applied far beyond its original intended use. This warrants conservative interpretation in order to avoid the creation of judge-made law of tremendous impact on international affairs and commerce.

Ultimately, the principle behind alien tort litigation is a good one, but it lacks the authority to be effective. A renewed mandate from Congress would allow the ATCA to truly make corporations accountable for their actions. ■

SEMESTER IN REVIEW: INTERNATIONAL HUMAN RIGHTS CLINIC

Clea Amundsen

The International Human Rights Program's clinic course (IHRC) provides students with the opportunity to engage in international human rights advocacy in a manner that is rarely possible in other classes. The clinic has two focus areas: class instruction and clinical case work.

Class instruction provides students with advanced advocacy training in international human rights. We have the opportunity to learn about issues that we will encounter working in the field of international human rights. The first part of the term dealt with the challenges and opportunities in practicing international criminal law. We considered, for example, the impact of politics in shaping indictments and the trial process, cross-examination strategies, preparation of exhibits, and the challenges in gathering evidence in war zones. The latter part of the term focused on other areas of international human rights advocacy, such as the practical challenges in setting up truth commissions and other community-based initiatives, as well as civil litigation as an effective strategy for holding individuals and companies accountable for human rights abuses.

The IHRC offers pro bono legal services to organizations promoting human rights. This case work is what sets the clinic apart from other international law courses, and we have been privileged to work on a number of high profile and very interesting files. We have been involved in files and projects that are frequently reserved for international lawyers in the field. We have provided assistance to three high-profile international NGOs, a trial team in The Hague, and have worked on a Supreme Court of Canada intervention. As part of our clinic course, we have travelled to the Supreme Court of Canada, and others will be travelling to Europe to see the impact of our research in the field.

We have worked directly for the international criminal lawyers representing General Ante Gotovina in the *Prosecutor v. Gotovina et al.* at the International Criminal Tribunal for the Former Yugoslavia. We are fortunate to be receiving guidance from IHRP's Acting Director, Diana Juricevic, who has just returned from a number of years working in The Hague. With the trial progressing to an advanced stage, the students have prepared legal arguments regarding several counts facing the Croatian General, including command responsibility, joint criminal enterprise, murder and deportation and forcible transfer. Our research will be incorporated into the legal sections of the Final Trial Brief.

We have also been assisting the Dutch Center for Corporate Social Responsibility in researching the possible liabilities of pharmaceutical companies who conduct clinical trials in developing countries. The dearth of information available on what is truly a new topic has revealed some of the frustrations involved in international legal research. Using the case study of India, we are developing an advocacy strategy in an emerging area of law, as it relates to the role and liabilities of contract research organizations in developing countries.

We are also supporting an international NGO, Women's Initiatives for Gender Justice, in updating a 2005 publication on sexual violence. We have been cataloguing and analyzing all cases involving sexual violence issued since 2005 at the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and Special Court for Sierra Leone. Our research will be included in the organization's 2010 publication on sexual violence.

We have also been working with the Iran Human Rights Documentation Center on a report documenting human rights abuses committed in Iran after the June 2009 elections. This report will be presented in Geneva at the United Nation's Periodic Review of Iran in February 2010. Our research on the law on freedom of assembly, freedom of association, and free and fair elections, will be incorporated into the legal sections of the report.

Finally, we have had the honour to intervene, in partnership with Human Rights Watch and the Asper Centre for Constitutional Rights, in *The Prime Minister of Canada et al. v. Omar Khadr* (see box).

Working on these case files has been incredible, and presents a welcome opportunity to get out of the academic setting and develop practical skills in legal research and advocacy. The insight and experience acquired through both class instruction and case work at the IHRC will undoubtedly prepare us to embark on future careers in international human rights. ■

SPOTLIGHT: INTERVENING IN *THE PRIME MINISTER OF CANADA ET AL. V. OMAR KHADR*

The IHRC, in partnership with Human Rights Watch and the David Asper Centre for Constitutional Rights, was granted leave to intervene as *amicus curiae* in the case *The Prime Minister of Canada et al. v. Omar Khadr* heard by the Supreme Court on November 13, 2009. This is the file that I had the privilege to work on. Our contribution was not only to highlight the *Canadian Charter of Rights and Freedoms* issues but also those involving international human rights law, which is where the clinic could best contribute. In brief, our argument was that Canada's conduct has violated Mr. Khadr's section 7 *Charter* rights. Given this, we argued that the most appropriate remedy would be a stay of proceedings. However, because Mr. Khadr is outside of Canada's territorial jurisdiction, we argued that a request for repatriation is the functional equivalent of a stay of proceedings in this case.

My task was to research the possible remedies available in abuse of process cases as well as the right of a citizen to re-enter his or her own country. I researched decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. My clinic partner did the same for the ICC and all the Ad-Hoc Tribunals. Our research was then incorporated into our factum which was filed before the Supreme Court.

In addition to our written submissions, we were also granted leave to make oral arguments. Several of us were able to travel to Ottawa to watch Professor Audrey Macklin and John Norris represent us and make submissions on our behalf. In addition to the IHRC, there were eight other interveners who presented arguments ranging from Canada's obligations under the Convention on the Rights of the Child to administrative law arguments that the Supreme Court could accept in order to request repatriation. This was an extremely valuable opportunity not only to see the justice system at work but also to observe the end product of a process to which we contributed. ■

ALUMNI INTERVIEW: ROSALIND SIPOS

Adam Tanel

Rosalind Sipos is a graduate of the University of Toronto Faculty of Law and a former International Human Rights Program (IHRP) intern. She presently works as an Associate Legal Officer in the Appeals Chamber of the International Criminal Tribunal for Rwanda. The views expressed are Rosalind Sipos' personal views and do not represent those of the International Criminal Tribunal for Rwanda.

What does your position entail day to day?

I work for the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) which was set up by the UN Security Council to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in the course of the Rwandan genocide in 1994. The ICTR, which shares a joint Appeals Chamber with the International Criminal Tribunal for the former Yugoslavia (ICTY), hears appeals from judgments and interlocutory decisions of the Trial Chambers. I assist the judges of the Appeals Chamber largely by undertaking legal research, drafting judicial documents and by assisting them with their preparation for hearings and deliberations.

What work experience did you have prior to this position?

I had worked with a number of different organizations addressing various aspects of human rights or international law. Among these were the British Institute of International and Comparative Law in London, UK, where I did research on public international law and terrorism issues. I also worked at the Centre for Policy Alternatives in Colombo, Sri Lanka, an NGO that does impressive work including public interest litigation, research and advocacy with a view to garnering better respect for a wide range of human rights issues in the country. Additionally, I had previously worked at the ICTY and the ICTR both in the Trial Chambers and for a Defence team. I articled at Fraser Milner Casgrain LLP in Toronto.

Is this the kind of work you saw yourself doing when you were in law school? If yes, what attracted you to it? If not, what prompted the change of course?

I went to law school because I had an interest in international law, as I had done my master's degree in international relations. When I started law school, my focus was more on public international law, but it evolved to be more human rights focused, I think because there seemed to be a more immediate impact on people's lives. The *ad hoc* tribunals for the former Yugoslavia and Rwanda are, I think, particularly exciting exercises of idealism in international affairs. As the first such tribunals since Nuremberg, when they started out it was uncertain whether they could succeed, but clearly they have been sufficiently successful to encourage the creation of other international criminal tribunals including the International Criminal Court, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and so on. Whatever the challenges the tribunals face, it is exciting to go to work every day with the feeling that you are part of something historically important.

What law school classes/experiences most prepared you for this work?

It is of course important to have a solid foundation of legal training for this, or any, legal work, and certainly my classes at U of T provided me with that. But I think just as important were the extracurricular opportunities that the UofT afforded. I was part of the Sierra Leone Working Group throughout law school, in which we researched and drafted memos on various legal issues that were sent to us by the Office of the Prosecutor for the Special Court for Sierra Leone. It was exciting to be working on something in the "real world" and to feel that the few skills I already had were useful. Similarly, the summer internships I did through the International Human Rights Program were of course invaluable.

What are the major challenges or frustrations of your position?

As I have said, the *ad hoc* tribunals are historic experiments in post-conflict justice and the international community has invested a lot of money and political energy into their realization. With that comes high expectations, and depending on who you ask, the tribunals are at once supposed to bring war criminals to justice, foster reconciliation, create a historic record of the conflicts, develop the law and so on. That's a tall order. At the end of the day, however, they are courts to pronounce judgment on the individuals brought before them. I guess as an idealist one wishes we could fully accomplish all those goals all at once, but one has to remember that the tribunals are only one element of the response to mass atrocities along with the important roles played by NGOs, governments and other UN bodies. I guess the frustration is that as an individual I can't do everything and by choosing to work in the Tribunals I am necessarily choosing not to spend my time working on some other worthy and interesting project.

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

I think the Tribunals send an important message that the international community is engaged in bringing an end to impunity and that people cannot commit mass atrocities with the assurance that they will not be prosecuted that they once could. Furthermore, one only has to look at the reactions of the public in both Rwanda and the former Yugoslavia to the different judgments to realize that these trials do have an impact on the victims. As I said, the tribunals are only one aspect of the extremely complex process of rebuilding a post-conflict society but they certainly play an important role.

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

Getting into the field of international human rights law, or international law in general is not as straightforward as getting a job on Bay street. That said, the effort is well worth it. My advice is to really take advantage of internships to try out different types of work to find what suits you and what issues engage you and then go for it! ■

SIERRA LEONE: JUSTICE FROM WITHIN

Tamara Ramusovic

The effort to bring to justice perpetrators of genocide, war crimes and crimes against humanity, has given rise to international courts of various forms. Notably, the ad hoc tribunals for Rwanda and the Former Yugoslavia, as well as the permanent International Criminal Court. In addition, special courts have been established through bilateral agreements between several states and the United Nations. Examples of such courts can be found in Sierra Leone, Cambodia and Lebanon.

On September 17, the IHRP Speaker Series hosted Sidney Thompson, the Associate Legal Officer for Trial Chamber II of the Special Court for Sierra Leone. The Special Court has jurisdiction over crimes committed in Sierra Leone since 1996 in the context of a decade-long civil war that ravaged the West African nation. Thompson provided an in-depth look into both the conflict and the court, suggesting that the nature of the Special Court benefits those most in need of redress: the victims.

The Special Court was established upon a request for international support from former President of Sierra Leone, Ahmad Tejan Kabbah. This led to Security Council Resolution 1315 and the creation of the court. The Special Court was established in the country's capital of Freetown and is staffed by both Sierra Leoneans and international lawyers and judges.

Since 2003, the Special Court has indicted 13 individuals, leaders of the Armed Forces Revolutionary Council (AFRC), the Revolutionary United Front (RUF), and the Citizens Defence Force (CDF), the three main groups to the conflict. The court's mandate is to bring to justice those who bear the greatest responsibility for the violations of both humanitarian law and Sierra Leonean law. To date, seven individuals have been convicted while three indictments have been dropped due to deaths of the accused.

As Assistant Legal Officer, Thompson provides legal support to the three judges of the second trial chamber in hearing and deciding the case against the AFRC, who along with the RUF, ousted President Kabbah in 1997 and captured Sierra Leone's capital. Thompson described some of the brutal crimes committed by these groups. The amputation of hands, a signature crime of the conflict, was symbolic of the desire to suppress the people's freedom to elect their leaders. Other specific crimes encompassed by the charges of war crimes and crimes against humanity include the use of child soldiers, sexual violence and the newly-recognized crime of forced marriage.

According to Thompson, the court should be praised for both its accessibility and legitimacy within Sierra Leone. The ability of regular citizens, many of whom are victims of the conflict, to observe the proceedings is a feature that many claim has been a serious weakness of the ad hoc tribunals for Rwanda and the Former Yugoslavia, housed in Tanzania and the Netherlands, respectively.

However, for prosecuting Charles Taylor, Liberia's former president who funded the activities of the RUF, the Court was forced to weigh the benefits of accessibility with potential security risks. After pleas from Liberia's current president, Ellen Johnson Sirelaf, the trial of Charles Taylor was transferred to The Hague. Ultimately, the Special Court could not ignore the potential consequences of trying Taylor in Freetown on the stability of the region. Those interested in learning more about the court, and watching the trial of Charles Taylor, can do so online at http://www.sc-sl.org. ■

KEN WIWA'S CREATIVE JUSTICE

Brendan Morrison

"For some, the law is about how much money you can get; for others, it is about the restoration of dignity." With these words, Ken Wiwa eloquently dismissed the claims that the settlement he won from Shell Oil was too low. This past spring, on the eve of the trial, Wiwa agreed to a $15.5 million settlement to drop charges against Shell Oil, its Nigerian subsidiary, and the head of its Nigerian operations, for complicity in human rights abuses against the Ogoni people in Nigeria. The numerous charges included the arrest and execution of Wiwa's father, along with eight other environmental activists, in 1995, for protesting the environmental practices of Shell Oil in the Niger Delta.

As the second distinguished visitor of this year's International Human Rights Program speaker series, Wiwa discussed the details of the settlement and the three years of creative legal maneuvering that led up to it in front of a packed classroom on September 21. The former *Globe and Mail* columnist said that it was the very first time he had spoken publicly about the settlement, and joked that it felt strange for it to be in front of a group of lawyers, as he was "feeling weary of lawyers lately."

Wiwa began the lecture by reading excerpts from his book, *In the Shadow of a Saint*, which won the 2002 Hurston/Wright Foundation's Legacy Award for non-fiction, and which he describes as a "spirited defence of my father." He went on to describe the challenges faced by the Ogoni people living in the oil-rich delta of the Niger River, where he says that oil spill rates are among the highest in the world. Pollution resulting from the oil production in the area has contaminated the local water supply and agricultural land upon which the region's economy is based. For decades, Shell has also been known to work with the Nigerian military to suppress all demonstrations in opposition to its activities. The oil company and its Nigerian subsidiary have provided monetary and logistical support to the Nigerian police and bribed witnesses to produce false testimonies. The Ogoni are one of the smallest of the 250 ethnic groups in the region, and very few of them are represented Nigerian politics. Wiwa is constantly mindful of this in his current work as Special Assistant to the President of Nigeria.

Wiwa teamed up with the Center for Constitutional Rights in New York to develop and execute the idea of using the Alien Torts Claims Act (ATCA) to bring the suit against Shell to a New York District Court. ATCA is a US federal law that was passed as part of the Judiciary Act in 1789. The act stipulates that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Wiwa and the CCR employed the old statute as a creative means to bring Shell Oil to account for their conduct overseas.

Further details of the case and the settlement are available on the CCR's website: http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum ■

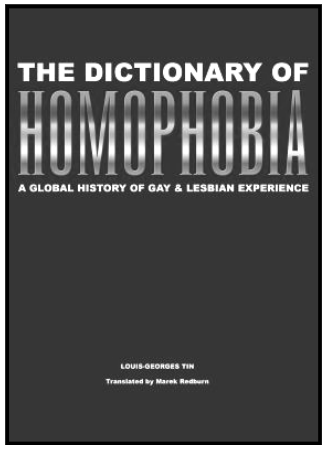
COMBATING HOMOPHOBIA

Aneesa Walji

In October, the Faculty of Law was privileged to have Louis-George Tin as a guest speaker hosted by the IHRP Speaker Series. Tin is a leading activist and academic on the rights of sexual minorities. In 2005, Tin founded the International Day Against Homophobia Committee. He also presented a declaration in 2008 at the United Nations General Assembly, calling for the decriminalization of homosexuality around the world.

Tin, the editor of *The Dictionary of Homophobia: A Global History of Gay & Lesbian Experience* discussed the recently translated book. The Dictionary is the product of work by seventy researchers that span fifteen countries. It contains over 175 essays on homophobia and gay rights and touches on topics ranging from HIV/AIDS to deportation. The essays not only discuss themes throughout history such as accusations of medical abnormality towards homosexuals, they also have regional focuses, such as central and eastern Africa.

The issue of religion arose repeatedly during Tin's lecture and was raised by audience members during the question and answer period. For example, Tin briefly touched on the controversy surrounding the recent statement on the theme of gender identity, sexual orientation and human rights which was enunciated in New York and in Paris in 2008 and 2009, respectively. The statement affirms that international human rights protections also apply to sexual minorities. While 66 member states at the UN General Assembly supported the statement, there was also strong opposition. In fact, an opposing statement was supported by almost 60 states. Notably, the statement was led by the Organization of the Islamic Conference and supported by the Holy See. It claimed that international human rights law is being undermined by the statement, a position that Tin plainly denounced.



After the lecture, two members of the audience noted that caution must be exercised when speaking about religion and homophobia. The first commentator pointed to the risks of promoting Islamophobia and emphasized that criticizing the religion of Islam will often lead to backlash, especially given current socio-political world tensions. Another member of the audience then highlighted the importance of not referring to religions as static monolithic entities since they evolve over time and are constantly in flux. Tin agreed with both audience members.

The centrality of issues relating to religion and homophobia in Tin's discussion, despite the fact that this was not the principal focus of the lecture, demonstrates how debates about homosexuality and the law may be either grounded in religion and ideology and/or in response to them. The lecture and discussion with Tin underscored what is already understood by many: that the role of religion and ideology must inform any advocacy strategy relating to the protection of sexual minority rights. Religion and ideology must be both *critically* and *delicately* engaged by human rights activists. ■

PROSECUTING POPOVIC ET AL.

Adam Tanel

Lada Soljan, a legal officer at the Office of The Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, spoke to a packed room for the IHRP Speaker Series. Her lecture covered a range of topics in relation to the work of the tribunal. She provided insights into the workings of the tribunal, discussed the atrocities that led to its formation, and detailed some of the many difficulties faced in investigating and prosecuting those responsible.

Ms. Soljan was part of the prosecutorial team that recently completed the *Prosecutor v. Popovic et al.* trial against seven defendants charged with crimes committed following the fall of the Eastern Bosnian enclaves of Srebrenica and Zepa. Though the judgment is eagerly anticipated by all involved, Ms. Soljan informed the audience that, invariably, appeals are to be expected in cases of such magnitude as *Popovic*.

Ms. Soljan described a trial process with interesting parallels to, as well as some marked differences from, domestic criminal trials. For the trial lawyers, the process is like running a marathon - through a gauntlet. The three-year long trial was presided over by three judges, with a fourth judge sitting in reserve. The investigation and trial have led to millions of pages of documents, though the burden this might impose is lessened by the fact that all filings are completely electronic. Ms. Soljan spoke very positively of her experience to date with the ICTY, but there is no doubt that such enduring high-stakes litigation takes a toll on counsel.

The investigations and evidence gathering for the tribunal are more extensive than in the domestic criminal context. Investigations have been ongoing for 15 years, yet new evidence of mass executions and cover-ups is still being unearthed, disclosed to the defendants, and used at trial. Similar to Ontario's criminal courts, the ICTY has a separate office that assists and supports victims and witnesses, and the accused reside in a detention unit.

The most interesting, and perhaps most disappointing, parallel may be the fact that the tribunal underlines that international criminal law remains as reactive as domestic criminal law. The international community was aware of the crisis before it happened and to a great extent witnessed it transpire - Canadian troops at one point guarded civilians in Srebrenica who were later targeted and massacred. The *ad hoc* tribunals, such as ICTY and ICTR, must serve as reminders of the catastrophic consequences that befall civilians when human rights abuses are not confronted immediately and vehemently.

While international criminal law was unable to prevent the atrocities of the Yugoslavian crisis, the achievements of the ICTY cannot be overlooked. The tribunal is a positive example of the growth of international law as a force for the protection of human rights. Perhaps the difficult lesson from the 20th century that has often been expressed as "never again" is better expressed as "not without repercussions". It may not have the same ring, but it is certainly a step in the right direction. ■

WORKING GROUP SPOTLIGHT: CONGO

Lauren Rock, Jennifer Simpson, Luiz Arthur Bihari and Samantha Seabrook

Since first erupting in 1996, the Democratic Republic of Congo's civil war has claimed over four million lives. Parties to the conflict have violated both national and international law, perpetrating egregious acts, such as rape and sexual slavery, with regularity. Belligerents have killed, maimed and forcibly displaced civilians. Massive wealth derived from the country's natural resources fuels the conflict further. In a vicious cycle, armed rebel groups illegally extract resources, use the proceeds to finance the conflict, and thereby gain access to more natural resources. International corporations' appetite for these "blood minerals" perpetuates the conflict by providing a major source of its funding.

The lack of attention paid to this conflict in the face of over a decade of brutal violence is disheartening. The Canadian public and the international community, despite possessing the leverage to stop the conflict, have not devoted the resources required to do so. It is for these reasons that two IHRP Working Groups chose to address some of the issues affecting the DRC, tackling one of the root causes of the conflict and some of its tragic consequences.

CRICES

One group, Confront Rape in Congo Empower Survivors Working Group (CRICES), works towards ending impunity for sexual violence against women in the DRC. Currently, CRICES is contributing to an extensive research project aimed at developing strategies to secure legal recourse and legal remedies for survivor women. CRICES operates in partnership with Aidsfree World and receives direct support and directions from their legal team. During the fall term, that partnership investigated regional and sub-regional treaties and organizations, such as the Southern African Development Community (SADC) and the African Union, in order to uncover the protocols, mechanisms and instruments applicable to human rights abuses and gender equality development.

The group is also analyzing the International Criminal Court's activities in the DRC, with a focus on outreach efforts with respect to the local population. We believe that justice will not be achieved until the local population understands and supports the work of the courts, creating a sense of ownership and agency over the process.

While a necessary step, the ICC is insufficient alone to deliver justice to the victims of conflict. A deep seeded culture of discrimination against women underlies the impunity with which rape and sexual violence have been perpetrated. To this end, the working group also plans to research the various rights and avenues for recourse available to survivors of sexual violence under numerous statutes and regional treaties.

In the second term, the group will focus on the empowerment of victimized women. The group will work to create legal education materials for local women's organizations in eastern Congo based on the research undertaken in the first semester. It is hoped that by informing women of their rights and the corresponding remedies in a "grass roots" process will generate a campaign for prosecutions both by the ICC, other regional African Nations and even the Congolese military and civilian courts. We have begun to establish ties with local Congolese expat groups in Toronto and will be hosting a Congolese Lawyer in Mid-November.

Law & Armed Conflict Working Group

The second group focused on the DRC, the Law & Armed Conflict Working Group focuses on the role of multinational companies in the conflict. The region is rich in timber, diamonds, copper, cobalt, gold, uranium and coltan. Rebel groups forcibly secure access to these natural resources, and trade them for supplies such as food, money and weapons. The well-supplied rebel groups are then able to maintain control of resource-rich territory.

Many mining companies have reaped the DRC's bountiful natural resources, while the country's widely available coltran has benefitted the electronic industry. It is estimated that the DRC possess nearly 80% of the total world supply of coltan. Electronics manufacturers contribute to the conflict by turning a blind eye to the way resource extraction fuels the ability of armed groups to continue committing violations of international law.

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The Canadian Crimes Against Humanity and War Crimes Act criminalizes any activity that aids and abets the commission of a crime against humanity, war crimes, or genocide. The Act further criminalizes the possession of goods obtained by a crime against humanity, war crime, or genocide. The definition of "person" in the Act includes corporate entities.

Mining companies that engage in extraction activities in the DRC may be subject to criminal prosecution under the Act for aiding and abetting the commission of a crime against humanity, war crime, or genocide. Electronics manufacturers that fail to properly source their coltan, or other resources, may be liable for possession of goods obtained by a crime against humanity, war crime or genocide.

Canadian corporations, or corporations with significant interests in Canada, must protect themselves from prosecution under the Act by evaluating their procurement practices. By ensuring their resources are properly obtained from non-conflict regions, Canadian corporations not only can prevent prosecution under the Act, but also serve as an example to other international corporations.

The Law & Armed Conflict Working Group is contacting politicians, the media and non-governmental organizations to create dialogue regarding the connection between corporations and the war in the DRC. We also encourage consumers to be aware of the issues and to ask questions about the resources going into your products and the source of those resources.

CRICES and the Law & Armed Conflict Working Group have set ambitious goals with the hope of contributing to the end of violence in the DRC. If you have an interest in learning more about our efforts, please contact Lauren Rock (CRICES) at lauren.rock@utoronto.ca or Samantha Seabrook (Law & Armed Conflict) at samantha.seabrook@utoronto.ca. ■

ABDELRAZIK

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of a passport. In the context of this case, therefore, s. 6(1) created a positive obligation on the government. On the affect of the Security Council sanctions regime, Justice Zinn held that the respondents had misinterpreted the travel ban provisions. SCR 1822 contains an exception to the ban; it provides that the travel ban may not require "any State to deny entry or require the departure from its territories of its own nationals…". Justice Zinn held that this exception applied to Abdelrazik and ordered the Canadian government to issue Abdelrazik with a passport and allow him to travel to and enter Canada. The respondents' argument – that the flight ban still applied because Abdelrazik would first have to pass over other territories before reaching the border of Canada - was dismissed as absurd because it would provide relief only to those persons who found themselves on the border of Canada at the moment their listing occurred.

In one sense, this case might not seem so exciting. No new interpretations of existing legal principles were necessary for the finding; no important doctrinal battles were resolved. Instead, the case is noteworthy for pitting itself against the listing system of the United Nations Security Council. This is more remarkable as Abdelrazik did not challenge the listing system; rather, he merely questioned its interpretation in his case. As a result, Justice Zinn's critique of the system may be *obiter* but it is scathing:

"There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness…. [T]he 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirements of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge."

Furthermore, the judgment suggests that the Federal Court accepted its task of ensuring Abdelrazik's rights because the international system provides no meaningful protection:

"… [I]t is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy for Mr. Abdelrazik is to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is … a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime."

Here, lies the significance of *Abdelrazik* – in identifying the deficiencies of listing, and the consequences attached to them. Faced with a dearth of effective review at the international level, courts are starting to carry out that review at the domestic level.

The victory is the seemingly spontaneous growth of a legal system to comply with the rule of law. In developing mechanisms to ensure the application of human rights law, domestic courts become part of the engine of reform of the international legal system, ensuring that those who wield power are subject to law. ■

UPCOMING HUMAN RIGHTS EVENTS IN TORONTO

Stay Tuned for Upcoming IHRP Lectures as Part of the Speaker Series!

Amnesty International Toronto - Cities for Life
November 30, 2009
Amnesty supporters will demonstrate along with over 800 partner cities around the world against the death penalty, and to call for a moratorium on executions.

Munk Centre for International Studies: "Evaluating the Impact of a Targeted Land Distribution Program: Evidence from Vietnam"
November 27, 2009, 2:00 – 4:00 PM, Room 108 N
Speaker: Loren Brandt, Dept of Economics, UofT

Munk Centre for International Studies: Human Rights and the Social Determinants of Health: Access to Housing
January 18, 2009 –January 20, 2009

Canadian International Law Students' Conference
February 6, 2010, U of T Faculty of Law
This conference theme will be International Criminal and Humanitarian Law.

Toronto Human Rights Watch - Film Festival
February 24, 2009 to March 5, 2010
Festival line-up and schedule will be announced in January 2010.

CBERN Business and Human Rights Symposium, York University, Toronto, ON
February 25, 2010 - February 28, 2010
This event is designed to draw Canadian academics from a variety of disciplines who are engaged in research on business and human rights into dialogue with each other and with non academics actively engaged with human rights issues on what is becoming a dominant theme in the field of business ethics.

IF YOU'RE INTERESTED IN CONTRIBUTING TO FUTURE ISSUES OF *RIGHTS REVIEW* OR IN LEARNING MORE ABOUT THE FACULTY OF LAW'S INTERNATIONAL HUMAN RIGHTS PROGRAM CONTACT US AT IHRPRIGHTSREVIEW@GMAIL.COM

Rights Review

UofT Law International Human Rights Program

Volume II, Issue 2, 2009