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Letter from the Editors

This issue of the Human Rights Brief draws attention to the rights of persons with disabilities in international law. As a staff, we intend not only to illuminate the hardship or moments of adversity confronting persons with disabilities. Nor do we report exclusively on the public and private actors whose treatment of persons with disabilities denies those individuals their right to dignity and autonomy. We also present this issue as a tribute to the practitioners, advocates, stakeholders, and health professionals who — alongside persons with disabilities and their families — campaign tirelessly to empower persons with disabilities and remove the barriers to their complete and meaningful participation in society. Among other accomplishments, these efforts have culminated in domestic reforms across the world and, internationally, the entry into force of the UN Convention on the Rights of Persons with Disabilities. In this issue of the Brief, we offer their insights into the field to which they are dedicated, in hopes of furthering their vision for a common humanity that embraces diversity and rejects discrimination in all its manifestations.

We begin with an article by Oliver Lewis, who offers critical yet optimistic commentary on the recent European Court of Human Rights case, Stanev v. Bulgaria. Rusi Stanev was brought to a disability institution against his will, and deprived of legal capacity. Although the Court did not address the issue of legal capacity, Lewis points out the significance of this case that has forged a path for the protection of the rights of people with disabilities. The Court held for the first time that a person in a disability institution was deprived of liberty, and that conditions of a disability institution may violate the right to be free from torture and inhuman or degrading treatment or punishment.

Professor Robert Dinerstein provides a precise, in-depth examination of Article of the UN Convention on the Rights of Persons with Disabilities, which provides for full and unmitigated rights to legal capacity for persons with disabilities. In so doing, Professor Dinerstein argues that Article 12 reflects an encouraging policy shift from substituted decision making to supported decision making, and sets forth guidelines for implementing supported decision making under Article 12.

Eric Rosenthal then highlights possible intersections between the rights of people with disabilities and the right to be free from torture, and inhuman or degrading treatment or punishment. Drawing on his experience and accomplishments at Disability Rights International, Rosenthal provides illustrative examples from the United States and around the world in support of his legal analysis.

Jennifer Reiss discusses the ratification of the UN Convention on the Rights of Persons with Disabilities by both the European Union and its member states, which, she argues, generates questions about its implementation as a mixed agreement with shared competences. To fulfill the principles and goals underlying the Convention, the EU and member state institutions must embrace a cooperative ethos and a sense of mutual responsibility, to both agree on their respective responsibilities and ensure that all parties follow through.

Also in this issue, Kaila Randolph explores some of the challenges concerning refugees’ access to HIV/AIDS medical treatment in South Africa. Despite South Africa’s domestic and international legal obligations, in addition to domestic public health policies, to ensure access to treatment, refugees are often precluded from accessing anti-retroviral drugs. Randolph explains that xenophobia and a lack of education of health professionals regarding their obligation to treat refugees contributes to refugees’ inability to access treatment. She suggests that a conflict resolution analytical framework may be helpful in addressing this issue, and provides concluding recommendations to the South African government.

This issue of the HRB includes an interview with Oliver Lewis, Executive Director of the Mental Disability Advocacy Center. This issue also includes the remarks of Claudio Disability Advocacy Center. This issue also includes the remarks of Claudio Grossman, Chair of the UN Committee Against Torture and Dean of the Washington College of Law, before the UN General Assembly. This issue concludes with columns providing concise legal analysis written by HRB staff writers that we hope our readers will find informative. We are extremely grateful for the guidance of WCL faculty, especially Juan Méndez, Fernanda Nicola, Susana Sá Couto, and Katherine Cleary, and to Professor Meetali Jain of the University of Cape Town Faculty of Law. The work of the HRB would not be possible without the unwavering guidance of the Center for Human Rights and Humanitarian Law and its Executive Director, Hadar Harris. HRB
Stanev v. Bulgaria: On the Pathway to Freedom

By Oliver Lewis*

“I’m not an object, I’m a person. I need my freedom.”

— Rusi Stanev, to his attorney Aneta Genova, before the European Court of Human Rights Grand Chamber hearing in his case, February 2011

Introduction

In this article, I suggest that the January 2012 judgment of the European Court of Human Rights (ECtHR) in Stanev v. Bulgaria1 takes us a few steps along the path towards freedom. Rather like a Franz Kafka novel, the judgment is a story about an ordinary person who became entangled in a web of antiquated laws and perverse processes, and who ended up in a grotesque situation from which he found it impossible to extricate himself. Rusi Stanev, the applicant, is an extraordinarily tenacious man who faced State absurdity and abuse, and who risked retribution by putting Bulgaria in the dock at the ECtHR in Strasbourg, and won. His life and his case are unique, but his is the voice of millions of others’ that we will never hear. They are — like he was — locked away and silenced.

On December 10, 2002, when he was 46-years old, an ambulance picked up Rusi Stanev at his home where he lived alone. He was bundled inside and driven 400km to an institution for “adults with mental disorders.” His transfer into the institution was arranged through an agreement by a municipal official acting as Mr Stanev’ s guardian (the guardian had never met Mr. Stanev and signed off on the institutional placement a mere six days after becoming his guardian) and the institution’s director. It was arranged on the basis that Mr. Stanev had a diagnosis of schizophrenia and that his relatives did not want to care for him. Mr. Stanev knew nothing about this agreement and did not want to leave his home. No one told him how long he would stay in the institution, or why he was being taken there. Two years earlier, the Ruse Regional Court had restricted his legal capacity. He was not notified about or allowed to participate in the proceedings that led to this determination. Once under guardianship, Mr. Stanev was prohibited by law from making any decisions about his own life.2 He had unsuccessfully appealed the court decision a year later. In 2005, the director of the institution was appointed Mr. Stanev’s guardian.3

Mr. Stanev filed his application to the ECtHR with the assistance of the Bulgarian Helsinki Committee and the Mental Disability Advocacy Center, two non-governmental organizations, on September 8, 2006. There was an oral hearing before a seven-judge Chamber on November 10, 2009, and the Chamber issued its admissibility decision on June 29, 2010. On September 14, 2010 the Chamber relinquished the case to the Grand Chamber, which is the ECtHR’s highest body comprised of seventeen judges. On February 9, 2011, an oral hearing took place before the Grand Chamber, and the judgement was issued on January 17, 2012, some six years and four months after Mr Stanev filed his case.

The Grand Chamber held that Mr. Stanev had been deprived of his liberty under Article 5 of the European Convention on Human Rights (ECHR) because he was under constant supervision in the institution and was not free to leave without permission. The Court found a violation of Article 5(1) of the ECHR because his detention was not based on his mental health status (which remained largely irrelevant to his placement) and

“Rusi Stanev, the applicant, is an extraordinarily tenacious man who faced State absurdity and abuse, and who risked retribution by putting Bulgaria in the dock at the ECtHR in Strasbourg, and won.”

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that there was no need to detain him. The Court also found a violation of Article 5(4) of the ECHR (which sets out the right to a court review of detention) because the Bulgarian law allowed Mr. Stanev no opportunity to have the lawfulness of his detention assessed by an independent judicial body; as a person whose legal capacity had been stripped, he had no legal standing to litigate. The Court also found a violation of Article 5(5) of the ECHR (which sets out a right to domestic compensation for a violation of Article 5). Of global jurisprudential significance, the Court found that the conditions of the detention were “degrading,” in violation of Article 3 of the ECHR. Although the Court found a violation of the right to a fair trial under Article 6 of the ECHR because Bulgarian law provided no mechanism for Mr. Stanev to seek restoration of his legal capacity, the Court, by thirteen votes to four, declined to look into the substance of the complaints about the deprivation of legal capacity, argued by the applicant under Article 8 of the ECHR (which sets out the right to respect for private and family life, home and correspondence).

The judgment contains two partly dissenting judgments, both of which depart from the majority on the Article 8 point. The Court awarded Mr. Stanev compensation of 15,000 euros.

This article does not address each of these findings in turn, as it is impossible to do justice to the entirety of the 65-page judgment and partly dissenting opinions. Instead, the rest of this article highlights three substantive issues. The first section looks at the Court’s treatment of the living conditions in the institution, the second section examines the Court’s discussion of whether Mr. Stanev was deprived of his liberty, and the third section looks at the Court’s (mis)handling of Mr. Stanev’s legal capacity complaints. I then offer some conclusions.

**Living Conditions Were Degrading**

The social care institution in which Mr. Stanev found himself was “accessible via a dirt track from the village of Pastra, the nearest locality 8km away,” in a village located in a “secluded mountainous area (some 800 m above sea level), near a hydroelectric power station,” in southwest Bulgaria. Mr. Stanev was placed in Block 3 of the home, which was “reserved for residents with the least serious health problems, who were able to move around the premises.”

A BBC journalist had visited Pastra in December 2002 and found that some of the residents “had no shoes and socks although it’s minus ten degrees [Celsius] outside.” The journalist reported that “[o]ne in ten residents did not survive the past year — and there is no reason to expect it to be any different this year.”

It was not just the BBC that visited the institution. Of huge significance for Mr. Stanev’s international litigation given its documentary credibility, a delegation of the European Committee for the Prevention of Torture (CPT) carried out a periodic visit to Bulgaria in December 2003. Their mission included a trip to the Pastra institution. The CPT found that in Blocks 1 and 2 the temperature at midday at the time of the visit in December was twelve degrees Celsius. In Block 3, where Mr. Stanev was held, the CPT found “somewhat better heating,” although “residents indicated that it had been on all the time since the delegation’s arrival.”

The residents’ clothes were bundled together and handed out randomly to the residents, a situation about which the ECHR commented “was likely to arouse a feeling of inferiority in the residents.” The CPT documented that residents had access to the bathroom once a week, and that the bathroom to which Mr. Stanev had access was “rudimentary and dilapidated.” The CPT also found that:

- The so-called “toilets”, also located in the yards, represented decrepit shelters with holes dug in the ground. The state of these facilities was execrable; further, walking to them on the frozen, slippery ground was potentially dangerous, especially at night. Residents visibly used the surrounding outside area as a toilet.

As well as the BBC and the CPT, Amnesty International also visited the Pastra institution one year earlier. Amnesty’s report is more graphic than the CPT’s. They found that the toilet:

> […] was some 30 metres away along a snow-covered path in an outhouse. Faeces blocked the hole in the ground and covered the snow around the outhouse. In block number two there were three rooms on the first floor, with one, four and seven beds respectively. Some beds had no mattresses and a few did not even have spring frames but only flat metal bars. When asked how the residents sleep in such beds the orderly replied to an Amnesty International representative that they put their coats across the metal bars and then lie on top. The orderly also explained that lights are centrally controlled and switched off at midnight. The residents were ordered to rise at 4am. When questioned about the rationale for such early awakening he stated: “Just so! Sometimes it can vary. It depends!” This was a clear admission of abuse of power by the staff.

The CPT found that there was one TV set owned by one of the residents, but generally that, “[n]o therapeutic activities whatsoever were organised for the residents, whose lives were characterised by passivity and monotony.” The institution’s daily budget for food per person was the equivalent of $0.89. The CPT delegation was so appalled with the situation that at the end of its mission to Bulgaria it made an immediate observation, finding that “the conditions witnessed at this
establishment could be said to amount to inhuman and degrading treatment.” The CPT urged the Bulgarian government to urgently replace the institution with a facility in conformity with modern standards. Responding to this in February 2004, the Bulgarian government promised that the Pastra institution “would be closed as a matter of priority.” This turned out to be entirely vacuous: the Pastra institution remains operational to this day. To highlight the situation, the CPT went back in October 2010, but its report on this mission is not yet public.17

In its judgment, the ECtHR relied extensively on the CPT’s documentation in finding that the living conditions in which Mr. Stanev was forced to spend approximately seven years amounted to “degrading treatment,”18 in violation of Article 3 of the ECHR, which sets out the absolute prohibition against torture, inhuman or degrading treatment or punishment. In the international litigation, the Bulgarian government pleaded a lack of financial resources in justifying its inaction in closing the Pastra institution, an argument that the ECtHR found irrelevant as justification for keeping Mr. Stanev in such conditions.19 Stanev is the first case in which the ECtHR has found a violation of Article 3 of the ECHR in any sort of institution for people with disabilities.

Liberty was Denied

Mr. Stanev alleged that he had been detained for the purposes of Article 5(1)(e) of the ECHR, which sets out an exhaustive set of circumstances when in which the State can legally deprive an individual of their liberty, including for people of “unsound mind.” Case-law has fleshed out what this antiquated phrase means, but the ECtHR has never been asked to decide whether a resident of a social care institution was detained for the purposes of Article 5 of the ECHR. Its previous case-law has largely concerned compulsory detention under mental health legislation in psychiatric wards/hospitals, which the Court has generally found acceptable as long as there are safeguards.20 If Mr. Stanev was detained for the purposes of Article 5(1) of the ECHR, then (according to Article 5(4)) he should have been entitled to have the lawfulness of the detention reviewed by an independent court.

The seventeen judges of the Grand Chamber saw the public policy implications clearly. No one knows how many people with disabilities are in social care institutions, but my estimation is that the figure is upwards of 2.5 million in the Council of Europe region.21 It appears from the judgment that the Grand Chamber judges did not want to open the proverbial floodgates. At the outset of the discussion on Article 5, the judgment goes to pains to state that, “it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a ‘deprivation of liberty’ within the meaning of Article 5(1) [of the ECHR].”22 The judgment, we are told, does not “rule on the obligations that may arise under the Convention for the authorities in such situations.”23

That said, the ECtHR found that Mr. Stanev’s detention was attributable to the national authorities because he was placed in a State-run institution that did not interview him before the placement.24 He was not given an opportunity to express his opinion about the guardian’s decision, even though he could have given it.25 He was not transferred to the institution on his request,26 and the restrictions complained of were the result of the (in)actions of public.27 The Court found that in the particular circumstances, with many caveats, without making any policy generalities, and only in this case, Mr. Stanev was deprived of his liberty in Article 5 terms.

The particular circumstances included the following findings of fact. Mr. Stanev needed staff permission before going to the nearest village.28 He had three leaves of absence of about ten days each, which were “entirely at the discretion of the home’s management,”29 and he needed to travel 400km to get home, making his journey “difficult and expensive […] in view of his income and his ability to make his own travel arrangements.”30 He was returned to the institution without regard to his wishes when he failed to return from a leave of absence in 2006.31 Furthermore, his identity papers were constantly held by the institution, which, the ECtHR found, placed “significant restrictions on his personal liberty.”32

The Court found that Mr. Stanev was not at any health risk that might have warranted detention, and that he was “under constant supervision and was not free to leave the home without permission whenever he wished.”33 Having lived in the institution for eight years, the Court found that he was likely to have felt “the full adverse effects of the restrictions imposed on him.”34 In addressing the subjective aspect of Article 5, the Court noted that Mr. Stanev had actively complained of being in the institution and had attempted to leave legally. For all these reasons the Court found that he had been detained. The question remained: was the deprivation of liberty lawful under Article 5(1) of the ECHR?

Answering this question in the affirmative, the Court stated what I think is the most important sentence in the whole judgment:

“It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty.”35

This is the closest the Stanev Court comes to a policy analysis. The de-coupling of guardianship and other human rights violations is a topic now well-established, and the Court will be presented with more cases in the future which will tease apart the intimate relationship between detention in an institution

“Stanev is the first case in which the ECtHR has found a violation of Article 3 of the ECHR in any sort of institution for people with disabilities.”

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and deprivation of legal capacity. Because the freshest medical report was two years old when Mr. Stanev was placed into the institution, the Court was convinced that the detention was not “in accordance with a procedure prescribed by law” under Article 5(1)(e) of the ECHR, and it therefore found a violation under this heading.

**LEGAL CAPACITY WAS HARDLY EXAMINED**

Mr. Stanev argued that his right to a fair trial (due process rights set out in Article 6 of the ECHR) and his right to respect for private life (Article 8 of the ECHR) were violated as a result of being deprived of legal capacity and being placed under guardianship. As already noted, the ECtHR found a violation of Article 6 on the basis that Bulgarian law did not guarantee with sufficient degree of certainty access for Mr. Stanev to seek restoration of his legal capacity.36 This is a welcome finding, as it is predictable and technocratic. Of more jurisprudential interest is the range of human rights that are automatically compromised as a result of the deprivation of legal capacity.

Mr. Stanev argued these points at considerable length under Article 8 of the ECHR. The Court refused to even entertain these arguments, and thirteen out of the seventeen judges found abruptly that “no separate issue arises under Article 8.” One can only speculate as to why the majority decided this way. Perhaps at sixty-one pages, the judges thought that the judgment was lengthy enough, or has covered enough terrain already. Perhaps they simply ran out of steam, or time. Perhaps they were in a rush to clear the backlog of other cases. Alternatively, (although to be clear, they do not put it in these terms), perhaps the Grand Chamber was willing to offer the State a wide “margin of appreciation” and was reluctant to provide broad policy guidance in an area where there is not yet clear common ground amongst the member States (let alone among the judges) on an issue they consider to be a social or moral one, notwithstanding the existence of the UN Convention on the Rights of Persons with Disabilities.37

Whatever the reason for the Court’s approach, their handling of the legal capacity claims stands in sharp contrast to its existing body of case law.38 In its 2008 judgment in *Shtukaturov v. Russia*, the Court established that the “interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life.”39 In the *Shtukaturov* case, the applicant was placed under guardianship without his knowledge, and was sent by his guardian to a psychiatric hospital for seven months. In the *Stanev* case, the applicant was sent by his guardian to a social care institution for seven years.

The *Stanev* judgment is appended by two separate partly dissenting opinions, the first by the judges from Belgium and Luxembourg (who are both Vice Presidents of the Court, i.e. very senior) and Estonia, and the second by Judge Kalaydjieva from Bulgaria (who herself is from Bulgaria and used to work as a human rights attorney). Both opinions regret that the Court failed to investigate the Article 8 claims, with Judge Kalaydjieva correctly identifying legal capacity as “the primary issue” in the case. She notes that the government offered no justification for Mr. Staney’s preferences being ignored, and that “instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian.”

Judge Kalaydjieva writes that she would have found a violation of Article 8 of the ECHR, stridently setting out that the Bulgarian law “failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing.” This language of contemporary standards is, in my view, code for Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which sets out that everyone with disabilities should have legal capacity on an equal basis with others, and that the State is required to make assistance available to those who need help in exercising their
legal capacity. It should be pointed out, however, that Bulgaria had not ratified the CRPD when the violations took place, so Bulgaria was not legally bound by its provisions.

Judge Kalaydjieva further notes the access to justice argument which was missed in the majority judgment; namely that Mr Stanev had to rely totally on the discretion of the guardian to initiate legal proceedings to restore his legal capacity, and to get out of the institution. Her insight highlights the way in which guardianship and institutionalization conspire not only to invalidate a person’s will and preferences, but how they segregate people from our societies, exclude them from the political sphere and erase them from our legal consciousness.

CONCLUSIONS

I would like to make two concluding remarks. First, that the Court should engage with developments in United Nations human rights law. Second, that despite its weaknesses, the Stanev judgment is a significant advance in international human rights law.

First, Stanev is the latest example of how the ECtHR is unwilling to interpret the ECHR in the light of UN human rights treaties, in this case the CRPD.40 One frustration is that CRPD provisions do not map neatly onto the ECHR, but the main frustration is that the Court is not even engaging with what the CRPD has to say. The ECHR was written in the late 1940s, and it is likely that none of the drafters had a situation similar to Stanev in mind. By contrast, the CRPD is a document adopted in 2006, drafted largely by experts (many of whom were people with disabilities) who knew the features of guardianship and institutionalization very well. Its provisions — in particular Articles 12 and 19 — speak directly to a Stanev scenario.

The ECtHR first cited the CRPD in 2009, three years after its adoption, in the case of Glor v. Switzerland.41 The Court stated that the CRPD represents a European and universal consensus on the necessity of addressing the treatment of people with disabilities. Although these are encouraging words, the Court did not rely on the CRPD in finding in that case for the first time that disability constituted a “status” as a protected ground of discrimination under Article 14 of the ECHR; or that people with disabilities constitute a vulnerable group for whom the State’s margin of appreciation to permit differential treatment should be narrow. More surprisingly, in very important judgments concerning the right to legal capacity in 2008,42 2009,43 and 2011,44 the Court failed even to mention the CRPD, despite legal capacity being a central concern in each of the cases, and a central feature of the CRPD. In a 2010 judgment on the right to vote of a person deprived of legal capacity, the Court cited the CRPD in passing but failed to use it in its analysis,45 and in a case against the UK in the same year, the Court mentioned offhand that the amicus curiae brief had cited the CRPD in its submissions.46

In a 2010 case concerning a deaf man who died in custody, the Court cited the CRPD early in its judgment, but despite the CRPD’s strong language about reasonable accommodation in detention,47 the Court did not rely on it in finding that “[w]here the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability.”48 In a 2011 case about a person with HIV, the Court referenced the CRPD in relation to the prohibition of disability-based discrimination but did not cite it in the main points of the case (for example, whether HIV can be considered a disability which, since Glor v. Switzerland, is already an established prohibited ground of discrimination under the “other status” provision in Article 14 of the ECHR).49 It is probably too early to conclude that the Court is being ablist in its approach, and perhaps too early to conclude that it is taking a different approach to that which it took following the 1989 adoption of the Convention on the Rights of the Child (CRC), although a review of the ECHR judgments from the 1990s citing the CRC suggest a Court slightly more willing to weave CRC principles into its judgments than the current bench’s treatment of the CRPD.50

Second, the Stanev judgment is a significant advancement of European and global case law. Writing in 2007, Sir Nicholas Bratza (the President of the seventeen-judge Grand Chamber that adjudicated the Stanev case, and the President of the ECtHR itself) observed that since the first major mental health case of Winterwerp v. the Netherlands in 1979, “the jurisprudence of the Court in the succeeding twenty years is notable for the almost complete dearth of judicial decisions in this vitally important area.” He goes on to explain that, “This gap is a reflection not of adequate safeguarding by member States of the Convention rights of those with mental disabilities but rather of the acute practical and legal difficulties faced by an especially vulnerable group of persons in asserting those rights and in bringing claims before both the domestic courts and the European Court.”51 Exactly so. That Mr. Stanev was able to bring his case to the public attention through the international litigation is due to his tenacity, to non-governmental organizations, and the donors that

“Her insight highlights the way in which guardianship and institutionalization conspire not only to invalidate a person’s will and preferences, but how they segregate people from our societies, exclude them from the political sphere and erase them from our legal consciousness.”
fund them. No civil legal aid is available in Bulgaria for this type of case, so the vast majority of cases go ignored.

The *Stanev* judgment has been described in the blogosphere as an “exciting decision,” a “huge achievement,” and a “landmark ruling.” My colleague Lycette Nelson, who represented Mr. Stanev before the Grand Chamber, describes the judgment as having “enormous significance.” The international NGO, Interights, which submitted an excellent amicus brief said on its website that, “there is no mistaking the significance of the *Stanev* judgment, which will benefit tens of thousands of persons with disabilities,” although this seems to miscalculate the number of potential beneficiaries by several million.

It is surely a jurisprudential failure that the Court did not directly address the right to legal capacity, and it is frustrating that the Court is not yet willing or able to offer macro comments about societal exclusion of people with disabilities. I share the frustration, but am not yet overly concerned. The Court is not a UN treaty body that comments on government progress and makes recommendations and has a more personable relationship with civil society. Nor is it an international think-tank or an advocacy organization. We are still in the early days of disability litigation: this is a relatively new and unsettled area in the European legal system, however backward that may seem to us advocates who operate in the CRPD ecosystem. The ECtHR is a judicial body that currently faces a barrage of criticism from governments for overstepping the boundary between national sovereignty and universal human rights. Perhaps these political considerations were at play in the *Stanev* case.

As a judicial body the Court has adjudicated the particular facts of the case. That it has chosen to couch the violations in overly narrow terms does not detract from the significant advances in international law. This is the first case in which the Court has found that a person in a disability institution was unlawfully deprived of liberty. This is the first case that the Court found that the regime and conditions of a disability institution violate the absolute right to be free from torture and inhuman or degrading treatment or punishment.

Franz Kafka once wrote that, “paths are made by walking.” Mr. Stanev’s case clears the path towards freedom, and towards a time when people with disabilities are not objectified by the law, but treated as full and equal subjects of human rights and fundamental freedoms. It is now for others to take action, by carrying out implementation advocacy, raising judicial awareness of disability rights, empowering victims of human rights violations to continue seek justice through the courts, and ensuring the viability of organizations that enable this to happen.

Endnotes: *Stanev v. Bulgaria: On the Pathway to Freedom*

3. For more on these situations of conflict of interest, see MDAC 2007, comments under indicator 11 at p. 42: “The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.”
10. CPT Report at para. 27.
11. *Id.*
14. *Id.* at para. 29: “[t]he daily expenditure for food per resident averaged 1.50 BGL and could go up to 2 BGL when there were donations.” According to the history section of www.xe.com, in December 2002 1.5 BGL was the equivalent to 0.89 US dollars.
15. In doing so, the CPT invoked Article 8(5) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (November, 26 1987) which provides that, “[i]f necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned.”
16. CPT Report at para. 34.
20. For a review of ECHR case-law on this, see chapter 2 of Peter Bartlett, Oliver Lewis, and Oliver Thorold *Mental Disability and the European Convention on Human Rights,* (2007).
21. In 2007, an international study estimated that there were nearly 1.2 million people living in residential institutions for people with disabilities in European Union member states (the study included Turkey, but excluded Germany and Greece for which no data was available). See Jim Mansell, Martin Knapp, Julie Beadle-Brown and Jeni Beecham, *Deinstitutionalisation and community living — outcomes and costs: report of a European Study* 26 (2007). My estimate of upwards of 2.5 million is based on the fact that the European Union’s 27 countries constitute around 502 million people, and that the number of people in the Council of Europe (which comprises 47 member states including all EU member states) is around 800 million, and that countries in former Soviet Union have higher rates of institutionalization than western European countries many of which are undergoing a de-institutionalization process.
22. *Stanev* at para. 121.
23. *Id.*
24. *Id.* at para. 122.
25. *Id.*
Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making

By Robert D. Dinerstein*

INTRODUCTION

In deceptively simple language, Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”), Equal Recognition before the law, provides that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” If, as is clear from the deliberations that produced this article, Article 12’s use of the term “legal capacity” includes not simply the capacity to have rights (or passive capacity) but also the capacity to act or exercise one’s rights, an important question that arises is how to address the circumstances of individuals with disabilities who may not be able to exercise their legal capacity without some kind of assistance or intervention. Article 12(3) addresses this question in language that once again seems straightforward and uncontroversial: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Yet this use of the word “support,” and the related concept of supported decision making, represents nothing less than a “paradigm shift” away from well-established but increasingly discredited notions of substituted decision making. Rhetorical identification of the shift from substituted to supported decision making, however, is one thing; understanding what these terms mean, and fully implementing a regime truly oriented toward supporting rather than supplanting the decision-making rights of people with disabilities, is quite another matter.

“…Article 12 was one of the most hotly contested articles to be considered during the treaty deliberation process.”

To paraphrase one commentator, with Article 12 “on the books,” now comes the hard part.

In this essay, after providing some background on Article 12 and its relationship to core values immanent in the CRPD as a whole, I set out some of the characteristics of guardianship — the primary form of substituted decision making employed around the world — and its alternatives. I then explore the concept of supported decision making and some of the ways in which it has, or might function. Finally, I discuss some of the beginning efforts to come to terms with the meaning of supported decision making in which States Parties, non-governmental organizations, and the Committee on the Rights of Persons with Disabilities are engaged. Early indications are that there continues to be substantial confusion, at least on the part of States Parties, over the meaning of supported decision making, to say nothing of the fitful process some countries are experiencing in changing their laws to provide for this form of assistance to individuals with disabilities. I will conclude with some observations about steps people with disabilities, NGOs, policy-makers, and others might take to hasten States’ embrace of supported decision making and make the exciting promise of the CRPD a reality for people with disabilities.

ARTICLE 12 AND ITS IMPORTANCE

As Amita Dhanda and others have documented, Article 12 was one of the most hotly contested articles to be considered during the treaty deliberation process. In addition to the controversy surrounding the provision of support, the nature of substituted decision-making arrangements, and the kinds of “due process” protections that should be in place with respect to legal capacity, a key dispute was whether there needed to be a distinction between the legal capacity for rights and the legal capacity to act. After much back-and-forth discussion, an alternative draft, and a last-minute footnote that purported to reject the concept of legal capacity to act on linguistic grounds, the States Parties adopted Article 12 and its commitment to recognizing legal capacity to the fullest extent.

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Article 12’s emphasis on legal capacity and the choice-making that underlies the concept, as well as its statement that “persons with disabilities have the right to recognition everywhere as persons before the law,” resonates with other important provisions of the CRPD. The Preamble to the Convention recognizes “the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,” and adds that “persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.” Article 3 of the CRPD proper, General Principles, includes “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” and “full and effective participation and inclusion in society.” Article 5’s call for equality and non-discrimination emphasizes that “all persons are equal before and under the law” and that States may need to provide reasonable accommodations to ensure that equality and non-discrimination are achieved. Article 19, Living independently and being included in the community, provides that “States Parties . . . recognize the equal right of all persons with disabilities to live in the community, with choices equal to others” and must ensure that “[p]ersons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others . . . .” Article 23, Respect for home and the family, requires non-discrimination “against persons with disabilities in all matters relating to marriage, family, parenthood, and relationships, on an equal basis with others” and ensures that people with disabilities of marriageable age have the rights to marry and found a family. Article 26, Habilitation and Rehabilitation, requires States Parties to adopt measures to enable people with disabilities to achieve and maintain “maximum independence” and “full inclusion and participation in all aspects of life.” Plainly, if an individual with disability is deemed not to have legal capacity, the person’s ability to make choices, achieve maximum independence and be fully included in the community is fatally compromised.

The requirement in Article 12(3) that States Parties provide access to whatever supports people with disabilities need to exercise their capacity reflects the critical insight that even people with the most significant disabilities have legal capacity and are covered by the CRPD. The provision builds on the statement in the Preamble that “recogniz[es] the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.” Article 12(4) expands on the desired characteristics of support by providing that, among other things, capacity-related measures “respect the rights, will, and preferences of the person” and “are proportional and tailored to the person’s circumstances . . . .” Article 12 is not the only place in the CRPD where support in one or more forms (including personal assistance) appears; Articles 19 (Living independently and being included in the community), 20 (Personal mobility), 24 (2)(d), (e) (Education), among others, all include references to the need to provide support to people with disabilities. The salience of support is a concrete expression of the social, interactive model of disability that animates the entire Convention and sees disability as not a thing in and of itself but rather as a product of the interaction between an individual and his or her built and attitudinal environments.

The importance of Article 12’s insistence on the recognition of legal capacity of people with disabilities also must be understood in the context of the historical treatment of people with disabilities and their presumed inability to make decisions about their lives. Society assumes that adults of typical intelligence, psychosocial functioning, and sensory ability are able to engage in all aspects of life — deciding where to live, whom (or whether) to marry, how to spend one’s money (or to whom to leave it), for whom to vote — on an autonomous basis, with whatever assistance they choose to seek out and consider in their decision making. But for adults with disabilities, the picture has been and continues to be quite different. States have assumed that the mere status of having an intellectual or psychosocial disability (or some sensory disabilities) provides a sufficient basis to presume that the individual is unable to participate fully and autonomously in society, in other words, that the individual lacks the legal capacity to exercise his or her rights. People with disabilities were objects of pity, not people with self-respect.

In this mode of thinking, people with disabilities need protection, not rights. Guardianship is the primary mechanism through which states have provided this protection; it is a mechanism that, at least in its most complete form, the CRPD, and Article 12, seeks to limit significantly.

**From Guardianship to Supported Decision Making**

Guardianship is a form of surrogate decision making, usually imposed after a court proceeding, that substitutes as decision maker another individual (the guardian) for the individual in question (called variously the ward or the allegedly incapacitated person). Full or plenary guardianship may or may not provide protection to the individual with a disability — there are numerous examples of guardians who have taken advantage of, ignored, or otherwise failed to serve the interests of the person they were supposedly protecting — but even when it is functioning as intended it evokes a kind of “civil death” for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all. Plenary guardianship falsely assumes that incapacity for individuals with disabilities is an all or nothing proposition; that where found it exists in all areas of an individual’s life; and that, once found to exist the individual (especially one with an intellectual disability) will not regain capacity at some later time. It fails to recognize that people with disabilities, like people without disabilities, have areas of varying capacity, in different areas of their lives, and at different times.

In recent years, some states have begun to move away from plenary guardianship as providing more protection than the individual with disability needs, and as being far from the least restrictive manner in which to provide it. Alternatives such as durable powers-of-attorney, advance directives, health care proxies, representative payee regimes, direct bank deposit systems, and other modalities can provide more targeted assistance to the individual and at the same time avoid the stigma and indignity of the individual being determined incompetent (or lacking in capacity) for all purposes. Even when some might believe that some form of guardianship is appropriate, limited or partial guardianship is preferable to plenary guardianship in that the court specifically identifies those areas in which the guardian is needed and the individual retains full decision-making capacity in all other areas of his or her life. Other reforms have focused
on increasing the level of due process that a state must provide before a guardianship can be imposed (e.g., right to a hearing, legal representation, elevated standard of proof, right to confront witnesses and present one’s own witnesses, right to appeal, and provision for periodic review) and have established that the guardian should use the standard of “substituted judgment” when acting on the individual’s behalf — that is, the guardian should strive to determine what decision the individual would make if he or she could do so rather than make the choice that the guardian believes is in the individual’s best interest.

Important as these reforms of guardianship have been, however, they still accept the predominance of a legal regime that locates decision making in the surrogate or guardian and not in the individual being assisted. In contrast, supported decision making, which Article 12 embraces, retains the individual as the primary decision maker, while recognizing that the individual with a disability may need some assistance — and perhaps a great deal of it — in making and communicating a decision. The paradigm shift reflected in the move from substitute to supported decision making aims to retain the individual as the primary decision maker but recognizes that an individual’s autonomy can be expressed in multiple ways, and that autonomy itself need not be inconsistent with having individuals in one’s life to provide support, guidance and assistance to a greater or lesser degree, so long as it is at the individual’s choosing.

**Supported Decision-Making**

Supported decision-making can be defined as a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life. Some of the above alternatives to guardianship could be part of a supported decision-making regime, though, to the extent they involve the individual with a disability identifying someone else as authorized to speak for him or her, they can move into a form of substituted decision-making (albeit one that is less restrictive of the individual’s liberty than guardianship). A purer form of supported decision-making would rely on peer support (for example, ex-users of psychiatric services for people with psycho-social disabilities), community support networks and personal assistance, so-called natural supports (family, friends), or representatives (pursuant to a representation agreement) to speak with, rather than for, the individual with a disability. “What the Convention requires is that the support should be based on trust, be provided with respect and not against the will of the person with disabilities.” Countries such as Sweden (through its use of the “god man”), a number of provinces in Canada, and Germany have made extensive use of supported decision-making arrangements to greater or lesser degree.

Inclusion Europe, an organization that advocates for the human rights of individuals with intellectual disabilities, has issued a Position Paper in which it identifies eight key elements of a system of supported decision-making:

- Promotion and support of self-advocacy.
- Using mainstream mechanisms for the protection of the best interests of a person. Accessibility and accommodation are important.
- Replacing traditional guardianship by a system of supported decision-making (recognizing that there needs to be a transition period from guardianship to support)
- Supporting decision-making. One should look to a formal system of support with registered supporters only for “essential and important decisions of legal relevance.” For many everyday decisions, informal support networks are sufficient and should be used wherever possible.
- Selection and registration of support persons. Jurisdictions need a registration system to reassure those who come into contact with persons with disabilities that the supporters are authorized to assist them. Such a system can also facilitate the training individuals will need.
- Overcoming communication barriers. Augmentative and alternative means of communication must be used when necessary.
- Preventing and resolving conflicts between supporter and supported person.
- Implementing safeguards. These safeguards must ensure that there is a level of proportionality in the support provided.

Michael Bach has identified three common elements to supported decision-making models in Canada: (1) they are based on a set of guiding principles that emphasize the person with disability’s autonomy, presumption of capacity, and right to make decisions on an equal basis with others; (2) they recognize that a person’s intent can form the basis of a decision-making process that does not entail removal of the individual’s decision-making rights; and (3) they acknowledge that individuals...
with disabilities will often need assistance in decision-making through such means as interpreter assistance, facilitated communication, assistive technologies and plain language.34

Supported decision making thus permits vindication of Article 12’s imperative that all people with disabilities retain their legal capacity, even those who may need significant and intensive support to effectuate it. But whether countries move toward adopting it in lieu of substituted decision-making regimes depends in the first instance on how they interpret their practices with respect to Article 12 and how treaty bodies and non-governmental organizations respond to those interpretations.

**Implementing Supported Decision-Making Under Article 12: The Hard Part Begins**

Under Article 4 of the CRPD, States Parties are obligated “to adopt all appropriate legislative, administrative and other measures for the implementation of the rights” in the CRPD and “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”35 To the extent a state provides only for plenary guardianship and makes no provision to assist people with disabilities to obtain the supports they need for decision-making, their laws would seem in clear violation of Article 12.

Article 34 of the CRPD created an expert committee, the Committee on the Rights of Persons with Disabilities (“the Committee”), to review and comment upon the activities of States Parties to the CRPD.36 Pursuant to Article 35 (1), States Parties must file with the Committee “a comprehensive report on measures taken to give effect to its obligations under [the CRPD] and on the progress made in that regard” within two years after the CRPD enters into force for that country.37 To date, the Committee has met for six sessions, with a seventh scheduled for April 16-20, 2012.38 The Committee has adopted Concluding Observations on two countries — Tunisia (at its Fifth Session) and Spain (at its Sixth Session) — and has received reports from 26 other countries (or sub-country entities) as of the upcoming Seventh Session. At the Seventh Session, the Committee expects to adopt Concluding Observations on Peru, and will adopt a list of issues for Argentina, China and Hungary. Thus, the work of interpreting and implementing the CRPD is in its very early stages.

The States Parties reports to the Committee from Tunisia and Spain reflect that those countries’ governments may not truly understand the difference between substituted and supported decision-making. Tunisia reported that it permits guardianship on the grounds of “insanity, mental impairment or profligacy.”39 The State said nothing about whether it provided for supported decision-making or, if not, what its plans were for moving toward adoption of such a scheme. The report on Tunisia by the International Disability Alliance noted that “Tunisia does not understand supported decision-making,”40 and another non-governmental organization, Atlas Council, also was critical of Tunisia’s compliance with Article 12.41 Tunisia’s response to the Committee’s List of issues (which included questions regarding the application of legal capacity, the kinds of guardianship, and whether there were any measures to move toward supported decision making) showed no greater understanding of the issue.

In its Country Report, Spain, in Paragraph 53, claimed to be in compliance with Article 12(3)’s requirement of providing access to supports because it had guardianship statutes!42 It reported that a finding of incapacity could be made on the basis that the person could not act “unaided.”43 It proposed to change its terminology from deprivation of legal capacity to modification of legal capacity, maintaining that this change in nomenclature would constitute compliance with the CRPD.44 The non-governmental organization CERMI45 stated more directly that Spanish laws did not provide for supported decision-making.46 Once again, the Committee’s list of issues identified guardianship practices as a cause for concern under Article 12; it requested Spain to report on the number of people under guardianship and the number of rulings modifying an individual’s capacity to act; to explain how an individual subject to guardianship was sufficiently protected given the absence of statutory language addressing the guardian’s potential undue influence on or conflict of interest with the ward; and to report on any measures designed to replace substituted decision-making with supported decision-making.47 Spain’s response essentially indicated that it is the court’s responsibility to protect the interest of the individual under guardianship.48

Notwithstanding these disappointing state reports, the good news is that the Committee’s Concluding Observations for both Tunisia and Spain reflect its understanding of Article 12 and its commitment to keep the focus on supported decision-making. At its Fifth Session, with regard to Tunisia’s compliance with Article 12, the Committee stated that it was “concerned that no measures have been undertaken to replace substitute decision-making by supported decision making in the exercise of legal capacity” and went on to recommend that Tunisia review its guardianship laws “and take action to develop laws and policies to replace regimes of substitute decision-making by supported
decision-making.”49 It added that relevant public officials and other stakeholders should receive training on this issue. At its Sixth Session, the Committee made the same recommendation to Spain in its Concluding Observations regarding the review of state guardianship laws and their replacement by supported decision making (adding that the latter “respects the person’s autonomy, will and preferences.”).50 In preparation for the upcoming Seventh Session, in which it expects to issue its Concluding Observations on Peru, the Committee propounded among its list of issues a question that asked the state to: indicate the number of people with disabilities under guardianship (as a percentage of all people with disabilities in the country); provide information on the legal criteria for guardianship and any procedures for challenging decisions ordering it; and clarify the meaning of the concept of people “unable to look after themselves due to a mental or physical disability.”51

Furthermore, at least some of the countries who have filed reports but that have not yet been on the Committee’s agenda do seem to recognize that their existing legislation or practice is at odds with Article 12. For example, Argentina has reported that its legislation does not comport with Article 12 because it does not provide for supported decision-making.52 Hungary reported on a statute that adopted provisions abolishing guardianship in favor of supported decision-making, but noted that the statute did not come into force.53 Both Australia54 and Austria55 contend that substituted decision making is used as a last resort. Ireland has identified legal capacity as a crucial issue to address in connection with its efforts to ratify the CRPD, recognizing that its 1871 Lunacy Regulations are in dire need of attention.56

Outside of the CRPD process, other countries are making strides toward addressing their laws for protecting the legal capacity of individuals with disabilities. According to the website of Mental Disability Advocacy Centre (“MDAC”), an organization that closely monitors developments in Europe in the area of legal capacity, Bulgaria, which only recently ratified the CRPD, has formed a task force on legal capacity law reform.57 The Czech Republic recently enacted (February 20, 2012) a new civil code that introduces supported decision making and views restriction on legal capacity as a last resort. According to MDAC, the Czech Republic is the first country to enact legal capacity reform based on the CRPD.58

**Conclusion: Next Steps**

To be sure, the above actions are nascent, and, in some cases, seem to represent a “two steps forward, one step back” approach to the legislative and regulatory change needed to implement Article 12. Nevertheless, states interested in complying with Article 12, or at least assessing the extent to which their existing legislation falls short of its mandate, can look to a variety of sources for inspiration in addition to the efforts the above states are undertaking. Even before the CRPD was adopted, the Montreal Declaration on Intellectual Disabilities, issued in 2004, called for supported decision making for people with intellectual disabilities.59 As noted above,60 the International Disability Alliance has issued a Legal Opinion on Article 12. The United Nations High Commissioner for Human Rights’ Thematic Study on enhancing awareness and understanding of the CRPD sets out clear (if not uncontroversial) views about Article 12’s reach.61 More recently, the European Commissioner for Human Rights’ report, *Who Gets to Decide?*, calls on member states of the Council of Europe to abolish mechanisms for full incapacitation and plenary guardianship and adopt supported decision-making standards.62 Entities as disparate as a Surrogate Court judge in New York City63 and the Inter-American system’s Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities64 have cited to Article 12 as persuasive authority in examining, respectively, a guardianship proceeding and the meaning of the Inter-American disability convention. Litigation brought before domestic courts and human rights commissions and courts; conferences and workshops featuring experts from around the world; foundations supporting international disability rights; non-governmental organizations (including those producing alternative reports for states reporting to the CRPD’s Committee); and, perhaps most importantly, people with disabilities themselves are important resources for assisting states that truly want to understand what supported decision making really means and why it is critical if Article 12 is to be implemented.

In addition, as the Committee itself has recognized, it is critical that states provide training for policy-makers and relevant stakeholders (including people with disabilities themselves, as well as governmental officials, health care personnel, and the business community, who come into contact with people with disabilities) on the meaning of supported decision-making — training that is concrete and practical as well as grounded in a solid philosophical and legal framework of autonomy, equality and non-discrimination. The reports of states that think they are providing supported decision making through guardianship suggest that there is much training work to accomplish. But even if supported decision-making is a relatively new concept within international human rights, it has been operating in some countries, such as Canada, for over 20 years. There is wisdom to be tapped.

The responsibility for implementation of the CRPD is not limited to the actions of States Parties. Article 33’s requirement that States Parties establish national implementation and monitoring mechanisms, with participation by civil society (including people with disabilities and their representative organizations), provides an opportunity for individuals and groups to keep a watch on states’ compliance with the Convention, and can provide an important source of information to the Committee. Finally, for those states that adopt the Optional Protocol,65 the filing of individual complaints can serve to encourage compliance with the CRPD.66

Enacting appropriate state legislation, and monitoring compliance with the CRPD, will not transform decision-making regimes from substituted to supported decision-making overnight, but they are a start. The human rights of people with disabilities demand that we not delay in making sure the paradigm shift represented by Article 12 becomes a reality.

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When Treatment is Torture:
Protecting People with Disabilities Detained in Institutions

By Eric Rosenthal & Laurie Ahern*

INTRODUCTION

Throughout the world, people with disabilities are subject to mistreatment in psychiatric hospitals, orphanages, nursing homes, and other institutions. Much of this abuse is a product of neglect and lack of care — poor, unhygienic conditions, a lack of treatment, and outmoded service systems that segregate people from society. In some circumstances, however, pain and suffering is a direct consequence of treatment practices whose stated purpose is to provide treatment, care, or protection. There is a growing recognition that pain inflicted in the name of treatment may violate international law. In some circumstances, it rises to the level of torture.

This article describes these developments and suggests challenges that lie ahead. The authors draw on insights from our work with Disability Rights International (DRI — formerly Mental Disability Rights International or MDRI), an organization engaged for nearly twenty years in documenting, exposing, and challenging abuses against people with disabilities.

The protection of people with disabilities has been profoundly influenced, in recent years, by the adoption and widespread ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD was adopted in December 2006,1 entered into force in May 2008,2 and has now been ratified by 112 countries.3 Before the adoption of the CRPD, the European Court was often very deferential to medical justifications for treatment. In the 1993 case of Herzeghaly v. Austria, for example, the ECtHR ruled that the long-term detention of a man in prolonged physical restraints did not violate the European Convention because such treatment was a form of “medical necessity.”4 More recent cases from the European and Inter-American human rights systems have recognized that poor conditions of confinement can constitute inhuman or degrading treatment.5 In the January 2012 case of Stanov v. Bulgaria, the ECtHR found that Mr. Stanov was improperly detained for seven years in a dilapidated facility that lacked adequate food, running water, access to toilets, privacy, or almost any form of meaningful activity.

“...The protection of people with disabilities has been profoundly influenced, in recent years, by the adoption and widespread ratification of the UN Convention on the Rights of Persons with Disabilities.”
According to the ECtHR, these conditions amounted to “degradating” treatment — but not torture.⁶ To date, neither the European nor Inter-American systems have recognized these forms of treatment for people with disabilities as torture, and the ECtHR in particular remains deferential to practices with a therapeutic purpose.

A 2008 report by former UN Special Rapporteur on Torture Manfred Nowak examines the implications of the CRPD and points the way to more significant and robust protections for people with disabilities.⁷ The current UN Special Rapporteur on Torture, Juan Méndez, has implicitly supported the approach taken by Nowak in his stand against the use of solitary confinement of people with mental disabilities.⁸

The CRPD can help guide the application of existing human rights law to people with disabilities — even though it was not intended by the United Nations to create new rights under international law.⁹ Article 15 of the CRPD tracks the International Covenant on Civil and Political Rights (ICCPR) in prohibiting torture and ill-treatment, adding that governments must take action to protect persons with disabilities “on an equal basis with others.” The CRPD has not changed the definition of torture or ill-treatment, so it is essential to look to the existing legal framework.

**Core Requirements of International Law**

As defined by article 1 of the Convention Against Torture (CAT), torture is:

“…any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁰

For a practice to constitute torture, it must meet each of CAT’s four elements: (1) severe pain, (2) intent, (3) purpose, and (4) an act or omission of a government authority. Where a practice does not rise to the level of torture, it may still constitute ill-treatment (a term encompassing “cruel, inhuman or degrading treatment or punishment”), prohibited under article 16 of CAT.

Protections against torture and ill-treatment are linked — both prohibited under article 7 of the ICCPR and article 15 of the CRPD. These protections are absolute — allowing for no exceptions.¹¹ These rights cannot be suspended, even in times of war, political instability, or public emergency.¹² This level of protection is crucial for people with disabilities in any country that may cite the lack of resources as an excuse for inadequate treatment. The lack of resources, development, or services available to people with disabilities cannot justify torture or ill-treatment.¹³

Both torture and ill-treatment require state action — the “consent or acquiescence of a public official or other person acting in an official capacity . . . .” Governments “have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”¹⁴ Former UN Special Rapporteur on Torture Manfred Nowak stated that it is the responsibility of governments to regulate health care institutions, and thus the state can be held responsible for “doctors, health professionals, and social workers, including those working in private hospitals . . . .”¹⁵ Governments must “exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.”¹⁶

Another common element for torture or ill-treatment is that the pain or suffering must reach a threshold level of severity to trigger protections under international law.¹⁷ International law recognizes that the severity of suffering is subjective, however, and factors such as a person’s age, health, or disability must be taken into consideration.¹⁸

For a practice to be considered torture, it is also necessary to demonstrate elements of “intent” and “purpose.” Meeting these elements presents a challenge in a social or medical context, because service providers are assumed to be acting out of a beneficent intent with the purpose of curing, helping, or protecting individuals with disabilities.¹⁹ Treatment is a proper and legitimate goal. Acting in this manner is often thought to shield service providers from liability for torture — even if pain and suffering results. Our experience demonstrates that such assumptions are not justified or supported by international law.
THE LINK BETWEEN CAT AND CRPD

For people with disabilities in a medical or social service context, the critical language in CAT’s definition of torture is that pain may not be induced to “coerce” or for a purpose “based on discrimination of any kind.” This is important because people with disabilities are often subject to involuntary or coercive treatment — particularly in mental health facilities. The protection is also broadly relevant to people subject to treatment in institutions. Many countries offer care only in the segregated environment of institutions. The CRPD is now available to serve as a guide to what constitutes improper “coercion” or “discrimination” under international law.

Under the CRPD, “discrimination on the basis of disability” is an act which “has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights...”20 The CRPD details ways in which government policies — even if intended to help — may discriminate against them unlawfully. This includes, for example, a protection against segregation from society by placing individuals with disabilities in institutions (such orphanages, psychiatric facilities, or nursing homes). Article 19 of the CRPD recognizes the right to “live in the community with choices equal to others.”

The CRPD also clarifies what constitutes improper coercion. One of the core principles of the CRPD is “[r]espect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons.”21 In the health care context, care must be provided “on the basis of free and informed consent.”22 The existence of a disability cannot be used to deny this right. Article 12 of the CRPD provides innovative protections to ensure that people with mental or physical disabilities enjoy “legal capacity,” including the right to make legal decisions on an equal basis with others. The CRPD requires governments “to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”23

LESSONS FROM DRI’S CAMPAIGN AGAINST TORTURE

DRI’s campaign against torture has provided an opportunity to examine how the protection applies to people with disabilities — and to see how the CRPD’s influence has helped to broaden understanding of what constitutes torture.”

“DRI’s campaign against torture has provided an opportunity to examine how the protection applies to people with disabilities — and to see how the CRPD’s influence has helped to broaden understanding of what constitutes torture.”

MANFRED NOWAK’S RESPONSE: A PATH-BREAKING REPORT ON TORTURE AND DISABILITY

In December 2007, the Office of the High Commissioner for Human Rights (OHCHR) convened a meeting of experts to
examine the issue of torture and disability, less than a year after the CRPD was adopted. The Committee included members of the UN Committee Against Torture, human rights experts, and representatives of disability organizations. DRI presented the Serbia Report along with video of children held in long-term restraint and detention. The official report of this meeting stated:

Many participants agreed that the situation presented in the video constituted torture as provided in Article 1 of CAT. Further, some noted that situations like the one in the video were not exclusive to Serbian institutions and that it was important to start applying the torture protection framework fully to the treatments and conditions inflicted on persons with disabilities.27

This reception of DRI’s report indicates a shift among human rights thinking from the perspective represented by the European Court in Herzeghalvy, which did not recognize the prolonged use of restraints as any human rights violation. Nowak’s final report concluded that “there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment.”28 Nowak’s report cites DRI’s worldwide findings — including DRI’s reports on Turkey and Serbia.29

By stating that the prolonged use of restraints “may” constitute “torture or ill-treatment,” Nowak avoided classifying this practice categorically. Circumstances of the case matter.30 The Special Rapporteur’s analysis recognizes that the stated intent of the treating professional to provide care is no defense for a practice that meets the elements of torture. “This is particularly relevant in the context of medical treatment of persons with disabilities,” says the report, “where serious violations and discrimination against persons with disabilities may be masked as ‘good intentions’ on the part of health professionals.”31 Nowak adds: “the requirement of intent in Article 1 of the CAT can be effectively implied where a person has been discriminated against on the basis of disability.”

Nowak also clarifies the purpose requirement:

Whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they...aim at correcting or alleviating a disability, may constitute torture or ill-treatment if enforced or administered without the free and informed consent of the person concerned.32

While Nowak leaves open what is a “fully justified treatment,” he points to what is not: “Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person. Persons with disabilities often find themselves in such situation, for instance when they are deprived of their liberty in prisons or other places, or legal guardians.”33 Nowak makes clear that “it is often circumstances external to the individual that render them ‘powerless,’ such as when one’s exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others.”34

TORTURE AT THE ROTENBERG CENTER IN MASSACHUSETTS

DRI has drawn on Nowak’s report to challenge abusive practices in “situations of powerlessness” around the world, including the Judge Rotenberg Center (JRC) in the United States. JRC is perhaps unique in the world because it has developed techniques of “behavior modification” for children and adults with disabilities that include the intentional infliction of pain through electric shocks, long-term restraints, seclusion, social isolation. DRI published its findings in Torture not Treatment: Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center (2010; updated 2011). DRI filed its report with the Special Rapporteur Against Torture as an “urgent appeal.”

JRC has vexed disability rights activists in the United States for more than three decades. The facility claims that aversive treatment is “necessary” because some people with disabilities will not respond to any other form of treatment. Time after time, US courts have upheld aversive treatment at JRC because parents claimed that their relatives had a “right” to this treatment or education under US civil rights law.

The challenge to aversive treatment as torture is in some ways easier and in some ways harder than in other contexts. The stated intent is to cause pain. Unlike a traditional mental health context, there is no need to find implied intent. On the other hand, the stated purpose of pain is to correct or alleviate the disability. DRI challenged this justification on two grounds. There are less intrusive and painful alternatives to aversive treatment. The great majority of professionals agree that this treatment is dangerous and unnecessary. DRI also called on Nowak to adopt a broader position and reject the doctrine of medical necessity. Even if pain were an effective treatment, the protection against torture must create an upper limit on the amount of pain that can be involuntarily induced on any person.

Nowak responded to DRI’s urgent appeal by expressing concern to the US Department of State. During an interview on ABC News, Nowak stated that the pain inflicted on children and adults detained at the Rotenberg Center constitutes torture. “I have no doubts about it. It is inflicted in a situation where the victim is powerless…. [A] child, in the restraint chair, being subject to electric shocks, how more powerless can you be.”35

The US State Department has never issued a public response to Nowak. The Justice Department is still in the process of investigating the Rotenberg Center more than two years after the urgent appeal. The US National Council on Disability, the highest federal advisory body on disability, cited DRI’s report calling the practice torture, and asked Massachusetts authorities to bring the practice to an end. The director of JRC, Mathew Israel, was forced to step down after he was indicted for misleading a grand jury during an inquiry into a scandal at the institution. Finally, Massachusetts’s regulatory authorities have banned the use of electricity and all severe aversive treatments on any new admissions after October 30, 2011.36

The new regulations do not protect people already detained at JRC. But they stem the flow of new abuses and they represent a victory for disability rights supporters in Massachusetts after
decades of effort. Coming shortly after DRI’s report and condemnation by the Special Rapporteur Against Torture, the timing of the new regulations is a rare case in which an allegation of torture under international law contributed to protecting citizens in the United States.

Further Support from Special Rapporteur Juan Méndez

When Nowak’s term as Special Rapporteur concluded, he was followed by Juan Méndez. Special Rapporteur Méndez has not explicitly re-examined the issues analyzed by Nowak in the context of treatment for people with disabilities. Méndez adopted a position on the prolonged use of seclusion, however, that compliments Nowak’s approach.

Méndez found that “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment depending on the circumstances.” In the case of juveniles or people with mental disabilities, however, Méndez finds that solitary confinement of any duration constitutes cruel, inhuman or degrading treatment under article 16 of CAT.

In certain circumstances, solitary confinement can rise to the level of torture — such as its use for the purpose of punishment. While the “purpose” of punishment is relevant, there are also circumstances where purpose does not explicitly figure into a situation of torture. A practice may rise to the level of article 1 torture “[w]here conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering.” This situation hinges on the severity of pain and not on the stated purpose of the authorities. Poor conditions may be caused by a lack of resources, and strict regimes may be imposed by authorities who claim to be acting for the safety or therapeutic benefit of the subject. This situation appears consistent with the position DRI took in the case of JRC: that the protection of torture creates an upper limit of pain that can be induced by the state — whatever the stated purpose may be.

Conclusions

Manfred Nowak’s report outlines the principles to guide how torture and ill-treatment can be understood to protect people with disabilities in light of the CRPD. By validating claims of torture made by DRI, Nowak has helped give specificity to those principles. In the case of prolonged restraints in Serbia, Nowak shows how intent to cause pain can be implied without specific evidence of the motivations of treating professionals. Moreover, this stated therapeutic purpose of protecting people in their care does not shield a practice from being labeled as torture.

In the Serbia and JRC cases, the powerlessness of children and adults with disabilities detained in institutions plays a role in determining that these individuals were subject to coercion. This factor allowed Nowak to call into question claims of “therapeutic purpose” in cases where severe pain and suffering had been inflicted — and thus find torture.

Article 4 of CAT requires governments to “ensure that all acts of torture are offences under criminal law.” Recognizing practices as torture ensures that health authorities and service providers can no longer blame the system for its inadequacies. They face personal risk in perpetuating practices that they know to induce severe pain. The implications of this recognition are enormous for people detained in institutions throughout the world. Health, social service, and human rights authorities need to be sensitized to the fact that people detained in facilities are inherently at-risk of torture. Recognizing abuses not just as inhuman and degrading, but also as torture, will help gain the attention needed to bring these abuses to an end.

Endnotes: When Treatment is Torture: Protecting People with Disabilities Detained in Institutions

3 U.N. Enable, http://www.un.org/disabilities/ (last visited February 6, 2012). As of this date, the CRPD was signed by 153 countries and ratified by 110. The Optional Protocol has been signed by 90 countries and ratified by 63. The United States signed the CRPD on July 24, 2009.
5 See Eric Rosenthal & Clarence Sundram, International Human Rights in Mental Health Legislation, 21 New York Law School Journal of International and Comparative Law 469, 512 (2002) (reviewing international case law on inhuman and degrading treatment). The most important case from the Inter-American Court is Ximenes-Lopes v. Brazil, in which the Court found a violation of the right to life as well as inhumane treatment. Mr. Ximenes-Lopes died after he was beaten, placed in physical restraints, forcibly medicated, and left without medical supervision. 2006 Inter-Am Ct. H.R. (serc. C) No. 149 (July 4, 2006) at ¶150.
7 Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, U.N. Doc. A/63/175 (Jul. 28, 2008) (by Manfred Nowak) [hereinafter Nowak Report].
8 Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, para. 78, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Méndez) [hereinafter Méndez Report].
9 See Frédéric Mégret, The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights, 30 Human Rights Quarterly 494, 502 (describing how the convention “in stating the obvious, is also effecting change”).
10 UN Convention Against Torture, art. 1(1).

Endnotes continued on page 74
The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union

Jennifer W. Reiss*

INTRODUCTION

A recent development in European law, less heralded, but no less path-breaking than the Treaty of Lisbon, was the ratification by the European Union (EU) of its first human rights treaty, the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Concluded as a mixed agreement, the CRPD’s pioneering monitoring mechanisms demand a high level of cooperation from both the EU and its Member States. As the Treaty of Lisbon fundamentally changed the frameworks by which the European Union’s institutions operate,1 the EU (at the time, still the European Community) formally participated in the negotiation of its first international human rights treaty, the CRPD.2 But the CRPD is a breakthrough in more ways than one: the CRPD is the first United Nations human rights treaty of the 21st century;3 it adopts a modern “social model” of disability4 to explicitly recognize the legal rights of the world’s largest marginalized group,5 and in a break from its predecessor treaties,6 the CRPD contains novel provisions for implementation and monitoring,7 which portend a “progressive[reconfigur]ation of the structure and process of human rights oversight.”8

The CRPD provides for a treaty monitoring body (the Committee on the Rights of Persons with Disabilities) with an international Conference of States Parties to monitor periodic State reports and to issue general recommendations, and it is supplemented by an Optional Protocol under which it can receive individual or collective complaints.9 But these traditional functions and institutions are underpinned by the requirement to establish national “focal points” to facilitate and monitor steps taken by national and sub-national organs to fulfill the Convention. This requirement — a first in international human rights law — effectively charges a named government body with oversight of CRPD compliance. The CRPD also requires cooperation with non-governmental organizations, which it is hoped, will be facilitated by these organizational centers. The CRPD thus revolutionizes governments’ accountability to the international community.

This unusually activist stance from the UN on monitoring and implementation has already grabbed the attention of academics and policy-makers.10 In Europe, however, the questions posed by the CRPD go far deeper than merely how to more effectively translate treaty commitments into practice. The conclusion of the CRPD by both the EU and independently by its Member States as a mixed agreement generates questions about the nature and future of European integration in the context of expanding EU authority and Member State rejection of formal constitutionalism.11 How will the EU and Member States implement Convention duties in areas of shared competence? As the Commission begins to implement a Code of Conduct under the Convention,12 the practical effectiveness of the Convention within the EU is at stake. Unless the current Code is revised to provide a concrete formula by which responsibility is divided and action taken, the CRPD will remain merely an empty promise of equal rights for the disabled.

This article proceeds in three primary parts: section one briefly describes the substance of the CRPD, section two situates its adoption in the context of European Union law, and section

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three recounts and critiques the Code of Conduct which ostensibly governs how the EU will fulfill its obligations.

**Provisions of the Convention on the Rights of Persons with Disabilities**

Substantively, the CRPD obligates signatories to go beyond the mere provision of non-discrimination legislation and address the full panoply of civil, political, economic, and social rights through the lens of disability. Underlying principles animating the Convention explicitly include individual autonomy, and “full and effective participation and inclusion in society.” Article 4 of the CRPD requires active and comprehensive state engagement in the human rights of disabled persons. This obligation is then supplemented by specific provisions in Articles 5 to 30, which touch on traditional elements of the human rights agenda — de facto equality, the right to life, judicial access, freedom from torture (or cruel, inhuman or degrading punishment), privacy, rights to home and family, education, employment, and participation in public life, among others — as well as more specific concerns of the disabled community, including: accessibility, independent living, rehabilitation, and personal mobility. The last section of the convention includes articles dealing with logistical issues: data collection, international cooperation, reporting, and monitoring.

Without negating the applicability of pre-existing human rights instruments, the CRPD is in essence a bill of rights for the disabled community, reaffirming that impairments do not negate fundamental protections accorded to persons by virtue of their basic human dignity. In this sense, one could argue that the CRPD should require little accommodation in national legal systems. Presumably, signatories like the EU, which are already active in protecting the human rights of its citizens, have generally applicable laws in place. The difficulty lies in the disability-specific provisions — the core of the Convention — which are designed to mainstream disabled persons and address the existing human rights gap engendered by their exclusion from the general population. Governments will have to review nearly the entire corpus of existing law for lacunae ignoring the needs of the disabled, from signage on buildings and making public information available through assistive technologies to specialized training for social services employees and the provision of cultural materials and sports activities in accessible formats. Indeed, the CRPD would be superfluous if it did not alert governments to, and compel action on those dimensions of human rights protection they have thus far failed to address from a disability perspective. However, the sheer pervasiveness of the neglect the CRPD addresses makes its implementation substantially more complex than other human rights instruments.
Adoption by the European Union

Added to the immense task described above are the multiple layers of responsibility and accountability in the EU’s supranational system — where Member States have exclusive legal competences, the EU has exclusive legal competences, and there is a vast interstitial space of shared competences — as well as the notion of legal clarity becomes more than a desirable end of CRPD obligations, but essential to its implementation.

In brief, powers — or competences — can be exclusive or shared (whether internal to the EU or in its external relations with non-member states).16 According to Article 2(2) of the Treaty on the Functioning of the European Union (TFEU), in areas of shared competence the Member States are only free to act to the extent that the EU has not done so. There is also a lesser form of “supplementary” competence for the EU to support or coordinate Member State actions, provided for in Article 2(5) TFEU. It should be noted that the TFEU explicitly includes the principles of “sincere cooperation” and “mutual respect” in the exercise of delineated competences, meant to reinforce the essentiality of loyalty between the EU and the Member States for effective action in a cooperative federal structure.17

Concluding treaties like the CRPD as “mixed” agreements — i.e. jointly by the EU and its Member States — has been the norm when some of the matters covered by the agreement fall outside the EU’s competence, or because in respect of matters for which competence is shared, the Member States have chosen to act under their own powers rather than through the Union.18 Mixed agreements are necessary to maintain the practical effectiveness of a cooperative federalist system,19 but they are also politically useful given the inherent volatility of this governance style.20 Thus far, mixed agreements have tended to involve discrete issues, like humanitarian aid, nuclear safety, and participation in the Cartagena Protocol on Biosafety.21 Because it does not impose a strict competence structure on the Commission and Member States, mixed agreements offer the space to experiment with creative modes of governance — especially when dealing with convoluted shared competences. Indeed, the Union has already begun experimenting with inventive modalities for managing shared competences that may be importable into the mixed agreement context.

For example, Council regulations now require Commission observation of bilateral air service agreements, and encourage the acting State to include standardized clauses drafted by the Commission in conjunction with the Member States. In multilateral agreements “disconnection” clauses have been added noting that EU law on point prevails over the international agreement inside the Union, but does not affect individual Member State obligations.23 Another option is the so-called Open Method of Coordination (OMC) a ‘soft law’ mechanism which stresses decentralized, voluntary, mutual learning via the setting of guidelines, timetables, and benchmarks for achieving generalized goals, often announced by the European Council, which are then translated into specific national policies tailored to circumstances in Member States. The intention is that civil society and stakeholders are involved in this debate and initial policymaking. These policies are then subject to peer review with the objective of exchange of best practices and thus gradual harmonization of EU objectives without resort to legislative or regulatory dictates in sensitive policy areas.24

With that context in mind, appended to the Council Decision concluding the CRPD on behalf of the European Union is a declaration of the powers of the Union vis à vis the Member States.25 Many of the CRPD’s obligations clearly engage shared and supplementary Union competences, particularly in terms of CRPD Articles 9 and 20 on accessibility and personal mobility, respectively. Ostensibly then, this document should be the foundation for any further exploration of dividing powers under the Convention. Unfortunately, it is not very helpful. The powers of the Union are very general ones, relatively apparent from a plain reading of the CRPD. The EU specifies exclusive competence regarding its own public administration and shared or supplemental competence in areas where it is provided for in the TFEU, such as transport, discrimination on the grounds of disability, employment and vocational training.26

The Decision does include an additional appendix to “illustrate” existing Union legislation relevant to matters covered by
the Convention, including seventeen items on accessibility, nine on employment and social inclusion, eight on mobility, five on access to information, five on data collection, and three on relevant aspects of international cooperation. However, (1) this listing may or may not be comprehensive and (2) interested parties are left to investigate each of the forty-seven acts independently to assess the extent of the EU and Member States’ comparative undertakings. Moreover, the document is somewhat biased in emphasizing the EU as the predominant actor. Although it might have been appropriate to include some discussion of what is clearly Member State competence as a counter-point to elucidate the declaration of the EU’s competence, there is no such explicit discussion of what might be exclusively the province of the Member States.27

Many of these instruments have as their legal basis in Article 114 TFEU — the European ‘commerce clause’ empowering the EU to adopt harmonizing legislation in support of the internal market.28 This is noteworthy because the article is subject to extensive qualifications pursuant to political concerns of the Member States, which further complicates the question of who is responsible for attending to the needs of disabled consumers. Comprehensive implementation will clearly take time, resources, and ultimately, political capital within the Commission. When seen in that context, the opaque pronouncement of competences becomes somewhat understandable. However, one must remember that delineating powers in the case of the CRPD means so much more than horse-trading in the bland ‘Eurospeak’ of a Brussels bureaucrat. It directly translates into political responsibility and — more importantly — accountability to fill one of the last true gaps in European human rights law. Delineating competences means that the paraplegic knows where to turn when she is denied access to public transport, it means that the schizophrenic can petition to be cared for by his family, rather than locked in an institution, and it means that autistic children can no longer be marginalized or excluded from a real education as a burden to the public. There are palpable consequences of the path the EU decides to take.

**THE CODE OF CONDUCT**

In late 2010, the Council, Commission, and Member States adopted a Code of Conduct with the primary purpose of describing the function of the Commission as the focal point for implementation of the CRPD (in accordance with Article 33(1) of the Convention).29 With the inventive monitoring and implementation provisions of the CRPD, the United Nations has engaged itself in a quest for continued effectiveness for the international human rights regime. In the Convention’s Code of Conduct, the EU had a similar chance to innovate, develop new governance mechanisms, and enhance its ability to fulfill its growing responsibilities in the human rights field. Unfortunately, the Code of Conduct leaves much to be desired.

The document is preoccupied foremost with management within the UN monitoring context but not truly with the division of responsibilities between the levels of governance. Coordination meetings may be convened on the subject of any type of competency prior or concurrent to UN committee meetings, with referrals on subjects of either shared or exclusive Union competence to a Disability High Level Group. In the event of Member State competence over a given subject, “coordinated positions” may be expressed by either the EU Presidency, an appointed Member State, or by mutual consent the Commission, who will also speak in cases of exclusive Union competence.30 In shared competence, determining who will make statements on behalf of the EU is an issue of “the preponderance of the matter,” a term which is left undefined.31 Only in the event of deadlock on shared competence combined with a pressing UN deadline is there provision for anything but the same vague standards suggested by the EU documents concluding the CRPD. Disagreements are referred to relevant Council Working Groups designated by the Presidency and as a last resort, to the Permanent Representatives Committee, who will vote on the matter in accordance with the EU voting rules assigned to the subject.32

If the EU is serious about its obligations under the Convention, the current Code of Conduct is not enough. The plight of the disabled is not going to be ameliorated by streamlined procedures in New York or Geneva.”

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“If the EU is serious about its obligations under the Convention, the current Code of Conduct is not enough. The plight of the disabled is not going to be ameliorated by streamlined procedures in New York or Geneva.”
“[T]he fulfillment of citizen-centered governance depends in large part on the cooperative ethos and notion of mutual responsibility suffusing Europe’s chosen style of federalism. The EU’s institutions must collaborate.”

— shall notify all appropriate focal points either of (1) the action proposed by that body to address compliance in accordance with an express competence or (2) the concern that compliance would be better served by action at another level of governance. In the latter case, a proposal or opinion on further conduct should be appended. This procedure would have to have some appropriate time limitation.

CRPD focal points of nations affected by the proposed action can then craft a response to the notification. If there is agreement between the Commission and the Member States in competency or method, the notifying focal point would be authorized to proceed. If there is disagreement, the initial notification would act as a binding agreement to enter into mutual discussions on the issue. Efficiency and effectiveness would be served by forcing participation in the cooperative procedure, so neither the Commission nor the Member States can shirk difficult questions. It also provides a forum for information sharing on better methods and unintended consequences. Discussions could trigger notification to and response from the European Parliament to increase democratic participation and the breadth of expertise available.

There should also be clarity in the procedures regarding what would happen if negotiations deadlocked. The CRPD obligations are obviously ongoing, and thus to be a good global citizen, the EU could not just leave the issue unresolved, however politically prudent that may be. The EU’s judicial cooperation regulations seem to provide for a final resolution in favor of the Commission in such cases by replacing the open-ended supervision provided for by earlier laws. A fairer and more definitive solution may be to provide for referral to the Court of Justice of the European Union for an Advisory Opinion on the Union powers in controversy after some extended time (such a provision would also respond to a potential critique of lack of judicial oversight, without necessarily encumbering innovation). The conceivable existence of a permanent deadlock in negotiations between Member States and the Commission was a key point that the Court of Justice left unresolved after the case of Commission v. Sweden.

Finally, to be prudent, a revised Code of Conduct would include review and expiry provisions, with perhaps a five-year limit and explicit provision to send the review report to the UN CRPD Committee for consideration. If anything, such procedures should be welcomed at the United Nations as improving the probability of compliance with the substantive provisions, as well as buttressing the establishment of the local focal points so key to the Convention’s innovative approach.

A further delineation of areas of competence — complete with existing affected legislation and proposed additional acts in both the EU and Member States — is useful if the EU is serious about effectively implementing the CRPD. In other words, without a dualist-style strict division of powers, the onus is on the EU and Member State institutions to behave themselves: to agree on the extent of the responsibilities on each side, ensure that the network of responsibilities is comprehensive, and stand by the agreed responsibilities. A precise declaration of competences keeps both sides honest. That said, it may not be realistic to create a straight recital of competences when the legal impact of the CRPD is so pervasive, but something more than the current Code is clearly warranted.

**Conclusion**

The Treaty of Lisbon is part of an ongoing constitutional process between the European Union and Member States. Increasingly, those “two levels of government are [seen as] complementary elements of one system” existing “in permanent interdependency,” which places the interests of individual citizens — rather than the state — at the center of its constitutional universe. Seen in that light, the concurrent advent of Lisbon and the CRPD is powerful. As the international human rights system continues to mature and recognize a fuller conception of individual dignity, perhaps unconsciously, the European Union is moving in a direction that aligns concrete political institutions with that vision. Nevertheless, the fulfillment of citizen-centered governance depends in large part on the cooperative ethos and notion of mutual responsibility suffusing Europe’s chosen style of federalism. The EU’s institutions must collaborate.

This obligation is especially profound in external relations agreements like the CRPD. In establishing the concept of “focal points”, the UN has recognized that clarity of responsibility and coordination of national action within international organizations is key to effectiveness: mere general mandates and reporting are insufficient to ensure accountability. Although Lisbon improves coordination on external action with the new unitary role of High Representative, a coordination problem remains outside the area of common foreign and security policy.
competences — particularly in agreements like the CRPD where responsibilities are difficult to specify outright — is one key element in the equation of deepening integration whilst respecting difference. Respecting and celebrating differences is of course the touchstone of the Convention on the Rights of Persons with Disabilities itself, and that should be the ultimate end of crafting its place in EU law.


2 See generally, Gráinne de Búrca, The European Union in the Negotiation of the UN Disability Convention, 35 EUR. L. REV. 174 (2010).


4 For an overview of the social model of disability and its contrast to the traditional medical model, see Michael Ashley Stein, Disability Human Rights, 95 CAL. L. REV. 75, 85-93 (2007).


8 Id. at 690.


13 CRPD, supra note 3, Art. 3(a), (c).


15 CRPD, supra note 3, Art. 4(4).
The Conflict Surrounding Universal Access to HIV/AIDS Medical Treatment in South Africa

By Kaila C. Randolph*

INTRODUCTION

Every individual has the human right to life, a principle found in every international human rights treaty, convention, and national constitution. Nonetheless, what can persons with HIV/AIDS do when their government denies them access to medical treatment? What can refugees do when they are denied health care, simply based on their identity as foreigners? Consider the case of Paula Chirundu, a 34 year-old refugee from Zimbabwe, living in South Africa. After she tested positive for HIV in 2005, she was referred to Hillbrow Hospital in Johannesburg, where health professionals illegally refused to provide her antiretroviral medications because she was a refugee and did not have citizenship documentation.1

Human immunodeficiency virus (HIV),2 which causes acquired immunodeficiency syndrome (AIDS) is one of the most dangerous and infectious diseases to plague the global human population. In 2010, an estimated 34 million people were living with HIV/AIDS.3 Africa continues to be the continent most highly affected by the epidemic, accounting for 22.9 million of all persons living with HIV/AIDS in 2010.4 South Africa is one of the worst impacted countries in the world, with more than 5 million people living with HIV/AIDS.5 By refusing to support the provision of free antiretroviral (ARV) treatment for all infected individuals, South African government officials are major obstacles to efforts to stem the pandemic.6 Refugees in South Africa are further disadvantaged because medical professionals often refuse to provide them treatment.7

Access to healthcare and medical treatment are fundamental human rights protected under international law.8 Recognition of this right can be found in Article 25 of the Universal Declaration of Human Rights which states, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”9 Despite these protections, former President Thabo Mbeki and his administration established an HIV/AIDS policy that denied access to treatment to individuals with HIV/AIDS. After much condemnation and a shift in political power in the last two years, the South African government finally developed an advanced policy for HIV/AIDS prevention and treatment; however, healthcare professionals continue to refuse to provide treatment to refugees on account of their status as foreigners. Healthcare professionals’ refusal to provide ARV treatment violates the rights of refugees under domestic law; whereas the government’s failure to enforce such laws violates the right to access healthcare under both domestic and international law.

An analysis of the HIV/AIDS pandemic in South Africa reveals that refugees’ rights to access adequate mental and physical health care, as protected by international treaties and the South African Constitution, are regularly violated by medical professionals who refuse to provide treatment. South Africa is a signatory state to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12 of which obligates States Parties to ensure the physical and mental health of every human being within their territory. Equally important, South Africa is also a signatory state to the International

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Covenant on Civil and Political Rights (ICCPR), which provides in Articles 6(1) and 26, respectively, that all persons within the territory of a State Party have the inherent right to life and are entitled to equal protection of the law without discrimination. South Africa is also a party to the 1951 Convention on the Status of Refugees, which guarantees that refugees exercise their fundamental rights and freedoms without discrimination and also be afforded the same treatment as nationals pursuant to Article 20.

The Government of South Africa is also bound by domestic legal obligations to remedy unequal access to ARV treatment. The Bill of Rights of the Constitution of the Republic of South Africa states that everyone has the right to medical treatment. The Refugee Act of 1998 ensures that refugees are guaranteed the same rights as South African nationals under the Bill of Rights of the South African Constitution. In 2007, the South African Department of Health released a statement reasserting that foreigners have the right to ARV treatment in South Africa regardless of their legal status, and should be provided free healthcare if they lack the necessary financial resources to attain healthcare on their own. Finally, as a State Party to the African Charter on Human and Peoples’ Rights, South Africa is committed to protecting the rights and freedoms recognized within the Charter, without distinction based on race or ethnicity. These rights include the right to life, the right to health, and the right to non-discrimination. Thus, the South African government, which funds the free ARV medications, has international, regional and domestic legal obligations to prevent discriminatory treatment of refugees in the provision of medical treatment. To do this, the Government of South Africa must investigate abuses and establish a working dialogue between health professionals and refugees to stem the spread of HIV/AIDS.

The intent of this article is to illustrate the conflict surrounding the HIV/AIDS epidemic in South Africa and to provide recommendations to the government regarding the steps necessary to achieve universal access to medical treatment. Part Two illustrates how xenophobia and misinformation by medical professionals results in discrimination towards refugees with HIV/AIDS, thereby violating domestic and international legal obligations. Part Three analyzes how the refusal to treat refugees has become a conflict based on identities and assesses what potential methodologies the government could develop to ensure universal access to ARV treatment. Part Four notes the importance of resolving and managing this conflict to prevent continued hostilities between refugees and health professionals, resulting in HIV/AIDS discrimination. Finally, Part Five presents concluding conflict resolution measures to increase education regarding refugee rights among healthcare professionals, reduce xenophobia and discrimination, and cease the identity-based conflict in South Africa.

**Refugees and the Continued Fight for Medical Treatment**

“Xenophobia is still here. Only now it lives at the hospital.”

— Sefu, Johannesburg

Since the departure of the Mbeki administration, the Government of South Africa undertook new efforts to combat HIV/AIDS with its “Strategic Plan for South Africa 2012-2016,” administered under the guidance of the South African National AIDS Council. Under the Strategic Plan, the Council is working to reduce the number of new HIV infections by at least fifty percent, and to decrease the impact of HIV/AIDS on society by expanding access to ARV treatments to at least eighty percent of all persons infected. The World Health Organization reported that within Sub-Saharan Africa, the number of individuals receiving treatment for HIV/AIDS successfully rose from 2,950,000 in 2008 to approximately 3,910,000 in 2009. However, despite the efforts of the South African government to strengthen their health system and remove barriers to access healthcare, vulnerable groups, such as refugees, continue to face difficulties in receiving treatment.

According to Article 27 of the Constitution of the Republic of South Africa, “(1) Everyone has the right to have access to (a) health care services, including reproductive health care; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights; and (3) No one may be refused emergency medical treatment.” In *Minister of Health v. Treatment Action Campaign (TAC)*, the Constitutional Court of South Africa asserted that the equal accessibility to AIDS medical treatment is a socio-economic right guaranteed by the Constitution. In *TAC*, the complainants alleged that the restrictions on the provision of ARV drugs to HIV-positive pregnant women violated the right to healthcare services of others under sections 27 and 28 of the Constitution. The Court relied on the reasoning in *South Africa v. Grootboom*, finding that the Constitution obligates the State to protect economic rights, such as equal access to health-care. Despite the difficulties in meeting such obligations, the Constitution requires the State to protect these rights within their available resources and ensure enforcement. Thus, the Court held that the South African government has the obligation to enforce the right to
access healthcare, and take the necessary legislative measures to ensure accessibility of ARV medications.22

The right to equal-access for medical treatment was expanded to include individuals with refugee status under the Refugee Act of 1998 (Act). Once individuals are granted refugee status, they are provided identification cards to be shown at local hospitals and clinics.23 Pursuant to the Act, refugees enjoy the same rights guaranteed by the Bill of Rights of the Constitution. Therefore, refugees are guaranteed access to medical care.24 In response to reports that a large number of refugees were being refused treatment by medical professionals, the Department of Health released a Revenue Directive to all hospitals and clinics asserting the healthcare rights of refugees with or without an identification card to medical treatment under the Act.25 The Revenue Directive emphasized refugees’ right to access both basic healthcare and ARV treatment, whether or not they had an identification card. Refugees are exempt from paying for ARV treatment services, irrespective of the location or level of medical institution (i.e. public or private clinics).26

South Africa’s international legal obligations under the ICESCR also require the government to uphold the right to healthcare for all, including efforts aimed at prevention, treatment, and the coordination of programs ensuring everyone medical service and medical attention in the event of illness.27 The Committee on the ICESCR has examined the right to health under the Covenant, and determined that there are four components of accessibility: non-discrimination in accessibility; physical accessibility for all persons within a safe physical reach to medical care; economic accessibility and affordability for all, including socially disadvantaged groups; and information accessibility where all persons have the right to seek and receive information regarding health issues.28 The Committee maintains that state obligations also include acceptability, where medical personnel must be respectful of the culture of the individuals, minorities, and other vulnerable groups seeking medical treatment.29 Accordingly, pursuant to the ICESCR, the South African government must ensure that refugees are not being discriminated against on any grounds, that they have physical access to local hospitals and clinics, that they are properly being informed of their rights to health services as refugees (including information on prevention and treatment), and that ARV treatments are economically affordable given that many refugees are unemployed or lack the financial means to pay for treatment. Equally significant, the government is also required to ensure that medical officials are respectful of refugees seeking healthcare services.

Nevertheless, the right to medical treatment of HIV-positive refugees is often infringed, as a result of xenophobic attitudes of health professionals, thereby inhibiting their ARV treatment.30 According to the Southern African Migration Programme (SAMP), medical xenophobia occurs when health professionals exhibit ill-treatment towards patients based on their foreign identity, by withholding treatment or demonstrating any form of discrimination motivated by hostility towards foreigners.31 In 2011, SAMP conducted a study investigating the existence of medical xenophobia in the South African public health system finding that medical xenophobia is manifested by the following: (1) patients are required to show identification documentation and proof of residence status prior to treatment, however, those lacking documentation are denied treatment; (2) health professionals refuse to communicate with patients in a common language or allow the use of translators; (3) treatment is sometimes accompanied with xenophobic statements, insults and other verbal abuse; (4) non-South African patients are required to wait until all South African patients have received medical attention, even if they have been waiting longer for treatment; and, (5) refugees and asylum seekers have such difficulty accessing ARV for HIV in public hospitals that many are forced to rely on NGO treatment programs.32 For instance, as Dr. Bernard Uzabakirilo, a medical practitioner at the Ekhuruleni Hospital outside of Pretoria, explains:

When a refugee comes to the hospital they have to present their documentation to prove their refugee status, but the staff at the registration point don’t [sic] recognize the legitimacy of their identification cards because they haven’t been properly educated.33

Thus, rather than be registered as a refugee at the local hospital or clinic, the individual is registered as an illegal immigrant — and thus not permitted to receive free ARV treatment — and is required to pay a consultation fee prior to receiving medical assistance, often ranging from $290 to $2,450, depending on the refugee’s medical condition.34 In addition to the costliness of treatment, the language barrier between refugees and healthcare professionals frequently delays or denies treatment. Dr. Uzabakirilo explains, “When refugees phone or come to the hospital and can’t speak English they are made to sit down and wait for a translator. I have seen patients who are made to wait for eight hours.”35 Currently, the Department of Health does not provide translators; thus, refugees seeking medical assistance must provide their own interpreters. Because of the costliness of interpreters, many of these refugees cannot afford to pay for a translator to assist them in the long wait for medical attention.36

Refugees are also harassed, ridiculed and persecuted by health care workers, when seeking ARV treatment at local hospitals.37 For example, Eric, a 33 year old refugee from Burundi, explained that xenophobic attitudes among health professionals are widespread, and many refugees are moved to the back of the line awaiting ARV treatment, ignored, or refused medication.38 Said, a refugee from the Akasia refugee camp in Pretoria, reported to Human Rights Watch:

“Refugees are also harassed, ridiculed and persecuted by health care workers, when seeking ARV treatment at local hospitals.”
I went to the hospital yesterday; I was sick. I called an ambulance but it didn’t come, so someone gave me a ride. At the hospital they told me, “this is not your country, we can’t treat you,” and sent me away. I left the hospital and went to another clinic. One doctor, a female doctor, was saying, “Just treat him,” but some others were saying, “Don’t treat him.” Some of them said I was a human being and deserved treatment, and others fought her right in front of me. Eventually they gave me medicine. I have been in South Africa for 7 years as a recognized refugee. I used to only go to private hospitals where I paid for treatment. I never had a problem there. Only later when I started going to public hospitals would I be treated like this.40

The AIDS Conflict of South Africa and its Refugees

In an effort to appropriately analyze the discord between health care workers and refugees, a conflict resolution analytical framework may prove useful. Conflict resolution is a conception of law in action where human behavior is modified to avoid potential lawsuits so that an agreement can be made between parties without significant expense or time.45 Such conflict prevention and management strategies are thus used to promote peaceful coexistence between groups of people, find peaceful ways to achieve resolutions, and facilitate an ongoing dialogue in meeting a common goal. An analysis through the conflict resolution framework of the unequal healthcare provided to refugees may aid the identification of power dynamics between the relevant parties (government, healthcare workers, and refugees), and the conflict prevention and management methods being used to fight unequal access to ARV treatment.

Xenophobic health care professionals refusing to abide by their aforementioned legal obligations to treat refugees is a continuous disagreement dividing the government, health care professionals and refugees. This disagreement has created an identity-based conflict: where differences between groups are divided along ethnic, political, religious, or cultural lines and regard the people’s need for dignity, recognition, safety, and a healthy lifestyle, or control.46 When healthcare workers refuse to treat HIV-positive refugees because they are not South African and speak a foreign language, the physical and mental health of refugees is threatened, and the risk that the virus will be spread is increased. The conflict surrounding access to ARV treatment exists as a result of hostile perceptions and attitudes towards refugees, and the internal desire to preserve such resources for South African nationals only. The government fails to fulfill its legal obligations under the Constitution and international treaties when it does not hold accountable health professionals and government officials that allow unlawful discrimination against refugees in the provision of ARV treatment.”
professionals and government officials that allow unlawful discrimination against refugees in the provision of ARV treatment.

**Conflict Prevention, Management and Resolution of the HIV/AIDS Epidemic**

For South Africa’s new government to meet its human rights obligations towards refugees, the government must better inform medical professionals about the healthcare rights of refugees, establish preventive measures, and produce and manage solutions. Such efforts will assist in rectifying existing conflict between xenophobic or misinformed health care professionals and refugees. Conflict prevention may be direct or structural in nature. Direct conflict prevention involves the implementation of measures that avoid short-term escalation of a potential conflict. Structural conflict prevention establishes long-term methods that focus on the true underlying causes of the conflict. In order to combat the increased spread of HIV/AIDS, the Government of South Africa could approach the core problem of medical access for refugees with structural conflict prevention methods in order to address the underlying xenophobia or misinformation of healthcare workers.

Once the government recognizes that structural conflict resolution can address the ongoing discrimination against refugees, officials should then manage the conflict. The government could manage the conflict by facilitating an open dialogue between the government, health officials, and NGOs that work with refugees, all of whom share a common interest in increased access to ARV treatment. Representatives from the Department of Health could work in coordination with NGOs in collecting data of refugees denied ARV treatment as a result of xenophobia. Collection of reliable data will facilitate open dialogue between all parties. Sensitization of public officials and healthcare providers to the circumstances of refugees could further combat underlying xenophobia.

The process of conflict management is necessary to create a strong foundation for more effective and productive conflict resolution through both accommodation and cooperation.

First, South African health professionals must abide by their Constitution, the Refugee Act of 1988, and other binding legal instruments that guarantee refugees the right to medical access and ARV treatment. Equally important, the government is obliged to enforce these laws against non-compliant health administrators and hospitals. Secondly, the government should construct more health care facilities near refugee camps, with an objective of prevention and treatment. The institution of these facilities will not only encourage refugees to seek treatment, but will also encourage HIV-positive individuals to remain on treatment, providing them medications, psychological therapy, and follow up communications with health specialists.

Although the construction of health facilities near refugee camps would be time consuming and costly, the government has access to financial resources that may be utilized for such objectives. For example, in 2011 the government received $548.7 million from the United States President’s Emergency Plan for AIDS Relief (PEPFAR), the U.S. government’s international strategic plan to assist countries that have been devastated by the HIV/AIDS epidemic. Between 2004 and 2011, South Africa received more than $3 billion to support HIV/AIDS prevention, treatment and care programs. Through the use of PEPFAR, South Africa may appropriate funding to the construction of health facilities near refugee camps and meet the Act’s international objective in providing treatment, care and prevention programs. The establishment of these facilities would not only meet the government and PEPFAR’s objectives, but would also relieve South Africa of seeking governmental funding for such programs elsewhere.

Furthermore, the South African government should develop and continue an interactive dialogue between refugees and healthcare professionals. Refugees should be informed of their human right to access medical treatment, and that the egregious refusal by hospitals is unlawful. In addition, medical practitioners must understand that refusing treatment to refugees is illegal. The government ought to work in conjunction with human rights NGOs in providing informational workshops regarding these rights at refugee compounds, and anti-discrimination and tolerance seminars at local hospitals. Finally, the government should make every effort to properly and expeditiously investigate filed complaints initiated by refugees, when a hospital refuses treatment. Such inquiries will provide the government a proper assessment of the challenges still facing ARV treatment and how South Africa can improve strategies targeting universal access. Although the Southern region of Africa has a substantial influx of refugees, documenting approximately 146,000 persons at the end of 2010, the government should utilize funding appropriated for combating HIV/AIDS, such as PEPFAR funds, in incorporating the aforementioned workshops, seminars and other methods within their prevention and treatment programs. Such methods practiced in numerous hospitals and refugee camps will undoubtedly reach the large number of health officials and refugees affected by the identity-based conflict and decrease the lingering xenophobic attitudes currently hindering ARV treatment.

Patients wait in line for ARV treatment at a local South African clinic. Source: Insight/Panos Pictures
South Africa has a history of neglecting to provide ARV treatment to infected persons. Today, refugees are repeatedly rejected at local hospitals and HIV/AIDS clinics. Further resistance to de-escalating this conflict, which is based on identities and needs, is dangerous given the statistical evidence of HIV-positive persons living in South Africa, and among asylum-seekers. With so many refugees residing in South Africa, it is not only necessary to treat native South Africans to prevent the spread of the virus, but all persons, regardless of their ethnicity or nationality.

Attention should be given to removing the barriers that refugees face in obtaining ARV treatment in South Africa. The hostile attitudes by xenophobic healthcare professionals towards refugees, the government’s lack of authoritativeness in tackling the issue, the resulting effects, and the common need for healthcare resources, demonstrate a clash in the common goal among all actors involved to combat HIV/AIDS. If the discourse is approached with conflict-prevention measures, the government may systematically begin using conflict management methods, such as constructive open dialogues between the parties, resulting in a solution that meets everyone’s common positive objective: reducing the spread of HIV/AIDS through universal access to ARV treatment.

The South African government should take the following measures to resolve the conflict: (1) agree to take action and enforce the Constitution and aforementioned human rights obligations upon health administrators and hospitals; (2) guarantee security in that refugees will not be turned away from treatment, by conducting investigations and follow-up inquiries with hospitals, and thereby imposing fines, should examinations reveal that health professionals are methodically discriminating against refugees; (3) assert that the interests of preventing the spread of HIV/AIDS is of equal importance with those who are infected; and (4) demonstrate that the refugees’ fundamental need for ARV treatment is recognized. Only through effective collaboration between the Government of South Africa and healthcare professionals, will refugees enjoy the equal access to ARV treatment required under both domestic and international law.

Endnotes: The Conflict Surrounding Universal Access to HIV/AIDS Medical Treatment in South Africa

2 “HIV is a lentivirus, and like all viruses of this type, it attacks the immune system. Lentiviruses are in turn part of a larger group of viruses known as retroviruses. The name ‘lentivirus’ literally means ‘slow virus’ because they take such a long time to produce any adverse effects in the body. They have been found in a number of different animals, including cats, sheep, horses and cattle. However, the most interesting lentivirus in terms of the investigation into the origins of HIV is the Simian Immunodeficiency Virus (SIV) that affects monkeys, which is believed to be at least 32,000 years old.” The Origin of Aids and HIV and the First Cases of Aids, AVERT, http://www.avert.org/origin-aids-hiv.htm (last visited Apr. 22, 2011).
6 Antiretroviral therapy (ART) is the medical treatment of HIV/AIDS through the use of at least three antiretroviral drugs (ARV) to decrease the progression of the HIV virus. Antiretroviral Therapy, WORLD HEALTH ORG., http://www.who.int/hiv/topics/treatment/en/index.html (last visited Apr. 22, 2011).
10 “(1) Everyone has the right to have access to: (a) health care services, including reproductive health care; (b) sufficient food and water; and, (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. (3) No one may be refused emergency medical treatment.” S. Afr. CONST., 1996 art. 27, § 1, 2.
11 Refugees Act 130 of 1998, ch. 5, art. 27 (b) (S. Afr.).
13 The African Charter on Human and Peoples’ Rights holds that every person within the territory of a state party is entitled to the enjoyment of the rights and freedoms enumerated in the Charter, without distinction of his or her race, ethnicity, color, gender, language, religion, political opinion, national and social origin, fortune, birth or other status. African Charter on Human and Peoples’ Rights art. 2, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Article 4 guarantees that every person has the right to life; Article 16 provides that every individual has the right to the enjoyment of physical and mental health and that state parties must take the appropriate and necessary measures in protecting such health by ensuring medical treatment to the ill; and, Article 20 holds that all individuals shall be equal and enjoy the same respect and obtain the same rights as one another. The Charter also obligates individuals to honor the right to non-discrimination, guaranteeing that all persons respect one another without prejudice. Id. art. 4, 16, 20, 28 June 27, 1981.
Interview with Oliver Lewis, Executive Director of the Mental Disability Advocacy Center

Human Rights Brief: Please describe your background, and how you came to be involved in the field of disability rights in general, and mental health advocacy in particular?

Oliver Lewis: The Freudian answer is that my mother is a psychiatrist for people with intellectual disabilities, and as a kid I spent some of the summer vacations in Brentry Hospital, a mental asylum in Bristol which was built in 1898 and closed in 2000. I used to sit in the occupational therapy department and ‘play’ with the ‘patients’. As a child I saw the de-institutionalization process, and saw how people inside the system can play a key role in transitioning to a more humane system.

Years later, I studied law at the London School of Economics, where I met Professor Jill Peay (she had just arrived at LSE and I was in her first criminal law class). Jill has researched at the interface between mental health and law and I found all of this fascinating. People tend to think that this ‘mental health law’ is narrow and obscure, but it’s not at all. The rights of people with disabilities cut across so many legal areas: constitutional and administrative law, family law, social security law, health law, criminal law, property law, contracts and torts, international human rights law, public international law. Not to mention other domains such as public policy, political and moral philosophy and sociology.

HRB: Please provide a brief overview of the mission and vision of the Mental Disability Advocacy Center (MDAC).

O.L.: MDAC was set up ten years ago to advance the rights of children and adults with intellectual disabilities or psycho-social disabilities. We achieve this through three organisational objectives:

1. Creating a body of progressive jurisprudence;
2. Instigating law reform;
3. Empowering people with disabilities and promoting participatory politics.

We’re an advocacy organisation and work with disabled people’s NGOs, to carry out hard-edged advocacy such as strategic litigation, parliamentary and governmental advocacy. We also work at the UN and European and African regional levels in various ways to advance the international legal and policy frameworks.

HRB: Your website mentions six human rights areas that MDAC works on. In your view, is there one in particular that presents a unique set of challenges?

O.L.: MDAC works on these areas because they represent six of the most ingrained areas of human rights violations, so they’re all quite challenging! If I picked one that is particularly challenging, it would be the right to legal capacity. This sits at the core of what we do, because essentially we’re battling against centuries of history where people have been labelled as incompetent and useless. Medicine and law have conspired to label people and then them their autonomy, their money, their homes. They have been legally transported into remote institutions where they are injected with chemicals to keep them quiet. This is done in the person’s ‘best interests’, under the watch of doctors, and with the approval of judges. In a sense, the other human rights areas which we work on flow from this conceptualization of a person with disabilities as sub-human. So we are fighting against segregated schooling, against congregated institutional
warehousing, against torture and ill-treatment, against denial of legal aid and access to justice, against political exclusion.

HRB: At present, are there any particular regional human rights systems — or perhaps any individual countries — that stand out in their approach and deserve recognition for their advances in the field of mental health advocacy?

O.L.: There are numerous examples of promising practice which tend to be initiatives by people with disabilities or their families which are grassroots, under-valued and in policy terms, unevaluated. The trouble about small scale innovations is that they are rarely scaled up by government, because of competing interests: some governments are more than happy to let the initiatives happen but are not willing to invest in scaling them up (despite financial and social benefits), some governments are more concerned about unions than people with disabilities, some devolve responsibility to municipalities which can be more interested in local employment figures than they are in the right to live in the community. And many governments are not providing financial investments even into monitoring human rights implementation: let alone adequately fulfilling their human rights obligations. No country is perfect. People often point to Sweden or Canada as examples of fantastic laws and practices. Undoubtedly what happens in those countries is measurably better than what happens in other places, but talk to people with disabilities, talk to people from ethnic minorities, talk to transgender people from those countries: things are not all rosy and we must guard against generalities of ‘good country’ and ‘bad country’!

HRB: Referring to the Convention on the Rights of Persons with Disabilities (CRPD), are there any places where you feel it falls short of offering the sort of promotion and protection MDAC considers significant and necessary?

O.L.: The CRPD is a human rights text. As such it is a result of intense negotiation and ultimately of horse-trading and political compromise. The CRPD really does express rights in a fresh and different way, and innovates by, for example, establishing national implementation and monitoring mechanisms. That said, a number of provisions which have given rise to intense debate. For example some people argue that Article 14 read together with Articles 12 and 25(d) of the CRPD mean that no-one can ever be subject to forced psychiatric interventions (medication usually injected, electroshock, or physical restraints and seclusion). Others justify such treatment for people lacking capacity to make healthcare decisions need to have access to healthcare on an equal basis with others, whether they have disabilities or not, and one might assess ‘capacity’. Given that nothing will change if the medical fraternity digs in its heels, I think the UN Committee on the Rights of Persons with Disabilities should reach out to the psychiatric community, and bring them into the discourse and provide clearer guidance. There are logistical and political hurdles to overcome, but it is possible.

HRB: Your article in this issue of the Brief ends with a call to action for people to get involved. If you were addressing those of our readers who are contemplating a career in disability rights, what might you suggest?

O.L.: There are lots of things you can do: volunteer at a local disability organisation, be active at the political level, do a course to get up to speed with international developments, come to MDAC’s summer school or come and intern with us or another NGO!

Lindsay Roberts and Christopher Tansey, J.D. candidates at the American University Washington College of Law, conducted this interview via email for the Human Rights Brief.
Statement by Claudio Grossman, Chairperson of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, before the 66th Session of the United Nations General Assembly

Chairperson, Distinguished Delegates, Colleagues and Friends,

It is an honor to address this General Assembly, now for the third time, in my capacity as Chairperson of the Committee against Torture. I am pleased to be in the company of my colleague Malcolm Evans, Chairperson of the Subcommittee on Prevention of Torture as well as with the Special Rapporteur on Torture, Juan Mendez. Our joint presence here today underscores the ongoing cooperation between the Committee, the Subcommittee and the Special Procedures of the Human Rights Council, and contributes to enhancing the understanding of our complementary and mutually reinforcing work.

For each of us this occasion is an essential opportunity to engage in a dialogue with you, member States of the United Nations, who adopted the Convention against Torture in 1984. We look forward to hearing your views as to how we can achieve full realization of the objectives of the Convention, which today has 149 States parties. Today’s dialogue complements and continues the Geneva-based annual meetings that the Committee holds with States parties as well as the State technical consultation held in Sion, Switzerland, on May 12-13, 2011, concerning the Treaty Body Strengthening Process, to which I will refer later.

I intend to cover several issues in my presentation today. First, I will inform you about new developments since last year concerning the Committee’s work, including critical issues arising under the Committee’s individual complaints mechanism. Second, I will report on how the Committee is effectively addressing its increased workload by utilizing the additional resources and meeting time provided by this General Assembly under Resolution 65/204. Third, I will touch upon the initiative of the High Commissioner for Human Rights to strengthen the treaty body system. Finally, I will refer to serious challenges currently facing the Committee.

With regard to all of the Committee’s activities over the past year, you have before you for your consultation the Committee’s annual report (A/66/44) as of June 2011.

Chairperson, Distinguished Delegates,

As you are aware, the Committee is mandated under the Convention against Torture to consider States parties’ reports (article 19), to examine individual complaints (article 22), to undertake confidential inquiries (article 20), and to conduct other activities, including the adoption of General Comments, to facilitate and ensure full realization of the Convention.

The examination of initial and periodic reports under article 19 through dialogue with States parties constitutes a core activity of the Committee. The Committee continues to have serious concerns about reporting delays. The Committee welcomes the submission of new initial reports during the past year by Madagascar and Djibouti, which will be considered as a matter of priority at the next session beginning on October 31. The Committee also deeply regrets that only two States have submitted initial reports during the past year and that 30 States parties have yet to present their initial report, many of which are more than a decade overdue. The Committee calls upon these States parties to promptly submit their overdue initial reports so that we can initiate a dialogue contributing to the realization of the goals set forth in the Convention.

The Committee is also very concerned that at least 65 States parties currently have overdue periodic reports, thereby impeding the monitoring functions of the Committee you established to ensure compliance with the Convention. We all know that law needs to be taken seriously, and that the Convention’s obligations have been voluntarily assumed by States parties. These past due periodic reports should be submitted to the Committee without further delay.

In an effort to assist States parties to comply with their Convention obligations, the Committee introduced an optional reporting procedure in 2007. This procedure, referred to as the list of issues prior to reporting (or LOIPR), consists of a list of issues transmitted to States parties prior to their submission of a report. The replies to the LOIPR become the States parties’ periodic report. This new procedure, also adopted by the Human Rights Committee in October 2009 and the Committee on Migrant Workers in 2010, provides numerous benefits: (i) it simplifies the process as State parties now need only submit one report rather than two as previously required when States had to submit replies to list of issues in addition to the periodic report; (ii) it assists States parties in preparing timely and more focused reports; (iii) it enriches the dialogue; and (iv) it results in more specific recommendations. Moreover, through the Committee’s advance identification of key issues of concern, including recommendations of other UN human rights mechanisms when appropriate, the LOIPR procedure has the broader potential of strengthening coherence and follow-up to treaty bodies’ recommendations. I am pleased to report that States parties have reacted favourably to this new procedure. To date, the Committee has completed a first cycle of four years and transmitted 75 LOIPRs to States parties with reports due in 2009, 2010, 2011 and 2012. With the assistance of the Secretariat, the Committee will evaluate and improve this procedure going forward, taking into account the suggestions of States parties and civil society organizations.

Concerning reports, I would like to bring to your attention that the treaty body system as a whole is facing serious difficulties, especially with regard to the inadequate capacity of UN Conference Services to process and translate documents in a timely fashion as well as the insufficient human resources within
Informe de Claudio Grossman, Presidente del Comité Contra la Tortura y Otros Tratos o Penas Cruel, Inhumanos o Degradantes, ante el 66º Periodo de Sesiones de la Asamblea General

Presidente, Distinguidas delegadas y delegados, colegas y amigos,

Me honra dirigirme a esta Asamblea General, por tercera vez, en mi calidad de Presidente del Comité contra la Tortura. Me complace estar en compañía de mi colega Malcolm Evans, Presidente del Subcomité para la Prevención de la Tortura, así como con el Relator Especial sobre la Tortura, Juan Méndez. Nuestra presencia conjunta hoy aquí resalta la cooperación existente entre la Comisión, el Subcomité y los procedimientos especiales del Consejo de Derechos Humanos y contribuye a mejorar la comprensión de nuestro trabajo colectivo y su complementariedad y refuerzo mutuo.

Para cada uno de nosotros esta ocasión es una oportunidad esencial para entablar un diálogo con ustedes, los Estados miembros de las Naciones Unidas, que aprobaron la Convención contra la Tortura de 1984. Esperamos escuchar sus opiniones sobre cómo podemos lograr la plena realización de los objetivos de la Convención, que hoy cuenta con 149 Estados parte. El diálogo de hoy complementa y continúa las reuniones anuales en Ginebra que el Comité lleva a cabo con los Estados parte, así como la consulta técnica de Estados celebrada en Sion, Suiza, el 12 y 13 de mayo de 2011 en relación al Proceso de Fortalecimiento de los Órganos de Tratados, al que me referiré más adelante.

Tengo la intención de cubrir varios temas en mi presentación de hoy. En primer lugar, informaré sobre nuevos acontecimientos desde el año pasado respecto a la labor del Comité, incluyendo aspectos críticos relativos al mecanismo de denuncias individuales. En segundo lugar, explicaré cómo el Comité ha abordado eficazmente el aumento en el volumen de trabajo utilizando los recursos y tiempo de reunión adicionales proporcionados por esta Asamblea General en su resolución 65/204. En tercer lugar, tocaré el tema de la iniciativa del Alto Comisionado para los Derechos Humanos para fortalecer el Sistema de Órganos de Tratados. Por último, me referiré a los graves desafíos que actualmente enfrenta el Comité.

Con respecto a todas las actividades del Comité durante el año pasado, tienen ante ustedes para su consulta el informe anual de Comité (A/66/44) de junio del 2011.

Presidente, distinguidos delegados,

Como ustedes saben, el Comité tiene el mandato conforme a la Convención contra la Tortura de examinar los informes de los Estados parte (artículo 19), de examinar denuncias individuales (artículo 22), llevar a cabo investigaciones confidenciales (artículo 20) y realizar otras actividades, incluida la adopción de observaciones generales, para facilitar y garantizar la plena realización de los objetivos de la Convención.

El examen de los informes iniciales y periódicos en virtud del artículo 19 a través del diálogo con los Estados parte constituye una actividad central del Comité. El Comité sigue seriamente preocupado por el elevado número de informes atrasados. El Comité acoge con satisfacción la presentación de nuevos informes iniciales durante el año pasado por Madagascar y Yibuti, los que serán considerados como un asunto prioritario en la próxima sesión que inicia el 31 de octubre. El Comité lamenta profundamente sin embargo que sólo dos Estados hayan presentado informes iniciales durante el año pasado y que 30 Estados parte aún no hayan presentado sus informes iniciales, muchos de los cuales llevan más de una década de retraso. El Comité hace un llamado a estos Estados parte para que presenten pronto sus informes iniciales para que así podamos entablar un diálogo que contribuya a la realización de los objetivos enunciados en la Convención.

El Comité también está muy preocupado de que a lo menos 65 Estados parte actualmente tengan informes periódicos atrasados, impidiendo con ello las funciones de supervisión del Comité que ustedes establecieron para garantizar el cumplimiento de la Convención. Todos sabemos que el derecho debe tomarse con seriedad, y que las obligaciones de la Convención han sido voluntariamente asumidas por los Estados parte. Estos informes periódicos deben presentarse al Comité sin demora.

En un esfuerzo por ayudar a los Estados parte a cumplir con sus obligaciones de la Convención, el Comité introdujo un procedimiento de información opcional en el 2007. Este procedimiento, conocido como la Lista de Cuestiones Previa al Informe (o LOIPR, por sus siglas en inglés), consiste en una lista de temas que se transmiten a los Estados parte previo a su presentación de un informe. Las respuestas a las LOIPR pasan a ser parte del informe periódico de los Estados parte. Este nuevo procedimiento, que fue adoptado también por el Comité de Derechos Humanos en octubre del 2009 y el Comité sobre los Trabajadores Migrantes en el 2010, proporciona numerosas ventajas: (i) simplifica el proceso, pues, ahora los Estados parte sólo necesitan presentar un informe en lugar de dos, como se requería con anterioridad cuando los Estados debían presentar respuestas a una lista de preguntas además del informe periódico; (ii) ayuda a los Estados parte a preparar informes más centrados y oportunos; (iii) enriquece el diálogo; y (iv) resulta en recomendaciones más específicas. Además, ya que el Comité identifica cuestiones clave de interés, incluyendo las recomendaciones de otros mecanismos de derechos humanos de la ONU cuando corresponde, el procedimiento LOIPR tiene el potencial adicional de fortalecimiento de la coherencia y seguimiento de las recomendaciones de todos los órganos de tratados.

Me complace informar que los Estados parte han reaccionado favorablemente a este nuevo procedimiento. A la fecha, el Comité ha completado un primer ciclo de cuatro años y transmitido 75 LOIPR a los Estados parte cuyos informes estaban programados para el 2009, 2010, 2011 y 2012. Con la asistencia de la Secretaría,
the Secretariat in the Office of the High Commissioner for Human Rights (OHCHR). I encourage member States to reflect on the implications for the treaty body system in the absence of the allocation of significant additional resources.

Contrary to the mandatory State reporting mechanism under article 19, State party acceptance of the individual complaints procedure under article 22 of the Convention is optional. The Committee regrets that, thus far, only 65 of the 149 States parties have made the necessary declaration accepting the Committee’s competence in this regard, and it calls upon the remaining 84 States parties to declare their acceptance. The individual complaints procedure is an important tool for achieving the goals of the Convention by enabling victims of torture to present their cases before the international community. It also allows the Committee to apply the Convention to real-life situations, thereby assisting State parties in fulfilling their obligations. Since last year, the Committee has considered the merits of 17 cases.

In addition to widespread ratification, another critical issue for the individual complaints mechanism is the need for full compliance with Article 14 obligations to provide remedies to victims of torture and other cruel, inhuman or degrading treatment or punishment. Under the Convention, States parties must ensure that such victims obtain redress.

I will now turn to how the Committee is addressing the increased workload by utilizing the additional resources and meeting time provided by this General Assembly.

The first measure taken by the Committee was to increase the number of reports it examines at each session, from six to nine for the November session and to eight for the May session. This will reduce greatly the backlog of reports pending before the Committee and ensure that reports are examined with minimum delay primarily attributable to translation into the working languages, another process which depends on the allocation of resources. This increase in the number of reports examined at each session, in conjunction with the optional reporting procedure that the Committee continues to develop, will improve the effectiveness and efficiency of examining reports.

Second, the Committee increased the number of individual complaints reviewed at each session. In the last session, the Committee decided 12 individual cases on the merits as compared to 5 at its previous session. Here, too, however, the Committee must rely on a Secretariat which lacks the resources required to significantly increase the number of cases ready for the Committee’s consideration. The problems caused by the lack of resources are compounded by the growing number of complaints submitted to the Committee. At this time last year, 101 petitions were pending before the Committee. Currently, there are 106 despite the twofold increase in the number of cases examined by the Committee at the last session. The Committee’s increasing workload reflects the positive development that individuals deem it important to seek justice through the Committee’s complaint procedure. States parties should play a leading role in finding permanent solutions to these resource and workload issues so as to ensure full realization of the objectives of the Convention.

Third, the Committee dedicated more time to its important article 20 confidential procedure. When information is submitted under this procedure to the Committee, it examines situations where there are well-founded indications that torture is being systematically practiced in the mentioned State party. In this context, I would appeal to the nine States that have declared that they do not recognize the competence of the Committee provided for by article 20 of the Convention to withdraw their reservation.

The fourth measure taken by the Committee on account of the additional resources and meeting time provided by this General Assembly was to accelerate its work on the General Comments initiated during the Committee’s 44th session in May 2010. The Committee had adopted a first draft, which was posted on the Committee’s website for comments after the May 2011 session. Many comments were received. The Committee will soon prepare a second draft at the upcoming session and aims to adopt the final text at the following session in May 2012. This draft General Comment explains and clarifies the obligations of States parties under article 14 of the Convention to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The substantive obligations of redress include five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The draft also refers to the procedural obligations, the implementation of the right to redress through legislation, effective mechanisms for complaints and investigations, and access to mechanisms for obtaining redress. It also enumerates possible obstacles to the right to redress and indicates what States parties should include in their reports to the Committee for the monitoring of this right.

The Committee has also been discussing a document regarding facts and evidence, designed to address important issues such as the weight that should be accorded to domestic determinations and the proper standard of proof. It also discusses the standard of reasonableness, state control or acquiescence, the exhaustion of domestic remedies, the introduction of new evidence, and due process guarantees.

I want to emphasize the importance of General Comments with regard to the Convention. They are prepared to promote and facilitate implementation of the provisions of the Convention and to assist States parties in understanding and fulfilling their obligations.

Chairperson, Distinguished Delegates,

Now let me turn briefly to the consultation process launched by the High Commissioner for Human Rights to strengthen the treaty body system, an initiative which the Committee fully supports and in which it has had the opportunity to participate and make proposals.

The growth of the treaty body system, which has doubled in size in recent years, has not been matched with equivalent resources. Although treaty bodies are continuously working to ensure that their working methods are efficient and effective, such as the Committee’s new LOIPR reporting procedure that assists States parties with their reporting obligations and achieves better outcomes under the consideration of States reports, there is further room for improvement. However, measures that lead to increased efficiency do not necessarily reduce costs: making our work more implementable at the national level requires more
el Comité está evaluando este procedimiento, tomando en cuenta las sugerencias de los Estados parte y organizaciones de la sociedad civil.

En cuanto a informes, me gustaría llamar la atención de todos ustedes en cuanto a las graves dificultades que enfrenta el sistema de órganos de tratados en su conjunto, especialmente con respecto a la capacidad insuficiente de los Servicios de Conferencias de las Naciones Unidas para procesar y traducir documentos de manera oportuna, así como los insuficientes recursos humanos en la Secretaría de la Oficina del Alto Comisionado para los Derechos Humanos (ACNUDH). Insto a los Estados miembros a reflexionar sobre las consecuencias de esta insuficiencia en el Sistema de Órganos de tratados.

A diferencia del mecanismo obligatorio de informes por los Estados parte conforme al artículo 19, la aceptación de los Estado parte del procedimiento de denuncias individuales conforme al artículo 22 de la Convención es opcional. El Comité lamenta que, hasta ahora, sólo 65 de los 149 Estados parte han formulado la declaración necesaria para aceptar la competencia del Comité en este respecto, y exhorta a los restantes 84 Estados parte a que declaren su aceptación. El procedimiento de denuncias individuales es una herramienta valiosa para alcanzar los objetivos de la Convención al permitir a las víctimas de torturas o tratamientos inhumanos presentar sus casos ante la comunidad internacional. También permite a la Comisión aplicar la Convención a situaciones específicas, lo que ayuda a los Estados parte en el cumplimiento de sus obligaciones. Desde el año pasado, el Comité ha hecho un examen de fondo de 17 casos.

Además de ratificación generalizada, otro tema crítico para el mecanismo de denuncias individuales es la necesidad del pleno cumplimiento de las obligaciones del artículo 14 de proporcionar reparaciones a las víctimas de tortura y otros tratos o penas crueles, inhumanos o degradantes. Conforme a la Convención, los Estados parte deben asegurar que las víctimas obtengan plena reparación por las violaciones infligidas.

Ahora me referiré a cómo el Comité está utilizando los recursos adicionales proporcionados por esta Asamblea General el año pasado. La primera medida adoptada por el Comité fue aumentar el número de informes que examina en cada periodo de sesiones de seis a nueve para el periodo de sesiones de noviembre y a ocho para el periodo de sesiones de mayo. Esto reducirá significativamente el número de informes pendientes ante el Comité y asegurará que los informes sean examinados con un retraso mínimo, atribuible principalmente a la traducción a los idiomas de trabajo, que es otro proceso que depende de la asignación de recursos. Este aumento en el número de informes examinados en cada periodo de sesiones, junto con el procedimiento de información opcional que el Comité continúa desarrollando, mejorará la eficacia y eficiencia del examen de los informes.

En segundo lugar, el Comité incrementó el número de denuncias individuales atendidas en cada periodo de sesiones. En el último periodo de sesiones el Comité emitió 12 decisiones de fondo en casos individuales, en comparación con las 5 del periodo de sesiones anterior. Aquí también, sin embargo, el Comité depende de una Secretaría que carece de los recursos necesarios para aumentar significativamente el número de casos preparados para ser examinados por el Comité. Los problemas causados por la falta de recursos se ven agravados por el creciente número de denuncias planteadas ante el Comité. Por estas fechas el año pasado, había 101 peticiones pendientes ante el Comité. Actualmente existen 106, a pesar del aumento al doble del número de casos examinados por el Comité en la última sesión. La creciente carga de trabajo del Comité es positiva en cuanto demuestra un incremento de personas que consideran que es importante buscar justicia a través del procedimiento de denuncia del Comité. Los Estados parte deberían desempeñar un papel en la búsqueda de soluciones permanentes a los problemas de falta recursos y mayor carga de trabajo para asegurar el pleno alcance de los objetivos de la Convención.

En tercer lugar, el Comité dedicó más tiempo al importante procedimiento confidencial del artículo 20. Cuando se presenta información conforme a este procedimiento, el Comité examina situaciones donde existan indicios fundados de que se está cometiendo tortura sistemáticamente en el Estado parte en cuestión. En este contexto, hago un llamado a los nueve Estados que han declarado que no reconocen la competencia del Comité para recibir informes. En el artículo 20 de la Convención se requiere que retiren sus reservas.

La cuarta medida adoptada por el Comité, en vista de los recursos y tiempo adicionales proporcionados por esta Asamblea General, fue acelerar su labor en el proyecto de Observación General iniciado durante la 44 Sesión del Comité, en mayo de 2010. El Comité aprobó un primer proyecto en el sitio Web del Comité para recibir comentarios luego del periodo de sesiones de mayo de 2011. Se han recibido numerosos comentarios. El Comité preparará un segundo texto del proyecto en el próximo periodo de sesiones y tiene como objetivo aprobar el texto definitivo en el siguiente periodo de sesiones en mayo de 2012. Este proyecto de Observaciones Generales explica y aclara las obligaciones de los Estados parte en virtud del artículo 14 de la Convención para asegurar que “su legislación garantice a la víctima de un acto de tortura la reparación y el derecho a una indemnización justa y adecuada, incluidos los medios para su rehabilitación lo más completa posible”. Las obligaciones sustanciales de reparación incluyen cinco formas de reparación: restitución, indemnización, rehabilitación, satisfacción y garantías de no repetición. El texto del proyecto también se refiere a las obligaciones procesales, la implementación del derecho a la reparación por vía legislativa, mecanismos eficaces de denuncia e investigación y acceso a mecanismos para obtener reparaciones. También enumera posibles obstáculos al derecho a la reparación e indica lo que los Estados parte deben incluir en sus informes al Comité para el cumplimiento pleno de este derecho.

El Comité también ha estado discutiendo un documento con respecto a los hechos y las pruebas, diseñado para resolver cuestiones importantes tales como el peso que debe darse a decisiones internas y criterios adecuados de prueba. También analiza el estándar de razonabilidad, control estatal o aquiescencia, el agotamiento de los recursos internos, la introducción de nuevas pruebas y las garantías al debido proceso.

Quiero hincapié en la importancia de las Observaciones Generales con respecto a la Convención. Son preparadas para promover y facilitar la aplicación de las disposiciones de la Convención y para ayudar a los Estados parte a comprender y cumplir con sus obligaciones.

Presidente, distinguidos delegados,
investment, more means of cooperation with States and more time. During the consultations aimed at strengthening the treaty body system, there has been great support to rationalize and focus the reporting obligation of States parties. For that matter, the new reporting procedure pioneered by the Committee has been positively received by the States parties. The use of modern technologies was considered including video conferencing to reach broader audiences and enhance the possibilities to promote the values of the Convention to the general public. Other avenues discussed to improve the system included strict page limitations on documents adopted by Committees as well as those submitted by States parties, better time management during the dialogue, and more focused recommendations which would, in turn, enhance the reporting procedure and cooperation between treaty bodies and States parties. It would be useful to continue this discussion in the present forum, as the members States have an obligation to provide adequate resources for the system they created to perform effectively. I look forward to continuing our interaction with the High Commissioner and all stakeholders in this process, including member States.

Distinguished Delegates, Colleagues and Friends

Thanks to the work of the international community, the unequivocal and absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment is set forth in numerous international and regional instruments including the Universal Declaration of Human Rights and specifically in the Convention against Torture, for which the supervisory organ, the Committee against Torture, was created. This framework affirms that there is no legal vacuum that would allow questioning the prohibition. These developments have been essential to advance, with legal legitimacy, the values of human dignity embodied in those treaties and conventions. Over the years the Committee has achieved important successes such as the transformation of countries’ legal norms including the incorporation of the definition of torture, investigating and punishing perpetrators of torture, and excluding confessions extracted through torture from legal proceedings. These developments show the powerful impact of the Convention.

Despite these important developments, we cannot affirm that torture has decreased. As I mentioned in my first report to the General Assembly, the Committee’s work over the last two decades shows that we continue to witness failures to implement the Convention’s provisions and the Committee’s recommendations; refusals to adopt a clear definition of torture, to criminalize torture and establish adequate penalties; failures to investigate alleged cases of torture; impunity for perpetrators of acts of torture; expulsion, return and extradition of persons to States where there are substantial grounds for believing that they are in danger of being subjected to torture; and “rendition” of suspects to countries that continue to use torture as a means of investigation and interrogation. Deplorable conditions of detention are still the general rule. Forced disappearances continue to deny persons their basic legal safeguards, and rehabilitation or redress is rarely provided to victims of torture or their families. These failures to realize the obligations laid down in the Convention should strengthen our resolve. Achieving the goals of the Convention is doable. Let us recommit ourselves to the full realization of those goals.

Distinguished delegates, colleagues and friends: Sometimes we talk in abstract terms about torture. Statistics and normative challenges dominate the discussion on numerous occasions. Often we lose the human dimension by resorting to language that fails to fully capture the absolute horror of torture. We should not, however, lose sight of the fact that we are dealing with women, men and children. The system that you have created, through the Convention against Torture, recognizes that crucial dimension. The Committee’s work reflects this foundation.

Allow me to share with you a recent case before the Committee. In that case, the complainant claimed that she would be imprisoned and tortured if returned to her country, in violation of article 3 of the Convention. Among other things, she had been arrested and, while in detention, subjected to torture, beatings and multiple rapes due to her religious and political activities. The Committee noted the claims and evidence submitted by the complainant and the arguments of the State party, as well as the recent reports by seven United Nations experts and by the United Nations High Commissioner for Human Rights on the human rights situation in the country concerned. In the light of the information before it, the Committee found that it was impossible to identify particular areas of the country which could be considered safe for the complainant and concluded that there were substantial grounds for believing that the complainant was at risk of being subjected to torture if returned to her country. The State party against whom the complaint was filed fully complied with the decision, giving a person the chance at a new life.

In 1984, with the adoption of the Convention against Torture, you created a system that made this possible. You have contributed to the realization of its goals by saving numerous lives.

It is our shared legal duty to now achieve the full realization of the Convention. On behalf of the Committee against Torture, I thank you for your attention.

New York, 18 October 2011
Ahora permitanme hablar brevemente sobre el proceso de consultas iniciado por la Alta Comisionada para los Derechos Humanos para fortalecer el Sistema de Órganos de Tratados, una iniciativa que el Comité apoya plenamente y en la que ha tenido la oportunidad de participar y hacer propuestas.

El crecimiento del Sistema de Órganos de Tratados, que se ha duplicado en tamaño en los últimos años, no ha coincidido con un incremento de recursos equivalente. Aunque los órganos de tratados trabajan continuamente para asegurar que sus métodos de trabajo sean eficientes y eficaces, tales como los nuevos informes LOIPR del Comité que ayudan a los Estados parte con sus obligaciones de presentar informes y lograr mejores resultados en el examen de los informes presentados por los Estados, todavía hay más espacio para mejorar. Sin embargo, no necesariamente la incorporación de medidas que conducen al aumento de la eficiencia reducen los costos: incrementar la ejecución de nuestro trabajo a nivel nacional requiere más inversión, más medios de cooperación con los Estados y más tiempo. Durante las consultas encaminadas a fortalecer el Sistema de Órganos de Tratados, ha habido gran apoyo para pensar en cómo centrar la obligación de informar de los Estados parte. Por eso, el nuevo procedimiento de informes aplicado por el Comité ha sido recibido positivamente por los Estados parte. Se ha considerado el uso de tecnologías modernas, incluyendo las videoconferencias, para llegar a una audiencia más amplia e incrementar las oportunidades de promover los valores de la Convención ante el público en general. Otras vías discutidas para mejorar el Sistema incluyen el establecimiento de estrictas limitaciones al número de páginas de documentos adoptados por los Comités y de los presentados por los Estados parte, mejor manejo del tiempo durante el diálogo y recomendaciones más específicas que, a su vez, mejorarían el procedimiento de presentación de informes y cooperación entre los Órganos de Tratados y los Estados parte. Sería útil continuar este debate en el presente foro, pues los Estados miembros tienen la obligación de proporcionar recursos adecuados para que el sistema que crearon funcione eficazmente. Espero continuar nuestra interacción con la Alta Comisionada y todas las partes interesadas en este proceso, incluidos los Estados miembros.

Distinguidos delegados, colegas y amigos

Gracias a la labor de la comunidad internacional, la clara y absoluta prohibición de la tortura y otros tratos o penas crueles, inhumanos o degradantes ha quedado establecida en numerosos instrumentos internacionales y regionales, incluyendo la Declaración Universal de Derechos Humanos y, específicamente, en la Convención contra la Tortura, para la que se creó un órgano de supervisión, el Comité contra la Tortura. Este marco asegura que no exista un vacío legal que permita cuestionar la prohibición. Este desarrollo ha sido esencial para avanzar, con legitimidad jurídica, los valores de la dignidad humana consagrados en los tratados y convenciones. El Comité ha logrado éxitos importantes en distintas oportunidades tales como la transformación de normas jurídicas internas, incluyendo la incorporación de la definición de tortura, investigación y castigo de autores de tortura y la exclusión de procesos judiciales de confesiones obtenidas mediante el uso de la tortura. Estos acontecimientos demuestran el impacto de la Convención.

A pesar de estos avances, no podemos afirmar que la tortura ha disminuido. Como mencioné en mi primer informe a la Asamblea General, la labor del Comité durante las últimas dos décadas demuestra que seguimos presenciando la falta de aplicación plena de las disposiciones de la Convención y las recomendaciones del Comité; el rechazo a adoptar una clara definición de tortura para tipificar como delito la tortura y establecer sanciones adecuadas; la no investigación de presuntos casos de tortura; impunidad de los autores de actos de tortura; expulsión, devolución y extradicción de personas a Estados donde hay razones fundadas para creer que están en peligro de ser víctimas de tortura; y entrega ilegal de sospechosos a países que continúan el uso de la tortura como medio de investigación e interrogación. Condiciones de detención deplorables siguen siendo la norma general. Desapariciones forzadas niegan a las personas garantías jurídicas básicas, y rara vez se proporciona una rehabilitación o reparación rara a las víctimas de tortura o sus familiares. Estos fracasos en cumplir las obligaciones establecidas en la Convención deben fortalecer nuestra determinación. Es posible alcanzar los objetivos de la Convención. Comprométámonos a la plena realización de sus objetivos.

Distinguidas delegadas y delegados, colegas y amigos: a veces hablamos en términos abstractos sobre la tortura. Las estadísticas y los desafíos normativos dominan el debate en numerosas ocasiones. Muchas veces perdemos la dimensión humana por recurrir a un lenguaje que no logra asir plenamente el horror absoluto de la tortura. Sin embargo, no debemos perder de vista el hecho de que estamos tratando con hombres, mujeres y niños. El sistema que ustedes han creado, a través de la Convención contra la Tortura, reconoce esa dimensión crucial. La labor del Comité refleja este fundamento.

Permitanme compartir con ustedes un caso reciente ante el Comité. En dicho caso, la peticionaria alegó que sería encarcelada y torturada si se le enviaba de vuelta a su país, en violación del artículo 3 de la Convención. Entre otras cosas, ella había sido detenida y, durante la detención, sometida a torturas, palizas y violaciones múltiples debido a sus actividades políticas y religiosas. La Comisión tomó nota de los alegatos y pruebas presentadas por la denunciante y de los argumentos del Estado parte, así como de los informes recientes de siete expertos de las Naciones Unidas y de la Alta Comisionada de Naciones Unidas para los Derechos Humanos sobre la situación de los derechos humanos en el país en cuestión. En vista de la información presentada, el Comité concluyó que era imposible identificar determinadas zonas del país que podrían ser consideradas seguras para la denunciante y concluyó que había fundadas razones para creer que la denunciante corría riesgo de ser sometida a torturas si era devuelta a su país. El Estado parte contra el que se presentó la denuncia cumplió totalmente con la decisión, dándole a esta persona la oportunidad de una nueva vida.

En 1984, con la adopción de la Convención contra la Tortura, ustedes crearon un sistema que hicieron esto posible. Así, ustedes han contribuido a la realización de sus objetivos salvando muchas vidas.

Es nuestro deber jurídico compartido lograr ahora la plena realización de la Convención.

En nombre del Comité contra la Tortura, les agradezco su atención.

Nueva York, 18 de octubre de 2011
**INTERNATIONAL LEGAL UPDATES**

**NORTH AMERICA & THE CARIBBEAN**

**THE SITUATION OF WOMEN AND GIRLS IN HAITI EXEMPLIFIES THE DIFFICULTIES OF POST-NATURAL DISASTER PROTECTION OF HUMAN RIGHTS**

Almost two years after a catastrophic earthquake devastated Haiti, killing more than 220,000 people and leaving more than a million people displaced, over 600,000 people still remain in makeshift tent cities, displaced within their own country. Disasters such as this leave a population vulnerable to disease and diminished personal security due to lack of infrastructure, rule of law, and effective public works. While deprivation of human rights may unfortunately be inevitable in extreme natural disasters, prevention of human rights abuses post-disaster is essential to protecting especially vulnerable groups. In Haiti, it was the existing inadequate human rights protections for women and girls that aggravated their vulnerability to increased sexual assault, gender based violence, and sex in exchange for basic needs post-earthquake. The grim situation faced by women and girls in Haiti indicates that where human rights protections are not sufficient, natural disasters only intensify existing abuses.

Before the earthquake, Haiti’s protection of women and girls was troubling. The Inter-American Commission on Human Rights reported, “forms of discrimination against women have been a fixture in the history of Haiti, both in times of peace and in times of unrest and violence.” Human Rights Watch (HRW) reports that according to the UN, between 2004 and 2006 up to 50 percent of girls living in conflict zones in Port-au-Prince were victims of widespread or systematic rape, sexual violence, or ‘gang’ rape. A survey of the area found that an estimated 35,000 women and girls were sexually assaulted between February 2004 and December 2006.

“Experience has also shown that pre-existing vulnerabilities and patterns of discrimination usually become exacerbated in situations of natural disaster,” states The Inter-Agency Standing Committee’s (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters. Though there is not yet data available on the number of sexual assaults post-earthquake, HRW predicts the numbers have increased due to new vulnerabilities. Other human rights organizations have found potential correlations between levels of hunger, survival or transactional sex, and an increased risk for gender-based violence. The recovery efforts are failing to protect and provide for women who are made more vulnerable by life in the tent camps.

Despite the earthquake, Haiti’s human rights obligations remain the same. Haiti is a party to several international human rights treaties that create binding obligations on the government to improve women’s health, including maternal and reproductive health, such as the International Covenant on Civil and Political Rights, Convention on the Rights of the Child, the American Convention on Human Rights, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. Moreover, the ratification of these international instruments demonstrates the State’s acknowledgement of its responsibility to exercise due diligence and undertake state actions to effectively address forms of discrimination and violence against women.

Where the Government made pre-earthquake efforts to meet these obligations, it provided women some post-earthquake protection. The Ministry of Women created a five-year plan to improve the lives of women and girls throughout Haiti. The Ministry partnered with women’s NGOs, and UN Agencies to create the Concernation Nationale Contre Les Violence Faites Aux Femmes (Concertation Nationale). While the earthquake greatly affected these efforts, the Concertation Nationale created some effective plans and legislation that aim to improve conditions for women. The Concertation Nationale helped to pass the 2005 decree making rape a crime and establishing a policy that all victims of sexual aggression can receive medical certification of sexual violence in order to ensure that evidence is present for the prosecution of perpetrators. The organization continues to push for the passage of anti-violence legislation that penalizes assailants, as well as public safety officials who do not enforce the law.

Despite the advancements, Haiti’s preventative and responsive efforts are falling short and the government is not fulfilling its obligations. The 2011 revision of the IASC Operational Guidelines provides that, “often, negative impacts on the human rights concerns after a natural disaster do not arise from purposeful policies but are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect.” While the political and economic realities facing Haiti may render the government unable to protect human rights as it should, it is an important lesson that protecting human rights before a disaster is the best remedy to ensure them after one.

**NEW NATIONAL DEFENSE AUTHORIZATION ACT AUTHORIZES INDEFINITE DETENTION OF U.S. CITIZENS**

On October 26, 2001 President Bush enacted the Patriot Act authorizing indefinite detention of non-U.S. citizens, allowing suspected terrorists to be detained without trial until the War on Terrorism ended. On January 11, 2002, the first group of twenty detainees arrived at Guantanamo Bay’s Camp X-Ray, where they were housed in open-air cages with concrete floors. Later that month, President Bush declared detainees’ status as unlawful enemy combatants, which disqualified them from prisoner-of-war protection under Article Five of the Geneva conventions (though protections are still afforded under Article Three). Human rights advocates argue that this system of indefinite detention circumvents the rule of law, and fails to prosecute terrorist suspects efficaciously, while wrongfully detaining hundreds. Yet on the eve of the ten-year anniversary of the first detainees arriving at Guantanamo Bay, President Obama signed the indefinite detention of alleged terrorists into law, despite his previously voiced reservations.
On December 31, 2011, President Obama signed the National Defense Authorization Act (NDAA), or H.R. 1540, for the 2012 fiscal year. Congress passes this act annually to monitor the budget for the Department of Defense, but this year the bill included highly controversial new provisions that allow indefinite military detention of U.S. citizen terrorist suspects, and requires the detention of suspected foreign enemies. The provisions also apply to any person who supports or aids “belligerent” acts against the United States, whether the person is apprehended abroad or on domestic soil.

U.S. citizens may now be joining the 171 detainees who remain at Guantánamo Bay, most of whom have never been charged with a crime and do not know when they will face trial, if at all. Many of the detainees were subjected to forced disappearances in secret CIA custody prior to being brought to Guantánamo, as well as to torture or other cruel, inhuman or degrading treatment; held incommunicado in solitary confinement for extended periods. Exactly what “interrogation techniques” have been used and what conditions the detainees were subjected to in CIA custody remains classified.

The Obama administration maintains that the law is merely a codification of existing standards and that U.S. citizens are exempt. While U.S. citizens are in fact exempted from the mandatory detention requirement of section 1032 of the new law, section 1031 offers no exemption for American citizens from the discretionary authorization of the U.S. Government to indefinitely detain them without charge or trial. Though supporters and critics disagree on whether the new law is a positive step, they agree that it will mean much more than maintaining the status quo. Instead, the law enshrines military authority to detain and imprison civilians anywhere in the world, without formal charges or trial. The power to detain is so broad that U.S. citizens may now be taken by the military from any “battlefield.” In support of the bill, Senator Lindsey Graham explained that it will “basically say in law for the first time that the homeland is part of the battlefield” and that people can be imprisoned without charge or trial whether American citizens or not. Senator Graham elaborated that if a U.S. citizen is “thinking about helping al-Qaeda,” then they are an “enemy combatant” and are not entitled to legal representation.

For the past ten years, the indefinite detention system created by the Patriot Act has created a tenuous human rights situation for foreign nationals. The NDAA now extends the danger of human rights violations to U.S. citizens, and in the process violates their constitutional rights. The Fourth Amendment of the United States Constitution grants citizens liberty from unreasonable seizures of their person, while the Fifth Amendment guarantees that one cannot be deprived of life, liberty, or property, without due process of law. The Sixth amendment provides every U.S. citizen the right to a fair trial in front of a jury with the assistance of counsel. The NDAA provisions openly violate these constitutional rights and perpetuate the use of the facilities at Guantánamo Bay, now open to the U.S. citizens they purported to protect. President Obama issued a statement saying “I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens . . . doing so would break with our most important traditions and values as a Nation.” Unfortunately, a presidential statement alone is not binding on future administrations’ interpretation of the NDAA. What will be left when the Obama Administration is gone is a law that authorizes human rights abuses and constitutional violations in the country and worldwide.

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**LATIN AMERICA**

**SHUTTING DOWN CLINICS THAT ‘CURE HOMOSEXUALITY’ IN ECUADOR**

In January 2012, three Ecuadorian non-governmental organizations posted a petition on Change.org, asking the Ecuadorian Ministry of Health to close “ex-gay” clinics. The petition received over 100,000 signatures, sending a strong message to the Ecuadorian government from the international community. Until January, lesbians in Ecuador were being tortured and sexually abused in approximately two hundred clinics that claimed they could “cure” people of their homosexuality. The clinics generally masqueraded as drug rehabilitation centers throughout the country.

Despite the aims of these clinics, lesbian, gay, bi-sexual, transgender, and inter-sex (LGBTI) individuals in Ecuador actually enjoy more profound de jure recognition of their rights than do their counterparts in other countries in Latin America. For example, Ecuador was the first country in the Americas, and the third in the world, to include sexual orientation as a protected category in its Constitution in 1998. In 1997, the country’s Constitutional Tribunal overturned section one of Article 516 of the Penal Code, which criminalized sexual activities between persons of the same sex. Article 68 of the 2008 Constitution formally recognized same-sex civil unions under the law, and Article 11 reiterated the freedom of all peoples from discrimination. Article 66 also guaranteed all Ecuadorians the rights to physical, moral, and sexual integrity of person, as well as freedom of expression of sexual orientation. Finally, Article 212 of the Penal Code criminalizing the torture of these clinics.

However, the de facto situation of LGBTI rights and protections against discrimination and even violence is completely contradictory to the law. These “intense rehabilitation” clinics employed methods prohibited under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture. Ecuador is a state-party to both of these conventions, and to the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women — conventions whose principles are violated by abuses which were taking place at these clinics.

Twenty-four year-old Paola Ziritt came forward after being held against her will in a clinic for two years, and reported that the clinic staff would routinely sexually and physically assault her. She spent several months handcuffed and was regularly doused with urine and water. Other women have reported being raped or threatened with rape, handcuffed, deprived of food...
and water, and forced to dress like prostitutes, according to Tatiana Velasquez, a representative of Taller de Comunicación Mujer, one of the organizations that petitioned the Ministry of Health to shut down the clinics. Taller de Comunicación Mujer, along with Fundación Causana and Artikulación Esporádika, have worked with clinic victims since at least 2005. However, information about the situation of the LGBTI community in Ecuador is difficult to find, as homosexuality is still taboo in Ecuadorian society and is rarely discussed. Despite efforts by the LGBTI community to assert itself, as evidenced most recently by the July 2011 pride parades in Quito and Guayaquil, the country’s two largest cities, the relative strength of the Catholic Church, as well as the machismo which permeates the culture, may be barriers to successfully lobbying for the closure of these clinics. During the 2008 constitutional referendum, conservative Catholic clergy and evangelical church leaders allied themselves with the “No” vote in protest over the legalization of same-sex civil unions. Furthermore, apart from the religious belief that homosexuality is a moral wrong, many people believe that homosexuality is also a curable disease, as evidenced by the prevalence of these torture clinics.

Regardless of outside influences and prevailing societal beliefs about homosexuality in Ecuador, the Ecuadorian Government has a legal obligation to continue to close these clinics. Whether Ecuadorian or international bodies take action, the practices these clinics employed are illegal and a violation of the rights of the women who were trapped in them.

Colombia Takes a Step Toward Justice with its Victims Law

Colombia is continuing its work toward lasting peace by addressing the needs of the victims of the country’s decades-long armed conflict. On June 10, 2011, President Juan Manuel Santos signed the Victims and Land Restitution Law (Victims Law), which complies with the United Nations’ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) of 2005. The goal of the Victims Law is to require the return of land appropriated by armed groups to its rightful inhabitants, and to financially compensate the 3.7 million internally-displaced persons (IDPs) and other victims of violence since 1985. Santos’ government chose 1985 as the earliest date to which people could cite claims because of that year’s symbolic importance in the country’s history — on November 6, 1985, members of the now-defunct M-19 guerilla group stormed the Palace of Justice in Bogotá. The event ended in the death of eleven of the twenty-five Supreme Court Justices, all thirty-five participating M-19 members, and nearly fifty army soldiers.

The Victims Law was generally greeted with support and enthusiasm by the Colombian and international communities, as evidenced by UN Secretary General Ban Ki-moon’s presence at the signing ceremony. In accordance with the Basic Principles, the Victims Law strictly defines victims as unarmed civilians who suffered violations of international human rights and humanitarian law during the armed conflict. If the victim is deceased, immediate family members may make a claim on behalf of the victim. No armed combatants can apply to the victims’ fund for compensation, except for former child soldiers. The law also outlines the general principles that will guide the restitution process, including dignity, equality, good faith, and due process. Article 28 of the law details a list of victims’ rights during the restitution process, including, among others, the right to truth and justice, family reunification, and lives free of violence. The Victims Law also complies with the Basic Principles by describing the process victims must go through in order to make their restitution claims, and the social services available to victims during and after this process. The Basic Principles provide for access to justice and reparations for harm suffered. In recognition of the fact that giving detailed accounts of the violence victims experienced would be emotionally taxing, the Colombian government will provide counseling services for those who file restitution claims. Special consideration is given to IDPs and vulnerable populations like the indigenous and Afro-Colombians, as well as human rights defenders and union organizers. Finally, the law includes specific measures for land resettlement, which are presented in more detail in the corresponding regulations.

President Santos signed these regulations on December 20, 2011. They were drafted in response to questions about how the reparations provisions would actually be enforced, and they establish more detailed assistance measures for the victims. The three main components of the regulations are restitution payments to victims (up to US $11,900 each, over the next ten years), administrative procedures to enroll in the victims’ fund, and safeguards for vulnerable populations to prevent gross human rights violations in the future. The amount of each restitution payment will be determined partly by the severity of the violence suffered by the victim during the civil war, but also by the types of positive steps the victim or the victim’s family has taken since then to rebuild his or her life. For example, higher payments will be given to those who have already invested in their education or that of their children, or who promise to do so in the future. This provision is in keeping with the Basic Principles as well.

A special office has been created to assist IDPs in establishing their land claims. Civil society organizations in Colombia have reported that citizens were not only forced to flee because of the violence, but were also forcibly evicted from their land in many cases. This land was then cultivated to finance the armed conflict. President Santos hopes to return over five million acres of land to displaced persons in the next few years. Concerns remain, however, about the possibility of renewed violence against victims returning to their land — since Santos took office in August 2010, over twenty leaders of farmers attempting to reclaim stolen land have been murdered and only six people have been arrested in these killings to date. Despite explicit warnings by the Colombian government that such violent acts will no longer be tolerated, no changes have been made to the penal code and the Victims Law does not directly address this new violence. Therefore, only time will tell if the Victims Law can truly provide the justice it promises.

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 PAGE NOT FOUND: THE TUNISIAN INTERNET AGENCY’S APPEAL TO ELIMINATE CENSORSHIP

On August 15, 2011, a Tunisian appellate court upheld a May 2011 order requiring the Tunisian Internet Agency (ATI) to censor Internet access for all Tunisians. The ATI intends to appeal the decision to the Tunisian Court of Cassation, the country’s highest court. Under new leadership after the January 2011 revolution, the ATI opened Tunisia up to the Internet fully for the first time in the country’s history. The ATI is using the resources at its disposal to advocate for freedom of expression via the Internet and against Internet censorship. The Agency encountered resistance on two fronts: from the Tunisian courts, which ordered the ATI to block all pornographic material, and from the Tunisian military, which ordered the agency to censor certain politically objectionable sites and Facebook pages. If the ATI loses its pending appeal, the agency will, pursuant to judicial order, block a classified list of websites deemed morally objectionable that the government can update at will. The creation and enforcement of such a censorship list would violate Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Judicial censorship of the Internet in Tunisia combined with the political agenda advanced by the military would together represent a de facto state of censorship not much different from the one present under the regime of ousted former President Ben Ali.

Under the Ben Ali regime, the ATI blocked culturally and politically objectionable content using censorship software installed at the Internet’s point-of-entry into the country. The newly elected legislature is facing pressure from progressive groups in the country to repeal old statutes that remain in force, including laws that prescribe jail time for nonviolent speech and structural modifications that effectively give the executive branch total control over the nomination, promotion, and discipline of judges.

Article 19 of the ICCPR, to which Tunisia is a party, provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” (emphasis added). According to General Comment 34, which describes the UN Human Rights Committee’s interpretation of Article 19, parties to the ICCPR must protect Internet-based forums and “take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”

The planned censorship list put forth by the Tunisian court contravenes both the letter of the treaty and its interpretation by the Committee. General Comment 34 reads Article 19 to include all information including “political discourse, commentary on one’s own or public affairs,” even if it is “deeply offensive.” The military is a legitimate arm of the government and often a political force itself, and the order to censor anti-military statements on Facebook seems to fall squarely within the definition of permissible political discourse under Article 19. Additionally, the censorship of pornographic materials may contravene the prohibition against censoring even “deeply offensive” material, although in practice, more conservative interpretations may find certain pornography to be a form of gender discrimination and therefore subject to restriction to prevent public morals. Even under such a reading, the General Comment makes clear that removing all individual choice and giving the government total control over the regulation of pornography would constitute “unfettered discretion” in violation of Article 19.

The classified list of censored materials proposed under the court order is a troubling and immeasurable step backwards for the free society that the new government endeavors to build. Tunisia experienced its first free election on October 23, 2011, and the inability for its citizens to discuss future government formations and political issues using the Internet as a forum runs counter to both the goal of building a new democratically engaged nation and Tunisia’s treaty obligations under the ICCPR not to confer “unfettered discretion” to limit freedoms using national laws.

SALEH’S AMNESTY: PROVIDING PEACE OR PREVENTING REMEDY?

On January 21, 2012, the Yemeni parliament passed a law granting President Ali Saleh immunity for all “politically motivated” crimes against the people of Yemen. This statement of immunity formed the substantive part of a Gulf Cooperation Council (GCC) brokered deal between Saleh and the new Yemeni parliament. The International Covenant for Civil and Political Rights (ICCPR) requires signatory states to ensure that victims of violations of the ICCPR, such as those allegedly committed by Saleh during the recent Yemeni revolutions, have access to an effective remedy. The parliament’s decision to neutralize Yemeni citizens’ ability to prosecute President Saleh in exchange for his voluntary abdication of power represents a violation of Yemen’s obligations to provide an effective remedy for violations of the ICCPR.

As part of the January agreement, Saleh ended his career as President and transferred power to Vice President Abd-Rabbu Hadi. Hadi went on to run unopposed in the February 2012 election, winning 99% of a vote in which barely 64% of the citizenry participated. The new immunity law protects Saleh and his aides from prosecution for their role in widespread violence against civilians peacefully protesting the government since February 2011, resulting in the death of around 2,000 civilians and military defectors. Protesters calling for constitutional and governmental reform suffered from armed attacks, arbitrary arrests, torture, and forced disappearances. The immunity also extends to public prosecution of crimes committed by Saleh and his aides over the course of his 33-year rule, including the government’s controversial use of artillery against the Huthis in Northern Yemen during the period of unrest Yemen experienced between 2004 and 2010. While lauded as an efficient way to put a prompt end to the bloodshed, the immunity deal garnered widespread Western and GCC support due to concerns that al-Qaeda, which enjoys a strong presence in Yemen, might be strengthened by continued unrest.

The new immunity law violates Yemen’s international legal responsibilities under the ICCPR, to which Yemen is a party. Article 2 of the ICCPR states that “[e]ach State Party undertakes . . . to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Thus, the ICCPR guarantees an effective remedy to any citizen whose rights have been
controls 238 of the 301 seats in the other
Council — is entirely appointed by the
Executive branch, and one chamber of the bicameral legislature — the Sura
Supreme Court is effectively controlled
by the General
Committee responsible for enforcement. If
President Saleh contravenes both the let-
er and spirit of the ICCPR, he would face
violated, regardless of whether the per-
petrator was acting in his official capac-
ity. Despite the political considerations in
Yemen, General Comment 31 of the
Human Rights Committee, which informs
analysis of states’ obligations under Article
2, notes that “[t]he requirement under article 2, paragraph 2, to take steps to give
effect to the Covenant rights is unqualified
and of immediate effect. A failure to com-
ply with this obligation cannot be justified
by reference to political, social, cultural or
economic considerations within the State.”

Amnesty can be a powerful conflict
resolution tool, but guidelines published by
the Office of the High Commissioner for
Human Rights (OHCHR) prohibit broad,
blanket grants of amnesty that infringe on
essential human rights by preventing pros-
sicution of those who “may be responsible”
for crimes against humanity. The reintegra-
tion of combatants back into society, both
judicially and socially, is a common obsta-
cle to national repair following intrastate
conflict, and immunity from prosecution is
a customary way to begin reconciliation as
discussed by the International Committee
of the Red Cross (ICRC). This comes with
the explicit exception that such amnesty
should not be used to allow those with
command authority and suspected of war
crimes to evade punishment.

The new immunity law signed by
President Saleh contravenes both the let-
er and spirit of the ICCPR, and a
fundamental misuse of amnesty as a remedy
for any government-sponsored prosecution
for crimes committed against the people
of Yemen. Without making a judgment
as to President Saleh’s guilt or innocence by
preventing the requisite investigation,
the Yemeni parliament has acted inconsist-
tently with international law. The General
Comment notes that failure to investigate
violations of the aforementioned rights,
implicitly folded into the government’s
blanket grant of criminal immunity, may
constitute a separate breach of the ICCPR.

Internal politics within Yemen make it
unclear as to whether conventional politi-
cal channels of overturning a policy like
this one would even be possible. The
Supreme Court is effectively controlled
by the Executive branch, and one chamber
of the bicameral legislature — the Sura
Council — is entirely appointed by the
President. The President’s majority party
controls 238 of the 301 seats in the other
legislative chamber. Given the present state
of internal Yemeni politics making domes-
tic change unlikely, a diametric shift at the
highest level of parliament as the issuing
body is necessary to ensure compliance
with Yemen’s international obligations. If
legislation like this immunity law is used to
parlay citizens’ internationally guaranteed
right to redress in exchange for political
stability, the weight of international legal
commitments would be insignificant in the
minds of policymakers and national enti-
eties responsible for enforcement.

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SUB-SAHARIAN AFRICA

LABOR ABUSES IN ZAMBIA’S COPPERBELT

Zambia, known for its mineral wealth and
currently Africa’s largest copper producer,
has attracted significant Chinese investment
since 1990. While these investments have
created jobs and increased copper production,
human rights groups decry the copper
miners’ poor labor conditions that have existed since these investments began. A recent
Human Rights Watch (HRW) report examines the labor practices of Chinese state-owned
copper mines, and calls on the Zambian and Chinese governments to take measures to enforce
labor laws and conform to international labor standards. Advocacy organizations like
HRW hope that shedding light on these violations will ensure that further eco-
nomic development of Zambia does not jeopardize the safety of its workers.

Observed labor violations in the
Chinese-owned mines include low wages,
long hours, a lack of safety standards,
and undercutting of mining unions. While
dangers are inherent to copper mining,
Zambian government representatives admit
that safety conditions in Chinese-owned
copper mines are very poor. For example,
in 2005, mine explosions killed forty-six
Zambian workers, many of whom were
initially unidentified because the mine
operators did not keep employee records.
Contrary to copper mining and processing
standards throughout Zambia, the Chinese-
owned mines often require twelve-hour
shifts instead of the eight-hour shifts
outlined in Zambian mining standards.

The HRW report details safety and health
hazards resulting from toxins and dust
inhalation, as well as the lack of proper
attire and equipment to prevent these haz-
ards. Notably, HRW points out that the poor
safety standards in Zambia’s Chinese-run
mines resemble the labor abuses occurring
in mines in China.

Zambia’s Mines Safety Department is
responsible for enforcing the country’s
mining regulations. However, human
rights groups report that the department
is ineffective, failing to enforce both
domestic and international labor law in
the Chinese-owned copper mines. While
regulation of all Zambian mines is sub-
par, human rights group emphasize that
the Chinese-owned mines are some of
the worst in the country. International
Labor Organization Convention No. 176
concerning Safety and Health in Mines
sets out basic mine safety standards that
states and employers must follow. Not
only do Chinese employers fail to comply
with these standards, but they also tend to
discriminate against employees for affili-
ation with non-Chinese labor unions even
though freedom of association is pro-
tected under the International Covenant
on Economic, Social, and Cultural Rights
and the International Covenant on Civil
and Political Rights. Domestically, mine safety
and freedom of association are outlined
within the Zambian Industrial and Labour
Relations Act 269 and the Minimum Wages
and Conditions of Employment Act 267.

HRW has called on the Chinese
government to convene the Forum on
China-Africa Cooperation to establish
mechanisms addressing labor conditions
and compliance with international human
rights standards in foreign investments.
HRW also recommends that the Zambian
government improve the functionality of
the Mines Safety Department, and also
investigate and prosecute mining company
officials who intimidate miners into work-
ing in hazardous areas.

In response to the HRW report, the
Chinese Non-Ferrous Metals Mining
Corporation (CNM), which operates four
copper mines in Zambia, said that “lan-
guage and cultural differences” could have
resulted in “misunderstandings.” Since
the report’s release, however, CNM has prom-
ised to conduct a general investigation,
and also to rectify existing malpractices. Yet
human rights groups continue to emphasize
the need for involvement of the Zambian government if labor conditions and standards are to improve.

Human rights abuses associated with Chinese involvement in Africa are not limited to Zambia. Recently, China has sold arms to the Sudanese government, some of which have been used to remove indigenous southerners from their lands to provide for Chinese development of oil fields. Additionally, the government of Zimbabwe has become heavily reliant on Chinese lending and investment in exchange for natural resources; human rights advocates note with frustration the detrimental social impact of growing Chinese alliance with Zimbabwe, allowing Zimbabwe to continue practices contrary to international norms and pressure.

The consequences of China’s increased involvement in Africa remain the subject of much debate among human rights groups. While China’s willingness to build roads in Gabon, develop mines in Zambia, and buy oil in Sudan has allowed for increased economic development, human rights advocates continue to address the lack of respect for human rights. As Zambia’s mining industry grows, advocates will continue to make the case that sacrificing domestic and international labor standards, along with other human rights, is too big a price to pay to attract foreign investment.

**ABUSE OF SOMALI REFUGEES IN KENYA AND ETHIOPIA**

Since 2010, escalating conflict in southern Somalia between forces allied with the Somali Transitional Federal Government (TFG) and the Islamist armed group al-Shabaab has resulted in thousands of civilian casualties and numerous human rights abuses against the refugee population. Human rights groups continue to encourage the TFG, the United Nations (UN), the African Union (AU), the Kenyan and Ethiopian Governments, and the African Union Mission in Somalia (AMISOM) to take steps to ensure that all parties are trained on international humanitarian law standards and how to respond to the increasingly frequent abuses committed against refugees.

The current conflict between the TFG and Al-Shabaab began in 2006 when the TFG, Ethiopian troops, and other military allies defeated the Islamist Courts Union (ICU), which was a rival administration to the TFG based on Sharia law. Al-Shabaab formed shortly after this defeat as a TFG off-shoot and has been causing havoc ever since. Recently, the number of uprooted and displaced Somalis has increased dramatically due to regional instability, and extreme drought and famine. Somali civilians continue to flee drought and conflict-affected areas to seek assistance across the border, but have faced repeated and unlawful deportation back to their war-torn country despite obligations under the 1951 Refugee Convention to allow safe haven to asylum seekers escaping violence.

The severe drought, combined with the armed conflict, have led the UN High Commissioner for Refugees to deem the situation in Somalia “the worst humanitarian crisis in the world today.” In 2010, the Office of the High Commissioner for Refugees reported that nearly 1.46 million civilians had been displaced, including 614,000 forced to flee to neighboring countries. Since this crisis declaration, human rights groups have been calling for international relief efforts. Additionally, these groups have criticized Kenyan and Ethiopian forces for violating international humanitarian law standards by returning refugees to conflict areas.

Human rights groups have reported numerous other human rights violations perpetrated against Somali refugees in addition to forced return, including arrest, deportation, and abuses by military forces and police. For example, in violation of Kenya’s Refugee Act of 2006, Kenyan police regularly arrest without cause and extort money from Somali refugees. Furthermore, overcrowding and a continued influx of asylum seekers have led to poor living conditions in the refugee camps. The Dadaab refugee camp in Kenya is currently the largest refugee camp in the world, sheltering around 450,000 refugees though it was built to hold only 30,000. As a result of camp congestion, vulnerable groups such as women and unaccompanied children experience little protection. Human rights groups have also received reports of Kenyan police raping Somali refugees and not being held accountable even when the information comes to light.

Similar to the refugee situation in Kenya, Somali refugees in Ethiopia face instability and abuse. When Somali women and girls travel to and arrive at refugee camps in Dolo Ado, Ethiopia, they experience an increased risk of gender-based violence, including rape, violence, and forced marriage. A lack of permanent security measures and preventive efforts such as adequate lighting at transit centers has impeded efforts to alleviate these human rights violations.

In light of these crises, human rights advocates emphasize the importance of TFG’s collaboration with the international community, as outlined in the 2011 Kampala Accord, to assist the transitional government in holding accountable those responsible for humanitarian law violations. International humanitarian law, also known as the law of war, is defined in the four Geneva Conventions of 1949, which seek to limit the effects of armed conflict on civilians and to restrict the methods of warfare. These norms are intended to protect wounded members of the armed forces, prisoners of war, and refugees in conflict areas.

One critical component of international humanitarian law is the 1951 Refugee Convention, which requires conflicting parties to follow the principles of non-discrimination and non-penalization of civilian conflict victims. The Convention also contains non-refoulement provisions that prohibit the forced return of refugees facing persecution or violence in their countries of origin, which Ethiopia and Kenya have violated by refusing safe haven to Somali refugees.

As abuses against Somali refugees are increasingly exposed, the international community continues to call on the Somali, Kenyan, and Ethiopian governments to respect humanitarian law. Human rights activists insist that hosts of Somali refugees end their unlawful return and alleviate overcrowding of refugee camps. Without timely investigation and prosecution of international humanitarian law violations being perpetrated within and outside Somalia, however, measures to improve refugee conditions will prove insufficient to address the humanitarian crisis confronting the Somali people.

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THE CASE OF N.Ç.: A TURKISH CHILD’S PRESUMED CONSENT TO PROSTITUTION

In many countries, when a thirteen-year-old girl is sold as a child prostitute, courts presume the girl has been raped. The Supreme Court of Appeals in Turkey recently found otherwise. Two women, who purported to be thirteen-year-old N.Ç.’s employers at a local factory in the province of Mardin, sold her as a child prostitute to over twenty-six men for a period of seven months. Both women have been sentenced to nine years in prison, but the twenty-six men, including teachers, civil servants, and village elders, have received reduced sentences ranging from one to six years. The men benefited from a legal technicality, namely the old Turkish penal code that was in effect at the time of the rapes included a provision allowing reduced sentences in cases where the minor consented to the sexual activity. The lowest court applied the old code, ruled that the girl consented to the intercourse, and sentenced each of the men to a minimum of five years in prison for statutory rape. The court also agreed to lower the sentences of some defendants by between two and ten months based on good behavior during the trial. Upon appeal, the Supreme Court upheld the lower court’s ruling, and an official of the Court defended its application of the old code as an “undebatable rule of law.” The reduced sentences for these perpetrators are alarmingly indicative of the state of children’s rights in Turkey.

The new code leaves no room for consideration of consent by a minor to sexual intercourse (the age for sexual consent in Turkey is fifteen). As such, the new law seems to be a legal victory for children’s rights. However, the alarming fact of N.Ç.’s case is not that the courts applied the old penal code. Courts are often precluded from retroactively applying new laws. The alarming fact of N.Ç.’s case is that all of the judges on Turkey’s Supreme Court ruled that N.Ç. consented to sexual intercourse with at least twenty-six men. In other words, the Supreme Court ruled that a thirteen-year-old girl had the capacity to consent to child prostitution. If a child can legally consent to prostitution, then child prostitution in itself is not a violation of that child’s human rights unless it is against the child’s will. If a court is willing to rule that a thirteen-year-old girl such as N.Ç. engaged in the intercourse willingly, then what child-victim of sexual violence stands a chance of obtaining justice in Turkey? Because the Supreme Court is Turkey’s highest court, N.Ç.’s only alternative for recourse is through an international court of human rights.

International human rights law does not permit the assumption of consent by a minor to prostitution. Article 34 of the UN Convention on the Rights of the Child requires that all State Parties undertake to protect children from all forms of sexual exploitation and abuse by taking appropriate national, bilateral, and multilateral measures to prevent child prostitution. Article 3 of the Optional Protocol to the UN Convention on the Rights of the Child requires that all participating State Parties make sexual exploitation of a child a criminal offense, and take measures to establish the liability of legal persons for committing an offense of child prostitution. Neither document mentions or allows consent by a child to rape or prostitution. Turkey ratified both the Convention and the Optional Protocol in 1995 and 2002 respectively.

The conventions imply that there is no basis in international human rights law for the assumption of consent by a minor to acts of sexual violence, and many people in Turkey seem to agree. Human rights activists protested the Supreme Court’s ruling outside the Palace of Justice in Istanbul on Friday, November 4, 2011. The Family and Social Policies Minister of Turkey, Fatma ahin, called the sentence “unacceptable and worrying:” the President of Turkey himself, Abdullah Gul, said the Supreme Court’s ruling made him “deeply uncomfortable;” and Umit Kocasakal, head of Istanbul’s bar association, said the Supreme Court’s decision was “bloodcurdling.” But Supreme Court officials simply stated that “this decision is not definite, it is also not possible for this decision to be changed by making noise.”

Regardless of the reason for the Supreme Court’s decision, N.Ç.’s case illuminates the reality that the achievement of human rights principles must come through the law, at the hands of those who administer it. Without the support of a society’s judicial authorities, victims of human rights violations have grim prospects for justice and restitution.

ELECTION FRAUD PROTESTS IN RUSSIA

Briefly in January and February 2012, it appeared the Russian government had decidedly altered its public policy against opposition protests and public demonstrations. The Russian government allowed two successful, peaceful demonstrations to occur on December 10 and December 24, 2011, and a third, much later, on February 26, 2012. Human rights organizations and activists looked hopeful and remarked on possible explanations for the policy shift. But the government’s arrest of nearly 550 people at election fraud demonstrations on March 5, 2012 has refuted these hopes.

The Russian government has ratified several legal documents that protect the right of its citizens to protest publicly. Russian Constitution Article 31 states that Russian citizens “shall have the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches, and pickets.” In customary international law, the Universal Declaration of Human Rights (UDHR) Article 20 provides for freedom of peaceful assembly and association and Article 19 provides for freedom of opinion and expression. The International Covenant on Civil and Political Rights (ICCPR) Article 21 requires states to recognize the right of peaceful assembly and provides that “no restrictions . . . be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” In practice, this provision enables governments to require protesters to obtain permits prior to holding public demonstrations.

Though not required specifically by its Constitution, the Russian government requires citizens to obtain a written permit from local authorities, such as the local Mayor’s office, before protesting publicly. Applicants must indicate the location and estimated number of participants, and may be subject to a nominal fine if their estimates turn out inaccurately low. If Russian authorities meet resistance when attempting to disperse demonstrators, resisting protesters may be detained for up to 15 days.

Prior to the March 5 arrests, some commentators theorized that the change in Russia’s response to public protests could conceivably be explained by the
permit requirement. Previous protests that ended in mass arrests either did not have a permit at all, or had displayed gross inconsistencies between the number of individuals estimated to participate and those who actually attended, with the latter exceeding the former by thousands in some cases. Conversely, both December demonstrations were sanctioned by the Russian authorities after demonstrators obtained the required permits, and were carried out peacefully, with no violence occurring between police and demonstrators. The permit requirement theory may also explain the March 5 arrests, as many of those arrested had refused to leave their demonstration sites even after their protest permits had expired at 9 p.m.

While protesters’ failures to satisfy permit requirements may explain the government’s varied responses to demonstrations, other commentators theorized that December’s peaceful protests should be attributed to something less tangible — the political considerations required by the new and middle-class demographic participating in those protests. Vladislav Y. Surkov, a Kremlin official who previously protected Mr. Putin from potentially politically dangerous street rallies, stated the protestors on December 10 represented “the best part of our society, or, more accurately, the most productive part.” Yevgeny S. Gontmakher, a government economic advisor, commented on the remarkability of the protestors’ demands for political rights rather than economic relief, stating this fact “is a sign that Russia is becoming a Western country, in its own way.”

Now following the March 5 arrests, another theory must be posited: perhaps the seeming, now probably temporary, policy shift had nothing to do with permit requirements or protest demographics. Perhaps instead it was simply and entirely political. In Russia, political protests are renowned for producing violence, but not change. Perhaps permitting the protests to occur peacefully was only Vladimir Putin’s bone to the people to appease them after allegedly rigged parliamentary elections in December but before his expected presidential election on March 4. If so, one might argue it was quite an effective distraction. No notable protests occurred between December 24 and February 26, and Human Rights Watch, which monitored the protests, continued to write that the protests occurred peacefully.

Regardless, Vladimir Putin is Russia’s President yet again, and opposition protesters are being arrested in droves. Perhaps the next election season will provide renewed hope for the respect of the people’s right to peaceful assembly — but then again, a cynic would say, that seems rather unlikely.

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SOUTH AND CENTRAL ASIA

TAJIKISTAN’S PARENTAL RESPONSIBILITY LAW: PREVENTING EXTREMISM OR VIOLATING RIGHTS?

On August 6, 2011, Tajikistan’s president, Emomali Rahmon, signed the Parental Responsibility Law into effect, banning children under the age of eighteen from attending religious services except funerals. On August 31, police began stopping individuals under the age of eighteen from entering mosques to celebrate Eid al-Fitr. The law is exclusively enforced against Muslims, who make up 90% of Tajikistan’s population. According to Suhaili Hodirou, a spokesperson for the Tajik government’s Office of Human Rights, “Religious activity is only banned up to the age of 18 — beyond that they have full rights.” The Tajik government adopted the Parental Responsibility Law in conjunction with an amendment to the Criminal Code created to punish organizers of “extremist religious” teaching to create a safer environment for children who the government says are vulnerable to recruitment by extremist groups. These provisions violate the freedom of worship provided in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), and, as a party to the ICCPR, Tajikistan is bound to protect the right to freedom of religion, the right to peaceful assembly, and the right to engage in cultural activities.

The new laws restricting religious freedom come during a movement to eliminate unsanctioned religious teaching, which the government suggests leads to violent extremism. The President introduced the new laws after the Tajikistan Defense Minister released a report showing increased juvenile violent crime rates in 2010. In August 2010, President Rahmon made an announcement to Tajik parents warning that their “children will become extremists and terrorists” if they did not bring the approximately 2,000 students home from Islamic colleges abroad. During 2011, government authorities shut down mosques throughout Tajikistan’s capital, arrested individuals in their homes for teaching unapproved schools of Muslim thought, and forced religious groups to pay for heavy censoring of literature.

Article 8 of the Parental Responsibility Law states, “Parents are obliged…not to let children-teenagers participate in the activity of religious organizations.” The only children exempt from this law are those enrolled in state-sanctioned religious schools. The Tajik government’s laws violate multiple articles in the ICCPR, most notably Article 18. Article 18 provides for freedom of “thought, conscience, and religion” and is one of the ICCPR’s seven non-derogable rights. Because the Article 18 rights are non-derogable, Tajikistan cannot, except under very limited circumstances, infringe on these rights. Although the Parental Responsibility Law does not prevent individuals from self-identifying as Muslim or from practicing Islam as an adult, it does violate the Article 18 right for any individual to “manifest his religion or belief in worship, observance, practice, and teaching.” Article 18 also requires that countries “respect the liberty of parents…to ensure the religious and moral education of their children in conformity with their own convictions.” The Parental Responsibility Law prevents parents from exercising the right to educate their children in accordance with their religious beliefs.

Paragraph 3 of Article 18 allows exceptions to the freedom to worship when restriction is necessary to protect the public interest. However, General Comment 22 specifies that these restrictions should be interpreted narrowly: limitations may never derogate from Article 18’s “fundamental character” but may restrain the freedom to manifest religious beliefs if the restrictions are necessary to protect other rights guaranteed in the ICCPR. Permissible limitations must meet the specific purpose for which the restriction is implemented, be directly related and proportionate to the need it is meant to fill, and may not be “applied in a discriminatory manner.”

If, as President Rahmon says, the Parental Responsibility Law is necessary to prevent religious extremism and terrorism in Tajikistan, the restriction must
be directly related and proportionate to the possibility of individuals becoming terrorists through religious practice in Tajikistan. Because the Criminal Code does not specify the meaning of “extremist religious” teaching and the new law restricts most children from attending all religious activities, the statute is neither directly related nor proportionate. The Parental Responsibility Law is also being implemented in a discriminatory manner because, thus far, it has only been enforced against Muslims. The right to freedom of religion is non-derogable under the ICCPR, and the Parental Responsibility Law does not meet the Comment’s stringent test to allow for limitation on the manifestation of religious practice.

Exchanging Reproductive Justice for a Food Processor: Incentivized Sterilization in Rajasthan, India

In the summer of 2011, India’s National Population Stabilization Fund (Fund) instituted a new scheme in Jhunjhunu, Rajasthan, a rural town west of New Delhi, offering incentives for area residents who agreed to undergo sterilization surgery. Government health officials created a sweepstakes program, entering those who agree to be sterilized into a drawing to win a TV, mini car, or food processor. This scheme represents one of a pattern of programs designed to help India meet its Millennium Development Goal to reduce its birth rate to two children per mother by 2015. While the program does perform some vasectomies, incentiv programs in rural communities disproportionately affect women: according to the most recent National Family Health Survey, 37 percent of Indian women have been surgically sterilized, and one percent of men have had vasectomies. The use of incentivizing, and often coercive, practices by government health officials compromise women’s health by encouraging women to undergo this dangerous procedure, often without informed consent, proper health care, or family planning information. By creating programs that decrease women’s access to quality health care and family planning information, India violates Articles 12, 14, and 16 of the Convention on the Elimination of Discrimination Against Women (CEDAW).

Incentive-based sterilization programs were popular with the Indian government from the 1950s until the mid-1970s but disappeared after Indira Gandhi’s 19-month emergency suspension of the Constitution ending in 1977. During this time, Prime Minister Gandhi’s son, Sanjay, implemented a policy of forcible sterilization in an attempt to curb the growing Indian population. When emergency law was lifted, Sanjay’s program stopped, and incentivized sterilization programs fell out of favor. However, in recent years, as India’s population reaches 1.2 billion, the federal government’s Family Welfare Program returned to the practice of incentivizing sterilization among men and women in rural areas.

Unlike previous programs, the Rajasthan scheme was the first to outsource surgeries to private clinics. In an attempt to meet its goal of 30,000 sterilizations over a period of three months, the Fund offered private clinics about $308.00 per surgery and an additional $10.00 per case if a single clinic performed more than thirty operations a day. By offering such incentives to the private sector, the Indian government encourages clinics to “cut corners,” says Abhijit Das of Health Watch Uttar Pradesh. Utilizing the private sector also puts more pressure on women to undergo the operation because clinics have no monetary interest in obtaining informed consent, in providing women with alternative contraceptive options, or in explaining the risks associated with the procedure. Das says sterilization is the number one contraceptive method offered in India and that one quarter of people in a recent survey did not even know about other options (37 percent of Indian women have been sterilized, three percent use the pill, and five percent use condoms). Additionally, under incentive-based sterilization programs, women face an increased risk of medical complications because clinics do not provide the level of care necessary to ensure proper health, and women often decide to have children at a younger age and get sterilized between the ages of 22 and 23. At this age, women are more vulnerable to gynecological problems and are four times more likely to need a hysterectomy later in life.

CEDAW’s Article 12 requires that state parties eliminate health care discrimination against women. The article specifically provides for access to services, “including those related to family planning.” Article 14 highlights the specific discrimination rural women face, requiring States to ensure that rural women have “access to adequate health care facilities, including information, counseling, and services in family planning.” Article 16 (1)(e) focuses on the disparity of power between spouses, requiring women to have equal rights to choose the number and spacing of children and to receive necessary information to make informed family planning choices.

Incentive-based programs violate women’s access to information and adequate health services by placing them in a position in which they are not empowered to make informed family planning decisions. As currently implemented, the Fund’s incentivized sterilization schemes greatly limit women’s legally protected choice and oppress, instead of promote, their equal rights and advancement. Private individuals, who profit from women’s lack of information, are able to coerce women into getting the surgery before they have considered other options. The provisions in Articles 12, 14, and 16 require India, as a party to CEDAW, to take active steps to ensure women are provided equal access to health care services and adequate information, regardless of where they live or how much money they have. The first step toward meeting this international obligation is to provide comprehensive information about different forms of contraceptives available, the risks and benefits of each, and about women’s protected right to choose the size and spacing of their individual families.

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East, Southeast Asia & Oceania

Recent Legal Reforms in Burma Give Hope for Lasting Democratic Change

Since President Thein Sein assumed power in March 2011, Burma’s nominally civilian government has instituted a number of legal reforms drawing the attention of the United Nations (UN) and many Western democracies. Observing members of the international community are considering whether these changes are sufficiently genuine to warrant long-term engagement with the Burmese government and the removal of sanctions against the country. As evidence of commitment to democratic advancement, they must weigh the significance of changes made
by executive and legislative decree over the past six months against nearly 50 years of authoritarian rule by military junta.

Burma’s most important legislative action in the past six months has been amending its Political Party Registration law. In October 2011, Parliament removed language that barred participation by parties that had not run in previous elections, and by individuals with past convictions. The law now allows opposition leader Daw Aung San Suu Kyi to represent her National League for Democracy (NLD) in April 2012 parliamentary elections. The pro-democracy NLD is legally registered and Suu Kyi is seeking a parliamentary seat in the rural township of Kawhmu, southwest of Rangoon. Both will reengage in the political process despite Burma’s military junta having refused to hand power to NLD after its 1990 electoral victory. The winner of the 48 contested parliamentary seats will nevertheless have limited influence among the 498 total elected seats in the upper and lower houses. The military controls one-quarter of the bicameral legislature, and the President’s party occupies 80% of the remaining seats.

Burma’s first parliament in over twenty-two years has passed additional legal reforms. Late 2011 saw the passage of a Labor Organization Law and Peaceful Assembly and Protection Bill. The former allows workers to organize unions and strike for the first time since 1962. The Assembly bill legalizes peaceful demonstrations after applying for permission from the government with five days notice. After fifty years of military rule before President Thein Sein, a retired military official himself, skeptics question the effects of these laws in practice. These cautious observers also point to reports of military abuse in Burma’s northern Kachin state, despite a recent ceasefire between the government and ethnic Karen rebels, as evidence of reform in name only. Furthermore, the government has yet to release as many as 900 political prisoners.

Perhaps the best example of the tension between the government’s persistent authoritarian character in the face of burgeoning democratic advancements is Burma’s National Human Rights Commission (NHRC). The NHRC was created in September 2011 by Government Notification No. 34/2011, which bypassed legislative approval. The body is comprised of fifteen members, including former military officials, bureaucrats, and academics. Few details are available about its scope of responsibilities. According to an announcement by the Commission, it was founded to protect the rights of “citizens described in the constitution.” This mandate may prove controversial, as Burma’s 2008 Constitution denies citizenship to individuals whose parents are not Burmese nationals. The NHRC’s first actions have been to call for the release of all remaining political prisoners and to visit internally displaced persons in Kachin, though not to investigate allegations of human rights abuse by the military there.

A recent petition submitted to the NHRC will test both the Commission’s mandate and independence, key criteria under the Paris Principles’ minimum competency requirements for national human rights institutions. In November 2011, nearly thirty former doctors, lawyers, and students signed a letter requesting reinstatement of their access to education and practicing licenses. Due to their previous detention as political prisoners, lawyers such as Aung Thein, former legal counsel to Aung San Suu Kyi, have been banned from resuming practice. Though only protecting limited rights of citizens, the Burmese Constitution nevertheless guarantees equal opportunity to employment in provision 349, and a fundamental right to education in provision 366. The petition is a potential bellwether to determine how the retired civil servants and scholars will approach allegations of rights violations through newly created, government-sanctioned channels.

On the 64th anniversary of its independence, Burma can also celebrate the conclusion of a year that saw it win the 2014 chairmanship of ASEAN, a visit from Secretary Hillary Clinton (the first by a US Secretary of State in fifty years), and commitments to discuss expansion of humanitarian and other foreign aid from the Japanese and British governments. While the legitimacy of reforms remains to be seen, Burma’s newest laws and NHRC at least create increased space for activists to take advantage of new rights and protect existing, fledgling rights. The NLD, Suu Kyi, and other activists have shown a willingness to continue to exploit even politically motivated change. Whether the President or military reneges on democratic progress, their political engagement and the international attention it draws will nevertheless impact the demand for human rights accountability in Burma.

Like, Comment, Share: Robust Domestic and International Debate on Thailand’s Lèse Majesté Laws Paving the Way for Reforms

In November 2011, the government of Thailand convicted a 61-year-old man for insulting the country’s monarchy in four text messages. Under Thailand’s lèse majesté law — one of the strictest in the world — Ampon Tangnoppakul was sentenced to 20 years in prison, or five years for each text. Tangnoppakul’s sentence preceded two other highly publicized convictions in December. A Thai-US citizen was sentenced to 30 months for translating and posting online passages of a banned biography of the King. A Red Shirt political activist was furthermore sentenced to 15 years for speeches made in 2008. Thailand has seen an increase from 33 lèse majesté cases in 2005 to 478 by 2010. These three cases in particular have triggered international expressions of concern and much domestic debate and activism in a struggle for the future of freedom of expression in Thailand in 2012.

The lèse majesté law is set forth in Article 112 of Thailand’s Criminal Code, which decrees that “whoever defames, insults or threatens the King, the Queen, the Heir to the throne or the Regent shall be punished with imprisonment of three to fifteen years.” Before 2006, Article 112 had been used most frequently by political elites as a proxy for targeting enemies with dissenting political views. Any citizen can bring a lèse majesté complaint to police, and trials are often closed to the public. Thailand has been a party to the International Covenant on Civil and Political Rights (ICCPR) since 1996, Article 19 of which obligates the country to protect the rights of individuals who seek, receive, and impart information and ideas of all kinds. Nevertheless, supporters of Thailand’s constitutional monarchy deny the law’s harsh effect on freedom of expression. Instead, they cite the need to protect the monarchy as an institution to justify continued enforcement of Article 112.

Article 112 is often used in conjunction with the Computer Crimes Act (CCA) of 2007 to block lèse majesté content. Under this law, 117 judicial orders have blocked 75,000 Internet URL addresses in Thailand since 2007. The CCA’s vague language
targets Internet users, their online hosts, or other intermediaries related to posting data ostensibly threatening the “kingdom’s security.” The combined effect of the two laws is to expose a large number of Thais to what some observers, such as Human Rights Watch, criticize as politically motivated prosecutions encouraged by royalist supporters. This hostile attitude toward online intermediaries has led Thai authorities to warn Facebook users that sharing or liking certain messages could expose them to lèse majesté penalties. The Thai government has additionally asked Facebook to remove 10,000 pages of what it perceives to be royal insults.

Thailand underwent its Universal Periodic Review in early October 2011, when 14 member states recommended amending or repealing Article 112. A few days later, UN Special Rapporteur for Freedom of Expression Frank la Rue issued a statement calling for amendments to both Article 112 and the CCA. According to the Special Rapporteur, the laws are overly broad and impose harsh criminal sanctions. Such international pressure was met domestically with a December “Fearlessness Walk,” where lèse majesté opponents stood silent for 112 minutes. Reactions in support of Article 112 were also seen in Bangkok in December, when protesting Thai royalists defended the law in front of the US embassy. In this way, international attention has contributed to vigorous debate of lèse majesté within Thailand.

Despite criticism, the government’s pursuit of convictions under Article 112 show a continuing resolve to politicize Thailand’s monarchy. While Thailand’s Facebook users contemplate the latest lèse majesté convictions, Deputy Prime Minister Chalerm Yoobamrung recently announced plans to spend $12.6m in technology to block online content critical of the monarchy. In an effort to diffuse tensions, Thailand’s Truth and Reconciliation Commission has announced its support of reforms to Article 112. These changes would give lighter sentences for convictions and better legal oversight of claims. The announcement was publicized at the same time that the National Human Rights Commission formed a task force to review the legality of lèse majesté enforcement. The results of the Commission’s report will be available in June 2012. Until then, international pressure, domestic debate, and investigations by impartial government institutions will continue to act as an engine for change.

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INTERNATIONAL CRIMINAL COURT

MAXIMIZING THE IMPACT OF ICC PRELIMINARY EXAMINATIONS

The primary goal of the International Criminal Court’s (ICC) preliminary examinations is to determine whether there are grounds to launch an official ICC investigation into a situation. As a basis for the decision to open an investigation, preliminary examinations have the potential to further the Court’s overall goals of ending impunity and deterring future crimes. To successfully achieve these goals, preliminary examinations require a balanced approach. On one hand, the Office of the Prosecutor (OTP) must adopt a consistent method of analysis that provides sufficient information about the investigation to spur national proceedings and alert potential perpetrators of crimes that they could be held accountable. On the other hand, the OTP must adapt to a wide variety of circumstances and cannot provide information that would raise expectations about the Court’s involvement, compromise due process, or risk the safety of victims and witnesses. During the first decade of the Court’s work, inconsistency among the approaches to preliminary examinations, especially the absence of clear timelines, has limited their effectiveness.

The ICC initiates preliminary examinations in one of three ways: through a decision of the Prosecutor; through a referral from a State Party or the UN Security Council; or through a declaration of a non-State Party pursuant to Article 12(3) of the Rome Statute, under which that State accepts ICC jurisdiction for the preliminary examination and consequent proceedings. In all three situations, the Prosecutor follows the same procedure to determine whether there is a reasonable basis to proceed with an investigation based on three criteria laid out in Article 53(1) of the Rome Statute. The Prosecutor must first determine whether there is temporal, material, and either territorial or personal jurisdiction. Second, the Prosecutor considers whether the case would be admissible, taking into consideration both the gravity of the alleged crimes and whether there are already sufficient and ongoing national proceedings. Finally, the Prosecutor considers whether ICC proceedings would violate the interests of justice.

In practice, however, the timeline of preliminary examinations conducted by the Prosecutor to date has been inconsistent. Without a clear and predetermined timeline, the Prosecutor has progressed quickly through all three Article 53(1) steps in some situations, while drawing out his analysis in others. In part, these discrepancies are necessary because the time required to analyze Article 53(1) factors varies based on the circumstances. In evaluating admissibility, the Prosecutor must determine whether there are already national proceedings covering the same crimes and individuals that would likely be the focus of an ICC investigation. In the Democratic Republic of the Congo and Uganda, the Prosecutor quickly found that no national proceedings were ongoing and moved to the next phase of his analysis. However, the preliminary examination in Colombia continues because some national proceedings are ongoing. Therefore, the Prosecutor must evaluate whether the national proceedings are genuine and focused on the individuals most responsible before moving to the next phase in his analysis.

Although certain situations require more time to complete all of the Article 53(1) steps, as preliminary examinations in Colombia and other situations are drawn out without even a general timeline, they become less credible. When the Prosecutor quickly decides to open an investigation — as in the Kenya situation — without making a decision about long-term preliminary examinations — in places like Colombia and Afghanistan — it can give rise to the impression that the Prosecutor has been influenced by non-legal factors. Disparate timelines may lead to impressions that the Prosecutor allocates time and resources unevenly among preliminary examinations, and could be mitigated by increasing transparency and establishing general timelines.

As preliminary examinations continue without a decision, potential perpetrators and national authorities may doubt the seriousness of the OTP’s investigations. As the prospect of an ICC investigation fades, there are fewer incentives to comply with the ICC’s laws. In this way, prolonged preliminary examinations weaken the Court’s ability to deter crimes and encourage national proceedings. The lack of even a general timeline is difficult for victims and affected communities, who have no indication of how long they must wait for justice, or if justice will even come at all.

Preliminary examinations provide a potential avenue for the Court to have a greater impact outside the courtroom. The OTP has taken some positive steps by increasing transparency, but the inconsistent approach to preliminary examinations has weakened their credibility and effectiveness in spurring national proceedings and deterring crimes. By establishing clear guidelines, a general timeline, and consistently providing updates regarding preliminary examinations, the OTP could help the ICC achieve its goals of deterring crimes and ending impunity without even going to trial.

NEW MECHANISMS ESTABLISHED TO FACILITATE MERIT-BASED ICC ELECTIONS

At the Tenth Session of the Assembly of States Parties (ASP) from December 12 to 21, 2011, States Parties to the International Criminal Court (ICC) voted in elections resulting in the largest change in leadership since the ICC’s first elections in 2003. The nominations and elections of the Chief Prosecutor and six new judges were significant because two new committees were established to evaluate the qualifications of the candidates for those posts. Such committees have not been used in past elections, and they represent an important step toward a more transparent and merit-based election process.

At the Ninth Session of the ASP in 2010, the ASP established a Search Committee to facilitate the nomination and election of the next Chief Prosecutor with the goal of electing a candidate by consensus. The Search Committee received expressions of
interest or recommendations to consider 52 candidates. After reviewing their credentials, the Search Committee interviewed eight of the candidates and recommended four to the ASP. Following informal consultations among States Parties, Fatou Bensouda was selected as the consensus candidate on December 1, 2011, and was formally elected on December 12, 2011. Her nine-year term as Chief Prosecutor will begin in June 2012.

The creation of the Search Committee was praised for facilitating nominations based on merit. Merit-based nominations and elections are important to maintain the credibility and impartiality of the Court. The method of informally submitting nominations to a committee also helps to avoid practices such as vote trading, which threatens the credibility of both the Prosecutor and the Court. However, some criticized the Search Committee for a lack of transparency and access to information. The Search Committee was also criticized for lack of diversity because only five states were represented — one for each regional group — and there were no requirements for gender diversity.

Nominations for judicial candidates also received impartial review intended to encourage a merit-based process. The Coalition for the International Criminal Court (CICC) created an Independent Panel composed of experts in international law and criminal law to raise awareness about the nomination criteria and review the qualifications of judicial candidates. Unlike the ASP Search Committee for the Prosecutor, the Independent Panel did not endore or oppose candidates, but rather evaluated their qualifications to determine whether they met the criteria for judges laid out in Article 36 of the Rome Statute, the founding treaty of the ICC. Article 36 specifies requirements related to candidates' moral character, past experience, and competence in relevant areas of law. Though the ASP has the authority to establish an Advisory Committee on judicial nominations under Article 36(4)(c), it has never exercised this authority and, as such, the Independent Panel is not affiliated with the ASP. In its final report, the Independent Panel found that four of the nineteen judicial candidates were not qualified because they lacked either the experience or competence in a certain area of law required under Article 36. After fifteen rounds of voting from December 12 to 16, States Parties elected six new judges, all of whom the Independent Panel found to be qualified.

The Independent Panel received similar praise as the ASP Search Committee for its role in supporting a merit-based process, but faced different challenges and criticisms. One concern was whether and how the members of the Independent Panel would measure the qualifications of the candidates. Some requirements under the Rome Statute, such as that the candidate possess high moral character, are difficult to measure, and there were concerns about the panel's ability to accurately assess such intangible qualities. Nevertheless, many found the panel members' extensive experience in international law and criminal law as well as their geographic diversity and knowledge of different legal systems sufficient to provide expertise to evaluate the criteria for judicial candidates.

As a judicial body, the independence and impartiality of the ICC are essential to its ability to deliver justice for grave violations of human rights. Electing court officials through a merit-based process safeguards the independence of the Court by alleviating perceptions of political influence that can arise from vote trading. Therefore, fair and merit-based elections serve the Court in two ways: first, the Court benefits from the leadership of the most highly-qualified candidates; and second, the Court earns respect and confidence for representatives elected through a transparent and merit-based process. The Court will reap these benefits as the mechanisms established to review the judicial and prosecutorial candidates for this election are refined in the future.

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**AD HOC TRIBUNALS**

**LIMITING THE EXPOSURE OF PROTECTED WITNESSES IN ICTY PROCEEDINGS**

On October 31, 2011, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced Serbian Radical Party leader Vojislav Seselj to eighteen months incarceration for contempt of court, under Rule 77(A)(ii) of the Rules of Evidence and Procedure (Rules), for Seselj's willful disclosure of protected witness information on his website. In the second of three such contempt proceedings related to Seselj's release of protected information, the Trial Chamber found that Seselj directly and intentionally violated its protective orders. This case presents a unique challenge for witness protection at the ICTY. Rule 69(C) of the Rules requires that a testifying witness' identity be revealed to the defense prior to trial as a basic tenant of the Article 21(4)(e) right to cross-examine. Yet when an accused individual ignores the ICTY's protective orders and reveals a witness' identity, other witnesses may be reluctant to testify. In a case like Seselj, where fears of witness intimidation stalled the proceedings for over a year in 2010, Rule 69(C) could potentially endanger a witness. The Trial Chamber noted that "public confidence in the effectiveness of its orders and decisions is absolutely vital to the success of the work of the Tribunal," and it must ensure that future witness protection measures will effectively prevent such disclosures, as required by Article 20 of the Statute of the Tribunal.

According to Rule 75(B)(i), the Chamber may proprio motu institute witness protection measures to include expunging identifying information from public records, allowing testimony via image or voice altering devices, or assigning a pseudonym. Further, Rule 69 authorizes protective orders for all information used in the proceedings. In Seselj's case, the Chamber issued protective orders and pseudonyms for many witnesses, and issued a general order to Seselj to refrain from disclosing such information. Seselj violated the orders of the Trial Chamber when he released identifying information and reprinted portions of statements made by witnesses in confidential submissions, which later appeared on his website and in a book that sold 10,000 copies. Seselj, representing himself, contended that the witnesses gave him permission to disclose, that exposing information about the reliability of the witnesses was necessary for his defense, and that these witnesses did not need protective measures.

The Amicus Prosecutor who brought the contempt charges also noted that Seselj seemed to enjoy the possibility that he would be charged with contempt, thereby bringing attention to his stated goals of derailing the proceedings and
delegitimizing the ICTY. Because of the willful nature of Seselj’s disclosures and Seselj’s stated intent to “create conditions for the next [disclosure]” when the contempt proceedings conclude, the Chamber considered the need for a deterrent from future disclosures. Seselj’s sentence of eighteen months includes these punitive considerations.

The ICTY takes considerable steps to protect witness’ physical safety through the Victims and Witnesses Section, providing security and stiff penalties for disclosure of protected information. However, such protective measures do not prevent an accused individual from disclosing information as Seselj did. Noting this dilemma and the inherent difficulty of testifying at a war crimes trial, the Parliamentary Assembly of the Council of Europe drafted a report on witness protection in the Balkans in June 2010. The report highlighted the plight of witnesses in the former Yugoslavia who have been murdered, threatened, and had their identities revealed by parties intent on obstructing justice. Many witnesses are reluctant to testify, believing they will be marked as traitors for doing so. In light of this, the Assembly decried the ICTY’s current practice of disclosing the identity of anonymous witnesses to the defense prior to the trial. In cases where revealing the identity of a witness is disproportionate to the risk of harm to that person, the Assembly encouraged the ICTY to consider amending the Rules to allow witness anonymity to the defense. On method used by the European Court of Human Rights is to secure a “special advocate,” functioning independently of the parties, to analyze the evidence, and act as an intermediary between the witness and the defense.

Whatever measures of additional witness protection the ICTY takes to address such situations in the future, it faces the daunting task of balancing such a measure against the Article 21(4)(e) rights of the accused “to examine, or have examined, the witnesses against him.” In Seselj’s case, the law binding those present in court from disclosing information did not stop him. Given the global audience for Internet disclosures, Seselj’s actions likely present an area of concern to the tribunal. It remains to be seen whether the ICTY can or will institute a process for allowing anonymous witnesses to testify without infringing on the rights of the accused.
accused’s right to trial without undue delay. Judge Short would have taken five years off the sentences given to Mugenzi and Mugiraneza in compensation for the violation of their rights and held further hearings to determine the appropriate remedy for Bizimungu and Bicamumpaka.

Turning to the allegations against the accused, the Prosecution argued that each of the accused was responsible under both Article 6(1) (direct responsibility) and Article 6(3) (superior responsibility) of the ICTR Statute based on specific events that allegedly supported the charges. In addition, the Prosecutor argued in its closing submissions that each of the four accused bore superior responsibility “for the genocide as a whole,” claiming that the government ministers were “criminally liable for the acts perpetrated by a range of subordinates, including: the staff of their respective ministries, the [Forces Armées Rwandaises], the gendarmerie, soldiers, prefects, prefects’ subordinates, bourgmestres, communal police, conseillers, local authorities, civic leaders, militias, Interahamwe, ‘the killers’, civilians and ‘the Hutu population throughout Rwanda.’” Notably, the Tribunal has previously held that “general statements of the situation in Rwanda in April 1994 may be illustrative as to the background of the case, but they are not suited to prove the individual guilt of the Accused.” Nevertheless, the Prosecutor asked the Chamber to “break new ground” by finding that an accused’s “charismatic power over [a] population based on the history and sociological make-up of that community” can satisfy the requirement of a superior-subordinate relationship. Specifically, in this case, the Prosecutor argued that the Chamber should consider “the manner in which [the Accused] were perceived by society as Ministers, and the power of influence they commanded” in determining whether they had a superior relationship over the various groups of persons responsible for carrying out genocidal acts throughout the country. However, the Trial Chamber rejected this allegation, noting that the Prosecution did not “link its theory to any specific, proven events in this case,” but rather presented “vague arguments” and evidence that was “general in nature,” which the Chamber determined to be “wholly insufficient to establish the rigorous requirements necessary to impose criminal responsibility pursuant to Article 6 (3) of the Statute.”

In terms of the charges upon which Mugenzi and Mugiraneza were convicted, both related to the role of the two accused in the removal of the Tutsi prefect of Butare prefecture, Jean-Baptiste Habyarimana, on April 17, 1994, and his replacement two days later. First, the Chamber determined that, at least as early as April 17, a joint criminal enterprise existed among several members of the Rwandan interim government, including Mugenzi, Mugiraneza, and Rwandan President Théodore Sindikubwabo, the aim of which was to kill Tutsis in Butare. In furtherance of this plan, the members of the enterprise agreed to remove Habyarimana from his post “in order to undermine the real and symbolic resistance that he posed to the killing of Tutsis in Butare.” According to the Chamber, the decision to remove Habyarimana amounted to an agreement to undertake a preparatory act that, while preceding the physical perpetration of genocide, was “clearly aimed at” furthering genocide. Furthermore, the Chamber determined that both Mugenzi and Mugiraneza “possessed genocidal intent when agreeing to remove Habyarimana.” Thus, the Chamber held, Mugenzi and Mugiraneza were guilty of conspiracy to commit genocide. Second, the Chamber determined that, two days after the removal of Habyarimana, President Sindikubwabo delivered an inflammatory speech at the ceremony inaugurating Habyarimana’s replacement that amounted to direct and public incitement to genocide. Specifically, the Chamber determined that Sindikubwabo’s speech “was a direct call for those in Butare to engage in the killing of Tutsi civilians,” delivered to a public audience, and that he made his remarks with genocidal intent. The Chamber then concluded that the speech was made “in furtherance of the criminal purpose” of the joint criminal enterprise to kill Tutsis in Butare. The Chamber found that Mugenzi and Mugiraneza shared President Sindikubwabo’s genocidal intent, as demonstrated by their involvement in the decision to remove Habyarimana and their presence at the inaugural ceremony on April 19. Finally, the Chamber concluded that Mugenzi and Mugiraneza “substantially and significantly contributed” to Sindikubwabo’s incitement by “creat[ing] a scenario that would allow for Sindikubwabo to publicly and ceremoniously air his inflammatory speech,” fostering a “context that would ensure that Sindikubwabo’s inciting message would be understood,” and providing “significant and substantial moral encouragement to Sindikubwabo as he incited the killing of Tutsis.” Therefore, the Chamber concluded that Mugenzi and Mugiraneza were guilty of direct and public incitement to commit genocide based on their participation in a joint criminal enterprise. Based on these convictions, and taking into account the gravity of the crimes and aggravating and mitigating circumstances, the Trial Chamber sentenced Mugenzi and Mugiraneza to thirty years in prison.

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**YUSSEF MUNYAKAZI v. THE PROSECUTOR, APPEALS JUDGMENT, CASE NO. ICTR-97-36A-A**

On September 28, 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Yussuf Munyakazi. The Trial Chamber convicted Munyakazi forcommitting genocide and extermination as a crime against humanity based on his participation in attacks on the parishes of Shangi and Mibilizi in April 1994, which resulted in the deaths of more than 5,000 Tutsi civilians. He was sentenced to a single term of twenty-five years of imprisonment. In its opinion, the Appeals Chamber dismissed each of Munyakazi’s eight grounds of appeal, as well as the Prosecutor’s three grounds of appeal, and confirmed the Trial Chamber’s judgment and sentence.

As a general matter, questions pertaining to the assessment of evidence played a significant part in the Chamber’s judgment. When addressing alleged errors in the assessment of evidence, the Appeals Chamber stressed that the Trial Chamber is endowed with broad discretion to evaluate inconsistencies arising within or among witnesses’ testimonies and to consider whether the evidence is credible taken as a whole. Furthermore, when evaluating inconsistent accounts, the Trial Chamber
the accused does not bear the burden of proving an alibi beyond a reasonable doubt; rather, when the defense of alibi is raised, the Prosecution must establish the allegations against the accused beyond a reasonable doubt despite the alibi. Nevertheless, the Appeals Chamber noted that the Trial Chamber has the right to require corroboration of any evidence, and held that, in this case, “it was not unreasonable for the Trial Chamber to question the credibility of Munyakazi’s alibi in the absence of corroboration given the inherent self-interest of his testimony and the introduction of the alibi at the close of the case.”

The Defense also challenged the validity of the Trial Chamber’s finding that Munyakazi was responsible for the attacks at the Shangi and Mibilizi parishes based on his role as a “leader of the attacks who exercised de facto authority over the Bugarama Interahamwe” that physically carried out the attacks. In particular, Munyakazi challenged the Trial Chamber’s finding that he had sufficient notice that the Prosecution was alleging he held a leadership role during the attacks. In reviewing the indictment, the Appeals Chamber noted that paragraph 1 alleged that, during the entire period covered by the indictment, Munyakazi was “a leader with de facto authority over the Bugarama MRND Interahamwe militia,” and that paragraphs 13 and 14 Munyakazi, “with the Bugarama Interahamwe, attacked and killed” Tutsi civilians at the two parishes. However, there was no specific allegation supporting the Trial Chamber’s ultimate finding that Munyakazi committed the crimes at Shangi and Mibilizi parishes “[o]n the basis of his leadership position at the crime sites.” Nevertheless, the Appeals Chamber determined that the “more general allegations” in paragraphs 13 and 14 must be read “in light of paragraph 1,” which alleges Munyakazi’s role as the leader over the Interahamwe, and that therefore, the indictment provided the accused with sufficient notice that he could be held responsible for the attacks on the parishes based on his leadership role over the militia members that carried out the attacks. Munyakazi also challenged the Trial Chamber’s assessment of the evidence presented in support of the Prosecution’s claim that Munyakazi acted as a leader over those who carried out the attacks on the Shangi and Mibilizi parishes, but the Appeals Chamber dismissed this challenge, relying on the principles described above relating to the Trial Chamber’s discretion in assessing evidence.

Yet another challenge brought by Munyakazi was that the Trial Chamber erred in finding that he acted with the requisite intent to convict him of genocide and the crime against humanity of extermination. According to Munyakazi, the Chamber had no legal or factual basis for its findings of intent, and the Chamber erred by failing to find that Munyakazi had formed the intent to commit genocide prior to the occurrence of the attacks. In its judgment, the Trial Chamber recognized that it “had very little direct evidence of Munyakazi’s intent” with regard to the acts carried out at the parishes and “no evidence of his personal views regarding Tutsis.” However, citing to Munyakazi’s statement to the Tutsi refugees at Mibilizi parish that they “were going to pay” for killing the head of state, and stressing the “nature and scope of the crimes” committed at both parishes, the Trial Chamber inferred that Munyakazi acted with the requisite genocidal intent and with knowledge that the attacks formed part of a widespread and systematic attack on Tutsi civilians. The Appeals Chamber found no error in the Trial Chamber’s approach, noting that an accused’s genocidal intent “may be inferred from circumstantial evidence, including his active participation in an attack.” In fact, despite Munyakazi’s argument to the contrary, the Appeals Chamber reiterated earlier jurisprudence holding that “[t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.”

Lastly, the Appeals Chamber dismissed Munyakazi’s challenge to his sentence, upholding the Trial Chamber’s finding that the abuse of a position of influence and authority in a given case may be counted as an aggravating factor in sentencing and deferring to the Trial Chamber’s broad discretion to dismiss or to take into account mitigating circumstances raised by the Defense. Furthermore, the Appeals Chamber held that the fact that Trial Chamber did not expressly discuss some mitigating circumstances raised by the Defense, namely that Munyakazi provided assistance to several Tutsi friends during the genocide, is not relevant because a Trial Chamber is not required to expressly address every piece of presented evidence,
and moreover possesses broad discretion
to determine the weight of such evidence. The
Appeals Chamber also rejected the
Prosecution’s request that the sentence be
increased to life imprisonment, and thus
affirmed the Trial Chamber’s sentence of
twenty-five years imprisonment.

Interestingly, Judge Liu attached a
separate opinion to the judgment in which he
discusses the Trial Chamber’s holding that
Munyakazi’s role in the attacks on
the two parishes amounted to “commiss-
sion” of the charged crimes under Article
6(1) of the ICTR Statute, a holding that
was not challenged on appeal. As Judge
Liu recognized, the ICTR first adopted an
expanded interpretation of “commission”
as a mode of liability in the Gacumbitsi
case, in which the Appeals Chamber held
that, in the context of genocide, a person
need not physically perpetrate the actus
reus or participate in a joint criminal
enterprise aimed at carrying out genocide
to be held responsible for “committing”
genocide, but rather may be found to have
“committed” the crime by performing
other acts, such as directing or supervis-
ing killings. This expanded understanding
of “committing” was later applied to the
crime against humanity of extermination.
While Judge Liu acknowledged that this
interpretation could now be considered
settled jurisprudence of the Tribunal, he
nevertheless wrote to express concern that,
by subsuming and conflating the various
modes of individual criminal responsibil-
ity outlined in Article 6(1) of the Statute —
namely, committing, planning, ordering,
instigating, and otherwise aiding and abet-
ting — the expanded definition “creates
considerable ambiguity as to the scope of
a convicted person’s criminal responsibil-
ity,” which in turn may “run contrary to
basic principles of fairness.” Judge Liu
also noted that the broad interpretation of
“committing” “uncannily resembles joint
criminal enterprise, without requiring the
satisfaction of [the latter’s] more stringent
pleading criteria.”

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**Ephrem Setako v. The Prosecutor,
Appeals Judgment, Case No.
ICTR-04-81-A**

On September 28, 2011 the Appeals
Chamber of the International Criminal
Tribunal for Rwanda (ICTR) issued its
judgment in the case against Ephrem
Setako, who served as head of the legal
affairs division of the Rwandan Ministry
of Defence during the 1994 genocide.
At trial, all of the charges against Setako
related to his alleged role in ordering
the killing of Tutsis at the Mukamira
military camp on two separate occasions,
 namely on April 25, 1994 and on May 11,
1994. The Trial Chamber of the ICTR had
sentenced Setako to twenty-five years of
imprisonment upon convictions for geno-
cide in relation to both sets of killings;
extermination as a crime against humanity
in relation to the April 25 killings; and
violence to life, health and physical or
mental well-being of persons (murder) as
a serious violation of Article 3 common to
the Geneva Conventions and of Additional
Protocol II in relation to the April 25 kill-
ings. On appeal, the Appeals Chamber
affirmed the Trial Chamber’s judgment,
and convicted Setako of an additional
count of murder in violation of Article 3
of the Geneva Conventions based on the
May 11 killings. Despite the additional
conviction, however, the Chamber did
not increase the original twenty-five year
sentence imposed on Setako.

Setako raised several unsuccessful
grounds of appeal, including a claim that
he had been denied a right to a fair
trial. Specifically, Setako challenged the
fact that the Trial Chamber granted the
Prosecutor leave to amend the indictment
more than three years after the initial
indictment had been issued, claiming that
the amended indictment significantly
expanded the case against the accused
and thus deprived him of his rights to be
tried without undue delay and to have
adequate time and facilities to prepare his
defense. In response, the Appeals Chamber
began by recalling that the Trial Chamber
enjoys considerable discretion in determin-
ing the conduct of trial proceedings, which
includes determining whether to grant the
Prosecutor leave to amend an indictment.
While the Trial Chamber must safeguard
the accused’s right to a fair and expedi-
tious trial, a discretionary decision of the
Chamber will not be overturned on appeal
unless the challenging party demonstrates
a discernible error resulting in prejudice to
that party. Here, the Appeals Chamber held
that Setako failed to make such a demon-
stration, particularly in light of the fact
that the Trial Chamber did not grant the
Prosecution’s request for leave to amend
the indictment in its entirety. Indeed, the
Trial Chamber rejected several proposed
amendments on the ground that they would
give the Prosecution an “unfair tactical
advantage” given the late stage of the pro-
ceedings. Instead, the Trial Chamber only
permitted those amendments that would
enhance the fairness of the trial, such as
those aimed at “better articulating [the
Prosecution’s] theories of criminal respon-
sibility, removing any factual allegations it
no longer wishes to pursue, and correcting or
supplementing with additional detail
any of the existing factual allegations.”

Another of Setako’s unsuccessful
grounds of appeal was a claim that the
Trial Chamber erred in finding two of the
Prosecution’s witnesses, who were “insider
witnesses,” credible. Setako raised a num-
ber of challenges to the credibility of the
witnesses, including the fact that, prior to
being investigated by ICTR authorities,
the witnesses had both provided confes-
sions to Rwandan national authorities in
which they made no mention of the crimes
in which they later implicated Setako.
Setako argued that the Trial Chamber failed
to adequately explain these omissions, cit-
ing to Rwandan Organic Law 8/96, which
requires that a person making a confession to
Rwandan judicial authorities provide
information about all of the suspect’s crimes
and co-perpetrators. The Appeals Chamber
began its assessment of Setako’s claim by
noting that the credibility of a witness will
depend on a variety of factors and must be
evaluated in the context of all of the evidence
on the record. In the present case, the
Appeals Chamber determined that the
Trial Chamber “reasonably considered” all
of the relevant factors, including the fact
that neither of the two witnesses had been
charged by Rwandan authorities with the
particular crimes in which they later implic-
ated Setako, making it unlikely that they
would voluntarily inform those authorities
that they had in fact participated in the
crimes. With regard to Rwandan Organic
Law 8/96, the Appeals Chamber noted that
Setako had not raised this law before the
Trial Chamber, but rather cited to it for the
first time on appeal, and thus the Defense
could not fault the Trial Chamber for
failing to address the law in its assessment of the witnesses’ credibility.

One ground of appeal raised by Setako that was successful involved a challenge to the Trial Chamber’s decision to take judicial notice of a certain fact determined by the Trial Chamber in the Bagosora, et al. trial, a case that was on appeal at the time of the Setako Trial Chamber’s judgment. Pursuant to Rule 94(B) of the ICTR’s Rules of Procedure and Evidence, a Trial Chamber may “decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.” However, Rule 94(B) expressly requires that the Trial Chamber take judicial notice of a fact or evidence from other proceedings only “after hearing the parties.” Furthermore, as established in prior jurisprudence of the ICTR, the reference to “adjudicated” facts in Rule 94(B) means that the relevant fact must have been determined in a final judgment. Here, the Appeals Chamber determined that the Trial Chamber erred by judicially noticing a fact from the Bagosora, et al. Trial Chamber judgment without hearing from the parties and while the judgment was pending appeal. Nevertheless, the Appeals Chamber determined that the fact that was judicially noticed was otherwise supported by documentary evidence entered into the record during Setako’s trial, and thus did not invalidate the conclusions of the Trial Chamber.

Among the grounds of appeal raised by the Prosecutor was a challenge to the Trial Chamber’s failure to convict Setako of the war crime of murder in relation to a number of killings that occurred on May 11, 1994 at the Mukamira military camp. Notably, the Trial Chamber had determined that Setako was responsible for these killings in support of its finding that Setako was guilty of genocide, but the Chamber made no finding with respect to the Prosecutor’s allegation that these killings also amounted to murder as a war crime. After reiterating its earlier dismissal of Setako’s challenge to the Trial Chamber’s finding that he ordered the May 11 killings, and determining that the victims of the killings could not be considered to have been taking an active part in hostilities at the time of their murder, the Appeals Chamber, by majority, held that Setako was in fact guilty of murder as a war crime based on the incident. While Judge Pocar agreed with the majority that the Trial Chamber erred by failing to convict Setako of the charge, he nevertheless dissented from the majority’s holding on the ground that he does not believe that the Appeals Chamber has the authority to enter a new conviction on appeal. As he has argued in dissenting opinions issued in previous cases, Judge Pocar stressed that Article 24(2) of the ICTR Statute requires that the Chamber apply fundamental principles of international human rights law, including those found in the International Covenant on Civil and Political Rights of 1966 (ICCPR). Because Article 14(5) of the ICCPR states that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law,” Judge Pocar argued that an accused must have a right to appeal any conviction entered by the Tribunal, a right that is denied when the Appeals Chamber enters a new conviction on appeal. In Judge Pocar’s opinion, the Appeals Chamber should have either found that the Trial Chamber erred in relation to the charge of murder as a war crime and remitted the case to the Trial Chamber to rectify the error, or simply entered its finding regarding the Trial Chamber’s error in order to correct the record, but decline to remit the case to the Trial Chamber in light of efficiency concerns. The latter approach might be particularly warranted in the present case, in Judge Pocar’s opinion, given that the Appeals Chamber determined that the additional conviction did not affect the accused’s sentence.

The Prosecution also contended on appeal that the Trial Chamber erred when it did not address the defendant’s responsibility for the charged crimes under both Article 6(1) (direct responsibility) and Article 6(3) (superior responsibility) of the Statute. Specifically, the Trial Chamber determined that, because it found that Setako was guilty under Article 6(1) of the Statute, it did not need to address Setako’s liability under Article 6(3), holding that Setako could not be convicted under both provisions based on the same set of facts. While the Appeals Chamber affirmed that the Trial Chamber could not enter separate convictions against Setako on the basis of more than one theory of liability, it held that the Trial Chamber should have considered whether Setako bore responsibility under Article 6(3) for purposes of sentencing. The Appeals Chamber went on to make the determination itself and held that the Prosecution had failed to establish beyond a reasonable doubt that Setako exercised effective control over the individuals who carried out the killings at the Mukamira military camp, and thus held that he did not bear superior responsibility for the charged crimes.

Finally, the Appeals Chamber addressed the appropriateness of the Trial Chamber’s sentence, holding that although the Appeals Chamber had entered an additional conviction against Setako for murder as a war crime, this finding did not warrant an increase in Setako’s sentence because the Trial Chamber had “decided on Setako’s sentence based on a full picture of the proven material allegations against him.”

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**No Refuge: The Quandary of Resettling Suspects Acquitted by the ICTR**

The International Criminal Tribunal for Rwanda (ICTR) rendered judgment in the high profile “Government II” case on September 30, 2011, and with it brought a persistently pressing matter back to the fore: what should the international community do with persons acquitted by the ICTR? In “Government II,” the ICTR tried four former ministers of the interim government established in Rwanda after the assassination of President Juvenal Habyarimana. Two of the four were acquitted for lack of sufficient proof of involvement. Returning to Rwanda is an unlikely option for these men because of their high profiles and the possibility of persecution, and they will have to go through the difficult process of seeking resettlement in another country. The ICTR has acquitted ten accused persons, and only five have managed to find a host country. André Ntagerura has unsuccessfully sought a host country since his acquittal in 2004. The plight of Ntagerura and others...
demonstrates the need for the international community to put its weight behind the tribunal’s verdicts and treat the resettlement of persons acquitted by international tribunals as a contemporaneous duty to the establishment of the ad hoc tribunals.

Outgoing ICTR President Judge Khalida Rachid Khan sees the resettlement of persons acquitted by the tribunal as a “fundamental expression of the Rule of Law,” guaranteeing acquitted individuals the right to live, including full enjoyment of education, employment, and family. Judge Khan has repeatedly implored the UN Security Council to aid in finding a suitable solution to the problem of resettlement. In a 2008 report highlighting relocation challenges, the ICTR noted that the effectiveness of ad hoc tribunals will be seriously challenged if member states do not demonstrate support in such efforts.

Public response in Rwanda to the acquittal of high profile individuals “convicted” in the court of public opinion is typically not positive. Thus, acquitted persons reside in temporary safe houses in Arusha, Tanzania. Many UN member states have the ability to provide a safe alternative, and several have, but the majority show reluctance to work with the ICTR. This is due, in part, to the lack of any formal mechanism for such relocations. Article 28 of the ICTR Statute governs cooperation with member states, but focuses primarily on the identification, testimony, service, arrest, detention, and transfer of suspects to the ICTR, and does not mandate cooperation with requests for the resettlement of acquitted persons. The ICTR has thus relied on its registrar to coordinate these relocations, with mixed success after protracted bilateral negotiations. So far France has accepted two acquitted persons, while Belgium, Switzerland, and Italy have each accepted one.

In the past, the United Nations High Commissioner on Refugees (UNHCR) has expressed reservations about granting refugee status to acquitted persons, pointing to Article 1(F) of the 1951 Refugee Convention that prohibits refugee status for persons that have committed crimes against humanity. However, the UNHCR notes that because acquitted persons fear persecution in Rwanda as a result of their acquittal, they require refugee status. Furthermore, an acquittal by an ad hoc tribunal may effectively remove the “serious reasons for concern” mentioned in Article 1(F). Yet refugee or not, the problem of finding a country to accept the acquitted persons remains.

In June 2011, outgoing ICTR President Khan, with the support of the UNHCR, appealed to the UN Security Council to form a solution. The Security Council responded positively to President Khan’s request, adopting Resolution 2029 on December 21, 2011, requesting that member states “cooperate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons.” Under Article 25 of the Charter of the United Nations, member states must “agree to accept and carry out” decisions of the Security Council, and such decisions are binding when made under Chapter VII of the Charter, as was Resolution 2029. It is now up to the member states and the ICTR to build a formal mechanism. Five acquitted persons remain in Arusha under the protection of the ICTR, and unless a solution appears soon, the Residual Mechanism will inherit the challenge of finding host countries when it takes over for the ICTR in July 2012.

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INTERNATIONALIZED TRIBUNALS

PRISONERS OF THE SPECIAL COURT FOR SIERRA LEONE ALLEGE MISTREATMENT IN RWANDA PRISON

Despite complaints of mistreatment from the prisoners themselves, the Special Court for Sierra Leone (SCSL) recently found that the eight men currently serving sentences in Rwanda for crimes against humanity are being treated fairly and according to international standards. The SCSL was established in July 2002 to adjudicate war crimes and crimes against humanity committed during the civil war in Sierra Leone. The Appeal Chamber sentenced Allieu Kondewa and Moinina Fofana in 2008 and RUF leaders Issa Hassan Sesay, Morris Kallon, and Augustine Gbao in 2009, to prison sentences in Rwanda. Following customary international standards and complaint review, Rule 39 of the Rules of Detention for the SCSL entitles detainees to medical services, adequate food, family visits, and the right to complain about conditions to the Chief of Detention and the Registrar of the SCSL. Although the prisoners have alleged that they did not receive proper nutrition or medical attention, a committee from the SCSL did not find sufficient evidence to warrant transfer to another country.

The SCSL does not have the capacity to house detainees after they have been convicted, and has therefore made agreements with Finland, Sweden, the United Kingdom, and Rwanda for prisoners to serve their sentences in those countries. Having been convicted by the SCSL, the prisoners are subject to the SCSL Rules of Detention while they serve their sentences in the host country. The Amended Agreement between the SCSL and the Government of Rwanda states that the “conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners,” and the International Committee of the Red Cross (ICRC) will inspect the conditions of detention to ensure that standards are being met. International standards require that the dignity of personhood of all detainees be respected and that all basic needs, such as health, security and privacy are met in a reasonable fashion. These needs are judged in part by medical officers who advice the Chief of Detention.

Under the Practice Direction for Designation of State for Enforcement of Sentence, once the SCSL has finalized a sentence, the President of the Court decides where the convict is sent. Rwanda’s commitment to take convicted persons from the SCSL became part of Rwandan law, which requires that the detention centers maintain a standard comparable to the requirements of the SCSL. However, prison conditions throughout Rwanda have historically been criticized, due to concerns of overcrowding, poor medical care, and physical. Because Rwandan law requires less stringent prison conditions, there is concern that the prisoners of the SCSL in Rwanda are being denied their rights to adequate standards of detention under the SCSL Rules of Detention and customary international law. However, the Commissioner General of Rwandan Correctional Services stated that the SCSL prisoners are given special treatment in Rwandan prisons and after a committee from the SCSL visited the prison in Rwanda and reported back to the court, the SCSL stated that the prisoners
were being treated in accordance with international standards.

Based on the report issued by the SCSL in January 2012, it seems unlikely that the prisoners will be removed to another country. Given the difference in prison conditions between Rwanda and prisons in Finland, Sweden, and the United Kingdom, it is understandable that the prisoners would want to be transferred to one of the European countries known for better health care and more humane prison conditions. Furthermore, the prisoners’ wives could seek asylum in the European host country under European asylum laws to be near their husbands. While the SCSL prisoners’ complaints may put a spotlight on the Rwandan prison system, allegations of overcrowding and human rights abuses have long plagued the Rwandan prison system. However, with the SCSL report stating no findings of abuse, it is unlikely that the prisoners will be moved to Europe.

Prisoners’ rights are an important aspect of international justice because the humane treatment of detainees and convicts legitimizes an international court’s ability to adjudicate human rights abuses. However, determining what constitutes fair treatment is challenging when prison conditions among different countries vary widely. As the SCSL has agreements with both European and African nations to host prisoners, prisoners understandably prefer sentences in European countries with better prison facilities. However, there is a limited amount the SCSL can do without clear evidence of prisoner abuse and violations of international standards.

TRIALS IN ABSENTIA IN THE SPECIAL TRIBUNAL FOR LEBANON

For the first time since the Nuremburg trial in absentia of Martin Bormann in 1946, an internationalized court, namely the Special Tribunal for Lebanon (STL), has initiated a trial completely in absentia. In the case of The Prosecutor v. Salim Jamil Ayash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra, the pre-trial court seized the trial chamber and determined that a trial in absentia is appropriate at this time. The defendants were indicted in June 2011, but as of February 2012, none of the four accused of assassinating former Lebanese Prime Minister Rafik Hariri had appeared before the court. Because trials in absentia are a controversial concept, as the STL begins its proceedings, it will have to balance the need for efficient justice with the rights of the accused for a fair trial under the International Covenant on Civil and Political Rights (ICCPR), Article 14(3)(d).

Trials in absentia are controversial because they seem to violate the due process rights guaranteed in Article 14(3)(d) of the International Covenant on Civil and Political Rights, which ensures the right of a defendant “to be tried in his presence.” Despite this discord with the ICCPR, many countries, such as the United States, France and Italy, allow for partial trials in absentia if the accused is aware of and present for the initial hearing of the trial. The validity of a trial in absentia rests on the guarantee that the defendant has the same rights during the trial as if he were present, and that he is made aware of the initial proceedings and indictment. The European Court of Human Rights allows trials in absentia provided that a retrial is permitted if the defendant chooses, except if the defendant waived his right to be present and had his chosen counsel appear on his behalf.

Unlike in the United States, the STL can hold trials completely in absentia under Article 22 of the Statute of the STL and Rules of Procedure and Evidence 105 and 106. A trial in absentia shall be conducted in the STL if the defendant has waived his right to be present, has not been handed over to the STL, or has absconded and the court has taken all “reasonable precautions” such as coordinating with Lebanese authorities. Rule 105 bis (A) allows the pre-trial court to initiate a trial in absentia if the defendants have not communicated with the court thirty days after the indictment.

The STL issued the indictment in Prosecutor v. Salim Jamil Ayash, et al. on June 28, 2011. Despite arrest warrants being issued on July 8, 2011, the defendants failed to appear before the court. In September, the pre-trial court initiated proceedings to seize the trial court to determine if a trial in absentia could proceed. However, the prosecution filed a motion that was granted requesting a delay in the proceedings because all reasonable measures to secure the defendants under Rule 106 have not been completed. The prosecution cited a lack of cooperation between the trial court and the Lebanese authorities who could do more to search for and arrest the defendants. However, on February 1, 2012, the Trial Chamber ordered the commencement of a trial in absentia against the four accused to start this year. If the four accused are found guilty, they may accept the verdict of the trial in absentia, accept the verdict and request a hearing on some aspect of the case, or request a new trial.

While in theory an apolitical tribunal, the STL is in a tenuous position given the current political situation in Lebanon. As the three-year mandate of the tribunal draws to a close and Hezbollah gains political support throughout the country, in part by promising to defund the STL, issuing a ruling to authorize a trial in absentia may add fuel to the fire and create increased resentment against the tribunal. Furthermore, the validity of a trial in absentia must be questioned. While the indictments of the four accused have been published throughout Lebanon and the world, it is possible that the suspects are so well hidden that they have not heard of the indictments, in which case commencing with a trial against them could violate their rights under the ICCPR. On the other hand, if the TIMES article is true, the rights of the victims to have their day in court against the accused should not be denied simply because the controlling political party in Lebanon wishes to avoid it. In the end, effective international justice should rise above the political concerns of a state.

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UPDATES FROM REGIONAL HUMAN RIGHTS SYSTEMS

INTER-AMERICAN SYSTEM

INTER-AMERICAN SYSTEM ENHANCES MONITORING OF LESBIAN, GAY, TRANSGENDER, AND INTERSEX PERSONS

In November 2011, the Inter-American Commission on Human Rights (IACHR, Commission) created a Unit on the Rights of Lesbian, Gay, Transgender and Intersex Persons (Unit) to improve its ability to protect the rights of lesbian, gay, transgender, and intersex (LGBTI) individuals. The IACHR will evaluate the Unit’s work after a year and determine whether to create a rapporteur on LGBTI rights. The Unit was created after the Commission held a hearing focusing on the lack of protection of the LGBTI community throughout the Americas and states’ failures to prosecute hate crimes against LGBTI persons. Article 1 of the American Convention on Human Rights requires signatories to respect the rights of all persons without discrimination, and Article 24 guarantees all people equal protection.

In establishing the Unit, the Commission cited the legal discrimination and physical violence suffered by LGBTI-identified people in the Americas. The Commission has addressed these human rights violations using precautionary measures, hearings, and other promotional activities. For example, in an April 2011 hearing, the Commission heard from petitioners on the situation of the LGBTI community in Haiti after the earthquake. The petitioners explained that in times of chaos, violence against the LGBTI community increases; in fact, claims that the earthquake was Haiti’s punishment for allowing the presence of LGBTI persons are a common justification for renewed violence. In September 2010, the Commission found that Chile had discriminated against a lesbian mother on the basis of her sexual orientation and referred her case to the Inter-American Court of Human Rights (IACtHR, Court). The Court found that Chile had violated her rights to equal protection under the law (Article 24), privacy (Article 11), and her right to a family (Article 17) when it denied her custody of her children based on her sexual orientation.

The development of the Unit is part of a larger LGBTI advocacy movement within Latin America. In July 2010, Argentina became the first Latin American country to legalize same-sex marriage and adoption nationwide. In November 2011, Ecuador’s Ministry of Health closed approximately thirty clinics claiming to “cure homosexuality.”

Despite these advancements, LGBTI individuals still struggle with a culture that is slow to change and hesitant to recognize LGBTI-identified people equal rights. Additionally, many Latin American leaders balk at passing strong legislation protecting LGBTI rights, and often avoid prosecuting crimes against the LGBTI community as hate crimes due to their conservative cultural backgrounds.

The Unit forms part of the Commission’s plan of action to enhance protection of LGBTI rights in the region, and will hopefully counter the pervasive anti-LGBTI sentiment throughout the Americas. One of the Unit’s tasks will be to document sexual orientation and gender identity-derived human rights issues and make recommendations on public policy, legislation, and judicial interpretation. Additional responsibilities include ensuring prioritization of discrimination cases against LGBTI persons and further developing the Organization of American States General Assembly’s resolutions pertaining to LGBTI rights.

Although many human rights organizations such as the International Gay and Lesbian Human Rights Commission celebrate the creation of the Unit, it has also been met with some criticism from conservative commentators. Professor Ligia M. De Jesus of the Ave Maria School of Law claims that the Unit is an indication that “activists, rather than jurists” control the Commission. Others who have chosen to remain anonymous claim that by protecting the rights of certain groups, the Commission is failing to protect other groups.

The Commission’s creation of the Unit on the Rights of LGBTI persons is an indication that LGBTI rights are gaining more attention and protection in Latin America, even amidst discrimination and conservative social beliefs. The Unit’s increases the capacity of the Commission to protect vulnerable people throughout the Americas by focusing attention and resources on LGBTI rights, and will likely be followed by the creation of a rapporteurship.

CONDITIONS IMPROVE AT BRAZILIAN PRISON; COURT LIFTS PROVISIONAL MEASURES

In August 2011, the Inter-American Court of Human Rights (IACtHR, Court) lifted provisional measures it had issued in response to continuous acts of violence perpetrated by both guards and inmates at Urso Branco prison in Brazil. The improvement in conditions at Urso Branco, and the Court’s subsequent lifting of the provisional measures, are an indication that the Court can effect change outside the traditional adversarial process. Despite advancements at Urso Branco, however, the Court issued additional provisional measures in December 2010 in response to injuries at Unidade de Internação Socioeducativa (UNIS, Socio-Educational Internment Facility), a correctional facility in Brazil for children and adolescents, which indicates the continued need for systemic prison reform throughout the country.

Article 63.2 of the American Convention on Human Rights (American Convention) grants the Court authority to implement provisional measures in cases of extreme gravity and urgency to prevent irreparable damage to individuals. Provisional measures can be issued either upon submission of a case by the Inter-American Commission on Human Rights (IACHR, Commission) to the Court, or when the Commission itself requests them. The Court’s provisional measures are binding on Brazil because it has ratified the American Convention and recognized the jurisdiction of the Court. Articles 4 and 5 require Brazil to protect individuals’ rights to life and humane treatment.

The Inter-American System has addressed poor conditions at prisons and juvenile detention centers in Brazil through
reports, hearings, court decisions, and provisional measures since at least 1995. Violence and riots are not uncommon in Brazilian prisons. For example, in 2007, Sao Paulo’s most powerful criminal gang attacked prison staff and police officers in retaliation for the death of 111 prisoners who had died when a prison riot was suppressed in 1992. In November 2010, eighteen prisoners were killed in two separate riots in northeastern Brazil over access to water and the rate at which their criminal cases are reviewed.

In response to a fatal prison uprising on the night of January 1, 2002, the Commission requested that provisional measures be issued to protect the inmates at Urso Branco prison. During the uprising, prison guards allowed inmates to attack each other until an assault team entered the prison the next morning to quell the riot. There were between twenty-seven and forty-five casualties. The Court ordered the state to take all measures necessary to protect the lives of the Urso Branco inmates, investigate the circumstances of the uprising, and report back to the Court periodically. Despite the implementation of provisional measures, in April 2004, another riot broke out at Urso Branco, resulting in the deaths of fourteen inmates. The most recent violent deaths at Urso Branco occurred in December 2007, when prison guards shot, but did not kill, four inmates during a two-day period in August 2009.

In August 2011, the Court lifted the Urso Branco provisional measures after prisoners’ representatives agreed with national and state government representatives that conditions had improved significantly over the nine-year period. The State had submitted a report to the Court in July 2002 as evidence of improved conditions at Urso Branco, claiming that penitentiary agents were replacing the special police force in charge of security, and that competitive public tests were being conducted to ensure that candidates for penitentiary agent positions were highly qualified. A September 2004 compliance report to the Court indicated that the prison had increased the number of guards and improved the quality of prison health care. In additional statements to the Court, Brazil claimed that 1) the number of Urso Branco prisoners had decreased; 2) the prison had been renovated; 3) free legal advice was now available to the inmates; and 4) steps had been taken to create a professional training program for the inmates.

Before lifting the provisional measures, federal and state authorities signed an agreement with the prisoners’ representatives detailing plans for the improvement of Urso Branco. Brazil agreed to continue improvements in five areas: prison infrastructure, enhanced training for prison personnel, investigations into prison deaths, improvement of social inclusion resources, and finally, research into methods used to combat violent prison culture.

Despite improvements after the Urso Branco violence, recent violence at UNIS is evidence that Brazilian prison conditions continue to be a problem. On January 31, 2011, UNIS agents entered the facility after an escape attempt, and in the ensuing confrontation between the agents and the juveniles, five juveniles were injured. On February 25, 2011, the Court implemented provisional measures to protect UNIS inmates, requiring that Brazil effectively protect the life and personal integrity of the youths in the detention center, and that the methods of punishment adhere to international norms.

Although the UNIS provisional measures indicate that the Brazilian detention system continues to warrant vast reform, the state’s efforts to ameliorate conditions in response to the Urso Branco provisional measures is a step in the right direction. The Inter-American System’s readiness to compel member states to address poor prison conditions, and the subsequent improvements, are promising movements for prisoner rights in greater Latin America. Time will tell whether advances achieved are systemic or merely reactive to discrete incidents.

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**European Court of Human Rights**

**Decision Upholding In Vitro Fertilization Ban Relies on Lack of European Consensus**

The European Court of Human Rights (ECtHR) ruled on November 3 that no consensus has emerged on the continent to make *in vitro* fertilization a human right that requires protection. The decision comes only four years after the ECtHR concluded that a couple had the right to the procedure when the man was in prison. The Grand Chamber’s decision in *S.H. v. Austria*, however, was not based solely on precedent or the specifics of Austria’s governing statute, but sought to discern how fertility treatment fit within Article 8 (respect for private and family life) of the European Convention on Human Rights (ECHR).

There are varying methods of conception outside of copulation, and Austria’s law does not ban all forms. The country specifically bans *in vitro* fertilization — conception outside of the female’s body — involving third parties, that is, where either the ovum and sperm do not come from the involved couple, who must be married or in a similar situation. Under extreme circumstances, such as where the involved male is sterile, donor sperm can be used, but it must be implanted *in vivo*, meaning the fertilization happens inside the woman’s body. By contrast, donor ovum can never be used for *in vivo* fertilization.

*S.H. v. Austria* was brought before the ECtHR by two couples unable to conceive without the use of banned third party *in vitro* procedures. In a decision on the merits, a chamber of the First Section of the Court found that Austria’s law violated Article 8, recognizing “the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose.” Because the Grand Chamber ruled this right existed, it found a violation of Article 14 (prohibition of discrimination) by not allowing those unable to conceive access to that right. Austria appealed the decision to the higher Grand Chamber and argued that that although the right to conceive should be protected, that right must not extend to all possible means of conception. In particular, the state was concerned with “selection” of children, exploitation of women, and the dilemmas created by children who would have two women who could claim motherhood.

In its judgment, which is final, the Grand Chamber struck down the lower chamber’s ruling, finding no violation of Article 8 of the ECHR, which also had the effect of making Article 14 inapplicable. In particular, the ECtHR found that Austria’s laws strike a balance between public and private concerns. That balance was used in the same manner as in what otherwise appears to be a conflicting ECtHR ruling.
in favor of a prisoner whose wife was denied access to artificial insemination in *Dickson v. United Kingdom*. In *S.H. v. Austria*, the Grand Chamber cited studies documenting regulation of *in vitro* fertilization across Europe, including bans on ovum donation in several European countries. For the Grand Chamber, a lack of consensus across the continent and an absence of long-standing principles signified that the issue before the court — whether Article 8 encompasses the right of couples to *all possible means* of medically induced conception — is not settled. That conclusion led the Grand Chamber to decline to step in and decide domestic policy, so long as states maintain that balance between public and private concerns.

In the fertilization debate, proponents of expanded access to scientific methods of conception call on Article 8 and similar protections that specifically identify a right to creation of a family as a dominant human right. The dissent in the *Austria* opinion cited a World Health Organization report that concluded that infertility affects 80 million people worldwide. The authors of the report wrote that, “it is a central issue in the lives of the individuals who suffer from it. It is a source of social and psychological suffering for both men and women and can place great pressures on [a couple’s] relationship”. The other side approaches the debate by identifying the “moral and ethical issues,” as the court calls them, emphasizing the creation of life and the concern that fertility treatments often prioritize science over morality. One of the most prominent opponents of *in vitro* and other methods of artificial fertilization is the Catholic Church. In 2008 Pope John Benedict XVI, in reference to fertilization outside of the body, said, “When human beings in the weakest and most defenseless stage of their existence are selected, abandoned, killed or used as pure ‘biological matter’, how can it be denied that they are no longer being treated as ‘someone’ but as ‘something’, thus placing the very concept of human dignity in doubt?”

The ECtHR’s restraint in interfering with fertilization policy reflects the court’s avoidance of choosing between two different issues within the human rights framework: the right to family life and a concern for the law’s interference in deeply entrenched moral issues concerning the creation of life. Like in *A, B, and C v. Ireland* in 2010, when the court ruled that Ireland could not restrict access to legal abortions but declined to require the country to extend the practice beyond when a woman’s life is at risk due to pregnancy, the court stayed out of the broad moral decision. The court, in avoiding a sweeping ruling in *S.H. v. Austria*, ensured that the moral and religious issues neither overstepped individual protections nor were impugned by other human rights issues.

The ECtHR made it clear with its decision in *S.H. v. Austria* that it is not inclined to decipher the answer to the Pope’s question. The court recognized that there might be changes to the overall trend in Europe and gave notice to the states that the issue “needs to be kept under review.” Unless consensus emerges, the ECtHR is concerned with making sure both sides of a debate are represented in the law instead of choosing between the two.

**European Court Sidesteps Exacerbating UK Conflict in Hearsay Case**

The Grand Chamber of the European Court of Human Rights (ECtHR) averted a possible conflict with the United Kingdom in December by overturning a lower Chamber ruling that almost completely barred the use of hearsay evidence to convict a criminal and overruled exceptions in British law. The long awaited decision in the combined case of *Al-Khawaja and Tahery v. the United Kingdom*, — arriving more than 18 months after the Grand Chamber hearing — came as the UK assumed the rotating chairmanship of the Committee of Ministers of the Council of Europe, the larger body that oversees the ECtHR. The chairmanship has emboldened critics within the UK government to push for long-sought reforms to the Court and the country’s connection to it.

The Grand Chamber overruled the lower Chamber in the case and held that testimony is admissible where there is good reason a witness cannot testify directly and there are adequate safeguards to comply with Article 6 of the European Convention of Human Rights (ECtHR), which provides for the right to a fair trial. In the case of *Al-Khawaja*, a woman who accused the defendant of indecent assault was unable to testify because she had committed suicide, but a number of friends and the complaint of another alleged victim corroborated her affidavit. The Grand Chamber upheld this use of hearsay evidence. In the case of *Tahery*, however, one witness refused to testify in the trial involving a stabbing during a gang fight and the case hinged critically on that witness’ testimony, which the defense had no other method of challenging. The Grand Chamber of the ECtHR did not object to the barring of this testimony. The approach essentially adopts the British rule of a generally strong restriction on hearsay evidence with an exclusion for only particular circumstances.

Previously, the UK has bristled over ECtHR-imposed restrictions on its ability to deport foreign nationals — including those convicted of violent crimes like rape — and for more than six years has refused to adhere to an ECtHR decision requiring that convicts be allowed to vote. In a January 24, 2012 speech before the Council of Europe Parliamentary Assembly, Cameron staked out the UK’s plans for reform in response to what he called growing unease over the court. “When controversial rulings overshadow the good and patient long-term work that has been done,” he said, “that not only fails to do justice to the work of the court it has a corrosive effect on people’s support for human rights.”

A leaked draft of the UK’s plan for ECtHR reform — called the Brighton Declaration — surfaced in February 2012 and advocates for bold reform in three significant areas. First it recommends inserting into the ECtHR explicit recognition of the principles of “subsidiarity” and the “margin of appreciation,” both of which operate to recognize the Court’s deference to national courts. Secondly, the document recommends a system whereby a national court could refer a point of law to the ECtHR. Third, it proposes altering the admissibility requirements under Article 35 to both shrink the time limit under which an application can be filed and make clear that the default is that an application is inadmissible if it is the same in substance as a matter decided by a national court taking into account the convention. The proposals will be debated at a conference in April at the end of the UK’s term at the chairmanship.

The Cameron government has also sought reform on the domestic level, which is controlled by the Human Rights Act of 1998, which *inter alia* committed British courts to give effect to the decisions of the
ECtHR. Political conflict lead one conservative member to resign from the eight-person panel working to draft a British Bill of Rights as a possible replacement for the Human Rights Act. Any progress the panel might make would also be limited by the UK’s treaty obligations under the ECHR, which makes all decisions by the ECtHR binding upon member states.

The reforms envisioned by the Brighton Declaration would further the British objectives by affecting what comes out of Strasbourg, not how it is implemented. The recommendations found within the proposal would likely make decisions such as Al-Khawaja and Tahery — where the national courts were given deference — a common occurrence. Although this would protect the interests of the states, the reforms would also meet an intended purpose of keeping cases out of the Court. The proposal calls this efficiency, but it would also have the effect of effect of restricting individuals’ access to the court as a final refuge.

ECtHR President Nicholas Bratza warned political leaders against using “emotion and exaggeration” to criticize the court in a speech delivered two day’s after Cameron’s address. Bratza — a British lawyer — defended the court and emphasized its importance amidst the European debt crisis. “Human rights, the rule of law and justice seem to be slipping down the political agenda in the current economic climate,” he said. “We must continue to ensure that the court remains strong, independent and courageous in its defense of the European Convention on Human Rights.”

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African Human Rights System

The East African Court of Justice Asserts its Jurisdiction to Hear the Independent Medical Legal Unit’s Reference Against the Kenyan Government

On June 29, 2011, The Independent Medical Legal Unit (IMLU) achieved a monumental victory in the East African Court of Justice (EACJ) in its case against the Republic of Kenya, when the court denied a motion to dismiss filed by Kenya’s Attorney General and ordered the case to proceed. IMLU is a non-governmental organization with a mandate to protect Kenyans from human rights violations perpetrated by the government. IMLU filed the reference against the Kenyan government seeking to hold it accountable for its failure to investigate and, if necessary, prosecute members of the Kenyan security forces responsible for extrajudicial killings, torture, and other human rights violations committed in Mt. Elgon District during the 2006-2008 violent conflict between Kenyan security forces and the insurgent Sabaot Land Defense Force (SLDF). Human Rights Watch (HRW) estimates that Kenyan security forces carried out hundreds of extrajudicial killings, detained and tortured thousands more, and are responsible for nearly 200 forced disappearances in violations of several international human rights conventions as well as the Kenyan Constitution.

In seeking dismissal, the Attorney General relied on Article 27 of the Treaty for the Establishment of the East African Community (Treaty), which limits the jurisdiction of the EACJ to interpreting and applying the Treaty and expressly restricts the Court from deciding cases related to human rights issues until a protocol — not yet completed — expands the Court’s jurisdiction over such cases. In response, the IMLU claimed that a good faith reading of Article 27 of the Treaty pursuant to the Vienna Convention on the Law of Treaties established the jurisdiction of the Court to hear allegations of violations of the fundamental Treaty principles, and the mere allegations are based on violations of fundamental Treaty principles, and the mere mention of alleged human rights violations in the reference does not purge the Court of its jurisdiction over the case.

The Attorney General also argued that the reference was time barred pursuant to Article 30(2) of the Treaty. According to the Attorney General, IMLU knew about the complaint in 2008 and failed to file the reference to the EACJ within two months thereafter. Yet the EACJ rejected this argument, ruling that the alleged violations — Kenyan government’s failure to investigate alleged human rights violations — are continuous from the time of the incident until IMLU concluded that the Kenyan government was not going to investigate and, where necessary, prosecute for alleged human rights violations.

Though IMLU gained a significant victory with the EACJ ruling against the dismissal of the reference as a whole, the Court dismissed the case against the Minister for Internal Security of the Republic of Kenya, the Chief of General Staff of the Republic of Kenya, and the Commissioner of Police of the Republic of Kenya — all of whom IMLU sought to hold accountable. The EACJ ruled that under Article 30, the individuals named in the lawsuit cannot be joined because they are merely employees of the Kenyan government and are therefore neither a state party nor an institution of the East African Community (EAC) that can be sued in the EACJ. Accordingly, only the Kenyan government can be held accountable by the EACJ for failing to ensure the rule of law, so only the Attorney General may be named in the lawsuit.

The EACJ’s rejection of the Attorney General’s opposition is significant beyond the case at issue. The decision effectively expands the jurisdiction of the EACJ to cases that detail human rights abuses, provided those cases focus primarily on violations of the Treaty. The failure of the Kenyan government to investigate details of atrocities committed during conflict in the Mt. Elgon region leaves the families of victims in plight with no means of obtaining closure and justice for their loved ones. The reference filed before the EACJ seeks to hold the Kenyan government accountable for this failure, and the court’s denial of the respondent’s opposition permits the case to move forward.

The African Court Affirmed Its Sole Jurisdiction over the Interpretation of the East African Community Treaty

On December 1, 2011, the East African Court of Justice (EACJ, Court) held that eligible applicants may file a reference alleging violations of the East African Community Treaty (Treaty) without first exhausting local remedies, and further issued a declaration that Rwanda breached the Treaty when it unlawfully detained
Lieutenant-Colonel Rugigana Ngabo of the Rwanda Patriotic Front (RPF). The case Plazeda Rugumba v. Attorney General of the Republic of Rwanda was initially filed by Lt. Col Ngabo’s wife in November 2010, urging the Court to declare that the government of Rwanda detained her husband incommunicado — without means of communication. Lt. Col Ngabo was not placed in preventive detention under lawful authority until January 2011, more than two months after the reference was filed.

The Court found that Rwanda violated Articles 6(9) and 7(2), which broadly oblige Rwanda as a party to the Treaty to adhere to principles of universal human rights through democracy and good governance. Mrs. Ngabo’s reference also sought to hold the Secretary General of the East African Community accountable for breach of Article 29 of the Treaty, specifically for failing to take necessary measures to oversee the compliance of Rwanda with the Treaty regarding the arrest and detention of Lt. Col Ngabo. The Court, however, dismissed the allegation against the Secretary General of the East African Community for lack of notice.

Mrs. Ngabo’s reference alleged that her husband was unlawfully detained incommunicado without trial as a threat to national security. According to Mrs. Ngabo’s application, her efforts to obtain information about the whereabouts of her husband had been futile to that point, and her husband had been denied his rights to visitation by either a health professional or even the Red Cross. In response, Rwanda denied the allegations, instead arguing that the Lt. Col Ngabo was in “preventive detention” in a military prison where the government extended him full rights within the perimeters of the Rwandan laws, including visitation rights. The Rwandan government conceded, however, that it did not lawfully move to place Lt. Col Ngabo in preventive detention until January 2011, after Mrs. Ngabo filed the reference before the EACJ. Lt. Col Ngabo’s detention from his August 2010 arrest to that point was found by the Military Court of Rwanda to constitute a breach of Articles 90 though 100 of the Rwandan Code of Criminal Procedure, which broadly govern custody pending investigation. More significantly, the Rwandan government challenged the jurisdiction of the Court to interfere with domestic affairs by hearing cases implicating human rights issues that are pending before local courts.

The Court rejected these arguments, holding that the jurisdictional challenge was premised on a mistaken interpretation of Mrs. Ngabo’s application to the Court. Mrs. Ngabo has sought a declaration that Rwanda breached its obligation under the Treaty. To that end, the reference implicates the Court’s Article 27(1) power to interpret the Treaty and ensure compliance. Significantly, the Treaty does not have an express provision that mandates that applicants exhaust all other remedies before seeking a remedy from the Court for an alleged violation of the Treaty. As such, the Court may entertain the reference even if the matter is pending before the Rwandan courts. The fact that Rwandan courts took action — notably, after the reference was filed — does not oblige the Court to then relinquish its exclusive jurisdiction to interpret Treaty and its mandate to ensure compliance.

The Court does not typically interfere with the states’ enforcement of its criminal law. However, in light of the absence of an express provision barring the jurisdiction of the Court over cases where applicants did not exhaust local remedies, as well as the Court’s exclusive jurisdiction to review alleged violations of the Treaty, the Court decided to entertain the reference. Accordingly, the Court found that Rwanda detained Lt.-Col in violation of Article 6, which restricts deprivation of individual’s liberty only in circumstances where the individual has violated established laws of the state, and Article 7, which grants individuals the right to be heard and go before a court within a reasonable time before an impartial court or tribunal.

Consequently, the Court issued a declaration stating the Rwanda breached Articles 6 and 7 of the Treaty. By declaring that applicants do not need to exhaust local remedies, the Court effectively expands the number of individuals who can file applications with the Court, and possibly increase the volume of cases that the Court considers. Furthermore, the decision indicates that although the Court does not directly interfere with domestic criminal matters, it retains jurisdiction to review the actions of states in the enforcement of their domestic in areas where compliance with the Treaty is implicated. As such, the Court’s decision in this case indicates a balance between the state’s rights to implement its laws and the Court’s mandate to ensure compliance with the Treaty.

INTERNATIONAL IMPLICATIONS OF THE UNITED STATES’ DE-FUNDING UNESCO

The UN Education, Science, and Cultural Organization (UNESCO) recently launched the Emergency Multi-Donor Fund to fill the void created by the decision of the United States, Canada, and Israel to halt their monetary contributions. Under U.S. legislation from the 1990s, the Obama administration was obligated to cut off funding to UNESCO after its members voted on October 31st by a margin of 107 to 14 with 52 abstentions to accept Palestine as a full member. The defunding may compromise basic international principles such as: UNESCO’s ability to promote universal education, Palestine’s right to international participation under the International Covenant on Civil and Political Rights (ICCPR), and multilateral cooperation on a much larger scale should the U.S. defund other UN organs.

U.S. contributions to UNESCO constitute nearly $80 million per year, or twenty-two percent of UNESCO’s regular budget. With the contribution mostly unpaid in 2011, UNESCO has halted all new projects, and may be forced to suspend other programs and lay off staff. The funding withdrawal was triggered by the 101st Congress’s passage of the Membership of Palestine Liberation Organization (PLO) in the UN Agencies bill. The Obama Administration is struggling to find a way around this statute that prohibits U.S. funding to any UN agency that accords the PLO the same standing as member states. The statute was passed in 1990, before the signing of the Oslo Accords between Israel and the PLO, which granted international recognition to the PLO as the legitimate representative of the Palestinian people. However, it is unlikely that Congress will amend this law and resume funding UNESCO because of a desire in the U.S. to cut government spending.

UNESCO works to attain equal education around the world, mobilize support for sustainable development, and encourage intercultural dialogue. As a key player in fulfilling the UN Millennium Development Goals (MDG), UNESCO supports and promotes literacy programs across the developing world. The right to education is enshrined in Article 13 of the International Covenant on Economic Social and Cultural Rights. UNESCO’s Education for All initiative, which seeks to meet the second MDG of universal primary education by 2015, has faced large funding gaps since its inception. UNESCO’s own funding shortfall as a result of the Palestinian vote is likely to exacerbate budgetary constraints on this crucial program. Specific programs that may be affected include: literacy training for Afghan police, an Iraqi curriculum development program, and education infrastructure support in South Sudan. The Emergency Multi-Donor Fund is unlikely to cover the twenty-two percent shortfall. Further, UNESCO will be forced to reformulate its budgetary plans in the coming years.

The Palestinian Authority (PA), a subsidiary of the PLO and the governing body of the West Bank, faces political and economic constraints as well. In April, a UN report on the progress the PA has made towards state-building concluded that its policies have placed the Palestinians in a position for the establishment of a state in the near future. Participation in international organizations is crucial to fulfilling conventional attributes of statehood. With the peace process between Israel and the Palestinians stalled, unilateral American actions are frustrating another avenue for Palestine’s international participation. The U.S.’s Membership of the PLO in UN Agencies bill seeks to deter further attempts by the Palestinians to gain full recognition in international organizations. In December, after halting development aid for two months, Congress voted to allow aid to the Palestinians as long as they were not admitted as a state into any other UN agencies. Facing a potential 1.1 billion dollar shortfall in 2012, Palestinians have little choice but to acquiesce. This is seemingly a breach of Article 5 of ICCPR, which says that no state shall engage in an activity that limits the freedoms provided in the ICCPR, which include the right of self-determination and the right of peoples to freely determine their political status.

Members of UNESCO contribute according to their share in the world economy. A member state that fails to pay its bills will also lose its vote in the organization. The consequences of a U.S. refusal to recognize the PLO could be far-reaching. If the Palestinians follow through on plans to apply for full membership in other UN and international institutions such as the International Atomic Energy Agency, World Health Organization and World Bank, U.S. law will require de-funding organizations that provide crucial international cooperation. It would deprive much of the UN system of its single largest monetary contributor, thus hindering the work of these specialized UN agencies.

EU BLOCKS SALES OF LETHAL INJECTION DRUGS TO THE U.S.

Through several UN General Assembly resolutions since 2007, the organization has encouraged the global trend towards the elimination of the death penalty. However, 34 U.S. states, the U.S. federal government and the U.S. military, as well as many other countries, continue to allow capital punishment. In December, the European Union (EU) decided to restrict sales to the U.S. of sodium thiopental and other drugs required in lethal injections, the most widely used method of capital punishment in the U.S., to prevent their use for the death penalty. Although international conventions calling for the elimination of the death penalty such as the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) do not obligate nations to promote the elimination of capital punishment, the EU is exercising its right to encourage abolition. Due to the U.S.’s shortage of lethal injection drugs and a Supreme Court that has shown some willingness to adopt the guidance of ratified international treaties, abolitionists are hopeful that the EU’s measures will succeed in decreasing the use of the death penalty in the U.S. with a view to abolition.

Internationalized courts prohibit capital punishment. The Second Optional Protocol to the ICCPR, which also calls on countries to report violations of the Protocol by member states, was adopted
by the General Assembly in 1989. Several regional organizations have also adopted legal instruments calling for the abolition of the death penalty within their membership, in particular the EU and the Organization of American States. Although these international conventions do not oblige signatories to promote the abolition of the death penalty in other countries, violations of international treaties are generally condemned and punished through various mechanisms adopted by other member states. Similarly, although the EU is not obliged to sanction countries that retain the death penalty, it is fully within its right to do so. The EU’s move offers an interpretation of Article 5 of the Universal Declaration of Human Rights (UDHR), which prohibits the use of “torture or other cruel, inhuman or degrading treatment or punishment” to include the death penalty. The EU is actively attempting to promote the abolition of the capital punishment, which it defines as illegal under the UDHR.

Protocol No. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1985, abolished the death penalty for all signatories. Although some European companies continued to export the drugs to the U.S., several countries began to impose limits prior to the EU’s decision to restrict sales of those drugs. The new restrictions have added to the already difficult challenge states face in obtaining the drugs necessary for lethal injections. The EU hoped its decision would mark a step towards the abolition of the death penalty leading towards the U.S. becoming a “paradigm for retentionist countries.” Death sentences have dropped dramatically in the U.S. recently. Some organizations partially attribute the sharp decline in executions to the supply shortage of lethal injection drugs. Several manufacturers have either suspended the manufacture of the drugs or blocked sales to the United States. Hospira, the only American manufacturer of sodium thiopental, suspended its production of the drug due to poor publicity from its use in lethal injections.

With an American administration purporting to work increasingly within a multilateral framework, many question whether international standards will pressure the U.S. to abolish the death penalty, as the EU hopes. Recent U.S. Supreme Court decisions, 

Roper v. Simmons and Graham v. Florida, took notice of the fact that the U.S. and Somalia stood alone as countries that had not ratified the UN Convention on the Rights of the Child. However, the Court made it clear that without codification of international treaties by the U.S. Congress, their provisions are not binding on the U.S., and criminal sentencing would be decided exclusively in accordance with U.S. laws. In Medellin v. Texas, the Court permitted U.S. courts to directly contradict a judgment of the International Court of Justice. As such, UN resolutions and other international protocols calling for the abolition of the death penalty are not binding on United States. Thus, without an affirmative decision by Congress to outlaw the death penalty or codify international treaties which do so, the U.S. will continue to retain such a practice. Meanwhile, the EU’s move to block sales of lethal injection drugs, which it promises to continue and expand as necessary, may have a practical effect leading to the decreased implementation of executions in the U.S.

Marie Soueid, a J.D. candidate at the American University Washington College of Law, covers Intergovernmental Organizations for the Human Rights Brief.
Joan Grillo, El Narco: Inside Mexico’s Criminal Insurgency (Bloomsbury Press, 2011)

The Mexican drug trade has been rampant for decades, increasing in violence as the years have passed. A recent BBC article reported that since 2006, there have been 50,000 drug-related killings in Mexico. Each day members of Mexican drug cartels engage in battles against each other, Mexican state and federal police, and the Mexican military. Because of the drug trafficking, people in Mexico, including Mexican citizens, foreigners, and migrants, experience human rights violations on a regular basis. The most severe of these are violations of the right to life, but also include lack of access to medical care, education, and livelihood.

Joan Grillo, a British journalist who has lived and worked in Mexico for ten years, takes a close look at drug trafficking in Mexico, how it functions, why it operates as it does, and who it effects. El Narco: Inside Mexico’s Criminal Insurgency paints a bleak picture of combative drug cartels, weak police and prosecutors, and rising violence. Grillo describes grotesque events, such as when narco-traffickers sewed a face onto a soccer ball, and threw heads onto a dance floor in a nightclub. Grillo deftly pulls voices from a variety of individuals, including civilian victims of violence, Mexican soldiers turned drug-cartel assassins, and Mexican politicians, each of whom explain the incentive to join the cartels, and the fear and intimidation the cartels wield.

Grillo takes the reader through different aspects of narco-trafficking, each one entrenched in the culture of trafficking. The book begins with the history of growing marijuana and opiates in Mexico, and then moves into the formation and structure of the main cartels — the Sinaloa, La Familia, and the Zetas. This section includes fascinating accounts of song-writers who are paid to write songs that glorify narco leaders, and reflect the religious fanaticism that accompanies some of the groups. The book concludes with discussions about the prosecution of narco-traffickers and the expansion of the cartels beyond narco-trafficking and into extortion. Grillo continually drops in bits of information about his own history, such as how he had many friends who were avid drug users, and how that somehow allows him understand drug addiction better. Although his comments do not provide insight into the Mexican drug violence, he seems to be building his own legitimacy by bringing himself closer to the subject matter.

From a legal perspective, one of the most interesting parts of the book is the chapter titled “Insurgency,” which deals with the classification of the conflict. Many scholars have tried to classify the conflict in Mexico. One law review article contends that the situation has risen to the level of a non-international armed conflict akin to the Colombian conflict. The Mexican government, afraid of the impact on foreign investment and tourism, is unlikely, however, to declare a non-international armed conflict. Many human rights groups also discourage such a classification, arguing that human rights abuses often increase during armed conflict. In fact, Human Rights Watch recently released a report documenting human rights abuses committed by the Mexican police and military during anti-narcotics operations.

Grillo does not classify the conflict as an armed conflict, but instead reinforces an idea that the Mexican drug cartels are a “criminal insurgency.” The U.S. Army “Counterinsurgency” manual defines an insurgency as a “protracted, politico-military struggle designed to weaken the control and legitimacy of an established government . . . .” Unlike a traditional insurgency, however, the drug cartels do not fight based on ideology, and they do not want to take control of the government. The narco-traffickers seek to make money, and do so by illegal means, thereby making their insurgency “criminal.”

Grillo uses a definition of “insurgency” from Merriam-Webster’s dictionary, and likens the conflict to that of the rebellion in the Niger Delta over oil fields. Taking the definition from a dictionary seems, perhaps, rudimentary, but it also works. The dictionary defines “insurgency” as “a person who revolts against civil authority or an established government,” and the drug cartels are doing just that in the name of making money. Perhaps it is easy to incorrectly presume that insurgencies are related to religious ideology because of the U.S. “war on terror,” while in fact, an insurgency is a simple revolt against authority. Despite the debate over how to legally classify the conflict in Mexico, Grillo vividly describes how the Mexican drug cartels from their history and early beginnings to their current rituals and effects on everyday life in Mexico.

Tracey Begley, a J.D. candidate at the American University Washington College of Law, reviewed El Narco: Inside Mexico’s Criminal Insurgency for the Human Rights Brief.

Endnotes on page 77
“Our clients’ stories do not begin and end in the United States. They begin and end in their home communities.” This realization prompted Rachel Micah-Jones to establish Centro de los Derechos del Migrante (CDM — Center for Migrants’ Rights), the first transnational migrant workers’ rights organization based in Mexico. However, Micah-Jones’ journey to seek justice started not in Mexico, but at the Washington College of Law (WCL).

Reflecting on how she became interested in law and migration, Micah-Jones, a WCL class of 2003 graduate, notes that she gradually developed a deep intellectual curiosity about migrant experiences. When considering where she would attend law school, Micah-Jones was drawn to WCL for its strong emphasis on public interest work and the variety of experiences the school offered in the human rights arena. One such experience at WCL’s International Human Rights Law Clinic (IHRLC) would guide Micah-Jones’ life and career. During Micah-Jones’ third year at WCL, members of her clinical team represented a domestic worker who was trapped in an exploitative labor situation due to the high recruitment fees and travel costs she had paid to attain her job. Micah-Jones remembers speaking with her fellow classmates and professors about how things would have been different for their client had she been informed about her rights before she left for the United States. Perhaps their client could have avoided the situation altogether, or at least sought help earlier, if she knew about resources available to her.

These conversations and the memory of that client stayed with Micah-Jones as she began her first job after graduation with Florida Rural Legal Services (FRLS), a statewide legal service agency that provides assistance to those who cannot otherwise afford an attorney. Micah-Jones continued the work she had begun during her WCL clinical experience by working on FRLS’ Migrant Farmworker Justice Project, which focuses on representing migrant workers in Florida’s agricultural sector. The majority of Micah-Jones’ clients at FRLS were Mexican, and to better communicate with them, Micah-Jones applied for and was awarded a grant from the Florida Bar Foundation to take Spanish language classes in Mexico during the summer after her first year with FRLS.

While in Mexico, Micah-Jones not only honed her Spanish language skills, but also learned more about her clients’ home communities. She had contact with many of the same clients she had helped in Florida, but found their demeanors to be completely different in their home communities. When Micah-Jones had visited these clients in Florida, they were reticent to discuss their experiences, even though FRLS was already aware that their living conditions were sub-standard. In Mexico, however, the clients were more self-assured and eager to speak about their experiences in the U.S. — about how they had not been paid, about the mistreatment they had endured, and about the poor conditions in which they lived.

It was at this point that Micah-Jones truly understood the fear factor at play in U.S. employer-Mexican migrant worker relations: without any knowledge of their rights, migrant workers were unable to assert themselves upon arrival in the U.S. and consequently, were taken advantage of throughout the entire process, from their recruitment to their return to Mexico. Having had this revelation, Micah-Jones felt compelled to combat the injustice she saw. In 2005, about one year later, CDM opened its first office in Zacatecas, Mexico.

The logistics of starting an international NGO were not easy to navigate, but seven years after its founding, CDM has expanded its work with migrant workers in the agricultural sector to include those in the landscaping, crab picking, and traveling fair and carnival industries. CDM’s primary work now falls into four core project areas: 1) Outreach, Education, and Leadership Development; 2) Intake, Evaluation, and Referral Services; 3) Litigation Support and Direct Representation; and 4) Policy Advocacy.

Through its Outreach, Education, and Leadership Development project area, CDM staff meet with workers in the safe space of their home communities and give them information about their rights before leaving for the U.S. In this vein, CDM helped establish a Comité de la Defensa del Migrante (Migrant Defense Committee) composed of current and former migrant workers who act as peer-to-peer educators and access points all along the migrant stream, collaborating to prevent abuses once workers are in the U.S. The Comité has also been instrumental in referring cases to CDM for litigation support, with significant success.

CDM’s Intake, Evaluation, and Referral Services and Litigation Support and Direct Representation projects work in tandem. CDM documents and evaluates cases identified by CDM staff or referred by partners in the U.S. or Mexico. If CDM cannot take the case, it connects the worker to a union, legal aid, or social services organization, as appropriate. When CDM litigates a case, it does so in conjunction with partner
organizations and counsel in the U.S. For example, last year, CDM brought cases on behalf of traveling fair and carnival workers who were paid subminimum wages for extremely long workdays, provided inadequate food and water, and forced to live in crowded, bug-infested conditions. These workers’ passports were also unlawfully confiscated upon arrival in the U.S. A Comité leader who had been trained by CDM prior to his departure for the U.S. brought this situation to the attention of another NGO, and the New York Attorney General’s Office ultimately recovered $325,000 for CDM’s client and his co-workers. When the Comité leader returned to Mexico, he also started organizing and educating workers recruited by carnivals and traveling fairs, which has led to CDM’s Fair Workers, Fair Wages campaign. Through this campaign, CDM, in collaboration with worker centers, law firms, low-wage worker advocates, and universities, seeks strengthened protections for traveling fair and carnival workers vis-à-vis advocacy with policymakers and strategic domestic and international litigation.

The carnival and traveling fair workers in these cases had all paid illegal recruiting fees to have their names added to a list of H-2B visa job seekers. The H-2B visa is used by employers to hire seasonal, non-agricultural migrant workers for jobs in industries such as landscaping, seafood, forestry, and hospitality. For this reason, CDM applauds the new U.S. Department of Labor (DOL) regulations released in February 2012. Under the new regulations, DOL will create a nationwide electronic registry where employers will be required to post all positions for which they wish to hire H-2B workers. The database enhances the transparency of the H-2B system and will hopefully result in fewer abuses by recruiters of potential employees, while at the same time affording job seekers a better idea of the work they will be doing in the U.S. and the hourly rate they will be paid. For example, when employers apply to hire H-2B visa workers, they must now provide the DOL with copies of any agreements they have with recruiters and sub-contractors hired by recruiters. Also, employers must disclose an accurate description of the H-2B job to potential workers, in a language they understand. Finally, employers must guarantee wages that meet the state minimum wage, must pay at least the wage offered to the employee, and must provide all tools necessary to the job free of charge. Micah-Jones notes with pleasure that “overall, the new regulations represent a huge step forward for transnational migrant worker rights,” though she hopes to see them enforced. Micah-Jones adds that CDM is developing an additional tool to help prevent migrant worker abuse in the form of an interactive map via which workers can obtain information about recruiters and connect with those who have already worked for a certain employer.

CDM also contributes to labor and migrant worker policy debates by providing analysis and recommendations to policymakers on both sides of the border and to worker advocacy groups, through its Policy Advocacy project. One form of CDM’s policy advocacy work is a report, Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry (Picked Apart), co-authored with the Immigrants’ Rights Section of the IHRLC (which has since become its own entity, the Immigrant Justice Clinic). The report documented labor conditions experienced by Mexican women who traveled to the U.S. on H-2B visas to work in the crab industry on the Eastern Shore, and recommended reforms on the state, national, and international levels. For example, Picked Apart recommended that Maryland Occupational Safety & Health (MOSH) provide greater oversight to the crab industry to help reduce the incidence of injury and illness among workers. Women interviewed by CDM and WCL universally reported sustaining cuts on their hands and arms while working with crabs, either from the shells or from the knives they use to extract the meat. These cuts often became infected because the women did not stop working to clean them, fearing they would not meet their daily quota of picked crabmeat.

Similarly, the report urged greater U.S. regulation of recruitment practices and sanctions for employers engaging in worker abuse through unfair and unlawful recruitment tactics. The majority of women workers interviewed for Picked Apart reported taking out loans to pay the recruitment fees; they then had to pay up to fifteen percent monthly interest on these loans, while additionally covering the costs of housing, groceries, transportation, and work tools, and also remitting money to family in Mexico. In a small victory for CDM and WCL, DOL’s recent regulations were influenced in part by Picked Apart’s findings and recommendations, and CDM’s continued advocacy. Finally, on the international level, Picked Apart urged the U.S. government to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the United Nations General Assembly on December 18, 1990. Unfortunately, to date, the U.S. and most other migrant receiving countries still have not ratified the convention.

Besides her busy life as CDM’s Executive Director, Micah-Jones has recently taken a position in the clinical program at the University of Maryland School of Law after relocating from Zacatecas back to Baltimore with her husband and two children. Micah-Jones is currently working on a report detailing labor abuses under the North American Free Trade Agreement with her clinic students.

In considering where her journey will take her next, Micah-Jones says that she feels lucky to have the support of her family, colleagues, and role models, and to be able to do work that she loves. She hopes that she will be able to continue the work of CDM, especially in supporting the sustained development of the Comité and its efforts to make a lasting impact on international labor recruitment issues. Micah-Jones believes that by giving workers the tools they need to organize and defend their rights, the workers themselves will be able to bring a much-needed transnational worker perspective to policy debates about recruitment and labor conditions. Likewise, the workers will be able to empower their compatriots as they undertake their own journeys from Mexico to the U.S. and back again.

Christina Fetterhoff, a J.D. candidate at the American University Washington College of Law, wrote this alumni profile for the Human Rights Brief.
Maryland Legal Aid Bureau and Texas Rio Grande Legal Aid Selected as Local Human Rights Lawyer Project Partners

The Center’s Local Human Rights Lawyer Project works with legal aid organizations to provide training, coaching, mentoring and technical assistance for integrating international human rights norms into domestic legal aid work in the U.S. Funded by the Ford Foundation, the project is the first of its kind — working at the state level to incorporate human rights norms, language and strategies into domestic work to help advocate for increased protections.

After receiving more than 10 applications from legal aid organizations across the United States, the Center selected Maryland Legal Aid Bureau, Inc. (www.mdlab.org) and Texas Rio Grande Legal Aid, Inc. (www.tra.org) as its Project Partners for the Local Human Rights Lawyer Project. Maryland Legal Aid Bureau and Texas Rio Grande Legal Aid are both highly respected and creative legal aid organizations with a demonstrated commitment to human rights.

The Project has also established an Advisory Board with over twenty members, consisting of leading legal aid attorneys and human rights experts from across the United States. Work on this project expands on nearly ten years of work by the Center in promoting human rights law in the U.S. Through trainings, workshops, mentoring, and research, the Center seeks to enhance understanding of international law and its applications to domestic social justice work. The Center aims to bridge the gap between the U.S. role in actively promoting human rights abroad and recognition of international law and standards within the U.S. legal system. For more information, visit the Local Human Rights Lawyer Project at http://www.wcl.american.edu/humright/locallawyering.cfm.

Groundbreaking Research with Successful Post-trafficking Re/integration in Nepal Underway by Center’s Program on Human Trafficking and Forced Labor

The Center’s Program on Human Trafficking and Forced Labor is midway into a first-of-its-kind study to investigate the re/integration strategies of women who are living in Kathmandu Valley after having been trafficked into forced prostitution in India. The study involves qualitative interviews and focus group discussions with 30 women who escaped or were rescued and repatriated to Nepal from 2 to 8 years ago, and then entered the care of one of two Nepal NGOs. The study will investigate women who, for various reasons, have not returned to their natal/family and community, and have sought to live independently in urban Nepal society (Kathmandu). This is a positive deviance study and the sample women have purposively selected for their re/integration success. The Program is collaborating with a Nepalese research institute and an expert consultant in Nepal.

This pioneering research will collect valuable information on NGO service delivery and on successful self-initiated re/integration strategies, leading to recommendations to strengthen NGO practices to support the re/integration of returnees and to address the legal and social obstacles of discrimination and stigma that prevents many former victims from rebuilding their lives.

The culminating report will be finalized by early Summer 2012. For more information on the Center’s Program on Human Trafficking and Forced Labor, visit: www.RightsWork.org.

Center Partners with Robert F. Kennedy Center for Justice and Human Rights to Develop Pioneering Human Rights Education Program for Law Students and High School Students

The Center has partnered with the Robert F. Kennedy Center for Justice and Human Rights (RFK) to create a one semester program for law students to learn about various human rights education pedagogies and to teach RFK’s Speak Truth to Power (STTP) human rights curriculum in local high schools. The program will create an innovative, replicable model for experiential learning and teaching of human rights. It is unique in its focus on training students on the use of different strategies and methodologies to create points of entry for discussion of rights-based issues; refining understandings of ways to talk about rights to different audiences; and providing practical experience of examining hard legal issues with non-legal audiences. The pilot program will be taught as part of the Fall 2012 WCL curriculum.

Speak Truth to Power, a project of the Robert F. Kennedy Center for Justice and Human Rights, uses the experiences of human rights defenders from around the world to educate students and others about human rights and empower them to understand and operationalize the rights framework in their own lives. The project’s renowned human rights curriculum, which has been taught to thousands of students in Africa, Asia, Europe and the United States, encourages youth to become personally involved in the protection of human rights. The STTP Law Project builds on the success of the STTP curriculum, and expands on more than two decades of work by the Center to help prepare law students to effectively discuss and advocate for human rights.

Human Rights Watch Researcher Joins On-the-Ground Journalist to Highlight Ethics in Research Issues in Post-Earthquake Haiti

The Center and the American University Washington College of Law International Human Rights Law Clinic hosted an expert panel discussion on November 7, to discuss and debate the challenges of human rights research and investigative journalism in a post-disaster setting. Amanda Klasing is a Researcher in the Women’s Rights Division of Human Rights Watch (HRW) and author of “Nobody Remembers Us”. Failure to Protect Women and Girls’ Right to Health and Security in Post Earthquake Haiti. Kathie Klarreich is a well-known

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jornalist and author on Haiti and a Knight International Journalism Fellow at HRW. The panel addressed logistical challenges, potential obstacles to acquiring true and informed consent from interviewees, and limitations of the legal framework. The event received international press coverage and was featured on Voice of America's Creole Service: http://www.voanews.com/creole/news/Yon-Fowom-sou-Dwa-Fanmak-Timoun-ann-Ayiti-133827168.html

HUMAN RIGHTS FILM SERIES HIGHLIGHTS FOUR FILMS RAISING THE PROFILE OF KEY ISSUES; AWARDS GRANT TO ASPIRING HUMAN RIGHTS FILMMAKER

The 12th Annual Human Rights Film Series, first organized in 2000 and co-sponsored by the American University Center for Social Media (CSM), showcases the power of film to educate and advocate about human rights. Four exceptional documentary films that exhibit excellence in filmmaking and explore a broad spectrum of human rights issues are screened each fall. The 2011 selections were: *If A Tree Falls: A Story of the Earth Liberation Front; How To Die In Oregon; The Redemption of General Butt Naked;* and *Not in Our Town: Light in the Darkness.* Following each screening, there was an opportunity for the filmmaker and an expert human rights practitioner to discuss the issues highlighted in the screening with the audience. A Student Human Rights Grant Competition is carried out in conjunction with the Series to promote and support student's multimedia initiatives around human rights. This year's winner, student filmmaker Yi Chen, will utilize her award to tell the untold stories of Washington, DC's Chinatown neighborhood and raise awareness of the need for advocacy for the basic human rights of the community's residents. The Human Rights Film Series and the Student Human Rights Grant Competition are campus-wide initiatives supported by all six schools at American University. For more information on the 2011 Human Rights Film Series, visit: http://www.wcl.american.edu/humrightcenter/12thannualhumanrightsfilmseries.cfm.

THE RESPONSIBILITY TO PROTECT TODAY: DID LIBYA KILL R2P? EXAMINES EMERGING ISSUE IN INTERNATIONAL HUMAN RIGHTS LAW

The invocation of the emerging doctrine of the Responsibility to Protect was seen as a watershed moment for the development of the principle. With the overthrow of the Khaddafi regime, the status of R2P and how it was applied is now in question. On November 15, the Center's Student Advisory Board convened a panel discussion with three experts on the status of the doctrine of the Responsibility to Protect (R2P) in light of the crisis in Libya. UN Security Council Resolution 1973 provided the international community with authority to intervene to protect civilians in Libya. Speakers included (in alphabetical order): Jonas Claes, Senior Program Specialist, U.S. Institute of Peace, Center for Conflict Management; Don Kraus, Chief Executive Officer, Citizens for Global Solutions; and Prof. Clovis Maksoud, Professor at WCL and the American University School of International Service (SIS) and Director of the Center for the Global South at SIS. The panel was moderated by Student Advisory Board member Kaitlin Brush. The event was webcast live with 40 remote locations participating in the discussion via live webcast.

BEDOUIN CITIZENS OF ISRAEL: STRUGGLING FOR RIGHTS

The Center welcomed advocates who work on behalf of the Bedouin community of the Negev on a panel discussing issues facing unrecognized villages in Israel and the latest plan issued by the Israeli government to address those issues. Speakers included WCL 2008 LLM graduate and US-Israel Civil Liberties Law Fellows Scholar Rawia Abu-Rabia, now a member of the Israeli Bar Association and a practicing lawyer at the Association for Civil Rights in Israel in charge of the Bedouin rights project; Thabet Abu Ras, Director of the Negev Project at Adalah, the legal center for Arab minority rights in Israel; Hanan Alsanreh, Director of Education and Community Development at Sidreh Association; and Michał Rotem, Program Coordinator of the Negev Coexistence Forum for Civil Equality in Israel. The event was held in collaboration with Project Engage.

INDONESIAN MIGRANT RIGHTS DEFENDER ANIS HIDAYAH SPEAKS ON ABUSE AND PROTECTION OF MIGRANT WORKERS

On November 3, the Center and the WCL Women and the Law Program hosted a panel discussion featuring Anis Hidayah, recipient of Human Rights Watch’s 2011 Alison Des Forges Award. Striving to protect and promote the rights of Indonesian migrant workers abroad, Ms. Hidayah currently serves as the Executive Director of Migrant Care, a non-governmental organization based in Jakarta, Indonesia. Ms. Hidayah spoke about her work monitoring abuse of Indonesian domestic workers in countries such as Kuwait, Malaysia and Saudi Arabia, and advocating for their protection by calling for better labor laws, oversight of recruitment practices, and more effective immigration policies.

ANTI-SLAVERY EXPERT AND SURVIVOR SHARES GHANA’S EXPERIENCE

On Thursday, February 9th, the Center’s Program on Human Trafficking and Forced Labor welcomed James Kofi Annan, a prominent figure in the global anti-slavery movement, to speak to the WCL community about issues concerning Ghana’s law and policy enforcement in the context of forced labor and child trafficking in West African fishing and cocoa industries. Mr. Annan is the Founder and Executive Director of Challenging Heights, one of the largest anti-trafficking organizations in West Africa. A former victim of child trafficking in Ghana, James has devoted his career to fighting child slavery and has received international recognition for his work. Before a capacity-filled room, Mr. Annan shared his personal experiences and assessed local, national and international efforts to advocate for the rights of the child and allow communities the ability to reject child slavery and exploitation.

RIGHTSWORK.ORG PROJECT OF PROGRAM ON HUMAN TRAFFICKING AND FORCED LABOR PUBLISHES NEW RESEARCH

In January and February 2012, the Center’s Program on Human Trafficking and Forced Labor published two new articles looking at demand and transparency as it relates to human trafficking. The articles, *Lack of Transparency in Recruitment Spurs Trafficking* by Cathleen Caron and
Addressing the Demand Side of Trafficking by Phil Marshall, can be found on www.RightsWork.org. The site also published reviews of two new books looking at the differentiation between trafficking victims and labor migrants: Rhacel Parrenas' Illicit Flirtations: Labor, Migration, and Sex Trafficking in Tokyo and Pardis Mahdavi's Gridlock: Labor, Migration, and Human Trafficking in Dubai.

CENTER SELECTS 2012 STUDENT ADVISORY BOARD, RECOGNIZING AND TRAINING FUTURE HUMAN RIGHTS LEADERS

The Center is proud to announce the newly selected 2012 Center for Human Rights and Humanitarian Law Student Advisory Board (SAB) members: Christina Fetterhoff, Upasana Khatri, Diana Navas, Rachel Schulman, Corrie Walters, Jacqueline Zamarripa, and Alyssa Zamorra. The SAB is a group of highly qualified and committed Washington College of Law students interested in human rights and humanitarian law who work closely with the Center over the course of a year. As part of its long-standing commitment to cultivating future human rights leaders, the Center selects SAB members based on their commitment to pursuing human rights careers and advancing human rights issues. The SAB assists the Center in developing programming that reflects student interests and priorities and each member serves as a Fellow to a core Center project. Members also receive specialized skills training in topics such as grant-writing, public speaking, advocacy, and field research to enhance their capacity to carry out meaningful human rights work. To learn more about the current SAB members visit: http://www.wcl.american.edu/humright/center/2012/sab.cfm.

Webcasts and podcasts of recent Center events are available for download on the Center’s website, www.WCLCenterforHR.org.

FACULTY UPDATES

Claudio Grossman is the Dean of American University College of Law (WCL) and a Co-Director of the Center for Human Rights and Humanitarian Law. He is also the Raymond Geraldson Scholar for International and Humanitarian Law. In December 2011, Dean Grossman gave a presentation to the Chilean Congress on the “Real and Universal System Protection of Human Rights.” The following month Dean Grossman received the 2012 Deborah L. Rhode Award from the AALS Section on Pro Bono and Public Service Opportunities, for work on behalf of pro bono and public interest programs throughout the country. That same month Dean Grossman participated as a panelist at the AALS Annual Meeting for an event concerning globalization and legal education entitled “Are U.S. Law Schools Giving Their Students the Tools They Need to Succeed in a Globalized Environment?” In February, Dean Grossman participated as a co-organizer and panelist at a conference on the Use of Forensic Evidence in the Fight against Torture. The conference was cosponsored by WCL and the International Rehabilitation Council for Torture Victims. Dean Grossman served as a panelist for “Using Forensic Medical Evidence in Court” and his topic was “Standards Regarding Evidence.” Later that month he traveled to Australia to give several presentations. In Melbourne at the Monash University Law Conference on Implementing Human Rights in Closed Environments, Dean Grossman participated in the Plenary Session 1, speaking on International Perspectives on Recognizing Human Rights in Closed Environments. At that conference he also served as a discussion facilitator for Parallel Session 3B on the Exploration of the International & Comparative Perspectives — Disability Settings. Also in Melbourne, Dean Grossman gave a lecture on The Relevance of the Convention against Torture in Preventing and Redressing Violence against Women at The Human Rights Law Centre and Castan Centre for Human Rights Law. At the University of Sydney, Dean Grossman gave a guest lecture on The Inter-American System for the Protection of Human Rights: Challenges. Over these few months Dean Grossman was interviewed by a variety of organizations including CNN en Español, El Mercurio, Right Now and Latin Pulse Podcast.

Susan Bennett is Professor of Law and Director of the Community and Economic Development Law Clinic at WCL. She is 2011-2012 chair of the advisory board for the Community Economic Development Pro Bono Project of the D.C. Bar. She also serves on the board of directors of the D.C. Interpreter Bank, which links interpreters and translators to D.C. legal services providers. In January 2012, Professor Bennett was appointed as an Advisory Board Member of the Center for Human Rights and Humanitarian Law’s Local Human Rights Lawyering Project, and as an Executive Committee Member of the AALS Section on Law and Poverty. She also gave a presentation, “Under Milkweed: A Chronicle for a Pedagogy of Community Economic Development Law and Community Lawyering,” at the AALS Workshop on the Future of Legal Education.

David Baluarte is the Practitioner-in-Residence for the International Human Rights Law Clinic at Washington College of Law. Professor Baluarte continues his work to combat statelessness in the Caribbean and the United States. He was recently selected by the UN High Commissioner for Refugees to implement a project with a Law Clinic in Nassau, The Bahamas that will develop the capacity of that clinic to defend the citizenship rights of Bahamians of Haitian descent. Baluarte has continued his work in the Dominican Republic, and spoke in support of nationality rights of Dominicans of Haitian descent on a panel at Georgetown Law Center at the end of the 2011; the panel included experts from UNHCR and the US State Department as well as the Dominican Ambassador to the US. Professor Baluarte will accompany a group of students from WCL on an Alternative Spring Break trip to the Dominican Republic to do legal documentation with the Jesuit Refugee Service in bateyes surrounding Santo Domingo. Baluarte further awaits the launch of a report he authored for the UN High Commissioner on Refugees and the Open Society Justice Initiative on stateless persons in the United States, which is expected in 2012.

A founding member of the National Lawyers Committee for Human Rights (NLCHR) of Peace Brigades International, Professor Baluarte has also been supporting the work of human rights defenders in Colombia, Guatemala, and Mexico. In June 2012, Professor Baluarte will lead a NLCHR delegation to Mexico to investigate the situation of migrants’ rights defenders and review the implementation of Mexico’s new immigration law. Professor Baluarte also continues his work on the implementation of the decisions of human
Claudia Martin, Co-Director of American University WCL Academy on Human Rights and Humanitarian Law and Professorial Lecturer in Residence. Professor Martin published The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice in Counter-Terrorism and International Law and Practice, Ana M. Salinas de Frias, Katja Samuels and Nigel White, eds., Oxford University Press (2012). In February 2012, she served as a judge for the 2012 International Humanitarian Law Student Writing Competition organized by the Center for Human Rights and Humanitarian Law at WCL American University. Also, she served as a member of the Honor Jury of the Essay Competition “Gender and Justice,” sponsored by the Supreme Court of Mexico. From March 12-16, 2012, Professor Martin lectured on human rights and indigenous peoples at the Erasmus School of Law in Rotterdam, the Netherlands, as part of a WCL faculty exchange program. In March 2012, she served as a member of the Honor Jury that selected the winners of the Academy on Human Rights and Humanitarian Law Human Rights Essay Competition. In addition, Professor Martin has continued to serve as a Contributing Editor to Oxford Reports on International Human Rights Law, a Member of the Editorial Board, Oxford Reports on International Law in Domestic Courts, Oxford University Press and Amsterdam Center for International Law.


In 2012, Professor Rodríguez-Pinzón taught, “The Inter-American System of Human Rights” at the University of Essex, School of Law, Colchester, U.K. He was the keynote speaker at “Temas Contemporáneos del Sistema Interamericano de Derechos Humanos (Contemporary Topics of the Inter-American Human Rights System)” held at the Instituto de la Judicatura Federal and Suprema Corte de Justicia de la Nación in Mexico City.

On March 27, 2012, Professor Rodríguez-Pinzón was interviewed by Univision about the Supreme Court’s hearings on the constitutionality of the health care reform. On March 29, 2012, he was interviewed by CNN Spanish about the Supreme Court’s hearings on the constitutionality of the health care reform.

Susana SáCouto is the Director of the War Crimes Research Office (WCRO) and Professor Lecturer-in-Residence at WCL. In December 2011, Professor SáCouto presented at a panel on Transitional Justice at the National Defense University’s 7th Annual International Lessons Learned Conference. Her presentation was entitled “Political Impact and Lessons Learned from the Practice and Jurisprudence of the ICC.” In February 2012, she delivered opening remarks and presented on a panel entitled “Prosecuting Gender Crimes at the International Level” at WCL’s Founders’ Day Event, Addressing Sexual and Gender-Based Violence in Conflict and Post-Conflict Settings: National and International Strategies. Professor SáCouto recently published Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project, in 18 Mich. J. of Gender & L. 297-359 (2012).

Macarena Saez is an International Legal Studies Program Fellow at WCL. She recently published a paper, Same-Sex Marriage, in General Reports of the XVIIIth Congress of the International Academy of Comparative Law (Karen B. Brown & David V. Snyder, 2012).
Endnotes: Stanev v. Bulgaria: On the Pathway to Freedom

26 Id.
27 Id. at para. 122-3.
28 Id. at para. 124.
29 Id. at para. 125.
30 Id.
31 Id. at para. 127.
32 Id. at para. 126.
33 Id. at para. 128.
34 Id. at para. 129.
35 Id. at para. 154.
36 Id. at paras. 222-248.
37 As an analogy see the approach of the Court with regards artificial insemination in S.H. and Others v. Austria, Application no. 57813/00, Eur. Ct. H.R. (2011).
38 For more on guardianship litigation, see Oliver Lewis, Advancing legal capacity jurisprudence, 6 EUR. HUM. RTS. L. REV. 700-714 (2011).
40 For more on how the ECtHR is unwilling to synthesize UN law into its jurisprudence, see Magnus Killander, Interpreting Regional Human Rights Treaties, 7 SUR INT’L J. ON HUM. RTS. 145-169 (Dec. 2010).
47 See Article 14(2) of the CRPD, which states that “if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.”
51 Foreword by Sir Nicholas Bratza, in Peter Bartlett et al, supra note 20.
52 Grants to the Mental Disability Advocacy Center by the Open Society Foundations, the Sigrid Rausing Trust, the Trust for Civil Society in Central and Eastern Europe and Doughty Street Chambers all contributed to MDAC being able to work on the Stanev case, among others. MDAC sub-granted part of its funding to the Bulgarian Helsinki Committee.

Endnotes: Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making

2 Id., art. 12 (3).
4 Michael S. Lottman, Enforcement of Judicial Decrees: Now Comes the Hard Part, 1 MENTAL DISABILITY L. REP. 69, 69 (1976), writing about post-decree implementation of court orders in institutional reform litigation in the disability field.
7 Dhandha, supra n 5, at 442.
8 Amita Dhandha, who was involved in the discussions of Article 12 and the rest of the Convention, provides a fascinating insight into the nature of these debates and disagreements in Dhandha, supra n.5.
9 Article 12 (1).
10 CRPD Preamble, art. (n).
11 Id., Preamble, Par. (q).
12 Id., art. 3 (a), (c).
13 Id., art. 5 (1), (3).
those suffering from mental deterioration.” These individuals also may not marry unless they can express their will beyond a reasonable doubt. 22 See, e.g., Rosemary Kayess & Philip French, Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities, 8 Hum. RTS. L. REV. 1, 5 (2008).

23 See Salzman, supra n.3. As Dhanda notes, supra n.5, at 460-61, the language of Article 12 does not literally prohibit substituted decision making but a full contextual understanding of the negotiation over its meaning strongly militates in favor of a view of legal capacity that is inconsistent with more restrictive forms of substitution. Upon ratifying the CRPD, both Australia (through a Declaration) and Canada (through a Declaration and Reservation) indicated their beliefs that some form of substituted decision making is still permitted under Article 12, though “as a last resort and subject to safeguards” (Australia) and “in appropriate circumstances and subject to appropriate and effective safeguards” (Canada). Convention on the Rights of Persons with Disabilities, Declarations and Reservations, available at http://www.un.org/disabilities/default.asp?id=475. A full discussion of the extent to which guardianship, especially plenary guardianship, survives Article 12 is beyond the scope of this essay.

24 See Robert D. Dinerstein, Guardianship and Its Alternatives, 235,236, Ch. 23 in ADULTS WITH DOWN SYNDROME (Siegfried M. Pueschel, ed. 2006).

25 For a discussion of the contextual nature of capacity determinations for people with intellectual disabilities, see Robert D. Dinerstein, Introduction, Ch. 1 in A GUIDE TO CONSENT (Robert D. Dinerstein, Stanley S. Herr & Joan L. O’Sullivan, eds. 1999).

26 The discussion in this paragraph is based on Dinerstein, supra n.24.


28 The province of British Columbia, Canada has a statute providing for such representation agreements, which permit an individual with a disability to demonstrate his trust in an individual or network of supporters to advocate on his or her behalf. See Representation Agreement Act, RSBC 1996, Chapter 405; Fact Sheet: Representation Agreement: Overview, Nidus Personal Planning Resource Centre and Registry, July 2010 (on file with the author); Legal capacity and supported decision-making 89 in Ch. 6, From provisions to practice: implementing the Convention in FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol (2007), available at http://www.ipu.org/PDF/publications/disabilities-e.pdf.

29 International Disability Alliance, Legal Opinion on Article 12 of the CRPD 4 (June 21, 2008)(on file with the author). The Legal Opinion was signed by 31 individuals from 16 countries. The author was one of the signatories to the Legal Opinion.


31 See, e.g., Bach and Kerzner, supra n.3; Lana Kerzner, Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective 31-32 and 33 et seq. (Paper presented at Conference, In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st Century, University of British Columbia, Vancouver, Canada, April, 2011)(identifying British Columbia, Yukon Territory, Alberta, Saskatchewan, Quebec and Manitoba as having legislation that recognize some form of supported decision-making)(on file with the author); cf. Sarah Burningham, Developments in Canadian Adult Guardianship and Co-Decision-Making Law, 18 DALHOUSE J. LEGAL STUD. 119 (2009) (describing co-decision-making legislation in Saskatchewan that is a reform of traditional guardianship and approaches supported decision making). Burningham also describes supported decision making legislation in Norway and Germany (which has a mixed system of support and substitution). Id. At 153.

32 See id. and Klaus Lachwitz, President, Inclusion International, Legal Representation and Supported Decision Making for People with Disabilities in Germany, Berlin, Germany (March 6, 2011)(on file with the author).


34 Michael Bach, Securing Self-Determination: Building the Agenda in Canada 3 (reprinted with permission from TASH Newsletter, June/July 1998)(on file with the author).

35 CRPD, art. 4(1)(a), (b).

36 Id. art. 34.

37 Id. art. 35(1).

38 See United Nations Office of the High Commissioner for Human Rights, Committee on the Rights of Persons with Disabilities, available at http://www.ohchr.org/EN/ HRBodies/CRPD/Pages/CRPDIndex.aspx. The information in the remainder of this paragraph is also available on this website.

39 Committee on the Rights of Persons with Disabilities, Replies submitted by the Government of Tunisia to the list of issues (CRPD/C/TUN/Q/1) to be taken up during the consideration of the initial report of Tunisia (CRPD/C/TUN/1). CRPD/C/TUN/Q/1/Add. 1, Fifth Session, 19 (Par. 102)(March 11, 2011).

40 International Disability Alliance (IDA), IDA Submission on List of Issues for Tunisia, Committee on the Rights of Persons with Disabilities, 4th Session 4 (4-8 October 2010).

41 Atlas Council, Redefining Disability [To CRPD Country Report, Tunisia], at 5 (October 2010).

42 Committee on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Spain, CRPD/C/ESP/1, 11 (Par. 53), October 5, 2010. 43 Id. at 11 (Par. 54).

44 Id. at 13 (Par. 68).

45 CERMI stands for Comité Espanol de Representantes de Personas Con Discapacidad. It is the government-appointed independent monitoring body for the CRPD.


47 Committee on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Spain (CRPD/C/ESP/1), concerning articles 1 to 33 of the Convention on the Rights of Persons with Disabilities, CRPD/C/ESP/Q/1, 2 (Pars. 9-11), June 20, 2011.

48 Ministerio de Asuntos Exteriores y de Cooperacion, Respuestas de Espana, 8-10, July 4, 2011 (in Spanish).

49 Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia, CRPD/C/TUN/CO/1, 4 (Pars. 22-23), May 13, 2011.

50 Concluding observations of the Committee on the Rights of Persons with Disabilities: Spain, CRPD/C/ESP/Q/1, 5 (Pars. 33-34), October 19, 2011. The Committee also noted its concern that no measures had been taken to move from substituted decision making to supported decision making and that the effective date of legislation on implementation of article 12 appeared to be unreasonably delayed. As with Tunisia, the Committee also called for training on supported decision making. Id. at 5 (Par. 34).

51 Committee on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Peru (CRPD/C/PER/1), concerning articles 1 to 33 of the Convention, CRPD/C/
Endnotes: When Treatment is Torture: Protecting People with Disabilities Detained in Institutions

11 See Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Note of the Secretary General para. 42, U.N. Doc. A/63/175 (Jul. 28, 2008) (by Manfred Nowak) [hereinafter Nowak Report] (a principle contained in the Convention Against Torture and other treaties and reaffirmed in the CRPD).

12 Convention Against Torture, article 2(2).

13 See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the CPT Standards 53, CPT/Inf/E (2002) — Rev 2004 (discussing core minimum standards that must be guaranteed in all circumstances despite resource limitations).


15 Nowak Report, supra note 7, at ¶51.

16 Id.

17 Nowak Report, supra note 7, at ¶47.

18 Id.

19 See Rosenthal & Sundram, supra note 5, at 513 (the challenge of showing intent and purpose in a medical or psychiatric context).

20 CPT, Art. 2.

21 CPT, Article 3(a)

22 CPT, Art.25(d).

23 Id., art. 12(3).


28 Nowak Report, supra note 7, para. 56.

29 Id., ¶42, n.3.

30 Id., ¶47.

31 Id., ¶49.

32 Id., ¶47.

33 Id., ¶50.

34 Id.


36 Department of Developmental Services, “Response to Testimony and Written Comments to Proposed Amendments to Behavior Modification Regulations 11 CMR 5.14,” October 14, 2011.

37 Méndez report, supra note 8, ¶77.

38 Id., ¶72.

39 Id., ¶74.

16 Note, however, that this rubric applies to external competences outside the former ‘second pillar’ of Common Foreign and Security Policy. The Lisbon changes retain the peculiarity of that area of law, even without the formalistic pillar structure. See Title V, Chapter 2 TEU (AA). In the interests of brevity and clarity a detailed discussion of European federalism has been omitted from this discussion. Interested readers can consult these resources, among many others: PAUL CRAIG & GRÂINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (5th ed. 2011); TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 175 (2010); Robert Schütze, On ‘Federal’ Ground: The European Union as an (International) Phenomenon, 46 COMMON MKT. REV. 1069 (2009); ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM (2009); THEODORE KONSTADINIDES, DIVISION OF POWERS IN EUROPEAN UNION LAW (2009); Ingolf Pernice, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 COLUM. J. EUR. L. 349, 351-2 (2009); MICHAEL LONGO, CONSTITUTIONALISING EUROPE (2006); PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 190-225 (2004); Gráinne de Búrca, The Institutional Development of the EU: A Constitutional Analysis, THE EVOLUTION OF EU LAW, 55 (Paul Craig & Gráinne de Búrca, eds., 1999); Deirdre Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 COMMON MKT. L. REV. 17 (1993).

17 Art. 4(3) TEU (AA).

18 Although there is no express provision for mixed agreements in the TEU or TFEU, the technique has the longstanding endorsement of the ECI. See Opinion 1/78 (Natural Rubber Agreement), 1979 E.C.R. 2871. Marise Cremona, External Relations and External Competence: The Emergence of an Integrated Policy, in THE EVOLUTION OF EU LAW 137-75, 170-1 (Paul Craig & Gráinne de Búrca, eds., 1999).

19 Gráinne de Búrca, The Institutional Development of the EU: A Constitutional Analysis, in EVOLUTION, supra note 19, at 55-81, 55.


21 Regulation (EC) 847/2004 on the negotiation and implementation of air service agreements between Member States and Third Countries, 2004 O.J. (L 157) 7.

22 See Marise Cremona, Disconnection Clauses in EC Law and Practice, in Mixed Agreements Revisited — The EU and its Member States in the World (Christophe Hillion & Panos Koutrakos, eds., 2010).


24 See Council Decision 2010/48/EC, supra note 11, at 55-6. The Council is the EU’s intergovernmental institution, whereas the Commission is its supranational arm, there is also a European Parliament, which does not pass legislation but does increase input on laws from the sub-national level. For more on the basic institutional structure of the EU see PAUL CRAIG & GRÂINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 31-102 (5th ed. 2011).

25 See Title VI, Art. 19(1), Title IX, and Art. 166 TFEU, respectively. The declaration obliquely refers to the European Court of Justice’s ERTA doctrine of Union exclusive competence “only to the extent that the provisions of the Convention... affect common rules previously established by the European [Union].” Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.


28 Code of Conduct, supra note 12, ¶1(b).

29 Id., ¶6(a)-(c).

30 Id., ¶6(c).

31 Id., ¶6(c)(i).

32 Some sort of Member State CRPD focal point coordinating body independent of the Commission would have to be set up or the function incorporated within an existing (presumably Council-related) body. It would be a repository for all national information and act as an information conduit between each Member State as well as between the Member States jointly and the Commission, but would not be subject to de facto ‘institutional capture’ by the Commission, nor impede direct Member State — Commission communication.

33 See, e.g., Regulation (EC) 662/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, 2009 O.J. (L 200) 25, art. 9.

34 See, e.g., Regulation (EC) 847/2004 on the negotiation and implementation of air service agreements between Member States and Third Countries, 2004 O.J. (L 157) 7.


(2) of the Constitution mandates the state to establish and implement, within its available resources, a comprehensive program that provides equal-access to ARV treatment for pregnant women and their newborns, including reasonable measures for counseling, testing, and other treatment methods.).

23 Id.; A person receives refugee status under the South African Refugee Act of 1998 when he or she has a fear of being persecuted for his or her "race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear unwilling to return to it; or, owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.” Refugees Act 130 of 1998, §30, ch. 1, art. 3 (1998S. Afr.); see also, “Living Up for Rights, in EQUAL TREATMENT MAGAZINE OF THE TREATMENT ACTION CAMPAIGN 8 (June 2008).

24 Refugees Act 130 of 1998, ch. 5, art. 27 (b) (S. Afr.).


26 Id.


29 Id. at para. 12 (c).

30 Xenophobia is the fear and hostility towards foreign nationals or those who are presumed to be from countries other than that of the majority. See Marcus Low, You Have Rights, in EQUAL TREATMENT MAGAZINE OF THE TREATMENT ACTION CAMPAIGN 3 (Sept. 2010).

31 A refugee is “a person who has been granted refugee status by the South African Department of Home Affairs. People who qualify for refugee status have to show that they are unable to return home because they are being persecuted because of their race, religion or political beliefs.” Jessica Kiddle and Adam Malapa, Arriving, in, EQUAL TREATMENT MAGAZINE OF THE TREATMENT ACTION CAMPAIGN 3 (June 2008). Thousands of Zimbabwean foreign nationals apply for refugee status in South Africa, however, the processing of their applications can take years. Although the South Africa Refugee Act of 1988 states that foreign nationals may retrieve their refugee status within fourteen days of entering the country, it often takes foreigners at least two months before immigration officials may see them. Without the necessary legal documents, it is difficult for foreign nationals to live, work and receive health care in South Africa; thus, such immigrants often utilize asylum-seeker permits, which must be renewed every three months. See Living Up for Rights, in EQUAL TREATMENT MAGAZINE OF THE TREATMENT ACTION CAMPAIGN 8 (June 2008).


33 Id. at 2. Researchers at Human Rights Watch contend that discrimination, including denying access to health services on the basis of national origin or legal status, inadequate or misleading information to both refugees and health workers regarding access to ARV treatment, and charging excessive fees are several hindrances to accessing health care in South Africa. Moreover, non-South African patients are denied ARV treatment for lacking identification documents, are charged extortionate and illegal fees, are verbally abused by health care professionals and often have communication difficulties due to language barriers. Id. at 12.


35 Id.

36 Id.

37 No Healing Here: Barriers to Obtaining Health Care, supra note 15.

38 Odendal, supra note 13, at 11.


40 No Healing Here: Barriers to Obtaining Health Care, supra note 15.

41 Palitza, supra note 39; The Office of the United Nations High Commissioner for Refugees, established by the United Nations General Assembly in 1950, is an agency which protects and safeguards the rights of refugees worldwide, ensuring that such persons exercise the right to seek asylum and find refuge in another state, integrate, and find resettlement in another country. About Us, OFFICE OF THE UNITED NATIONS HIGH COM’R FOR REFUGEES, http://www.unhcr.org/pages/493646c2.html (last visited Apr. 23, 2011).

42 See Palitza, supra note 39.
“A treatment interruption is when someone on antiretrovirals stops taking them. This might be because the person chooses to stop treatment or for reasons out of their control like being detained in Migrant Detention Centre. Some immigrants to South Africa arrive having had to stop treatment because supplies of antiretrovirals (ARVs) have run out in their home countries. Some immigrants have been denied treatment in the public sector.” Treatment Interrupted, supra note 1, at 11.

Id.; Médecins Sans Frontières is an international medical humanitarian organization that provides emergency aid to individuals affected by epidemics, armed conflict natural disasters and healthcare exclusion. Médecins sans frontières, http://www.msf.org/ (last visited Apr. 23, 2011).

A conflict is defined as perceived differences between two or more actors at the same moment in time, traditionally involving hostile attitudes and behaviors between the parties, and frustration concerning resources. Nicklas L.P. Swannström & Mikael S. Weissmann, Conflict, Conflict Prevention, Conflict Management and Beyond: A Conceptual Exploration 7-9 (2005), http://www.silkroad-studies.org/new/docs/ConceptPapers/2005/concept_paper_ConfPrev.pdf.

Swannström & Weissmann, supra note 45 at 19.

Conflict management refers to the limitation or containment of a conflict without necessarily providing an immediate resolution.

Endnotes: Book Review


4 Department of the Army, Counterinsurgency (2006).
NOTES

The Rights Work Initiative is a project of the Program on Human Trafficking and Forced Labor at the American University Washington College of Law’s Center for Human Rights & Humanitarian Law in Washington, D.C. Its mission is to challenge existing discourses on human trafficking and forced labor for the purpose of ensuring that critical national and global debates, policies and responses are well-grounded within a human rights and evidence-based framework.

Rights Work seeks to address research gaps and facilitate debates about ‘what works’. After over a decade of programs to combat human trafficking into forced labor, very little reliable evidence exists on the question of which interventions work, which do harm and which are ineffective. Trafficking narratives abound but they mainly rely upon conventional myths and stereotypes about the problem. Rights Works seeks to counter this trend through innovative in-country evaluations of existing programs and on-line discussions at www.rightswork.org about critical issues from an evidence and rights-based perspective.

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