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INTERNATIONAL LEGAL UPDATES

NORTH AMERICA

FOR THE POOR, BAIL OFTEN MEANS JAIL

A Human Rights Watch study found that 87 percent of people arrested in New York City in 2008 on non-felony charges were unable to post bail set for \$1,000 or less. Nearly three-quarters of these prisoners were accused of nonviolent, non-weapons related crimes such as shoplifting. Former Supreme Court Justice Arthur Goldberg explained that, “After arrest, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail, while the accused who can afford bail is free to return to his family and job ... This is an example of justice denied, of a man imprisoned for no reason other than his poverty ...”

Bail requirements are an incentive for defendants to attend court proceedings by threatening monetary loss if they fail to appear in court. Judges have broad discretion to set the amount of bail so long as the amount set is within the constitutional confines of the Eighth Amendment prohibition against excessive bail. The amount of bail should be no more than is reasonably needed to keep the suspect from fleeing before or during the case. Unable to make bail, indigent defendants must often spend time in jail awaiting trial. In addition to the stressful and often violent experience of imprisonment, pretrial detention can cause defendants to lose jobs and income, keep defendants from caring for children or sick relatives, and prevent school attendance.

This system of monetary bail requirements unfairly denies indigent defendants their right to liberty and therefore contravenes both the U.S. Constitution and persuasive international customary law. For instance, Article 9 of the Universal Declaration of Human Rights prohibits arbitrary detention and Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which the U.S. ratified in 1992, states that, “everyone has the right to liberty and security of person.” In addition, ICCPR Article 2(1) requires the protection of the rights outlined in the Convention, including the right to liberty,

“without distinction of any kind,” and specifically identifies “property” as a prohibited basis for discrimination. The UDHR and the ICCPR are not enforceable on the U.S. The absence of enforceable international obligations imposed on the U.S. may be one of the reasons why this system of monetary bail requirements has not been amended and continues to unfairly deny indigent defendants their right to liberty.

Defendants who are unable to post bail are punished through extended imprisonment prior to any guilty verdict. Also, the threat of confinement or continued confinement often causes defendants charged with misdemeanors to plead guilty because many misdemeanors do not carry a prison sentence, and defendants can often plea bargain for a lesser punishment. Some U.S. cities have implemented reform measures that have significantly reduced the number of pre-trial detentions. In 1982, Philadelphia decreased the number of people detained for failure to post bail by 26 percent by implementing new bail guidelines based on empirical data. Bail guidelines are similar to sentencing guidelines in that they delineate what arraignment decisions are most appropriate for individual defendants. Unfortunately, these guidelines became outdated and many judges have chosen to ignore them. However, Philadelphia and other cities can use up-to-date empirical data to better predict which defendants pose the highest risk of missing their court appearances, and in turn, only require monetary bail from high risk defendants.

Allegheny County, in southwestern Pennsylvania, expanded on the Philadelphia model by creating a pretrial services agency that obtains detailed information about defendants and assesses their threat to the community and their risk of missing court appearances. The pretrial services agency also uses many non-monetary bond options, including a call-in and in-person reporting system, drug testing, and electronic monitoring. Washington, DC also uses a pretrial services agency and tries to minimize pretrial detention for indigent defendants because, “non-financial conditional release . . . is more effective.”

Other U.S. cities can use these models to decrease the number of indigent defendants who are detained for failure to post bail. Although current bail policies in many U.S. jurisdictions are discriminatory and violate the U.S. Constitution’s prohibition on excessive bail fees, these jurisdictions can adopt policies used in places such as Allegheny County and Washington, DC to significantly improve this situation.

OBAMA WAIVES SANCTIONS FOR FOUR COUNTRIES THAT USE CHILD SOLDIERS

For the past year, American taxes funded military assistance to four governments who use child-soldiers. On October 25, 2010, President Obama issued a waiver of penalties under section 404(a) of the Child Soldier Prevention and Accountability Act (CSPAA) of 2008 for Chad, the Democratic Republic of the Congo (DRC), Yemen and the Sudan. The waiver allows these countries to continue to receive military aid from the U.S. despite their widespread use of child soldiers. President Obama determined that these countries are of particular importance for national security and that it was a national interest to waive sanctions. These countries currently receive U.S. military aid for special operations and counterterrorism missions, humanitarian efforts in Chad for Darfuri refugees, and assisting Yemen in rebuilding its military capacity. However, many human rights activists argue that the waiver signals that counter-terrorism work takes precedence over human rights concerns.

In 2008, the United States passed the CSPAA, in order to encourage compliance with the Optional Protocol to the UN Convention on Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol). The CSPAA is part of the larger human trafficking bill, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (WWTVPRA). The act prohibits funding for countries known to recruit or use child soldiers; however, it permits a national interest waiver of the ban. Under the CSPAA, governments whose military forces recruit or use children in violation

of existing international standards will be given two years to release the children within their ranks. During this period, the U.S. will only provide military aid to specifically support that process. If child soldiers are still being used or recruited after the two year period ends, all forms of U.S. military assistance will be suspended.

The recruitment of child soldiers is a routine practice in Chad, the DRC, Yemen and the Sudan. In 2009, the government of Chad conscripted refugee children to use as combatants and guards in its clashes with rebel forces. Children were forced to carry heavy ammunition and supplies through difficult terrain in the DRC and hundreds of boys and girls were forced into the southern Sudanese army, despite a commitment by the Sudan People's Liberation Army to release them. In Yemen, children are thought to comprise half the ranks of both the government forces and the opposing rebels.

State Department officials say that these countries are working to eliminate the use of child soldiers, but have had difficulty implementing policies to end the practice. The Obama administration claims that engaging these militaries is the most effective way to encourage the reforms that would end the use of child soldiers. The State Department further argues that ending military aid could negatively impact valuable military force modernization and human rights training.

Human rights groups are skeptical of the administration's approach. Jo Becker, advocacy director for the children's rights division at Human Rights Watch, noted that the blanket waiver of penalties indicates that the U.S. is giving up all of its leverage to force these countries to stop using child soldiers. This is especially significant given that the WWTVPRA already contains exemptions that allow continued U.S. funding for programs that directly target the problem of child soldiers or aid in the professionalization of armies. Therefore, the Obama administration did not need to waive the penalties under the CSPAA to continue to work toward force modernization and human rights reforms in these countries.

Critics of the waiver argue that the U.S. should use its influence to persuade countries to end their use of child soldiers through cooperation with international organizations and international legal agree-

ments. All four of the countries in question have ratified the UN Convention on Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. In addition, Chad has ratified the African Charter on the Rights and Welfare of the Child (African Charter), and both Chad and the DRC have ratified the Rome Statute, which establishes the International Criminal Court and renders the use of child soldiers a prosecutable war crime. Both collectively and separately, these international agreements bar the recruitment and use of children as soldiers in armed conflict. Thus, Chad, Yemen, Sudan, and the DRC are non-compliant with their international obligations.

The UN Convention on the Rights of the Child and the African Charter have committees that monitor compliance, but they are limited to collecting and reporting information on compliance. Nevertheless, the International Criminal Court (ICC) has been prosecuting individuals on charges of recruitment and use of child soldiers, and has investigated possible war crimes involving the use of child soldiers by the Sudan and the DRC since 2005. Additional charges and convictions stemming from the use of child soldiers have been pursued with the 2002 implementation of the Optional Protocol.

By waiving the penalties associated with using child soldiers, the U.S. is failing to meet its own obligations and failing to encourage other States to comply with the international laws protecting children. Instead the U.S. is focusing on maintaining strategic alliances. This posture undermines efforts to end the conscription of children into military forces around the world.

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LATIN AMERICA

VIOLENCE AGAINST IRREGULAR MIGRANTS IN MEXICO

The human rights of migrants in Mexico have drastically deteriorated in recent years. Gang-related violence has made Mexico particularly dangerous for irregular migrants traveling to the United States. Along their journey, these migrants,

mostly from Central America, are commonly subject to extortion, kidnapping, rape, torture, and other abuses with little chance of redress because they have not entered through legal channels and could be subject to imprisonment or deportation themselves. Moreover, the situation encourages recidivism of violence, because migrant victims are not able to aid in prosecuting the abuses.

Recently, the UN High Commissioner on Human Rights called for an investigation into the alleged abduction of forty migrants traveling on a state-run train. The abduction occurred after the train driver allegedly extorted money from the passengers. The driver then allegedly stopped the train to allow unidentified gunmen aboard who robbed and abducted some of the passengers. The events seemed to occur despite an earlier search of the train by the Federal Police and the National Institute of Migration staff.

The irregular status of the migrants impedes the reporting of abuses because Article 67 of Mexico's Population Law requires authorities to obtain proof of the reporter's legal presence in the country before investigating any grievances. If a victim of abuse is unable to prove his legal right to be in the country, he is taken to the migration authority. This process can lead to voluntary repatriation or deportation that prevents the victim from assisting in the investigation or prosecution of suspects. In Mexico, this kind of impunity results in unchecked violence against irregular migrants by nationals. The Mexican Government has created a temporary visa for migrants who are victims of crime, but it has proven extremely difficult for most victims to obtain.

Without providing better access to the temporary visa, Article 67 of the Population Law violates Mexico's international human rights obligations to provide equal access to the courts to all people in its territory by prioritizing migration status over criminal justice. The International Convention on Migrant Workers, to which Mexico is a party, confers the right to security of person and effective protection by the state against violence to migrants without discrimination against *alien* status. Moreover, in 2003 the Inter-American Court of Human Rights ruled that states have an obligation to act with due diligence to prevent and punish

abuses against migrants by state officials and private individuals.

Migrants typically journey across Mexico on foot or by secretly riding on freight trains. Along the well-traveled routes, gangs routinely prey on travelers and are believed to be aided by government authorities in their extortion attempts. Of the 238 migrant victims interviewed by Mexico's National Human Rights Commission, 91 interviewees stated that public officials were directly responsible for their kidnapping and a further 99 victims observed police colluding with kidnappers during their captivity. If kidnapped, migrants are sometimes tortured until they reveal the phone numbers of family members living in the United States, and then they are held for ransom. If ransom is not paid, they are sometimes murdered. According to some sources, as many as six of every ten female migrants, many under the age of eighteen, are raped on the journey.

In accordance with Central American governments' attempts to repatriate irregular migrants with dignity and to combat overcrowding in detention centers, Mexico permits migrants identified by authorities to opt for a voluntary repatriation instead of the traditional administrative immigration process. If a migrant chooses repatriation, he is sent back to his country almost immediately and is not registered. Not registering the migrants has several benefits such as saving Mexico's resources and allowing the migrants to avoid criminalization. However, it is not a panacea because it also leads to further attempts at migration across Mexico, leaving migrants vulnerable once again for the duration of a second trip. If the migrant chooses the traditional process, he is kept in a detention center and is often deported after proceedings.

Mexico began allowing migrants who were victims or witnesses of a crime to apply for a temporary visa pending resolution of the criminal proceedings in 2007. The process has been largely ineffective; generally only those who are accompanied and sponsored by an NGO or priest obtain a visa. Since the temporary visa option was established, only ten to fourteen people each year have obtained one.

The Mexican government has been an outspoken advocate of irregular migrants' rights internationally, and the creation of

the temporary visa in 2007 was an attempt to address the dangers faced by irregular migrants. Nonetheless, these measures have been largely ineffective. The lack of due process protections under Article 67 of the Population Law for victims, the cyclical violence from unregistered repatriations, and the extreme hurdles in obtaining a temporary visa all stand in the way of Mexico meeting its international human rights obligations. A concerted action among elements of the nation's criminal, judicial, and immigration policies are necessary to prevent and prosecute the crimes committed against irregular migrants in Mexico.

"BABY DOC" CHARGED WITH CRIMES AGAINST HUMANITY

After twenty-five years in self-imposed exile, Haiti's ex-dictator Jean-Claude "Baby Doc" Duvalier has returned to Haiti and been charged with crimes against humanity for events that occurred during his 1971-1986 dictatorship. Duvalier's dictatorship was known for carrying out torture, execution, and forced disappearances through the National Security Volunteers militia, known as the *tonton macoutes*.

The Rome Statute of the International Criminal Court (ICC) criminalizes crimes against humanity, among other acts, but cannot be applied retroactively. Furthermore, international prosecution can be very difficult, as would be organizing a trial in Haiti. However, the Haitian people may find redress in a new Swiss law that would return to Haiti the contents of Duvalier's frozen Swiss accounts.

After Duvalier's return to Haiti on January 16, 2011, he was charged by a prosecutor for corruption and embezzlement. In the following days, four Haitians, including a former UN spokeswoman, filed separate charges of torture and crimes against humanity under Haitian law. A group of agricultural laborers who allege Duvalier sold them into slavery in the Dominican Republic also filed a lawsuit alleging Duvalier's responsibility for crimes against humanity. Duvalier has not yet issued a response to the allegations. Unfortunately, without the creation of a special tribunal specifically authorized to address this issue, no international criminal charges can be brought against Duvalier.

The ICC does not have jurisdiction over his case because the crime occurred prior to the entry into force of the Rome Statute on July 1, 2002. The charges also cannot be brought before the Inter-American Court of Human Rights because the Court only has jurisdiction to hear cases brought against a state – not an individual, even former heads of state.

Although Duvalier might not be tried in an international court for the crimes he allegedly committed, victims may still be able to seek monetary reparations. Duvalier currently has about \$6 million in frozen assets in a Swiss account. In recent years, Switzerland began returning "potentate funds" from ousted dictators' accounts to their respective nations.

On February 1, 2011, new legislation in Switzerland, dubbed the "Duvalier Act" by the Swiss press, took effect and provided for the return of \$6 million of Duvalier's funds to Haiti, "to be used to improve the lives of all the Haitian people." The new legislation shifts the burden to the fund-holder to prove he or she acquired the funds *legally*, as opposed to the state having a burden to prove the funds were acquired *illegally*.

If tried, Duvalier will be the first former head of state tried in a Haitian court. The United Nations High Commissioner for Human Rights has already offered technical assistance to the Haitian judiciary specifically for the Duvalier case. Other Latin American states, such as Peru, Argentina, Chile, and Uruguay, have successfully tried former heads of state without international assistance or international tribunals. However, Haiti will likely need more assistance than those states because of the lack of infrastructure, rampant corruption, and deficiency of expertise to try such a complex and controversial case. Not only will the state judiciary require technical assistance in establishing a national tribunal, but also the victims will need help presenting their cases.

The UN High Commissioner has called on the Haitian authorities, "to send a message to the world that their national courts can ensure accountability for serious violations of human rights, even in difficult humanitarian and political contexts." Even if prosecution of Duvalier fails, Haiti will still likely see the return of the \$6 million in frozen funds. If these greatly needed

funds do make their way back to Haiti, their use for victims reparations would be a step towards victims' justice in Haiti.

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MIDDLE EAST AND NORTH AFRICA

COPING WITH THE REFUGEE IMPLICATIONS AND INTERNATIONAL OBLIGATIONS AS A RESULT OF THE NEW SOUTH SUDAN

"Egypt's top priority in Africa is the future of Sudan," stated a Wikileaks cable that further explained that a unified Sudan would serve Egypt's interest. According to an Egyptian official, the creation of a new South Sudanese state would likely increase the flow of refugees into Egypt. With the combination of an estimated 1.5 million new South Sudanese refugees entering Egypt post-South Sudan, the future of Sudan certainly merits its position as Egypt's top priority in Africa. Its inability to accommodate its current refugee population in accordance with international human rights and refugee law is not a positive indicator for Egypt's ability to meet its international obligations – with the needs of an expanded refugee population.

During the second week of January 2011, South Sudan voted overwhelmingly for independence in a referendum. The vote resulted in the creation of a new state, splitting the religiously and ethnically divided Sudan in two. With over one million South Sudanese living in north Sudan, the referendum could result in a mass exodus of Southern Sudanese from Khartoum and its outlying areas into neighboring Egypt. These new refugees would join some 750,000 Sudanese already residing in Egypt.

Although the Sudanese refugees that currently reside in Egypt fled Sudan seeking safety, they encountered new challenges of poverty and exploitation in Egypt. Egypt utilizes the broad and encompassing definition of "refugee" as put forth by the Organization of African Unity Convention – a definition that is widely heralded as a success by the international community for its flexibility. Of the 750,000 Sudanese in Egypt, only 18,000 are legally registered with the government. Unregistered Sudanese refugees cannot legally work,

cannot utilize the public education system, and have had difficulty seeking legal remedy to bring complaints of mistreatment by security forces.

Egypt's practice of refugee mistreatment extends further than just limiting their legal rights. The state has used violence against Sudanese refugees and has illegally deported refugees back to their home state, despite their vulnerability to torture and detention. There is also evidence that Egyptian soldiers have shot at and killed African migrants being deported from or trying to enter Israel through the Egyptian/Israeli border.

Egypt has no national implementing legislation relating to refugees. Its legal obligations arise from provisions in international agreements it is party to, including the 1951 Refugee Convention and its 1967 Protocol as well as the African Refugee Convention of 1974. Both conventions prohibit the forcible return, or refoulement, of refugees to another state where the refugee has a reasonable fear of persecution. Furthermore, killing refugees and asylum-seekers is a violation of Article 7 of the International Covenant on Civil and Political Rights and Article 4 of the African Charter on Human and People's Rights, international instruments to which Egypt is a party.

With such a poor track record, it is difficult to foresee how Egypt will accommodate the possible influx of Sudanese refugees in the wake of post-referendum violence in Sudan. Khartoum's water concerns and apprehension of South Sudan as an upper-riparian state have already laid the groundwork for a hostile relationship with the new state. Regardless, Egypt has international obligations to treat new South Sudanese refugees humanely, either by offering them the potential of asylum or ensuring that they are not forcibly deported to Sudan. Even though the UN High Commissioner for Refugees has already begun to create contingency plans for displaced South Sudanese, Egypt has to prepare for its international obligations that are likely to be triggered by the reality of an independent South Sudan.

SAHARAWI CALL FOR INDEPENDENCE GAINS ATTENTION

In a rare moments the world's attention was drawn to the protests of Western

Sahara activists on November 8, 2010. After months of peaceful protest, Moroccan authorities reportedly attacked about 12,000 Saharwis, killing eight and wounding 700. The Saharwi, indigenous peoples from Western Sahara, were protesting the economic and social exclusion they suffered under Moroccan rule. The attack came just a few weeks before UN-mediated negotiations were scheduled to commence on the territorial status of the Western Sahara.

U.S. media has not often focused on the plight of the Saharwis, likely in part because the U.S. has long supported Morocco's occupation of the Western Sahara – the longest territorial conflict in Africa. After emerging from the colonial control of Spain in 1966, the Western Sahara was soon occupied by neighboring Morocco. The occupation violated a 1975 UN Security Council Resolution asserting Western Sahara's right to self-determination and disregarded an advisory opinion by the International Court of Justice (ICJ) in 1975. The ICJ opinion defined the Western Sahara as non-self-governing territory under belligerent military occupation. Since then, Morocco has negotiated several agreements regarding the territory, the most recent being the 1991 Settlement Plan (Settlement Plan) between Morocco and Polisario Front, the Sahrawi National Liberation Movement. The Settlement Plan, which the UN Security Council and the U.S. endorsed, called for a referendum on Saharwi self-determination to be held in Western Sahara. To date, no definitive plans for such a referendum have emerged, largely because of Morocco's reluctance to support steps towards self-determination. Meanwhile, Saharwi activists still angrily protest against Morocco's occupation and policies within the Western Sahara.

The twenty years since the Settlement Plan have witnessed a significant shift in the international landscape that may shed light on options for the Western Sahara, both in regards to internal and external self-declaration. International law does not contain a right to external self-declaration, nor does specifically prohibit it. As articulated by the Canadian Supreme Court in *Reference re Secession of Quebec*, the right to external self-determination "arises only in the most extreme cases and, even then, under carefully defined circumstances." The court further explained

that those circumstances would need to include an environment where people are “prohibited from a meaningful exercise of self-declaration” within the state or where “a people are subject to alien subjugation, domination, or exploitation.”

In 1998, when the Canadian Supreme Court decided *Reference re Secession of Quebec*, few successful examples of internal self-declaration existed. Instead, the international community repudiated numerous declarations of internal self-declaration, like that of Northern Cyprus. In terms of the Western Sahara, the precedent for unilaterally declaring independence was sparse. However, in light of recent events, the indigenous people of Western Sahara may have greater reason to hope that the international community will give deference to their claims of self-determination. In particular, the landmark advisory opinion of the ICJ in *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* provides the most encouraging precedent for unilateral declarations of self-determination, albeit a vague one. The ICJ was careful to make its holding extremely narrow by emphasizing the particularities of Kosovo’s recent history and the likely absence of substantial violence that would accompany self-determination, distinguishing the case of Kosovo from those of Northern Cyprus and Southern Rhodesia. Yet, although the circumstance of the Western Sahara is not identical to that of Kosovo, both states share similarities. Like Kosovo, the Western Sahara has been the subject of numerous UN resolutions and is presently not threatening violence. Additionally, in both states, access to government mechanisms and justice systems was limited. Moreover, as in the case of Kosovo, the UN and other international institutions have given more credence to Western Sahara’s claim for autonomy.

Saharwis might not have to unilaterally declare independence if Morocco follows the example of Sudan. In a highly anticipated referendum on self-determination, the people of South Sudan popularly and peacefully voted for independence on January 9, 2011. The positive and peaceful model of transition of South Sudan could provide Morocco with the impetus to revisit the idea of a referendum in the Western Sahara. While the case of South Sudan is peppered with controversy, the international community’s acceptance and

support for South Sudan’s right to self-determination sets an encouraging precedent for Western Sahara.

In contrast to 1991, today the Western Sahara has more precedent to draw on in the event that a referendum is held, or autonomy is declared. Although the violent repression on November 8 delayed UN talks on the territorial status of the Western Sahara, when the talks do commence, the cases of Kosovo and Sudan will importantly highlight possible paths to self-determination for the Saharwis.

A BREAK WITH KEMALISM AND A MORE DEMOCRATIC CONSTITUTIONAL COURT? – THE POTENTIAL IMPLICATIONS OF TURKEY’S CONSTITUTIONAL REFERENDUM

On September 12, 2010, 58 percent of Turkish citizens voted in favor of a constitutional referendum, introducing 26 amendments to Turkey’s Constitution. The referendum pitted supporters of the oldest political party in Turkey, the left-wing Republican People’s Party (CHP), against the fastest growing political party, the conservative Justice and Development Party (AKP). Among these amendments were administrative reforms to the Constitutional Court providing for more nuanced appointment procedures. Despite the criticisms directed at the AKP and the monumental potential the referendum will have on Turkey’s founding principles, there is much reason to believe that these administrative reforms will result in a more democratic Constitutional Court.

Campaigns around the constitutional referendum further polarized the already fragmented political landscape in Turkey. Since the AKP came to power in 2003, Turkish politics have been particularly divisive. The main difference between the AKP and its opponents lies in their opposing interpretations of Kemalism – a political ideology rooted in laicism, modernity, and republicanism as espoused by Turkey’s founder Mustafa Kemal Atatürk. Supporters of the CHP claim that the AKP has betrayed Kemalism by adopting political positions more conservative than those envisioned by Atatürk. The referendum ushered in more waves of criticism from the CHP, as the party claimed that the constitutional reforms would undermine the independence of the judiciary by firmly

bringing the Constitutional Court under the control of the AKP.

In spite of these critiques, the results of the referendum will change several discreet administrative matters that could facilitate the establishment of a more independent and democratic judiciary. Two of the most pivotal reforms are directed towards the appointment procedures and term limits of Constitutional Court justices. The amendment to Article 146 of the former constitution, outlining appointment procedures of the Constitutional Court justices, is one of these changes. Under the old constitution, the President appointed justices from a list of nominees derived by the plenary assemblies of various courts. Plenary assemblies, which are used in countries like France and Spain, are composed of political appointees that are subject to political influences. In Turkey, plenary assemblies are often politically appointed and composed of traditionally Kemalist judges, who nominate justices with similar Kemalist backgrounds.

In contrast, the new constitution calls for a representative system where the President and the Turkish Grand Assembly appoint candidates from a greater variety of governmental and judicial entities. In order to ensure diversity of political backgrounds of the judges on the court, representative systems often require different branches of the government to appoint a set number of judicial appointees. For example, both Italy and Bosnia-Herzegovina call for representative systems in their respective constitutions, and have adopted systems promoting an ideologically diverse court. However, this diversity initiative can be undermined if appointment procedures are not transparent, as is the case in Bosnia-Herzegovina, according to the European Center on Minority Issues.

Another amendment that may affect the diversity of the Constitutional Court is the one made to Article 146(b), replacing a mandatory retirement age with a non-renewable twelve-year term for Constitutional Court appointees. The amended article reads, “The members of the Constitutional Court shall be elected for a term of twelve years. A member shall not be re-elected. The members of the Constitutional Court shall retire on reaching the age of sixty-five.”

Fixed terms, like the ones used in the Constitutional Courts of Germany and

South Africa, are adopted in order to ensure that the Constitutional Court is composed of justices from a wide political spectrum. As justices with different political beliefs are cycled through these high courts every twelve years, the ideological composition of the Court will necessarily fluctuate. Arguably, mandatory retirement ages, like the ones used in Russia's Supreme Court, may stifle the jurisprudence in the Constitutional Court, because justices are not accountable to any entity and remain on the court for lengthy periods of time.

These amendments will undoubtedly shift the nature of the Constitutional Court. Turkey's old Constitutional Court has been criticized for espousing traditional Kemalist views. It has staunchly defended laicism by denying women the right to wear hijabs in school and has granted the Turkish military leaders special privileges and immunities. From this perspective, change in judicial term limits is likely a positive step, because it may create room for the appointment of justices of different political backgrounds. Still, while the amendment might allow the Constitutional Court to embrace more diverse ideological views over time, it may tie appointment of Supreme Court justices with the political agendas of new administrations.

Whether the administrative changes to the Constitutional Court will promote a more democratic judiciary is still uncertain. However, if the reforms result in a more ideologically diverse and independent judiciary, the Constitutional Court may be able to liberate the Turks from some of the worst features of Kemalism—the suppression of the freedom of religion and freedom of speech.

EGYPT'S PARLIAMENTARY ELECTIONS— A CHALLENGE TO THE EMERGENCY

On October 9, 2010 the Muslim Brotherhood, Egypt's largest opposition party, announced that it would run in the parliamentary elections in November. Within two weeks, more than 200 members of the Brotherhood were arrested. Egypt has been under a state of emergency for nearly 29 years, since Hosni Mubarak became president. Under Egypt's state of emergency, security personnel are permitted to arrest anyone suspected of posing a threat to the state, even if the actual threat is one of political opposition. Egypt's use of the state of emergency to justify certain

police actions is likely a violation of international law.

Egypt's ruling party has used international concern over terrorism as a basis on which to outlaw the Muslim Brotherhood for years. A state of emergency was first declared when Islamic groups targeted President Sadat in 1981, but the conditions that necessitated marital law have long disappeared. Counter-terrorism has taken on dimensions of such urgency within the international arena, that Egypt's strict censorship on media and repression of opposition groups has gone long unchallenged. However, the unprecedented levels of international attention to the upcoming parliamentary elections in addition to heightened civil unrest makes one thing certain – Egypt's state of emergency is at a crucial juncture.

The government has reasoned that it can arbitrarily arrest and detain political opposition because of its emergency law. Emergency laws, such as Egypt's State of Emergency statute, are not *per se* violative of international law. A state of emergency typically replaces rights and freedoms outlined in domestic legislation with more stringent laws. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) permits a state to declare a temporary emergency when there is a public threat to the life of the nation. Even then, states can only take measures strictly required by the exigencies of the public emergency.

Egypt declared its state of emergency in response to alleged threats of terror which the administration identified as being a public threat. Terrorist threats can trigger emergency law. Security Council Resolution 1566 (2004) stipulates that an individual may only be considered a terrorist, if such an individual committed an act (1) against members of the general population with the intention of causing death or serious bodily injury, (2) with the purpose of provoking a state of terror, intimidating a population, or to compel the State to abstain from doing any act, and (3) that can be defined as a serious crime under domestic law. The Human Rights Council subsequently adopted the same guidelines.

The circumstances in Egypt challenge the boundaries of a legal state of emergency. The actions of Egyptian authorities likely violate the ICCPR and Resolution 1566 by directly targeting representatives

of the Muslim Brotherhood for voicing their political agenda. Article 3 of the State of Emergency law permits authorities to arrest those suspected of disrupting public order without a warrant. It makes no mention of the criteria established in Resolution 1566. Of the 200 members of the Muslim Brotherhood recently arrested, not one is alleged to have committed an act that could be considered an act of terrorism under the Resolution 1566. While the Brotherhood does have a controversial history, it officially renounced violence in 1970s. With the exception of some isolated incidences, the Brotherhood largely functions as a social welfare group in Egypt with a political undertone. However, some disgruntled pro-violence groups formed in response as a result of the Brotherhood's decision to use peaceful means.

The government has reasoned that it can arbitrarily arrest political opposition because of the emergency law. The provisions of the emergency law are vague and broadly applied by the Egyptian government. Most concerning is the length of the state of emergency. As Martin Scheinin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, aptly asserted, “[a] state of emergency almost continuously in force for more than 50 years in Egypt is not a state of exceptionality; it has become the norm . . .”

Some consider the upcoming Egyptian elections as a litmus test, assessing the extent to which President Mubarak and his National Democratic Party will continue to exercise tight control over Egypt's politics, and more importantly, over the 2012 presidential elections. More than an Islamic group, the Muslim Brotherhood represents a widely supported political and socio-economic alternative to the current administration. Under the declared state of emergency, all opposition groups stand little chance of posing a meaningful opposition to the incumbent National Democratic Party. Conditions may change, however, as international and domestic pressure intensifies, compelling Mubarak to address challenges to his police state.

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SUB-SAHARAN AFRICA

RECIPROCAL VIOLENCE: MASS EXPULSIONS BETWEEN ANGOLA AND THE DRC

In November 2010, the UN Children's Fund (UNICEF) reported that more than 650 women and girls had been raped during a mass expulsion of 6,621 undocumented Congolese immigrants from Angola to the Democratic Republic of Congo (DRC) in September and October 2010. The reports of sexual violence are based on evidence collected by NGO welcome committees in the Western Kasai province of the DRC. Many of the victims reported being locked up in derelict buildings, gang-raped, and tortured by Angolan security forces and then forced to walk several days back across the border into the DRC. Although the UN Office for the Coordination of Humanitarian Affairs (OCHA) confirmed the reports of sexual violence, neither it nor UNICEF has confirmed in which country the sexual violence took place.

To date, neither Angola nor the DRC has investigated the allegations. In response to press inquiries, the DRC information minister said that his government has not received any complaints and does not want "to launch a dossier." Angola's ambassador said that his government has been expelling undocumented Congolese immigrants, but asserted that DRC authorities are always notified about the expulsions. Despite the reports of sexual violence, Angolan authorities have not ceased the ongoing expulsions, with another 1,350 Congolese reportedly expelled in December 2010.

While the media has covered the recent reports of sexual violence, the ongoing cycle of forced expulsions of undocumented immigrants from both Angola and the DRC has received scant international attention. Over the past decade, since the collapse of diamond mines in the southern DRC, an increasing number of Congolese citizens have crossed the border into Angola in search of better livelihoods and to escape ongoing violence and instability in the DRC. In response, the Angolan government forcibly expelled between 300,000 and 400,000 Congolese citizens from its Lunda Norte region between 2003 and 2009.

In 2004, the Angolan government began *Operation Brillante*, which sought to expel

garimpeiros, undocumented foreign workers in Angola's informal diamond mining industry. The vast majority of *garimpeiros* are Congolese. *Operation Brillante* led to the expulsion of a recorded 80,000 Congolese from Angola. In May 2009, the Angolan government began *Operation Crisis*, expelling 160,000 *garimpeiros* to the DRC. In response, the DRC forcibly expelled an estimated 51,000 Angolans, in what the media has termed a "tit-for-tat expulsion." Many of the Angolans expelled were refugees from Angola's 1975-2002 civil war and had been living in the DRC for many years. In October 2009, Angola and the DRC agreed upon protocols to suspend expulsions and to conduct consultations before any further deportations. But the most recent expulsions demonstrate Angola's failure to comply with this agreement.

Several humanitarian organizations, including *Medecins Sans Frontieres* (MSF), have documented a systematic pattern of state-sponsored sexual abuse and torture by the Angolan armed forces during these expulsions. MSF and OCHA also report that many returnees are forced to walk several days across the border and are suffering from dehydration, malnutrition, sleep deprivation, malaria, and HIV-related diseases upon their arrival in the DRC.

While the UN Humanitarian Coordinator for the DRC has developed an emergency response plan to address the needs of those recently expelled, previous experience indicates such institutional responses will have limited effect. Angola has consistently denied NGOs such as Human Rights Watch and UN organizations access to detention and deportation sites, and the International Organization for Migration has reportedly been unable to secure funding to assist those in need.

OCHA does not dispute the legality of Angola's expulsions, but has called on both Angola and the DRC to ensure that any future deportations are carried out in an organized manner to prevent further humanitarian suffering. Both states have ratified the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the International Convention on Economic and Social and Cultural Rights. In addition to the rights of liberty and security of the person, freedom from arbitrary detention, and freedom from cruel, inhuman

and degrading treatment enshrined in the international conventions, the actions of both Angola and the DRC violate Article 12(4) and 12(5) of the African Charter. In 1996, the African Commission on Human and Peoples' Rights ruled in a communication against Angola that these two provisions, when read together, prohibit states from carrying out mass expulsions of non-nationals based on nationality, race, ethnicity, or religion without opportunity for a legal hearing. Accordingly, those expelled may well have recourse before the African Commission. But without increased international pressure and additional funding, it is unlikely that either the humanitarian or legal responses to recent expulsions will be an improvement on the ineffectual responses of the past.

MEETING THE NEED FOR MEDICAL EVIDENCE IN PROSECUTION OF SEXUAL VIOLENCE: ONE KEY TO CURBING IMPUNITY IN SUB-SAHARAN AFRICA

Across the sub-Saharan region, standardized procedures for the collection of forensic evidence in crimes of sexual violence are severely lacking. This medico-legal problem is one of the many obstacles to the effective prosecution of rape and sexual assault and contributes to the pandemic of sexual violence against women in the region. One of the reasons for this high prevalence of sexual violence is widespread impunity for offenders. In countries such as Uganda and Zambia, marital rape – the most common form of sexual violence perpetrated against women – is not criminalized. Additionally, several countries allow an offender to escape prosecution if he proposes marriage to the victim. Even in those countries that do criminalize all forms of sexual violence, laws are often not enforced or contain loopholes. This systemic denial of justice to survivors and impunity for offenders normalizes rape and violence against women and girls.

In this context, proper guidelines and institutional capacity for the collection of medico-legal evidence become all the more important. Medico-legal evidence includes the collection of sperm, semen, and other forensic evidence and the documentation of physical injuries for use in court proceedings. While courts in the region may require the presentation of such evidence, sub-standard collection practices and limited numbers of medical professionals

often pose an insurmountable obstacle to survivors seeking justice.

Uganda's current legal system framework, for example, demonstrates a complete disconnect between court evidentiary requirements and the services actually available to survivors. Under Ugandan law, if a survivor of sexual violence decides to press charges against an assailant, she must first undergo a medical examination by a police surgeon. Uganda currently has only a handful of police surgeons — some reports suggest as few as two or three — all based in urban areas. In addition to prohibitively high transportation costs to urban areas, most survivors cannot afford police surgeon examination fees, which range between U.S. \$15 and \$25. Furthermore, sexual offenses can only be tried at the high court level, yet only five of Uganda's 112 districts currently have high courts. The Kampala-based Center for Women in Governance reports that 619 cases of rape were registered and investigated in Uganda in 2009. Of these, only 37 percent were prosecuted and only five percent resulted in criminal penalties for the perpetrators.

Some sub-Saharan states have taken small steps toward improving the medico-legal services available to survivors. In October 2010, Zimbabwe's Justice, Legal and Parliamentary Affairs Ministry announced that forensic evidence collected by State Registered Nurses (SRNs) will now be admissible as evidence in criminal court proceedings. Before the new policy, only medical doctors were authorized by law to collect forensic evidence, and, as in many other countries, victims of sexual violence often have to wait for days without bathing before seeing a medical doctor. Zimbabwe's new SRN policy thus fits into a larger state initiative to increase access to justice for survivors of sexual violence.

Another more comprehensive way of addressing the medico-legal problems faced by survivors of sexual violence employs the "one-stop" care center model developed in South Africa. Thuthuzela Care Centres (TCCs) are operated by South Africa's National Prosecution Authority at public hospitals in communities where the incidence of rape and sexual violence is particularly high. TCCs provide a safe atmosphere where survivors receive immediate treatment and counseling, referrals for long-term follow-up counseling, and subsequent transportation to a safe place.

All medical examination procedures are explained by nurses and, with consent from the survivor, doctors conduct examinations and collect forensic evidence. An investigating officer interviews survivors, and the center provides consultations with prosecutors, court preparation for victims, and explanations of court proceedings if a survivor presses charges. Through these centers, South Africa has distributed standardized medico-legal guidelines and developed forensic examiner programs for nurses.

Although South Africa still struggles with the deep cultural, societal, and economic factors underlying its high rates of sexual violence against women, the TCC model represents an encouraging move toward more effective and accessible resources for survivors. In 2007, the U.S. government created the Women's Justice & Empowerment Initiative (WJEI) to expand the TCC model to Zambia, Benin, and Kenya. To date, WJEI has established coordinated response centers in seven districts in Zambia, a one-stop care center in Kenya's largest hospital, and a pilot program in a Kenyan informal settlement. In Benin, WJEI has trained 3,000 local volunteers in 35 communities to refer victims of sexual violence to NGO-run services. These developments indicate a promising regional trend toward more effective medical and legal support for survivors of sexual violence. Nevertheless, the prevalence of sexual violence should not be underestimated. To combat it in earnest, local and regional governments must prioritize capacity-building and technical training to facilitate prosecution and curb the culture of impunity for perpetrators.

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EUROPE

FREEDOM TO ASSEMBLE IN RUSSIA: DOES THE FUTURE HOLD HOPE FOR IMPROVEMENT?

Recently, Russian policy has become increasingly strict on individuals' rights to assemble and to protest, narrowing the state's interpretation of these fundamental rights. Article 31 of the Russian Constitution and Article 11 of the European

Convention on Human Rights (ECHR) protect individuals' rights to peaceful assembly. Nonetheless, the Russian government has restricted many non-violent protests causing an upheaval among demonstrators and activists.

Article 31 of the Russian Constitution establishes the right to assemble, stating: "Citizens of the Russian Federation shall have the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches and pickets." Additionally, Russia is a State Party to the ECHR, which also protects the right to peaceful assembly and to an effective remedy, and secures these rights without discrimination, under Articles 11, 13, and 14, respectively. Under the ECHR, individuals can remedy violations of these rights before the European Court of Human Rights (ECtHR).

The most blatant restriction of the right to assemble is exemplified in Russia's prohibition of the Moscow lesbian, gay, bisexual, and transgendered (LGBT) pride parades from 2006 to 2008. Russian authorities feared that the demonstrations would cause violent reactions among the Russian people prejudiced against homosexuals, and as such, the bans were allegedly grounded in concern for public safety. The government's ban on peaceful assembly together with the discriminatory comments of Moscow's former mayor towards homosexuals caused parade organizers to bring claims of discrimination before the ECtHR.

Nikolay Alekseyev, founder and chief organizer of the LGBT rights group Moscow Pride, and a prominent LGBT rights activist, has filed three complaints with the ECtHR in response to Russia's ban on the LGBT demonstrations and the lack of an available remedy under Russian law to challenge these bans. The complaints allege that Russia violated Articles 11, 13, and 14 of the ECHR. On October 21, the ECtHR, in *Alekseyev v. Russia*, ruled in favor of Alekseyev, marking the first victory for LGBT rights activists in a case against Russia before the ECtHR. The ECtHR reasoned that Moscow authorities' concern over possible disturbances caused by the demonstrations was insufficient to justify the ban. This ruling reinforces the LGBT community's right to protest and organize, and extends protection of the right to peaceful assembly to other groups.

The ECtHR further found that the petitioners were denied an effective domestic remedy to address the breach of freedom of assembly because the LGBT community's claims were not given a fair hearing in Russia, despite the constitutional guarantee to peaceful assembly. The ECtHR stated that conditioning a minority group's rights to freedom of assembly on the majority of the population's acceptance of these rights is inconsistent with the values of Article 14 of the Convention. As a result, the ECtHR imposed a fine of €29,510 in damages and legal fees to be paid to Alekseyev.

In a movement to combat the oppressive policies of the Russian government, a group known as Strategy 31, whose name refers to Section 31 of the Russian Constitution, is working to bring attention to the restrictions on freedom of expression and right to assemble by organizing monthly protests and distributing pamphlets. The members of the Section 31 movement hold protests in Moscow's Triumphnaya Square each month with 31 days in order to draw attention to Article 31 of the Russian Constitution. Beginning in 2009, Strategy 31 has been working to restore the right of the Russian people to assemble, and, until September 2010, the government banned all nine protests sponsored by Strategy 31 for various reasons. Despite the government's opposition, the demonstrations have gained support from many of Russia's wide range of human rights groups affected by the government's restrictive policies. In October, Moscow also prohibited protests for political reform and demonstrations against the destruction of 1,000 hectares of the Khimki forest.

Perhaps as a result of publicity from the Alekseyev case or the constant pressure by Strategy 31, the Russian government has taken affirmative steps toward improving individuals' right to assemble. Russian President Dmitry Medvedev overturned the federal "Law on Rallies, Meetings, Demonstrations, Marches, and Pickets" sponsored by the United Russian Party. The law would have made organizing future demonstrations a crime for individuals previously convicted of planning illegal rallies. Additionally, the Russian government permitted Strategy 31's October 2010 monthly protest. Finally, authorities have allowed several rallies commemorating journalists who were murdered for investigating and exposing human rights violations and

violators, including Kremlin critic Anna Politkovskaya and Oleg Kashin. Various Russian activists are hopeful that the success in Alekseyev's case is a step forward for greater recognition of the freedom to assemble and protest.

SPANISH AUTHORITIES EXTRADITE MOROCCAN MAN DESPITE RISK OF TORTURE

On November 19, 2010, the Spanish Council of Ministers approved the extradition of Ali Aarrass to Morocco, ignoring concerns that Aarrass may face torture upon return. The extradition was ordered against UN recommendations to refrain from removing Aarrass until the Committee on Human Rights reviewed his case. Because substantial grounds for believing that Aarrass may be tortured exist, the extradition violates Article 3(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Spain is a party to and has ratified many international treaties that expressly prohibit a person's extradition to a country where they would be at risk of torture, including Article 5 of the Universal Declaration of Human Rights (UDHR), Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture. Spanish authorities held Aarrass on terrorism-related charges as a suspect in the May 2003 suicide bomb attacks in Casablanca, Morocco. He holds dual Belgian-Moroccan citizenship and has been under investigation by the Spanish National Criminal Court (*Audiencia Nacional*) since May 2006. Aarrass was arrested in the Spanish city of Melilla on April 1, 2008 on a warrant issued by Morocco one month earlier. The Spanish National Criminal Court reviewed Aarrass's case, and on March 16, 2009, official investigations were provisionally closed by Judge Baltasar Garzon for lack of evidence. However, Aarrass remained detained in Spain pursuant to an extradition request from the Moroccan government.

On November 21, 2008, the Spanish National Criminal Court authorized Aarrass's extradition to Morocco based on Morocco's pledge that Aarrass would not face the death penalty or a life sen-

tence without the possibility of parole. The court rejected Aarrass's argument that his joint Belgian-Moroccan citizenship should bar his extradition to Morocco. The court based its decision on a 1997 treaty between Belgium and Morocco that allows for dual Belgian-Moroccan nationals who have committed a crime which carries a sentence of two or more years to be extradited to Morocco from anywhere in the European Union. According to Amnesty International, Aarrass appealed his case to the Constitutional Court of Spain claiming that his extradition would violate the principle of double jeopardy. Because Spain found insufficient evidence upon which to charge Aarrass, his extradition would amount to receiving two separate judgments for the same offense.

Aarrass's appeal does not suspend the extradition process. On November 26, 2010, the UN Human Rights Committee issued a provisional measure calling on Spain to refrain from enforcing the extradition until the Committee had time to decide the case. Despite the UN's provisional measure, the Spanish Council of Ministers approved Aarrass's extradition on November 19, 2010, based on Morocco's pledge that Aarrass would not face the death penalty or a life sentence without the possibility of parole. Aarrass was removed from Spain to Morocco on December 15, 2010.

The international outcry over Aarrass's extradition arises from fear for violations against terrorist suspects in Moroccan prisons. International organizations, including Human Rights Watch, Amnesty International, and the Arab Commission for Human Rights recognize human rights violations committed by Moroccan security officials against suspects arrested under the country's counterterrorism law. Pursuant to this law, Moroccan suspects are often detained without explanation and are subjected to torture. Human Rights Watch reports indicate that Moroccan detainees are often beaten, suspended in contorted positions, threatened with the sexual abuse of the detainee's female relatives, sleep deprived, or subjected to cigarette burns.

Spain's decision to extradite Aarrass violates multiple international treaties to which Spain is a party. The ruling of Spain's National Criminal Court to continue with the extradition despite the known risks and warnings by the UN and violations of inter-

national human rights treaties could lead to claims against Spain before the European Court of Human Rights and the Human Rights Council.

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SOUTH AND CENTRAL ASIA

MADE IN KAZAKHSTAN: MIGRANT CHILD LABOR IN KAZAKHSTAN'S TOBACCO FIELDS

Despite national and international laws prohibiting children from working in tobacco fields, many migrant youth in Kazakhstan reportedly spend up to thirteen hours per day harvesting Philip Morris Kazakhstan's (PMK) tobacco leaves during the hottest months of the year. Most of the children have migrated with their families from other Central Asian countries to work in the fields. The intense labor requirements, and exposure to toxic pesticides and dangerous levels of nicotine, jeopardize the safety and health of field workers, especially child laborers, who are more vulnerable than adults to the hazards of tobacco farming. PMK has disregarded its corporate social responsibility by profiting from migrant child labor in Kazakhstan, and the Kazakh Government has been complicit in gross violations of international and domestic laws protecting the rights of migrant children by allowing these practices to continue.

Kazakhstan has ratified several international treaties, which prohibit migrant child labor. Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Kazakhstan ratified in 2006, prohibits the economic and social exploitation of children. The ICESCR restricts children from working in environments that are harmful to their health or development, such as PMK's tobacco fields. Frequently handling large amounts of tobacco can lead to a condition called "green tobacco sickness," which is caused by the absorption of large amounts of nicotine into the skin and can cause vomiting and headaches.

Furthermore, the ICESCR urges states to establish minimum age limits for child workers. Kazakh law itself prohibits those younger than eighteen from working on tobacco farms. Nevertheless,

the Kazakhstan Government reported more than 900 incidents of migrant child labor in 2009 and more than 1,200 in 2008. Kazakhstan is also bound under the ICESCR to uphold rights for all, regardless of national origin. The fact that many of the child laborers are migrants from other Central Asian countries should make no difference in how the government addresses this issue.

Additionally, the Convention on the Rights of the Child, to which Kazakhstan is a party, requires member states to protect children, regardless of nationality, from work that interferes with their health. Article 32 of the Convention on the Rights of the Child further calls on member states to provide a minimum employment age; regulate hours and conditions; and establish penalties and-or sanctions to ensure that employers adhere to the law. As a member of the United Nations International Labor Organization, Kazakhstan is also bound by the Minimum Age Convention and Worst Forms of Child Labor Convention, the latter of which seeks to protect children from forced labor and harmful professions.

Even though Kazakhstan has not signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which seeks to protect immigrants from less favorable work conditions and increases the recognition of migrant workers' rights, the previously mentioned international treaties and domestic laws prohibit Kazakhstan from allowing migrant child labor in tobacco fields. However, Kazakhstan's refusal to join itself to this Convention sends a mixed message to the international community.

PMK, a wholly owned subsidiary of one of the world's largest tobacco companies Philip Morris International (PMI), buys all of the tobacco in the Enbekshikazakh district of Almaty province, where nearly all of Kazakhstan's tobacco is grown. PMI has claimed that in past efforts to eliminate migrant child labor practices, it required Kazakh farmers to sign contracts with assurances of adequate labor conditions. However, in 2009, despite more than twenty reports of migrant child labor to PMK, PMK only terminated a single farm's contract for repeat offenses. Since the report's release in 2010, PMI has promised to improve communications with PMK and work with the local government.

Despite its international and national legal commitment to ban migrant child labor, Kazakhstan sustains a culture where children work days, nights, and weekends in tobacco fields. To show the world that it is attuned to the rights of migrant families, the Kazakh Government could ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in addition to meeting its current international legal obligations. PMK should terminate contracts with farms that repeatedly use child labor and the government should initiate more inspections of fields and impose sanctions for violations. Much more needs to be done by the Kazakh Government and business community to eradicate migrant child labor from Kazakhstan's tobacco fields.

HOW INDIA'S CONSERVATION EFFORTS IMPACT INDIGENOUS PEOPLES

India has seventy million hectares of forests, which is more than twice the entire geographical area of Finland. Besides the diverse array of animals and vegetation that call the Indian forests home, 250 million people depend upon the forests for their livelihoods. Many of these people are members of native tribes whose rights are protected under international and national laws. While India's sizeable indigenous forest-dwelling population is receiving the benefit of the country's environmental conservation efforts, more targeted efforts could be undertaken to fulfill the nation's international promises toward indigenous peoples. Efforts to increase the quality and quantity of ten million hectares of forest include the Indian government's creation of the Green India Mission and the Forest Rights Act (FRA). These policies have been commended for their progressive goals in environmental conservation and promotion of indigenous peoples' rights, but have also faced some criticism for weak implementation.

In 2008, India's National Action Plan on Climate Change (NAPCC) established the Green India Mission to increase forest coverage in order to decrease carbon levels, develop ecosystems, and protect forest-dependent communities. In December 2010 at the United Nations (UN) Climate Change Conference in Cancún, Mexico, India's Minister of Environment and

Forests Jairam Ramesh affirmed his country's commitment to conservation. He said,

We are pursuing aggressive strategies on forestry and coastal management. . . . India . . . [will] be amongst the most responsible in ensuring a high rate of growth of the *real* GDP — *Green* Domestic Product. That is my solemn assurance to the world community today on behalf of the Government of India.

By setting ambitious conservation goals, India is also meeting its international commitments to indigenous “forest dwellers.” India supported the non-binding UN Declaration on the Rights of Indigenous Peoples (Declaration), which aims to acknowledge and protect indigenous land rights. The Declaration forbids forcibly displacing indigenous peoples and upholds their right to possess and use their land.

Despite India's lack of international legal obligations towards indigenous people, the Green India Mission does recognize and include language in support of forest dwellers' rights. Besides the protection of individual rights, the mission seeks to provide community forest rights over resource allocation, according to the Ministry of Environment and Forests' mission plan.

India's direct endorsement of the Declaration was an extension of prior domestic commitments. In 2006, the Indian Parliament passed the FRA, which recognizes, vests, and establishes a framework of forest dwellers' rights. The key aspects of the FRA include private or communal land ownership rights or restitution and community rights, including resource allocation.

The implementation of FRA, which went into effect two years ago, has received a fair dose of criticism. In April 2010, the Ministry of Environment and Forests and the Ministry of Tribal Affairs created a joint committee to review the FRA. After visiting seventeen states, the committee issued a lengthy report that generally found weak implementation, namely that tribal livelihood security had not been achieved. Specifically, the committee discovered problems with large-scale mapping efforts and the documentation process, including issuing land title deeds.

Because India's forests contain valuable minerals like iron ore and bauxite, mining corporations — many of which are aligned with the government — are eager to develop these areas. Nevertheless, civil society has praised the Environmental Ministry for carefully vetting development proposals. In August 2010, the British firm Vedanta Resources PLC proposed a \$1.7 billion project with the East Indian state of Orissa to mine bauxite. The Environmental Ministry rejected it based on the potential harm to the ecosystem and the five thousand primitive tribal members who live in the region. Vedanta has previously been sued for mining projects that have interfered with the rights of tribes in Orissa. In 2008, Survival International, a tribal rights organization, sued Vedanta for damage related to aluminum manufacturing and planned bauxite mining.

India could further show its support for indigenous peoples by ratifying the International Labor Organization's (ILO) Convention 169 on Indigenous and Tribal Peoples. However, while the convention deals directly with the rights of native peoples and becomes legally binding one year after ratification, there have been problems with implementation in other countries.

India's lofty conservation goals have had a positive ripple effect on the nation's indigenous groups. The FRA and Green India Mission have been commended for considering forest dwellers' rights, but not without some criticism for imperfect implementation. As its environmental efforts progress, the nation should improve upon past mistakes under the FRA and continue to properly vet development proposals in the region.

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SOUTHEAST ASIA AND OCEANIA

CAMBODIA'S HUMAN RIGHTS PROGRESS AND NATIONAL RECONCILIATORY EFFORTS IN JEOPARDY

In July 2010, the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its first verdict, finding Kaing Guek Eav “Duch,” a Khmer Rouge official, guilty of crimes against human-

ity and war crimes for his operation of the Toul Sleng detention center in Phnom Penh. A second trial for four of the most senior surviving Khmer Rouge leaders is scheduled to begin in 2011, but Cambodian Prime Minister Hun Sen has publicly said that the trials will end there. Additionally, on October 26, 2010, the Government of Cambodia called for the removal of the UN Human Rights Commission's presence from Cambodia. Foreign Minister Hor Nam Hong explained that the removal would be justified because the UNHRC office has acted as “a spokesperson for the opposition party,” and because the UN human rights envoy, Christophe Peschoux “[did] not work . . . on human rights issues with the government.” Politicizing the UNHRC might be an attempt to delegitimize the office in the eyes of the public before the government officially ends trials for crimes committed under the Khmer Rouge.

The ECCC was created originally by an agreement with the UN and was formally established in 2006, with financial help from foreign governments and international bodies, such as the European Union. Generally, the ECCC's jurisdiction extends over crimes committed by members of the senior leadership in the Khmer Rouge regime. Article 8 of the Law on the Establishment of ECCC for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Khmer Rouge) provides that the ECCC has the power to try those “who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979,” at the height of the Khmer Rouge regime.

Up to three million people perished during the Khmer Rouge regime. Thus, limiting the ECCC trials for war crimes and crimes against humanity to only five potentially means that the Cambodian government would bring no future case against other senior leaders also involved in planning the killings. Also problematic is that, apart from the ECCC, Cambodia effectively lacks another venue in which to try surviving Khmer Rouge officials, and it refuses to allow other nations or international venues try the officials. Therefore, the ECCC represents the best chance for

justice; however, its politicization will lead to support for its discontinuance, which would effectively grant impunity to all other Khmer Rouge officers who were on the ground carrying out the brutal crimes against humanity dictated by the regime's leadership. Even if Cambodia were to remove the trials to its Supreme Court or Military Court, the government openly acknowledges the weaknesses of its overall legal system. Its national courts fall short of international standards, the primary reason the ECCC was created, such as being independent, fair, and of sufficient resources to try the Khmer Rouge cases. The argument could be made, however, that any trial is better than no trial; after all, the Cambodian populace has been waiting for justice for over thirty years.

The possible closure of the UNHRC office in Cambodia will make the prosecution of crimes committed during the Khmer Rouge regime, in addition to the two cases at the ECCC, unlikely. Human rights groups such as Amnesty International and Human Rights Watch argue that the possible closure of the UNHRC's office constitutes a "direct assault on the UN's human rights mandate, encompassed by the Universal Declaration of Human Rights and the international human rights conventions." As a state party to the ICCPR and ICESCR, Cambodia is obligated to respect rights protected by those instruments, as well as the UN mandate in general. However, Hun Sen's plan to "dig a hole and bury the past," by capping the trials for Khmer Rouge officials, limits justice and secures his own immunity from additional trials. As some analysts have asserted, any extension of trials into the lower ranks of the Khmer Rouge could uncover evidence implicating Hun Sen and other former officers of the Khmer Rouge, many who are Hun Sen's political allies. Such evidence could undermine Hun Sen's political position and his majority party's continued leadership.

By closing the UNHCR office, and effectively disengaging with the international community on human rights, Cambodia is taking two steps backwards. In doing so, the government could seriously jeopardize all the progress achieved by the ECCC, which could have long-term detrimental effects on the ability of the Cambodian society to reconcile and improve human rights.

ENSURING RELIGIOUS FREEDOM IN INDONESIA: HOW THE GOVERNMENT IS FAILING TO MEET ITS INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS

The freedom to practice one's religion without unlawful interference or coercion is increasingly under threat for religious minorities in Indonesia. Christian denominations, specifically, seem to be the target of extremist hostilities. On December 17, 2010, the eve of the Islamic New Year, a crowd set fire to a Catholic church under construction in Bekasi, West Java. Five days earlier, 200 demonstrators from hard-line Islamic organizations, including the Indonesian Ulama Forum, together with the Civil Service Police Unit of Rancaekek, raided seven churches. The demonstrators disrupted worship services and, ultimately, forcibly closed the churches, expelling hundreds of worshipers into the streets. The government has often failed to extend state protection to non-registered places of worship outside of this Christian holiday season. Most recently, on February 8, 2011, more than 1,000 extremist Muslim demonstrators raided a courthouse and burned two churches in Temanggung, located in central Java, after a Christian man was sentenced to five years in prison for distributing leaflets deemed blasphemous to Islam. Although Indonesia's Constitution and its international obligations require it to recognize and maintain the right to freedom of religion in Indonesia, that right, especially for religious minorities, has largely been left to the worshippers themselves to defend. Consequently, the minorities' human right to freely worship is at risk of being *de facto* annulled.

As a State Party to the International Covenant on Civil and Political Rights (ICCPR), Indonesia must abide by Article 18, which protects the rights to "freedom of thought, conscience, and religion," and includes the right to "manifest [one's] religion or belief in worship, observance, practice, and teaching." Chapter XI, Article 29(2) of the Indonesian Constitution protects the same principle right: "The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief." However, in Indonesia, the organized practice of religion in groups may only be carried out in places of worship that are registered with the government. To register, religious groups must solicit and procure a Joint Ministerial Decree (SKB), which

is approved and issued jointly through the Religious Affairs Ministry and the Home Ministry, provided that the religious leaders or planners have first met a list of stringent requirements. Among them are the obtainment of local consent as manifested by the signatures of sixty local residents at minimum, proof of at least ninety church members, and approval from village leaders and a local interfaith forum.

Minority religious groups have complained that the SKB process is discriminatory and infringes on their constitutional rights. As a result, many churches are unregistered and located in house-like dwellings, or "house churches," making them vulnerable to attack by extremist groups. An International Crisis Group (ICG) report on religion in Indonesia, called "Indonesia: Christianisation and Intolerance," dates the start of a state of elevated religious tensions in Bekasi, a prominent suburb of Jakarta, back to 2008. The report attributed the rise in tensions to competition between "hard line Islamists and Christian evangelicals . . . for the same ground," including mass conversion efforts, church construction, and "affronts to Islam." Furthermore, ICG cites government reluctance to prosecute "hate speech" due to unclear legal limits of free speech, and it suggests that Indonesia develop a strategy to address the growing religious intolerance "because without one, mob rule prevails."

In a move demonstrative of the government's stance, Jakarta's Police Chief issued a statement on December 18, 2010 vowing to provide protection for every registered church from attack during the Christian holiday season. Thus far, the government has failed to sufficiently thwart the extremist groups who are moving freely in Indonesia and raiding house churches – exercising their own type of vigilante justice. Although Article 29 of Indonesia's Constitution cannot realistically be interpreted to require that the government protect individuals from every private threat to their freedom of religion, failing to sufficiently address this pervasive type of "unchecked extremism" threatens minority groups' rights to freely worship, as it implies that the government condones these aggressive hostilities.

Indonesia is legally obligated to recognize and protect the right to practice any religion freely and manifestly, and

as such, it must take prompt, affirmative actions to stop the church raids by holding accountable the extremist groups who conduct them and simultaneously fostering a national culture of acceptance. The government must also lower the barrier to receive an SKB because, in practice, the stringent requirements make it difficult for minority groups to obtain government approval. Thus, the unregistered churches go undocumented in government records and are more vulnerable to attack because they lack the full rights of other organized religious bodies under the law. Therefore, the Indonesian government needs to take a more active role in protecting minorities' right to freedom of religion in order to satisfy its international and domestic obligations as well as strengthen the unity of a growingly diverse nation.

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EAST ASIA

SOUTH KOREA'S NATIONAL SECURITY LAW: LEGITIMATE MEASURE OR THREAT TO FREEDOM OF SPEECH?

On January 10, 2011, South Korean officials accused a 54-year old man known only as "Cho" of using various websites, including Twitter, to praise the North Korean government and distribute information from its official website. The South Korean government indicted Cho under the country's National Security Law (NSL), which prohibits positive remarks about and dissemination of material by anti-state groups. The law has been criticized for failing to clearly define which activities it prohibits, and human rights groups claim that it may be applied in cases where national security is not actually at risk, ultimately violating the right to freedom of expression guaranteed under Article 21 of the Korean Constitution and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which South Korea ratified in 1990. While Korean courts have ruled that the NSL is only applicable in cases where national security is actually threatened, the courts have used inconsistent standards to determine what constitutes such a threat.

The NSL was passed in 1948 shortly after the establishment of South Korea.

It defines anti-state groups as "domestic or foreign organizations or groups whose intentions are to conduct or assist infiltration of the Government or to cause national disturbances." As recently as 2010, the Supreme Court affirmed that this definition was intended to include North Korea and pro-North Korean organizations. While the South Korean government maintains that the NSL is a necessary and legitimate national security measure, human rights organizations such as Amnesty International have documented numerous cases since the law's inception in which its application served only to stifle legitimate freedom of expression and speech. For example, in the 1990s the government used the law to punish a Korean filmmaker for showing his film about the suppression of communists in the 1940s. According to Amnesty International, "while certain left-wing political works are permitted for academic study, possession or reference to the same works often becomes a criminal offense in the hands of a student or activist with perceived 'pro North Korea' leanings." This inconsistent pattern of enforcement indicates that the information itself is likely not a risk to national security.

South Korean courts have ruled in the past that supposed violators of the NSL who do not pose a threat to national security cannot be found guilty of violating the law. The courts have nevertheless been inconsistent in the standard used to determine whether pro-North Korean statements or information dissemination poses a risk to national security. Just two months prior to Cho's indictment, the Supreme Court found another South Korean resident known as "Song" guilty of violating the NSL for mere possession of instrumental songs with pro North Korean titles. In 2010, the Supreme Court held that a student involved in pro North Korean student groups who possessed information praising North Korea and who demonstrated in support of North Korea while obstructing traffic was guilty of violating the NSL. Even though four of thirteen justices dissented, citing a dangerously low standard for determining whether an activity presents a risk great enough to justify the restriction, the majority noted that, since the defendant's motives were not "academic research and profit," he must have "possessed it with a purpose to praise, encourage the activities of [the] anti-state organization." While the Supreme Court

has consistently applied this lower threshold for a risk to national security, other South Korean courts have applied higher standards. For example, in a 2008 public statement calling for the repeal or reform of the NSL, Amnesty International cited the case of professor Oh Se-chul, who had warrants for his arrest issued twice because of his involvement in the Socialist Labour Solidarity movement. In both instances, the Seoul Central District Court found a lack of "proof that he tried to overthrow the country and the democratic system," indicating a much higher standard for what constitutes a threat to national security under the NSL.

Such inconsistency in the standards used by South Korean courts to determine whether a national security risk exists in NSL cases reflects a struggle in South Korea over how to balance the country's democratic ideals with its national security concerns. Although inconsistently applied in South Korean courts, the current standard set by the Supreme Court for determining what expression qualifies as a threat to national security appears low enough that the freedom of expression protected by Article 19 of the ICCPR is threatened. The case of Cho offers another opportunity for the South Korean judicial system to interpret the NSL in a manner consistent with international legal norms.

CHINA'S IUD POLICY: GROUNDS FOR REFUGEE STATUS?

On February 1, 2011, the U.S. Second Circuit Court of Appeals heard the case of Mei Fun Wong, a Chinese national seeking asylum in the United States. Wong seeks asylum on the basis that she allegedly faces persecution in China because she refuses to comply with China's policy requiring women to use intrauterine devices (IUD) under the country's population control policy. China allows for the involuntary insertion of IUDs when women fail to voluntarily comply with the policy. The Court denied a portion of Wong's petition in accordance with a 2010 decision that involuntary insertion of an IUD, absent "aggravating circumstances," is not "involuntary sterilization" for the purposes of determining refugee status under the Immigration and Nationality Act. Nevertheless, the Court remanded the decision to the Board of Immigration Appeals (BIA) for it to "articulate the aggravating circumstances and nexus standards it applied to the case

. . . to permit judicial review.” While the United States is not a signatory to the 1951 Convention Relating to the Status of Refugees, its accession to the 1967 Protocol indicates its commitment to implementing the Convention. Accordingly, Wong’s case raises compelling questions as to whether the involuntary insertion of IUDs should be considered persecution for the purposes of determining refugee status under international standards.

In 1991, after the birth of her son, Wong was forced by Chinese officials to wear an IUD to prevent future pregnancy. Wong’s requests to have the IUD removed due to severe pain were denied, and in 1992, she arranged for a private doctor to remove the IUD. When an annual gynecological examination revealed that the IUD was gone, Wong was detained for three days. She was released from detention once she acquiesced to the insertion of a new IUD. In 1998, Wong attempted to flee China to avoid what she called the “continual torture and torment” of wearing the IUD, but was stopped in Hong Kong and jailed for four months. Upon return to the mainland, the government fined her for leaving China illegally and for missing required gynecological appointments. In 2000, she and her son arrived in the United States and sought asylum, citing fear of future persecution based on her past persecution under China’s population control policy.

In its *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (UNHCR Note), the United Nations High Commissioner for Refugees (UNHCR) recognizes the necessity of non-discriminatory and non-coercive family planning policies aimed at improving general welfare, but maintains that such policies should be consistent with international human rights standards. Under the Refugee Convention, an individual is eligible for refugee status if, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” she is unable or unwilling to return to her country. According to the UNHCR, claims for refugee status resulting from coercive family planning policies violating international human rights standards may be justified based on a fear of persecution due to the impact or harm suffered because of the policy or due to the penalties or sanctions imposed for non-compliance.

While the UNHCR considers some family planning policies such as forced abortion or forced sterilization to be inherently persecutory, it is unclear whether involuntary insertion of IUDs is persecutory under the Convention. Claims for refugee status based solely on China’s policy of forced IUD insertion are often distinguished from those based on forced sterilization or abortion because of the tempo-

rary and seemingly noninvasive nature of IUDs. Nevertheless, a claim based on the IUD policy that succeeded in demonstrating a well-founded fear of persecution based on a political opinion – such as the desire not to wear an IUD – would likely be sufficient to qualify for refugee status. Additionally, individuals such as Wong who have been imprisoned or potentially face imprisonment for violating the IUD policy have stronger claims for refugee status, according to the UNHCR Note, even if the imprisonment is brief.

In Wong’s case, her claims that the IUD is painful, her repeated attempts to breach the policy by having the IUD removed, and her decision to leave the country, make clear her political opinion that she should not have to wear the device. Together with her prior imprisonment for failure to comply with the policy, these facts should be sufficient to satisfy the requirements of refugee status based on international norms. Wong’s future ultimately rests on the BIA’s decision on remand, which the Second Circuit instructed to look to international standards. It is unclear what will happen to Wong in China after such disregard for the population control policy if her second attempt before the BIA fails.

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