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International Legal Updates

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INTERNATIONAL LEGAL UPDATES

North America

Family Faces Criminal Charges for Human Trafficking in Canada

In what has been called Canada's largest human trafficking case to date, Ferenc Domotor Sr. is accused of being the ringleader in a human trafficking and fraud operation in the City of Hamilton, Ontario, Canada. Domotor Sr. is currently facing human trafficking, fraud, conspiracy and organized crime charges before the Ontario Superior Court of Justice. Along with multiple alleged co-conspirators, Domotor Sr. is accused of luring 19 Hungarian nationals to Canada with the promise of high-paying jobs. Instead, when they arrived they were allegedly forced to work as slave laborers for Domotor Sr.'s family-run stucco and construction business. The Royal Canadian Mounted Police (RCMP) and the Canadian Border Services Agency (CBSA) arrested ten members of Domotor Sr.'s extended family on charges of unlawful recruitment and exploitation of foreign nationals, and of withholding travel documents. Charges were also filed against other members of Domotor Sr.'s family for receiving financial benefit from the exploitation of the Hungarian workers by collecting the workers' welfare payments.

Allegedly, Domotor Sr. financed and arranged for the victims to fly to Canada, and instructed them to claim refugee status upon arrival. Domotor Sr. then locked them in the basements of homes in Hamilton and Ancaster, Ontario where some were fed "three-day-old meals that even dogs would not eat." Domotor Sr. then allegedly confiscated their passports and forced them to work at a construction site for seven days a week without pay. Several victims claim that they were threatened, ordered not to leave the houses unaccompanied, and beaten.

Canada has only recently adopted measures to aid trafficking victims and prosecute traffickers. Trafficking in persons did not become an offense under the Criminal Code until November 2005 due to a lack of widespread awareness about the extent of the problem and insufficient prioritization of the issue in the political sphere. Before this amendment, the Criminal Code did not contain any provisions that specifically forbade trafficking in persons, although several other offenses such as, kidnapping, uttering threats, and extortion were used to prosecute human traffickers. So far, however, convictions under the new law have occurred only in cases involving Canadian women and girls subjected to sexual exploitation.

The prosecution of Domotor Sr. marks the first case of forced labor not involving sexual exploitation that will be tried under the law. The prosecution of Domotor Sr. is also significant because the victims were foreign nationals – a move that may indicate Canada's new willingness to prosecute cases involving foreigners rather than limiting prosecution to cases where victims are Canadian citizens. This case also highlights what immigration agency records have suggested: more human trafficking victims in Canada are forced into manual labor than are forced into sex trafficking.

In the past decade, Canada has taken significant steps toward addressing human trafficking. On October 21, 2010, the Canadian federal government introduced the Preventing Human Smugglers from Abusing Canada's Immigration System Act. This legislation proposes extensive measures to stop human trafficking by making it easier to prosecute human traffickers, imposing mandatory prison sentences on convicted human smugglers, and holding ship owners and operators accountable for use of their ships in human smuggling operations. Additionally, in 2002 Canada ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Protocol). Canada made no reservations or declarations and thus is obligated to uphold all parts of the Protocol. Canada's legal obligations under the treaty include enacting legislative measures to establish criminal offenses for trafficking, taking measures to provide trafficking victims with social and psychological services, and taking steps to prevent human trafficking. Since May 2006, Canada has started to provide foreign victims of human trafficking with temporary residence permits and access to interim healthcare coverage. Subsequent legislation gave victims the ability to obtain a work permit.

The successful prosecution of Domotor Sr. would mark a major step forward for Canada in combating human trafficking. The case itself suggests a greater awareness of importance of enforcing human trafficking laws among Canadian law enforcement officers and prosecutors, and a greater willingness to take aggressive measures to protect victims and punish perpetrators. Initially, Domotor Sr. was released on CAD $50,000 bail and the Justice of the Peace ordered him to surrender his passport, refrain from travelling outside Ontario, and remain in his home unless accompanied by one or more of his sureties. Additionally, he was ordered not to have any contact with his alleged trafficking victims or have any foreign nationals residing with him. However, at the time of printing, Domotor Sr.'s bail was revoked and he was in custody awaiting trial.

U.S. Resumes Deportations of Haitian Nationals Amidst Cholera Epidemic

Wildrick Guerrier, a Haitian national and a long-time resident of the U.S., died of cholera-like symptoms in an overcrowded Haitian jail approximately one week after the U.S. deported him for a conviction of firearms possession. Subjecting Guerrier to the life-threatening conditions of Haitian jails appears to be grossly disproportionate to his offense.

In a February press release, the Inter-American Commission on Human Rights (IACHR) urged the United States to halt deportations of Haitians with serious illnesses or family ties in the U.S. The IACHR asserted that deportation could endanger the lives of Haitian nationals due to the continuing humanitarian crisis in Haiti. The Haitian government routinely imprisons deportees with a U.S. criminal record. Prisons in Haiti are overcrowded and lack potable water, sufficient sanita-

tion, and access to adequate medical treatment, all of which contribute to the spread of cholera, tuberculosis, and other diseases. The IACHR has issued precautionary measures requesting that the U.S. suspend the deportation of five Haitian nationals until Haiti can guarantee that detention facilities meet the necessary minimum standards.

After the earthquake in Haiti in January 2010, the U.S. government designated Haiti as a country whose nationals could receive temporary protected status (TPS) and initially suspended the deportation of Haitians with criminal convictions. One year after the earthquake hit Haiti, over 1 million people are still displaced and hundreds of bodies still have not been pulled out of the rubble. In addition, Haiti continues to grapple with a cholera epidemic. While the TPS designation extends until July 2011, the U.S. resumed deportations of Haitians on January 20, 2011. The Department of Homeland Security (DHS) claimed to have lifted the moratorium on deportations because it could not detain deportable Haitians indefinitely and their release was not in the interest of national security.

Many Haitians currently residing in the U.S. have been granted TPS. TPS allows foreign nationals to remain in the U.S. when conditions in their home countries, such as an ongoing armed conflict or a natural disaster, temporarily prevent them from returning safely. Those applying for TPS are subject to the eligibility requirements listed in 8 U.S.C. § 1254(a) and 8 C.F.R. §§ 244.2 — 244.4, however, meaning they must be nationals of or have habitually resided in a country designated for TPS, and must have continuous physical presence in the U.S. since that country's most recent TPS designation. Most notably, an individual is ineligible for TPS if he has been convicted of any felony or two or more misdemeanors in the U.S., has persecuted others, is otherwise subject to one of the bars to asylum, or is subject to one of the criminal or security related grounds of inadmissibility. These eligibility requirements have prevented many Haitians, like Guerrier, from receiving TPS. DHS's decision to resume deportations places these individuals at the greatest risk as prison conditions in Haiti are a breeding ground for the spread of cholera and other diseases. The current conditions in Haitian jails support the Center for Constitutional Rights's claims that resuming deportations "would end up being a death sentence for many."

Although the deportation and likely imprisonment of Haitian nationals, especially stemming from two misdemeanor convictions, seems to violate the guarantee of proportionality between punishment and crime under the Eighth Amendment to the U.S. Constitution. The proposition that the Eighth Amendment does not extend to deportations on the ground that a deportation is not a punishment for crime has been upheld since it was first established by *Fing Yue Ting v. United States*, 149 U.S. 698 (1893). Nevertheless, there is something intrinsically disproportionate about allowing individuals convicted of misdemeanors to share the same fate as those convicted of capital offenses, given the likelihood that imprisonment in Haiti following deportation will likely lead to death. While the U.S. is not obligated to suspend the deportations of Haitians indefinitely or to extend TPS to ineligible Haitian nationals residing in the U.S., the humanitarian concerns in Haiti indicate that the timing of the agency's decision to resume deportations could not be worse. If nothing else, the U.S. should extend the moratorium on deportations to Haiti until the health and political crisis in the country abates.

Extrajudicial Killings and Police Brutality in Jamaica

On January 7, 2011, Jamaican police killed an alleged gang leader, who neighbors claim was innocent and unarmed when shot by police. This incident follows the August 2010 release of an amateur video showing Jamaican police shooting and gruesomely beating to death an unarmed man after he had been subdued. These incidents of police brutality and extrajudicial killings are not the first to surface in Jamaica. Although Jamaica's population is less than three million, 140 people die in police shootings each year, making Jamaica's rate of lethal police shootings one of the highest in the world. From 1999 to 2009, 1,900 people were killed in police shootings, but only one police officer was convicted of manslaughter – a second was brought to trial and acquitted on appeal. Allowing extrajudicial killings denies suspected criminals the rights to due process, humane treatment, and judicial protection.

These extrajudicial killings and incidents of police brutality contravene the American Convention on Human Rights (ACHR), which Jamaica ratified in 1978. Article 4 of the ACHR guarantees the right to life; Article 5, the right to humane treatment; Article 8, the right to due process; and Article 25 the right to judicial protection. Jamaica's systematic failure to conduct detailed, timely, and impartial investigations into police shootings and extrajudicial executions violates the right to due process and to judicial protection. The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights have held that state parties must undertake comprehensive, prompt, and impartial investigation when rights protected under the ACHR are violated, and that states must prosecute and punish those responsible for violations. The IACHR has specifically expressed concern about the police killings in Jamaica.

The extrajudicial killings also violate Jamaica's international legal obligations under the International Covenant on Civil and Political Rights (ICCPR). Article 9 of the ICCPR guarantees the right to liberty, the right to be free from arbitrary arrest and detention, and the right to judicial proceedings. Moreover, Article 2(3) of the ICCPR obligates States Parties to ensure that those whose rights have been violated have access to effective judicial, legislative, and administrative remedies. However, Jamaica has declared a state of emergency with regards to gang violence, and declared to the United Nations Secretary-General that it may therefore derogate from many of its obligations under the ICCPR.

The United Nations also has several mechanisms to protect against police brutality and extrajudicial killings. Although these mechanisms are not legally binding, they demonstrate the international community's commitment to preventing police brutality. The UN General Assembly adopted a Code of Conduct for Law Enforcement Officials (Code of Conduct) through the passage of resolution 34/169. Article 3 of the Code of Conduct states that "law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." Similarly, the UN Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Use of Force and

Firearms by Law Enforcement Officials (Basic Principles). The Basic Principles recommend that police use lethal weapons only when absolutely necessary to protect life, and beseech police to respond proportionately to threats and unlawful activities. The Basic Principles also request the governments of UN Member States to ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offense. Finally, the Basic Principles specify that exceptional circumstances such as internal political instability or other public emergencies may not justify any departure from these principles. Jamaican police use Jamaica's high crime rates and gang-related violence to justify the use of disproportionate force. Jamaica's National Security Ministry estimates that there are 268 active gangs in Jamaica — a country with one of the highest murder rates in the world. These statistics, however, do not justify the use of police brutality under the Basic Principles. Police must ensure public security without compromising human rights.

Jamaican police have attempted to reduce the violence in Jamaica by using the "hot spot" strategy, whereby police and military personnel flood a particular neighborhood and take swift action against gangs in the area. Opponents criticize this strategy as an ineffective show of force that does not end the gang violence. As an alternative, commentators have suggested that Jamaica institute a policy of preventive detention that specifically targets the drug kingpins and major players in the gangs. Preventive detention refers to a short-term strategy that aims to remove the leadership of violent gangs and drug rings from society in order to prevent the emergence of "hot spots"— areas where the high level of gang violence has created a state of emergency. While this would eliminate the problem of collective punishment, it would also create the potential for human rights abuses associated with pre-trial detention, including potentially violating suspects' rights to liberty, due process, and judicial proceedings.

Important elements of prevention in relation to extra-judicial killings and police brutality may be the use of a combination of human rights training for police officers, community policing techniques, improvement of support systems for police who feel that they are in danger, and a strong judicial system that enforces the rule of law. These types of solutions would eliminate the perceived need for police to take matters into their own hands by assuring that the police are confident that the judicial system will effectively and justly punish those engaged in violence. Also, the judicial system must enforce the laws with respect to police brutality so that police officers are also sanctioned for their acts of violence. Thus, an overall strengthening of the rule of law is likely to help resolve human rights abuses perpetrated by Jamaican police.

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Latin America

Seeking Justice for Victims of Oil Exploitation in Lago Agrio, Ecuador

After seventeen years of litigating *Aguinda et al. v. Chevron Corp.* in at least three fora, the Lago Agrio community, an oil-rich area in the Sucumbíos province of Ecuador, won a judgment against Chevron-Texaco Corporation for its toxic-waste contamination of the Amazon. On February 14, 2011, an Ecuadorean court awarded $8.6 billion in damages, plus an additional amount for punitive damages if Chevron did not publicly apologize within fifteen days of the court's decision — Chevron did not comply. While the judgment may be unenforceable because Chevron-Texaco has no assets in Ecuador, it is a victory for the implementation of the American Convention on Human Rights (ACHR) and numerous other international agreements that protect individuals' rights.

The court found that Texaco's oil operations — before it merged with Chevron Corporation — from 1964 and 1992 polluted the Ecuadorian and Peruvian rainforest by not properly containing waste pits for toxic oil exploration byproducts. The pollution resulted in widespread harm to the environment and human health.

Two lawsuits were initially filed in U.S. federal court but were dismissed for *forum non conveniens*. Chevron, however, advocated for and agreed to litigation in the Ecuadorian courts. This litigation in Ecuador lasted approximately eight years prior to February's judgment. Among Chevron's defenses was that it could not be found liable for individual citizens' complaints because the government of Ecuador had released it from all liability in two separate contracts. The court, however, rejected this argument, stating that on their faces, the agreements only referenced the government and not suits by individual citizens.

The court explained that even if the releases had included individuals, the contract would be illegal and in violation of the fundamental rights protected under the Constitution of Ecuador and numerous international agreements. The court also rejected Chevron's argument that the state of Ecuador was acting on behalf of the Ecuadorian people, and that the government-signed release agreements should bind all Ecuadorian citizens. The court distinguished governmental acts of representation, which "show the unilateral will of the state," from acts where the government is a participatory partner, such as to contracts with a corporation. Acts where the government is a partner are not acts of representation binding all citizens.

Citing Ecuador's Constitution and the ACHR, ratified by Ecuador in 1977, the court held that contracts such as the 1995 and 1998 releases could not extinguish a plaintiff's right to bring claims. Article 8.1 of the ACHR guarantees every person the right to a hearing for the determination of his or her rights.

The court additionally found a right to claims in the courts under Article 18 of the American Declaration of Human Rights and Duties of Man of 1948, Article 10 the Universal Declaration of the Human Rights, and Article 14 of the International Covenant on Civil and Political Rights. The court reasoned that because the Constitution and international agreements recognize the right to a hearing as a fundamental right guaranteed by the state, a state could not relinquish that right in a contract. Thus, a court could not interpret the Ecuadorian government's prior releases with Texaco as binding on all affected citizens.

Although the court's interpretation of the relationship between states, transnational actors, and individuals upheld human rights in the face of a development model that often leaves individuals voiceless, both parties plan to appeal the judgment. Chevron-Texaco claims the trial was fraudulent and inconsistent with scientific data, despite the court's stated attempt to reconcile both parties' scientific assess-

ments and a court-appointed scientific assessment. The plaintiffs claim that the $8.6 billion award is insufficient to clean up the environmental damage.

Regardless of each party's claims, the Ecuadorian court's judgment is unenforceable for now because Chevron-Texaco has no seizable assets in Ecuador. Furthermore, one week before the judgment, Chevron-Texaco obtained a temporary restraining order (TRO) from a U.S. court enjoining the plaintiffs from attempting to enforce a judgment from the Ecuadorian legal proceedings in the U.S. The TRO was extended in March. Overall, however, the decision can be seen as a step towards holding transnational companies accountable for the harms they cause.

Amnesty in Uruguay is Rejected

The Inter-American Court of Human Rights (IACtHR) held that Uruguay's amnesty law for crimes committed by the state during the 1973-1985 military dictatorship violated the American Convention on Human Rights (ACHR). *Gelman v. Uruguay* is the first case against Uruguay for human rights violations to come before the IACtHR. Under the ACHR and the Inter-American Convention on Forced Disappearance of Persons (IACFDP), the IACtHR condemned Uruguay for the forced disappearance of María Claudia García Iruretagoyena de Gelman. Gelman was abducted as part of "Operation Condor," a joint effort between the dictatorships in Uruguay, Paraguay, Chile, Brazil, and Argentina to eliminate political dissidents in the 1970s. In response to the IACtHR's decision, the Uruguayan Senate, passed legislation to annul its amnesty law on April 12. The legislation must now go to the lower house for a vote.

Additionally, the IACtHR held that Uruguay had violated the Rights of the Family under Article 17 of the ACHR for crimes against Macarena Gelman Garcia, María Claudia García Iruretagoyena de Gelman's daughter. Article 17(1) provides that the state must protect the family unit, as it is the "fundamental group unit of society." Garcia did not learn the identity of her mother until her grandfather tracked her down twenty years after Gelman's abduction.

The case was previously ineligible for trial in Uruguay because the amnesty law, the 1986 Expiry Law of Demanded State Punishment, prohibited nearly all judicial investigations into the human rights violations committed by military and state actors during the period covered by the amnesty law. The case was submitted to the IACtHR after Uruguay refused to follow the Inter-American Commission on Human Rights' recommendations to repeal the amnesty law, conduct investigations, and provide reparations to victims of state terrorism.

An alleged political dissident, Gelman was abducted in 1976 when she was seven months pregnant. While in detention, she gave birth to a daughter, Macarena Gelman Garcia. The baby was then taken from her and left on the doorstep of a police officer, who adopted and raised her. Garcia's husband, Marcelo Gelman, was also abducted, tortured, and assassinated. María Gelman's remains have never been found.

The IACtHR found Uruguay in violation of Articles 3, 4(1), 5(1), 5(2), and 7(1) of the American Convention on Human Rights (ACHR) by depriving Gelman of the rights to recognition as a person before the law, life, personal liberty, and personal integrity. Uruguay ratified the Convention in 1985 when the dictatorship stepped down and therefore, is bound by its obligations and prohibitions. The IACtHR also found that Uruguay had violated Articles 1 and 11 of the IACFDP, which Uruguay ratified in 1996, by practicing forced disappearances and not holding detainees in officially-recognized detention centers. Most importantly, the IACtHR declared Uruguay could no longer use domestic law to avoid complying with its international obligations and should ensure the amnesty law is no longer used as an obstacle for investigations into forced disappearances.

To eliminate impunity for crimes committed during the twelve-year military rule, the judgment instructed Uruguay to carry out investigations of forced disappearances and bring perpetrators to justice. The IACtHR also mandated the adoption of policies in compliance with criminal and administrative responsibilities under international law. In addition to reparations, the IACtHR ordered the state to make a public apology for the crimes committed, conduct investigations into those who remain missing, and make publically available information regarding the forced disappearances.

The judgment in *Gelman* is in line with IACtHR jurisprudence, which prohibits the use of amnesty laws. In 2001, the IACtHR held that the Peruvian amnesty law protecting police and military officials who had engaged in state-sponsored terrorism from 1980 to 1995 violated the state's duty to guarantee domestic legal effects of the ACHR because the state is obligated to create national laws that uphold human rights enumerated in the ACHR.

Legislation annulling the amnesty law is pending in the lower house in Uruguay. If it passes, it could become law on May 20, which is the day Uruguay honors political dissidents who suffered forced disappearances during the military dictatorship. Such a public and complete abandonment of its amnesty law would represent a significant step towards justice and accountability in Uruguay, bringing it in line with the rest of the Inter-American system in this regard.

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Middle East and North Africa

Human Rights in an Arab Spring

From arming pro-government protestors with machetes to shooting at civilians from helicopters, Arab governments have taken extreme measures to suppress the protests that have been blazing across the Middle East for the past five months. What began in Tunisia spread to Egypt, where protestors demanding democratic reform and human rights dismantled long-standing autocratic regimes. Now civil society in the rest of the Arab world has taken a cue, believing that they too are entitled to democratic political reform and basic social, political, and economic rights.

Despite having similar demands, each movement in Egypt, Jordan, Libya, Syria, and Yemen has taken a unique form. The rules governing the type of permissible regulatory measures change as civil unrest grows and becomes more organized. Each uprising in the Middle East has triggered distinct international laws. This article is a survey of the international and domestic laws that have been implicated in each conflict, and how they have been observed or violated.

Emergency Decrees

Before the protests began, the governments of Egypt, Jordan, Libya, Syria, and Yemen all violated international law by prohibiting the rights to assemble and to freedom of expression. Articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR) — which all five countries have ratified — protect these rights. However, Egypt's Emergency Laws, Syria's Emergency Laws, and Yemen's Law No. 1 on Associations and Foundations prohibit gatherings without governmental approval. Under Article 4 of the ICCPR, emergency laws may suspend these rights, but the state of emergency may only last as long as the exigencies of the situation require. The international community has recognized that Syria's emergency law of 48 years and Egypt's emergency law of 43 years have long exceeded the acceptable period. Further, in Libya, independent organizations are outlawed pursuant to Law 71 of 1972; thus, any gathering by a group of people promoting ideologies contrary to the government is illegal and punishable by death. Finally, until lifting the restriction on February 15, 2011, Jordan also prohibited public protests without permission from the government.

If protests begin to threaten public order, then states are entitled to enforce their criminal laws. Still, international law prohibits law enforcement officers from using excessive force against peaceful protestors. The Code of Conduct for Law Enforcement Officials (Code of Conduct) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles) codified international norms regulating law enforcement officials' actions. Those documents, which were adopted by the United Nations General Assembly in 1979 and 1990, respectively, draw upon the Universal Declaration of Human Rights (UDHR), the ICCPR, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Prevention and Punishment of the Crime of Genocide. The Basic Principles articulate that law enforcement officials may only use firearms in self-defense, in defense of others against the imminent threat of death or serious injury, or to arrest and prevent the escape of those presenting an imminent threat of death or serious injury. Even then, officers must clearly identify themselves, warn of their intent to use firearms, and use force only to the minimum extent necessary when dispersing unlawful assemblies.

In Libya, Muammar Qaddafi's forces are violating these international provisions by using warplanes and snipers to shoot indiscriminately at civilian protestors and to shoot at any group with more than three people. Additionally, in Egypt and Syria, there have been widespread reports of police officers using live ammunition against retreating protestors, in violation of the governing international treaties. In fact, government officials in Syria have killed hundreds of protestors. The government in Yemen has also been using live ammunition against protestors, and even coordinated sniper attacks on a protest camp in March, killing 52 people. In Jordan, on the other hand, there have been no reports implicating police officers with using force against protestors.

It should be especially noted that Article 8 of the Code of Conduct calls on officers to rigorously oppose and prevent any violations of the law and to prevent violence. Police officers in all five of these Arab countries have stood by as pro-government supporters, widely suspected of being government-paid thugs, violently attacked peaceful pro-democracy activists. By failing to take any action as the suspected thugs attacked, the police forces in all of the states have violated Article 8.

Armed Opposition

If the protestors arm themselves, as they have in Libya and Yemen, then the state has a limited right to use force against the protesters. That right expands and different rights govern once the conflict reaches a certain threshold, rising to the level of a non-international armed conflict. Additional Protocol II to the Geneva Conventions provides that International Humanitarian Law (IHL) does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other similar acts. This is generally recognized as customary international law. But once opposition movements begin to coordinate their attacks under an organized command structure in a contracted conflict, IHL is triggered. In that case, the state would have the right to attack opposition movements just as it would be able to attack enemies during war.

Security Council Resolution 1970 called on Libya to respect IHL while the conflict was developing into a non-international armed conflict, as it has now been categorized by the president of the International Committee of the Red Cross (ICRC). The conflict in Libya has certainly triggered the application of IHL, as the armed rebels have been organizing under the direction of the Rebel Council based in Benghazi. Accordingly, the conflict in Libya is regulated by the Fourth Geneva Convention, Additional Protocol I, Additional Protocol II, and customary international law. A fundamental principal of IHL codified by the Fourth Geneva Convention is civilian distinction, which obligates the Libyan government to protect civilians who are not participating in hostilities and prohibits the government from directly firing at or violently attacking unarmed civilian protestors. Nevertheless, Qaddafi and his forces have repeatedly breached these obligations by directing snipers to target civilians and by firing cluster munitions into residential neighborhoods. Libyan government forces have also forcibly disappeared at least thirty civilians and rebels, in violation of customary international law applicable in non-international armed conflicts and international human rights law. The Libyan government has also employed the use of mercenaries to violently suppress peaceful protestors, in violation of Additional Protocol I. A mercenary is defined as any person who is specifically recruited locally or abroad for the purpose of a concerted act of violence to undermine the constitutional order of a State and is motivated by material compensation.

In Syria and Yemen, although some protestors have begun to arm themselves, they are neither organized nor does the violence rise to the level of a non-international armed conflict. For instance, there is no command structure and violence on behalf of the protestors has been sporadic. In accordance with ICRC provisions in situations not governed by IHL, if the struggle in Syria and Yemen does not amount to a non-international armed conflict, then the governing state authority must restore internal order, while respecting human rights. Both states have recklessly

disregarded this important obligation, as the uprisings in the two countries have turned deadly.

Conclusion

The revolutions across the Arab world have highlighted the importance of respecting a wide array of international human rights provisions. Not only were the protests largely in response to the curtailment of social, economic, and political rights in their countries, but the very act of protesting has challenged oppressive government regulations that have disregarded key provisions in international human rights and humanitarian law. While some governments, like Jordan, limitedly violated international law in trying to quell the protests; others, like Syria and Yemen, have responded with unlawful excessive force to the protestors' peaceful demands for change. Although each movement has taken on a different form, they have all highlighted that civil society in the Arab world is eager and willing to fight for the basic rights that they have been denied for so long.

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Sub-Saharan Africa

Power is Everything: The Costs of Ethiopia's Ambitious Pursuit of Hydro-Electrical Power

In 2005, the government of Ethiopia announced an ambitious 25-year plan to construct a series of hydroelectric dams along the Omo River in an effort to become a regional supplier of electricity. Since then, Ethiopia has opened several new dams, including Gibe I and Gibe II, and is scheduled to finish construction of the controversial Gibe III dam by July 2011. When completed, Gibe III will be the largest infrastructure project in Ethiopian history and the highest dam on the African continent. Since construction began in 2006, international groups have criticized the Ethiopian government's failure to consult indigenous groups about the project or to conduct environmental impact assessments on the region's already fragile ecosystem. As a result of the government's noncompliance with required economic and social safeguard policies, the African Development Bank, the World Bank, and the European Investment Bank have all decided not to provide loans for the project. However, Ethiopia recently secured U.S. $500 million from the Industrial and Commercial Bank of China (ICBC) to complete the Gibe III dam and also signed a memorandum of understanding for China to finance construction of the Gibe IV dam and other future projects on another river, the Blue Nile.

The Omo River is the lifeline for hundreds of thousands of people from eight distinct indigenous groups in the South Omo region of Ethiopia and the Lake Turkana region of Kenya. Opponents of the Gibe III project argue that the dam will reduce the river's flow and threaten the livelihoods of thousands of people who rely on its natural flood cycle for food cultivation. Organizations such as Survival International and International Rivers are also highly critical of the government's plan to lease out tracts of newly irrigated land to foreign investors upon completion of the project. Additionally, the project will affect Kenya's Lake Turkana, the world's largest desert lake, which receives up to ninety percent of its water from the Omo River. A hydrology study by the African Development Bank found that the water volume required to fill the Gibe III reservoir would deprive Lake Turkana of approximately 85 percent of its normal annual water inflow. Furthermore, critics of the Gibe III assert that restricting the flow of the Omo River will exacerbate food insecurity in a remote region that has already suffered through a long history of conflict between struggling indigenous groups.

Gibe III's projected ecological and social impacts illustrate what is at stake as the Ethiopian government repeatedly fails to comply with its national and international legal obligations. Domestically, the Ethiopian government disregarded provisions of its Federal Public Procurement Directive requiring competitive international bidding for large-scale projects by directly awarding a no-bid contract for Gibe III to the Italian construction company, Salini Costuttori, for more than U.S. $2 billion. After the contract was awarded, construction began in July 2006 without completion or approval of the Environmental and Social Impact Assessment (ESIA) that is required by Ethiopian environmental law. In 2008, the Ethiopian Environmental Protection Authority retroactively approved an ESIA for Gibe III, without completing geological or baseline health studies. Contrary to ESIA requirements, the Ethiopian government did not consult any affected communities until after construction had already started, and to date only about 100 people have been consulted about the project. Opponents argue that this violates Article 92(3) of the Ethiopian Constitution, which requires consultation of affected communities. On an international level, the construction of Gibe III runs contrary to the UN Declaration of Indigenous Rights, which declares the right of indigenous people to develop, use, and control their traditional lands and to obtain redress when this land is confiscated, destroyed, or damaged without free, prior, and informed consent. Furthermore, critics argue that Ethiopia has violated Article 21, the peoples' right to freely dispose of their wealth and natural resources, of the African Charter of Human and Peoples' Rights, to which Ethiopia is party.

Advocacy groups maintain that no real or genuine effort has ever been made to consult the linguistically and physically isolated indigenous communities of the Lower Omo region. The managers of Gibe III have made very little information publicly available, and numerous independent surveys have reported that the indigenous communities of the region know virtually nothing about the project. This problem has been further exacerbated by the Charities and Societies Proclamation passed by the Ethiopian Parliament in February 2009, which restricts any charity or NGO from promoting human and democratic rights in Ethiopia if it receives more than ten percent of its funding from foreign sources. The resulting revocation of community association licenses by the Ethiopian government has restricted the ability of advocacy groups, the vast majority of which are funded internationally, to increase awareness within the country about the project and its impacts among affected communities.

In contrast, groups in Kenya that will be affected by Gibe III have been able to protest openly about the project and have garnered significant international support. In 2006, the government of Kenya signed a memorandum of understanding with Ethiopia for the purchase of 500 MW of electricity from the Gibe III dam. In response, Friends of Lake Turkana filed a law suit against the Kenyan government claiming that this agreement violates the

constitutional right of the Kenyan people to a clean and healthy environment. To date, no such public discourse or legal action has been permitted in Ethiopia.

Ethiopia is Africa's second most populous state and currently only about two percent of the population have access to electricity. As such, the need for Ethiopia to develop and implement a comprehensive energy plan is not in dispute. But Ethiopia's increasingly repressive government has denied any public debate about Ethiopia's energy future and has compromised the quality of the country's hydroelectric dam projects. Opponents argue that greater transparency and consultation in the planning and implementation of hydropower projects could lessen the negative social and environmental impacts and result in better-designed, cost-effective projects that comply with domestic and international law. But Ethiopia's government appears steadfastly opposed to this path. Prime Minister Zenawi has criticized Western interference in the project as an attempt to keep Ethiopia "undeveloped and backward," and has vowed to complete construction of all planned hydroelectric dams "at any cost." At present, it appears that construction of Ethiopia's massive dams will continue, illustrating the point made by Abdulhakim Mohammed, Head of Generation Construction at the Ethiopia Electric Power Corporation (EEPCO): in Ethiopia power is and will continue to be "everything."

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Political Obstacles Continue to Prevent Action by Zimbabwe's First Human Rights Commission

After 31 years of independence, the Zimbabwean government is still struggling to address past human rights violations, including the abuses that occurred during the violent, disputed elections of 2008. In the aftermath of those events, the political parties that formed the Government of National Unity (GNU) agreed to create a Human Rights Commission by constitutional amendment, which was passed in 2009. The Commission's creation initially brought hope to Zimbabweans, who believed that it would hold accountable those responsible for the government's numerous past human rights abuses and pave the way for free and fair elections in the future. Nearly two years later, this Commission seems to have made little progress because of political stalemate delaying legislative authorization of many of its important functions and the government's failure to finance its work.

Zimbabwe's Human Rights Commission derives its legal authority from Section 100R of the constitution. Section 100R expressly enables the Commission to take over investigations initiated by the Public Prosecutor, to promote the development and awareness of human rights in Zimbabwe, and to investigate complaints it receives. Yet the specific functions that would fully allow the Commission to accomplish its investigatory functions, which are envisioned under Section 100R(8), have yet to be conferred by parliamentary act. These include the independent activities that are typical for similar national human rights commissions: conducting investigations on its own initiative; visiting prisons, refugee camps, and mental institutions to evaluate conditions; and securing reparations for victims of human rights violations.

In September 2010, the Ministry of Justice and Legal Affairs introduced a bill to grant these additional powers to the Commission, but the bill still has not passed. Human rights groups in Zimbabwe have blasted the proposed bill for not addressing past human rights abuses and the bill's design. The mandate it proposes for the Commission explicitly does not cover government-sanctioned massacres against the Gukurahundi people. Nearly 20,000 Matabeleland and Midlands peoples were killed in these massacres in the early 1980s under the direction of President Robert Mugabe. Thus, this exclusion strongly suggests government interference with the scope of the Commission. Any bill granting the Commission extensive powers or enlarging its mandate to include crimes like the Gukurahundi massacres, would likely not receive support from President Mugabe or the ruling Zimbabwe African National Union — Patriotic Front (ZANU-PF) party. Zimbabwe's Parliament is currently split between Mugabe's ZANU-PF, which holds 45 percent of the seats in the Senate and the House of Assembly, and the Movement for Democratic Change, which holds approximately 51 percent of the seats. Moreover, any bill that passes the legislature must receive Presidential approval before it can become law.

The current stalemate over the Commission's functions carries forward the reluctance and delay that has plagued the Commission since its beginning. It took the GNU over a year to swear in the eight-member Commission in April 2010. Particularly controversial was the appointment of the Commission's Chairperson, Reginald Austin, who was MDC's candidate for the position. Recently, Austin went on record to express mounting frustration with the Commission's slow progress: "It's over a year since we were sworn in, but we still have no Act which gives us power to perform our mandate. Besides, we do not even know how we are going to operate because there is no law to guide us." Further, the Commission requires a budget of approximately U.S. $8 million per year to accomplish its constitutional mandate, according to Austin, but has had no budget at all since its creation.

Other African national human rights commissions have suffered a similar plight, with political will to create a strong, independent institution failing shortly after creation. In 2000, Niger established its National Commission on Human Rights and Fundamental Liberties (NCHRFL). But, when the NCHRFL found the government's removal of traditional chiefs to be illegal in 2002, the government attempted to restructure it. Civil society organizations prevented the restructuring of the NCHRFL for a period of time. However, the government eventually succeeded and the NCHRFL now includes more government representation, compromising its independence and rendering it ineffective.

Yet, not all such commissions are doomed to fail. Establish in 2002, the Kenya National Commission on Human Rights (KNCHR) is authorized to investigate human rights violations and monitor government institutions. The KNCHR's record of quick investigation and response to alleged abuses demonstrates that it is not afflicted with the same levels of political manipulation or incapacity as Niger's or Zimbabwe's commissions. Recently, for example, it investigated complaints about reproductive health and access to quality healthcare and found systematic human rights abuses. In response, the KNCHR will conduct public hearings, primarily in rural areas, to educate Kenyans about reproductive and health rights. Although the success of the campaign remains uncertain, other human rights commissions can

learn from the KNCHR's responsiveness to complaints and tangible activities.

The unwillingness of the Zimbabwean government to grant powers and fund the Commission comes at a delicate time for the country. According to Amnesty International, arbitrary arrests and torture by police forces have increased since February, along with excessive limitations on freedoms of expression and assembly. Six activists who organized a peaceful public discussion about the unrest in Egypt and the Middle East now face charges of treason and, if they are convicted, the death penalty. Without a functional Human Rights Commission to afford oversight, such abuses can continue unabated.

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Europe

Media Law in Hungary Raises Concerns among European Community and Tests EU Credibility

On January 1, 2011, a new media law entered into force in Hungary that, as Amnesty International warns, will impose potentially wide-ranging restrictions on freedom of expression. The Media Services and Mass Media Act (the Act) establishes two government-appointed entities, the National Media and Communications Authority (NMHH) and the Media Council, which are vested with the power to oversee and regulate all media outlets. These two entities extend state control to all realms of public and private media. Such expansive state control, in conjunction with poorly defined regulatory standards, represents a very real threat to the freedom of the press that is guaranteed by the Hungarian Constitution and Article 10 of European Convention on Human Rights (ECHR). For this reason, the Act is rousing great concern, particularly in light of Hungary's current role in the eighteen-month Trio Presidency of the European Union.

The architect behind the Act is the current Fidesz government, which won the 2010 elections by a two-thirds majority. The conservative Fidesz government has faced recent criticism for rapid centralization of political power and increased state control of formerly independent government institutions.

Under the Act, the Media Council will use poorly defined standards to regulate television, radio stations, newspapers, online news sources, and even personal blogs. Some of these standards include protection of public order, lack of balance, and appropriate information in relation to public affairs. The ambiguity of the criteria could lead to self-censorship by media in order to avoid fines. Moreover, the government's direct appointment of the NMHH members, without parliamentary approval, raises concerns that the body will lack political independence. In addition, the nine-year renewable and unlimited terms for the Media Council's five members may concentrate control over the media among a few hands and, thus, undermine media pluralism. Finally, one of the Media Council's most worrisome powers is its authority to impose fines of up to €300,000 for periodicals and €730,000 for broadcast media that violate the Act. After such a violation, media companies may also be denied future licenses.

The Act has sparked heated debate and protest within Hungary. On January 27, 2011, several thousand protesters gathered, for a second time, at the parliament building in Budapest to demonstrate against the Act and demand freedom of the press. Yet, some argue that the Act protects society by providing for the regulation of media that, according to the text of the law, "infringe[s] upon human dignity"; discriminates on grounds of gender, racial or ethnic origin, or nationality; or exposes minors to programs that may impair their development such as those involving pornography or extreme violence. Just the day after the law was enacted, opposition parties in the Hungarian Parliament appealed it to the country's Constitutional Court. However, chances for overturn are slim given the Court's support for the ruling Fidesz party.

The Media Act has received harsh criticism. Many European nations criticize the Act for violating Article 62 of Hungary's constitution, which recognizes freedom of the press, as well as Article 10 of the ECHR, which guarantees the right to freedom of expression, and the EU Audiovisual and Media Services Directive (AVMS). The AVMS aims to coordinate national EU Member States' legislation concerning traditional TV broadcasts and "on-demand" services, including blogs and videos. Goals of the AVMS include safeguarding media pluralism, preserving cultural diversity, and guaranteeing the political independence of national media regulators. The new Hungarian Act also runs counter to the standards of the Organization for Security and Co-operation in Europe (OSCE), including the right to free media, editorial independence, and media pluralism. The OSCE issued a strongly-worded statement, declaring that the Act "violates OSCE media freedom standards and endangers editorial independence and media pluralism." With the new Fidesz government receiving criticism from certain political and media segments, there are concerns that the new law will be used to suppress such expression.

With Hungary having assumed the Presidency of the EU Council on the same day the Act was passed, the EU's credibility and its protection of fundamental rights are also at stake. Debates have been held in Strasbourg by the EU Civil Liberties and Culture Committees to assess the Act's legality. In a January 21, 2011 letter to Hungary's Deputy Prime Minister Tibor Navracsics, European Commissioner Neelie Kroes outlined three main points of concern: the Media Act's "balanced broadcast" requirement, which permits potentially restrictive regulation of media that takes one side of an issue; the "country of origin" principle that allows for censorship of foreign broadcasts; and the registration requirement for all media, which would create an "unjustified restriction" on the fundamental right of "freedom of expression."

The European Commission requested more information on the law to determine whether it complies with EU legislation and fundamental rights and gave Hungary until February 4, 2011 to respond. As a result of such pressure, the Hungarian government agreed to review its media laws to ensure that they conform to EU legislation, after which the EU will make a legal assessment to determine if the changes are in line with European policy on media freedom. On February 16, 2011, the communications secretary for the Hungary state said that proposed amendments to the law, including adjustments to the balanced-coverage provisions, would be submitted to Parliament within two weeks. Following these amendments, if the European Commission determines that Hungary has failed to comply with EU law, the European Commission

has reserved the right to send a formal notice letter to the Hungarian government, initiating a legal proceeding against the country's government. The Hungarian government has assured the Commission that they are listening to its concerns and are willing to take appropriate action. Although this engagement is promising, it remains unclear whether it will be sufficient to keep the Act from undermining freedom of the press.

The UK Defies European Court of Human Rights by Denying All Prisoners the Right to Vote

Six years after the European Court of Human Rights (ECtHR) ruled that the United Kingdom's law denying prisoners the right to vote is a violation of Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR), UK lawmakers have yet to implement the Court's ruling. In November 2010, the Council of Europe requested that the UK government implement the ECtHR's judgment within six months.

The 2005 decision in *Hirst v. The United Kingdom* (No. 2) affirming the right of UK prisoners to vote has led to considerable international pressure on the UK to change its policy. The case originated from a 2001 application lodged with the ECtHR by a convicted prisoner in the UK, and was appealed to the ECtHR Grand Chamber in October 2005 which upheld the ruling of the Court. Specifically, the ECtHR ruled that the ability to vote is a right, not a privilege, of all UK citizens, including prisoners. In *Hirst,* the ECtHR stated that "prisoners in general continue to enjoy all of the rights and freedoms [including the right to vote] guaranteed under the Convention, save the right to liberty." Additionally, the ECtHR stated that national legislatures can impose restrictions on prisoners' right to vote so long as they are tailored to particular offenses or offenses of a particular gravity. According to the ECtHR, denying convicted prisoners this right without consideration of the length of the individual's sentence or the gravity of the offense constitutes disproportionate punishment. The ECtHR determined that an "automatic blanket ban imposed on all convicted prisoners, which was arbitrary in its effects, could no longer be said to serve the aim of punishing the applicant once his tariff (time period representing retribution and deterrence) had expired."

British law has denied prisoners the right to vote for over 140 years. This limitation is currently codified in Section 3 of the Representation of the People Act of 1983 (the Act) which states "A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election." The law is rooted in the concept that incarceration not only removes prisoners from society, but also limits the enjoyment of prisoners' individual rights, including the right to vote, and the right to liberty. A convicted person is defined in the Act as any person found guilty of an offense (whether under the law of the UK or not) including a person found guilty by a court of a service (Armed Forces) offense but not including a person dealt with by committal or other summary process for contempt of court. Once released from prison, however, a former prisoner's right to vote is reinstated. Similar laws preventing prisoners from voting regardless of the length of their sentence or the gravity of the offense committed are in force in eight other European states. However, based on the Rules of Court for the ECtHR, until a legal challenge is brought in the aforementioned countries, the European Council will not proactively demand changes to the countries' domestic legislation.

The prolonged legal argument between the ECtHR and the UK may be coming to an end. In late February 2011, the House of Commons voted 234 to 22 to uphold the ban on prisoners' right to vote. Although the House of Commons decision is not binding until it is passed by the House of Lords, it is an indicator of the strong attitude to do only "the minimum necessary" to comply with ECtHR. This could include only allowing prisoners serving shorter prison sentences to vote. Additionally, in early March, the UK requested that the Grand Chamber of the ECtHR review and consider overturning the ruling in *Hirst.* The ECtHR will review the UK's compliance under the doctrine of the margin of appreciation, a concept developed by the ECtHR which provides deference to the differing methods states use in implementing requirements of the ECHR. However, before the Grand Chamber can rule on the implementation, the judges must first determine whether to review the case *de novo*.

On March 9, 2011, after reviewing Britain's response to the *Hirst* ruling, the Committee of Ministers of the Council of Europe issued an unprecedented warning to the British Government that they must take urgent steps to enable prisoners to vote in the forthcoming general election. If the UK decides not to implement the ECtHR's requirements in their domestic policy, the ECtHR, under Article 41 of the ECHR granting the court jurisdiction to afford just satisfaction to injured parties, may order the UK to pay compensation to prisoners who were denied the right. The Parliament's disregard for the ECtHR's decision presents the UK government with the challenge of deciding between the democratically elected legislature's decision and compliance with the ECtHR's ruling.

The future of the UK ban on prisoners' right to vote also has important implications for the authority of the ECtHR as members of the UK Parliament have criticized the power of the ECtHR to rule counter to the decisions of Parliament. This issue has breathed life into fringe debates on whether the UK could withdraw from the ECHR and the jurisdiction of the ECtHR. Given that the UK was among the first countries to ratify the ECHR, and has had a good record of complying with the ECtHR judgments, withdrawal from the ECHR is highly unlikely. Due to the wide publicity that this issue has received, the potential negative impact on the perceived legitimacy of the ECtHR is of great concern and will depend on the upcoming decisions of the UK Parliament.

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South and Central Asia

Protecting Religion or Proscribing Expression?: Pakistan's Blasphemy Law

Defamation of the Prophet Muhammad in Pakistan is punishable by death, under the state's blasphemy law. As a State Party to the International Covenant on Civil and Political Rights (ICCPR), Pakistan is bound to respect and ensure civil and political rights, including one's opinions. However, in January 2011, the Pakistani government charged a seventeen-year-old student for scribbling derogatory remarks about the Prophet Muhammad on an exam.

The police have refused to report what Muhammad Samiullah wrote because doing so would also be "blasphemous."

The blasphemy law was added to Article 295-C of Pakistan's criminal code in 1986, after General Zia-ul-Haq introduced the Islamic Sharīʿah legal code. Blasphemy is defined as the act of speaking sacrilegiously of a religious leader or things sacred to a religion. Pakistan's blasphemy law mandates the death penalty or life imprisonment for those who defame the Prophet. Hundreds of people have been charged under the law since its inception, even for merely disrespectful indirect insinuations.

Pakistan signed and is bound by the ICCPR in 2008, but has made several key reservations, including to two articles relevant to alleged religious defamation. Article 18 authorizes the right to freedom of thought and religion and Article 19 allows one to hold opinions without interference. Pakistan rejected these provisions insofar as they conflict with Pakistani and Sharīʿah law. Furthermore, Pakistan is not a party to the ICCPR's Optional Protocol, which would subject Pakistan to the jurisdiction of the United Nations (UN) Human Rights Council. Because Pakistan refused to be fully bound by the ICCPR's freedom of expression standards or the Human Rights Council's enforcement mechanism, challenging the blasphemy law will be very difficult from the international law perspective.

However, the application of the blasphemy law also appears discriminatory because prosecutions tend to specifically target members of religions other than Islam. Articles 26 and 27 of the ICCPR are fully binding on Pakistan. Article 26 calls for states parties to treat all persons as equal before the law and prohibits discrimination based on religion or opinion. Additionally, Article 27 specifically protects the right of minority religions to practice.

According to a Human Rights Watch report, the blasphemy law only protects Islam, and as a result, Christians and Ahmadiyya — Muslims who do not believe Muhammad was the final prophet — have come under attack. A 2010 Freedom House report notes that while Christians and Ahmadiyya make up only two percent of the population, they represent nearly half of the more than 900 prosecutions for blasphemy. For instance, in November 2010, a Christian mother of five was sentenced to death for criticizing Islam to a group of female farmhands. This is the first time that a woman has been convicted under the blasphemy law.

Fortunately, death sentences under the blasphemy law are almost universally overturned or commuted on appeal, and no one in Pakistan has yet been put to death under the blasphemy law. However, opponents of the blasphemy law have expressed uneasiness with the death penalty even being an option. Their uneasiness grew in November 2010, when a member of the conservative Pakistan People's Party (PPP) tabled and ended discussion on a bill that would prohibit death sentences for blasphemy convictions. Even though no one has been put to death under the blasphemy law, opposition parties and judges who have pardoned the convicted have been killed in reaction to their decisions.

Also, under pressure from the PPP leadership and after death threats from various sources, former Minister Sherry Rehman withdrew efforts to complete a draft amendment to the blasphemy law. According to Rehman, Prime Minister Syed Yusuf Raza Gilani refused to allow Parliament to even discuss the amendment proscribing the death penalty and disbanded the committee to amend laws.

On March 24, 2011, the UN Human Rights Council adopted Resolution A/HRC/16/L.38 "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief." The non-binding Resolution encourages states to combat religious discrimination without limiting freedom of expression. Pakistan is directly addressed in the Resolution, and the Council recently interviewed some individuals negatively affected by the blasphemy law before the Resolution was adopted.

Pakistan is free to make reservations when it accedes to international human rights instruments, but it is clear that further efforts need to be made to protect freedom of religion and speech in Pakistan. In order to do so, Pakistan could rescind its reservations to the ICCPR and become party to the Optional Protocol. Otherwise, the protection of one view of one religion is likely to continue to take priority over the protection of individual rights.

His Day in Court? Sri Lankan President Sued in the United States

On January 28, 2011, family members of three people allegedly killed in violation of the 1991 Torture Victim Protection Act (TVPA) sued Sri Lankan President Percy Mahendra "Mahinda" Rajapaksa. The petition in *Manoharan v. Mahendra Rajapaksa* was filed in the United States District Court for the District of Columbia to seek thirty million dollars in damages for victims of the conflict in Sri Lanka. The plaintiffs' lawyers, however, have serious hurdles to overcome regarding notice, jurisdiction, and immunity.

The *Manoharan* suit comes in the wake of a 25-year conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE), which ended in May 2009. The ethnic civil war led to thousands of civilian casualties and injuries, as well as forced disappearances. The conflict came to a head in 2009 when government forces pushed the LTTE into a small area in northeastern Sri Lanka.

In *Manoharan*, the petitioners bring six claims under the TVPA against President Rajapaksa for deaths occurring during the Sri Lankan civil war. The TVPA allows civil suits to be filed in the United States against individuals acting in official capacities who commit torture or extrajudicial killing.

The plaintiffs filed the complaint on behalf of six people who were killed in Sri Lanka. Ragihar Manoharan was a twenty-year-old college graduate and member of the ethnic Tamil minority. Sri Lankan security forces allegedly beat him and shot him in the back of the head. Premas Anandarajah was one of seventeen humanitarian workers from *Action Contre La Faim* ("Action Against Hunger") who was deployed to the town of Muttur to provide aid. Despite clear markings on the group's compound as a neutral humanitarian aid organization (making it illegal to attack), Sri Lankan military forces allegedly attacked the compound and massacred everyone there. The third plaintiff represents four members of the Thevarajah family who were huddled in a no-fire zone bunker when the Sri Lankan Navy allegedly bombarded them with artillery shells.

The plaintiffs allege that these acts violated the TVPA because the killings were committed extrajudicially under the authority of the government. The TVPA provides a cause of action for extrajudicial

killings, which occur when a governmental authority kills a person without going through the proper legal or judicial channels. The plaintiffs claim that the actions were committed "under color of foreign law under the command and control" of Sri Lanka's military and security forces under President Rajapaksa.

Under the TVPA, plaintiffs must also show that all local remedies have been exhausted. The plaintiffs contend that justice cannot be properly rendered in Sri Lanka because the defendant has "politically compromised" the court system, and the plaintiffs' lives would be put at risk by returning to Sri Lanka. An alternate forum, Sri Lanka's Lessons Learnt and Reconciliation Commission (LLRC) was established in 2010 to investigate issues surrounding the civil war, but does not have a mandate to hear individual claims.

The *Manoharan* petitioners may find it difficult to fulfill the rigors of the Federal Rules of Civil Procedure, including requirements for service and personal jurisdiction, since the defendant is not only a foreign citizen, but also a sitting head of state. The *Manoharan* plaintiffs assert personal jurisdiction in federal district court because the act "arose from a tortious act in the District of Columbia," and the alleged violations fall under international customary law. The complaint, however, does not support its assertion that any of the acts at issue took place in the District of Columbia, since the complaint is about violations that took place in Sri Lanka.

In order to satisfy service requirements, the plaintiff in *Manoharan* requested the Clerk of the U.S. District Court to send a summons and complaint by mail to President Rajapaksa's residence in Colombo, Sri Lanka. Additionally, the attorneys attempted to fulfill service obligations under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and sought an order from the district court authorizing service of summons and complaint on the Sri Lankan embassy in the District of Columbia, so as not to conflict with provisions of the Vienna Convention on Diplomatic Immunity. As of publication, the case has been assigned to Judge Colleen Kollar-Kotelly, but no further public information regarding service of process on the defendant is available.

In *Mwani v. bin Laden*, the U.S. Court of Appeals for the District of Columbia Circuit ruled that service of process was met against a terrorist or terrorist organization when it was published in two American publications and a London-based Arabic language publication for six weeks. However, this holding is seemingly limited to terrorist organizations and perhaps organizations that cannot be reached through traditional methods of service. In *Mwani*, the court specifically discusses the impossibility of knowing a terrorist organization's address. This method of service did not apply to the Afghanistan government, which was also a party to the suit. Because the *Manoharan* defendant has a permanent address, unlike the *Mwani* defendants, the *Mwani* publication standard would likely not be sufficient, and the plaintiffs would need to use another method of service.

In addition to the notice and service hurdles, the *Manoharan* plaintiffs also face immunity challenges under the Foreign Sovereign Immunity Act (FSIA). The FSIA prohibits plaintiffs from bringing most non-commercial suits against foreign states, their political subdivisions, and their instrumentalities and agencies. Under *Chuidian v. Philippine National Bank*, individuals can also qualify as an agency or instrumentality of a foreign state. Other types of immunities, including immunity under the Vienna Convention on Diplomatic Relations, may also block the plaintiffs' claims.

Specifically related to the TVPA, in *Belhas v. Ya Alon*, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision to dismiss the case for lack of jurisdiction under the FSIA where the foreign defendant became available for service of process when he traveled to the District of Columbia for a think tank fellowship. The Court ruled that the TVPA does not exempt individuals from the FSIA, so an individual may still enjoy immunity when he acts in his official state capacity. The FSIA could bar the suit against the Sri Lankan president because the claim occurred in the president's capacity as an executive official.

While the TVPA allows foreign plaintiffs to recover damages for extrajudicial killings, there are serious procedural and substantive challenges to bring these claims, even beyond those mentioned here. While the possibility of suing the Sri Lankan president is a step toward achieving justice, the *Manoharan* attorneys have an uphill battle to recover damages.

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Southeast Asia and Oceana

Rohingyas Seeking Protection and Refuge

The Rohingyas are a Muslim ethnic group located in the Rakhine (Arakan) State of southwestern Burma. According to Human Rights Watch, the Rohingyas are subjected to systematic persecution and human rights abuses at the hand of the Burmese government, on account of their ethnic identity. Abuses include extrajudicial killings, forced labor, forced land confiscation, torture, and restrictions on the freedom of movement. Additionally, the Burmese government continually refuses to grant the group citizenship, rendering them stateless in their own "ancestral homeland." The persecution of the Rohingyas in their homeland is further intensified by the fact that they are unable to seek protection from neighboring countries.

Recently, a group of 91 Rohingyas claimed that on January 19, 2011, the Thai navy set them out to sea in an engineless boat with limited food and water. The Rohingyas had fled the ethnic persecution in Burma, but were apprehended in Thai waters while trying to cross into Malaysia in search of work. They landed on India's Andaman and Nicobar Islands in early February. International human rights organizations have asked India, Indonesia, and Thailand to grant the Rohingyas refugee status in accordance with their obligations under Articles 14 (right to seek and enjoy in other countries asylum) and 15 (right to a nationality) of the Universal Declaration of Human Rights (UDHR). These organizations are also requesting that the three countries allow the United Nations High Commissioner for Refugees (UNHCR) to access the Rohingyas in order to provide emergency assistance as well as counseling and advice on attaining refugee status. If the Rohingyas are denied refugee status and forced to return to Burma, they would be at risk of continued or aggravated human rights violations.

Thai authorities have denied charges that they set Rohingyan refugees out to sea and claim that they returned the 91 persons detained in Thailand to Burma in late January 2011. Panitan Wattanayagorn, the Thai government spokesperson, claimed it was "unlikely" that the Thai navy pushed the Rohingya refugees out to sea, but that a government investigation would take place. Wattanayagorn explained that the normal practice is to "prosecute refugees who illegally enter Thai waters and then deport them via land." However, according to Amnesty International, the Thai government had previously pushed hundreds of Rohingya asylum-seekers to sea in "unseaworthy" boats in late 2008 and early 2009, leading to an undisclosed number of fatalities, and diminishing the credibility of Thailand's denial of current charges. Further, a June 2008 report by the U.S. Committee for Refugees and Immigrants (USCRI) gave Thailand's refugee policy "mixed reviews"; although Thailand has hosted 1.2 million refugees over the past 30 years, it has refused to recognize most refugees from Burma and has confined thousands of Burmese refugees in camps along the Burma-Thailand border with diminished rights.

The Rohingyas are stateless persons because of direct discrimination by the Burmese government in its refusal to grant the minority group citizenship. As stateless persons, the Rohingyas have "no access to employment, schools, health care, police protection, or other public services." They cannot even freely move about the country, as they must get permission from local authorities to travel from one village to another. This stateless condition affects every aspect of daily life. According to Human Rights Watch, the Burmese government's "violent and discriminatory treatment" of the Rohingyas directly contributes to their chronic poverty and has forced around 300,000 Rohingyas to flee to nearby Bangladesh. However, the Rohingyas still face serious problems in Bangladesh due to their lack of official documentation, and they often live in refugee camps with "primitive and squalid conditions." They are neither given official resident status nor work authorization, thus perpetuating vicious cycles of arrest, long-term detention, deportation to Burma, and illegal re-entry via traffickers. Still, the Rohingyas continue fleeing to Bangladesh because, according to the Arakan Rohingya National Organization, they believe the country shares "the bonds of Islamic fraternity," and therefore has a "historical and moral obligation to endeavor for a permanent solution of the Rohingya problem."

Although Thailand, India, and Indonesia have not ratified the 1951 UN Convention Relating to the Status of Refugees or its Protocol, the countries still have legal obligations under customary international law to grant the Rohingyas refugee status. For example, the UDHR has identified universal human rights to nationality and to seek protection from persecution on account of political crimes or other acts inconsistent with the purposes and principles of the United Nations.

Further, India and Thailand, as members of the UNHCR's Executive Committee, are obligated to become parties to and implement international conventions providing for the protection of refugees; admit refugees to their territories, not excluding those in the most destitute categories; and promote the assimilation of refugees, especially by facilitating their naturalization. The UNHCR's official website explains, "States with a demonstrated interest in and devotion to the solution of refugee problems" are considered for membership in the Executive Committee. Therefore, failure of these two countries to grant the Rohingyas refugee status calls into question their dedication to protecting the most destitute refugees. More importantly, the three countries' failure to affirmatively act deprives the Rohingyas of a universal human right under the UDHR — the right to seek and enjoy asylum — while continuing to subject them to unstable living conditions, excluded from state recognition, protections, and life-saving services.

Illegal Intercountry Adoptions: Vietnam's Progress and Remaining Challenges

Intercountry adoption (ICA) began as a humanitarian effort after World War II to place orphaned children, for whom a state could not find a family domestically, into families of willing foreigners. In recent decades, ICA has grown into a complex and substantially commercial enterprise, lending itself to manipulation and abuse. Such abuse is particularly evident in Vietnam, which began engaging in ICA in the 1970s, and is now one of the leading countries of origin of illegal adoptions, primarily due to adoption scams and kidnappings conducted by unofficial adoption agencies. International Social Service (ISS), a non-profit organization that assists internationally separated families, estimates that approximately 1,000 Vietnamese children are adopted annually by families residing in the United States, Canada, Denmark, France, Ireland, Italy, Sweden, and Switzerland.

Vietnam is a State Party to the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The state's failure to curb its illegal adoption market violates Article 10 of the ICESCR guaranteeing the "widest possible [state-provided] protections and assistance" to families, particularly while they are "responsible for the care and education of dependent children." Illicit actors taking advantage of lax enforcement of laws or nonexistent adoption regulations and familial protections have, easily and with impunity, dismantled the Vietnamese family by unlawfully taking children from their biological families. Such actions also violate provisions of the UN's Convention on the Rights of the Child (CRC) to which Vietnam is also a State Party. The CRC provides that States Parties must: respect the right of the child to preserve his/her family relations as recognized by the law (Article 8), take measures to combat the illicit transfer of children abroad (Article 11), and ensure that ICA does not result in improper financial gain for those involved in it (Article 21(d)).

A case that recently surfaced illustrates the need for reform of Vietnam's adoption framework. The case concerned a 2006 adoption scam of thirteen ethnic Ruc children from Vietnam's Quang Binh province. The biological parents have unsuccessfully lobbied for information about their children's whereabouts. They submitted complaints to authorities and openly accused the responsible organization — which operates under regulation the Quang Binh Province's Department of Labor, War Invalids, and Social Affairs — of giving up their children for adoption by foreigners without the parents' consent.

The 1993 Hague Adoption Convention (Convention) promulgated international safeguards and standards for the ICA process to be implemented by States Parties. According to the U.S. Department of State Bureau of Consular Affairs, the goal of the

Convention's drafters was to make adoption a last resort, and additionally "aims to prevent the abduction, sale of, or traffic in children, and [if adoption is necessary,] it works to ensure that intercountry adoptions are in the best interests of children." A state joining the Convention must establish that it has a central authority, which will function as the authoritative source of information as well as the point of contact. This central authority must also oversee the accreditation of adoption agencies that comply with uniform standards and ensure professional and ethical practices, including the itemization and written disclosure of the estimated expenses associated with each adoption beforehand. More than seventy states are party to the Convention, including the United States.

Due to increasing awareness of child trafficking and pressure on the Vietnamese government to better regulate its adoption agencies and procedures, the United Nations Children's Fund (UNICEF), Vietnam, and the Department of Adoption of the Ministry of Justice of Vietnam commissioned a study to identify and address problems in both domestic and intercountry adoptions. The study, conducted by ISS and released in August 2010, identified inadequacy and inconsistency within the procedures for ensuring "free and informed consent" by biological parents. Accordingly, it urged Vietnamese authorities to: clarify the laws regarding parental consent for the adoption; establish an official system of data collection for children in need of adoption; assess the causes of child abandonment, relinquishment, and separation; and develop social service programs to address those causes.

In response to the study, the National Assembly of Vietnam passed a law on child adoption, which took effect on January 1, 2011. This law better considers the rights and interests of adopted children. It requires that officials handling child adoption issues must: 1) respect the child's right to live in his or her original environment; 2) ensure the lawful rights and interests of the adopted child and the adopting parents are respected (i.e., a voluntary procedure, no sex discrimination, consistency with social norms); and 3) assure that no willing Vietnamese family can be found before permitting a non-resident adoption. Passing this new law enabled Vietnam's Ambassador to the Netherlands, Huynh Minh Chinh, to sign the Convention on December 16, 2010. However, as of May 2011, Vietnam is still considered a "non-member" on the Convention's official website.

Despite the enactment of the new law and its scheduled implementation, the U.S. Department of State has not lifted its ban on ICA with Vietnam. In September 2008, the U.S. suspended adoptions from Vietnam, and the most recent State Department advisory notice, issued in July 2010, asserted that "important steps must still be taken before Vietnam completes this reform process and before intercountry adoptions between the United States and Vietnam can resume." These steps may include: decreasing fraudulent documentation or the improper issuance of official documents based on incorrect information, as was the case with at least one of the thirteen Ruc children; eliminating corruption and other official participation in illegal adoptions; and shutting down unlicensed facilities that prey upon single pregnant women by providing them support in exchange for relinquishing parental rights. If implemented, these measures, in addition to Vietnam's accession to the Convention, will aid the success of adoption reforms and hopefully bring an end to illegal ICA practices in Vietnam.

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East Asia

The Right to Conscientious Objection and How South Korea Falls Short

On February 10, 2011, Baek Jong-geon conscientiously objected to mandatory service in South Korea's military. The 26 year old Jehovah's Witness faces eighteen months in jail for violating the country's Military Service Act (MSA), which requires all 19 to 35 year old Korean men to serve a 21 to 24 month long military commitment. The MSA fails to recognize the right to conscientiously object to military service — a right derived from the freedom of thought, conscience, and religion protected under Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Instead of providing proportionate and non-punitive alternative service options as recommended by the United Nations Commission on Human Rights (Commission) (now replaced by the Human Rights Council), South Korea regularly imprisons conscientious objectors — a practice that infringes upon the right to conscientiously object, thereby violating the country's international obligations as a State Party to the ICCPR.

Jong-geon, who aspires to join the legal field, passed the South Korean judicial examination in 2008, making him eligible to become a judge, prosecutor, attorney, or military judicial officer. In order to complete this process, Jong-geon is obligated by the MSA to fulfill the mandatory military service. By refusing to do so, Jong-geon faces a five-year bar from becoming a judge, prosecutor, or attorney in addition to the eighteen-month jail sentence. Conscientious objectors in South Korea often face other consequences, such as loss of licenses and business permits, prohibition from jobs in any state agency, and social stigmatization. As of February, 2011, 955 men were serving prison sentences for conscientious objection — a fraction of the 15,000 men who have served time for the crime over the last fifty years. Jong-geon's situation is representative of the larger problem in South Korea, both for Jehovah's Witnesses who see military service as inconsistent with their religion, and for others who conscientiously object to military service, because by imprisoning these individuals, South Korea is failing to protect the right to conscientiously object.

While the right to conscientiously object to military service is not explicitly granted by the ICCPR, the Commission has repeatedly recognized it as implicit in the right to freedom of thought, conscience and religion outlined in Article 18 of the ICCPR. In 1987, the Commission adopted Resolution 1987/46, which recognized that conscientious objection "derives from principles and reasons of conscience, including profound convictions, arising from religions, ethical, moral or similar motives." The Commission went a step further in 1989 when it recognized conscientious objection as a right deriving from the rights to freedom of conscience, thought, and religion established in Article 18 of both the Universal Declaration on Human rights and the ICCPR. In so finding, the Commission called on States Parties to the ICCPR requiring military service to introduce proportionate, non-punitive alternative service options. While providing alter-

native service options is not obligatory, it is recommended by the Commission as a best practice in lieu of measures like imprisonment or discrimination.

Late South Korean President Roh Moo-hyun was sympathetic to the plight of conscientious objectors, and in 2007, the Ministry of National Defense announced that alternative service options for conscientious objectors would become available in 2009. However, shortly after President Lee Myung-bak's 2008 inauguration, and a month prior to implementation, this plan was postponed indefinitely and has yet to be reintroduced. Affected parties filed suit in South Korea's Constitutional Court and await a ruling on the constitutionality of the MSA. Regardless of the outcome, South Korea's imprisonment of conscientious objectors and failure to introduce alternative service options violates the country's international obligations under the ICCPR.

China's Continuing Crackdown on House Churches Infringes on Religious Freedom

Throughout April and May 2011, hundreds of Chinese Protestant Christians were detained for attempting to hold open-air religious services in Beijing. Shouwang church pastor Zhang Xiaofeng and congregation members organized the services after government pressure resulted in the church's eviction from its meeting place. According to the church, this latest eviction is one of at least three successful attempts by the government to block Shouwang's acquisition of a permanent meeting place. China only protects the legal rights of religious groups affiliated with state-registered religions, and Shouwang, with around 1,000 members, is one of the largest unregistered house churches in China. While the government often turns a blind eye to small gatherings of house churches, it has been cracking down on Shouwang, and house churches like it, by refusing to recognize Shouwang legally and by interfering with its ability to rent a meeting space. China's obligations under its own Constitution and 2005 Regulations on Religious Affairs (RRAs), as well as under the International Covenant on Civil and Political Rights (ICCPR), require it to protect freedom of religion. Nevertheless, government regulations requiring alignment with state sanctioned institutions infringe upon the religious rights of Shouwang church and other similarly situated religious groups by constructively compelling the groups to believe in a particular form of Protestantism and by discriminating against those who refuse.

China's obligation to protect the right to freedom of religion is found in Article 36 of the Chinese Constitution, the State Administration for Religious Affair's (SARA) RRAs, and Article 18 of the ICCPR, to which China is a signatory. The Chinese Constitution states that citizens "enjoy freedom of religious belief" and that citizens may not be "compel[led] . . . to believe in, or not believe in, any religion." This guarantee is supplemented by the RRAs, which were created to "ensure freedom . . . of religious belief," but which require religious bodies to register with government. The ICCPR's provisions in Article 18 protecting the freedom of religion are similar to those in the Chinese Constitution, but include that religious freedom "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." In a 1993 general comment, the Office of the High Commissioner for Human Rights emphasized that such limitations on the freedom of religion must be narrowly construed and that "[t]he fact that a religion is recognized as a state religion or that it is established as official . . . shall not result in any impairment of the enjoyment of any of the rights under the Covenant . . . nor in any discrimination against adherents to other religions or non-believers."

While China considers Protestantism one of five recognized religions, only two Protestant churches — the Three-Self Patriotic Movement and the China Christian Council — are state-sanctioned. Many Christians disagree with the theologies of these state-sanctioned churches, opting for the more or less stringent doctrines available in unregistered house churches. Though SARA allows small groups of family and friends to worship in homes, larger congregations are expected to register with the government, necessarily affiliating themselves with one of the two state-sanctioned Protestant churches.

While China often turns a blind eye to smaller unregistered congregations, recently, house churches have faced increasing government scrutiny, which many believe to be linked to widespread crackdowns on dissent throughout the country. These crackdowns, which coincide with revolts in the Middle East, have resulted in the arrests of high profile dissidents such as artist and activist Al Weiwei. Since the Middle Eastern revolts have inspired some Chinese citizens to attempt to organize a "Jasmine Revolution" within China, many observers believe that the government's crackdown on house churches is an attempt to curb dissent and maintain control.

While Shouwang refuses to join a state-sanctioned church due to ideological differences, its attempts to register independently with the government in 2006 were denied. Because the government has failed to publicly disclose evidence that Shouwang poses a threat to "public safety, order, health, or morals or the fundamental rights and freedoms of others," China's refusal to grant Shouwang legal recognition, as well as its requirement that churches join state-controlled congregations, infringes upon the right to religious freedom as protected by its Constitution, RRAs, and the ICCPR. By requiring churches to affiliate with particular ideologies in order to gain legal recognition, and consequently, legal rights such as the ability to secure a place of worship, China is failing to protect the ability of these churches to "adopt a religion or belief of [their] choice."

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