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International Legal Updates

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INTERNATIONAL LEGAL UPDATES

North America

Arizona's SB 1070: Endangers Vulnerable Groups

Absent national immigration reform, Arizona's state legislature passed Arizona Senate Bill 1070, also called the Support Our Law Enforcement and Safe Neighborhoods Act (Act). The legislation requires police to inquire into the immigration status of individuals whom an officer has reasonable suspicion are in the country illegally and to detain those individuals who cannot prove their legal immigration status. Similar legislation has been proposed by other states throughout the U.S. The potential impact of the Act on asylum seekers, victims of human trafficking, and domestic violence victims is particularly concerning. Immigrants in these situations may be undocumented for the purposes of the Act.

The Act creates a state crime of "[w]illful failure to complete or carry an alien registration document." However, a person is only guilty of a misdemeanor if he or she violates 8 U.S.C.§ 1304(e) or § 1306(a), requiring individuals to carry a federally issued Alien Registration Certificate or Receipt Card. The Act is not applicable to individuals who have valid visas or other grounds to remain in the U.S. Under the Act, a person is presumed to be lawfully present in the U.S. if the person provides the officer any of the following: a valid Arizona driver's license, non-operating identification license, tribal identification, or valid U.S. federal, state or local government issued identification, if proof of lawful residency or citizenship is required to obtain the identification.

Individuals who have applied for asylum can remain in the U.S. while awaiting adjudication of their application; however, they may only have the forms that they submitted or receipt notices from U.S. Citizenship and Immigration Services (USCIS). The Act fails to provide instructions for police if an alien claims that his or her application is pending, and is also silent about whether USCIS receipt notices qualify under the fourth category of valid proof of lawful presence. This ambiguity gives law enforcement broad discretion, which may lead to abuse and the unjustified detention of individuals who have initiated the process to legalize their status in the U.S. Failing to recognize USCIS receipt notices carried by an asylum applicant and detaining an individual awaiting adjudication of his asylum application contravenes Article 31 of the 1951 Convention Relating to the Status of Refugees, as modified by the 1967 Protocol, prohibiting countries from penalizing refugees because of illegal entry if they are fleeing persecution. As a state party to the protocol, the U.S. is bound by Article 31.

The Act also endangers human trafficking victims, many of whom are undocumented immigrants. Some enter the U.S. legally and willingly, but their immigration status expires after they are enslaved; others are forced to travel to the U.S. through legal means or are voluntarily smuggled in, but are enslaved upon arrival. Even after a human trafficking victim escapes, he or she may still be vulnerable to arrest and detention under the Act. Victims of trafficking awaiting T or U visas may lack required proof of lawful presence under the Act. By criminalizing the failure to produce this proof, the Act punishes the victims instead of the traffickers.

Local law enforcement is in a difficult position — it must uphold Arizona law, while the United States is bound by its obligation under the trafficking Protocol. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, states that a country should provide for the physical safety of trafficking victims within its territory and adopt appropriate measures allowing victims to stay temporarily or permanently. Although the U.S. provides protective measures for victims of trafficking through the T and U visa programs, the Act threatens the effectiveness of these programs because victims may be subject to arrest and detention while they wait for their visa to be granted.

Undocumented victims of domestic violence are also vulnerable and less likely to seek help under the new Act. The Immigration and Nationality Act (INA) § 212(a)(6)(A)(ii) provides a waiver to domestic violence victims who unlawfully entered the U.S. This waiver allows victims to remain in the U.S. through a self-petition for legal status under the federal Violence Against Women Act of 1994 (VAWA). The victims must file a police report to begin the visa application process. However, the Act adds an additional element of fear of law enforcement, which may discourage victims from reporting abuse.

In reshaping its immigration policy, the U.S. has both domestic and international legal obligations to protect vulnerable groups. However, the Act fails to provide this protection. U.S. immigration policy, whether formulated by states or the national government, must conform to international legal obligations.

Allegations Against Canada for Complicity in Torture of Afghans

A Canadian Parliamentary committee recently heard testimony suggesting that Canada's policy of transferring Afghan detainees to Afghan security forces amounted to complicity in torture. In 2003, the North Atlantic Treaty Organization (NATO) assumed control of the International Security Assistance Force (ISAF) and its mandate to assist the Afghan Interim Authority in maintaining security. Initially, ISAF transferred detainees to U.S. forces. However, since 2005, NATO has transferred detainees directly to the National Directorate of Security (NDS), Afghanistan's intelligence service. International obligations, such as Common Article 3 of the Geneva Conventions, the International Convention on Civil and Political Rights (ICCPR), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibit NATO member states from exposing detainees to a substantial risk of torture. However, civil society and government representatives expressed concern that detainees transferred to the

NDS may be subject to torture. By 2008, Canada had quietly suspended detainee transfers.

Richard Colvin, former diplomat with Canada's mission in Afghanistan, remarked in 2009 to a Parliamentary committee on the Afghanistan mission, "[a]ccording to our information, the likelihood is that all the Afghans we handed over were tortured. For interrogators in Kandahar, it was standard operating procedure." As a member of NATO, Canada's reticence to continue NATO's practice of detainee transfer raises important questions for NATO and its constituent forces.

According to the International Committee for the Red Cross, the conflict in Afghanistan ended when the transitional government was established in 2002. Nevertheless, all parties to the conflict must, at a minimum, abide by Common Article 3 of the Geneva Conventions requiring the humane treatment of all individuals not participating in the conflict, including civilians and wounded, captured, and surrendered combatants. Thus, under Common Article 3 and the rules of customary international humanitarian law, transferring detainees to a state where they may be tortured is a serious breach of Canada's international obligations. Additionally, allegations of torture, if substantiated, could mean Afghanistan failed to comply with Common Article 3.

International treaties including the ICCPR and the CAT, to which Canada and Afghanistan are state parties, also prohibit torture. Article 4 of the ICCPR provides that "[In] time[s] of public emergency" states may not derogate from the prohibition on torture. Moreover, the non-refoulement principle of customary international law, contained in Article 3(1) of the CAT, specifically prohibits the expulsion, return, or extradition of a person to a state where there are substantial grounds for believing that he may be subject to torture. Under Article 1 of the CAT, the obligations of states parties also extend to official complicity in, consent, or acquiescence to acts of torture. Article 2 requires state parties to take effective measures to prevent torture in territory under their jurisdiction, and Article 4 requires all State Parties to prohibit participation and complicity in torture. According to the Human Rights Committee (HRC), the absolute prohibition on transferring detainees to where they risk torture or other ill-treatment is incorporated in the prohibition on torture and other ill-treatment itself. Also, some argue that a state's obligation not to torture or ill-treat detainees extends to the conditions to which detainees are transferred. Amnesty International USA points out, "A state cannot claim to be treating detainees humanely while knowingly handing them over to torturers — be they within one state outside it, citizens of the same state or officials of another — anymore than it can knowingly 'release' detainees in a minefield and claim that their safety is no longer its responsibility."

In a legal opinion prepared for the HCR in 2001, international lawyer Elihu Lauterpacht and Queen's Counsel to the Foreign Office of the United Kingdom, Daniel Bethlehem, argued that a state's obligation under the principle of non-refoulement has no limitation or exceptions. As a state party to the CAT, Canada cannot transfer detainees if there are substantial grounds to believe that they may be tortured. Canadian military officials received numerous warnings from diplomatic staff regarding potential torture and knew of incidents in which a prisoner with marks on his body was found near "a pair of suspicious cables."

In February 2007, Amnesty International Canada and the British Columbia Civil Liberties Association filed for an order from the Federal Court of Canada to cease detainee transfers and require Canada to account for individuals previously transferred. The Federal Court of Canada and the Military Police Complaints Commission, an independent quasi-judicial body established by the Canadian Parliament, are evaluating the military's knowledge of torture in Afghan prisons.

NATO forces are faced with a difficult decision. The institutional arrangement between NATO and the Afghan security forces has failed to protect detainees from torture. The findings of the Federal Court of Canada and the Military Police Complaints Commission will be internationally significant as they may critique NATO policy regarding the transfer of Afghan detainees — a policy that many countries have adopted.

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Latin America

Criminalizing Social Movements in Peru

Peru has taken a dangerous step toward endangering social protestors by passing Decree Law 1095 (Decree 1095) on September 1, 2010. Decree 1905 is a response to protests by communities against a national irrigation project. The law permits deployment of the military during civil unrest, including demonstrations, and the use of military courts for prosecuting any "illicit conduct" by soldiers during protests. The use of military courts to prosecute human rights abuses is in violation of international human rights standards. Moreover, deploying the military (trained to fight armies, not police civilians) to manage social protests comes precariously close to violating human rights, including the right of assembly and freedom of association listed in Articles 15 and 16 of the American Convention on Human Rights, to which Peru is a signatory.

Most significantly, Decree 1095 authorizes the use of military courts to hear complaints of human rights abuses committed against protestors. International human rights standards and the United Nations Human Rights Committee have consistently implored signatories of the International Covenant on Civil and Political Rights (ICCPR) to prosecute military personnel in civilian courts when the alleged conduct includes human rights abuses. Additionally, in decisions such as *Durand and Ugarte v. Peru*, the Inter-American Court of Human Rights has reiterated states' obligations to discontinue the prosecution of army personnel for human rights violations in military courts. Moreover, trials in Peru's military courts often end in impunity. Therefore, trying military personnel for human rights abuses in military courts could impede the justice sought by Peru's citizens.

During the 1980s and 1990s, the Peruvian military committed numerous human rights violations while fighting domestic terrorism. Little justice has been served for these abuses. Peruvian President Alan García was in his first presidential term from 1985 to 1990, and allegedly authorized unnecessary use of military force. During the Accomarca massacre in August 1985, 69 unarmed civilians were killed by the Peruvian armed forces in an

anti-terrorism operation. Many of the accusations against President García are either still under investigation or were archived without a verdict. Given this history, military courts will not likely exercise impartiality, and use of the courts to prosecute human rights violations will decrease both deterrence and likelihood of justice.

Moreover, the mandates of military courts often contravene international standards of judicial independence, transparency, and impartiality. Military courts frequently only investigate allegations against lower ranking members, and may create discrepancies between the standards applied to civilian and military human rights violators. For this reason, military courts are ill-suited to prosecute civil human rights abuses."

Decree 1095 also authorizes use of military force against protestors. The decree itself does not criminalize protests or violate the rights of assembly and association; however, human rights organizations are concerned that it may open the door to such violations based on the military's history. The decree could threaten social movements and protests, which are a vital means for democratic participation in South America where lobbying opportunities are limited and weaker governments have fragile checks and balances.

Decree 1095 may become especially relevant to Cusco and Espinar community members who are currently protesting planned irrigation systems that they believe will constrict their own water supply. Although two judicial rulings have postponed the government-led project until an environmental impact assessment is completed, the government continues to move forward in defiance of the court. The disregard of the court's judgment is evidence of the weak checks and balances. At least one man has been killed and 28 injured in the unrest. Social protests such as these are an essential tool for balancing the government's power. Nevertheless, protestors may suffer violent consequences and human rights violators will likely receive impunity as a result of Decree 1095.

President García, whose primary agenda has been economic development in the country, argues that continuing with the irrigation project is an economic benefit to Peru's population. He believes the irrigation will increase agricultural production in other regions and provide an alternative for the mining-dependent economy. Yet, his issuance of Decree 1095 demonstrates that he is more concerned with economic diversification than protection of fundamental human rights of members of the Cusco and Espinar communities."

Decree 1095 represents a step backward for human rights in Peru. In 2009, the country's judicial system demonstrated its independence in what was regarded as a fair trial for bringing former President Fujimori to justice for human rights abuses. Moreover, Fujimori's prosecution was a victory against impunity. Because Decree 1095 returns the prosecution of human rights violations to military court where impunity is likely, the progress made over the last two decades may substantially relapse. Considering the military's abusive history and the important function of social movements in Peru, Decree 1095 dangerously opens the door to future abuses that may never be redressed if tried in military courts.

Contemporary Slavery In The Bolivian Chaco

Approximately 600 Guarani families are subjected to systems of debt bondage and forced labor, primarily in agriculture, on large estates in the Bolivian Chaco, according to a recent Inter-American Commission on Human Rights report. Despite Bolivia's clear obligation to prohibit and prevent slavery as a state party to the 1926 Slavery Convention and International Labor Convention (ILO) Convention 29 on forced labor, the state has not sought to prosecute the violators. The Guarani remain captive primarily because of political divisions in the country, which have weakened the state and prevented prosecution.

The prohibition of slavery is considered jus cogens — a peremptory norm from which no derogation is permissible under international law. The 1926 Slavery Convention defines slavery as the "condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." In June 1930, the ILO expanded the definition of slavery to include forced labor through Convention 29 (ILO Convention 29). ILO Convention 29 defines forced labor as "all work or service which is exacted from any person under . . . penalty and for which the said person has not offered himself voluntarily." The incorporation of forced labor into the definition of slavery effectively removed the requirement of ownership from the 1926 Slavery Convention and its 1956 supplement.

Furthermore, the Slavery Convention's 1956 supplement incorporates the concepts of debt bondage and serfdom. Under the 1956 supplement, debt bondage is defined as a condition in which one's services to pay a debt are not reasonably assessed and applied to that debt, and serfdom as a condition in which a person is forced to live and labor on land belonging to another without freedom to change his or her status.

Bolivia is a state party to both the Slavery Convention, its supplement, and ILO Convention 29 on forced labor. Bolivia's domestic law, including both the current and most recent Bolivian constitutions, also outlaws the practice of forced labor. As do the Bolivian Criminal Code and Supreme Decree Number 28159, which specifically targets slavery of the Guarani in the Chaco region.

Individuals may inherit the debt of their parents and are often only permitted to repay it through more labor. Their labor is then not applied fairly to the debt—demonstrating the cyclical use of forced labor and systematic debt bondage, prohibited in the 1956 supplement to the Slavery Convention. Forced laborers live under threat of corporal punishment and must perform excessive physical labor to repay their debts to estate owners who have coerced them into fraudulent contracts. Compensation for labor is minimal or given in-kind. The estate owner is the only source of critical needs such as food, clothing, and medicine but sells the items at prices excessively higher than the market. This nominal compensation coupled with the overpriced goods perpetuates ongoing indebtedness. Furthermore, only the estate owners record the payments and debts. The families are not free to seek work elsewhere, and if they insist on going to another estate, they are usually sold along with their debt, which is characterized a form of serfdom.

Although the Bolivian government acknowledges and condemns modern forms of slavery, it has been unsuccessful in prosecuting violators because of a complex set of financial and political challenges. Those

challenges include a weak state presence in the Chaco region and an insufficient number of police, judges, prosecutors, and public defenders. Additionally, many of the landowners are in local or regional government positions.

However, as the issue gains more attention, the most significant challenge to enforcement is the political division between the lowland region, where the Guarani reside, and the rest of the country. In recent years, the region has pushed for increased autonomy from the central state and the ruling party's policies, including nationalization, agrarian reform, and indigenous empowerment. If the regional leaders enforce agrarian reform, it will be contradictory to their expressed preference for privatization. If they embrace indigenous repatriation, then they will contradict their efforts to resist the 2009 constitution, which sought to give greater rights to marginalized indigenous communities. The political stalemate is preventing the cooperation needed between regional and national authorities to prosecute the estate owners.

In spite of heavy political divisions, the national government cannot ignore slavery while making political compromises with the eastern lowlands. The State has the legal responsibility to meet its international obligations and uphold its domestic law in the case of the Guarani by devoting the resources and political capital necessary for prosecuting those responsible for slavery conditions in the Chaco region. Most notably, the Inter-American Commission on Human Rights has scheduled a hearing for October 2010, where Bolivia will report on any progress made in remedying the situation, as per the Commissions suggestions at a prior hearing.

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Sub-Saharan Africa

Kiobel Decision Significantly Limits Corporate Liability for Human Rights Violations

In the face of allegations that Royal Dutch Shell aided and abetted in human rights violations perpetrated by the Nigerian government, the United States Court of Appeals for the Second Circuit has rejected the theory that corporations can be held liable in the United States under the Alien Tort Claims Act (ATCA). If upheld, the recent *Kiobel v. Royal Dutch Petroleum* decision will significantly limit legal recourse available to victims of human rights abuses attributable to a corporate entity.

In Kiobel, a group of residents from the Ogoni region of Nigeria alleged that government forces subjected members of their community to summary executions, beatings, rapes, arbitrary arrests, and destruction of property throughout 1993 and 1994. They further alleged that these abuses aimed to reprimand a community movement to protest the environmental effects of oil exploration in the resource-rich region, and that the defendant Shell provided significant financial and logistical assistance to the perpetrators. Filing suit under the ATCA, the plaintiffs argued that the corporation should be held liable for what amounted to grave human rights violations and crimes against humanity.

The court proceeded on the premise that the scope of liability under the ATCA is determined by customary international law or norms that are "specific, universal, and obligatory in the relations of states inter se." It then examined a broad range of sources — international tribunals, treaties, and the work of renowned academics — and concluded that, while individual and state liability has been firmly established since Nuremberg, customary international law to date has "steadfastly rejected" the notion of corporate liability. There is no basis, according to the court, for jurisdiction over Shell under the ATCA.

It might appear that this decision has rendered the corporate entity eternally immune in United States courts for any abuses it may commit or support abroad. Yet, in its opinion the court explicitly narrowed its position: until corporate liability under international law evolves to the point of universal recognition and acceptance so as to constitute customary international law, it cannot be the basis for an ATCA claim.

Although there was speculation that the U.S. Supreme Court might address the issue of corporate liability under the ATCA in *Presbyterian Church of Sudan v. Talisman Energy*, it instead recently denied the petition for certiorari in that case without explanation. Furthermore, Kiobel was recently adopted by the Second Circuit in another ATCA case against Firestone, alleging profit from forced labor and child labor at its rubber plantation in Liberia. Meanwhile, the Kiobel plaintiffs have requested en banc review. If ultimately upheld, however, the decision represents a setback for human rights activists who battled in recent years to revive ATCA and expand the spectrum of legal options available against corporate entities that commit or otherwise support human rights abuses in pursuit of the bottom line.

The ramifications of the decision are particularly far-reaching in certain regions of sub-Saharan Africa, where vast natural resources coexist with poor labor regulations, low standards of living, corrupt and unstable regimes, and prolonged civil and regional conflict. Many corporate entities have been able to take deliberate advantage of these conditions without effective regulation and often at the expense of local communities.

The absence of local and regional justice mechanisms capable of effectively holding corporate entities liable throughout the continent has forced affected communities to seek forums for redress elsewhere. Nigeria's judicial system, for example, is among the world's most corrupt, and circumstances such as those in *Kiobel* reveal an intimate relationship between the government and the corporate entity. Until the decision in *Kiobel*, ATCA represented one possible avenue to justice, although prior ATCA claims against corporations had only resulted in out-of-court settlements and raising awareness more generally. Where the case has been decided, as in *Bowoto v. Chevron* arising out of events in Nigeria, courts have ruled in favor of the accused entity.

Other recent developments offer some promise of better protection against human rights violations attributable to corporate dealings and objectives. The Office of the United Nations High Commissioner for Human Rights in particular has been working to articulate the human rights obligations and responsibilities of corporate entities. Furthermore, recent court proceedings against Trafigura in both the Netherlands and Britain reflect an emerging commitment to hold corporations accountable in those nations for violations committed abroad. Despite these efforts, the *Kiobel* decision exposes a void within the frame-

work of international law based on the legal status of corporate non-state actors and the corresponding lack of international enforcement mechanisms.

In his separate opinion, Judge Leval stressed that *Kiobel* "deals a substantial blow to international law and its undertaking to protect fundamental human rights." Ultimately, however, he concurred in the decision, conceding that international law to date "[does] not provide civil liability against any private actor and [does] not provide for any form of liability of corporations." This legal truth is especially troubling in an era of fundamental changes to the international world order, in which corporations extend farther and possess greater influence than many of the states whose resources they pursue. Unless the Kiobel decision receives a very bold review and is overturned, it will remain for the international community to establish the norm of corporate liability without the active participation of the U.S. court system.

Elections Commission Approves Former Warlord's Presidential Campaign: A Setback to Liberia's Rebuilding Process

As the citizens of Liberia prepare to elect a new president in October 2011, the National Elections Commission has ruled that Prince Yormie Johnson may participate as a candidate in the race. A current senator from Nimba County, Johnson is more infamously known as a former warlord and leader of the since-disbanded Independent National Patriotic Front of Liberia (INPFL). As a breakaway faction of Charles Taylor's own rebel group, the INPFL established a significant presence in the early stages of Liberia's civil war by capturing, torturing, and killing then-President Samuel K. Doe in September 1990. Charles Taylor filled Doe's vacant post at the apex of Liberia's crumbling government, and the nation plunged further into prolonged conflict.

In the following years, Liberia was wracked by intensified fighting between several rebel groups and Taylor's government forces, with each carrying out systematic human rights violations against civilians. Taylor fled the country in 2003 following the Comprehensive Peace Agreement, and Liberia emerged from civil war into a crippling humanitarian crisis. Over 250,000 citizens had been killed over nearly fourteen years of violence, and over one-third of the population displaced. The United Nations soon thereafter established a peacekeeping presence in Liberia, and the post-conflict disarmament, reintegration, and reconciliation process began to take shape.

One crucial element of the rebuilding process was the Truth and Reconciliation Commission (TRC), the legitimacy of which has been severely undermined by the National Election Commission's decision. The TRC was launched in 2006 to facilitate the delicate process of Liberia's rebirth and renewal and to shed an accurate, unbiased light on the root causes of the conflict, the breadth of human rights and international law violations, the experiences of women and children, and the exploitation of natural resources in furtherance of wartime objectives. Despite deficiencies in its process, ranging from limited resources and scarce evidence to poor coordination and internal discord, the TRC's findings reflect a commitment to the principles of the mandate — justice, accountability, and reconciliation — and a sincere desire to lay a foundation for lasting peace and stability.

In its Final Report, issued in late 2009, the TRC concluded that Prince Johnson was the conflict's most notorious perpetrator of violence and disarray and recommended that he face criminal prosecution for gross violations of both domestic and international law. The Report also urged that, at minimum, Johnson and other alleged perpetrators be restricted from holding public office for a period of thirty years.

While the decision to admit Johnson publicly undermines these conclusions, it is nonetheless defensible on constitutional grounds, as Liberia's Constitution affords all citizens the right to seek office, provided minimal demographic standards are met. Implicit in the TRC's recommendation, however, is a call to democratically amend the Constitution, notably untouched since prior to the outbreak of civil war, to embed in its fabric higher standards of eligibility intended to protect principles of human rights. As any constitutional amendments must be ratified by referendum, the effort would provide a rare opportunity for the citizens of Liberia to raise a potent, unified voice against impunity. Only with the integrated efforts of the Elections Commission could proposed amendments gather momentum, yet their decision here indicates that it will either ignore or consciously resist the TRC's recommendation.

What will come of Prince Johnson's participation in the presidential race will not be known until October 2011. While he continues to draw support from within his native Nimba County, international human rights observers contend it is grounded not in respect, but in fear that he will again become a violent and destabilizing force if not elected. The bitter memories of civil war and indiscriminate violence linger in the collective consciousness of Liberians, and as a core perpetrator, Prince Johnson remains a public face of this suffering. In disregarding the TRC's call for public sanctions, the Elections Commission has threatened the efficacy of an accountability measure potentially capable of restoring the confidence of Liberia's weary population in its public institutions. It has sent a telling message of free license to perpetrators and obstructed the aspirations of others for a future that does not resemble the past.

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Europe

Égalité, Fraternité, Expulsé— French Expulsion of the Roma

The French government's recent policy to shut down Roma encampments in France is drawing attention and criticism from the European community. Many are concerned with the potential violations of the European Charter of Fundamental Rights (ECFR) and the 2004 European Union Freedom of Movement Directive (Directive). Article II-81 of the ECFR states that any discrimination based on ethnic or social origin shall be prohibited, and Article II-79 of the ECFR prohibits collective expulsions. The Directive enforces the rights of EU citizens and their family members to move and reside freely within member states; however, for periods of residence longer than three months, member states can require registration by EU citizens.

On September 29, 2010, the European Commissioner for Justice, Viviane Reding, told French radio that the European Commission has launched infringement

proceedings against France for breaching the EU's ban on ethnic discrimination. The Commission's action could lead to a complaint at the Court of Justice of the European Communities (Court).

A leaked September 11, 2010 document from the French Ministry of the Interior indicated that Roma from Romania and Bulgaria are the principal targets of French President Nicolas Sarkozy's policy. From August to September 2010, the French government deported approximately 1,000 Roma. Most of the deportees have been put on planes, mainly to Bucharest, Romania, after receiving €300 per adult and €100 per child, and signing a declaration affirming that they are leaving voluntarily. The remaining deportees were kicked out of the country due to criminal records and for violating residency registration requirements. Although the French government justified the expulsion policy on the basis that deported Roma resided in France for over three months without work or residency permits, the September 11 document suggests that the Roma were targeted on account of their ethnicity.

This recent government action was prompted by several riots that erupted in the Loire Valley of Central France in July 2010, as a result of the shooting and killing of a young French Roma Luigi Duquenet by French police. Duquenet was shot at a checkpoint after he recklessly drove and hit a gendarme. Following the riots, the French government decided to close down 300 encampments within three months. Sarkozy described the Roma camps as sources of "illicit trafficking, deeply disgraceful living conditions, and the exploitation of children through begging, prostitution, and delinquency." By the end of August 2010, the French government dismantled over 128 encampments.

On September 9, 2010, the European Parliament passed a Resolution by 337 votes to 245 calling on the French government to "immediately suspend all expulsions of Roma," and stating that the policy "amounted to discrimination." In response to accusations of ethnic discrimination, the French government maintains that each expulsion is decided on a case-by-case basis, and that national security and the enforcement of immigration laws, not ethnicity, are the deciding factors. On October 19, 2010, less than a week before the Commission's deadline for France to change its policy, the European Commission suspended infringement procedures against France. Commissioner Reding stated that France "has responded positively" and has promised to adopt procedural changes in the French Senate as per the Commission's requirements.

Nevertheless, the newly enacted policy disproportionately effects the Roma population in France. Éric Besson, France's Minister of Immigration, said that the ECFR, which outlaws discrimination on ethnic grounds, is respected scrupulously in France, and the government only targeted and expelled individuals who posed a threat to public order. Besson further emphasized that "no collective expulsions were undertaken."

Beyond the immediate consequences for the local Roma populations, the French policy may have significant implications on the interpretation of EU legislation. This policy discredits the authority of legal standards set forth in the ECFR, which ensures that the EU protects the rights of citizens in its member states. The infraction proceedings initiated against France before the Court will determine how EU legislation on freedom of movement and minority rights will be interpreted and applied uniformly across all EU member states. The Court's ruling will bear importance to future efforts to hold EU member states accountable for the respect of human rights of other member states' citizens. The level to which France is held responsible for implementing European law into its domestic law will set a precedent for the punishment of future violations of minority rights.

France's Burqa Ban Passes Constitutional Muster

The French government's ban on clothing that covers individuals' faces when in public, including the burqa and the niqab worn by Muslim women, has passed its last domestic legal hurdle. The burqa is a full-body garment with a narrow gauze-covered eye opening, while the niqab, has just a narrow eye opening. France's Concealment Act (Act), which prohibits the covering of the face in a public space, passed through France's National Assembly and Senate with overwhelming support earlier this year. On October 11, 2010, the Constitutional Council's decision No. 2010-613 rendered the Act constitutional. Despite constitutional approval, the legality of the Act may be brought into question before the European Court of Human Rights (ECtHR).

The French Constitutional Council (Council), France's highest legal authority, ruled that the law does not create disproportionate punishments and therefore conforms to the constitution. The Council found that the Act conformed to Article 10 of the French Constitution pertaining to religious expression, after amending the text to state: the ban cannot apply in places of worship. The Council did not specifically mention the wearing of face-covering clothing in mosques, but it did suggest that extending the ban to places of public worship might violate religious freedom. Anyone violating the ban will be subject to a fine of €150 or required to complete a citizenship course, and anyone who forces another individual to conceal her face in public will be subject to a one-year prison term or a fine of up to €30,000.

This new law extends the prohibitions of French law No. 2004-228 of 15 March 2004, which banned the displaying or wearing of overt religious symbols in all public schools, including headscarves worn by Muslim schoolgirls. The 2004 law specifically applies to the public display of religious symbols or clothing, whereas the text of the Concealment Act does not make explicit reference to Islam or the Islamic veil. French President, Nicolas Sarkozy has eluded that the Act is aimed at Muslim women, stating: "The burqa is not a religious sign, it's a sign of subservience, a sign of debasement . . . It will not be welcome on the territory of the French Republic." However, the Concealment Act does not specifically mention the words "Muslim," "women," or "veil" in any of its six articles; rather, the law generally references clothing designed to cover the face. Nevertheless, many fear that the Act will disproportionately stigmatize France's Muslim population, the largest in Europe.

Many human rights organizations, including Amnesty International, view the ban as a violation of essential human rights defined by the Charter for the Fundamental Rights of the European Union (Charter) and the European Convention on Human Rights (ECHR), to which France is a state party. Both Article 9 of the ECHR and Article 10 of the Charter seek to ensure the freedom to manifest religion or belief

in worship and observance. The same is true for Article 18 of the United Nations Universal Declaration of Human Rights (UDHR) and Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Concurrently, the principal document enunciating women's rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes a state obligation to take measures to abolish laws, regulations, customs, and practices that discriminate against women (Article 2) and to modify social and cultural patterns to eliminate discriminatory practices (Article 5).

Rather than an infringement on religious freedom, the French government views the decision by the Council as an important affirmation of French values – equality between men and women, and secularism. The French government also justifies the ban on the basis of national security. French authorities assert that "the ability to cover the face in a public place is a security hazard in a time of increased threat from terrorist organizations."

Now that France's Constitutional Council has approved the Concealment Act, only the ECtHR can strike it down and render a binding opinion on France. The likely success of a claim against the ban before the ECtHR is uncertain. In *Aktas, Bayrakand and others v. France* (no. 435631/08) decision of June 30, 2009, the ECtHR rejected the admissibility of complaints filed by four Muslim girls and two Sikh boys, who were expelled from public schools in France in 2004 for violating the law prohibiting the wearing of clothing or symbols expressly showing the students' religion. The ruling upheld the 2004 law reasoning that the restrictions on the manifestation of religion were necessary to guarantee public order and maintain the rights and freedoms of others.

The French law reflects a growing tension between the right to religious freedom in a secular country and the affirmation of women's rights, two principles that are promoted and protected by international law. While France claims the new law is a step forward for the rights of Muslim women and Muslim leaders concur that Islam does not require women to hide their faces, the ban elicits outcries from both Muslim fundamentalists and human rights advocates. With this new law, France may be trying to enforce women's rights within CEDAW, but in doing so, France is infringing on what many Muslim women in France may regard as their religious freedoms.

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South and Central Asia

Rape Victims Subjected to "Finger" Test in India

In India, physicians are allowed to perform a "finger" test on rape victims to determine their level of sexual activity. If a physician is able to insert two fingers into the victim's vagina, she may be considered "habituated" to sex. Results of the examination are admissible in court and can be used to undermine the credibility of an unmarried rape survivor, according to a recent Human Rights Watch report. There are several international instruments that commit states, including India, to uphold a women's right to pursue medical attention and legal remedies, and would prohibit the use of the finger test.

The international community has taken measures to stop sexual violence and encourage the prosecution of sexual offenders. According to United Nations Resolution 62/134 (Resolution), states are obligated to exercise due diligence to prevent, investigate, and punish sexual crimes. The Resolution further urges states, "[to] provide victims with access to appropriate health care, including sexual and reproductive health care, psychological care, and trauma [counseling]."

Various international laws protect women's rights. Article 5 of the Universal Declaration of Human Rights (UDHR) forbids "cruel, inhuman or degrading treatment." India ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and article 5(a) of CEDAW obligates states to "modify . . . social and cultural patterns of conduct of men and women" to prevent prejudice based on gender stereotypes. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) extends the " . . . right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The finger test likely violates the women's rights articulated in the UDHR, CEDAW, and ICESCR. Furthermore, the finger test may deter rape victims who fear subjection to such an invasive procedure or the potentially damaging results from coming forward. In addition to violating clearly established international human rights law, the finger test, by creating a potential disincentive for women to come forward after being raped, also undermines the justice system by allowing some rapists to escape punishment.

India has taken some steps to prevent the use of the finger test. In 2005, the Supreme Court of India held in *State of Uttar Pradesh v. Pappu* that a rape victim's prior sexual activity is irrelevant. More recently, on October 23, 2010, Additional Sessions Judge Kamini Lau condemned the finger test in a rape case before her court. She said, "The test is violative of the fundamental right to privacy of the victim . . . State action cannot be a threat to the constitutional right of an individual. What has shocked my conscience is that this test is being carried out in a routine manner on victims of sexual offences (even minors) by doctors." She recommended that police should be sensitized to the issue. The court opinion stated that courts should review irrelevant procedures and reject immaterial evidence. It is yet to be seen whether the Delhi court's order will be followed.

Furthermore, there is a proposed amendment in the legislature to the Criminal Law Bill, which states, "previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent." Also this year, India established a committee, headed by Justice Gita Mittal, to consider further amendments to sexual violence laws. The committee has not yet released a formal response to the use of the finger test.

Despite efforts by the national court system, legislature, and medical organizations to ban the finger test, local doctors, attorneys, judges, and police officers are still authorizing the test. Human Rights Watch identified eighteen Indian states, including three major Mumbai hospitals, which still use the finger test. In June 2010, the Maharashtra government standardized how many fingers to use during the test, and earlier this year, the Delhi government requested reports regarding whether the orifice is "roomy" or "narrow." The inaction of India's national government shows that it is either unable or unwilling to

enforce the Supreme Court's five-year-old decision.

Despite attempts to dissuade the use of the finger test, the practice is still used on women in a country with the second largest population in the world, even though the finger test clearly violates international laws and obligations to protect the right to privacy and bodily integrity.

Accountability in Sri Lanka? Lessons Learnt and Reconciliation Commission

Sri Lanka's Lessons Learnt and Reconciliation Commission (LLRC) has come under scrutiny for its lack of accountability and efficacy as a truth-seeking mechanism. While the LLRC has made some progressive suggestions, like the need to improve conditions for internally displaced persons (IDPs), it has also rejected assistance from international experts. Faced with allegations of war crimes committed by Sri Lankan forces and rebel group members, Sri Lanka and the international community have not taken the necessary steps to ensure accountability for the alleged crimes.

Typically, a truth commission is a non-judicial body that is tasked with investigating past wrongdoings. Much of its success depends on its transparency and accountability, which in turn relies on its autonomy. Truth-seeking mechanisms work to end impunity by exposing information about past human rights violations to the public.

In an apparent effort to stave off international scrutiny, Sri Lankan President Mahinda Rajapaksa established the LLRC in May 2010 to investigate the failure of the Norwegian-brokered peace process. For 25 years, the Sri Lankan government fought against the Liberation Tigers of Tamil Eelam (LTTE). In 2009, at the end of the conflict, government forces pushed the LTTE into a small area in northeastern Sri Lanka. U.S. State Department reports and interest groups allege that the government and the rebel group are jointly responsible for 7,000 civilian casualties, tens of thousands of injured civilians, and forced disappearances.

Survivors have stated that the government killed rebels who surrendered, a violation of Article 3 of the Geneva Conventions requiring the humane treatment of combatants who have laid down their arms. Human rights and relief organizations have also accused the government of blocking humanitarian aid, including aid from the Red Cross. Further, international observers have alleged that the Sri Lankan government intentionally bombed and attacked facilities in areas populated by minority groups, violating Geneva Convention IV, which protects civilians from direct military attacks.

Numerous human rights organizations have criticized the LLRC's mandate as too narrow and ill-equipped to investigate alleged war crimes in 2009. Furthermore, similar commissions in Sri Lanka in the past thirty years have suffered from a lack of transparency. With this in mind, the United Nations (UN) is pressuring Sri Lanka to consent to an investigation of the events that took place from January to May 2009, but Sri Lanka refuses UN participation in the truth-seeking process. UN Secretary-General Ban Ki-moon has set up a panel of three experts on international law to report on legal standards applicable to the situation in Sri Lanka. The UN panelists are available as a "resource" to the LLRC at the discretion of the government. Sri Lankan authorities, however, have denied the need for an oversight panel and reasserted the LLRC's internal autonomy. In June, Sri Lanka denied the panelists' visas to enter the country, and a Sri Lankan Cabinet minister led demonstrations against the UN in Colombo in July.

Despite an international outcry that Sri Lankan forces and the LTTE violated international humanitarian law during the end of the conflict, Sri Lankan Defense Secretary Nandasena Gotabhaya Rajapaksa denies that these allegations have been brought to his attention. Gotabhaya Rajapaksa refuted reports of civilian deaths during the conflict, arguing that what were perceived as civilian deaths were in fact rebels in civilian disguise. In a June 2010 interview with the BBC, Gotabhaya Rajapaksa further attempted to suppress the investigation when he threatened to execute a general who promised to cooperate with investigations of war violations.

Sri Lanka has benefited from financial aid and increased tourism since the end of the conflict and, in the last fiscal year, has received more foreign aid than ever before. However, there has been no accountability for the crimes committed by the Sri Lankan forces or the LTTE. In order to increase the pressure on Sri Lanka to take action, the United States and UN could work with the World Bank, International Monetary Fund (IMF), and China, the most generous provider of aid, to impose sanctions on Sri Lanka until it can account for the effectiveness of the LLRC. As another option to pressure Sri Lanka, the UN Security Council could take steps to create an international ad-hoc tribunal under its UN Charter Chapter VII powers. However, a first step toward accountability would be allowing the UN panel to meet with the LLRC in Sri Lanka.

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East Asia

China Infringes on Religious Freedoms

On November 1, 2010, a new regulation tightening Chinese control over Tibetan monasteries entered into effect. According to Xinhua, the official news agency of China, the new "Management Measure for Tibetan Buddhist Monasteries and Temples" prohibits foreign individuals and organizations from involvement in monastery affairs. China hopes that the measure will minimize negative foreign impact on public order, health, and the fundamental rights and freedoms of others. Although a notice issued by China's State Administration for Religious Affairs (SARA) specifies that "legitimate" rights and interests of the Tibetan Buddhist religion remain protected under law, one implication of the new regulation is that any connections between the Tibetan Buddhists living in China and those living in exile, including the Dalai Lama, are illegal. The new measure is contrary to China's own Constitution and its 2005 Regulations on Religious Affairs (RRAs), which were established to "ensur[e] citizens' freedom of religious belief," because it limits the influence of the religion's leaders and scholars who do not pose a threat public order, health, and morals or fundamental rights and freedoms of others.

China's Constitution and the 2005 RRAs protect the freedom of religion in Tibet. Article 36 of the Chinese Constitution states that "[c]itizens of the

People's Republic of China enjoy freedom of religious belief" and that "[n]o state organ, public organization or individual may compel citizens to believe in, or not believe in, any religio[n]." The RRAs, established to protect the freedom of religion, use language similar to that in the Constitution, and further state that the government "protects normal religious activities, and safeguards the lawful rights and interests of religious bodies, sites for religious activities and religious citizens."

Despite these protections, China justifies limiting foreign influence on Tibetan monasteries based on a provision outlined in Article 3 of the RRAs. This provision states that, "No organization or individual may make use of religion to engage in activities that disrupt public order, impair [the] health of citizens or interfere with the educational system of the State, or in other activities that harm State or public interests, or citizens' lawful rights and interests." A similar provision exists in Article 36 of the Chinese Constitution. While the provision itself does not limit religious freedom, China's application of this provision effectively limits the religious freedom of Tibetan Buddhists.

Prohibiting the influence of foreigners on monastery affairs limits the religious freedom of Tibetan Buddhists because it restricts the Dalai Lama's involvement in the religion, as well as that of a majority of Tibetan Buddhism's scholars. The Dalai Lama is the exiled leader of the largest and most influential school of Tibetan Buddhism, whose role dates back to the 16th century and has since been a continual and central practice. According to the Central Tibetan Administration, "The religious heads and scholars of Tibetan Buddhism as a whole are, currently, living outside Tibet. Hence, the lineage of the sacred Buddhist teachings and initiations can be said to be existing in the exiled Tibetan community." As a result, the new measure will "obstruct the Buddhist teaching and its sacred transmissions inside Tibet and mak[e] it extremely difficult for the monastic institutions to undertake their important religious activities."

China considers the new measure appropriate because it believes that foreign influences, including the Dalai Lama, have encouraged Tibetan Buddhists to act in a way that offends public safety, order, health, or morals, or the fundamental rights and freedoms of others, violating Article 3 of the RRAs. A notice by SARA explaining the purpose of the new measures accuses the Dalai Lama and his followers of "plot[ting] and spread[ing] confusion in the Tibetan areas," ultimately leading to serious influence over Tibetan Buddhists. The notice may be specifically referring to the 2008 protests in Tibet and similar political unrest for which the Chinese government blames the Dalai Lama. Although the protests were carried out by Tibetan Buddhists, the Dalai Lama maintains that they were a result of widespread discontent with the Chinese government, and were unrelated to Tibetan Buddhism as a religion.

The Dalai Lama has continuously objected to the use of violence in any form, including in protests related to the status of Tibet. It is unlikely that his influence has caused Tibetan Buddhists to engage in activities which "disrupt public order, impair [the] health of citizens or interfere with the educational system of the State, or . . . harm State or public interests, or citizens' lawful rights and interests." Barring some indication that the Dalai Lama's influence has caused Tibetan Buddhists to engage in these kinds of activities, the new measure is contrary to the protection of religious freedom in China's Constitution and the 2005 RRAs.

Migrant Workers or Refugees? China's Obligations to North Korean Defectors

China and North Korea recently increased efforts to find North Koreans seeking refuge in China. According to a recent report by Asahi Shimbun, a Japanese daily newspaper, the two countries' joint efforts have already resulted in the capture of dozens of North Koreans. Since the mid 1990s, hundreds of thousands of North Koreans have attempted to cross the border into China. This year's food shortages have resulted in many more desperate North Koreans seeking to enter China in search of food. By repatriating these North Koreans, China may be violating its obligations under the 1951 Convention on the Status of Refugees and its 1967 Protocol, if North Korean defectors can be considered refugees and have individualized concern for their life or freedom.

China considers North Korean defectors to be illegal economic migrants, and as a result, repatriates them in accordance with a bilateral treaty between the two countries. Because leaving North Korea without permission is considered treason, repatriated individuals face imprisonment, torture, and death. China has been accused of being partially responsible for the human rights violations occurring in North Korea, as well as violating its obligations as a signatory to the 1951 Convention and its 1967 Protocol.

The 1951 Convention on the Status of Refugees and its 1967 Protocol exist to protect the rights of refugees. Article 33 of the Convention establishes the principle of non-refoulement, stating: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." While specifically outlined in the Convention, the principle of non-refoulement is also considered customary international law. This principle prohibits the return of refugees to their home countries if they face danger or persecution there.

Under the 1951 Convention, a "refugee" is a person "who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is unable or unwilling to return to his country. Because many of the North Korean defectors are leaving for economic reasons and not because of persecution related to "race, religion, nationality, membership of a . . . social group or political opinion," China defines them as illegal economic migrants. The United Nations High Commissioner for Refugees (UNHCR) distinguishes between economic migrants and refugees, noting that individuals leaving their home countries for purely economic reasons are economic migrants. Nevertheless, UNHCR also recognizes that the distinction between economic and political actions within a country is not always clear. For example, if economic sanctions or decisions on the part of a government have political intentions, one might be considered a refugee instead of an economic migrant. China's blanket classification of all North Koreans as illegal economic migrants means that at least some and possibly all North Koreans who are entitled to refugee status are wrongly repatriated as illegal economic migrants.

Despite these blurred definitions, UNHCR believes that at least some of the North Koreans being repatriated by China definitely meet the criteria for refugee status. Human Rights Watch considers most North Koreans in China to be refugees *sur place* (in place) because, even those who initially fled North Korea for economic reasons, fear persecution if they are forced to return. UNHCR describes refugees *sur place* as individuals who have not necessarily left the country illegally or as individuals who qualify as refugees at a later date. UNHCR calls for special consideration of situations in which a person's actions may have been noticed by the authorities in the person's home country, and how those actions may be viewed by those authorities. Under this definition, even if North Koreans were not refugees when they left the country, the fear of persecution upon return to the country qualifies them as refugees.

China's reluctance to grant asylum to North Koreans is, in part, due to policy concerns. Acceptance of North Koreans could lead to an increase in individuals crossing the border, leaving China with a permanent refugee population. Additionally, action on China's part could strain the relationship between the two countries, ultimately decreasing the significant influence China presently has over North Korea, and destabilizing North Korea generally.

Because China does not grant UNHCR access to the border or to North Koreans already in China, concrete information regarding the reasons for leaving North Korea and the persecution faced upon return is difficult to obtain. The lack of information makes it impossible to determine with certainty the refugee status of most individuals. The recent crackdown on North Koreans by the two countries will only increase the number of individuals whose rights are violated as a result of the repatriation policy. China's policy concerns, however, are not acceptable reasons to refuse UNHCR access to the border or to fail to comply with obligations under the 1951 Convention and its 1967 Protocol.

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Southeast Asia and Oceania

November 7th Elections in Burma: The Next Stop on Burma's "Roadmap to Democracy"?

On November 7, 2010, Burma held its first elections since the 1990 elections that produced dramatic victories for the National League for Democracy (NLD). Despite the previous election's conclusive results, the military junta ruling Burma refused to hand over power to the NLD. The recent elections, officially announced on August 13, 2010, were potentially a significant step from military to civilian rule, as outlined in the Burmese government's policy called the Roadmap to Democracy, originally released to the public in 2003. However, several developments prior to the elections, including the exclusion of political prisoners from voting, and the closure of polls in many border townships, home to minority ethnic groups, indicated that even though the Roadmap calls for "fair and free elections," the November 7 elections were not going to be free nor fair.

Leaders and organizations from around the world, including United Nations Secretary General Ban Ki-moon and the Association of Southeast Asian Nations (ASEAN), urged Burmese leaders to change their election policies. Article 21, Section 3 of the Universal Declaration of Human Rights (UDHR) is generally accepted as a reflection of customary international law regarding elections: "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Although Burma is not a state party to the International Covenant on Civil and Political Rights (ICCPR), its failure to live up to the standards set forth in the UDHR may seriously undermine the validity of the elections.

One of the main issues under contention was a Burmese law that prohibits political prisoners from participating in any election activity, including voting. On September 23, 2010, Amnesty International called for the immediate and unconditional release of all political prisoners in Burma. On election day, about 2,200 individuals were being held on the basis of political beliefs, including Aung San Suu Kyi, leader of the former NLD. Suu Kyi, joined by her other NLD colleagues, called for the boycott of the elections. Labeling them "unfair and unjust," Suu Kyi missed the opportunity to run for office in the elections as she was freed from house arrest on November 13, just one week after the elections took place. The junta did, however, give Suu Kyi permission to vote in the November 7 elections on the grounds that her political imprisonment, unlike other political prisoners, was served through house arrest, not jail.

By closing several polling stations on the eastern border in the interest of "security," the junta invited even more criticism of the November elections. In total, more than 300 villages in 33 townships were disenfranchised due to the premature poll closing. Those same townships are home to minority ethnic groups who have refused in the past to join the Burmese border guard. The government failed to provide any alternative options for voting to the disenfranchised, such as an absentee ballot or transportation to another polling station, violating the democratic principles of equal and universal suffrage pertinent to customary international law.

On September 28, 2010, Burmese Foreign Minister Nyan Win spoke before the UN General Assembly, insisting that the junta is committed to doing its best to ensure successful, free, and fair elections. Alluding to the restrictive election measures, Win commented that Burma has, "ample experiences and lessons learnt in holding multiparty general elections." Although Win did not directly address the junta's rationale for the polling station closures, experts believe it was a combination of security and economic concerns, citing a lack of ceasefires in ongoing conflicts between armed ethnic groups and the Burmese military, as well as an interest in preserving border security to maintain increasing trade with China. The junta failed to ensure "universal and equal suffrage" by making the November 7 elections accessible to all, falling short of its responsibility under Article 21 of the UDHR. Such a failure severely undermines not only Burma's "Roadmap to Democracy," by discrediting a core goal of the plan, but will delegitimize further efforts, real or contrived, to democratize Burma in the near term.

Thailand in Trouble

In early October, the Thai government announced that it would extend the rule of emergency law in Bangkok and three other provinces adjacent to the capital for another three months. The Thai government's April 2009 original enactment of an emergency decree, due to political upheaval, has given way to many human rights abuses, such as censorship of expression and restraints on peaceful assembly. The extension comes at a time when the government, currently holding the UN Human Rights Council presidency, has articulated fears of renewed violence due to political protests and, more importantly, politically motivated bombings since March 2010. The factual basis under which the extension was granted, however, is increasingly dubious. Many critics believe it is a way to silence the political opposition, a move Thailand vigorously denies. Additionally, reports from political prisoners allege that Thailand is stepping outside of the permitted boundaries of an emergency decree, under international law, by violating non-derogable rights protected in the International Covenant on Civil and Political Rights (ICCPR).

As a state party to the ICCPR, Thailand is legally obligated to abide by the provisions of the Covenant. Article 4 of the Covenant states that during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed" the states may take measures "derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law." A further stipulation is that the state party to the Covenant must immediately inform the other States Parties of its decision to derogate. To the extent that it has complied with the notification requirement, Thailand promptly informed the international community of both its decision to derogate and of the subsequent extension, insisting that the extension of the emergency decree was a necessary move to preserve stability.

National and international human rights advocates question whether the "life of the nation" has truly been threatened by the recent increase in political demonstrations, as the protests in Bangkok had been peaceful until one month after the enactment of the emergency decree. If the ongoing situation in Thailand does not constitute a threat to the "life of the nation," it would mean that Thailand has illegally derogated from the treaty, violating fundamental human rights and other Articles of the ICCPR.

Specifically, there is evidence that the rights under Articles 9, 19 and 21 of the ICCPR, or the right to freedom from arbitrary arrest, the right to freedom of opinion and expression, and the right to peaceful assembly and association, respectively, are being violated. Currently, internet censorship, forced closures of certain media groups (such as radio stations), and arrests and "silencing" of political opposition members, are among the charges. The Centre for the Resolution of the Emergency Situation (CRES), a group created by the government and military "to coordinate and administer the Emergency Decree," have disabled or censored 1,500 websites, radio and television stations, and print publications since early April 2010. Additional provisions under the emergency law stipulate that arrestees can be detained for 30 days without charge or trial, while conferring immunity from prosecution for officials who have violated human rights in the performance of their duties.

Perhaps the most troublesome charges for the government are the reports of political prisoners who, while waiting for further judicial proceedings, are beaten and tortured in detention centers. If true, the tortuous practices would directly violate Article 7 of the ICCPR, the right to not be subject to "torture or to cruel, inhuman or degrading treatment or punishment," thereby making Thailand's derogation illegal under international law, as subsection 2 of Article 4 explicitly prohibits derogations from Article 7, among others (not to mention other international prohibitions of torture).

If the allegations are true and abuses of derogated rights are found, Thailand could face international investigations and even more serious repercussions from the international community, especially at a time when it holds a leadership position on global human rights. Although Thailand has complied with its notification duty under Article 4 of the ICCPR, the foundation of its decision to enact and extend an emergency decree is highly questionable. With allegations that its emergency decree is curtailing the rights of many individuals—at the very least their right to free speech and assembly—Thailand's global authority and position on human rights, in general, may be irreparably damaged.

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