

INTERNATIONAL LEGAL UPDATES

NORTH AMERICA & THE CARIBBEAN

THE U.S. SUPREME COURT TO REHEAR *KIOBEL*, THREATENING CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

On February 28, 2012, the Supreme Court heard oral arguments in the case of *Kiobel v. Royal Dutch Petroleum*. The case involves three questions: whether corporate civil liability under the Alien Tort Statute (ATS) is a question of merits or of subject matter jurisdiction; whether corporations can be held accountable for tort liability for violations of the law of nations; and whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring outside the U.S. Despite that the central focus of the case was initially whether a corporation has civil tort liability under the ATS, the oral arguments indicate the Justices are instead focused on the extraterritoriality of the statute itself. The Court ultimately ordered *Kiobel* to be reheard on the question of extraterritoriality in the fall of 2012.

The ATS, which was enacted in 1789, gave federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of the law of nations. Initially, it regulated diplomatic relations between States and addressed crimes with international consequences, such as piracy. Modern application of the ATS in cases such as *Filártiga v. Peña-Irala* (1980) and *Doe v. Karadzic* (2000) have expanded the ATS to hold individuals accountable for egregious human rights violations, including genocide, torture, war crimes, and crimes against humanity, but there has been a split in federal circuit courts over whether corporations can be held liable for these same crimes. Due to their status as extraterritorial entities, corporations have escaped international legal bodies designed to deliver justice for grave breaches of human rights.

Kiobel is a class action suit against Royal Dutch Shell Petroleum Co. (Royal Dutch) and Shell Transport and Trading Co. The plaintiffs aimed to hold the companies

accountable for aiding and abetting armed forces in the alleged killing, torture, and cruel, inhuman and degrading treatment of a group of Nigerians in the Ogonia region. The issue in *Kiobel* was whether U.S. federal common law or international law is the proper source of law for determining whether corporate liability attaches under the ATS. Counsel for Royal Dutch, Kathleen Sullivan, argued that the proper source is customary international law, which has not held corporations as entities liable for committing or aiding and abetting human rights violations. Though the ATS involves civil liability, Sullivan based this argument on the jurisdiction of international criminal courts.

On this issue, the Second Circuit had previously held that corporate liability does not exist under the ATS because corporate liability is not recognized as a “specific, universal, and obligatory” norm of customary international law. However, subsequent decisions by the D.C. Circuit in *Doe v. Exxon*, the Seventh Circuit in *Flomo v. Firestone*, and the Ninth Circuit in *Sarei v. Rio Tinto* explicitly rejected the Second Circuit’s reasoning, finding that the courts do have jurisdiction under the ATS in suits against corporations. *Kiobel* is the first such case to come before the Supreme Court.

Some proponents of the notion that courts do, in fact, have jurisdiction point to the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*. In that case, the Supreme Court extended certain First Amendment protections to corporate entities, thereby extending rights traditionally reserved for persons. Since corporate entities enjoy some rights as persons, *Kiobel* stood to hold corporations responsible as persons where they commit or aid in crimes punishable under ATS. If the Supreme Court affirms the Second Circuit’s holding in *Kiobel*, the ATS will not be applicable to corporations for claims of civil liability, even for the most atrocious acts.

However, during the *Kiobel* oral arguments before the Supreme Court, the Justices did not focus solely on the issue

of whether corporate persons are liable under the ATS — much to the frustration of Petitioner’s Counsel Paul Hoffman — instead turning their attention to the implications of the extraterritoriality of the statute. Throughout the argument, the Justices honed in on whether the ATS allows U.S. courts to hear lawsuits for violations of international law on foreign soil at all, for natural or corporate persons. Justice Alito was particularly skeptical, asking: “[w]hat business does a case like [*Kiobel*] have in the courts of the United States?” and further commented that finding liability in this case would only create international tension.”

After the arguments, the Court took the rarely used step of requesting that counsel brief a new question: whether the ATS “allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” Now, not only corporate accountability under ATS at risk, but the very fate of the ATS itself. The ATS has been a useful tool for protecting human rights, and without it, victims of grave human rights abuses may be left without legal recourse. Yet among the varying arguments about domestic law versus international customary law, only Justice Breyer brought up the question of human rights. As both a survivor of torture and the United Nations Special Rapporteur on Torture, Juan Mendez, noted in his remarks on the case that he “hope[s] that the Supreme Court will uphold the promise of these laws, and fulfill the United States’ commitment to protect human rights, and not allow corporations to get away — literally — with torture.”

INVESTIGATIVE JUDGE REFUSES TO PROSECUTE DUVALIER FOR CRIMES AGAINST HUMANITY

During the 1970s and 1980s Jean-Claude Duvalier, known as “Baby Doc” ruled Haiti with repressive tactics that included forced disappearances, torture, and detention. In 1986, after being overthrown by a popular rebellion, Duvalier fled Haiti along with an alleged \$300 to \$800 million USD embezzled during his Presidency. After nearly twenty-five

years in exile and with no stated reason, Duvalier returned to Haiti on January 16, 2011. Upon his return, the government of Haiti reopened cases against him involving financial misconduct and human rights abuses. Many saw this as an opportunity to prosecute Haiti's most notorious dictator, but Haitian Judge Carves Jean dismissed the claims of grave human rights violations, saying that the statute of limitations on his crimes had run. In doing so, Judge Carves Jean ignored international law governing the application of the statute of limitations in alleged crimes against humanity by granting impunity to Duvalier, thereby denying his thousands of victims a chance at justice.

"Baby Doc" Duvalier succeeded his father, Francois 'Papa Doc' Duvalier's brutal regime in 1971. As "President for Life," "Baby Doc" Duvalier assumed the role of head of state and commander-in-chief of Haitian security forces. According to a Human Rights Watch report, Duvalier "commanded the network of military and paramilitary organizations that committed a wide range of serious human rights violations, including arbitrary arrests, torture, 'disappearances,' and extra-judicial executions." Additionally, his government held hundreds of political prisoners in prisons dubbed "the triangle of death" due to their infamous inhumane conditions and numerous prisoner deaths.

Despite the many years of documented evidence of abuse under Duvalier, investigative Judge Carves Jean recommended that Duvalier only face charges for a misappropriation of government funds; a crime that, under Haitian law, carries a maximum penalty of five years in prison. According to Judge Carves Jean, the statute of limitations had run on the alleged human rights abuses and thus Duvalier could not be prosecuted. The complainants, along with international organizations such as Human Rights Watch, said they would appeal the decision not to prosecute Duvalier for the crimes they suffered. Duvalier's lawyer, Reynald Georges, reported that he would appeal the corruption charges.

Under Section 466 of the Haitian Code of Criminal Procedure (available here in French), the statute of limitations for criminal charges is 10 years, which, according to Mr. Georges, would make Duvalier's crime non-prosecutable.

However, this requirement does not necessarily apply to elevated and internationally regulated crimes such as torture or crimes against humanity, as Haiti is a party to the American Convention on Human Rights and has accepted as binding the jurisdiction of the Inter-American Court on Human Rights. The Inter-American Court has upheld Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which provides that "[n]o statutory limitation shall apply to [crimes against humanity], irrespective of the date of their commission." While Haiti has not ratified that treaty itself, the Inter-American Court has further held that States under its jurisdiction must nonetheless comply with this imperative of the law, as "the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but is acknowledged by it."

Moreover, the forced disappearances characteristic of the Duvalier regime are considered by international law standards legally "unfinished" crimes, as the fate of victims of forced disappearances is as yet unknown. Any statute of limitations that could run will not start until their fate is uncovered and the crimes are deemed "finished." Until the fate is known, the obligation to investigate a disappearance persists. Human Rights groups, as well as the Office of the UN High Commissioner for Human Rights (OHCHR) have condemned the decision not to prosecute Duvalier for human rights abuses, and argue that Haiti is shirking its recognized obligations. Rupert Colville of OHCHR urged the authorities to bring justice to the victims of the Duvalier regime's human rights abuses, concluding "there can be no true reconciliation and forgiveness without justice."

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LATIN AMERICA

PINHEIRINHO EVICTIONS HIGHLIGHT BRAZILIAN POOR'S LACK OF ACCESS TO ADEQUATE HOUSING

Six thousand people have been forcibly evicted from their homes in Pinheirinho,

a community on the outskirts of Sao Jose dos Campos, in Sao Paulo State, Brazil. The Military Police Command orchestrated the eviction in the early morning of Sunday, January 22, 2012 after municipal Judge Marcia Loureiro signed a repossession order despite Brazilian constitutional protections and ongoing negotiations with the federal government to incorporate Pinheirinho residents into the federal housing program, Minha Casa, Minha Vida (My House, My Life). The situation of the Pinheirinho residents highlights the plight of millions of poor Brazilians whose right to adequate housing is precarious at best.

The right to adequate housing is the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. It is enshrined in Article 25 of the Universal Declaration of Human Rights (UDHR), Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Articles 21 and 22 of the American Convention on Human Rights (American Convention). Brazil is a state party to both the ICESCR and the American Convention. To help citizens realize rights in the ICESCR, governments are obliged to take steps toward the progressive realization of these rights, including legislative, administrative, and judicial measures with a focus on the continued improvement of living conditions. In order to fulfill its obligation, Brazil has enacted programs like Minha Casa, Minha Vida, and has passed a plethora of laws focused on housing. Most notably, several articles of Brazil's Constitution specifically address the right to adequate housing: Article 6 lists the right to housing among those protected under the document and housing is also mentioned in Articles 7(IV), 23(IX), 183, 187(VIII), 203(II). Article 183 states that "those who are squatters in an urban area of up to 250,000 (m²), for a continuous period of at least five (5) years, without claim for housing, will be able to have its domain unless he/she has another urban or rural property," assuming the property upon which they are squatting is not being otherwise utilized. The Pinheirinho settlement sprung up in 2004 and therefore meets the criteria laid out in Article 183. During the past eight years, the residents have built churches and libraries, and have opened shops and cafes. They have also been working to legalize

their right to occupy the property through Sao Paulo State's Cidade Legal (Legal City) settlement regularization program.

Pinheirinho sits on previously unimproved land owned by a bankrupt investment firm. The head of the investment firm, Naji Nahas, owes a debt of \$15 million in back taxes to Sao Jose dos Campos, which the municipality wished to collect by repossessing his parcel of land. Brazil's federal and state courts have been battling about who has jurisdiction over the case, and whether the city could actually displace the residents. The federal government was willing to buy and regularize the land, which prompted a federal judge to stay the impending eviction. Although the municipality of Sao Jose dos Campos and the government of Sao Paulo state refused the offer, they did agree to a negotiation window of fifteen days. This agreement was breached when the police arrived in Pinheirinho January 22, after another federal judge overturned the stay and declared the fate of Pinheirinho to be a state matter. The municipal court was then able to reinstate the original court order upholding the expropriation of the land. Despite resistance efforts in defense of their community, the residents of Pinheirinho have now been forced into emergency housing situations provided by local churches. Most have not been permitted back to Pinheirinho to reclaim what is left of their possessions.

The plight of the Pinheirinho residents is unfortunately not uncommon in Brazil, as the number of evictions has grown along with the country's economy. Brazil's economic boom has led to public and private infrastructure and development projects in the country's main cities and their suburbs, many in preparation for the upcoming World Cup and Olympic Games. However, tens of thousands of low-income families have been forcibly displaced in order to make way for these projects: according to 2011 government statistics, 11.5 million Brazilians live in inadequate and often illegal housing, compared with 4.5 million in 1991. Moreover, Brazil reports an estimated housing deficit of about 7 million units.

To date, it is unclear whether the state or local government actually had jurisdiction over the Pinheirinho decision and what will ultimately become of the 6,000

people who called the community home. However, Article 183 of Brazil's constitution, as well as its ratification of the ICESCR and the American Convention, require Brazil to address its housing crisis to remedy situations like the one in Pinheirinho, and to ensure the progressive realization of all Brazilians to their right to adequate housing.

ARGENTINA DECRIMINALIZES ABORTION IN CASES OF RAPE

In Argentina, the case of a 15-year old girl who was raped by her stepfather drew nationwide attention after she and her doctor were held criminally responsible for terminating the resulting pregnancy. The central issue in the case was the interpretation of Article 86, paragraph 2 of Argentina's penal code, which outlawed abortion except where the pregnancy resulted from "rape or indecent assault perpetrated against a feeble-minded female." Argentinian courts have disagreed over whether this part of the statute applies only to mentally handicapped women who lack the capacity to consent, or to cases of rape in general. In its opinion, the National Supreme Court clarified the confusion and confirmed the broader application of the statute to all cases of rape.

After the girl's petition to have an abortion was initially denied by the lower court in her home province of Chubut, the provincial Supreme Court there ultimately granted her the necessary permission. However, the Public Defender of Chubut appealed the decision to the National Supreme Court on behalf of the girl's fetus after the abortion had been performed. Citing Argentinian and international jurisprudence, the Public Defender argued that the girl's abortion was illegal because she is not mentally handicapped and because the fetus' right to life had been violated.

The Supreme Court of the Nation summarily rejected the Public Defender's arguments in its strongly worded opinion, stating that Article 86, paragraph 2 of the penal code should be interpreted to allow legal abortions in all cases of rape, not only situations where the survivor is mentally handicapped. The Court went on to explain that any other interpretation would substantially and unnecessarily increase the number of illegal abortions taking place in Argentina, and would have an

unreasonable negative effect on rape survivors who are not mentally handicapped. "Forcing every other victim of a sexual crime to carry their pregnancy to term is an attack against their most fundamental rights," concluded the Court, after also basing its arguments on Argentinian and international law.

Referencing Article 75, paragraph 23 of the Constitution, which addresses congressional duties with reference to human rights, especially the rights of children, women, the elderly, and the handicapped, the Court stated that protecting the rights of children should not be interpreted in a way that would hold rape survivors criminally responsible for terminating ensuing pregnancies. In this case, where the survivor was herself a juvenile, the Argentinian state's duty to protect her rights superseded its duty to the fetus. The Court went on to state that Argentina's adherence to both the Organization of American States and United Nations human rights treaties was not compromised by the Court's move to decriminalize abortion in cases of rape. In fact, the Court considered the equal protection and non-discrimination clauses of the Argentinian Constitution, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, to be the guiding principles of Argentinian jurisprudence. Provisions of the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Convention on the Rights of the Child that address fundamental freedoms and equal protection under the law also apply.

Under the clarified interpretation of the Penal Code, doctors who perform abortions after receiving sworn statements from women that the pregnancy they are seeking to terminate resulted from rape also cannot be held criminally responsible. As such, the Court noted its desire to streamline access to medical services for rape survivors to remedy cumbersome processes that could be considered structural and institutional inequality and violence under the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women. In doing this, the Court also hopes to dissuade rape

survivors from seeking unsafe abortions, which could potentially result in severe health complications and possibly death. The World Health Organization estimated that twelve percent of maternal deaths in Latin America and the Caribbean in 2008 were due to unsafe abortions. Likewise, about one million women per year are hospitalized in the region because of complications from unsafe abortions.

While the Catholic Church and other pro-life organizations in Argentina have denounced the Supreme Court's ruling, women's rights activists have hailed it as a step in the right direction for reproductive freedom in Argentina. As evidence of this, several days after the Court issued its decision, the National Campaign for the Right to Legal Abortion rallied representatives from Argentina's main political parties and proposed legislation which would decriminalize abortion during the first trimester of pregnancy, showing the issue will not end with the Supreme Court's decision.

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MIDDLE EAST AND NORTH AFRICA

ISRAEL CUTS TIES WITH THE UNHRC

On March 26, 2012, Israel announced its intent to sever ties with the United Nations Human Rights Council (UNHRC) following the Council's continued investigation into Israel's settlements in the West Bank. The international legality of these settlements has been in question since Israel began building on land occupied during the 1967 War. The Palestinian Authority, who claims the legal right to administer some of the land on which the settlements are built, moved in March for the UNHRC to investigate possible human rights violations that may ultimately result from Israeli operation of the settlements. According to UNHRC president Laura Dupuy Lasserre, the probe would enlist a panel of human rights experts to report back to the UNHRC concerning "the implications of the settlements on civil, political, economic, social, and cultural rights of the Palestinian people in the occupied Palestinian territory, including East Jerusalem." The Israeli government, displeased with the result of the vote

triggering the investigation, is now cutting all ties with the UNHRC including refusing to allow the UNHRC access to the settlements.

The UNHRC is an operating body within the United Nations, and comprised of forty-seven member states tasked by the General Assembly with strengthening the promotion and protection of human rights within the United Nations member community. It was established pursuant to Resolution 60/251 in April 2006, replacing the United Nations Commission on Human Rights as the principal investigatory body for human rights situations requiring the United Nations' attention.

The human rights obligations of UN member states can stem from either General Assembly resolutions or treaty responsibilities. Whereas bodies like the UN Committee Against Torture or the UN Committee on the Rights of the Child are charged with monitoring member state compliance with specific agreements and conventions, General Assembly resolutions are non-binding and carry no affirmative international obligations. As such, although international norms are a powerful international relations tool in and of themselves, departures from these norms do not carry the full weight of consequences associated with violating international legal agreements. This disparity can impact state decision-making, even though the obligations a given country has across both mediums may be substantially similar.

In the context of the UNHRC, Resolution 60/251 emphasizes "the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all," but provides no other language empowering the Council to enforce these responsibilities. Instead, the duties of the UNHRC are described as "[p]romoting human rights education," "advisory services," and "mak[ing] recommendations to the General Assembly." By contrast, the Mandate of the UN Committee Against Torture — set forth in Part II of the UN Convention Against Torture Other Cruel, Inhuman or Degrading Treatment or Punishment — provides for the use of discretion in investigating reports of systematic torture by a state, as well as the Committee's ability to weigh evidence and solicit input from state parties before making its final report. There is thus a marked difference in the stated role of the

UNHRC compared to other operating bodies. The latter can investigate matters with the weight of whatever treaty applies to the matter in question.

Given the lack of compulsory power in the UNHRC's enabling resolution and the absence of a specific treaty setting forth its scope and mandate, it is likely that if Israel chooses to continue its refusal to cooperate with the UNHRC, there will be no substantive international legal consequences. Participation in UNHRC activities, including the fact-finding missions Israel takes issue with, remains technically and practically voluntary. Despite being a permanent agenda item for the UNHRC, Security Council resolutions against Israel continue to be unrealistic given the United States' ability to exercise its Permanent Five Security Council veto power over any proposed resolution, pursuant to Article 27(3) of the UN Charter.

A common criticism of the UNHRC is that its members have themselves been subject to allegations of human rights violations in recent years, which further undermines the Council's credibility as a genuine, committed guardian of human rights. The UNHRC current membership includes China, Saudi Arabia and Libya, all of whom have been widely suspected or outwardly accused of serious human rights violations in the recent past. Recent lists of candidates for membership have included Sudan and Syria. The UNHRC's lack of actionable international legal authority to compel cooperation further cements the Council's role as an information-gathering device rather than an intermediate enforcement mechanism. It seems clear that Israel's refusal to engage the Council on any level will frustrate the impact of any investigations or advisory services. Without the unilateral ability to make policy determinations, it will be up to diplomatic actors other than the UNHRC itself to bring Israel back to the table moving forward.

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HAVE SYRIAN OPPOSITION GROUPS VIOLATED THE GENEVA CONVENTIONS?

On July 31, 2012, video footage surfaced on YouTube purporting to show

the summary execution of members of the pro-Syrian regime Berri clan by the Syrian opposition. While the events portrayed are difficult to verify, the video showed what many believe to be Zeino Berri, an alleged regime loyalist and *shabiha* leader (pro-regime thugs used by the regime to violently crackdown on dissent), and another clansmen being taken into a yard and lined up against a wall. Moments later, the sound of assault rifles erupts and the camera pans to a heap of bodies on the ground. According to activists, fourteen members of the clan were killed by shooting and hanging. While the Free Syrian Army (FSA) “strongly condemned” the executions, maintaining that it had no links to the group responsible for the act, the Tawheed Brigade, an Aleppo-based rebel group affiliated with the FSA, claimed responsibility for the executions, citing the Berri Tribe’s failure to uphold an earlier agreement to remain neutral during the conflict. Two weeks prior to the incident, the International Committee of the Red Cross (ICRC) designated the fighting in Syria to be a non-international armed conflict (NIAC), officially subjecting combatants to the Geneva Conventions. In light of the ICRC’s recent designation, the summary execution of members of the Berri clan by armed opposition groups constitutes a violation of Common Article 3 of the Geneva Conventions, which requires that those not taking an active part in hostilities, including members of the armed forces in detention, be treated humanely.

The conflict in Syria began in March 2011 when demonstrators, inspired by other Arab Spring revolutions, began calling for the resignation of President Bashar al-Assad and his regime. While protests were initially peaceful, the regime’s continued and increasing use of violence to suppress the revolution coupled with the international community’s inability to come to a diplomatic solution, *inter alia*, resulted in the increased militarization of the opposition movement. The FSA, formed in July 2011, serves as the primary armed opposition group and is comprised an estimated 40,000 military defectors and volunteers. Over the past several months, groups like Amnesty International and Human Rights Watch, while recognizing that Syrian government forces “perpetuate human rights violations on a mass scale, including crimes against humanity and war crimes,” have expressed concern over rebel

violations of international law including unlawful killings and torture.

The Geneva Conventions — to which 194 states are party — regulate conduct during armed conflict. While the Geneva Conventions generally concern international armed conflict, Common Article 3 and Additional Protocol II dictate minimum requirements for belligerents engaged in NIAC. Although Syria is not a party to the Additional Protocol, it is a party to the Geneva Conventions, including Common Article 3, which have become universally applicable. When designating hostilities as a NIAC, the ICRC, whose legal determinations are not binding but extremely authoritative, considers the intensity of the conflict (including its duration) and the level of organization of armed opposition groups. The ICRC previously designated the areas around Homs, Hama, and Idlib war zones, but in mid-July, it designated Syria to be in a state of NIAC, suggesting that both the intensity of the violence and the organization of armed opposition groups throughout the country reached the level necessary for the designation. The ICRC interprets Common Article 3 as applying to both to state armed forces as well as organized armed groups. Thus, this designation officially subjected all combatants, including the regime’s Syrian Army, the opposition’s FSA as well as other “organized and armed opposition groups,” to the provisions outlined in Common Article 3.

Common Article 3 requires that persons not active in hostilities, including members of armed forces who are in detention, be treated humanely, and prohibits “murder of all kinds” and “the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.” The summary execution of the fourteen Berri clan members is a clear violation of Common Article 3, and ultimately provides grounds for a later war crimes prosecution.

In a televised interview on August 1, an FSA spokesperson reiterated the FSA’s commitment to the Geneva Conventions and called for an investigation into the killings, the results of which Amnesty International says should be referred to the UN Commission of Inquiry on Syria. According to Amnesty International, this referral would be “instrumental for possible prosecution” if the situation in Syria

is referred to the ICC. While it is clear that the Syrian regime remains responsible for a majority of the war crimes committed during the conflict, the FSA should nonetheless demonstrate its commitment to the Geneva Conventions and prove that this is, as the group claims, an isolated incident by completing an “impartial, independent, and comprehensive” investigation into the killings.

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SUB-SAHARAN AFRICA

THE PRACTICE OF RITUAL KILLINGS AND HUMAN SACRIFICE IN AFRICA

Despite the African Charter on Human and People’s Rights’ that provides an individual is entitled to respect for his life and integrity of his person, ritual killings and the practice of human sacrifice continue in several African countries. These practices entail the hunting down, mutilation, and murder of the most vulnerable people in society, including people with disabilities, women, and children. Reports indicate that killings of this nature occur in Nigeria, Uganda, Swaziland, Liberia, Botswana, South Africa, Tanzania, Namibia, and Zimbabwe. Because of the secrecy involved in ritual sacrifices, a majority of these incidents go unreported and uninvestigated. Anti-sacrifice advocates face an uphill battle in combating these rituals because the practices are largely denied and touch on cultural underpinnings, resulting in an ideological conflict between protection of human rights and respect for the beliefs and practices of other cultures.

Those who practice sacrifice and ritual killings believe them to be acts of spiritual fortification. Motivations to carry out these acts include the use of human body parts for medicinal purposes and the belief that human body parts possess supernatural powers that bring prosperity and protection. In Uganda, reports indicate that child sacrifice is a business where the wealthy pay witch doctors to conduct sacrifices in an effort to expand their fortunes. In Swaziland and Liberia, politicians allegedly commission ritual killings to improve their odds in elections. In parts of South Africa, ritual killings are culturally

accepted, and the practice is often not reported by community members.

Questions of cultural relativism may arise with respect to ritual killings because they may be linked with religious beliefs. Article 8 of the African Charter on Human and People's Rights guarantees freedom of conscience, the profession and free practice of religion. The article also states that "No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." While a broad reading of Article 8 guaranteeing the right to religious freedom could theoretically permit ritual killings for religious reasons, the "subject to law and order" clause may be invoked to limit the free practice of religion with respect to ritual killings. Furthermore, reading the Charter in its entirety supports a prohibition on ritual killings. For instance, Article 5 states that every individual shall be "entitled to respect for his life and the integrity of his person." If ritual killings were permitted as an acceptable exercise of religious freedom, the door is opened to many of potential human rights violations on the basis of religion.

In response to recent reports of ritual killings allegedly conducted by some traditional healers, other healers have spoken out against ritual killings, arguing that those practices are a disgrace to the history and culture of African medicine men and healers. In March 2012, Sierra Leone's union of traditional healers met to put forward their campaign against ritual killings. Since the union's founding in 2008, their mandate has always been to stop indiscriminate killings and afflictions of the innocent.

Activists rallying against ritual killings are calling for stronger protections, including legislation that would allow for the regulation of traditional healers. Some countries, such as Uganda, Rwanda, and Nigeria have taken steps to begin regulate traditional healers, but regulation is not widespread. Appropriately regulating traditional healers could provide necessary protection for individuals seeking care from traditional healers and could hold healers accountable for unlawful acts, such as ritual killings. Furthermore, regulation could provide protection for traditional healers, for example, with respect to intellectual property rights.

As they have done for centuries, traditional healers continue to fulfill an important role of providing beneficial medical services to communities. However, the practice of ritual killings and human sacrifice goes against the fundamental human rights norm of ensuring respect for an individual's life and integrity of person. Although the African Charter guarantees the right to freely practice one's religion, ritual killings are not permissible on this basis. The positive contributions of traditional healers to many African societies should not be compromised by the practice of ritual killings. Activists and governments can ensure respect for the human rights of all individuals by working to ensure transparency and accountability among traditional healers.

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EUROPE

THE ARREST AND DEPORTATION OF SUSPECTED ISLAMIC EXTREMISTS IN FRANCE

Over a ten-day period in March 2012, Mohammed Merah, an Islamic extremist, shot and killed seven unarmed people in Toulouse, France. In the wake of these killings, the French government proceeded to arrest and detain nearly thirty suspected Islamic terrorists. To date, two have been deported and French authorities have stated that others will follow. Unlike Norway's judicial response to the Oslo shootings of July 2011, France has undertaken a responsive plan of action that sidesteps the criminal justice system and relies instead on detentions and deportations.

Several of the detainees are part of the suspected terrorist organization, Forsane Alizza, which French authorities banned in February 2012. These individuals have been accused of "being part of a criminal gang connected to a terrorist enterprise" — a crime punishable by up to ten years imprisonment. State prosecutors have indicted others in the organization for allegedly plotting to kidnap a prominent Jewish judge from Lyons. Paris prosecutor Francois Molins explained that many of those arrested have undergone religious indoctrination and physical training in

parks and forests near Paris "in order to take part in a jihad." He also stated that several suspects operated websites calling for an Islamic caliphate in France and the application of Shariah law. Outgoing President Sarkozy has insisted that the detentions and deportations are consistent with the law, and he explained the government's mission by stating, "All those who make remarks contrary to the value of the Republic will be instantly put outside the territory of the French Republic. There will be no exception, there will be no leniency."

Anti-terrorism is an area of international law that is unsettled, and over which there is considerable disagreement. On the one hand, the Universal Declaration of Human Rights (UDHR) provides that all persons receive the equal protection of the laws without distinction as to national origin or religion; that no one be subject to arbitrary arrest, detention, or exile; that everyone have the right to an effective remedy by a competent national tribunal; that if charged with a crime, each person have the right to be presumed innocent until proven guilty according to law in a public trial; and that all individuals have the right to freedom of thought, conscience, religion, opinion, expression, and association.

Yet, on the other hand, the United Nations Security Council and General Assembly have implemented a number of regulations allowing counter-terrorism measures to be taken by states individually and collectively. States, as sovereigns, may legitimately limit the exercise of certain rights, particularly freedom of movement and the right to privacy, when doing so protects public order and safety or national security. This broad and potentially limitless authority has led to the recognition of the risk of infringement on human rights through anti-terrorism measures. In response, the UN Counter-Terrorism Implementation Task Force has published a Basic Human Rights Reference Guide to the Stopping and Searching of Persons. Specifically, this instrument suggests that a decision to stop or search an individual in an effort to counter terrorism must always be consistent with international human rights law, be necessary to prevent terrorist acts or to apprehend those who participate in terrorist acts, and

not disproportionately or discriminatorily impact ordinary citizens.

A now well-settled theme in anti-terrorism law is the general ambiguity and secretiveness surrounding state counterterrorism actions. As such, little information has been released to the public regarding France's recent arrests and detentions. While the Toulouse tragedy certainly justifies a state's action to prevent future occurrences of terrorism, the prompt and, in some cases, final nature of the government's arrest, detention, and deportation of dozens of suspected terrorists raises many questions regarding the protection of these individuals' human rights. For instance, exactly how much evidence do French authorities have on these suspected terrorists? Is it merely coincidence that they acquired sufficient evidence to arrest thirteen individuals allegedly plotting to kidnap a prominent Jewish judge just after the Toulouse killings? Do authorities have more evidence against some of these suspected terrorists than websites, posted in exercise of their right to freedom of expression and opinion, and evidence of physical training sessions, in exercise of their right to freedom of assembly? Are these individuals receiving due process prior to deportation? Additionally, there are other concerns regarding the difficulty of identifying terrorists without making distinctions based solely on national origin or religion. As Frederic Pechenard, the Director of the French national police, put it: "There are hundreds of young French people who go to Egypt, to Yemen, to Pakistan, to study the Koran . . . who are nothing more than religious. Amid these hundreds of people are a few potential terrorists."

Without more information regarding the arrests, one cannot justifiably make assertions as to whether the suspected terrorists' human rights are being respected. Even so, the arrests and deportations of dozens of suspected Islamic terrorists in response to the killings of one represent yet another example of a state bypassing the criminal justice system in favor of administrative measures that more easily enable denials of due process and equal protection of the law.

KOSOVO'S DRAFT CRIMINAL CODE AND THE RISK TO FREEDOM OF THE PRESS

The parliament of Kosovo is currently considering a new draft criminal code that has proven rather contentious with the Kosovo media and international human rights organizations. Two articles of the draft code, articles 37 and 38, may restrict freedoms of press and expression. Specifically, Article 37 of the proposed criminal code subjects journalists to possible criminal liability for publishing defamatory remarks in the media. This provision is new because the current criminal code does not contain a comparable counterpart. Article 38 of the proposed code, however, is similar to and modeled after article 29 of the current criminal code. Article 29 assigns criminal liability to those who "take part as [professionals] in the publication of media information," who are members of media editorial boards, and their assistants, when such individuals refuse to disclose their confidential sources, if the disclosure of such information is necessary to prevent: an offense punishable by at least three years in prison, an offense of inducing another to expose their private parts or masturbate in public, the showing of pornography to minors under 16 years of age, misappropriation in office, and the accepting and giving of bribes.

The freedoms of press and expression are fundamental human rights recognized by the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Kosovo is a party to both the ICCPR and the ECHR, and is thereby bound by their provisions. Article 19 of the ICCPR lays out the right to freedom of expression to seek, receive, and impart information through any media of choice. This right, however, may be limited by law when necessary to respect the "rights and reputations" of others, and to protect national security, "public order," or "public health or morals." Similarly, article 10 of the ECHR provides that everyone has the right to receive and impart information and ideas without interference by public authority. This document, however, also includes exceptions to freedom of expression: this right may be subject to "restrictions or penalties when prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the

prevention of disorder or crime, for the protection of health or morals, [and] for the protection of the reputations or rights of others..."

After the National Assembly adopted the proposed code on April 20, 2012, the media community in Kosovo began a sustained protest urging the President not to approve the code. On April 23, hundreds of journalists protested in silence before the National Assembly, and on May 3, Kosovo media outlets engaged in a one-day boycott when they refused to cover news regarding the Kosovo government. After reviewing the draft criminal code, Kosovo's President, Atifete Jahjaga, returned the proposed code on May 8 to the National Assembly with instructions for revisions of the two contentious articles, stating the draft criminal code provisions were "contrary to Kosovo's Constitution."

While there has been much protest over the code's proposed articles restricting freedoms of press and expression, it seems that the international legal documents protecting those freedoms allow for Kosovo's proposed restrictions. Both the ICCPR and the ECHR provide for restrictions on freedom of expression that aim to protect the rights and reputations of others. Such provisions arguably make allowances for imposing criminal penalties on those who publish defamatory statements about others, as defamation tends to destroy the reputation of its target. Similarly, both the ICCPR and the ECHR provide for restrictions on the freedom of expression when necessary for the preservation of public order, health, morals, and national security. These permissible restrictions could arguably justify a law imposing criminal liability on media members who refuse to reveal their confidential sources in cases involving any crime subject to a sentence of more than three years.

The proposed articles of Kosovo's draft criminal code themselves may not violate international human rights law. Nevertheless, their implementation may be contrary to traditional notions of fundamental human rights and the freedoms associated with modern democratic societies. After all, such restrictions may provide cover and support for corruption and illegal activity by discouraging the press from acting as the public watchdog and failing to protect whistle-blowers.

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SOUTH AND CENTRAL ASIA

CALL FOR INDEPENDENT INVESTIGATIONS OF POLITICAL DISAPPEARANCES IN BANGLADESH

On April 17, 2012, Elias Ali, secretary of the Sylhet Division of the opposition Bangladesh Nationalist Party (BNP), disappeared. Ali and his driver were both abducted that night, and Ali's car and cell phone were found abandoned in a parking lot near his home in Dhaka. In response to Ali's disappearance, Prime Minister Sheikh Hasina Wajed said publicly that she believes Ali and his driver are "hiding" at the behest of the BNP to allow opposition groups to blame the government. Ali's wife, however, believes that security forces took him because of his involvement with the BNP. In reaction to the Prime Minister's words, the BNP and allied groups announced a country-wide strike on April 22nd. According to Human Rights Watch (HRW), Ali's disappearance is just one of a growing number of disappearances of government opposition leaders and activists. HRW called for Bangladesh to immediately order an independent investigation of the growing number of politically related disappearances occurring throughout the country. In 2000, Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR), indicating a commitment to protecting the rights of individuals from enforced disappearances. By failing to investigate the increasing numbers of disappeared persons, Bangladesh is not fulfilling its responsibility to provide effective remedies, provided in Article 2 of the ICCPR.

According to Odhikar and Ain-O-Sailash, two Bangladeshi human rights organizations, there were only two enforced disappearances in 2009. In 2010, there were 18 disappearances, and in 2011, 30 people were disappeared in Bangladesh. By May, 22 people have already been disappeared in 2012. Human rights organizations in Dhaka accuse the Rapid Action Battalion (RAB), the Bangladeshi government's military unit, of hundreds of extrajudicial killings and dozens of disappearances in

the past year. RAB, which consists of 12 battalions, was originally set up as an anti-terrorism force in 2004. Five of the RAB battalions operate in Dhaka. According to Odhikar, RAB killed 732 people between RAB's 2004 inception and March 2011. Extrajudicial killings escalated after the current Awami League government came to power in January 2009, but the RAB officially claims that each member of the opposition parties' death occurred in crossfire and was in no way politically motivated. Although international and domestic human rights groups believe that the government is responsible for the violent suppression of opposition groups, the Bangladeshi government claims that political opposition disappearances have nothing to do with the RAB and are instead planned attempts to blame the government for violence.

Enforced disappearance, under Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED,) is "any form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." The ICCPED was adopted in 2010 to prohibit states from employing forced disappearances and to hold states accountable for the protection of citizens from enforced disappearances, which includes the duty to investigate disappearances even if they are not perpetuated by the state. Although Bangladesh claims that the RAB is not responsible for the pattern of enforced disappearances and extrajudicial killings throughout the country, ICCPED still requires that Bangladesh investigate the disappearances to determine the cause.

However, because Bangladesh is not a signatory to ICCPED, U.N. bodies cannot apply the ICCPED directly. Instead, any action in response to Human Rights Watch's demand for independent investigation should come under the ICCPR, to which Bangladesh is a party. Under Article 2 of the ICCPR, Bangladesh is obligated to provide effective remedy to those whose rights have been violated. According to the Human Rights Committee's (HRC) General Comment 31, Bangladeshi authorities have a duty to investigate and to

bring the perpetrators to justice under the ICCPR. General Comment 20 also specifies that "effective remedy" means that investigations of complaints must be prompt and impartial.

Because Bangladesh is not a signatory to the First Optional Protocol, which would allow the Committee to hear individual complaints of violations of the ICCPR, none of the individuals who have been affected can bring a claim against Bangladesh to the HRC. Another option is for human rights organizations in Dhaka and Human Rights Watch is to submit an NGO Country Report to the HRC. The HRC can then examine the NGO Report alongside Bangladesh's Country Report and issue its recommendations to the Bangladeshi government to address the pattern of enforced disappearances throughout the country.

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EAST, SOUTHEAST ASIA & OCEANIA

INDONESIA RATIFIES THE UN MIGRANT WORKERS' CONVENTION

On April 13, 2012, Indonesia's parliament unanimously ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention). Lawmakers and civil society groups welcomed the entry into force of the treaty, which Indonesia had signed twelve years earlier but is only now legally binding. The Convention provides fundamental human rights protections for Indonesia's approximately three million documented migrant workers currently overseas. However, only 45 countries have ratified the Convention. Absent harmonization with Indonesia's domestic legal framework and reciprocity by receiving states, its impact on overseas workers may be slight in the short-term.

The rights articulated in the Migrant Workers Convention overlap with other major international human rights treaties and equalize migrant workers' rights with those of citizens with employment status. Indonesian and international human rights advocates hope the Convention's reporting requirements will act as a catalyst

for domestic reform. Under Article 73, Indonesia must submit a report within one year to a Committee outlining its legislative, judicial, administrative, and other efforts taken to comply with the Convention's provisions. The substantive provisions applicable to Indonesia as a state of origin include Article 37, which obligates the government to inform workers of their rights and obligations under the local law of their destination country before departure. Article 37 further specifies that state parties must freely provide this information in an appropriate language. Under Article 65, parties must also maintain services to provide information and assistance regarding travel authorizations, living conditions, and any relevant local labor regulations.

The Convention's provisions mandating state delivery of important pre-departure services could provide the catalyst to transform Indonesia's much-criticized National Law on the Placement and Protection of Indonesian Overseas Workers (Law 39/2004). Currently, Law 39/2004 delegates extensive responsibility to private recruitment agencies in facilitating overseas work placements without sufficient regulation. These agencies register workers with the Ministry of Manpower and Transmigration, arrange employer contracts, and conduct pre-departure trainings. The law, however, does not compel specific government action to effectively investigate and monitor these practices. Workers are sometimes fraudulently forced to pay excessive costs for travel documents once in the capital for pre-departure orientation, the quality of which is unregulated. The vague provisions of Law 39/2004 at once involve 13 government agencies in oversight but create fatal jurisdictional challenges; regional governments are powerless to sanction or withdraw agency permits on their own. This failure to clearly delineate duties means that all government stakeholders are able to eschew responsibility. The result has been a lack of awareness and inability to address illegal recruitment practices at the local level.

Even under a revised Law 39/2004, Indonesian migrant workers will continue to face numerous challenges as they travel to states that are not a party to the Convention. Neither Saudi Arabia nor Malaysia is a party, which together receive nearly 80% of Indonesia's workers. Last year saw 1,075 worker deaths in both

countries according an Indonesian human rights group. A moratorium on sending workers to Saudi Arabia has been in place since August 2011, but recruitment agencies nevertheless have defied this ban. Twenty-five maids remain on death row there, and the remains of another, cause of death unknown, were returned to Indonesia in the week preceding adoption of the Convention. Malaysia is once more a destination country following the adoption of a 2011 Memorandum of Understanding, which now allows workers to keep their passports and enjoy one day of rest each week. Still, the agreement does not address minimum wage concerns or contribute to the regulation of illegal recruitment practices. Indonesia's Minister of Manpower and Transmigration has pledged not to send workers anywhere that does not respect the Convention. However, countries like Malaysia can and have in the past easily replaced Indonesian labor with migrant workers from Cambodia. Indonesia is therefore forced to juggle competing interests to sustain this crucial component of its economy, which saw USD \$8 billion in remittances in 2011.

Indonesia's ratification of the Convention is a significant first step to preserving migrant workers' rights. Yet much work is still needed to realize what Foreign Minister Marty Natelegawa describes as a breakthrough towards better protection mechanisms. Indonesia's regulatory framework needs revisions to provide better oversight of recruitment agencies, and this resolve should also be reflected in the government's bilateral agreements. Perhaps most importantly, widespread acceptance of norms enshrined in the Convention is necessary to fully realize its protections. Otherwise, progress will continue in incremental steps by labor supply countries like Indonesia, which can only achieve partial success towards protecting migrant workers' rights absent cooperation by the international community.

WUKAN HOLDS LOCAL ELECTIONS, DISPLAYS CIVIL DISOBEDIENCE

In March 2012, a small fishing village of 10,000 residents in southern Guangdong province elected Lin Zuluan as its leader. Nearly 80% of Wukan residents cast ballots in what was seen as a shocking concession from local Communist Party authorities. The election followed a lengthy standoff between farmers and

the local government, which had transferred the village's remaining farmland to developers for industrial use. After initial violence in the fall protesting confiscation of their land without adequate compensation, the Chinese government's reaction has been surprisingly tolerant. Despite continued targeting of dissident lawyers, Tibetan monks, and high-level politicians, Wukan has emerged as an anomalous and successful instance of civil disobedience.

Protests in Wukan came to a head in December 2011 after Xue Jingbo, a leader of the movement, was abducted and died in police custody. Xue Jingbo had been detained for his role in the first rallies held in September when a violent clash between villagers and police occurred. Authorities said he had died of a heart attack, while family members said his body showed multiple signs of physical abuse. Nearly 1,000 villagers gathered in outrage and refused to retreat, shouting slogans like, "Down with corrupt officials." Shortly thereafter, senior provincial Communist Party officials met with village leaders and promised to release other protestors in police custody. They also agreed to recognize a democratically elected village governing committee, the local body controlling finances and land sales. This committee, now comprised of residents with no prior government experience, is seeking return of the land sold by previous authorities. Provincial Communist Party Vice Secretary Zhu Mingguo recently visited Wukan and promised that a portion would be returned by May 1, 2012.

These recent developments have left Wukan residents hopeful and also fueled speculation about the village as a model for grassroots democracy in China. Critics waiver on their effectiveness, but direct elections have been occurring at the village level in China since the draft version of the Organic Law of Village Committees was piloted in 1987. The National People's Congress fully adopted the law in 1998, which allows for direct election of three to seven village committee members by eligible voters over the age of 18. This principle of self-governance is also found in the Constitution of the People's Republic of China. Article 111 states that "[t]he chairman, vice-chairmen and members of each residents' or villagers' committee are elected by the residents." As is the case at other levels of Chinese government, some provinces hold only indirect

elections by permitting voting on candidates nominated by village communist party branches. However, in other provinces, committee members are nominated directly by villagers, by groups within the village or in numerical groups reaching a certain threshold.

The Organic Law of Village Committees has led to several important developments. First, provincial level governments have promulgated local laws on the implementation of vague provisions within the national law. Thus, the national law has given birth to a variety of experimentation at the local level, which in some cases has led to legitimate systems of direct representation. In Lishu county in Jilin province, implementation rules explicitly forbid nomination of candidates by the Communist Party. Villages like Xinfeng in Jilin province have also prevailed in

holding direct elections this past March. In this way, democratically elected village committees have sprouted throughout China and are exercising leadership alongside village Party branches. Their co-existence has contributed to what some observers describe as changes towards more inclusive, democratic leadership styles. Most importantly, the national law has created a legal infrastructure for self-governance at the grassroots level.

Wukan villagers described the March 2012 election as the first real poll in years. Contrastingly, the Secretary of the Guangdong Provincial Committee of the Communist Party denied the election represented any significant departure in governance. Secretary Wang Yang maintained that, "What made the Wukan election special was that the organic law and election rules were fully observed and

implemented in detail this time, unlike previous pro forma elections." By admitting past corruption, Wang Yang shrewdly framed the Party's response to the Wukan protests as an admirable resort to the rule of law. "That's why we decided to stand on the side of the villagers instead of a few local village officials," said Wang Yang, who is also competing for a spot in China's Politburo Standing Committee. The Wukan phenomenon is therefore not an innovative model for democracy, but instead is an example of deft political handling of local unrest prior to Party leadership elections next year.

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

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