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## International Legal Updates

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## INTERNATIONAL LEGAL UPDATES

## NORTH AMERICA &amp; THE CARIBBEAN

**TROY DAVIS EXECUTION EXPOSES INEQUITY BETWEEN THE CAPITAL PUNISHMENT CASES WITH DNA EVIDENCE AND THOSE WITHOUT**

Since 1989, 273 people have been exonerated in the United States through DNA evidence; including seventeen people who were executed before DNA was able to prove their innocence. While DNA testing has undeniably been a silver bullet in exonerating those who were not guilty, only about 10 percent of criminal cases actually have DNA evidence. Individuals seeking to assert post-conviction evidence in cases without DNA evidence are forced to navigate undefined standards of proof, leaving them in an often intractable legal situation.

Troy Davis, who was executed in September 2011 for the murder of off-duty police officer Mark MacPhail, was among those in the ninety percent of cases that lacked DNA evidence. Instead, the conviction was based solely on nine eyewitness reports, seven of which were later recanted citing police coercion. Yet Davis's post-conviction challenges in state court, his habeas corpus petition in federal court, and his petition for Writ of Certiorari to the Supreme Court were all denied.

In capital punishment cases, like Davis's, the Supreme Court has failed to establish a clear path for proving post-conviction innocence. In *Herrera v. Collins*, a case involving a post-conviction claim of innocence, the Court focused on defending procedure, yet expressed discomfort in dicta with the Constitution allowing the execution of an innocent person. The majority in *Herrera* ultimately found that "a claim of 'actual innocence' is not itself a constitutional claim" and may have a "very disruptive effect" on the justice system. The disagreement within the Court in *Herrera* and the subsequent conflicting jurisprudence about post-conviction claims of innocence, has led to a general state of confusion in the law.

Despite this confusion, Davis filed a successful original writ petition and his

case was moved to the Southern District Court of Georgia under the "actual innocence" exception. This exception allows a federal court to hear the merits of successive claims if the failure to hear the claims would constitute a "miscarriage of justice." However, the Supreme Court has failed to establish when innocence is just a gateway through which a habeas petition must pass and when it falls under the miscarriage of justice exception. Moreover, courts have employed different approaches to applying the "actual innocence" standard in determining whether post-conviction claims should be heard. While some courts balance the evidence of innocence against the reliability of the state's verdict, others apply the "extraordinarily high" burden of proof standard established by the Supreme Court in *Herrera*.

While Davis's claim is the first ever innocence claim to pass the "extraordinarily high" threshold assumed to exist in *Herrera*, the language of *In re Davis*, provides that the district court must determine whether evidence "that could not have been obtained at the time of the trial clearly establishes petitioner's innocence." The Georgia Federal Judge who reexamined Davis's case after it was sent to the District court ruled that the recantations by key witnesses "cast some additional, minimal doubt on his conviction," but "were not sufficient for a new trial." According to the Judge, while doubt existed, it was "absent a truly persuasive showing of innocence."

Essentially, individuals lacking DNA evidence are stuck in a Catch-22; if a conviction is based on faulty evidence, the reviewing court defers to the discretion of the jury verdict based on said faulty evidence to determine whether a defendant could be innocent. In a striking illustration of this, the Supreme Court has refused to hear the appeals of thirty of the thirty-one individuals who were subsequently exonerated by DNA. If DNA testing has taught us anything, it is that the criminal justice system is extraordinarily fallible. This problem extends beyond Troy Davis: if 273 people were exonerated using DNA evidence after being convicted beyond a reasonable doubt, one might reasonably infer

from a statistical perspective that there are many other innocent individuals among the 90 percent without DNA evidence.

The Supreme Court held in *Sawyer v. Smith* that the "Eighth Amendment protects against the risk that the death penalty would be imposed in an arbitrary or capricious manner." A poignant example of this arbitrariness is the case of Marcus Ray Johnson who was due to be executed in the same chamber as Davis just two weeks later, but unlike Davis, was granted a stay by a Georgia court in order to investigate new DNA evidence. The Due Process Clause of the Fourteenth Amendment, states "*nor shall any State deprive any person of life, liberty, or property, without due process of law . . .*" Surely, this procedural equality provided under the Due Process Clause is most important when it comes to the State's most severe deprivation, life, but with extremely high and undefined standards for post-conviction exoneration in capital punishment, the justice system is failing.

**MASS ARRESTS OF PEACEFUL PROTESTORS MAY CONSTITUTE A VIOLATION OF HUMAN RIGHTS**

The right to peacefully protest is at the foundation of democracy and international human rights law, but the line between crowd control and the violation of these rights is sometimes difficult to define. In some cases, such as in Libya, where protestors were met with a full-scale military assault, it is easy to see the abuse of the right to assemble and speak freely. What is more difficult to delineate is whether there have been veritable human rights abuses in the response to the recent string of "Occupy Wall Street" protests, which have led to mass arrests and accusations of excessive use of force by law enforcement.

The national "Occupy Wall Street" movement formed as a general protest of income inequality and record corporate profits during a period of high unemployment. The movement has been described as "a horizontally organized resistance movement employing the revolutionary Arab Spring tactic to restore

democracy in America.” The right to assemble in this manner is upheld under national and international law because it serves the purpose of allowing a population to organize, protest, and exercise free speech as an important mechanism of political participation.

The First Amendment of the United States Constitution as well as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) protect protestors’ rights to exercise free speech and free assembly. The ICCPR applies both domestically and abroad and these rights may not be abridged through arbitrary arrest or detention, except in situations that threaten national security or public safety. The ICCPR provides that law enforcement officials should use force only as a last resort, in proportion to the threat posed, and in a way to minimize damage or injury.

Nevertheless, on October 1, 2011, Occupy Wall Street protesters marched across the Brooklyn Bridge in New York City and approximately 700 individuals were subsequently arrested en masse by police. The Partnership for Civil Justice Fund filed a lawsuit on behalf of protestors alleging that police entrapped protestors into illegal activity so they could be arrested. This is not an unfamiliar story for protestors. The Fund in 2010 won an \$8.25 million class action settlement in a similar case of the mass arrest of nearly 400 people in Pershing Park in Washington, D.C. Mass arrests such as these inevitably involve arbitrary arrest because a crowd is not a single entity but a variety of individuals, only some of whom may be breaking the law while others are well within their right to continue in peaceful protest.

While the U.S. government has the authority to make reasonable regulations concerning the manner in which individuals express themselves, the First and Fourteenth Amendments of the Constitution guarantee that individuals may peacefully express or propagate ideas, either verbally or otherwise, in areas open to the public. Even a disorderly crowd, or the fear of one, cannot be used to stop a peaceful demonstration or violate the right to peaceably assemble. In *Edwards v. South Carolina*, the Supreme Court held that free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

conditions as they are, or even stirs people to anger.” In light of this rationale, the Court concluded that freedom of speech is protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

The difficulty with what the Supreme Court calls freedom of speech’s “highest purpose” to create unrest, is that the point at which it does so is exactly the point at which it can be suppressed for not being “peaceful,” making it inherently complicated to regulate. Though *Edwards* proffers the subjective test of whether the speech is producing “clear and present danger” to determine when it can be censored, the discretion afforded to police officers in crowd control increases the risk of both first amendment and international human rights violations. Yet, as the Supreme Court explained in *Hague v. Committee For Industrial Organization*, the state cannot use uncontrolled force to restrain freedom of speech as a substitute for their duty to maintain order. The challenge remains to find innovative ways for both police and protestors to walk the fine line between ensuring safety and protecting human rights.

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## LATIN AMERICA

### PERU ENACTS LAW OF PRIOR CONSULTATION WITH INDIGENOUS PEOPLES

This September, Peruvian President Ollanta Humala signed his country’s long-awaited law of free prior and informed consent (FPIC) with indigenous peoples, the Law of the Right to Prior Consultation with Indigenous or Tribal Peoples, Recognized in Convention 169 of the International Labor Organization. The principle of FPIC requires that indigenous peoples be informed, in a culturally appropriate manner, about government projects that will affect them, and that they be given the opportunity to object to these projects moving forward. Although Humala acknowledged that changes for Peru’s indigenous peoples would not occur overnight, the passage and signing of this law

marks a major step forward in recognizing many of their rights enshrined in the International Labor Organization’s (ILO) Indigenous and Tribal Peoples Convention (ILO Convention) and the American Convention on Human Rights, to both of which Peru is a state-party, and the UN Declaration on the Rights of Indigenous Peoples (Declaration).

In late spring 2009, the long-standing marginalization of indigenous peoples in Peru by the government and private corporations became newly apparent, as protests erupted in Bagua province, in northern Peru, against the proposed expansion of drilling, logging, and hydroelectric dam projects in rain forest territory. The violence that ensued finally prompted the Peruvian Congress to pass the FPIC law. Despite concerns by former President Alan García that the law would hinder economic growth by preventing foreign investment, President Humala and indigenous rights activists argued that the law would actually facilitate economic growth. By working with indigenous peoples to reach an agreement on economic development projects, conflicts like the situation in Bagua will not occur. Regardless of the potential economic effects of FPIC, Peru is now obligated under both international law and domestic law to consult with indigenous peoples on projects that may affect them.

FPIC as a right is intrinsically linked to many other rights protected under international human rights mechanisms, especially the right to participation, the communal right to property, and the right to cultural identity. Article 6 of the ILO Convention asserts that states-parties must consult with indigenous and tribal peoples, through the appropriate representative institutions, whenever they are considering the implementation of legislative or administrative measures that will have a direct effect on the peoples concerned. The American Convention details the right to participation in Article 23, and in the case of indigenous peoples, this right is broadened to include participation through “their own institutions and according to their values, practices, customs and forms of organization.” The UN Declaration, in articles 18, 19, and 26-30, addresses participation and communal property rights, stating that indigenous peoples may choose their own representatives and mechanisms to participate in decision making pro-

cesses, and that they have the right to use their lands and territories as they see fit. Finally, the American Convention and the UN Declaration both include the rights of all citizens to fully participate in the cultural life of their countries and to the full enjoyment of their own cultural identities. Projects for which indigenous peoples must be consulted inherently affect their cultural life because indigenous culture and traditions are so connected to the land on which they live.

Peru's new law adopts much of the same language used in the international documents, notably in Articles 2, 4, 6, and 14, which address the right to FPIC, participation, good faith negotiation, absence of coercion, and inter-cultural dialogue. The law states that both indigenous peoples and the Peruvian government may identify projects that will affect the indigenous, and that each side must present their analysis of a project's effects in a timely manner. The government must also maintain a registry of different indigenous peoples' representative organizations in order to facilitate information sharing. Despite the ultimate goal of FPIC being a satisfactory agreement between the state and indigenous people, the government has the final say in deciding which projects move forward if there is a dispute between the parties.

Peru has joined Bolivia, Colombia, and Ecuador, which also have prior consultation laws or have incorporated ILO Convention language into their Constitutions. These countries have set the standard for FPIC for the rest of the signatories to the ILO Convention by integrating international law into their domestic laws. Despite possible difficulties in practical implementation as states and indigenous peoples attempt to reach mutually satisfactory decisions regarding development projects, Peru's FPIC law will ideally empower indigenous peoples to take a lead role in the decision-making processes that affect them.

#### **MILITARY JUSTICE REFORM IN MEXICO AMID INCREASED VIOLENCE**

This summer, the Mexican Supreme Court proclaimed that allegations of human rights abuses perpetrated by members of the military will now be adjudicated in the country's civilian courts. The change was in response to a lengthy campaign for military justice reform by human rights groups, as well as the decision of the

Inter-American Court of Human Rights (IACtHR) in *Radilla Pacheco v. México*, holding the Mexican state accountable for the forced disappearance of Radilla at the hands of Mexican soldiers in 1974. The decision directed Mexico to give its non-military courts jurisdiction over human rights cases involving members of the military. The Mexican Supreme Court also responded by ordering the judiciary to verify whether statutory and case law comply with Mexico's obligations under international human rights law. These actions are part of a wider attempt on the part of the Mexican government to respond to international criticism of how the violence plaguing the country is being addressed: President Felipe Calderón has also proposed reforms to the National Security Law; and, last spring the legislature passed sweeping reforms to the Constitution, incorporating international human rights standards language.

In its opinion, the Mexican Supreme Court found that Article 57 of the country's Military Justice Code violated Mexico's obligations under international human rights law by permitting military personnel to only be tried in military courts. In Mexico, judges in military courts answer to the Defense Secretary, and therefore may be hesitant to preside over cases that highlight military abuses. This creates a culture of impunity, in which soldiers can violate their fellow citizens' rights without fear of reprisal. The Supreme Court's decision, therefore, is compliant with international law and also invaluable for Mexico's efforts to combat impunity and defend human rights.

Mexico is a state-party to the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. The IACtHR based its recommendations on Radilla and three other cases that helped prompt the Supreme Court's ruling on elements of these laws. For example, in the case of *Cabrera García y Montiel Flores v. México*, the Mexican government was held accountable for the illegal detention and torture of Cabrera and Montiel by soldiers in 1999. In the cases of *Fernández Ortega y otros v. México* and *Rosendo Cantú y*

*otra v. México*, the IACtHR found Mexico accountable for the rape and torture of the two named plaintiffs, indigenous women, by Mexican soldiers in 2002. Following a formal declaration by the Military Prosecutor's Office recognizing its lack of jurisdiction over these cases as a result of the Supreme Court decision, criminal investigations about the allegations have been moved to the Attorney General's Office and the civilian courts.

In October 2010, President Calderón proposed to include torture, rape, and forced disappearance as crimes to be adjudicated in civilian courts under the Military Justice Code. However, human rights activists rejected the proposal because arbitrary arrest, which often leads to other human rights violations, was not included. Extrajudicial killings, also not included, have dramatically increased along with other generalized forms of violence. Calderón's proposal did not pass, but the Supreme Court's decision has now essentially superseded it by holding the military accountable for all human rights abuses in civilian court.

The Supreme Court's ruling comes at a time when accountability and rule of law are of ever-increasing importance, as Mexico battles against narco-trafficker-induced violence and the resultant increased military presence throughout the country. Since December 2006 more than forty thousand Mexican troops have been deployed across the country to aid in the war on drugs. Since then, Mexico's National Human Rights Commission has reported a drastic increase in the number of allegations against soldiers of serious human rights violations, including torture, murder, forced kidnapping, and rape. The violent criminal activity in Mexico has undeniably resulted in a far greater number of human rights abuses. However, the military, as an agent of the Mexican state, has a duty to protect the country's citizens. This duty is undermined if it too disregards respect for human rights.

Military justice reform is a growing trend across Latin America. Bolivia, Brazil, Chile, and Peru have also reformed parts of their military justice systems, recognizing the importance of transferring cases to civilian jurisdiction in order to aid in the fight against impunity. The recent Mexican Supreme Court decision is a step towards helping Mexico begin to address

past human rights violations perpetrated by the military, while also promoting accountability in the future.

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## MIDDLE EAST AND NORTH AFRICA

### **NOT WHAT THE DOCTOR ORDERED: HOW THE MILITARY ATTACKS ON BAHRAIN'S NATIONAL HEALTHCARE SYSTEM UNDERMINE ITS TREATY OBLIGATIONS**

On March 16, 2011, the Bahrain Defense Force (BDF) occupied Salmaniya Medical Complex (SMC) in the capital city of Manama, disrupting medical treatment and preventing ambulances from leaving to help those injured in anti-government protests. According to a July 18, 2011 Human Rights Watch report, the occupation of the SMC is only one part of the Bahraini government's systematic campaign targeting medical professionals and anti-government protesters in need of medical care. As a party to the International Convention on Economic, Social and Cultural Rights (ICESCR), Bahrain is not only obligated to "assure medical service and medical access" to all citizens in the case of illness, but is also prohibited from curtailing that medical access. The systematic targeting of patients and medical personnel contravenes international principles protecting the right to access healthcare established in Article 12 of the ICESCR.

While the protests that prompted the siege were partly in response to similar anti-government movements across the Middle East, they were more directly aimed at the Sunni royal family's attempts to keep the Shiite majority out of the political process. Bahrain is one of the only Shiite majority countries in the Middle East, and the Sunni minority is disproportionately represented in government. Bahrain reacted to these protests by cracking down on dissenters in a number of ways, including by targeting the medical system. After occupying SMC and other medical facilities, the BDF began the systematic and targeted abuse and interrogation of patients with protest-related injuries. The military also held more than seventy treating physicians incommunicado before trying them in

military tribunals. Reports and interviews of hospital personnel substantiate claims that the government prevented access to healthcare for those injured by participating in anti-government protests. Although the occupation of the SMC occurred during a state of emergency declared by King Hamad, derogation during a state of emergency is only permissible when the life of the nation is at stake, and then only to an extent strictly required by the emergency. Even if the state of emergency is justified, Bahrain's affirmative abuse of the medical community and patients does not serve a legitimate purpose protecting national needs during a time of crisis.

As a party to the ICESCR, Bahrain must comply with Article 12(2)(d), which requires "[t]he creation of conditions which would assure to all medical service and medical attention in the case of sickness." The UN Committee on Economic, Social and Cultural Rights (UNCESCR) General Comment 14 further informs the interpretation of Article 12(2)(d), requiring governments to ensure the right to health by respecting the right through government action, protecting the right through government policy, and fulfilling the right through legislation.

Though the presence of the military at hospitals does not itself undermine Bahrain's commitments under international law, any prolonged occupation that involves the mistreatment of medical personnel and patients as a matter of policy gives rise to material violations. Specifically, this includes preventing international organizations from rendering aid, and undermining the respect and protection required of hospitals and medical personnel. The systematic and all-encompassing nature of BDF attacks on field workers, hospital facilities, and the patients and doctors therein constitute disruption of citizens' right to healthcare at multiple access points. Under the UNCESCR interpretation of the ICESCR, the healthcare system should not be limited on the basis of any discrimination, including on the grounds of religion or political opinion or status. Denying protesters treatment in hospitals on the basis of political expression constitutes discrimination of the sort prohibited by the ICESCR.

The abrogation of the right to health is only a part of the Bahraini government's disregard for human rights during the period of political instability in the

Spring of 2011. The country is still feeling the deleterious effects of the government's attack on the healthcare system. More than 1,400 people have been arrested and 3,600 dismissed from their jobs since the protests began, and while the prison sentences of those health workers handed down by military tribunal were recently overturned, this is more placatory than substantive; the doctors will still be prosecuted in civilian court.

Limitations placed on the right to health in Bahrain through the actions of the BDF appear to represent a disconnect between the rule of human rights law and its application. Whether the hospital occupations and subsequent mistreatment are acts of willful disregard or material misunderstanding, the global community's response to such a gap between rule and implementation may send a signal to other countries in similar future human rights quandaries.

### **ONE STRIKE, YOU'RE OUT: EGYPT'S EXPANDED EMERGENCY LAW POSES A RISK TO THE RIGHT TO COLLECTIVE BARGAINING**

In early September 2011, Egypt's provisional government, the Supreme Council of the Armed Forces (SCAF), expanded the country's emergency law to its widest scope since the provisional government took power. The SCAF claimed the expansion of the emergency law was a response to unrest created by civilian attacks on the Israeli Embassy in Cairo on September 9, 2011. Nevertheless, widespread strikes threatening to bring the government to the negotiating table just before the announcement likely factored into the decision to expand the law's provisions. According to Amnesty International, the law's expansion represents the "greatest erosion of human rights since the resignation of President Hosni Mubarak." In the past, the Egyptian government has arrested workers for strikes and assembling outside of work hours, and Amnesty International contends that the frequency of such arrests may increase under the new emergency law. The working population of Egypt has historically been very politically active, and as of February 2011, there was a strike in some part of the Egyptian manufacturing sector every day for the past three years. The expanded emergency law may unfairly limit the power of the Egyptian workforce by removing critical labor negotiation tools

in violation of Egypt's international treaty responsibilities not to impede their usage.

*Inter alia*, the new measures prohibit “assault[s] on freedom to work,” which has been taken by Amnesty International to implicitly provide for the search, arrest, and detention of workers on strike. The emergency law also directs the trials of those detained to the (Emergency) Supreme State Security Courts, which limit defendants' access to counsel and the right of those convicted to appeal. While the provision at issue does not explicitly prohibit strikes, its character threatens human rights in Egypt by giving security forces a broader, more general mandate to detain workers and disrupt methods of collective bargaining in the name of protecting Egyptians' right to report to work, even though the methods being curtailed are guaranteed by international agreements.

Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right of workers to strike by recognizing the ability to strike as a critical tool for workers engaged in collective bargaining. General Comment 18 of the Committee on Economic, Social, and Cultural Rights (ESCR), which informs Article 8, calls collective bargaining “a tool of fundamental importance in the formulation of employment policies. The right to collective bargaining is also codified in International Labor Organization (ILO) Conventions 87 and 98, both of which Egypt ratified. Article 3(2) of Convention 87 guarantees the freedom of workers to organize and prohibits public authorities from interfering or restricting the right or its exercise. Along the same lines, Article 1(2)(b) of ILO Convention 98 guarantees protection from acts that prejudice union workers because of membership or participation in union activities outside working hours.

The Egyptian government's use of the emergency law to constrain collective bargaining would represent a material breach of international treaty obligations. Although the Egyptian government arrested workers for striking as recently as July, under the expanded emergency law the frequency and scope of such arrests could increase. The decision by the SCAF to declare, even if only implicitly, a prohibition on the right to strike cannot be defended under even the narrowest interpretations of these conventions and crosses

into direct and unequivocal limitation of workers' rights.

The decision to characterize labor stoppage and other tools of collective bargaining as “assault[s] on freedom to work” would unfairly limit methods of employment negotiation and organization if used as Amnesty International contends it may be. These rights are essential for effective representation of the interests of the Egyptian workforce and expressly provided for by ILO Conventions 87 and 98. The new emergency law is a step backwards for those hoping for a demonstrable change from the overly restrictive policies in place for decades under the Mubarak regime.

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## SUB-SAHARAN AFRICA

### A POTENTIAL END TO IMPUNITY FOR THE DRC'S WORST WAR CRIMINALS

The Democratic Republic of the Congo (DRC) has undergone horrific violence during two wars from 1996 to 1997 and 1998 to 2003. In October 2010, the United Nations Office of the High Commissioner for Human Rights released the first comprehensive analysis (mapping report) detailing the atrocities committed in eastern Congo by Congolese senior army officials. The mapping report documents human rights abuses against civilians, including the use of child soldiers, gender-based violence, mass killings, and torture. The report not only highlights the issue of impunity for war criminals, but also offers potential solutions to bring such criminals to justice. One of these proposed solutions, a specialized mixed court to try the individuals responsible for the most serious war crimes, is currently being considered by the Congolese legislature.

A mixed court would try war crimes, genocide, and crimes against humanity that have occurred in the DRC over the last three decades as well as present and future crimes. The court would be composed of Congolese officials and both international experts and judges. The court is termed “mixed” because while it would be situated within the domestic judicial system, it would temporarily employ international

experts to lend their knowledge and establish international credibility. A mixed court is distinguishable from an international tribunal because it would allow for greater Congolese ownership and responsibility. An example of a similar court is the Bosnia and Herzegovina War Crimes Chamber (WCC), which incorporated international judges to prevent political interference but instituted benchmarks for phasing out international staff. While the WCC has been criticized for its ultimate implementation of the transition process, it has successfully processed numerous cases.

The mixed court concept was initially proposed in 2004 by Congolese nongovernmental organizations, legal experts, and various human rights advocates as a way to hold accountable those responsible for the gravest human rights violations. Until now, the only criminal actions against Congolese war criminals have been heard in military courts, primarily against low-level officials. While military courts have made significant efforts to incorporate investigation and prosecution standards established by the Rome Statute of the International Criminal Court (ICC), they tend to be structurally weak and easily influenced by political interference. Because the ICC can only pursue a limited number of high profile cases such as the trial of the former Congolese Vice President Jean-Pierre Bemba, the mixed court would fill the impunity gap that has plagued the DRC for decades.

In April 2011, members of Congolese civil society, human rights groups, and international stakeholders met to discuss the draft legislation and propose essential improvements. The suggested improvements include amendments guaranteeing integration of international staff, reparations for victims, and assurance that the accused will be given fair and equitable trials. In July, a new version of the draft was adopted by the Congolese Council of Ministers and sent for review to the Senate's Political, Administrative, and Judicial Commission.

While the proposed legislation is promising, the most recent draft has aroused controversy among the human rights community because the mixed court would be situated within the national judicial system, which is also in need of reform, and mandates the death penalty for those convicted. Human Rights Watch is con-

cerned that the court could become an “instrument of execution.” Another cause for concern is the possibility that the inclusion of the death penalty provision could dissuade the involvement of international experts because many in the international community consider the punishment to be inherently cruel and inhumane.

Another major concern is the draft legislation’s lack of provisions protecting the rights of defendants. To be considered a fair and effective judicial process, defendants must be provided qualified representation. Furthermore, the mixed court’s ability to extend jurisdiction to abuses perpetrated after the periods of war relies on building the capacity of the Congolese domestic judicial system. If the State fails to mandate fair trials for each of the accused, there is a strong possibility that a resulting loss of credibility will jeopardize capacity-building efforts. As the legislation is considered, human rights advocates continue to encourage amendments essential for viable justice, and remain optimistic that the enactment of a mixed court will combat the Congolese climate of impunity.

#### **AFRICAN OPPOSITION TO THE UN RESOLUTION ON SEXUAL ORIENTATION & GENDER IDENTITY**

In June 2011, the United Nations (UN) Human Rights Council adopted L.9/Rev.1, the Resolution on Sexual Orientation and Gender Identity (Resolution). It is the first UN resolution to address the rights of the lesbian, gay, bisexual, and transgender (LGBT) community. The Resolution, put forward by South Africa amidst widespread anti-LGBT activity in Africa, brings attention to discrimination based on sexual orientation and gender identity, and also demonstrates that the rise in violence against lesbians, gay men, bisexuals, and transgender people will not be tolerated.

The Resolution reiterates the fundamental rights to freedom and dignity to which every person is entitled per the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (ICCPR). It requests that the High Commissioner of Human Rights conduct a study documenting discriminatory laws, practices, and acts of violence against individuals based on their sexual orientation and gender identity. A panel

discussion will be held following the study, during the 19<sup>th</sup> session of the Human Rights Council in 2012, with the goal of assessing how international human rights law can be used to combat LGBT discrimination, and also to consider discrimination eradication strategies for the future.

Numerous African states have opposed the Resolution, which narrowly passed with twenty-three states in favor and nineteen opposed. Among the nineteen states voting against the Resolution, nine of them were African; they include Angola, Cameroon, Djibouti, Gabon, Ghana, Mauritania, Nigeria, Senegal, and Uganda. The Resolution has aroused backlash from several of these states. In reaction to the proposed resolution, Nigeria claimed the proposal is contrary to the beliefs of most Africans, and a Mauritanian diplomat deemed the resolution “an attempt to replace the natural rights of a human being with an unnatural right.”

In addition to vocally opposing the Resolution, a few African leaders have continued to allow and even promote anti-LGBT legislation within their countries. For example, Senegal continues to criminalize homosexuality in its Penal Code despite its ratification of the ICCPR and the African Charter on Human and Peoples’ Rights (ACHPR), which require states to protect and promote the rights of all citizens equally. Several African states, including Mauritania, Sudan, and parts of Nigeria and Somalia, treat homosexual acts as crimes punishable by death. Most visible in recent years is the controversial proposed legislation in Uganda calling for various punishments of all who commit homosexual acts and those who support them, including the death penalty. In total, thirty-six African states have laws criminalizing homosexuality.

LGBT discrimination and violence directed at LGBT individuals is particularly rampant in sub-Saharan Africa, with torture, imprisonment, and murder of LGBT-identified individuals occurring most frequently. Additionally, the sexual assault of lesbians in an attempt to change their sexuality, referred to as corrective rape, is common, especially in South Africa. Some of these violations are permitted by African states that have maintained anti-sodomy laws since colonization and have failed to punish perpetrators of hate crimes.

In contrast, South Africa, where corrective rape is prevalent, has taken the lead on combating violence and discrimination based on sexual orientation. South Africa originally passed a constitutional prohibition against LGBT discrimination in 1994, and in 1996, the Constitutional Court overturned anti-sodomy laws because of their inconsistency with its reformed Constitution. Moreover, in addition to sponsoring the Resolution, South Africa is currently the only African country to allow same-sex marriage.

Despite overwhelming African opposition and only a modicum of support within the region, LGBT activists recognize the Resolution’s signal of support for LGBT rights and celebrate the UN’s first resolution addressing LGBT discrimination. After years of inconsistent positions on the issue of sexual orientation and gender identity, civil society groups are proud that South Africa has set a standard for other African countries to attain. Human rights activists applaud the Resolution and the attention to human rights violations based on sexual orientation, and encourage UN member states to comply with international standards.

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#### **EUROPE**

#### **REFUGEE RIGHTS AND ITALY’S RESPONSE TO THE INFLUX OF NORTH AFRICAN MIGRANTS**

Thousands of African migrants have traveled to Europe since January 2011 following the Arab Spring, most entering the European Union (EU) through the Italian islands of Lampedusa and Sicily. An estimated 50,000 migrants have reached Italy this year to date, with weekly reports of additional migrants arriving in Italy. Italy was unprepared for such a large influx of migrants, and its response has highlighted the existing divide between international human rights principles and the reality of implementing those principles on the ground.

As an EU member and a UN party, several international human rights laws bind and impose obligations on Italy in its capacity as a receiving state of potential ref-

ugees. First, Italy must accept any asylum-seekers requesting entry into its borders. Article 14 of the Universal Declaration of Human Rights recognizes the right of every person to seek and enjoy asylum in another country, and the EU Council Directive on the Temporary Protection of Displaced Persons requires that asylum-seekers be admitted to the country where they first seek refuge. Second, Italy cannot expel asylum-seekers once granted entry. The UN Convention and Protocol Relating to the Status of Refugees espouses the principle of *non-refoulement*, which prohibits the expulsion or return of refugees against their will to territories where their life or freedom would be threatened. Third, as the first receiving state, Italy must process each refugee's application for asylum according to the Dublin agreement.

The current migrant situation presents difficulties in meeting these requirements. Each migrant traveling from North Africa has a unique background and immigration purpose. Many migrants are Egyptian, Tunisian, and Libyan, fleeing states in political and economic upheaval stemming from the Arab Spring revolutions. Some are political and ethnic refugees; others are economic migrants. Other migrants who were once economic immigrants to North Africa are now fleeing the region after experiencing increased racial and ethnic persecution stemming from economic instability. Additionally, refugees from Somali, Ethiopian and Eritrean refugee camps located in the horn of Africa are traveling through Arab Spring states, hoping to obtain refugee status in Europe. Both refugees and economic immigrants are traveling collectively and intermingled. Nevertheless, each migrant's immigration status must be processed individually.

The UN Convention on Refugees defines refugee as an individual who is unable or unwilling to return to their country of origin due to a well-founded fear of persecution based on the individual's race, religion, nationality, membership of a particular social group or political opinion. Receiving states must first ascertain whether a migrant is a refugee, or some other type of immigrant. The heterogeneity of these migrants particularly requires that any migrant traveling through or from an Arab Spring country be considered a potential refugee upon departure from that state. Assumptions otherwise risk the possibility that true refugees will be denied

their rights. In light of these facts, some Italian responses to the migrant influx appear questionable.

Struggling to manage ever-increasing numbers of migrants, Italy teamed with the EU Border Protection Agency, Frontex, in February 2011, to initiate Joint Operation Hermes 2011, which focuses on detecting and preventing illegitimate border crossings. Prioritizing increased border controls has potentially resulted in the violation of international refugee laws. Human Rights Watch and Amnesty International have reported incidents involving migrant boats that Italian officials have either blocked from docking in Italian ports or potentially failed to aid in distress. Policies preventing illegitimate border crossings are permissible assuming they allow for potential refugees to freely seek asylum. Without any means of accurately and immediately distinguishing between asylum-seekers and illegal immigrants, Italy's policy risks violating international refugee laws regarding treatment of asylum-seekers.

Italy's inability to promptly process the mass influx of migrants has resulted in riots at border control stations and immigration camps, and has emboldened many migrants to escape the camps before processing. Some have immigrated to other EU nations, resulting in conflicts between Italy and other EU states regarding Italy's management of the situation. The migrant influx occurs at an interesting time in European politics, with many right-wing political organizations calling for stricter immigration laws. European governments will likely find implementing international refugee laws challenging considering the current economic situation and increasing resistance from right-wing parties. Ultimately, how Europe responds to the mass influx of migrants from North Africa will be a defining indication of the enforceability of international refugee law, and adherence to guiding principles.

#### **RELIGIOUS FREEDOM AND THE FRENCH LAW BANNING PRAYER IN PARIS' PUBLIC STREETS**

In September 2011, France implemented a new law banning prayer in Paris' public streets. Legislators passed the law in response to increasingly common occurrences whereby Muslim worshippers overflow from mosques, spread their mats upon the ground, and pray in nearby streets.

Though technically permitted under EU law, the ban focuses more on religious practice than on public crowds, and falls within a sequence of legislation that reflects a French political climate increasingly adverse to freedom of religion. The ban on prayer in Paris streets highlights a consistent struggle many states face when enforcing international human rights principles—balancing secularism with respect for varied religious beliefs.

Under international human rights law, individuals have a fundamental human right to practice religion in public spaces. Article 18 of the Universal Declaration of Human Rights (UDHR) acknowledges the right of every person to manifest her religion or beliefs, "either alone, or in community with others and in public or private." Both the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9, and the Charter of Fundamental Rights of the European Union, Article 10, mirror UDHR Article 18. These documents, however, permit this fundamental human right to be curbed by statute when required to protect public safety, order, health, and morale, or when necessary to protect the rights and freedoms of others. This same struggle between secularism and freedom of religion can be found in Article 1 of the French constitution, which states that France shall be a secular Republic that respects all beliefs and ensures equality without distinction of religion.

Accordingly, France is within its legal rights in passing the ban on prayer in public streets. French legislators have likely justified the law with the public safety exception. However, evidence also suggests some officials have justified the ban as effectuating public sentiment toward religion. French right-wing political groups frequently call attention to the growing Muslim population and the problems these groups believe the Muslim religion poses to a secular state. This sentiment seems consistent with the legislation's application. The law is designed to reduce street crowds and improve traffic flow, but rather than forbidding the formation of crowds in public spaces without a permit, the law is specifically aimed to prevent individuals from openly practicing religion in public streets. Claude Gueant, the French Interior Minister, summarized the intent of the legislation when he said that the streets are for driving, not praying, and further declared

## SOUTH AND CENTRAL ASIA

### ENFORCING THE *PROPISKA* SYSTEM: RESTRICTIONS ON THE RIGHT TO FREEDOM OF MOVEMENT IN UZBEKISTAN

that praying in the streets is “not dignified for religious practice and violates the principles of secularism.”

There has been minimal backlash to the law from the French Muslim community, which may result from the relatively small percentage of practicing French Muslims – 10% according to some Muslim associations. Nevertheless, despite claims by Interior Minister Mr. Gueant that French Muslim leaders agree with the ban, a small but angry protest occurred on the first day of its implementation.

The ban follows just six months after the implementation of the law prohibiting head coverings in public places in April 2011. These laws evidence a contemporaneous struggle within France toward the increasingly large Muslim population and its integration into French society. While many Muslims may not have been upset by the ban, their silence does not diminish French society’s need to reconcile its secular roots with its changing demography. Nor does it lessen the international community’s interest in ensuring that fundamental human rights are respected and protected, regardless of location.

France faces the challenge of a rapidly changing demographic in its society, not unlike the challenges faced by other similarly homogenous European states. In fact, French legislation in response to this challenge may have recently served as a model to other European nations with similar concerns. For example, the Netherlands and Belgium recently passed laws prohibiting head coverings in public places, following similar legislation in France. This potential for influence makes the legislation in France banning prayer in Paris’ public streets that much more relevant to the international community at large. France will not be the only state to confront issues of public displays of religion, but its response to that confrontation may ultimately guide the overall European response to increasingly diverse societies. How France reconciles its constitutional principles of religious freedom and secularism will ultimately serve as an example for other European states wrestling with similar questions.

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In August, the Uzbek government began enforcing residency restrictions in the capital of Tashkent to prepare for Uzbekistan’s Independence Day on September 1, 2011. Police conducted raids to identify and expel Uzbek citizens without Tashkent *propiskas* (residency permits) in an attempt to remove the unemployed lower class from the capital city. The widespread expulsion of citizens from Tashkent through *propiska* enforcement is at odds with Uzbekistan’s international obligations as a party to the International Convention on Civil and Political Rights (ICCPR) because it prevents Uzbek citizens from moving freely throughout the country and establishing residence where they choose.

In a 1999 resolution, Uzbekistan reinstated the Soviet-era policy of using *propiskas* to track and restrict the movement of citizens throughout the country. Uzbek citizens are now required to live in the district specified on their *propiska* and cannot legally obtain permission to live in Tashkent. In the years following the reinstatement of the Soviet-era system, police did not enforce *propiskas* because urban redevelopment projects required thousands of unskilled rural laborers, many of whom lacked the *propiskas* necessary to remain in Tashkent. Now, as these projects end and unemployment increases, the government cites concerns about the impact of thousands of unemployed citizens on Tashkent political and social culture. According to an Uzbek diplomat in an interview with EurasiaNet, “We have seen crowds of young and unemployed youth attack government buildings this year in Arab countries. We must learn a lesson or risk negative consequences.” By enforcing the *propiska* policy, the government seeks to avoid a concentration of unemployed individuals, to “clean up” the city for the Independence Day celebration, and to channel the labor force back into the cotton-farming industry.

The ICCPR provides the right to freedom of movement in Article 12, but also deems exceptions permissible when “necessary to protect national security, public order, public health, or morals.” Exceptions

to Article 12 must be “consistent with the other rights” in the ICCPR. Because the presence of Uzbek citizens lacking Tashkent *propiskas* poses no risk to these permissible exceptions and, ultimately, infringes upon rights guaranteed under Article 26, the *propiska* policy violates Uzbekistan’s international obligations under the ICCPR.

The *propiska* system is not a permissible exception to Article 12 because it is not necessary to protect national security, public order, public health, or morals. The Tashkent nonresidents have not presented any threat to governmental control or caused any disturbance within the city. Without a substantial threat to the nation, the Uzbek government is not justified in suspending the rights of its citizens. In addition, UN General Comment No. 27 interpreting Article 12 of the ICCPR requires that exceptions be the “least intrusive instrument amongst those which might achieve the desired result.” The sweeping expulsion of citizens from Tashkent is neither the least intrusive method nor does it achieve the intended result. Instead, this system creates widespread corruption and disproportionate oppression on Tashkent’s poorest citizens. If the government wishes to encourage citizens to leave the capital city, it must create incentives (such as fair wages and a safe work environment in the cotton industry) to promote migration that respects human rights and citizens’ freedoms.

Permissible restrictions must also be consistent with other rights recognized by the Covenant, including the Article 26 right to be equal without discrimination. The *propiska* system violates this right in two major ways. On September 15, 2011, Islam Karimov, the Uzbek President, signed legislation allowing citizens who own real estate in Tashkent to obtain *propiskas*. The *propiska* system also creates an environment in which Tashkent authorities frequently accept bribes of around \$1,000 from nonresidents to obtain necessary residency documents, creating a *de facto* exception for those able to afford the bribe. Both provisions benefit wealthy citizens and have a disparate impact on Uzbekistan’s poor. Because the policy violates the principles of equality and non-discrimination guaranteed under Article 26 of the ICCPR, it cannot be a permissible exception to Article 12.

Because the *propiska* system is not a permissible exception to Article 12, Uzbekistan's *propiska* policy damages human rights protections guaranteed by the ICCPR. To address its political and social problems without compromising its international obligations, the Uzbek government must find a way to encourage its citizens to consider issues of overpopulation and urbanization without infringing on the right to move freely within the country and the right to choose residence.

#### **NEPAL'S NEW PRIME MINISTER GRANTS IMPUNITY FOR CIVIL WAR CRIMES**

In August, Nepal elected its fourth prime minister since its first democratic election in 2008. Prime Minister Baburam Bhattarai, a member of the Unified Communist Party of Nepal (Maoist), stepped in to lead the Constituent Assembly away from its political standstill and toward the creation of a long-anticipated constitution. Within days of his election, Bhattarai signed an agreement withdrawing criminal cases against members of the Maoist party and other political movements who committed crimes and human rights abuses during Nepal's ten-year civil war. The agreement also granted a general amnesty for these individuals and groups, protecting those who committed war crimes during the conflict from being prosecuted and preventing victims of those crimes from seeking judicial remedy. As a party to the International Convention on Civil and Political Rights (ICCPR), Nepal is obligated under Article 2 to provide "effective remedy" by a "competent judicial...authority" for all those alleging that their human rights have been violated. By granting impunity to members of political groups that allegedly caused countless human rights abuses during the civil war, Bhattarai's agreement bars victims from effective judicial remedy, thereby violating Article 2 and demonstrating a disregard for Nepalese citizens' human rights.

From 1996 to 2006, Nepal experienced a violent and turbulent civil war as Maoist rebels overthrew the Hindu monarchy in hopes of a democratic future. During the conflict, rebels, including members of Bhattarai's Maoist party, and police forces murdered 15,000 Nepalese, and the country saw the highest number of political disappearances in the world. As Nepal rebuilds

post-conflict, the combatants and perpetrators of war crimes, many of whom are still politically affiliated, must slowly reintegrate into society. Now that the Maoists are in power, public recognition of the horrors of the civil war through the prosecution of these combatants would reflect poorly, and possibly detrimentally, on Bhattarai and his party. However, Bhattarai's agreement is not the first suggestion to grant amnesty to those who committed politically motivated war crimes; none of the political movements involved in the civil war want to be held responsible for the crimes committed during that time. In the years since the end of the civil war, there has not been a single criminal prosecution for crimes committed during the ten-year conflict.

Article 2, Paragraph 3 of the ICCPR requires parties to ensure victims of human rights violations have access to an effective remedy. Article 2 also specifies that a competent judicial authority must hear victims' claims of alleged violations and that a competent authority must be able to enforce identified remedies. General Comment 31, which informs Article 2 of the ICCPR, specifically highlights the importance of effective remedy in preventing future violations and that impunity is a strong contributing factor to the recurrence of violations. The General Comment also emphasizes the detriment impunity presents to Article 14, which promotes judicial independence, and Article 6, which protects against extrajudicial punishment. According to the General Comment, a nation that fails to investigate and to bring perpetrators to justice can itself be in breach of the ICCPR because it is not protecting these essential human rights.

In preventing prosecution of pending cases and granting general amnesty for all politically motivated human rights violations committed during the civil war, Bhattarai denies those who wish to prosecute claims against rebels or the former government access to the only judicial system in which they may seek remedy for their harms. This clearly bars victims' ability to receive reparations for harms committed during the civil war, which is essential both to the individuals' recovery and the country's ability to move forward. Without effective remedy, victims cannot receive restitution or rehabilitation, and the Nepalese society cannot benefit from measures of satisfaction such as public apologies, public memorials, guarantees of

non-repetition, and important changes in the country's laws and practices.

Like many human rights provisions, Article 2 of the ICCPR has both positive and negative legal obligations. The negative legal obligations require signatories to refrain from violating Article 2. Article 2's positive legal obligations are just as essential: the state must prevent third parties from violating individuals' civil and political rights. As Nepal continues its transition from monarchy to war-torn territory to democratic nation, it will be important for the Constituent Assembly to keep in mind both Nepal's positive and negative legal obligations under the ICCPR. Nepal's negative obligation can be met through the creation of a constitution that protects the right to access effective remedy and to have that remedy enforced by competent governmental authorities. The positive obligation requires the new government to actively fulfill its obligation of providing effective remedy by nullifying Bhattarai's agreement and allowing victims to pursue justice.

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#### **EAST, SOUTHEAST ASIA & OCEANIA**

##### **PAPUA NEW GUINEA'S JUDICIARY MAKES INCREMENTAL PROGRESS TO UPHOLD HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES**

Papua New Guinea (PNG) has long struggled to protect human rights in the natural resource extractive industries. PNG is one of the most resource rich countries in the Pacific. In 2010 its natural resources made up 76% of the country's \$5.9 billion in export profits. PNG also struggles to effectively manage this wealth, and was ranked 153 out of 187 countries in the 2011 United Nations Development Programme's Human Development Index. This economic disparity between the state, resource development corporations, and customary landowners has resulted in frequent conflict, including PNG's nine-year-long civil war. These clashes have also led to allegations of human rights violations against mining companies in particular, ranging from complicity in war crimes to extrajudicial killings.

On July 26, 2011, PNG's National Court decided what could prove to be a landmark case for citizens seeking relief against human rights abuse by transnational corporations. In *Medaing v. Ramu Nico Mgmt. Ltd.*, landowners and related third parties sued the owners of a nickel and cobalt mine for the harmful environmental impacts of its waste removal system. The Appellate Court declined to grant a permanent injunction, which would have prohibited dumping into the Astrolabe Bay on the north coast of Madang Province. The decision nevertheless recognized two important legal bases for valid claims of action against human rights violations in the future.

The *Medaing* case was brought on behalf of customary landowners, as well as citizens without a proprietary interest in the mining site but potentially adversely affected by waste removal plans. The National Court held that the plaintiffs had proper standing to bring their public and private nuisance claims due to their "close physical connection" and "genuine interest" in the land in question. The plaintiffs sought a permanent injunction against Ramu Nico's Deep Sea Tailings Placement (DSTP) system, which controversially proposed to deposit mining waste at sea levels where, allegedly, it would not harm marine life. The court ruled that the DSTP system was both a public and private nuisance, since plaintiffs successfully showed the waste dumping would interfere with the use of their land, and furthermore cause inconvenience, damage, or harm to the general public.

Perhaps most importantly, the National Court recognized plaintiffs' alleged breach of National Goal No. 4 as a justiciable claim of action. The preamble to the Constitution of PNG delineates five National Goals, including the conservation of natural resources and the environment for the collective benefit of PNG. Section 25 of the Constitution declares these goals nonjusticiable, but provides exceptions. The National Court held the exceptions to mean that it would not exceed its jurisdiction where "judicial power can reasonably be exercised in such a way as to give effect to the National Goals." The court continued to describe the National Goals as the "core values" of PNG, which should guide "all persons and bodies" under the authority of the Constitution. After interpreting Section

25 and ruling in favor of the plaintiffs on this claim, the court then held that the same exception did not require it to take further action. The court continued to cite the potentially severe economic consequences of disrupting mine operations at this late stage in its development, and declined to grant a permanent injunction.

The decision is currently on appeal to the Supreme Court. While failure to achieve an injunction may be viewed as a setback, it is in many ways a human rights victory. The case was the second and only successful advocacy strategy to bring a nuisance claim against a transnational corporation in PNG. Also, recognition of expanded jurisdiction for PNG's judiciary to hear questions on its National Goals may have lasting impact. National Goal No. 3 calls for "the State to take effective measures... in particular to control major enterprises engaged in the exploitation of natural resources." National Goal No. 5 calls for "traditional villages and communities to remain as viable units of Papua New Guinean society." The National Court's decision may thus provide future means for legal redress in conflicts arising between affected local communities and both transnational corporations and the state. Goal No. 5 could prove particularly important by forcing PNG to protect landowner rights and the rights of indigenous peoples in transactions to develop natural resources.

Absent an international legal framework to enforce corporate social responsibility, potential victims of abuse by the extractive industries must rely exclusively on the PNG government for protection. The *Medaing* case and its legacy are now in the hands of the Supreme Court. Importantly, PNG's highest court acts as an appellate body of the National Court and comprises of National Court judges in ad hoc panels. Should it overturn parts of Justice Cannings' decision, the approach giving effect to the Constitution's National Goals will nevertheless make its way to the Supreme Court in future cases. Despite a setback for the *Medaing* plaintiffs, PNG's judiciary is embracing its role in the protection of human rights.

## **CAMBODIA TARGETS CIVIL SOCIETY ACTIVITY WITH REVISED PENAL CODE AND PENDING NGO LAW**

Cambodia's increasing exercise of authority to restrict civil society activity has drawn much criticism from the international community. In July, a Cambodian appeals court upheld what some observers consider a groundless conviction on incitement charges against a staff member of the Cambodian League for the Protection and Promotion of Human Rights (LICADHO). This decision was followed in August by the suspension of the NGO Sahnmakum Teang Tnaut (STT), an advocate for the urban poor in land rights cases. The five-month-long suspension lacked clear justification and cited vague breaches of administrative regulations. Together, these incidents reflect the Cambodian government's abuse of legal means to enforce near-absolute discretion in regulating civil society, in particular the revised Penal Code and the pending Law on Associations and Non-Governmental Organizations.

Cambodia's revised Penal Code is controversial for creating new crimes and expanding preexisting ones to potentially threaten freedom of expression. The new law took effect on December 10, 2010. While eliminating Disinformation as a crime frequently enforced in allegations of "disturb[ing] the public peace," the revised code creates five new provisions in its place. New crimes of Public Defamation, Public Insult, and Slandorous Denunciation are broadly defined and may be used to stifle opposing political views. Discrediting a Judicial Decision and False Denunciation to Judicial Authority are also crimes carrying prison sentences of up to 6 months and monetary fines. Furthermore, Article 495 of the revised code criminalizes incitement as, "creat[ing] serious turmoil in society." Defamation, Public Insult, and Incitement to Discrimination may all be triggered by speech or publicly displayed writing or drawings. These crimes potentially conflict with protections on freedom of expression afforded citizens by the Cambodian Constitution. They may also be used in a manner conflicting with the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a State Party.

Broad governmental regulatory powers created under the pending Law on Associations and Non-Government Organizations (LANGO) contain a similar potential for politicization. The draft law is currently with the Ministry of the Interior, after which it will move to the Council of Ministers and National Assembly for final approval. LANGO is in its third iteration and will impact both international and domestic NGOs.

Unlike the voluntary registration scheme in Cambodia's 2007 Civil Code, NGO registration under LANGO will become mandatory. For foreign organizations, the law proposes a 45-day approval period with no clear grounds for denying applications. Only Cambodian nationals can establish domestic associations and NGOs; this provision excludes refugees, stateless persons, and other non-Cambodian residents. LANGO also requires groups to notify local government authorities in writing of any activity or training

event. In addition to the 2007 Civil Code, these provisions are contrary to the Law on Peaceful Demonstrations, which does not require governmental notification of "education dissemination activities." Taken together, the provisions not only conflict with sources of Cambodian law, but might also amount to a breach of the ICCPR's freedom of association protections, and the national implementation of provisions of the ICCPR to the Cambodian Constitution, namely Articles 35, 41 and 42.

Amidst this increasingly hostile environment, civil society possesses limited means of redress. Cambodia has established domestic human rights bodies in name, but these bodies are under the authority of the Senate, National Assembly, and prime minister's cabinet. Groups could seek to challenge the constitutionality of legislation through Cambodia's Constitutional Council, but they must gain referrals from the King, elected officials, or the Supreme Court in the course of litigation.

Such appeals to domestic remedies do not encourage optimism in a country ranked 66<sup>th</sup> out of 66 countries for corruption, according to the World Justice Project, and 65<sup>th</sup> for providing effective limits on government powers.

On the 20<sup>th</sup> anniversary of the Paris Peace Accords, Cambodian civil society must again look to the international community for assistance. Whether these efforts will succeed, including appeals to the UN by US NGOs and monetary restrictions imposed by the World Bank, remains to be seen. After nearly two decades of foreign assistance, Cambodia demonstrates growing resolve to implement a repressive legal framework, with rule of law secondary to government discretion.

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