

2009

## International Legal Updates

Evan Wilson

*American University Washington College of Law*

Tracey Begley

*American University Washington College of Law*

Caitlin Shay

*American University Washington College of Law*

Shubra Ohri

*American University Washington College of Law*

Annamaria Racota

*American University Washington College of Law*

*See next page for additional authors*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [International Law Commons](#)

---

### Recommended Citation

Wilson, Evan, Tracey Begley, Caitlin Shay, Shubra Ohri, Annamaria Racota, Bhavani Raveendran, Ri Yoo, Aileen Thomson. "International Legal Updates." Human Rights Brief 17, no. 1 (2009): 39-51.

This Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

---

## International Legal Updates

### Authors

Evan Wilson, Tracey Begley, Caitlin Shay, Shubra Ohri, Annamaria Racota, Bhavani Raveendran, Ri Yoo, and Aileen Thomson

## INTERNATIONAL LEGAL UPDATES

### NORTH AMERICA

#### A CASE FOR RESPONSIBLE DEVELOPMENT OF THE ALBERTA OIL SANDS

In July 2009, in the remote community of Beaver Lake, Alberta, journalists from the BBC beheld an unusual sight: two British bankers taking part in a traditional Cree ceremony. From their business dress and stiff dancing, the bankers looked out of place, but it was not their familiarity or fascination with Cree culture that brought them there. They represented the UK-based Co-operative Bank, known for its aim to practice ethical investing, which had just agreed to financially assist the Cree with their legal challenge. The Beaver Lake Cree claim that after 130 years, rights they were guaranteed by treaty are being ignored by the governments of Alberta and Canada in order to allow for oil development.

Within the traditional hunting grounds of the Cree lies what some argue is the single largest oil deposit on the planet. By recoverable volume, the Alberta Oil Sands deposit is second only to the oil fields of Saudi Arabia. However, unlike the free-flowing Saudi oil, the process of removing the tar-like bitumen from the sandy soil is energy intensive and, in some cases, extremely invasive. Mining companies remove the oil through on site steam injection or strip-mining, both of which carry significant environmental consequences. Currently, most of the oil sand is recovered via strip-mining, where the oil must be washed from the sand with hot water, resulting in significant tailings effluent that is disposed of in massive tailings ponds. These ponds are often situated adjacent to natural bodies of water. Squeezing oil from sand has required drilling, mining, habitat removal, and creation of some twenty square miles of tailings ponds, dramatically changing the habitat of the Beaver Lake Cree's traditional hunting grounds and threatening the Cree's way of life.

With help from the Co-operative Bank and others, the Beaver Lake Cree hope to stop the rapid expansion of the oil sands mining operations. Their complaint cites Treaty Six, signed in 1876 with the

Canadian government, and pits rights guaranteed by a 130-year-old treaty against the economic potential of an estimated three million barrels of oil per day. In the treaty, the Beaver Lake Cree and many other native peoples in Alberta and Saskatchewan agreed to "cede, release, surrender and yield up to the Dominion of Canada . . . all their rights, titles and privileges" to their lands. In exchange, the Government agreed to protect their "right to pursue their avocations of hunting and fishing throughout the tract surrendered." However, little scientific testing has been done to quantify the destruction that the Beaver Lake Cree observe around them and measure its impact on their "right to pursue their avocations."

Fortunately for the Beaver Lake Cree, a recent case decided in British Columbia argued by their attorney Jack Woodward, suggests that courts still recognize and uphold such treaty rights. In *Tsilhqot'in First Nation v. British Columbia*, the court held that the Tsilhqot'in rights to hunt, trap, and trade on over 400,000 hectares of their territory had been violated. A similar success for the Beaver Lake Cree would help set a precedent in Canada that development of natural resources should not come at the expense of indigenous and human rights.

#### THE FAILED EXECUTION OF ROMELL BROOM: AN "INNOCENT MISADVENTURE" IN DUE PROCESS?

For the third time in three years, Ohio's execution team spent well over an hour trying to locate a suitable vein on an inmate through which to administer a lethal injection. Yet, Romell Broom's attempted execution on September 15, 2009 is the first time Ohio has ever had to halt and reschedule an execution because the team could not establish an intravenous drip. The Governor's warrant of reprieve postponing the execution said, "Difficulties in administering the execution protocol necessitate a temporary reprieve . . . ." The media drew attention to the pain Broom likely felt being poked 18 times with a needle, sometimes penetrating to the bone, and the frustration of his family, forced to watch

the grueling and ultimately unsuccessful process. Some have even focused on the pattern of "difficulties" that has emerged in lethal injections in Ohio, contending that they constitute more than a mere "innocent misadventure," as described by the U.S. Supreme Court in *Baze v. Rees*, which held that Kentucky's lethal injection protocol did not constitute cruel and unusual punishment, but noted that repeated abortive attempts at an execution might. The ineptitude revealed by Broom's failed execution is magnified by the failure of due process to prevent such a situation. Only two weeks before his scheduled execution, the Sixth Circuit Court of Appeals rejected Broom's claims that just such a failure might occur.

After nearly 25 years on Ohio's death row, Broom's appeals and clemency efforts failed completely in 2007. He then intervened in *Cooley v. Strickland*, challenging the constitutionality of lethal injection as administered in Ohio. The Sixth Circuit held on September 1, 2009 that there could be no recourse for Broom against Ohio's execution protocol, even if it violated the Eighth Amendment's prohibition of cruel and unusual punishment, because his claims violated the statute of limitations. It was not relevant to the court that Broom was still involved in post-conviction appeals at the time he should have begun litigation challenging the method of his execution to satisfy the statute. Requiring death row inmates to pursue multiple paths of litigation simultaneously places a heavy burden on attorneys and their clients and challenges traditional notions of fair play and substantial justice. The injustice of these decisions is only heightened by the proximity of Broom's failed execution to the extinguishment of his claims.

Had Broom's claims succeeded under the statute of limitations, they still would have been held to the extremely high standard set forth in *Baze*, requiring that plaintiffs adequately prove an alternative execution method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." Such a high standard paired with limited means prevents death row inmates like Broom from effectively challenging the

execution method to be used on them, even in well-founded cases. Broom's failed execution exemplifies not only the cruel and unusual nature of lethal injection, but also of the high barriers courts have erected against challenges to that method. The inability of inmates like Broom to overcome the heightened barriers created by cases like *Baze* and *Cooley* shows that what failed in Ohio was not just an execution protocol, but due process.

#### IMMIGRATION DETENTION CENTERS: AMERICA'S OTHER HEALTHCARE CRISIS

I am 35-year-old man without a penis with my life on the line. I have a young daughter, Vanessa, who is only 14. She is here with me today because she wanted to support me — and because I wanted her to see her father do something for the greater good, so that she will have that memory of me. The thought that her pain — and mine — could have been avoided almost makes this too much to bear.

Francisco Castaneda spoke these words on October 4, 2007 before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law during a hearing titled "Detention and Removal: Immigration Detainee Medical Care." Mr. Castaneda died five months later from metastasized squamous cell carcinoma of the penis. His family maintains the civil case he brought against the Government for its failure to provide adequate medical care while he was detained at an immigration detention center in California. The case is now before the U.S. Supreme Court, stalled on the issue of whether Mr. Castaneda's family has standing to sue the individuals responsible for deciding that the medical procedures that could have saved his life were "elective" and therefore not available to detainees.

With over 300,000 people moving through the U.S. immigrant detention system each year, problems of access to adequate medical care affect large numbers of people. The federal government provides medical care at 23 immigration detention facilities, which house nearly half of the 33,000 immigrants detained on any given day. The average duration of detention is 38 days, but some immigrants wait months or even years for their day in court. During that time, detainees are only allowed

medical care approved by Immigration and Customs Enforcement (ICE), the agency in charge of the detention centers. ICE's current policy is to hold detainees who are fit for deportation, allowing non-emergency off-site doctors visits only if necessary to prevent a change in deportation status. Fortunately, that policy is set to change in 2010 to provide detainees more access to non-emergency medical attention.

These changes came too late for Mr. Castaneda. There is also concern that they will not help many detainees who need it most. The regulations set forth by ICE's parent agency, the Department of Homeland Security, are not binding on ICE or its employees. They have the legal weight of suggestion, and since only one in ten detainees has a lawyer, it is likely that few would be equipped to pursue a legal remedy.

Federal employees are considered by the majority of U.S. federal circuits to be protected from suit by the Federal Tort Claims Act. If successful, Mr. Castaneda's civil suit has the potential to provide a remedy to those who have access to counsel by allowing claims against ICE employees in their individual capacity. Mr. Castaneda's *Bivens* claim, an action outside the scope of the Federal Tort Claim Act, against the doctors who treated him and the officials who denied him care may scare the agency or Congress into action, providing some avenue of relief for detainees seeking justice. Still, a more reasonable solution is to create a binding set of rules to ensure that immigrants detained in the United States are not denied basic medical care.

## LATIN AMERICA

### GUATEMALAN COURT SENTENCES MILITARY OFFICIAL FOR 1980s FORCED DISAPPEARANCES

For the first time in Guatemalan history, a former military official was found guilty of ordering the forced disappearances of indigenous civilian farmers during the violent 36-year civil war. On August 31, 2009, a panel of three judges sentenced Felipe Cusanero Coj to 150 years in prison: 25 years for each of the six disappeared farmers. In Guatemala, cases for forced disappearances can be brought anytime until the remains of the missing are found. The bodies of the six farmers, each abducted between 1982 and 1984, have not been

recovered and their families initiated proceedings against Cusanero in 2003.

The Guatemalan conflict between leftist guerrillas and government forces raged from 1960 to 1996, ending when the two sides signed the 1996 Peace Accords. During this time about 250,000 people, primarily indigenous Mayans, were killed and about 45,000 were forcibly disappeared. Forced disappearance, a powerful tool used by the government during the conflict, is defined as the detention or abduction of a person by a government or group acting with the government's authority, coupled with the concealment of the fate of the person. As with many of the disappeared, it is unclear why these six farmers were targeted or what happened to them.

During the conflict, the government created "civil defense patrols," made up of groups of citizens who were forced or recruited to patrol their communities. There is some disagreement as to whether Cusanero is considered a former paramilitary official or military official. Since the Guatemalan government is trying to avoid responsibility for the actions of the civil defense patrols during the conflict, it considers the individuals who were part of these patrols to be paramilitary. During the conflict, government forces detained, killed, and disappeared people, frequently ordering these patrols to do the same. Cusanero, who was the mayor of his community at the time, was in charge of the patrol located west of Guatemala City and ordered the forced disappearances of community members. Since he was in charge of military operations in the area, he most likely ordered the forced disappearances of additional civilians, but other community members have remained silent for fear of retaliation.

Such fear has several likely roots. Indigenous communities are still wary of the Guatemalan government because of past government-led oppression. In addition, some former military leaders still work for the government and wield significant power. Furthermore, since the civil defense patrols pitted community members against one another, people who were part of these patrols and those who were targeted often still live in close proximity. Survivors of the conflict are often hesitant to institute proceedings because they would have to continue living in the same community as

the individuals they would be accusing of committing heinous crimes.

Although the Cusanero decision sets a significant precedent in accountability for forced disappearances, Cusanero played a very small part in the larger scheme of the civil war. The masterminds of the conflict have yet to be held responsible for their actions.

Nevertheless, the Cusanero case is a welcome exception to past trends in the Guatemalan justice system regarding human rights violations committed during the conflict. Cases of this nature have often floundered, as both the parties bringing the action and the judges frequently receive threats, usually from the accused. Hopefully this change in direction will mark a new beginning of accountability in the Guatemalan justice system, while providing closure for families of the victims of the disappeared.

#### INDIGENOUS ECUADORIANS CLASH WITH POLICE OVER PROPOSED WATER LAW

Hundreds of indigenous peoples from the Ecuadorian Amazon protested the proposal of a new national water law on September 30, 2009. The protest was organized by the Confederation of Indigenous Nationalities of Ecuador (CONAIE), a group working to protect natural resources. Held near the southern city of Macas, the protest ended in violence as police killed one indigenous man and injured dozens more. Approximately forty police officers were also injured. The violence was halted when police pulled out of the region on orders from Ecuador's president, Rafael Correa. Following the conflict, Correa invited indigenous leaders to the capital to discuss their concerns regarding the proposed law. Although CONAIE has yet to meet its primary objective of complete authority over indigenous communities' ancestral lands and resources, it appears to be making progress through dialogue with government officials.

The indigenous communities are surrounded by wetlands, which provide the water they need for subsistence farming and drinking. However, new commercial mining projects are being developed in this fragile environment. The new water law would prioritize private mining companies' use of water for their operations, effectively privatizing water resources. Mines typically use large amounts of water in

order to extract metals from the rock. Indigenous communities are concerned that if the state grants these private companies unlimited access, there will not be enough water to adequately fulfill the needs of the communities.

This proposed law may be in direct conflict with Ecuador's newly passed constitution, which articulates the rights of indigenous communities to maintain possession of their communal lands and ancestral territories, including participation in the use of natural resources. The Constitution explicitly provides the rights to water and nourishment, as well as the right of the *pacha mama* (mother earth) to be respected, maintained, and regenerated. Roughly translated, Article 15 stipulates that the sovereignty of energy will not take priority over the right to water. Therefore, the use of water by private companies should not take precedence over the water needs of local communities.

While the President has agreed to cooperate with indigenous communities, he must balance these concerns with national interests, such as generation of income from mining operations. The Congress has suspended further discussions on the law until further notice.

This kind of conflict is not unique to Ecuador and seems to be a recurring problem throughout Latin America. For example, in June 2009, Peruvian police killed dozens of Amazonian indigenous peoples who were protesting new government policies allowing foreign companies to exploit natural resources in the communities' ancestral lands.

The noticeable similarity between these conflicts is that the interests of indigenous communities do not appear to be a government priority. These communities rely on natural resources and communal living to survive, and their homelands are being destroyed by natural resource extraction projects with increasing frequency. Given this reality, it is essential for indigenous groups to continue to organize against encroachment on their land, culture, and way of life.

#### CONTROVERSY OVER NICARAGUAN SUPREME COURT RULING ALLOWING PRESIDENT ORTEGA TO SEEK RE-ELECTION IN 2011

On October 19, 2009, left-wing Sandinista justices on the Constitutional Com-

mission of the Nicaraguan Supreme Court ruled that Sandinista President Daniel Ortega will be eligible to run for re-election in 2011. The decision effectively overturns portions of Article 147 of the Nicaraguan Constitution, which set a presidential term limit of no more than two inconsecutive terms. The decision is said to be final, but the right-wing Liberal party justices argue that it is illegal.

This decision presents two issues. First, because Latin America is plagued with a history of dictatorships, preserving presidential term limits in this region is of the utmost importance. The international community has expressed concern over the number of Latin American presidents who have been attempting to amend presidential term limits. For example, President Hugo Chávez of Venezuela won a popular referendum in February of this year that eliminates term limits.

Nicaragua's Constitution has included presidential term limits since 1995. The National Assembly can amend constitutional provisions by a two-thirds majority vote. The Supreme Court cannot amend the Constitution, but can rule part of it "inapplicable," as it did in its most recent decision on term limits. After an unsuccessful attempt to get the National Assembly to lift the limits, President Ortega filed a "motion of unconstitutionality," which was referred to the Supreme Court for a ruling.

The second issue raised by this decision is the Supreme Court's lack of transparency while reaching the decision. During the ruling, only Sandinista justices were present even though Liberal party justices also sit on the Constitutional Committee. Liberal party justices claim they were not called in time to participate in the decision and that they did not know the decision was even being made at that time. The Supreme Court as a whole has yet to vote on the issue. The U.S. State Department commented that "the ruling appears to short circuit, through legal maneuverings, the open and transparent consideration by the Nicaraguan people of the possibility for presidential re-election."

Nations across Latin America struggle with upholding constitutional limits on presidential terms. Proponents of the softening of presidential term limits argue that allowing for two or more consecutive terms may provide more time for presidents to accomplish their goals and capitalize



on campaign promises. Furthermore, if presidents are vying for re-election, they may have additional incentive to appease their citizens to gain voter support. While these arguments are well founded, Latin America has a special interest in closely monitoring this trend to ensure that history is not repeated. If the softening of presidential term limits is indeed found to be beneficial, the process of doing so must be transparent if the countries concerned wish to maintain democracies. In the case of Nicaragua, Ortega should ensure that the process is consistent with democratic principles.

## SUB-SAHARAN AFRICA

### CÔTE D'IVOIRE: SETTLEMENT BUT NO LIABILITY IN TOXIC WASTE DUMPING CASE

In August 2006, hundreds of thousands of people in Abidjan, Côte d'Ivoire, discovered that noxious toxic waste had been dumped in 15 public locations around the city, forcing thousands to flee their homes and businesses. Following the dumping, as many as 17 deaths were linked to toxic waste exposure, and over 100,000 people visited health clinics. The public outcry against the incident was so overwhelming that Côte d'Ivoire's interim government was forced to resign.

Trafigura, a Dutch-based crude oil company, acknowledges hiring a contractor to dump the waste in Côte d'Ivoire, but denies any wrongdoing. Evidence suggests, however, that the company was aware of the environmental and public health dangers and the likelihood of inadequate waste disposal in Côte d'Ivoire. After failing to legally unload the waste elsewhere, Trafigura transported it to Abidjan on August 19, 2006 and hired a local contractor. The contractor, Tommy Ltd., had been established only weeks before and had no prior experience handling caustic waste. Although Tommy Ltd. assured Trafigura that it would dump the waste in proper facilities in Akouédo, an area outside of Abidjan, minimal research would have revealed that the town had no caustic waste facilities. Trafigura paid Tommy Ltd. U.S. \$20,000 for its services — services which, if done properly elsewhere, would have cost 16 times that price.

For the past three years, various legal battles have ensued to determine liability

and to punish those responsible. Three company officers, including Trafigura boss Claude Dauphin, spent six months in an Abidjan jail following the incident. They were released shortly after an out-of-court settlement with the Ivoirian government. In 2008, Salomon Ugborugbo, the owner of Tommy Ltd., was convicted for poisoning and sentenced to twenty years in prison. Seven other Ivoirian officials were acquitted, and the State decided evidence was insufficient for criminal proceedings against Trafigura officials.

In February 2007, without consulting victims' associations, Côte d'Ivoire's government accepted a U.S. \$198 million settlement from Trafigura for cleanup and victim compensation, and waived any future State liability actions. However, many human rights groups assert that victims have had difficulty registering claims or receiving compensation proportionate to their medical and other related expenses.

On September 17, 2009, the victims' lawyers from the British firm Leigh Day & Co. also settled with Trafigura. The agreement allowed 31,000 victims to collect U.S. \$1,546 each, approximately six times less than originally sought. The settlement stated that the victims accepted that the waste was not clearly linked to any deaths or serious injuries, and that Trafigura was not responsible for Tommy Ltd.'s illegal dumping.

In October 2009, a confidential scientific report conducted by Trafigura was leaked to the public. It links thousands of illnesses to the dumping and acknowledges that, one month after the dumping, Trafigura was aware that the lethal substances could cause deaths, severe burns, and other side effects. Trafigura failed to release the report or any of this information to the 31,000 victims involved in the settlement.

While no further legal action can be brought against Trafigura in Côte d'Ivoire, a 20,000 person class-action suit is pending in the United Kingdom. Meanwhile, the Dutch government has chosen not to pursue any legal action against Claude Dauphin.

Although cleanup efforts in Abidjan began in September 2006, some sites remain contaminated. The United Nations reports that a French company has successfully decontaminated eight dump sites, but others remain unsafe. Prior to and since the

Côte d'Ivoire incident, Trafigura has been linked with numerous questionable business dealings.

### INTERNATIONAL COMMUNITY MUST RESPOND FORCEFULLY TO GUINEA MASSACRE

The September 28, 2009, daylight massacre of 150 peaceful demonstrators by Guinean security forces sparked international outrage and condemnation. Unfortunately, violence by Guinean security forces is not unprecedented. In 2007, security forces suppressed public demonstrations by killing over 130 people and injuring more than 1,500 people. In response, the then transition government of former military president Lansana Conté created an Independent National Commission of Inquiry that documented up to 3,156 human rights violations. However, no one was arrested and victims have not received promised compensation.

Despite pressure on former president Conté after the 2007 killings, Guinea never returned to civilian rule. Hours after Conté's death in December 2008, Moussa Dadis Camara led a military coup and suspended the Constitution. In response, the African Union suspended Guinea's membership, but Nigeria, Senegal, and France supported Camara. In an attempt to ensure a timely and transparent transition to civilian government, regional groups formed the International Contact Group on Guinea in February 2009.

Weeks before the most recent massacre, however, Camara indicated that he would run in the January 2010 election. Civilians mounted a protest in Conakry, which ended when Guinea security forces opened fire and killed an estimated 150 people, injured 1,253, and publically raped at least 33 women.

To prevent future atrocities, the international community must respond more forcefully than it has in the past. So far, the Economic Community of West African States (ECOWAS) has appointed Burkina Faso's president, Blaise Compaoré, to mediate between Camara's party and the political opposition. On October 14, 2009, the International Criminal Court's prosecutor confirmed that he is investigating possible war crimes committed by Guinea's security forces. On October 30, 2009, the United Nations announced that three

prominent jurists will form an independent commission to inquire into the events.

While these actions are encouraging, the situation in Guinea remains unstable. On October 28, 2009, approximately thirty youths led a five-day hunger strike to protest further violence and encourage political dialogue. Domestic and international investigations must produce results and lead to prosecutions of the responsible parties. Above all, Guinea must be pressured to return to a civilian government and restore the rule of law.

#### ZAMBIA TO DECIDE CONSTITUTIONALITY OF MANDATORY HIV TESTING

For the first time, a Zambian court is considering whether it is constitutional to exclude HIV-positive personnel from the military. Sergeants Stainley Kingaibe and Charles Chookole allege that the Zambian Air Force (ZAF) subjected them to HIV testing without consent or counseling, in violation of their rights to privacy, freedom from cruel, inhuman, and degrading treatment, and freedom from discrimination, pursuant to Articles 11, 15, and 23 of the Zambian Constitution. Both are represented by the Legal Resources Foundation of Zambia, with assistance from the Southern Africa Litigation Centre and the Zambian AIDS Law Research and Advocacy Network.

Kingaibe and Chookole served in the ZAF for 13 years. In 2001, both went for medical exams and, unlike in prior routine exams, they were given blood tests and subsequently placed on anti-retroviral medication. They never received test results and were not told the purpose of the medication. A year later, the ZAF Medical Board assessed both men unfit for service and discharged them, even though neither had taken any sick leave and Chookole had in fact been promoted. The two men did not find out they were HIV-positive until both later went for voluntary HIV testing, and were informed that they had already been given anti-retrovirals.

Since 2003, the ZAF's official policy bans HIV-positive recruits, but does not allow the military to discharge HIV-positive people who are already employed. The ZAF claims that the men were dismissed because Kingaibe has cancer and Chookole has tuberculosis; however this does not explain why neither was informed they were HIV-positive.

The current litigation reflects a larger debate among governments, NGOs, and human rights groups over how to implement policies designed to curb the spread of HIV while protecting the rights of infected people. In 2008, the Pretoria High Court in South Africa declared that military bans on HIV-positive recruits and employees were unconstitutional, despite the military's claim that they posed a risk to other soldiers, were not suited for stressful conditions, and undermined the military's duty to protect the nation. On the other hand, in Botswana, employers in all professions can legally test and deny employment to HIV-positive applicants. The United Nations allows HIV-positive people in its peace-keeping forces, but permits continued service so long as they pass regular "fitness for duty" health assessments.

Zambian Health Minister Kapembwa Simbao has called for compulsory HIV testing for everyone who visits a public health facility, because voluntary counseling and testing procedures have not led to widespread testing. Zambia has a 14 percent HIV infection rate — a number which rises to 29 percent in the military — and only 15 percent of the population has ever been voluntarily tested.

Human rights groups assert that mandatory testing violates the right to privacy and leads to discrimination. Compulsory HIV testing may also cause people to avoid going to health care centers and increase stigma and discrimination. Policies that limit freedom instead of protecting rights lead to laws that are blatantly discriminatory. For example, in Togo it is illegal not to use a condom, and in Guinea, Guinea-Bissau, Mali, and Niger, women can be criminally charged for not taking precautions to prevent transmitting HIV to their unborn children. Currently, 15 HIV-positive Namibian women are suing the government for forced sterilizations at public hospitals.

As nations struggle to prevent the spread of HIV, they must also respect human rights and refrain from discriminatory practices. Zambia is bound by its Constitution, the African Charter on Human and People's Rights, and the International Covenant on Civil and Political Rights, all of which require the government to protect individuals from inhuman and degrading treatment, privacy, and discrimination. To adhere to these obligations, the Zambian High Court should order the ZAF to reinstate Kingaibe

and Chookole and give HIV-positive members regular health assessments instead of barring them from service.

## MIDDLE EAST AND NORTH AFRICA

### SITUATION WORSENS FOR YEMENI REFUGEES

An estimated 150,000 civilians have been displaced and left with little humanitarian aid in Northern Yemen as a result of recent conflict. Fighting between the Yemeni government and the Huthis, a Shia rebel group based in the northern province of Sa'ada, began in 2004 when cleric leader Hussein al-Houthi launched an uprising against the Government. The Yemeni government recommenced military action in July 2009 after a year-long cease-fire, and violence has escalated in recent months. Aid organizations are declaring conditions for civilians in Northern Yemen a humanitarian crisis.

Thousands of civilians have fled their homes to escape the fighting. However, many have become stranded with no access to food, medical attention, electricity, shelter, clean water, or protection. The area has been inaccessible to outsiders for three months, and food reserves are running out.

The Yemeni army has blocked aid to Sa'ada city, claiming that the current situation is too dangerous for aid workers to enter. The International Red Cross and Red Crescent have been able to assist individuals who managed to escape the conflict area, but those stuck in the city have been left with no humanitarian aid.

Aid organizations are hoping that the Huthis rebel group and the Yemeni government will declare a temporary cease-fire so that humanitarian groups can enter the area, but this seems unlikely. A ceasefire was briefly declared for *Eid al-Fitr*, but both sides accused each other of violating it.

Even those who are able to reach refugee camps are not necessarily safe. On September 17, 2009, Yemeni air strikes hit a refugee camp near the Sufian area, killing 87 civilians and injuring 40 others. The UN Children's Fund (UNICEF) reports that many of the casualties are women and children.

Like all non-state armed groups, the same humanitarian law principles to which

Yemen is bound also bind the Huthi rebel group. Both have an obligation under Article 23 of the Fourth Geneva Convention on the Protection of Civilian Persons to allow the civilian populations at risk access to humanitarian aid. Further, Article 54 of Additional Protocol I prohibits states and non-state actors from leaving civilian populations with inadequate access to food and water. As hundreds of civilians wait, displaced from their homes and exposed to the violence of war, it is clear that neither side is upholding its international obligations.

In its flash appeal on September 2, 2009 to stimulate funding for relief efforts in Yemen, the UN Office for the Coordination of Humanitarian Affairs (OCHA) warned that the crisis could worsen in the following weeks and called on the international community to step up relief effort. As of November 10, OCHA had only collected about 46 percent of the U.S. \$23.7 million for which it appealed.

#### AS THE SYRIAN SUPREME STATE SECURITY COURT RESUMES OPERATION, ARRESTS AND SENTENCING OF HUMAN RIGHTS DEFENDERS INCREASE

On September 17, 2009, the European Parliament passed a resolution demanding the release of Muhammad al-Hassni. Hassni, the president of the Syrian Organization for Human Rights, is known for monitoring the detention conditions and legal practices of the Syrian Supreme State Security Court (SSSC). The Syrian government arrested him on July 28, charging him with “weakening national sentiment.”

Hassni’s arrest is part of a wave of repression against human rights defenders that began early this summer. As recently as September, the Syrian Centre for Media and Free Expression was closed without warning, and blogger Kareem Arabji was sentenced to three years in prison. This trend seems particularly timely. After an eight-month hiatus, the controversial SSSC quietly restarted its operations, just two months prior to Hassni’s arrest.

Human Rights Watch issued a report last year calling on Syria to dissolve the SSSC. The report accused the SSSC of using illegal incarcerations to intimidate political opposition. The SSSC practices violate a number of international conventions that Syria has ratified. Article 14 of the International Covenant on Civil and Political Rights entitles a suspect to “ade-

quate time and facilities for the preparation of his defense,” and Article 19 guarantees the right of freedom of expression. The SSSC’s punishment of political prisoners for their opinions without an opportunity to defend themselves is a violation of this Convention. The SSSC is also in violation of Article 1 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits using physical or mental pain to obtain a confession. Coercing confessions is a common practice in the pretrial period of the SSSC.

The SSSC was introduced in 1963 as an exceptional court to prosecute critics of the Government. Its charges against defendants criminalize freedom of expression. Among them are: “exposing Syria to the threat of hostile acts;” “weakening nationalist sentiments;” and “opposing the objectives of the revolution.” Defendants are subjected to extensive pretrial detentions and torture, allowed minimal contact with lawyers, denied the right to appeal, and often given pre-determined judgments. Torture and restricting legal aid are violations of Article 31 of The UN Standard Minimum Rules for the Treatment of Prisoners.

The prison associated with the SSSC, which houses bloggers, journalists, Islamists, and activists, is notorious for its poor conditions and use of torture. On July 5, 2008, Syrian police opened fire on rioting inmates, killing approximately 25 prisoners. There is no evidence as to what happened to the prisoners in Sednaya that day. The riot prompted the SSSC to halt its operations temporarily.

Despite widespread international protests, the SSSC resumed its functions this summer. Since then, arbitrary arrests of political activists and journalists in Syria have escalated. The rise in the number of prosecutions against human rights defenders in Syria seems to indicate a larger effort to repress Syrian civil society.

#### EGYPTIAN CIVIL SOCIETY ORGANIZATIONS PROTEST EGYPT’S LEGAL PERSECUTION OF ACTIVISTS, ARTISTS, AND ACADEMICS

Egyptian activists, academics, lawyers, and non-governmental organizations came together on October 10, 2009 to denounce a number of *Hesba* cases brought against activists, artists, and academics in Egypt. *Hesba* cases are lawsuits that can only be filed by Muslims against individuals or

organizations accusing them of insulting God. The Arab Network for Human Rights released a report earlier this month criticizing the quantity of *Hesba* cases that were being brought in Egyptian courts. Supporters of the campaign against *Hesba* assert, “An opinion should never drag anyone to court.”

The arrest of Hassan Hanafi and Sayed El Qemany were the final impetus for the campaign. Hanafi and El Qemany are Egyptian academics whose research on reinterpretations of Islamic history and critiques of political Islam incited protests among conservative Islamists. Both were accused of apostasy and are to be brought in front of Egyptian courts in *Hesba* cases.

While *Hesba* cases are not unique to Egypt, they are most prevalent there. This fall, Egyptian courts have accepted more *Hesba* cases than ever before. Although the Prosecutor General has the right to limit the number of *Hesba* cases that make it to court, individuals continue to file hundreds of complaints. The Prosecutor General has legitimized these complaints by allowing many of them to proceed to full-fledged hearings.

Those who file *Hesba* cases often use them to persecute individuals working in academia, science, politics, art, and cinema. By permitting *Hesba* cases to come into court, Egypt gives these complaints a legal basis. Numerous writers, intellectuals, filmmakers, and activists have been prosecuted in court. Among them are famed Egyptian feminist, Nawal El Saadawi, who exiled herself to America after repeated threats on her life, and Naguib Sawiris, a businessman who criticized the Egyptian Constitution for allowing Islamic law to be a “major legislation resource.”

Punishments for those prosecuted in *Hesba* courts go beyond fines and imprisonment, and include manipulating marriages, revoking citizenships, and physical violence. Egyptian professor Nasr Hamid Abu Zaid was forcibly divorced from his wife for his controversial perspectives on the Quran. The couple fled to the Netherlands after the ruling. In February 2009, courts revoked the citizenships of Egyptians who were married to Israelis because their marriages were claimed to be a threat to national security and Islam. An Egyptian filmmaker, Enad El-Dighaidy, and an unveiled Egyptian actress were threatened with eighty lashes for “defaming the coun-



try,” but the trial court decided in favor of El-Dighaidy and the actress.

The *Hesba* cases violate Articles 15, 16, and 19 of the Universal Declaration of Human Rights. These articles reaffirm the right to protection from arbitrary deprivation of nationality, state protection of family and marriage, and freedom of expression and opinion. Further, the *Hesba* cases are in violation of the Cairo Declaration on Human Rights in Islam adopted by Member States of the Organization of the Islamic Conference. Specifically, these cases violate Article 5, the right to marriage, and Article 16, the right to enjoy the fruits of scientific, literary, artistic, or technical production. While these rights can be subverted by violations of *Shar'ia* Islamic law, *Shar'ia* stipulates that state courts do not have the religious authority to judge what are and what are not violations of Islamic law.

A campaign initiated by the Arab Network for Human Rights and the Hisham Mubarak Law Center is currently seeking supporters to denounce efforts to limit the freedom of expression and research in Egypt. Through the campaign, these organizations hope to deter the use of legal mechanisms to persecute Egyptian intellectuals and scholars. So far, six other Arab human rights organizations and two lawyers have joined the campaign. The Egyptian government has yet to respond to these organizations' protests.

## EUROPE

### LEAD-CONTAMINATED ROMA CAMPS IN KOSOVO

The Roma community's decade-long exposure to lead contamination in northern Kosovo is one example of European reluctance to expose and rectify the persistent human rights issues that Roma face.

During the 1999 bombing of Kosovo, the Roma lived in Serb-majority areas in the Mitrovica region of northern Kosovo. Due to their linguistic ties, the Roma were perceived as Serbian corroborators and were targets of retaliatory Albanian violence and eventually expulsion from the region. One of these raids destroyed the Roma *Mahalla* (“neighborhood” in Turkish) in Mitrovica. As a result, a total of 8,000 people were internally displaced.

While many fled to neighboring countries, others were temporarily relocated by the United Nations High Commissioner for Refugees (UNHCR) to camps in the Mitrovica region, where they live in makeshift tents, huts, and metal containers. The World Health Organization (WHO) advised the UNHCR against building these camps because toxic lead waste in the area made the land unsafe for human habitation. The UNHCR did not heed these warnings, and Roma families have lived in these camps ever since.

Limited access to clean water and inadequate diet have compounded the problem of lead contamination levels for the Roma living in the camps. According to medical studies conducted by Human Rights Watch, lead exposure can damage internal organs and the nervous system, stunt growth, and lead to behavioral problems. It can also negatively affect fetal brain development, causing disabilities and mental retardation. WHO-sponsored medical treatment for poisoned Roma children was discontinued in 2007 because, without relocation and adequate diet, treatment would be futile.

Three main solutions were proposed for the displaced Roma. The first was to rebuild the *Mahalla* resettlement. Although many international actors preferred this option, it was rejected by the residents of the camps because they would lose access to Serbian welfare and health benefits. Second and most popular among the camp residents was resettlement north of the Ibar River. There is, however, no land presently available for such an undertaking. The third is to relocate residents to other countries. This idea seems unrealistic mainly because Western European countries are reluctant to take in Eastern European Roma. As one European Commission official stated, “There is no appetite in Europe for more asylum seekers from that region.”

The Roma's ongoing plight in Kosovo results from the lack of one single institution to assume responsibility for negotiating and implementing urgent evacuation and medical treatment for these individuals. The UNHCR initially managed the camps, followed by United Nations Interim Administration Mission in Kosovo (UNMIK), and then the Kosovo Agency for Advocacy and Development since January 2009. Camp residents view this latest change in management as a sign that the

international community is washing its hands of this burden.

Roma rights activists like Diane Post continue their efforts to obtain justice. In July 2008, Post helped an international law firm file a complaint on behalf of the Roma families with the UNMIK Human Rights Advisory Panel for violations of the right to life, protection against inhumane and degrading treatment, and the right to a fair trial. The case is currently pending.

The treatment of the displaced Roma is an institutionalized crime. Ongoing lead poisoning in Kosovo is especially appalling because aid organizations are complicit. Former Czech President and human rights campaigner, Vaclav Havel, once said, “The fate of the Roma would be a litmus test for Europe's new democracies.” Based on this account of the Roma in Kosovo, it seems that Europe has yet to meet Havel's test.

### ITALY'S IMMIGRATION POLICY FACES NEW CRITICISM

Italy's new public security law, passed on August 8, 2009, is the latest in a series of measures by the government to combat the rise in illegal immigration. The law seeks to deter illegal immigration by making it a criminal offense punishable by fines of €5,000 to €10,000, with prison terms of up to four years for those who defy expulsion orders. The law also allows unarmed civilians to work alongside enforcement officers to report and apprehend undocumented individuals. Italian citizens who help hide migrants or fail to report them could face anti-solidarity charges. Earlier this year, the Senate enacted another security bill authorizing medical staff to report patients who are illegal immigrants to Italian immigration officials. These new policies deprive undocumented immigrants of basic human rights including freedom from persecution and access to health care.

In addition to new legislation, Italy's much criticized “push-back” policy cracks down on the arrival of undocumented individuals by sea. In 2008, an estimated 36,000 migrants entered Italy by sea via Lampedusa, an island off the coast of Sicily. The majority comes from Africa to escape persecution and violence. A 2008 agreement between Italy and Libya increased patrols of international waters to interdict migrants *en route* to Europe. Migrants on the interdicted boats have been either forced onto Libyan vessels or

taken directly to Libya, where authorities allegedly detain and mistreat them.

Migrants on boats intercepted by Libyan authorities are not screened to determine if any individuals are asylum seekers or refugees before being forcibly returned to Libya. Therefore, according to a Human Rights Watch report, the agreement with Libya is in violation of Italy's obligation as a State Party to the 1951 Refugee Convention, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture, and European Convention on Human Rights not to force the return of people to "countries where their lives or freedom would be threatened, or where they would face a risk of torture or inhuman and degrading treatment."

Migrants that manage to escape Libyan vessels are often subsequently interdicted by Italian officials and held in overcrowded detention centers on Lampedusa. The conditions are so poor that more than half of the detainees are forced to sleep outside under plastic sheeting. Although the United Nations High Commissioner for Refugees (UNHCR) provides assistance to the migrants on the island under a project funded by the Italian Ministry of the Interior and the European Commission, overcrowding in these temporary detention centers has become a humanitarian concern.

The Italian government justifies these draconian measures as a national security issue. Critics, however, attribute these laws to the country's failure to better facilitate the integration of immigrants into Italian society. The European Union is also at fault for failing to implement a common immigration approach throughout the EU so that individual countries would be barred from adopting extreme immigration policies. According to many human rights activists, the EU needs to become more involved in protecting immigrants and supporting policies for greater integration of new immigrants.

#### KAZAKHSTAN: HUMAN RIGHTS DEFENDER FACES UNFAIR TRIAL

In 2010, Kazakhstan will chair the Organization for Security and Cooperation in Europe (OSCE), despite its worrisome human rights record. Among recent offenses are abuses of due process in the criminal justice system. On September 3, 2009, a Kazakh court found Evgeniy

Zhovtis guilty of manslaughter and sentenced him to four years in prison for causing a car accident that killed a young man. The sentence was upheld on appeal. Zhovtis is the director of the Kazakhstan Bureau on Human Rights and Rule of Law and a leading human rights advocate in Kazakhstan. He is a spokesperson for various human rights issues in the country including freedom of religion, freedom of assembly, and electoral reform.

International observers at Zhovtis's two-day court hearing included individuals from the OSCE, the Norwegian Helsinki Committee, Human Rights Watch, along with leaders of Kazakhstan's opposition parties.

Zhovtis's lawyer, Vitaliy Voronov, argued on appeal that his client was deprived of the due process right to a fair trial and an opportunity to properly present a defense. The trial was marked by violations of the Kazakh rules of criminal procedure. First, under Kazakh law, anyone suspected of a crime must be informed immediately. Zhovtis was informed after 17 days, giving his lawyers little time to prepare his case. Second, the trial judge either rejected or postponed all defense petitions without ruling on them. For example, the court denied the defense's motions to introduce expert technical evidence refuting the prosecution's incomplete motor-vehicle examination, introduce three experts on road traffic accidents, and exclude the prosecution's report, which used outdated forensic methods. Lastly, the court did not grant enough time for the defense to prepare a final statement before pronouncing the verdict. Specifically, the defense requested a few days to prepare a final statement, but the judge only granted forty minutes. The defense was also barred from admitting the victim's mother's statement of forgiveness that renounced all criminal charges against Zhovtis. These actions resulted in a blatant denial of Zhovtis's opportunity to challenge the evidence brought against him.

In a statement made following the verdict, Zhovtis alluded to the possibility that political motives may have contributed to the denial of a fair hearing. "There is no law here," he stated. "[T]here is no justice here. Where there is no law and no justice, unfortunately there is a political setup." In addition to political machinations, his defense counsel charged that the judge's final verdict was prepared in advance, as

he could not have drafted a five-page judgment within thirty minutes of deliberation.

Although the Almaty Province Court is the final court of appeal, Kazakh legislation allows for a supervisory hearing to address possible procedural violations. In light of Kazakhstan's violations of the International Covenant of Civil and Political Rights, the Declaration on Human Rights Defenders, and other international human rights instruments, Human Rights Watch has urged Kazakh authorities to reopen the investigation and provide Zhovtis a fair and impartial trial. OSCE members should put pressure on Kazakhstan to improve its human rights record as 2010 approaches.

## SOUTH AND CENTRAL ASIA

### LANDMARK DECISION IN INDIA DECRIMINALIZING SEX BETWEEN SAME-SEX PARTNERS

The High Court of Delhi handed down a landmark decision on July 2, 2009, igniting fierce debate throughout India. The opinion in *Naz Foundation v. Government of NCT Delhi* declared that Section 377 of the Indian Penal Code, criminalizing private sexual acts between consenting, same-sex adults violated the Indian Constitution. After a decade-long campaign, the Naz Foundation (India) Trust (Naz India) brought a public interest suit against local and national government authorities, claiming that Section 377 violated Articles 14, 15, 19, and 21 of the Indian Constitution. Named defendants included the National Ministry of Health and Family Welfare.

In response, the Indian government set up a group of ministers to decide the merits of Naz India's challenge. The Union Cabinet and the Ministers chose to let the Supreme Court handle the matter, but sent Attorney General Goolam Essaji Vahanvati to assist in the formulation of an opinion. In a move which gave hope to advocates of the decision, the Indian government chose not to challenge the decision in the Supreme Court.

Many argue that decriminalization of same-sex partnerships will tear away at the social fabric of India and its deeply religious culture. NGOs and private citizens oppose the ruling, including Swami Ramdev, a spiritual teacher, and the Delhi Commission for Protection of Child Rights.

The Indian Supreme Court faces enormous pressure from religious groups, including Hindu, Muslim, Sikh, and Christian organizations, many of whom find themselves on the same side of an issue for the first time. The foremost university for Islamic education in India, *Darul Uloom Deoband*, strongly opposes the ruling, as does the government's main opposition party, the Hindu nationalist *Bharatiya Janata Party*. The Indian Supreme Court also faces international pressure to uphold the High Court's ruling. The United Nations Joint Programme on HIV/AIDS heralded the High Court decision as a noteworthy step in the fight against HIV and AIDS.

Neither the Indian Supreme Court nor the government agencies involved have specified when final challenges will be heard or when the final decision will be handed down. Regardless of the outcome, it is unlikely the Indian government will dispute the decision.

According to the International Gay and Lesbian Association's *2009 Survey of State Sponsored Homophobia*, eighty countries still criminalize sex between consenting adults of the same sex. Twenty-two of those eighty countries are in Asia and the Middle East. In seven of them, same-sex intercourse is punishable by death. In many countries, "being gay" is considered a Western lifestyle that would be unheard of without European and American influence. If the Indian Supreme Court stands by the Delhi High Court's opinion, it will serve as an example among of the potential to accept same-sex partnerships while maintaining traditional values and cultural identity.

#### PRISONER RELEASES IN TURKMENISTAN: SIGN OF CHANGE OR SINGULAR REFORM?

On September 29, 2009, President Gurbanguly Berdymukhamedov of Turkmenistan released 1,670 prisoners, including 21 foreigners. This followed the release of 9,000 prisoners in October 2008 and 2,000 earlier this year. Those released include political prisoners detained during the over two-decade-long autocratic rule of former President Saparmurat Niyazov. Since his election in February 2007, Berdymukhamedov has sought to encourage foreign investment by softening the country's image. The recent freeing of political and other undisclosed prisoners signals a change in policy and increased openness

in Turkmenistan since Niyazov's death in 2006.

Thus far, Berdymukhamedov's new strategy has succeeded in generating interest in investment in the country, creating an opportunity to influence reforms. Multinational companies interested in hydrocarbon fuel sources have frequently visited, and both the United States and European nations have shown interest in Turkmenistan's rich natural-gas reserves. In July 2009, the European Union approved a trade agreement with Turkmenistan. Although initially delayed in the European Parliament because of human rights concerns, the agreement was finally passed with the hope of pushing Turkmenistan to change its policies. Despite such efforts, Berdymukhamedov has failed to democratize Turkmenistan, continuing to deny freedom of expression, intimidate journalists, and commit other abuses similar to those of his predecessor's administration.

Fifteen NGOs issued "A Call for Access to Turkmenistan" on September 29, 2009, requesting that the strengthening of diplomatic and business relationships be accompanied by a push for human rights. The statement encouraged businesses, countries, and international organizations to use their newly-founded contacts with Turkmenistan to push for access to the country and information therein.

Although Berdymukhamedov has moved to get rid of some of Niyazov's most appalling policies, remnants of Niyazov's autocracy are still visible in Turkmenistan: state-controlled media; policies forcing foreign journalists to work in secret; and restrictions on fundamental freedoms. Despite the number of prisoners who have been released, many are still detained. Reliable estimates of the numbers of political prisoners are unavailable because of a lack of access. The reports available from Turkmen prisons allege torture, sentencing without fair trial, and appalling conditions. Human rights organizations have continually been denied access to examine possible human rights violations since Berdymukhamedov took power. Another issue is the black-lists used to stop Turkmen citizens from leaving the country. In early October 2009, the government denied students permission to study at the American University in Bulgaria. Previously, these same students were also stopped from studying at the American University

of Central Asia in Kyrgyzstan and only found out they were "black-listed" when a border guard informed them. According to Human Rights Watch, hundreds of students have been prevented from studying abroad since July 2009.

Turkmenistan is a State Party to the International Covenant on Civil and Political Rights, guaranteeing freedom of movement, and the International Covenant on Economic, Social, and Cultural Rights, guaranteeing the rights to education and access to higher education. The building blocks of reform are in place, and the opening of Turkmenistan presents an opportunity to push for reform. It remains to be seen whether the opportunity will be wasted in the race for natural gas reserves, or whether the release of these prisoners will signal the beginning of human rights reform.

#### BAGRAM PRISON REFORM: CHAMPIONING RIGHTS OR MILITARY MANEUVERS?

Although it does not share the same notorious reputation as the military prison at Guantanamo Bay Naval Base, the Bagram Theater Internment Facility in Afghanistan has come under increasing scrutiny. Since September 2006, twenty detainees have been moved from Guantanamo to Bagram, which has become well known for sleep deprivation and waterboarding. A prison-wide protest has been taking place since July 1, 2009 in objection to a lack of rights, including denial of legal counsel and information regarding the reasons for their imprisonment.

Pressure on the U.S. government about the Bagram facility began in April 2009, when U.S. District Judge John D. Bates held in *Al Maqaleh v. Gates* that Bagram detainees had equivalent legal rights to those detained in Guantanamo. The decision gave three Bagram detainees the right to seek review of habeas corpus petitions for release. Amnesty International reports that the Obama Administration filed a brief in September in the District of Columbia Circuit Court of Appeals in the *Al Maqaleh* case, arguing that Bagram detainees should be denied the right to challenge their detention and attaching new "Detainee Review Procedures at Bagram Theater Internment Facility" set to go into effect in September 2009.

These rules provide for the review of the detention of over six hundred prisoners

in the Bagram facility suspected of Al-Qaeda and Taliban involvement and will closely resemble the Guantanamo Administrative Review Board process. U.S. military officials will represent detainees before military review boards during which detainees may call witnesses and present evidence. The review boards will decide if the detainee will remain in U.S. custody, be transferred to Afghan custody, or be released.

U.S. officials claim this process is a marked improvement over Guantanamo's. Because most of the detainees are Afghani and most of the crimes took place in Afghanistan, witnesses and evidence are easier to procure. However, a major issue with the system is that detainees will not be protected by attorney-client confidentiality. Despite its faults, the review board will be the first opportunity for Bagram detainees to officially challenge their imprisonment. As of October 2009, U.S. military officers and officials had already been assigned to review boards and to individual detainees. Officials also plan to let isolated detainees see relatives and to begin releasing those detained without charge. In November, a new facility will replace the dilapidated Bagram prison, hopefully providing more humane conditions.

These steps, however, are not motivated solely by humanitarian concerns. Rather, they come after a strategic assessment of the war ordered by General Stanley A. McChrystal, which concluded that prison facilities in Afghanistan created "breeding grounds" for Al-Qaeda recruits by mixing militants with small-time criminals. Additionally, in mid-October, Taliban leaders showed a willingness to negotiate with the U.S. government, offering a possible severing of ties with Al Qaeda. One of the items up for negotiation is a program for the release of Bagram prisoners. In return, Taliban leaders made an ambiguous offer to ensure Afghanistan would not be used to attack the United States.

However, since the CIA will lose long-term detention facilities with the closure of Guantanamo, many U.S. officials are fighting to keep Bagram open. The United States has ratified the International Convention on Civil and Political Rights, which bans detention without cause and the denial of due process, and it is also a signatory of the Third Geneva Convention, which addresses the treatment of prisoners

of war. The United States has been accused of violating both of these international conventions at Guantanamo and risks the same accusations at Bagram.

## EAST ASIA

### LABOR ISSUES AT THE KAESŎNG INDUSTRIAL COMPLEX IN NORTH KOREA

Located just across the demilitarized zone in North Korea, the Kaesŏng Industrial Complex (KIC) is an industrial area where South Korean companies use North and South Korean labor to manufacture products. A joint project formed in 2004 between North and South Korea, the KIC is a symbol of the growing level of engagement in North-South relations. As of June 2009, about forty thousand North Koreans and one thousand South Koreans were employed in the KIC, producing watches, shoes, clothes, kitchenware, plastic containers, electrical cords, and car parts. Recently, however, concerns have been raised about working conditions and exploitation at the KIC.

Officially, the minimum monthly wage for North Korean workers at the KIC is U.S. \$52.50. However, North Korean government authorities retain the majority of worker salaries, and only a small amount reaches employees' pockets. Article 32 of the KIC Labor Law requires that South Korean companies disburse wages directly to workers in cash. In practice, these funds are paid to a government agency in U.S. dollars at the request of the North Korean government, which maintains that this policy is due to insufficient foreign exchange centers in the KIC. Human Rights Watch suggests that as much as thirty percent of wages owed to workers at the KIC are retained as contributions to a fund to provide free housing, healthcare, and education to the North Korean public. Others go further to argue that the workers in the KIC receive only about U.S. \$2 per month, which means the North Korean government absorbs about 96.7 percent of the wages. Although the KIC Labor Law guarantees employees full compensation for their labor, the exact amount workers receive remains unclear.

In addition, other fundamental workers' rights are not covered by the KIC Labor Law. The North Korean Central Guidance Agency on Special Zone Development, a cabinet level administrative body, recruits

KIC workers and selects worker representatives. By not allowing companies to bid for skilled workers, the North Korean government maintains a stable workforce and controls labor costs. This practice interferes with the workers' ability to elect their own representatives to act on their behalf. Moreover, it is a clear violation of workers' rights to freedom of association and collective bargaining, which are protected by international treaties to which North and South Korea are States Parties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

To fulfill its legal obligations to workers within its borders, the North Korean government should work with the International Labor Organization to re-examine and revise the KIC Labor Law. The law should be amended to include workers' rights to freedom of association; to choose their employment according to their wishes free from government interference; and to be fully informed of their rights. Furthermore, South Korean corporations should perform their duties as employers to respect labor standards and to enforce the KIC Labor Law effectively. The revised law should impose sanctions on employers in cases where violations occur. The continued success of economic collaboration between North and South Korea depends on adequate and effective legal protections of workers in the KIC.

### IMPRISONMENT OF CHINA'S LEGAL ACTIVISTS

On October 1, 2009, China celebrated the 60th anniversary of its Communist leadership. Displaying pride in their country's development, government officials and citizens organized parades, firework displays, and events to contribute to the biggest celebration in Chinese history. However, in addition to the festivities, the event included efforts to silence dissenting voices to prevent them from raising human rights concerns challenging the image of social harmony.

Among the advocates targeted were Xu Zhiyong, founder of the Open Constitution Initiative (OCI), and Zhuang Lu, OCI's financial manager. Known as *Gongmeng* in Chinese, OCI was founded in 2002



to provide representation for victims in cases that are unwelcomed by the Chinese government. The lawyers at OCI are at the forefront of providing free legal services to disadvantaged groups in China, including victims of torture and parents of children who died or fell ill after drinking tainted milk.

On July 14, 2009, OCI received notification from the national and Beijing tax bureaus of a fine for ¥1.42 million (U.S. \$208,000). Shortly thereafter, Xu Zhiyong and Zhuang Lu were seized on suspicion of tax evasion. Beijing Civil Affairs Bureau officials confiscated files, computers, and other equipment from OCI's office and ordered the center shut down.

Officially, Xu Zhiyong was charged with tax evasion. The Chinese government claimed OCI was shut down because it was operating as a business and had not registered as a non-profit as required by law. However, civil rights activists and human rights organizations allege that it was part of a larger effort to stifle dissent in the countdown to the celebration by targeting civil rights advocates. This discrepancy in registration is likely due to highly restrictive government regulations. Xu Zhiyong claimed that although OCI had not registered as an NGO, it "has always been a non-profit organization" and that OCI made "no profits whatsoever, but . . . got penalties for income tax." Since only organizations with government approval prior to their formation can register as non-profits, many take the same route as OCI, registering initially as commercial entities and later trying to register as NGOs. Thus, the forcible shutdown of OCI has alarmed China's non-profit community.

The arrests of Xu Zhiyong and Zhuang Lu illustrate only a fraction of what civil rights activists experience in China. Lawyers who take politically sensitive cases face possible arrest, kidnapping, and physical attacks. Amnesty International, which continues to receive reports of intimidation of activists in Beijing, estimates that several hundred dissidents are under various kinds of surveillance or house arrest throughout China.

Zhuang Lu and Xu Zhiyong were released on August 22 and 23, respectively, perhaps largely due to public advocacy in China and Hong Kong. Although this may demonstrate increasing responsiveness to domestic activism, NGOs in China con-

tinue to face government restrictions and interference.

In a statement on his blog, Xu Zhiyong describes OCI's closure as a "penalty to the baby victims of the poisonous milk powders; a penalty to the young students at migrant workers' childrens' schools . . . [and] a penalty to tens of thousands of the poor and powerless, those who need the society's help the most." By sanctioning lawyers for their efforts to remedy social tensions, the Chinese government is preventing its citizens from seeking legal redress for their grievances, leaving innocent individuals with no remedy for their injuries.

#### CRIMINAL PROCEDURES IN JAPAN: THE NEED FOR REFORM

After serving 17 years in prison, Toshikazu Sugaya was released in June this year when DNA testing failed to connect him with the crime. Sugaya was sentenced to life in prison in 1993 for murdering a four-year-old girl after confessing to the crime during a police interrogation. He later retracted his confession, arguing it was obtained through duress. At his retrial that began on October 21, 2009, Sugaya pled not guilty and asked the court to justify his treatment.

Sugaya's wrongful conviction sparked calls for reform of Japan's criminal justice system, which has long been the subject of criticism by international community for lack of mechanisms to protect defendants' rights. In Japan, suspects are detained in *daiyo kangoku* — holding cells in police stations — for as long as 23 days without charges. Suspects are questioned without legal representation and without a time limit on interrogation sessions.

The conviction rate in Japan is over 99 percent, partially due to the large number of confessions obtained at *daiyo kangoku*. Relying on confessions as the basis of conviction encourages the use of force or threat during interrogations. Amnesty International contends that coercion, assault, and other inhumane treatment, including keeping suspects awake for days, are used in *daiyo kangoku*. Thus, many suspects confess to crimes they did not commit to protect themselves from further abuse.

The United Nations Committee against Torture was established under the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment, to which Japan acceded in 1999. In 2007, the 38th session of the Committee examined Japan's criminal justice system, and specifically addressed the use of torture in *daiyo kangoku*, stating that the lack of procedural guarantees for detainees "may lead to a de facto failure to respect the principles of presumption of innocence, right to silence and right of defense." The Committee recommended that Japan implement measures to guarantee that all detainees have legal representation and that independent monitoring of police conduct is carried out. The Committee also expressed concern with Japan's high conviction rate and called for systematic monitoring and recording of interrogations.

However, Japan responded that the presence of defense counsel during interrogations would hinder investigations and inhibit effective questioning. Japanese police and public prosecutors also argue that recording interrogation sessions will decrease the level of trust between suspects and investigators, impeding the efficiency of the questioning process.

In Japan's August 2009 general election, the Democratic Party of Japan overwhelmingly defeated the Liberal Democratic Party, which had governed for 54 years, and promised to adopt monitoring mechanisms for interrogations at *daiyo kangoku*. With due consideration of human rights, the new Japanese government should keep its pledge to guarantee suspects' rights and avoid wrongful convictions. Only through judicial procedures conforming to international standards can the Japanese criminal system fulfill its function to deter and punish perpetrators and to effectively protect Japanese society and its citizens.

#### SOUTHEAST ASIA AND OCEANIA

##### THAI GOVERNMENT TO FORCIBLY REPATRIATE LAO HMONG REFUGEES

The government of Thailand announced that it will forcibly repatriate all remaining Lao Hmong refugees from Thailand by the end of 2009. These repatriations are pursuant to a joint Lao-Thai Committee on Border Security agreement requiring Thailand to return all Hmong to Laos. Currently, approximately 4,000 refugees still live in the military-controlled Huai Nam Khao camp. While the Thai government claims that most repatriations are voluntary, they



come without independent observation and are often the result of extreme coercion by the military.

Conditions in the Huai Nam Khao camp are stark, and the Thai government severely limits access by outsiders. *Médecins Sans Frontières* (MSF) was the only organization allowed inside the camp, but according to MSF, “restrictions and coercive tactics imposed by the Thai military authorities” forced the organization to cease operations. Despite repeated requests, the Thai government has refused access to the UN High Commissioner for Refugees.

The Huai Nam Khao camp is crowded and unsanitary. There is a high risk of diarrhea and cholera epidemics and, according to MSF, a “high level of psychological distress” among refugees. These mental health issues are caused in part by a fear of returning to Laos. Many Hmong, who were trained by and fought with the U.S. Central Intelligence Agency during the Vietnam War, are now targeted and persecuted by the communist Lao government. In the past, refugees in the Huai Nam Khao camp have resorted to arson, hunger strikes, and suicide attempts in an effort to stop their repatriation and garner attention from the outside world.

Thai officials claim that the Lao Hmong are economic migrants and not refugees protected by international law. These claims are contradicted, however, by reports that Lao government officials indefinitely detain and abuse some repatriated Hmong. To avoid capture, many Hmong live in the jungle in Laos, hiding from the government and the military. One young Hmong refugee in Thailand described her experience to MSF: “Laotian soldiers attack us regularly, at least four or five times a year . . . Generally, the soldiers systematically kill the men and capture the women.”

In recent months the Lao military has stepped up its assault on Hmong, reportedly with support from the Vietnamese People’s Army. The Lao military has even employed Hmong to hunt down their own people. Several reports have circulated describing heavy artillery attacks, including the use of mortars and machine guns, on Hmong hiding in the highlands of Laos.

Thailand’s treatment of refugees violates norms of international humanitarian law. Thailand is not a signatory to the 1951 Convention relating to the Status of

Refugees and has no domestic refugee law or provisions for asylum. Even though the Thai government is not violating domestic law in repatriating these refugees, forcing refugees to return to their country of origin violates the customary international law principle of *non-refoulement*. *Non-refoulement* protects people from being forcibly returned to a country where their lives or freedom would be threatened.

Many international humanitarian organizations, governments, and the UN have called for Thailand to improve its treatment of refugees and to stop the planned repatriation. Eric Schwartz, Assistant Secretary for the Bureau of Population, Refugees and Migration at the U.S. State Department, told the Human Rights Brief that it is the State Department’s position that “anyone returned [to Laos] has to have had the opportunity to have their claims heard in a fair and transparent manner.” Despite this foreign pressure, the Thai government insists on going forward with the repatriations.

#### TONGAN PARLIAMENT REJECTS CEDAW RATIFICATION, WOMEN’S GROUPS REACT

On September 18, 2009, the Tongan Parliament announced that it will not ratify the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Parliament reasoned that certain provisions of CEDAW go against Tongan social and cultural tradition, and that women are “cherished and respected” in Tonga without the Convention. Tongan officials also expressed an unwillingness to change national laws regarding land and inheritance rights, abortion, and family planning, which would be mandated if the country adopted CEDAW. In his speech to the UN General Assembly on September 26, Dr. Feleti Sevele, Tonga’s Prime Minister, emphasized that “Tonga would rather be judged on its actions of empowerment of women in Tongan society over the past century than by a ratification of convenience.” Currently, 185 states are party to the Convention, representing over 90 percent of UN Member States. States not party to CEDAW include Iran, Somalia, and Sudan.

The widest gap between existing Tongan law and the provisions of CEDAW relates to land and inheritance. CEDAW mandates that women have the same rights as men to ownership of property and choice of residence. In Tonga, however,

women can lease but cannot own land. Inheritance passes through male heirs, and a son born out of wedlock takes precedence over a widow or legitimate daughter in the distribution of a man’s estate. A widow may continue to live on her husband’s land if there are no male heirs, so long as she does not remarry or have any sexual relationships.

Women’s groups in Tonga are reacting strongly to Parliament’s decision. In response to the government’s claim that women are “cherished,” ‘Ofakilevuka Guttenbeil, Managing Director of the Tongan National Centre for Women and Children (TNCWC), asked, “If this statement was true why on earth are we seeing battered women on a daily basis . . . why on earth have we had four homicides out of six homicides in the first six months of this year [concerning] husbands murdering their wives?” The TNCWC claims that over two hundred women each year seek help for domestic violence, while much more goes unreported. This number is significant given Tonga’s relatively small population of approximately 50,220 women.

While the Parliament has declared its intention to deal with women’s issues on its own, many Tongan women’s groups are still pressing for Tonga to align itself with international standards by ratifying CEDAW. A coalition of five women’s organizations is circulating a petition that they will present to top government officials in hopes of overturning the Parliament’s decision. Some women activists have even declared their intention to fast until Prime Minister Sevele is removed from office.

#### TOWARD A REGIONAL UNDERSTANDING: CHALLENGES FOR ASEAN’S INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

Members of the Association of South-east Asian Nations (ASEAN) officially launched the new ASEAN Intergovernmental Commission on Human Rights (AICHR) on October 23, 2009. The AICHR is a consultative body, comprised of one government-appointed representative from each of the ten ASEAN Member States. Unlike other regional human rights bodies, AICHR currently performs no investigative or judicial functions. Although this body has already faced considerable criticism, little attention has been paid to the ways in which the AICHR could be effective in the

short term, including the kind of progress that would be practical at this point.

Article 4.2 of the Terms of Reference, the official governing document of the AICHR, lists as one of its mandates and primary functions “[t]o develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation . . . .” Before the AICHR can develop a substantive framework, however, ASEAN Member States must first agree on what “human rights” are, what standards they will use to measure progress, and what, if any, the consequences would be for non-compliance.

Currently, there is a significant split among ASEAN Member States in their recognition of international human rights norms as expressed through the ratification of international conventions and treaties. Indonesia, Thailand, the Philippines, Laos, Vietnam, and Cambodia have signed and ratified almost all major international human rights conventions. By contrast, Malaysia, Burma, Singapore, and Brunei have each ratified only the Convention for the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

Given this sharp divide, a realistic starting point for the AICHR in drafting a Human Rights Declaration might be rights similar to those expressed in CEDAW and CRC, since every ASEAN Member State has generally accepted the principles embodied in these conventions. Agreement on issues such as gender equality and the

#### Wilson et al.: International Legal Updates

rights of children may help to create a foundation for a broader Human Rights Declaration. Moreover, the process of discussing and drafting an agreement on these issues may facilitate improved cooperation among Member States, easing the transition to debating more contentious issues.

Achieving the stated purposes of AICHR, including the promotion and protection of human rights in the region, will inevitably be slow. The region’s history of human rights abuses and firm commitment to national sovereignty create significant hurdles that must first be cleared. At least some ASEAN Member States, nevertheless, seem open to genuine dialogue and compromise. The Philippines, for example, has been pushing for the creation of the AICHR for several years. Additionally, Indonesia appointed as its representative Rafendi Djamin, a veteran human rights activist.

Despite early criticism, many human rights advocates in the region are reserving judgment until they see what the AICHR can accomplish. Anna Samson, National Legal, Communications, and Advocacy Officer for the Jesuit Refugee Service in Thailand, told the Human Rights Brief that the formation of the AICHR is a “step forward as it creates an avenue for dialogue in the region.” Even so, Samson and other members of civil society throughout the region are cautiously waiting to see how the AICHR can “operationalize human rights” in Southeast Asia. **HRB**

*Evan Wilson, a J.D. Candidate at the Washington College of Law, covers North America for the Human Rights Brief.*

*Tracey Begley, a J.D. Candidate at the Washington College of Law, covers Latin America for the Human Rights Brief.*

*Caitlin Shay, a J.D. Candidate at the Washington College of Law, covers Sub-Saharan Africa for the Human Rights Brief.*

*Shubra Ohri, a J.D. candidate at the Washington College of Law, covers the Middle East and North Africa for the Human Rights Brief.*

*Annamaria Racota, a J.D. candidate at the Washington College of Law, covers Europe for the Human Rights Brief.*

*Bhavani Raveendran, a J.D. candidate at the Washington College of Law, covers South and Central Asia for the Human Rights Brief.*

*Ri Yoo, a J.D. candidate at the Washington College of Law, covers East Asia for the Human Rights Brief.*

*Aileen Thomson, a J.D. candidate at the Washington College of Law, covers Southeast Asia and Oceania for the Human Rights Brief.*