

UNITED NATIONS UPDATE

NEW DEVELOPMENTS IN THE DEBATE ON TORTURE

UN OFFICIAL'S COMMENTS DRAW U.S. AMBASSADOR'S IRE

The UN High Commissioner for Human Rights, Louise Arbour, made a public statement regarding terrorism and torture on December 10, 2005, the anniversary of Human Rights Day. The statement criticized the nations leading the war on terror for permitting the torture and ill-treatment of detainees held in Iraq, Guantánamo Bay, or those subject to secret renditions to various prison facilities in Europe and Asia. Commissioner Arbour recognized that governments should be allowed to protect themselves and their citizens from terrorism and called for increased coordination between law enforcement agencies within and among nations. She added an important distinction that "imminent or clear dangers at times permit limitations on certain rights. The right to be free from torture and cruel, inhuman or degrading treatment is not one of these. This right may not be subject to any limitation, anywhere, under any condition."

Ms. Arbour further stated that the war on terror can only be won if international human rights norms are fully respected. The Commissioner reiterated that torture is immoral, illegal, and ineffective and cited two main activities used in the war on terror that directly oppose the Convention Against Torture (CAT). The first is the United States' efforts to obtain diplomatic assurances to justify the return or "rendering" of suspects to nations where they will likely face the risk of being tortured. The diplomatic assurances from the host countries are supposed to alleviate any fears that the suspects will be tortured, but according to Arbour, they contain no reliable oversight mechanisms.

The second of these practices is the holding of prisoners in clandestine detention facilities. The Commissioner argued that keeping prisoners in secret detention with the detainee's location or fate unknown amounts to a "disappearance." Such conduct can constitute cruel and inhuman treatment of both the disappeared person and their families, who are deprived of any informa-

tion of the whereabouts of their relatives. Commissioner Arbour summarized her concerns:

Like many, I believe firmly in the role of law to guide us through difficult challenges. The law provides the proper balancing between the legitimate security interests of the State with the individual's own legitimate interests in liberty and personal security. It must do so rationally and dispassionately, even in the face of terror. For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually improves human security.... Pursuing security objectives at all costs may create a world in which we are neither safe nor free. This will certainly be the case if the only choice is between the terrorists and the torturers.

The United States Ambassador to the UN, John Bolton, responded to the Commissioner's comments with an attack not only on the substance of her statement but also on her authority. He stated his disappointment that the Commissioner decided to focus on alleged American conduct instead of "the serious human rights problems that exist in the world today." He continued, "[I]t is inappropriate and illegitimate for an international civil servant to second-guess the conduct that we're engaged in the war on terror with nothing more as evidence than what she reads in the newspapers. I want to focus today on trying to get our High Commissioner for Human Rights to talk about the real human rights problems in the world." Critics argue that Ambassador Bolton's comments relay the wrong message to abusive governments, which suggests that it is acceptable to attack Ms. Arbour instead of addressing the human rights violations her office challenges.

Critics also argue that Bolton's comments are ill-timed in light of the UN's current negotiations for a new Human Rights Council to replace the much criticized Human Rights Commission (Commission). Given that some countries propose that it should have the ability to review and even

suspend the OHCHR, many fear Ambassador Bolton's comments might serve as additional fodder for those already seeking to undermine the Commissioner's office.

Further criticisms attack the accuracy of Mr. Bolton's claim that Ms. Arbour is relying solely on what she reads in the newspapers to reach conclusions about the treatment of detainees. In a recent letter to Secretary of State Condoleezza Rice, Human Rights Watch noted that the Commissioner relied on several direct, reliable sources, including detailed testimony collected from human rights groups. The letter cites other reliable sources, namely Bush administration officials' repeated statements that prisoners are held in clandestine locations without access to the International Committee of the Red Cross and that some of these detainees are transferred to countries with records of systematic torture.

THE MCCAIN AMENDMENT

In late December 2005, the U.S. Congress addressed many of the concerns regarding torture through an amendment to the Department of Defense's 2006 Appropriations Act, which establishes the Army Field Manual as the uniform standard for the interrogation of detainees. The amendment also prohibits cruel, inhuman, and degrading treatment of persons detained by the U.S. government regardless of location or nationality. The U.S. Army is currently updating its Field Manual and is expected to release a new version in the spring. Although the amendment allows the Field Manual standards to be changed at any time, thus calling into question its reliability, many expect the manual will include detailed examples of prohibited behavior and references to the Geneva Conventions.

The amendment was named after its main sponsor, Senator John McCain (R-AZ), who was a POW and a victim of torture during the Vietnam War. Senator McCain's contention that torture is ineffective in obtaining information echoes Ms. Arbour's statements. He argues that because much of the information gathered using torture is by definition gathered under duress, it is neither reliable nor trustworthy. The

White House initially opposed Senator McCain's amendment due to fear that it would impinge on the government's ability to collect information necessary to win the war on terror. It is alleged that Vice President Cheney telephoned Republican senators in an attempt to derail the amendment and that he lobbied for the CIA to be exempt from the new law. Attempts to block the amendment failed, however, and the Senate and the House of Representatives both voted overwhelmingly in favor of it, eventually leading President Bush to support it as well.

The CAT, to which the U.S. is a party, is clear in its prohibition of "cruel, inhuman, and degrading treatment" of detainees. The Bush administration, however, has interpreted the CAT's ban to apply only to detainees in U.S. custody and within U.S. borders. A crucial part of the McCain amendment rejects this narrow interpretation and extends protection from torture to U.S. detainees wherever they may be held. Specifically, it eliminates the geographical exception the U.S. had previously read into Article 16 of CAT. The use of cruel, inhuman, and degrading treatment is now outlawed anywhere individuals are held in U.S. custody, including Guantánamo and Iraq, regardless of whether that state is party to the Convention. The amendment, however, does not address the "rendering" of suspects to foreign governments that are not party to the CAT that could use whatever means they deem necessary to extract information from detainees. Moreover, it permits non-military personnel accused of torture, including CIA agents and government contractors, to invoke a superiority defense, or "Nuremberg Defense," and claim that they were following a superior officer's orders that they believed to be legal.

In addition to the scandals at Abu Ghraib and the alleged transfer of terrorist suspects to secret locations in Eastern Europe and Asia, allegations of abuse at Guantánamo Bay arose soon after Congress passed the Appropriations Act. For example, lawyers for Guantánamo detainees have reported that hunger strikes are occurring as the result of the detainees' ongoing detention without trial and the general conditions of their imprisonment. It is alleged that prison guards have been force-feeding detainees by inserting thick pipes through their noses and into their stomachs. These allegations further illustrate the need for legislation that provides clear standards of permissible behavior for the treatment of detainees. The

U.S. Army must define in their Field Manual whether this type of force-feeding should be classified as torture.

It is unclear whether Ms. Arbour's statements affected the passage of the McCain Amendment. What is emerging, however, is a growing overlap between Arbour's insistence on an absolute ban on cruel, inhuman, and degrading treatment and Congress' move toward a broader application of U.S. obligations under the CAT. The passage of the McCain amendment by an overwhelming majority of the U.S. Congress represents an affirmation of a long-standing human rights principle, as well as a victory for those calling for stricter adherence to international legal standards and explicit prohibitions against the cruel and degrading treatment of detainees.

INTERNATIONAL COURT OF JUSTICE UPDATE

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (*DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA*)

On December 19, 2005, the International Court of Justice issued a judgment in litigation between the Democratic Republic of the Congo (DRC) and Uganda. In a 16-to-1 ruling, the Court found Uganda guilty of violating principles of international humanitarian and human rights law, specifically the principles of non-use of force and non-intervention. The DRC initially brought the case as part of a series of suits against neighboring countries, including Rwanda and Burundi, to address the actions of these countries' armed forces in Congolese territory.

The Court cited as a clear indication of Uganda's control in the DRC that the Ugandan forces occupied the DRC's eastern province of Ituri in June of 1999. Most of Uganda's abuses in the DRC extended from its occupation of this province. During this occupation members of the Ugandan military, specifically the Ugandan Peoples Defense Forces (UPDF), killed and tortured civilians, burned villages, and failed to differentiate between military and civilian targets. Ugandan armed forces were also accused of training child soldiers and inciting ethnic conflict. Despite the DRC's allegations, the Court did not find sufficient evidence of a specific Ugandan government policy to plunder and exploit Congolese natural resources or that the military occupation was carried out for such purposes. The

Court, however, determined that many UPDF officers and soldiers, including high-ranking officials, pillaged valuable natural resources from the DRC.

The Court noted that, as an occupying power in the Ituri district, Uganda violated its obligations under international law to take measures to support human rights and prevent acts of looting, plundering, and exploitation of Congolese natural resources. In determining that Uganda was in fact occupying Ituri, the Court reasoned:

[U]nder customary international law, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and ... occupation extends only to the territory where such authority has been established and can be exercised.

Uganda is legally responsible for its military's actions in Ituri. The country is also responsible for any failure to prevent human rights violations from occurring in the area under its control. This duty extends to abuses committed by third parties and rebel groups in the region. Uganda attempted to assert that its soldiers were acting in self-defense when engaging in military activity in the DRC, but the Court did not support this contention.

UGANDA'S COUNTERCLAIMS

The Court found sufficient evidence to support only one of Uganda's counterclaims against the DRC, which alleged that the DRC had violated its legal obligations to protect Ugandan diplomats and their property. The DRC's armed forces attacked the Ugandan Embassy in Kinshasa and failed to prevent the theft of archives and property. The DRC's armed forces also mistreated Ugandan diplomats at Ndjili International Airport in violation of obligations owed to Uganda under the Vienna Convention on Diplomatic Relations of 1961.

REPARATIONS

The Court ruled unanimously that each party must make reparations to the other for the injuries caused. Due to the imbalance of the grievances, Uganda is likely liable for a greater amount than the DRC. If the parties fail to settle the reparations issue themselves, the Court reserved the right to conduct further proceedings to resolve the matter.

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vent, Punish and Eradicate Violence Against Women. She maintains her focus on women, human rights, and public interest law, which she

now hopes to apply to her prospective judgeship. Most of all, Ms. Rioseco continues to share her passion through her courses and her many publica-

tions and hopes that her work will positively affect others now and in the future. **HRB**

Emily Wann, a J.D. candidate at the Washington College of Law, covers the Alumni Profile for the Human Rights Brief.

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50 YEARS IS ENOUGH: U.S. NETWORK FOR GLOBAL ECONOMIC JUSTICE

www.50years.org

50 Years Is Enough: U.S. Network for Global Economic Justice is a coalition of over 200 U.S. grassroots, women's, solidarity, faith-based, policy, social and economic justice, youth, labor, and development organizations dedicated to the transformation of the World Bank, the International Monetary Fund, and the World Trade

Organization. The Network partners with over 185 international organizations in more than 65 countries. Through economic literacy training, public mobilization, and policy advocacy education and action, the Network seeks to transform the international financial institutions' policies and practices and to make the development process more democratic and accountable.

The Human Rights Brief is accepting submissions for the next edition of the "NGO

Update." If your organization has an event or situation it would like to publicize, please send a short description to hrbrief@wcl.american.edu and include "NGO Update" in the subject heading of the message. Please limit your submission to two paragraphs. The Human Rights Brief reserves the right to edit for content and space limitations. **HRB**

Lauren Bartlett, a J.D. candidate at the Washington College of Law, covers the NGO Update for the Human Rights Brief.

CENTER NEWS/FACULTY AND STAFF UPDATES: *continued from page 55*

hoc and hybrid criminal tribunals. She also delivered a presentation on the prosecution of gender-based crimes committed in the context of war or mass violence at the Global Women's Court of Accountability, held November 17-18, 2005, at the Joan B. Kroc Institute for Peace and Justice of the University of San Diego. Over the past several months, she has participated in three sessions of the Working Group on Social Reconstruction and Reconciliation convened by the U.S. Institute of Peace. In January 2006 she also participated in a roundtable discussion on legal and judicial reform in Sudan convened by the Initiative for Inclusive Security.

Rick Wilson, Professor of Law at WCL and Co-Director of the Center, served as a mod-

erator for a panel on "Globalization of Clinical Legal Education: Transplanting Clinical Models into Other Cultures and Families of Law" at the Sixth International Clinical Conference, UCLA/IALS, in Lake Arrowhead, California. He sponsored a report entitled "A Moral Choice for the United States: The Human Rights Implications for the Gwich'in Peoples of Drilling in the Arctic National Wildlife Refuge" along with the Gwich'in Steering Committee and the Episcopal Church. He served as a commentator on a presentation by Justice Richard Goldstone called "Perspectives on Economic, Social, and Cultural Rights." He also served as a moderator for a panel on "International Prevention of Torture: The Role of the United Nations, International

Law and the United States" presented by the United Nations Association, National Capitol Area, and co-sponsored by the ABA Section of International Law. He was invited to serve as an international expert by the Clinical Legal Education Foundation of Russia to assist in the planning of three trainings of 24 selected clinical programs during 2006 in St. Petersburg, Russia. In November he was interviewed by Susan Kinzie of the *Washington Post* about WCL's clinics and other human rights activities. In December he was interviewed by the *National Journal* regarding the case of Canadian detainee Omar Khadr, represented by Rick and Muneer Ahmad. **HRB**

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NEW JUSTICES

THE INTERNATIONAL COURT of Justice is composed of 15 permanent judges who are elected by the UN General Assembly and the UN Security Council from individuals nominated by the national groups in the Permanent Court of Arbitration. Elections take place every three years, with one-third of the judges retiring at the end of each cycle to ensure continuity within the Court. Judges may be re-elected.

On November 7, 2005, the UN General Assembly elected four new judges, who will begin their nine-year terms on the bench on February 6, 2006. The retiring judges include Nabil Elaraby of Egypt, Pieter Kooijmans of the Netherlands, Francisco Rezek of Brazil, and Vladlen S. Vereshchetin of the Russian Federation. The new judges include Mohamed Bennouna of Morocco, Sir Kenneth Keith of New Zealand, Bernardo Sepúlveda Amor of Mexico, and Leonid

Skotnikov of the Russian Federation. Judge Thomas Buergenthal of the United States, former Dean and Professor of International Law at the American University Washington College of Law from 1980 to 1985, was reelected for another term. **HRB**

Nicholas Leddy, a J.D. candidate at the Washington College of Law, covers the United Nations Update and the ICJ Update for the Human Rights Brief.