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Human Rights Brief

HUMAN RIGHTS BRIEF

A Case for the Right to Self-Determination in Africa's Last Colony

by Ryan Allman

For over 40 years, the Saharawi people of Western Sahara have lived divided by a 1,700-mile sand wall.[1] The wall, or "berm," built in the 1980s by the Kingdom of Morocco, is the longest defensive fortification in use today, littered with landmines and barbed wire and manned by tens of thousands of Moroccan troops.[2] Dividing the occupied and liberated territories of Western Sahara, the berm is a physical manifestation of Morocco's unlawful denial of the Saharawi people's right to self-determination that has resulted in a four-decade long abuse of the Saharawi people's human rights, including the rights to be free from torture, to freedom of expression, and to peaceful assembly and association. To address this abuse of human rights, the UN must facilitate a referendum for the self-determination of the people of Western Sahara.

In 1975, Morocco annexed Western Sahara, a former Spanish colony.[3] Since then, the Saharawi people have lived in the occupied territory or as refugees in exile.[4] The latest report from the UN High Commissioner for Refugees (UNHCR) estimated 170,000 Saharawi currently live in the Tindouf refugee camps in southwest Algeria.[5] In 1991, a United Nations-brokered ceasefire established the United Nations Mission for the Referendum in Western Sahara (MINURSO),[6] which ended the war between Morocco and the Saharawi liberation movement, the Polisario Front, and left Western Sahara a UN designated "Non-Self-Governing Territory."[7] Almost thirty years later, the Saharawi people still await the referendum that would allow the people of Western Sahara to freely determine their political future.[8] Despite an opinion from the International Court of Justice in 1975 that Morocco has no valid claim to the territory of Western Sahara,[9] Morocco continues to unlawfully occupy the region and deny the Saharawi people a referendum.[10]

The right to self-determination is the legal right of people to decide their own political future. A core principle of international law,[11] self-determination is enshrined in customary international law[12] and international treaties.[13] Under international law, minority or oppressed groups have the right to self-determination, which protects the ability to freely determine their political fate and form a representative government.[14] The principle of self-determination originated to justify people's pursuit for independence from colonial governments that did not adequately represent their interests.[15]

Morocco, as the occupying power of the Western Sahara, and as State Party to the International Convention on Civil and Political Rights (ICCPR),[16] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[17] and as a UN Member State, is obligated under international law, to allow the Saharawi people to realize their right to self-determination.[18] Article 1 of the ICCPR and ICESCR enshrine the right to self-determination for a Non-Self-Governing people to "freely determine their political status."[19] The UN Committee for Economic, Social and Cultural Rights, in its 2015 ICESCR review of Morocco, stated its "concern about the failure to find a solution to the right to self-determination of the Non-Self- Governing Territory of Western Sahara."[20] Article 2(4) of the UN Charter requires UN Member States to respect territorial integrity,[21] and Article 73 enshrines the right to self-determination.[22]

The non-realization of the Saharawi people's right to self-determination has prevented their enjoyment of other human rights, including the right to be free from torture. Human rights defenders and human rights monitoring groups report a history of disappearances, torture, intimidations, arrests, detainments, abuse in captivity, grotesque sentences, and denial of fair trials in the occupied Western Sahara.[23] Morocco is required to observe the Saharawi right to be free from torture as a State Party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture)[24] and under the UN Charter.[25] Torture or cruel, inhuman or degrading treatment or punishment is prohibited by Article 7 of the ICCPR and the Convention against Torture.[26]

SAHARAWI WOMEN IN THE TINDOUF REFUGEE CAMPS VIA CREATIVE COMMONS USER CARLOS NÚES, LICENSED UNDER CC BY-NC-ND 2.0.

In 1993, Morocco ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requiring the country to abolish and prevent torture or other forms of ill-treatment from undermining the right to a fair trial.[27] Morocco's constitution also forbids torture, and the country's penal code criminalizes torture.[28] Yet, despite laws to the contrary, Moroccan courts had a long-standing record of using torture and coercion to secure evidence to convict civilian prisoners.[29] Until reforms were made in 2015 to end military trials for civilians, Morocco regularly tried civilians in military courts[30] and continues to arbitrarily detain civilians based on military court sentences, as in the case of Mbarek Daoudi, a Saharawi activist held since September 2013.[31] A Moroccan military court sentenced twenty-five Saharawi to prison in 2013, based on confessions allegedly obtained by means of torture.[32] These charges were made in connection to the violent resistance against Moroccan security forces who dismantled the Gdeim Izik protest camps in 2010.[33] In response to protest from human rights organizations, these prisoners were granted a re-trail in a civilian court in 2017.[34] Since the 1960s, over 500 Saharawi have "disappeared," after being arrested by Moroccan security forces.[35] Today, hundreds of disappeared persons remain unaccounted for, and the Moroccan government denies knowledge of the disappearances.[36] In 2016, the UN Committee Against Torture reported that Morocco breached UN Convention against Torture Articles 1 and 12 to 16,[37] with regard to the treatment of Saharawi activist Naâma Asfari, finding that Moroccan authorities failed to investigate Asfari's allegations of torture and other ill-treatment, protect him and his lawyers from reprisals, and denied him reparations including medical rehabilitation and compensation.[38]

Morocco is required to also observe the Saharawi right to freedom of assembly. In particular, Articles 21 and 22 of the ICCPR[39] and Article 8 of the ICESCR enshrine the right to freedom of peaceful assembly and association.[40] Moreover, Moroccan authorities systematically restrict freedom of expression, association and peaceful assembly in Western Sahara, preventing gatherings supporting Saharawi self-determination, obstructing the work of local human rights NGOs,[41] and threatening and abusing activists and journalists.[42] Human Rights Watch reported that, in June 2018, Moroccan police beat up at least seven activists who organized a pro-independence protest.[43] According to Amnesty International, human rights defenders are intensely surveilled, sometimes amounting to harassment.[44] U.S. journalists reporting for Democracy Now! recently documented heavy surveillance by Moroccan authorities when visiting the occupied territories in 2016.[45] These actions are in conflict with Morocco's responsibility as a State Party to the ICCPR and the ICESCR to protect the Saharawi people's freedom of expression, association and peaceful assembly. Furthermore, human rights abuses in the region go largely under-reported. MINURSO remains the only modern UN peacekeeping mission established since 1978 without a mandate to monitor human rights.[46] This lack of a human rights mandate leaves the conflict region without an independent and impartial mechanism to monitor human rights abuses in both Western Sahara and the Tindouf camps. Moroccan authorities claim that the Moroccan National Council of Human Rights (CNDH) protects human rights in the territory.[47] However, the King of Morocco appoints the president and at least nine of CNDH's twenty-seven members.[48]

The violations of human rights in Western Sahara are a consequence of the Moroccan denial of the Saharawi people's right to self-determination.[49] For the Saharawi people to realize their human rights, the UN must facilitate a referendum. Until the people of the Western Sahara determine their political future, the UN must facilitate international monitoring and observance of human rights in both Western Sahara and the refugee camps to ensure human rights violations do not occur.

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The Link Between Tourism and Child Abuse in Cambodian 'Orphanages'

by Madison Bingle

In February 2019, the U.S. Attorney's Office in Oregon sentenced Daniel Stephen Johnson to a lifetime in prison for repeatedly sexually abusing children in an unlicensed orphanage that he operated under the guise of a missionary in Cambodia.[1] This case is one of many, and exemplifies the pressing need for the implementation of comprehensive protective policies to safeguard children living in Cambodian orphanages.

The link between child abuse in Cambodian orphanages and tourism is a complex issue stemming from Cambodia's recent history of war and genocide. In 1992, the United Nations Transitional Authority in Cambodia (UNTAC) and many foreign NGOs entered the country in an effort to aid in Cambodia's reconstruction.[2] In the process, UNTAC and NGOs expanded the market for Western tourism, as well as highlighted the vulnerabilities of Cambodian people during the post-genocide era.[3] However, as tourists began flocking to Cambodia's historical memorials and ancient temples, the country also drew two other types of tourists — those looking to volunteer, and those looking to engage in sex tourism.[4] More specifically, "orphanage tourism" became a tourist commodity in Cambodia.[5] While orphanage tourism and sex tourism are different, the prevalence of sex tourism in Cambodia and orphanage tourism has significant overlap.[6] Rising tourism rates coincided with increasing amounts of children living in residential care institutions, commonly known as orphanages.[7] Children in these facilities are particularly vulnerable to abuse and exploitation.[8]

According to UNICEF estimates, the number of orphans decreased substantially between 2009 and 2014.[9] Despite there being fewer orphans, the number of orphanages and children living in orphanages has doubled.[10] In 2005, there were approximately 150 orphanages, and in 2019, there were over 400.[11] Additionally, an inspection by the Cambodian government revealed that out of the 16,000 Cambodian children housed in orphanages, 68 percent have at least one living parent.[12] The problem became so great that UNICEF began referring to so-called orphanages as residential living institutions.[13] Many low income families are persuaded by institution directors to place their children in residential care facilities, thinking that their children will have better lives there, with access to food, education, and medical care.[14] But, the reality is that many children in residential care institutions are subjected to abuse and neglect.[15] Some institutions force children to make handicrafts or force them to perform dances for visiting tourists — making these institutions the means of a type of modern slavery.[16] Thus, the demand for this type of tourism led to an increased number of children in residential care institutions who are significantly more likely to be exposed to physical and sexual abuse, as well as deliberate under-nourishment to solicit more donations.[17]

Cambodia has ratified the UN Convention on the Rights of the Child.[18] Article 20 states that children displaced from their family units "shall be entitled

to special protection and assistance provided by the State."[19] Additionally, Articles 34 and 39 protect children from physical and sexual abuse and mandate special assistance if exposed to violence.[20] Furthermore, in the 2015 Méndez Report, UN Special Rapporteur on Torture, Juan E. Méndez, illuminated the need to recognize orphanages and residential care facilitates as detention centers under international law.[21] In this report, a State party to the UN Convention against Torture (CAT) must ensure specific standards to protect people from torture.[22] As a ratified member of the CAT, Cambodia has duties under Article 11, which requires that detention centers are kept under systematic review by the State. The Mendez Report elaborates that states have an obligation to "prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies, and practices that allow children to remain with family members or guardians in a non-custodial, community-based context."[23]

As a party to the Convention on the Rights of the Child, the Cambodian government has made significant efforts to comply with the treaty, and it has implemented an Action Plan for Improving Child Care.[24] In 2015, the government initiated the Sub-Decree on the Management of Residential Care Centers, which attempts to map and ultimately regulate the residential care institutions across the country.[25] Additionally, they have introduced a reintegration program working with NGOs, such as the Cambodian Child's Trust, to provide resources to families who are reintegrating children back into their homes.[26] Since 2015, Cambodia has reduced the number of residential care institutions by 35 percent, and the number of children living in these institutions has decreased by 54 percent.[27] While these numbers are promising, the continued allowance of orphanage tourism and the overall lack of comprehensive legislation fails to adequately protect children in Cambodia.[28] Likewise, Cambodia has failed to provide a network of social workers to aid in rehabilitation efforts for children who have been abused while living in these institutions.[29] Attempting to draw attention to its own citizens' role in perpetuating the social issue in Cambodia, Australia is the first country to implement legislation identifying the practice of short-term volunteering in orphanages as a form of modern slavery.[30] While this recognition of the issue may impact internal guilt that foreign citizens have in the harming of Cambodian children, the policy has yet to stop other countries from allowing its citizens to partake in volunteer tourism.[31]

The link between child abuse in Cambodian orphanages and tourism is often overlooked by the good intentions of those volunteering. However, the nature of Cambodia's tourism, paired with lacking legislative components to protect children in residential care institutions is a violation of the UN Convention on the Rights of the Child — specifically specifically a child's right to a family and the right to integrate into the community.[32] It also violates obligations under the UN Convention against Torture, under Article 11.[33] The efforts of the Cambodian government to prevent the institutionalization of children as a result of tourism is increasing; however, it still needs to implement policies that prevent unlicensed orphanages and untrained volunteers from working with children to be compliant with its international legal obligations under these two conventions. Finally, the role that foreign governments play in their citizens perpetuating the institutionalization of children in Cambodia must be recognized on a global scale.

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PHOTO OF CAMBODIAN CHILDREN OUTSIDE THE KHMER LITERACY SCHOOL VIA WIKIMEDIA COMMONS USER CAMBODIA4KIDS, LICENSED UNDER CC-BY-2.0

Indonesian Government Proposes Legislation Attacking Anti-Corruption Agency, Brutally Cracks Down on Student Protesters

by Hailey Ferguson

Anti-corruption protests have been a growing trend around the world as citizens increasingly are rising up to oppose government activity that has led to systemic and endemic corruption. In the past two months, Indonesian students have led peaceful protests op-

posing such human rights abuses. The protesters' grievances are directed toward President Joko Widodo and his government, stemming primarily from the government's support of legislation recently passed in Parliament that would curb the power of the nation's anti-corruption apparatus.[1]

The Corruption Eradication Commission (KPK) was formed in 2002 with the primary goal of internally prosecuting corrupt government actors in Jakarta, but it is now in danger of being prevented from carrying out that purpose by the current government.[2] Indonesia has been plagued with corruption throughout the Widodo administration.[3] Independent corruption reports suggest rampant bribery within the public service sector and a judicial system that is independent in name but is largely influenced by political interests.[4] It is not just the KPK that is in trouble; the Widodo administration is both scrutinizing those within the government less and attacking personal and economic freedoms more by revising the Criminal Code.[5] Students and young people throughout the country have grown energized and have been demonstrating against these extreme legislative changes over the past few months. As of September 2019, Jakarta police have injured over 300 protesters, killing one.[6]

PROTESTERS IN JAKARTA ON SEPTEMBER 24TH DEMONSTRATE AGAINST THE WIDODO GOVERNMENT VIA WIKI-MEDIA COMMONS USER JAHLILMA, LICENSED UNDER CC BY-SA 4.0.

As a member of the United Nations Human Rights Council, Indonesia is under an obligation to uphold the "promotion and protection of civil rights around the globe," and within its own borders.[7] Admittedly, a seat on the Human Rights Council does not necessarily guarantee that a state upholds human rights obligations, as several of the states on the Human Rights Council have extensive records of human rights violations. However, recently Indonesia has recently taken action to permit itself to be held accountable for human rights violations. In 2006, Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR), agreeing to undertake specific responsibilities to uphold civil and political freedoms under Article 2.[8] Additionally, the right to peaceful assembly is protected under Article 21 of the ICCPR and Article 20 of the UDHR.[9] In essence, Indonesia has agreed that all people whose rights have been violated will have access to a fair remedy issued by "competent judicial, administrative, or legislative authorities," even if the violator of rights comes from within the state itself.[10] By crippling the internal accountability and anti-corruption organs within its own government, the current Indonesian administration is directly skirting those duties. Not only will there be no free and independent judiciary to deal with internal corruption, but any subsequent changes in the laws would likely infringe on the rights of Indonesian citizens.

In a sharp diversion from what many hoped would be a period of progressive reforms under Widodo, his administration has used the legislature in order to bolster its own powers.[11] The executive is effectively supporting abuses being carried out by the security forces against peaceful protesters, ultimately quashing the Indonesian people's freedom of expression.[12] Even after Human Rights Watch issued formal concerns to Widodo in writing, international or internal pressure will not force the government to abide by the agreements that Indonesia has signed.[13]

The extreme use of force against peaceful demonstrators in Jakarta and other major cities in Indonesia is particularly disturbing. After the hundreds of casualties in these protests and those in the August Papua protests, the Indonesian government has experienced increased scrutiny by human rights groups as of late.

[14] There are videos and images circulating on social media showing the police using excessive force on the protesters, mostly young university students.[15] A representative from Amnesty International in Indonesia notes that the security forces' actions are "not in accordance with standard [security] procedure," and it is written into law that the police force "must follow human rights principles while on the job."[16] Not only this, but this disturbing activity by the security force is endangering the Indonesian citizens' right to peaceful assembly clearly protected by the ICCPR and the UDHR.[17]

Human rights abuses perpetrated by state security forces against peaceful student protests in Jakarta continue a concerning trend of violent responses by police that result in civilian casualties.[18] Last year saw mass protests from citizens in Chile, Lebanon, Hong Kong, and more, demanding a change in leadership when they felt the so-called democratic systems in place had failed. Some of these protests, such as in Beirut, were also a referendum on the central governments as we saw in Jakarta, but all had a similar response from state police causing widespread injury or death.[19] There is evidence of security forces in other absolutist states systemically using torture and sexual violence against detainees arrested at peaceful protests in order to quell rising populism.[20] Additionally, many police are simply not trained to handle the large scale public movements that are increasingly common globally. Tactics such as using live ammunition to clear protesters will only cause more casualties to those asserting the rights afforded to them and contest government's claims that their security forces are there to protect citizens. Unfortunately, since these incidents are so widespread amongst countries that are experiencing populist movements similar to Indonesia, it is unlikely to see an international referendum on security force human rights abuses promptly.

With the lack of pressure against other states suffering from similar protester abuse and government corruption issues, there is little hope that other states simply condemning such issues will be effective. However, often governments are forced to make changes when faced with economic pressure from partners in the market. The Association of Southeast Asian Nations (ASEAN) established the ASEAN Economic Community (AEC) in the early 2000s, which plans to connect individual Southeast Asian markets to increase equitable development, and eventually integrate the region into the larger global marketplace.[21] This organization has already taken great strides, and only stands to become more lucrative as the region develops further. If ASEAN utilizes sanctions or regional trade freezes to block Indonesia from lucrative economic opportunities with the AEC, the Widodo government would be forced to make reforms to the administrative actions that have placed public freedoms at risk. Regional organizations with meaningful influence, economic or otherwise, are responsible for pressuring Widodo to uphold the laws that Indonesia is a signatory to in order to halt any further actions that would unduly strengthen the government at the expense of Indonesian citizens' freedom.

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In Morocco, Her Body is Not Her Choice

by Arielle Kafker

Hajar Raissouni is a writer for Akhbar Al Yaoum, an independent Moroccan newspaper. The twenty-eight-year-old was arrested on August 31, 2019 on charges of engaging in premarital sex and having an abortion.[1] She was apprehended outside her gynecologist's office alongside her fiancé, doctor, nurse, and a medical secretary, all of whom faced ancillary charges.[2] Raissouni claimed she was visiting her gynecologist because of a blood clot.[3] On September 30, 2019, a court convicted Raissouni and sentenced her to one year in prison for violating statutes on extramarital sex and prohibited abortion.[4] Officials interrogated Raissouni during her pre-trial detention and forced her to submit to a medical examination because of the alleged abortion.[5] Details of her private life were also shared with the public. Raissouni's conviction is a microcosm of Morocco's systematic violations of sexual and reproductive rights.[6]

Morocco criminalizes abortion except when a pregnancy is life-threatening to the mother.[7] Pregnancies resulting from rape and incest must be carried to term according to the law.[8] Additionally, sex before marriage is expressly prohibited: thousands of people were tried for premarital sex in 2018.[9] These prohibitions are codified in Articles 454 and 490, respectively, of Morocco's penal code.[10] Shortly after Raissouni's arrest, hundreds of women signed a manifesto proclaiming their participation in illicit premarital sex and abortion; they also took to the streets in solidarity with Raissouni and in protest of the anti-premarital sex laws.[11]

Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which Morocco ratified in 1979, guarantees the right to physical and mental health.[12] The United Nation's Economic and Social Council clarified the full scope of Article 12 in Agenda item three of its meeting in the Spring of 2000: it "may be understood as requiring measures to improve…sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."[13] A country that surveils medical offices to ensure they are not providing abortions is actively inhibiting access to reproductive health services.[14] The law forces hundreds of women to seek dangerous "back-alley" abortions every day.[15] Not only is Morocco in violation of the ICESCR, but it is leaving women with only hazardous options for terminating pregnancies.

Morocco's laws on premarital sex and abortion also contravene the premise of the Convention to End All Forms of Discrimination Against Women (CEDAW), of which Morocco is a State Party.[16] Part I Article I of CEDAW asserts that "marital status" cannot be a vehicle for discrimination.[17] Regulating sex solely amongst those who are unmarried is therefore a prohibited practice. Furthermore, Article 12 states: "state parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."[18] Equality between

the sexes cannot exist in healthcare when men have complete agency over their medical care and women do not. Morocco must better integrate family planning and women's healthcare generally as protected rights. Monitoring doctors' offices restricts forms of care women seek: when a woman is put in jail because she sought treatment for a blood clot, all women become too afraid to seek medical care for any reason. Though Morocco's policy does not directly inhibit women's access to medical services unrelated to abortion, it is the inevitable consequence of surveilling gynecological offices and penalizing women they suspect of engaging in premarital sex or abortion. To combat the diminishing of women's health—as Morocco is obligated to do under CEDAW—it must enact policies, stopping its surveillance of medical offices and its punishment of women exercising their bodily autonomy.

Morocco is also in violation of international law for its treatment of Hajar Raissouni. Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Morocco ratified in 1993, are obliged to stop torture within their borders.[19] According to the CAT, torture is defined as a public official inflicting, or consenting to, severe pain or suffering.[20] When Raissouni was taken into custody, she was brought to a hospital for a forced gynecological exam.[21] A procedure as invasive as a gynecological exam would likely result in both physical and emotional pain and suffering when done without consent.[22] This examination was intentionally executed at the bequest of the Moroccan government because it occurred while Raissouni was in the custody of the State.[23] The alleged purpose of the exam was to gain information: to discover whether an illegal abortion had occurred, which is inherently discriminatory because it stems from legislation discriminating on the basis of sex.[24]

Once the exam was complete, Raissouni was returned to detention, where she was questioned about her sexual and reproductive behaviors.[25] The information gathered by law enforcement was disseminated to the public.[26] Both are invasions of privacy that contravenes Article 12 of the Universal Declaration of Human Rights, which guarantees a right to privacy.[27] The Article espouses a general right to privacy, and specifically, that a person's reputation is protected.[28] In publicizing such socially taboo allegations, Raissouni's reputation was harmed.[29] Additionally, the International Covenant on Civil and Political Rights (ICCPR), which Morocco ratified in 1979, protects the right to privacy inclusive of reputation.[30] The ICCPR allows exceptions only when the interference is as unintrusive as possible and when there is a legitimate necessity; neither circumstance was met in this case.[31] Morocco has historically illegally interfered with the protected right to privacy of journalists through surveillance.[32]

On October 16, 2019, King Mohammed VI issued a pardon to Raissouni, and she was released from jail.[33] The state should be held accountable in terms of reparations for Raissouni, as well as for enacting policy ending the discrimination in women's healthcare provision.

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GAVEL AND MOROCCAN FLAG VIA FLICKR USER, MARCO VERCH PROFESSIONAL PHOTOGRAPHER AND SPEAKER, LICENSED UNDER CREATIVE COMMONS 2.0

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Combatting Femicide in France

by Adrian Lewis

"Femicide" is defined in France as the death of a woman at the hands of her partner or ex-partner.[1] More than 130 women were killed by their partners in 2019, exceeding the government's count of 121 victims of femicide the previous year.[2] Though not the highest among western European countries, France's rate of femicide is higher than that of many neighboring countries, including Spain, Italy, the Netherlands, and the UK.[3] A steady increase of domestic violence deaths in recent years has sparked outrage and calls for legislative change to combat the growing trend.[4] As a State Party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), France's failure to adequately address violence against women is a violation of its obligations under Article 12 of the Convention, as elaborated in CEDAW General Recommendation 19, which requires states to take all appropriate measures to ensure women have equal access to healthcare and related services, including those that protect against a known or suspected threat of physical violence.[5]

Illustrative of the worsening trend was the September 2019 murder of a 27-year old mother of three from northern France.[6] She was in the process of separating from her 37-year old husband when, following an apparent dispute, he stabbed her fourteen times as their three young children looked on. Law enforcement had been called to the woman's home only the previous week, after she reported to police that her husband was threatening her with a knife. A common thread running through so many tragic accounts of femicide is victims' repeated outreach to local police

in the days and weeks preceding their murders. Such pleas repeatedly elicited responses from law enforcement officers claiming there was not enough evidence to detain a violent abuser or to confiscate a partner's weapon.[7] The experiences of numerous victims of femicide have been shared in the press, often made public by family members only after the women's worst fears were realized.[8] Such stories recount women's harrowing struggles to seek help from police and to secure protection for themselves and their children. Increasingly, such delays are costing women their lives.[9] And with each death, calls for government action and legislative change have grown louder.[10]

In September, France's secretary for gender equality called civil society representatives together with actors from government, politics, and the healthcare sector to participate in a three-month consultation on how best to confront the challenge.[11] Results of the multi-sector initiative included plans for the widespread implementation of electronic bracelets to monitor the location of offenders in relation to their victims and the suspension of child visitation rights for offenders already separated from their former partners.[12] While the conference served to increase public awareness of the issue, activists note that no additional funding was earmarked to combat violence against women, which was one of civil society's primary demands of government in undertaking the three-month conference.[13]

Several international legal instruments exist for the protection of women who are vulnerable to the kind of domestic violence that too often ends in femicide.[14] Most notably, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) obligates member states to take positive measures to eliminate all forms of violence against women, including domestic violence.[15] Such measures are outlined in Article 2, which stipulates that signatory states "agree to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."[16] Growing rates of femicide suggest France must take additional action to establish its commitment to CEDAW. The convention's 16 articles aim to end discrimination at the root of violent crimes against women and demand active measures on the part of member states to advance this objective.[17]

In addition, France recently strengthened its commitment by adopting the Optional Protocol to CEDAW aimed at more effectively monitoring member states' compliance with the Convention.[18] On a more fundamental level, France is a party to key treaties and conventions that form the foundation of the modern international human rights framework, including the International Covenant on Civil & Political Rights (ICCPR), the International Covenant on Economic, Social & Cultural Rights (ICESCR), and the Convention Against Torture.[19] Legal analysis based on the principles in the Convention Against Torture has illustrated how acts of domestic violence can be interpreted as acts of torture.[20]

The European Union (EU) has been at the forefront of efforts to enshrine into law the equal rights of women by prioritizing them in the Strategic Engagement for Gender Equality 2016-2019 framework.[21] The Council of Europe, the EU's human rights body, took the latest step toward realizing an end to violence against women in 2011 with the ratification of the Istanbul Convention, the formal title of which is the "Council of Europe Convention on preventing and combating violence against women and domestic violence."[22] Its primary objectives are embodied in Article 3(a) of the convention; "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[23]

France's obligation to end violence against women within its borders is thus enshrined in both regional legislation like the Istanbul Convention, as well as in international agreements like CEDAW and those listed above.[24] In fulfilling its relevant obligations, France should follow the example of neighboring countries and invest additional resources into ensuring local law enforcement agencies are equipped with the training and resources to effectively aid women who report domestic violence.[25] In Spain, the government has established a separate system comprised of 100 specialized courts that hear only cases of sexual violence against women.[26] This additional measure has helped reduce the country's annual rate of femicide by

"RAPISTS, KILLERS, ABUSERS – IT'S YOUR TURN TO BE AFRAID" GRAFFITI IN RENNES, FRANCE VIA FLICKR USER ALTER1FO.COM. (CC BY-NC-ND 2.0)

one third.

In addition to providing legal remedies, Article 20 of the Istanbul Convention states that the provision of shelter and physical protection from immediate threats must always be available to victims seeking assistance and redress.[27] Under Article 15, France is obliged to take active steps to provide or strengthen appropriate training for professionals interacting with victims and to introduce training on coordinated multi-agency cooperation to enable comprehensive handling of cases involving violence against women.[28]

France's progress toward ending femicide within its borders is dependent on the implementation of the policies outlined above, as well as those detailed in the regional and international human rights conventions that have been ratified by its legislature. France's government and law enforcement agencies are afforded sufficient means within the text of such agreements to end femicide in France.[29] All that remains is a national commitment to operationalizing the legal instruments at their disposal to protect women from the threat of violence.

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Arbitrary Detention in Jammu and Kashmir

by Maya Rose Martin

Early in August 2019, the Indian government stripped Jammu and Kashmir of their special status under the Indian constitution.[1] Since then, nearly 4,000 residents of Jammu and Kashmir were arrested and detained without trial.[2] These arrests were justified by the Public Safety Act (PSA), which allows arrests to ensure public order.[3] However, these detentions violate the Indian Constitution and the International Covenant on Civil and Political Rights (ICCPR).[4] India is not fulfilling its obligations to ensure of the right to freedom from arbitrary detention and the right to a fair trial.

Since the partition of India and Pakistan, the disputed status of Jammu and Kashmir (Kashmir) has led to decades of violence in the region.[5] Kashmir has held special autonomous status protected by Article 370 of the Indian Constitution for over fifty years.[6] This status was also protected by UN Security Council Resolution 47 in 1948.[7] Since 1989, various groups have protested for Kashmir's right to self-determination, leading to a rise in violence and approximately 77,000 killed in the region over the past thirty years.[8]

On August 5, 2019, the Indian Prime Minister, Narendra Modi, controversially decided to remove Kashmir's autonomous status under Article 370.[9] Subsequently, India shut down access to internet and mobile communication in the region.[10] Adding further tension, on August 6, 2019, the President of India, Ram Nath Kovind, ordered that Jammu and Kashmir be reorganized into two separate union territories.[11] This designation eliminates representation in the federal government and gives the central government of India direct control over the region.[12]

During the lockdown, roughly 3,800 Kashmiris were detained without charge or trial.[13] According to the Indian government, as of September 6, 2019, over 1,000 remain in prison.[14]

However, most journalists have been barred from entering the region to verify data.[15] Many of those arrested have been beaten or tortured by security forces.[16] Some detained Kashmiris have been transported to prisons more than 1,000 kilometers away from Kashmir.[17] The government has not disclosed the reasons for these detentions. Those arrested include local politicians, journalists, lawyers, or suspected political dissidents, including the former chief minister of Kashmir.[18] However, the government has not provided reasons for the detention of other civilians without political influence, including children.[19]

International human rights standards do not allow for prolonged, arbitrary detention. Article 9 of the ICCPR, which India has ratified, states that no one shall be arbitrarily arrested or detained without trial.[20] The Indian security forces are obligated to inform detained individuals of the reason for their arrest and to allow them access to a trial in a timely manner. If the detention appears to be unlawful, detainees are entitled to take proceedings to court and be fairly compensated, according to ICCPR Article 9(4) and (5).[21] The Kashmir PSA violates these rights. The PSA allows civilians to be arrested for "acting in any manner prejudicial to the security of the State."[22] This contro-

versial law has been broadly applied by Indian security forces; India argues that the law protects citizens from militants.[23] In one month, 250 habeas corpus petitions were filed in the region by prisoners challenging their detention, a number that would likely increase but for the fact that there is a lack of legal representation for criminal defendants in the region.[24] However, this number does demonstrate that a large number of detainees have been imprisoned without trial.

If children have been detained in Kashmir, as some journalists have suggested, this would violate Article 37 of the Convention on the Rights of the Child (CRC).[25] Article 37 protects children from arrest and detention except as a measure of last resort. There are reports of children as young as nine being detained, but this has been disputed by the Indian government.[26] India is also violating its own constitution, as Article 22 of the Indian Constitution protects against arbitrary detention.[27] Article 22 also states that individuals are to be informed of the grounds of their arrest in a timely manner. However, Article 22(3)(b) does allow for arrests and detention on a basis of preservation of public order, but those arrests are to be held to a strict standard.[28]

Thousands of arrests have been confirmed since August 5, 2019, and few of the imprisoned have had a trial due to the PSA.[29] The High Court of Jammu and Kashmir has ignored or prolonged proceedings for the petitions of habeas corpus filed by detainees.[30] These actions directly contradict Article 9(3) of the ICCPR, intended to give individuals who are unjustly detained access to trial.[31] The situation is complicated as most attorneys in Kashmir are boycotting the court following the arrest of the leaders of the Jammu and Kashmir Bar Association in August.[32] The lack of due process and access to attorneys is preventing detainees from seeking justice.

NGOs, such as Amnesty International, have called on India to stop abusing the PSA and release detainees.[33] At the UN General Assembly in September 2019, Pakistani Prime Minister Imran Khan also called on the world to sanction India and not allow such human rights abuses in Kashmir, making a point to mention the targeting of Muslim and non-Hindu Kashmiris.[34] Few nations besides Pakistan have made diplomatic or economic efforts to condemn India.[35] The UN Human Rights Council has already condemned

PHOTO OF A ROAD IN KASHMIR'S ANCHAAR AREA AFTER YOUTH PROTESTERS CLASHED WITH POLICE FORCES VIA FLICKR USER IPS INTERPRESS SERVICE NEWS AGENCY, LICENSED UNDER PD.

India's actions in the Kashmir crisis, with seemingly little effect.[36] The most effective result may be from India's courts. Attorneys from other regions of India should be allowed to counsel detainees.[37] If petitions from Kashmir are allowed to proceed in court, the detentions may be found unconstitutional under Indian law.[38]

On October 31, 2019, Kashmir's constitution was nullified, the state was split into two territories (Jammu and Kashmir, Ladakh) and the Indian government took more direct control over the region.[39] Increased international condemnation over the crisis in Kashmir may spur the Indian government to change its actions in Jammu and Kashmir. India's judicial system should take action to curb the President and Prime Minister's actions regarding Kashmir. India is violating international human rights standards in Kashmir and should immediately give detainees access to fair and impartial legal counsel and trial.

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Xenophobia in South Africa

by Salim Rashid

In September 2019, looters and protestors targeted foreign-owned businesses in Johannesburg, killing and displacing several South African residents and immigrants.[1] These recent attacks are some of the many acts of anti-immigrant violence that have plagued business owners for the past few decades.[2] South African leaders have attempted to address these issues through a series of initiatives following South African independence in 1961. For example, the South African Human Rights Commission (SAHRC), the UN High Commissioner for Refugees (UNHCR), and the National Consortium on Refugee Affairs (NCRA) created the Roll Back Xenophobia Campaign (RBX), South Africa's first attempt at recognizing xenophobic rhetoric.[3] Unfortunately, the campaign lost funding in 2002 and never realized its goal, with xenophobic violence becoming more common in the years following.[4]

South Africa's improving economy invites unique opportunities that are imperative to the success of the continent as a whole. South Africa has the second largest economy in Africa based on its gross domestic product.[5] Its economy attracts immigrants from around the continent who are seeking refuge from poverty and persecution in their home countries.[6] Many South Africans blame immigrants for hardships they face. A Wits University study on forced migration found that sixty-four percent of South Africans believed that immigrants were "generally untrustworthy," and a similar percentage thought that South Africa would be better off if immigrants left the country.[7] Unemployment in South Africa is between twenty and forty percent; however, foreign-born residents are only three to five percent of the total population.[8] Over time, this rhetoric has evolved into violence. The South African Human Rights Commission stated that attacks against immigrants in 2008, which claimed fifty-six lives, exposed the "vulnerability of [immigrants], particularly from other African countries."[9]

Harmful rhetoric starts at the top. Reputable Government officials perpetuate negative stereotypes about immigrants.[10] Violence against immigrants and negative stereotypes reinforced by South African leadership are clear violations of South Africa's international human rights obligations. Although President Cyril Ramaphosa has condemned South African citizens, this ideology is unique among South African leadership.[11] Former President Jacob Zuma stated that the South African government cannot ignore that immigrants commit the most violent crimes.[12] Gauteng Province Police Commissioner Lieutenant, General Deliwe De Lange, claimed that "illegal" immigrants are responsible for sixty percent of "violence" in his province.[13] De Lange prefaced this comment by ensuring he is "not xenophobic." Yet, the African Institute for Security Studies found that law enforcement does not release data on nationalities of persons they arrest.[14] Intentional distortion of facts by trusted government representatives fuels distrust towards immigrants and justifies the violence that they endure. This rhetoric constitutes the government inciting violent acts against a race or group of persons of another ethnic origin.

The International Bill of Rights — consisting of the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social, and Cultural Rights (ICESCR) — is considered a hallmark declaration drafted in order to form inalienable standards amongst nations around the world.

ANTI-XENOPHOBIA SIGN FOUND AT HAROLD CRESSY HIGH SCHOOL, CAPE TOWN, SOUTH AFRICA VIA WIKIMEDIA COMMONS USER HELEN RIDING, INCLUDING CC BY-SA 4.0.

In 1948, South Africa was one of four African nations that initially abstained from signing the UDHR, partly due to the apartheid state.[15] But, on the 70th anniversary of the UDHR's creation, the Constitution of the Republic of South Africa was signed into law by former president Nelson Mandela.[16] Chapter 2 of the Constitution of the Republic of South Africa — also known as the "Bill of Rights" — contains similar principles found in the UDHR.[17] In fact, the South African Parliament considers the UDHR as a predecessor to its own Bill of Rights.[18] The history of apartheid in South Africa has shaped the strategies intended to protect South African residents from violence and discrimination; however, the application of domestic and international declarations aimed to protect human rights has gone astray.

South African officials have violated Article 2, paragraph 2 of the ICESCR by threatening the safety of people from different "national or social origin" by qualifying commonly held and inaccurate accusations.[19] Comments similar to Police Commissioner De Lange's erroneous claims victimize foreigners without any consideration of how the rhetoric influences the society at large. Additionally, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits governments from inciting any violent acts against "any race or group of persons of another . . . ethnic origin."[20] Lastly, Chapter 2, Article 9 of the Constitution of the Republic of South Africa states that the government may not unfairly discriminate against a number of protected classes.[21] However, subsection 5 of the same Article allows for "fair" discrimination, leaving room for injustices against migrants face.

Leaders of other African countries have become unsettled with South African leadership's complacency in this matter. Following the September 2019 attacks in Johannesburg, Nigerian President Muhammadu Buhari met with President Ramaphosa to discuss their shared concerns about the administration's commitment to a safe environment for immigrants.[22] Other leaders have taken a more abrasive approach. Nigeria's former Minister of Foreign Affairs, Bolaji Akinyemi, requested that the Nigerian government to take South Africa to the International Criminal Court for alleged violations of international treaties. He also claimed that the South African government violated Article 2, paragraph 2 of the ICESCR for escalating violence between South African citizens and residents. As Nigeria urges the African Union to step in and enforce these various international obligations, immigrants look for ways to safely flee the country or defend their property.[23]

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Vieques, Puerto Rico: U.S. Ecological Militarism and Climate Change

by María Alejandra Torres

Before Hurricane Maria, a category four hurricane that hit Puerto Rico on September 20, 2017, Vieques, Puerto Rico was already dealing with over fifty years of ecological devastation.[1] The hurricane caused massive damage, increased poverty levels, and accelerated mass migration, particularly at the Superfund Site in Vieques.[2] The government designates the most hazardous waste sites as Superfund Sites.[3] The EPA labeled the site a Superfund Site because of the U.S. Navy's activities, which hindered Viequenses' right to the enjoyment of a safe and clean environment, a right considered at the Thirty-Seventh Session of the Human Rights Council.[4] Moreover, Vieques' complex history with the U.S. Navy and the Environmental Protection Agency (EPA) reflects Puerto Rico's colonial status and lack of self-determination according to the UN Special Committee on Decolonization. The EPA represents the U.S.'s dedication to the protection of internationally recognized rights, but it has unsuccessfully protected these rights; yet, Puerto Rico's territorial status impedes the island's ability to enforce internationally recognized environmental law.

From the 1940s until 2003, the United States Navy commandeered about three-quarters of Vieques, an insular Puerto Rican municipality.[5] During World War II, the federal government evicted thousands of residents from their homes and placed them in "resettlement tracts" in razed sugar cane fields.[6] The government then used this land to create a U.S. naval base. The naval base used the eastern side of the island, called the "Atlantic Fleet Weapons Training Facility," for ground warfare, maneuver training, and live impacts.[7] On the western side of the island, the base used an area named the "Naval Ammunition Support Detachment (NASD)" as storage for ammunition and vehicles. In 1961, President John F. Kennedy blocked

the Navy's secret plan to displace the entire Viequense civilian population, including digging up the dead from their graves.[8]

The local resistance movement, opposing the Navy's occupation, expanded after April 19, 1999, when a U.S. F-18 fighter jet accidentally dropped two 500-pound bombs on an allegedly safe area, killing civilian David Sanes Rodriguez.[9] Due to continued protests, the U.S. Navy shut down the naval base and withdrew from Vieques in 2003, but not without leaving environmental destruction.[10]

Vieques still faces the detrimental consequences of U.S. ecological militarism, such as unexploded artillery, and monumental pollution released from the heavy metals and toxic chemicals caused by the heavy use of munition dropped on the island.[11] The Navy's militarism has worsened health conditions for locals.[12]

Consequently, and almost ironically, on February 7, 2005, the EPA placed Vieques on the National Priority List, a list of sites throughout the U.S. and its territories that contain hazardous substances or pollutants requiring further investigation, at the request of former governor, Sila María Calderón.[13] The EPA subsequently labeled the "Atlantic Fleet Weapons Training" area in Vieques a Superfund Site, recognizing it as a contaminated site, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[14] Such action demonstrates that the U.S. recognizes its obligation to manage chemicals and waste, which have severely impacted Viequenses' human right to a healthy and sustainable environment.[15] Indeed, throughout the clean-up process, the Navy and EPA must ensure community participation by meeting with residents and issuing public notices.[16]

However, the method of clean-up, carried out by the U.S. Navy itself, has been problematic for residents. The EPA and the Navy have not involved the people of Vieques in the Superfund Site decision-making process. At one point, the Navy held community meetings only in English with highly technical information not understandable by the average Viequense person.[17] Further, the Navy uses an open detonation technique that eliminates old bombs by blowing them up, and open-air burning of vegetation to find cluster bombs.[18] These methods subject locals to a cycle of ecological militarism and health issues while giving Vieques little say in the matter.[19] Vieques' lack of decision-making power contradicts the EPA's objective to rely on community involvement to understand local priorities and the goal of providing technical assistance to increase community understanding of the clean-up process.[20] The Navy is trying to fix the damage caused by decades-long activity by employing similar tactics to what created this precarious situation in the first place.

As of 2019, the EPA affirms that hazardous substances may still be present at the site, additionally stating that clean-up is not complete, human exposure is not under control, and the site is not ready for redevelopment due to contamination issues.[21] This is especially troublesome because Hurricane Maria, as well as Hurricanes Harvey and Irma, caused Superfund Sites in Puerto Rico to experience inundation, potentially widening the toxic footprint of the Vieques Site.[22] Inundation spreads toxic chemicals into waterways, communities, and farmlands, which is in contrast to the goals of the Thirty-Seventh Session of the Human Rights Council.[23] Contamination has caused heightened cancer

PHOTO OF VIEQUES, PUERTO RICO VIA FLICKR BY KATIE WHEELER, LICENSED UNDER CC BY-NC 2.0.

rates among Vieques' residents, and because there are still unexploded bombs all over the small island, Judith Enck, the former EPA administrator for Region 2, stated concern that the bombs on land washed into the sea after Hurricane Maria, further spreading contamination.[24] Indeed, if the environmental threat that Vieques faced was already perilous due to toxic pollution, and if Hurricane Maria exacerbated that level of peril with inundation, then Vieques warrants particular attention from the U.S. government. Puerto Rico is, after all, a U.S. territory subject to U.S. laws and fiscal budget — a fact that the EPA has been accused of overlooking in other scenarios.[25] These accusations may increase given President Trump's proposed 2020 fiscal budget, which would cut funding for the EPA by 31%, yet the Navy plans to complete the clean-up on land by 2026 and the underwater clean-up by 2036.[26]

Although U.S. domestic environmental law serves to protect rights that are codified within the international human rights framework, the EPA has failed to properly protect the environmental and health rights of the people of Vieques. Yet, because of Puerto Rico's status as an unincorporated territory, Puerto Rico has not been able to directly enforce U.S. environmental law. The inadequate response to the crisis in Vieques demonstrates how the federal government has violated Puerto Rico's inalienable right to self-determination and independence because the United States abstained from voting in the UN General Assembly resolution 1514 (XV).[27] According to the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ("UN Special Committee on Decolonization"), despite the majority of Puerto Rican people rejecting its current status as a U.S. territory on November 6, 2012, the United States has failed to set in motion a decolonization process for Puerto Rico.[28]

The United States' political control of Puerto Rico denies the island sovereign decision-making power to address the crisis caused by the U.S. Navy's training site and Hurricane Maria in Vieques. The United States and the political representatives of Puerto Rico must begin a decolonization process immediately, which is not only long overdue but necessary for the Viequenses to adequately combat the effects of the environmental damage and ensure the protection of their fundamental human right to a clean and healthy environment.[29] Unless the United States relinquishes its grip on Puerto Rico and places it on the path to decolonization and independence, it will be difficult for Puerto Rico to properly confront its challenges given that the federal government has not enforced the Navy's cooperation and neglected the leadership of Viequense people in the operation.

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Kazakhstan: Neglects and Abuses Against Children with Disabilities

by Courtney Veneri

Kazakhstan has nineteen state-controlled institutions for children with mental illnesses or developmental disabilities.[1] The children in these institutions are marginalized and live apart from society in poor conditions, where they are subjected to neglect and abuse.[2] Kazakhstan must improve conditions for children living with disabilities in state-controlled institutions in order to properly implement its own legislation and to comply with its international obligations.

People living with disabilities in Kazakhstan are generally not considered to be valuable members of society, and they face discrimination and isolation.[3] Therefore, parents are sometimes reluctant to register their children as having a disability — around three percent of children in Kazakhstan are registered as having a disability, as opposed to the global average of ten to fifteen percent.[4] Children who are registered as having a disability are excluded from society and kept locked away in institutions.[5] The State does not provide these children with a proper education, and they often remain in institutions for the rest of their lives, as the state moves them to an adult institution when they turn eighteen.[6] Children living with disabilities who are not in institutions are often homeschooled or put in inadequate, segregated schools.[7] These schools do not facilitate any socializing with other children, increasing the marginalization of children living with disabilities. Further, the teachers working to teach the children rarely show up, stunting their progress and preventing them from progressing in their education and knowledge.

Furthermore, the conditions of the state facilities are prison-like.[8] Children are sedated —sometimes for up to twenty-four hours.[9] They are beaten, forced to work, and made responsible for the younger children.[10] Children are crammed into rooms — up to twenty children may share a room, and those who are unable to walk are kept in beds or cribs.[11] The children living in these institutions are unable to participate in society or go to school, and are rarely given an education within the institution.[12] They are subject to physical restraints and forced sedation.[13]

In 2019, Human Rights Watch conducted in-depth interviews with children living in state-controlled institutions and published a report detailing the issues the children were facing.[14] They recommended that children should be integrated into society and that institutionalization should be ended in Kazakhstan to the furthest extent possible — by encouraging children with disabilities to be taken care of by their families and communities.[15] Children should be supported by their communities rather than forced to live in neglect.[16]

Kazakhstan is a party to both the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), and it has federal law focused on disabilities — Law No. 39/2005.[17] The general international standard for a state's responsibilities for people living with disabilities is

BEDS FOR CHILDREN WITH DISABILITIES LIVING IN A STATE-RUN INSTITUTION IN KAZAKHSTAN VIA HUMAN RIGHTS WATCH, LICENSED UNDER CC BY-NC-ND 3.0 US.

set forth in the CRPD. Article 7 requires that all the provisions set forth in the CRPD be applied to children as well.[18] States are required to ensure that people living with disabilities are able to participate in their communities and are protected from inhumane or degrading treatment.[19] Article 23 of the CRC provides the international basis for the rights of children with disabilities.[20] Article 23 requires states to provide the means for children with disabilities to live a full life, such as education, social services, and adequate medical care.[21] Further, Article 23 specifically states that these practices are all intended to allow children "active participation in the community."[22] Kazakhstan has its own law to implement the rights of people living with disabilities.[23] Article 4 requires people living with disabilities to be integrated into society, and Article 5 prevents discrimination or violation of their human rights.[24]

Kazakhstan's treatment of children who have disabilities falls short of both international law and their own legislation. Keeping children isolated from their communities directly violates the CRPD and the CRC.[25] Article 20 of the CRC requires that any child separated from the family environment be given special protection — keeping the children isolated in beds and preventing them from getting an education is directly contrary to that provision.[26] Children living with disabilities should be able to interact and participate in their communities and access education as laid out in these international covenants.

Further, the way children are treated in the state-run institutions is also not consistent with both the CRPD and the CRC.[27] Children who live in institutions must be treated with respect — abusing children or sedating them for days on end is illegal under both Conventions. This sort of abuse, such as being beaten and restrained for hours at a time, conflicts with Article 15 of the Convention for Persons with Disabilities and Article 19 of the CRC.[28] The state must treat these children with respect and provide opportunities within these institutions, such as access to education.[29] The children are entitled to the same opportunities as children living outside of institutions.[30]

Finally, Kazakhstan needs to comply with its own internal law. Kazakhstan provides its own legal framework for ensuring compliance with its international obligations, but it has failed to enforce the law on a consistent basis.[31] There needs to be an overhaul of the state-run institutions for children living with disabilities and social education to reduce the levels of societal discrimination those children are exposed to. For example, Kazakhstan could more strictly enforce rules against the abuse of children by institutional staff and begin public information campaigns to push for a better public understanding of people living with disabilities, along with creating opportunities both in institutions and outside of them to provide an education to children with disabilities. By showing that abuse will not be tolerated while also creating more community awareness and education, children living with disabilities will have more opportunities to live full lives. Kazakhstan is not compliant with its international legal obligations, nor its internal national law. It must provide better facilities for children living with disabilities in institutions, and it must start providing opportunities for these children to be included in their communities so they may benefit from education and proper care.

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Strengthening the Right to Know through Truth and Reconciliation Commissions

by Tracey B.C. Begley*

In recent decades, Truth and Reconciliation Commissions (TRCs) have been used throughout the world after an armed conflict, a specific act of violence, or sustained persecution by a State, and have served to try to help a society understand and come to terms with these actions by seeking information about what happened. Some TRCs have been able to ensure that events or individual memories of the violence are not forgotten by memorializing the work of the commission or setting up national monuments to honor all victims. TRCs are not needed for memorialization, which can take a variety of forms, including official archives of witness statements, a national monument, or experiential museums, but TRCs are often in a position to promote and ensure memorialization in an effort to promote reconciliation and provide a form of redress. Both the Inter-American Court of Human Rights (IACtHR) and Inter-American Commission on Human Rights (IACHR) have noted that TRCs are a way to "shed light on situations involving systematic human rights violations on a mass scale."[1]

TRCs have served an important role in strengthening individual and community rights related to knowing and remembering what happened during times of violence. Although, both international humanitarian and human rights law contain some elements of the right to know, such as to know the fate of missing loved ones during armed conflict. Truth and Reconciliation Commissions have consistently materialized these rights through memorialization, bringing strength and elucidation to the contours of the right to know.

This paper will give the reader a short background on the use of Truth and Reconciliation Commissions, and the basis of the right to know, or right to truth, in international humanitarian and human rights law. It will then explore how the right to know has developed through human rights soft law partially due to how TRCs have integrated memorialization into their efforts.

TRUTH AND RECONCILIATION COMMISSIONS AND MEMORIALIZATION

The idea behind a Truth and Reconciliation Commission is often simple: to find out what happened during a conflict so that people can understand these events, heal, and move forward together. Reconciliation is " . . . about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward,"[2] and memorializing those events can be essential to moving forward. Getting to "the truth," however, and what that actually is, how it is "found," and recorded, is much more complex. Typically, TRCs are distinct from courts in that they do not have a mandate to prosecute individuals, so they can find out information that may not be admissible in court, or that individuals would not share if they faced prosecution. This unique attribute comes with the ability to gather extensive information about what happened during a conflict, and presents the challenge of what to do with that information so it is memorialized and accessible. This paper will look specifically at how TRCs that are used in response to an armed conflict can serve an essential role in memorialization efforts.

Memorialization can take many forms, such as archiving of state records; archiving proceedings of a Truth and Reconciliation Commission; converting detention centers into museums, public memorials or monuments; establishing national days to honor victims; maintaining interpretive sites or experiential museums; integrating historical events into school curricula and online documentation; and many more means. Memorialization can serve to redress violations and to prevent future violations.[3] Memorialization

can be focused on the individual (e.g., specifically naming victims on a monument—or can be focused on the collective (e.g., dedicating a monument to "all victims" of a certain event). While transitional justice is often approached from a legal perspective, there is also an important role for arts and culture.[4]

RIGHT TO KNOW/RIGHT TO TRUTH AND THE DUTY TO REMEMBER

Truth and Reconciliation Commissions have made great headway in encouraging and implementing memorialization projects. Both international human rights law (IHRL) and international humanitarian law (IHL) speak to this innate desire to understand what happened to loved ones during an armed conflict or other acts of violence. When TRCs are set up in the aftermath of armed conflict, there are pertinent aspects of IHL that may come into play, and, arguably, even the human rights aspect of the right to know stem out of these explicit IHL obligations. While human rights treaties do not explicitly provide for a victims' "right to know" or the "right to truth," actors in the international community —including some UN bodies, the IACHR, and IACtHR — have extrapolated the right to know from other rights.[5] TRCs have relied on many sources for these inferences, including the Universal Declaration of Human Rights, the American Convention on Human Rights, and the American Declaration on the Rights and Duties of Man.[6] TRCs have played a pivotal role in further articulating and trying to implement these rights, as discussed below.

INTERNATIONAL HUMANITARIAN LAW

Often, but not always, TRCs are set up in the wake of an armed conflict. International humanitarian law, which applies during armed conflict and may apply to certain issues in the aftermath of a conflict, includes provisions relating to both knowing what happened to loved ones and reparations for violations.[7] The Fourth Geneva Convention of 1949 and Additional Protocol I of 1977 require parties to an international armed conflict to account for those who are missing.[8] Additionally, the Third Geneva Convention provides for an Information Bureau that would actually centralize and transmit information between parties in regard to civilians and combatants who are missing.[9] These provisions were envisioned to be used during an armed conflict, but people often remain missing long after a conflict has ended, and parties continue to be obligated to account for them.[10] Indeed, the Customary International Humanitarian Law Study conducted by the International Committee of the Red Cross (ICRC) provides that "each party to the conflict must take all feasible measure to account for persons reported missing as a result of an armed conflict and must provide their family members with information it has on their fate," which applies in both international and non-international armed conflicts.[11]

Further, IHL rules on the prohibition of enforced disappearances, the requirement to respect family life, and the obligation to record all available information prior to the disposal of the dead further strengthen the obligation on parties to account for people during and after an armed conflict.[12] There may be different mechanisms capable of sharing information, such as the Information Bureau that is described for use in international armed conflicts. Although normally at the end of an armed conflict, TRCs are also a mechanisms by which to determine where people may have perished, conduct investigations and gather witness testimonies to try to provide information about the fate of loved ones.

Many TRCs are able to recommend or provide reparations to those affected by violations, and those reparations may take the form of memorialization. IHL also provides obligations in regard to providing "compensation" to victims, which is a form of reparations. Article 91 of Additional Protocol I provides that "a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation."[13] This provision existed in the 1907 Hague Convention before the 1977 Protocols were negotiated, and is intended to apply to all parties regardless of which side "wins" the conflict.[14] Sandoz, Swinarski, and Zimmerman discuss in their commentaries, that the term compensation could mean material goods, money, or other services.[15] The term "compensation" does not necessarily encompass as many forms as is understood in the use of "reparations," but, nevertheless, it is clear that the drafters of AP I intended for some kind of amends when there were violations by the Armed Forces of one of the Parties to the conflict.[16] AP I applies only in international armed conflict, so there is a narrower scope of the application of Article 91. The ICRC Customary International Humanitarian Law

Study, however, provides that in both international and non-international armed conflict "a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."[17]

INTERNATIONAL HUMAN RIGHTS LAW AND DEVELOPMENTS THROUGH TRCS

There are no human rights treaties that explicitly provide for a "right to know" or "right to truth," but this right has developed through soft law, and particularly through case law, in the Inter-American Human Rights System. Arguably, the right to know has partially advanced through the inclusion of memorialization in recommendations by TRCs.

In 1983, Argentina set up a body to look into what happened to people who had been disappeared, known as the National Commission on the Disappeared.[18] Although it was not officially called a truth commission, it is the first widely known use of such a body. The term "truth commission" later came to be used with the setup of such commissions in Chile and El Salvador in the early 1990s.[19] A Truth and Reconciliation Commission (TRC) was famously set up in South Africa in 1995, and since then TRCs have become widely known as a transitional justice tool to move a society from armed conflict to peace and stability.[20]

These initial truth commissions began to pave the way for memorialization efforts. The report from the South African TRC report specifically recommended using memorialization efforts[21], as did the reports from Guatemala,[22] El Salvador,[23] and Argentina.[24] Recommendations included having a national day to remember the victims, naming public schools, highways and buildings after victims, and constructing national parks and monuments in commemoration of victims.

Coming out of this wave of foundational and inspirational TRCs, in 1997, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minority Rights requested a study on "the impunity of perpetrators of human rights violations."[25] In the ensuing report, author Louis Joinet wrote that from the 1970s-1990s, the international community approached perpetrators of human rights violations in a spectrum, beginning from granting amnesty and ending in the 1990s with an Inter-American Court decision that amnesty is incompatible with the right to a fair hearing before an impartial and independent court.[26]

Importantly, the Joinet report lays out 42 principles in regard to human rights violations. The principles fall into three categories, and clearly draw on the work of the TRCs in trying to help elucidate egregious events. The categories were: a. the victims' right to know; b. the victims' right to justice; and c. the victims' right to reparations.[27] He wrote that the victims' "right to know" is paralleled by States' corollary "duty to remember."[28] The "right to know," draws "upon history to prevent violations from recurring in the future," and the "duty to remember" guards "against the perversions of history that go under the names of revisionism and negationism."[29] He argues that both the right and the duty serve to unearth information about violations so that they cannot be erased from society's memory and may serve to prevent future violations. Joinet explains that one method to seek this truth is through extrajudicial commission of inquiry, and, indeed, this report was written just a few years after the first TRC was established in South Africa, which included recommendations to include "symbolic reparation(s)" such as "identifying a national day of remembrance and reconciliation, erection of memorials and monuments, and the development of museums."[30]

Joinet's third set of principles is the victims' right to reparations, which is deeply established in international law.[31] Reparations may include reinstitution, compensation, or rehabilitation.[32] While reparations are often determined on an individual level (e.g., providing monetary compensation for property loss, or medical treatment for injuries suffered during a conflict), they may also be provided in a collective manner. "Collective measures of reparation involve symbolic acts such as annual tributes of homage to the victims or public recognition by the State of its responsibility, which help to discharge the duty of remembrance and help restore victims' dignity."[33]

In 2005, Diane Orentlicher wrote an update to Joinet's 1997 report. Writing eight years later, Orentlicher was able to draw on the practice of a number of Truth and Reconciliation Commissions and developments in in-

WOMAN LIGHTING BUTTER LAMPS ON KATHMANUD, NEPAL BY FLICKR USER BRYON LIPPINCOTT CC-BY

ternational law to provide further detail and revisions to the provisions Joinet articulated. In 2005, when Orentlicher's report was published, TRCs in Chile, Chad, Ghana, El Salvador, Guatemala and Sierra Leone had already included aspects of memorialization connected to the right to know in their final recommendations and reports. Some of these TRCs called for the erection of monuments that listed all victims, or the conversion of secret detention centers into museums and memorials.

- The 2004 Sierra Leone Truth and Reconciliation Commission stated: "The Commission recommends that at least one National War Memorial be established in memory of the victims of the war. The Commission also recommends the establishment of memorials in different parts of the country. The decision on the National War Memorial should be taken after consultation with the population. It is important to remember that memorials may take different forms. Examples include the establishment of monuments, the renaming of buildings or locations, the transformation of victim's sites into useful buildings for the community, etc."[34]

- The Guatemala Historical Clarification Commission wrote: "The government should promote forms of remembering and honoring victims that can become a permanent fixture in the collective memory of present and future generations; for example, changing the names of plazas, streets or places in memory of people or events that have a collective significance and epitomize the struggle for human rights. Commemorations should redeem the values and struggles for human dignity that many victims were engaged in and that remain convictions that inspire much of society."[35]."[36]

The 2005 Updated Principles articulates that there is a specific principle of memorialization that was not included in the previous report. This principle is called "the duty to preserve memory."[37] This duty can be seen articulated and implemented in the reports from TRCs that include specific language about preserving archives and memories, such as the ones from Guatemala and Sierra Leone mentioned above. Joinet had included this as the "duty to remember," but Orentlicher's articulation is more explicit. She explains:

> "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments."[38]

Orentlicher's Updated Principles also include specific mention of the preservation of archives not only from a State's records (as a memorialization of what happened), but also of the Truth Commission itself. These archives may include witness statements, evidence, photographs, videos, and other information that would preserve the collective memory.

In the early 2010s, there were further developments of the right to know by the Inter-American Human Rights system, coming from events decades earlier. In the Inter-American Human Rights system, the right to know/the right to truth, stems from the frequent use of enforced disappearances in the region, particularly in the 1970s and 1980s, and from the commissions

created in Argentina, and later in El Salvador and Guatemala. Neither the Inter-American Declaration nor the Convention have specific provisions on the right to truth, but, the Inter-American Court has linked the right to know to IHL provisions as discussed above, as well as to the prohibition on enforced disappearances, deprivation of liberty and failure to provide information.[39] The Court has found that states do have an obligation to conduct an investigation to find the whereabouts of someone who has been disappeared so that the victim's family may know the truth of what happened.[40] The Inter-American Commission has reinforced this obligation, noting that victim's families have a right to know what happened, and States must provide a recourse for families.[41]

Additionally, in a 2012 report to the UN General Assembly, Pablo de Grieff, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, wrote that the measures of "truth, justice, reparations and guarantees of non-recurrence" while essential, may not be sufficient, and "other measures that have the potential to contribute are commemorations, the establishment of memorials and, very importantly, a reform of the educational systems".[42] These are all mechanisms to memorialize events of a conflict or mass human rights violations and ensure that they are not forgotten in the collective memory.[43]

RECENT EXAMPLES: CANADA AND NEPAL

Two of the most recent TRCs have been or are grappling themselves with these various rights and duties and how they should be implemented. In Canada, a Truth and Reconciliation Commission was created by a settlement agreement to address the legacy of the Indian Residential School program, which existed for decades.[44] "These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society . . .."[45] About 150,000 children went through the Indian Residential Schools.[46] This TRC was not created in the aftermath of a conflict or to address wrongs during a war, but the TRC recommendations were quite extensive in regards to memorialization.

The TRC report provides extensive and holistic "calls to action," including one specifically for museums and archives. The report calls on museums and archives to ensure that information about the residential schools is available publicly, that there is compliance with the Universal Declaration on Indigenous Rights, and asks the federal government to ensure resources for reconciliation related events/activities/exhibits at museums and archives.[47] Perhaps most substantially is the creation of the National Centre for Truth and Reconciliation, which houses all of the statements from the Truth and Reconciliation Commission, documents, and archives.[48] This is a place where anyone can go to read and learn about the information found through the TRC. It was created to ensure that continued learning and preserve memories.

In Nepal, there are two active truth commissions, one is the Truth and Reconciliation Commission and the second is the Commission on Investigation of Enforced Disappearance. Following a ten year armed conflict in Nepal, the fighting parties, the Government of Nepal and the Communist Party of Nepal (Maoist party), negotiated a Comprehensive Peace Agreement in 2006, which provided for the creation of a truth commission.[49] The commissions were not actually created until February 2015 through a piece of domestic legislation, and since their creation, they have received about 60,000 complaints.[50] They had mandates until only 2017, which were extended by one year until 2018, and which were then extended again for another one year each.[51] Unfortunately, the commissions have only five members,[52] which make the work quite slow given the volume, but the commission has a mandate to investigate and publish information, and to recommend reparations or compensation. Memorialization has become an essential part of the work of a truth commission.

In 2017, the International Center for Transitional Justice published a report based on interviews with Nepalis who were victims of the armed conflict.[53] The report delves into the significance of memorialization in Nepali culture, and unofficial efforts to remember victims of the war from 1996-2006. Nepalis who participated in the study noted numerous reasons why public memorialization was important, including recoding the names of people who were victims of the conflict, and seeing family members publically recognized as victims.[54] The memorials could also

serve to share stories and educate younger generations about the conflict.[55] There are already a number of unofficial memorials that have been built, and participants discussed how the location of the memorial was important in regards to whether they were in an urban area like the capital, where many people who see it, or whether they were constructed locally, where violations happen, or perhaps both for different audiences and purposes.[56] However, many participants noted that the memorials do not reduce their own suffering, but provide a public recognition of it.[57]

CONCLUSION

The actual implementation of the right to know and the right to truth through TRCs has helped human rights systems clarify and strengthen these rights. Many TRCs have reinforced duties to memorialize events, and soft law instruments have also built on these findings to develop the practice of documenting TRCs and a much stronger foundation for the right to know. As observed in some of the original TRCs — such as in South Africa, Guatemala and El Salvador — these commissions upheld the idea of the right to truth simply through their existence and objective. Additionally, the commissions' recommendations to promote memorialization reinforced the idea of the right to know. Founded on IHL and IHRL, the Inter-American system has also provided clearer articulations of these rights. Similarly, additional human rights soft law created through UN reports have further clarified, synthesized, and strengthened the right to know and the duty to remember. The continual dialogue between national mechanisms, regional bodies, and the international UN system has solidified and articulated the rights of survivors, their families, and societies to know what happened during a period of violence and for their States to ensure that these episodes are remembered. These developments have created a strong foundation for current truth commissions, including the commissions in Canada and Nepal, to ensure that memorialization efforts are included in reparations.

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Indigenous Peoples' Rights in Russian North: Main Challenges and Prospects for Future Development

by Ruslan Garipov*

I. INTRODUCTION

Beginning with the Alaska colonization period by Russians (1732-1867) and the exploration of California (Fort Ross in Northern California, 1812-1841), American Indian's culture became popular in Russia and was reflected in Russian art and literature. In 1872, Duke Alexey Alexandrovich Romanov visited America, where he hunted buffalos in the West with well-known General G. Custer and Buffalo Bill.[1] In Buffalo Bill's show "Wild West" alongside the American Indian's part of show, were Russian Cossacks, whose part proved very popular. North American Indian images were very popular among well-known Russian artists and painters such as: Nicolai Ivanovich Fechin (1881-1955), who immigrated later to the USA, and Nikolai Konstantinovich Rerikh (1874-1947), the author of the Rerikh Pact, and others. American Indians were popular among Russian writers and revolutionary leaders: Pushkin, Chekhov, Lenin and many others passed through that stage. Ivan Alekseyevich Bunin (1870-1953) translated into Russian the well-known poem "The Song of Hiawatha," which was written by American poet Henry Longfellow.

In East Germany,[2] "Red Westerns", produced by DEFA Studios as a part of anti-American propaganda, featured Native Americans as the heroes, rather than white settlers as in John Ford's Westerns in the USA. Many people in the Soviet Union fell in love with American Indian culture and history because of German and American writers, such as: Karl May, Liselotte Welskopf-Henrich, James Willard Schultz, James Fenimore Cooper, Thomas Mayne Reid, Henry Longfellow and others. An American Indians Society was created in the USSR. With these films and publications, the interest in Indians transformed from a small group episodic phenomenon to one of a larger scale at the beginning of the 1980s.[3] Soviet anti-American propaganda aggressively proclaimed Native Americans as oppressed peoples whose cultures had been destroyed by the unstoppable and ruthless march of capitalism. Newspapers publicized the events about American Indian uprising at Wounded Knee in South Dakota in 1973. People collected signatures for a petition in support of Leonard Peltier, an Indian activist jailed for the killing of two FBI agents in 1977. American Indians' image for use in anti-American propaganda was chosen not by accident, but as a result of accurate and deeply laid policy. This policy resulted in an interesting phenomenon in the Soviet Union that continues to persist in contemporary Russia.

At the same time, people in Russia are often unaware or indifferent to its own indigenous communities that inhabit Russian Northern territories. As indigenous people possess non-typical Russian features and have different ways of life became targets of racist stereotyping and numerous jokes and anecdotes.[4] Discrimination is still one of the major problems for indigenous peoples in Russia that affects their living standards and reflects in the disparity of wages, unemployment and death rates among indigenous peoples.[5] In 1999, the UN Committee on the Rights of the Child referred to the growing incidence of societal discrimination against children belonging to ethnic minorities, including indigenous peoples, and asked the Russian Federation to take all appropriate measures to improve the situation.[6]

II.WHO ARE INDIGENOUS PEOPLES IN RUSSIA?

Indigeneity is a very important and sensitive issue in modern Russia with its multi-ethnic and multicultural nature of the nation with almost two hundred different ethnicities living within the Russian Federation. The definition of indigenous peoples in the Russian Federation relies on several cumulative requirements,

outlined in the Law About Guaranties of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation (1999): (1) living in the historical territories of their ancestors; (2) preserving their traditional way of life, occupations, and folk art [handicrafts]; (3) recognizing themselves as a separate ethnicity; and (4) numbering at most 50,000 people within Russia.[7] Due to the numerical threshold, indigenous peoples in Russia are called "indigenous small-numbered peoples."[8] It is rather unique worldwide and "creates asymmetrical legislative protection among groups who share similar challenges and characteristics, but are not ultimately recognized as indigenous peoples".[9] There is a unified list of indigenous peoples in Russia, which currently enumerates a list of 47 indigenous peoples, 40 of which inhabit territories of Siberia, North and the Far East of Russia.[10]

Constituting up to 0.3 percent of Russia's population, indigenous peoples of the North represent one of the poorest and most disenfranchised segments of society.[11] This isolates them from decision-making processes. The difficulty in access of information used to be the main reason for the limited international awareness about indigenous communities in Russia,[12] and the situation has changed partly due to the monitoring process of human rights treaties and partly due to the growing number and increased activities of regional and local nongovernmental organizations.[13]

It is also important to highlight that indigenous peoples are not intrinsically vulnerable, but because of external factors brought by the modern society. Considering the climate change and industrial development in the Northern territories, many indigenous groups are now in danger of disappearing because of a high risk of pollution and threats to their traditional way of life.[14] Many of them move to the cities, where they often face social exclusion, discrimination, and, finally, assimilation. Indigenous peoples are highly susceptible to unemployment, face a variety of socioeconomic challenges, find it difficult to preserve their traditional activities, and often lose their native language and culture. Of all of the problems facing indigenous peoples, the most concerning is the right to their lands and to their traditional way of life.

III.ABORIGINAL LAW IN RUSSIA

According to the Article 69 of the Constitution, the Russian Federation shall "guarantee the rights of the indigenous small-numbered peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation".[15] This provision became an innovation for the Russian constitutional law is for the first time indigenous peoples were mentioned in the supreme legal authority. Article 9 of the Russian Constitution declares that land and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories.[16] But this provision was not further developed by federal law to address natural resources, animal husbandry, and specially protected territories of the North.

The Constitution of the Russian Federation, the Federal Law About Guaranties of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation (1999), the Federal Law About General Principles of Organization of the Communities of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East of the Russian Federation (2000), and the Federal Law About Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East of the Russian Federation (2001) set the basic legal system for the protection of the rights of indigenous peoples in the Russian Federation. Regrettably, this set is filled with legal gaps and contradictions, and needs to be advanced according to international values.[17] There is a considerable gap between general relevant standards of international law and the real situation of these peoples in Russia. The "ultimate lack of political will and focus on national economic development maintain discriminatory patterns, discourage any real participation of these communities in decisions that affect them, prolong the violations against their land rights and ultimately endanger their survival".[18]

Aboriginal legislation in Russia has not yet had the expected positive impact on the lives of indigenous peoples and "the main problem appears to be lack of implementation at the regional and local level".[19] It is often when the goodwill and availability of the local executive branch of power is more important than rule of law and plays in both positive and negative terms. For instance, in Yamalo-Nenets Autonomous Okrug, the governor organizes a monthly meeting with Nenets indigenous leaders to discuss any problems in

their communities, while in Kamchatka Kray a Council was created to deal with regional indigenous issues.[20] Aboriginal law improvement in Russia is a crucial and important task today to bring the rule of law and justice back to the people.[21]

IV. INDIGENOUS PEOPLES' RIGHTS IN RUSSIA

A rights-based, equitable dialogue between the government and indigenous peoples is mostly absent in recent years in Russia. Indigenous peoples' rights are considered something which are "granted" by the state and revoked again when needed.[22] Unlike some other industrialized nations, Russia has never acknowledged that indigenous peoples have been subjected to conquest, exploitation, oppression and marginalization and, thus, has never begun to address the legacy of the historical injustice they have suffered.[23]

During the Soviet era, the Committee of the North had created autonomous administrative regions (national acreage) and districts (national raiony) in order to protect indigenous peoples.[24] Nevertheless, the ambitious measures of such representation has not been achieved and indigenous peoples do not participate in governance of their territories.[25] Article 6 of the ILO Convention 169 requires governments to consult indigenous peoples whenever consideration is being given to legislative or administrative measures which may affect them directly and establish means by which these peoples can freely participate at all levels of decision-making in institutions and bodies responsible for policies and programs which concern them.[26] The 1999 "Guaranties" law allows for representation quotas for indigenous peoples within legislative bodies of the regional and local level.[27] Currently though, no such quota system, nor permanent seats for indigenous representatives exist in the federal or the regional level. Indigenous peoples asked for the establishment of an Indigenous Parliament, in the same manner as the Saami Parliaments in Scandinavian countries, but the first relevant draft federal law submitted to the Russian Parliament was rejected.[28]

A. Land Rights

Land rights is still the most important issue for indigenous peoples living in Russia. The economic transformation in Russia needs to be supported through institutional development, especially through the allocation of property rights in a manner that protects local economies and allows the indigenous population to participate in decision making as well as share in the benefits of development.[29]

The separation of competences concerning land rights between the federal and the regional authorities is still not clear.[30] According to the Article 72 of the Russian Constitution, the subjects of the Russian Federation have joint responsibility with the Russian Federation over issues of possession, use and management of the land, natural resources, and water.[31] At the same time, Article 36 asserts that the conditions and the order of the use of land are to be subject to federal law.[32] This framework has led to conflicting legislation and a legal vacuum in land law in Russia.[33] The 1999 "Guaranties" law protects the right of indigenous peoples to own and use, free of charge, various categories of land required for supporting their traditional economic systems and crafts.[34] In other words, the land is not protected just for the mere fact that indigenous peoples have been living there, but because the land is necessary for the traditional economic system of the indigenous community.[35]

The Federal Law "about Territories of Traditional Nature Use of the Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation" is also ineffectual. No single territory of traditional nature use was created on federal level since that law was adopted.[36]

Possibly the main problem in creating such territories is that the decision-making process is concentrated in the hands of the government, and little attention is given to the interests of indigenous peoples. The law on territories of traditional nature use does not give indigenous peoples any role in identifying the size of such territory. Article 9 of the law states that borders of the territory of traditional nature use are provided by authorities only.[37] Such an approach ignores indigenous people's interests, disregards their special connection to the land, and excludes them from participating in defining the borders of the territories of traditional nature use.[38] These issues have a particular urgency because of the increasing interest among extractive businesses in the Russian North.[39]

B. Traditional Activities

KHANTY BEAUTY WITH CHUCKA GIRL BY FLICKR USER IRINA KAZANSKAYA CC-BY-2.0.

Setting land ownership aside, indigenous rights to traditional activities are also currently under severe threat.[40] There is a problem with indigenous peoples' right to priority licensing implementation and therefore the licenses to fish and hunt often go to commercial stakeholders rather than indigenous peoples. Such a practice became the norm in Russia and gave rise to a recent complaint from Sami, an indigenous people living in the North of Russia, to the UN against the actions of the regional government about the transfer of the pasturelands in a long-term lease to a hunting club.[41] Traditional activities and access to natural resources is a part of the right to a healthy environment and an essential part of the right to life for indigenous peoples.

Article 15 of the ILO Convention 169 fixes indigenous peoples' rights to participate in the use, management and conservation of the natural resources pertaining to their lands.[42] Even though the 1999 "Guaranties" law complies with the abovementioned standards, there are no proper consultations with indigenous peoples about exploration or exploitation of natural resources in areas where they live, no compensation for the lands utilized by the state or business entities, and no environmental assessments take place.[43] Indigenous peoples often have no participation in the benefits of commercial activities on their territories as the benefits are usually divided between the federal, regional, and local governments, to which indigenous communities do not have access.[44]

The 1999 "Guaranties" law declares that indigenous peoples have the right to protect their lands and traditional way of life.[45] Ecological and ethnological examination should be done before any resource extraction is commenced on the lands of indigenous peoples. Nevertheless, this provision is ineffective, for the reason that the mechanism for such examinations has not been defined and developed on the federal level.

In the Republic of Sakha (Yakutia), one of the northern territories of Russia, a regional law was adopted in 2010 on ethnological expertise[46] that is supposed to be held prior any commercial projects on the territories of indigenous peoples to research the socio-cultural context of the development on the particular ethnic group.[47] However, many companies do not consider it binding due to the fact that it is a regional law and, therefore, not applicable to projects carried out on a federal or supra-regional level.[48]

V. CONCLUDING REMARKS

It is a significant challenge to find a way to combine economic benefits with the preservation of unique ecosystems and indigenous communities in the North. It is, therefore, important to emphasize indigenous peoples' connection to the land and subsistence off its natural resources. Their lifestyle, which is rooted in sustainable development, requires a different way of thinking compared to most modern-day populations which do not rely on subsistence.

While Russia may have positive intentions and solid laws on the books, operationalization and implementation of these laws in terms of actual consultation and participation outcomes for indigenous communities is still lags behind.[49] Rapidly evolving indigenous industry relationships and different stakeholders' expectations raise many important issues, such as human rights, negotiation processes regulation, and corporate social responsibility. "Something must be done to align the purposes of, and incentives at play in the gulf between, international investment law and indigenous

rights".[50]

Apart from developing national legislation and implementing international standards, it is significant to strengthen local management capacity and provide for the enforcement of laws designed to protect rights of indigenous peoples in Russia. It is critical to ensure that indigenous peoples have a proper governance structure, decision-making power, and capacity to participate effectively in the achievement of their development goals.

It is vital to bring to the fore the internationally recognized principle of free, prior and informed consent of indigenous peoples concerning any proposed commercial development on their territories in Russia. Commercial enterprises must recognize indigenous peoples as equal partners and allow them opportunity to co-manage profitable projects. It is indispensable to protect the environment and lands of indigenous peoples as well as their traditional way of life and traditional natural resource use. Indigenous peoples should benefit from natural resources' possession on their land instead of becoming a hostage of it and suffer oppression and degradation from its exploitation. International law provides efficient tools and mechanisms to protect indigenous peoples' interests in face of any threats connected to the exploitation of natural resources on their territories.

In 2019, the ILO celebrates the 100 year anniversary of its formation in Geneva. It is also the 30 year anniversary of the ILO Convention 169 that was signed on June 27, 1989. This Convention remains the pinnacle achievement of the trade union movement's legacy of solidarity with indigenous and tribal peoples.[51] The ILO Convention 169 remains the only international Convention that can be ratified that deals directly with the rights and cultures of indigenous peoples.[52] The principles enshrined in the Convention formalized a more expansive view of the rights of indigenous peoples in international law, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[53] The Convention has also influenced the World Bank's operational guidelines on indigenous peoples, OD 4.20.[54]

And even if a country has not ratified the Convention yet, it can still use its provisions as guidelines. For instance, Germany has not ratified Convention 169, but its development policy for cooperation with indigenous and tribal peoples in Latin America is based on the Convention.[55] Finland has not yet ratified Convention 169, but it has tried to meet many of the provisions of the Convention in the Saami Act of 1995.[56] Russia has not ratified ILO Convention 169, arguing the definition of indigenous peoples and the land ownership rights in the Convention do not meet the requirements of Russian legislation.[57] Undoubtedly, it is a good time to reevaluate the legacy of the ILO Convention 169 for indigenous peoples' rights development and take the steps necessary to meet its provisions in the Russian Federation and further its ratification.

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Universal Protocol for Investigative Interviewing and Associated Safeguards: Taking Jordan as an Example

by Lubna N. Nasser*

I. INTRODUCTION

In his last thematic report to the General Assembly in October 2016, former UN Special Rapporteur on Torture Juan E. Méndez called for the development of a universal protocol to ensure that as a matter of law and policy, no person—be it a suspect, victim, or witness—is subjected to torture, ill-treatment, or coercion while being questioned by law enforcement officials, intelligence personnel or other authorities with investigative mandates.[1]

Around the same time, the Human Rights Council adopted Resolution 31/31 calling for the implementation of safeguards to prevent torture during police custody and pretrial detention.[2] Subsequent to these developments, the creation of the protocol has been recognized as a critical objective by numerous stakeholders and has received broad support from civil society, law enforcement professionals, academics, psychologists, international organizations, and member States of the United Nations.

In principle, the universal protocol will help the global community move one step closer to reducing the incidence of torture and ill-treatment around the world and strengthen the protections for persons interviewed by authorities who, as a result, find themselves "confronted with the entire repressive machinery of society".[3] In this article, the universal protocol will be examined while taking Jordan as an example and showcasing the need and value added of such a guideline.

II. WHY ARE THE GUIDELINES NEEDED?

Law enforcement officials and other investigative bodies play a vital role in serving communities, preventing crime, and protecting human rights. One of law enforcement's key competencies is conducting interviews. The information derived from these interviews plays an integral role in the criminal justice process, affecting the outcome, reliability, and fairness of criminal proceedings. However, questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. Every day, societies are repeatedly challenged with the reality that torture persists—particularly in the context of law enforcement interviews and during the first hours of custody—despite its absolute prohibition under international law.

Justified by the need to "fight crime" and "counter terrorism," abusive interrogation practices risk becoming normalized and widespread.[4] In many parts of the world today, a suspect's confession is still considered the strongest form of evidence, often leading to incrimination without the inclusion of corroborating evidence. This phenomenon is one of the main incentives for law enforcement officials' continued use of physical and psychological ill-treatment.

Furthermore, international law mandates due process guarantees, and that safeguards be afforded during questioning to counter the risks of torture and ill-treatment, but unfortunately, they are often absent or denied. The absence of basic legal safeguards nourishes an environment where coercive methods of questioning are encouraged.[5]

Using forceful interviewing methods that amount to torture or other ill-treatment confuse and disorient persons being questioned, to the point where they may actually believe or remember occurrences that have not taken place—leading to inaccurate and deceptive information.[6] In that fashion, justice systems are weakened because justice is not served. Empirical evidence also shows that torture and mistreatment can

and will breed extremism among criminal elements and, ultimately, more crime.[7]

The forthcoming guidelines will therefore be based on decades of rigorous scientific research and evidence that unequivocally demonstrate that torture and coercion not only do not work, but, in fact, have the opposite effect, as they can produce false and unreliable information.[8] The universal protocol will embrace the idea that non-coercive interviewing methods are in fact the most effective in fighting crime—in addition to their being the first and foremost legal safeguard.[9] The universal protocol aims to give less weight to confessions and to eliminate the use of coercive investigative techniques and, consequently, lead to fewer incidences of torture and ill-treatment.[10]

Moreover, the protocol will list and develop the basic procedural safeguards pertaining to questioning already enshrined in international human rights law.[11] In addition to fostering trust in the judicial system, safeguards allow investigations to be more effective in the use of limited resources—both human and financial—normally available to those institutions.[12] Such safeguards are: information on rights, access to council, right to remain silent, medical examination and recording.[13] In addition, the protocol will emphasize the exclusion of evidence obtained under torture as it is a non-derivable norm in international law.[14] A change of mind-set—and a move away from the culture of dependence on confessions—is one of the foremost aims of the universal protocol.[15]

What is promising is that a number of States have already moved away from coercive and accusatorial interviewing models and have implemented a model similar to the one envisioned. Successful models are the PEACE model from England and Wales adopted in 1992 and the K.R.E.A.T.I.V model from Norway.[16] These models highlight how planning and preparation, engagement and explanation, accounting, closure, evaluation, and how to strategically use evidence, illustrating the critical traits that an interviewer must possess; foremost among them is the ability to develop rapport with the interviewee.[17] The protocol will underscore these best practices and how lessons learned can be utilized to ensure the protocol's effective implementation. This fair investigative process is the beginning and essence of the fair trial process to which all individuals have a right to.[18]

The ultimate goal of the universal protocol is to prevent torture and other ill-treatment practices by outlining interviewing principles and providing a model that respects its absolute prohibition. Application of the universal protocol will help states comply with their international obligations, particularly under Articles 11 and 15 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT).[19] Law enforcement officers frequently work in difficult environments and are often not adequately trained to properly respond to the situations encountered, leading them to resort to torture or other coercive practices during interviews and investigations.[20] In that connection, the guidelines will serve as an essential tool for providing much needed practical guidance to practitioners, and to changing practices and mindsets.

III. UNIVERSAL PROTOCOL IMPLEMENTATION

Central to the universal protocol's success will be its effective implementation on the ground. The protocol's procedures should be included in national systems and as a matter of law and policy to promote the actual application of the procedures by all State agents.

In order to ensure effective implementation, individuals who conduct interviews in an investigative context should undergo specialized training to ensure that the questioning is carried out at the highest level of professionalism and in compliance with human rights standards. However, comprehensive training should not only be required for interviewers but also for supervisors and high-level officials as well as all relevant personnel, such as lawyers, judges and prosecutors, so that the change in mindset and institutional culture is far-reaching and all-embracing.

The protocol shall recognize that some of the procedural safeguards have financial implications on States; as such, the protocol will outline and identify approaches to implement those safeguards in a cost-effective manner. Additionally, the protocol will articulate that the effective application of most of the safeguards contained therein can be implemented in a sustainable manner and without the need for large investments.

IV. TAKING JORDAN AS AN EXAMPLE

Jordan ratified the main human rights treaties protecting individuals from torture and ill-treatment. Such treaties are the International Covenant on Civil and Political Rights (ICCPR), United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT), Convention on the Rights of the Child and also Jordan is a party to the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court.[21] Nevertheless, ratification of international treaties is only the very first step in preventing incidents of torture and ill-treatment. The ratification places obligations on State parties and once those obligations are reflected in the domestic legislation and in practice, only then will the prevention and redress will be effective and operative. The Committee considers that the term "redress" in article 14 encompasses the concepts of "effective remedy" and "reparation."[22]

At the same time, it is important to recognize the serious challenges Jordan faces: a severe economic situation, hosting a huge influx of refugees, abating the already scarce resources in the country, security issues given its strategic geographic situation, and the constant threat of terrorism that has unfortunately materialized more frequent than usual in the past 3-4 years.[23] Per the United Nations Refugee Agency, Jordan is ranked as the second country in the world with the highest share of refugees in relevance with its population: 89 refugees per 1,000 inhabitants (666,294 registered Syrian refugees and 66,823 registered Iraqi refugees among other nationalities.)[24] "A major challenge facing Jordan remains to reinvigorate the economy in the context of a challenging external environment. Adverse regional developments, in particular the Syria and Iraq crises, remain the largest recent shock affecting Jordan.[25] This is reflected in an unprecedented refugee influx, in disrupted trade routes, and in lower investments and tourism inflows.[26] Continued regional uncertainty and reduced external assistance will continue to put pressure on Jordan.[27] All of the mentioned challenges make the law enforcement officials' jobs much more complicated and complex. Nonetheless, given Jordan's domestic and international legal obligations, it must respect human rights standards at all times in all of its processes and procedures.

National and international reports indicate that confessions are heavily relied on as core evidence and, consequently, pressuring law enforcement officials doing the questioning. For example, the U.S. Department of State's (DoS) 2018 Jordan Report on Human Rights Practices mentions allegations of torture by security and government officials as one of the most pressing and significant human rights issues in 2018.[28] And in 2006, Human Rights Watch (HRW) published a study with a focus on the Jordanian Intelligence practices.[29] In the study, a defense lawyer was interviewed, and he told HRW "that 95 percent of the evidence for the prosecution's case typically rests on confessions alone."[30] In addition, it documents how the absence of legal safeguards fosters the environment of such violations.[31]

Jordanian law does criminalize torture, but it is still not in line with international standards with few legal safeguards provided by the law.[32] The King of Jordan responded to Jordan's own small share of the Arab Spring with an unprecedented political reform to answer to people's demands.[33] As a result, the constitution was amended, and the most important amendment came to Article 8 under Chapter two of the Constitution, which provides the "Rights and Duties of Jordanians," prohibiting torture and formally forbids accepting confessions and/or evidences taken under duress.[34]

There are some provisions on interviewing techniques and legal safeguards in the Jordanian legislation, but they are not fully in line with international standards and not always implemented in practice.[35] For example, with regards to the general principles on arrest and detention, the Jordanian Criminal Procedure Code (CPC) contains certain relevant provisions with regards to the means of apprehension and its documentation. However, there is nothing found in the Jordanian Criminal Procedure Code (CPC) regarding the right to information on rights at the outset of the arrest. As for the access to counsel, the law still does not allow detainees to have legal representation at the outset of arrest but rather at the point of being charged.[36]

Furthermore, nothing can be found in the legislation with regards to the right to remain silent in the first 24 hours of arrest and before seeing a public prosecutor. Concerning recording, the CPC instructs the public

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prosecutor to have written recordings of the hearings which must be read to the defendant and, then signed by the public prosecutor, the notary, and the defendant and if the defendant refuses to sign, that should be recorded with the reasons on abstaining from signing.[37] However, nothing is mentioned in the CPC with regards to audio-visual recordings. As for medical examination, there is no explicit provision in the Jordanian legislation granting the right to prompt and independent medical examination upon arrest.

Then, looking at the safeguards provided for vulnerable populations in the law: the 2014 Juvenile Law, contains specific provisions to ensure having mechanisms in place to safeguard the juvenile from any ill-treatment or coercion during questioning.[38] Meanwhile, the new amended law on the Rights of Persons with Disabilities has no provisions stipulating special and additional rights of people with physical and intellectual disabilities when they are being questioned by law enforcement officials.[39]

Jordan has taken a few good steps in the prevention of torture and ill-treatment, but it still has a long way to go. Equivalently, examining the universal protocol and context in Jordan, it becomes crystal clear that there is an utmost need for such a protocol as a guiding principle on disposing the confession-based criminal justice systems and adopting a universally accepted interviewing technique with an emphasis on the provision and implementation of procedural legal safeguards.

V. CONCLUSION

A torture-free society is one where citizens trust their institutions, law enforcement officials, prosecutors, and the judiciary system. It is one where citizens have full confidence that these institutions exist to protect them. The universal protocol aims to implement the prohibition and prevention of torture and ill-treatment by mainstreaming non-coercive questioning techniques and insisting on the importance of safeguards in the fight against torture and other forms of ill-treatment. It will be an important tool to change mindsets and the institutional culture that relies excessively in obtaining confessions as the chief way to "solve crimes"—particularly after showcasing how coercive methods are ineffective and lead to unreliable information, which undermines justice systems and erodes society's trust in public institutions.

From my modest experience, I believe this protocol will be successful not just on paper but also in its implementation because it is tackling what Jordan—and most States—are usually most skeptical of. When States want to use the 'security' argument, or the 'counter-terrorism' argument, or that these models are unrealistic and don't reflect the challenges law enforcement officials face, the protocol will have the answers to all of that. With the right backing from the international scene and strong push on the political local level, I can see this model being adopted and trained in police academies. This vision comes with the challenge of time and resistance to change, but if the trainings were practical, bringing the best practices illustrated in the protocol to life, and harness all the lessons learned from the field to enhance the training experience, eventually a change will happen.

Once finalized, the protocol will contain a set of non-binding but highly authoritative guidelines on the conduct of non-coercive interviews and the implementation of safeguards. It will be intended to assist law enforcement officials and relevant authorities to achieve better operational results while protecting human rights and meeting the obligations to prohibit and

prevent torture and ill-treatment. Grounded in scientific research and empirical evidence that demonstrate that intimidation, ill-treatment and torture do not work, the universal protocol brings that understanding to a universal level and will play a vital role in preventing the use of torture and ill-treatment.

It is quite obvious through the Jordanian example how the universal protocol will be an instrumental and, most importantly, practical tool for States to move further away from confession-driven criminal justice systems and one step closer to making the absolute prohibition of torture a reality.

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2 Hum. Rts. Council Res. 31/31, U.N. Doc. 31/31, 1 (Mar. 24, 2016).
3U.N. Secretary-General, supra note 1, at ¶ 4.
4 U.N. Secretary-General, supra note 1, at ¶ 9; see also African Commission on Human and Peoples Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: Luanda Guidelines Trainer Manual (2017), https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_toolkit.pdf
5 U.N. Secretary-General, supra note 1, at ¶ 6.; Hum. Rts. Council Res., supra note 2, at 1.
6 U.N. Secretary-General, supra note 1, at ¶ 7.
7 Id.
8 Id.
9 See U.N. Secretary-General, supra note 1, at ¶ 3.
10See id.
11 Id. at ¶¶ 10-15.
12 See id. at ¶ 8.
13 Id. at ¶¶ 19, 21-22.
14 Juan E. Méndez, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68/Add.2 (Feb. 27, 2015).
15 Id.
16 U.N. Secretary-General, supra note 1, at ¶ 13.
17 Id.
18 Id. at ¶ 14.
19 G.A. Res. 39/46, at 1 (Dec. 10, 1984).
20 See U.N. Secretary-General, supra note 1.
21See G.A. Res. 39/46, supra note 19, at 1; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); Geneva Conventions , Aug. 12, 1949, 75 U.N.T.S. 287; Rome Statute, art. 8(2)(xxii), Jul. 17, 1998, 2187 U.N.T.S. 90.
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23 Jordan's Economic Outlook, World Bank (Oct. 3, 2018), http://pubdocs.worldbank.org/en/995001538654889315/Jordan-MPO-Revised.pdf; June 2018 Fact sheet, U.N.H.C.R. (Jun. 2018), http://reporting.unhcr.org/sites/default/files/UNHCR%20Jordan%20Fact%20Sheet%20-%20June%202018.pdf.; Jordan Overview, World Bank (Apr. 1, 2019) http://www.worldbank.org/en/country/jordan/overview.
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25 Id.
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27 Id.
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34 Constitution of Jordan of 1952, art. 8.
35 Crim. Pro. Code No 9, Official Gazette No. 1539, Mar. 16, 1961.
36 Id. at art. 63 (1) - (2).
37 Crim. Pro. Code, supra note 35, at art. 63(3).
38 Juvenile Law No 32, Official Gazette No 5310 (Nov. 11, 2014).
39 Jordan: Parliament Passes Human Rights Reforms, Advances for People With Disabilities, Women, Criminal Suspects, HUM. RTS.WATCH (Oct. 4, 2017), https://www.hrw.org/news/2017/10/04/jordan-parliament-passes-human-rights-reforms.

Prosecuting Offenders for Rape Committed in Armed Conflict: Interrogating the Accountability of the Nigerian State

by Dr. Caroline Omochavwe Oba*

INTRODUCTION

Rape has occurred during armed conflict since the beginning of time. Occurrences of rape are recorded in ancient wars, and there are passages in the Bible that make allusion to it.[1] The common narrative has been that rape committed during armed conflict is an inevitable by-product of war or a collateral damage. Whatever the merit in these perceptions, rape in armed conflict has metamorphosed from a byproduct of war to a weapon of war itself. Various actors in armed conflicts around the globe seem to have realized that rape is a deadly, efficient, and cheap tool to achieve their objectives in a conflict. These include ethnic cleansing, as found in the Bosnia wars; crushing political dissent, as seen in the Democratic Republic of Congo; and subjugation of women, as seen in the Boko Haram insurgency in Nigeria. Though rape was not treated as a crime for a long time, it is now considered as a war crime,[2] a crime against humanity[3] and a possible modality or component of genocide.[4] It is, therefore, unsurprising that the Nobel Peace Prize for 2018 was awarded to two persons who have drawn the world's attention to this dangerous trend. Both laureates were cited "to have made crucial contributions to focusing attention on, and combating rape and such like in wars."[5]

In this article, the analysis of armed conflicts will be restricted to the ongoing conflict in the north-eastern part of Nigeria between Nigeria's military and Boko Haram insurgents. Rape as a weapon of war has been perpetrated in this conflict. Women and girls are abducted and used as sexual slaves, forced into marriages and impregnated by the insurgents. There have also been allegations of rapes against members of the Nigerian military in the internally displaced persons camps set up in the region.[6] Rape has been used as a tool of war against both men and women, but this article centers on rape of women in the Boko Haram armed conflict.

BACKGROUND

In both international and Nigerian criminal law, only individuals who perpetuated rape as a tool of war are prosecuted. No attention is given to the role of the state, either by omission or commission in the use of rape as a tool of war. The prosecution of individuals alone has not served as a deterrent, and the cycle of the violence has continued unabated.

Boko Haram was founded by Mohammed Yusuf, an Islamic scholar who formed the movement to establish an Islamic State where Islamic values could be pursued and there would be no western education. The insurgents were labeled Boko Haram, meaning western education is forbidden, by the local people in the northeastern city of Maiduguri.[7] Boko Haram believes that western education, particularly the education of women, is an evil thing, as a woman's role in life is to marry, have children, and take care of the home and family.[8]

Following the Nigerian government's crackdown on Boko Haram's activities in 2009, culminating in the extra-judicial execution of Mohammed Yusuf, the group declared war against the Nigerian State. Abduction of women and girls, who are subsequently used as sex slaves, married off or given to Boko Haram fighters as compensation for their contributions, is one of the war tactics of this group.

THE ROLE OF THE STATE IN THE COMMISSION OF RAPE BY BOKO HARAM

Boko Haram has interfered in the operation of schools in the northeast and threatened violence to realize its

objectives of wiping out western education and establishing an Islamic education system. The situation peaked on April 14, 2014, when Boko Haram abducted 276 girls from their dormitory at Chibok secondary school in Borno State. Before this incident, intelligence reports detailed that the insurgents would be targeting schools. The government of Borno State was advised by the West African Examination Council (WAEC) that it was not safe to conduct the school examinations in Borno State, including Chibok. WAEC recommended that affected students be moved to the state capital to take examinations, but the recommendation was not heeded.[9] In addition, military authorities had information that Chibok was going to be attacked four hours before it happened, but no action was taken.[10] Consequently, the girls were abducted. After over two years in captivity, several girls were released, some of whom had become pregnant or nursing mothers.

In March 2018, Amnesty International alleged that a similar situation occurred, where the Nigerian government failed to act on information of an attack on Dapchi girls' secondary school in Yobe State.[11] Moreover, the insurgents have also abducted other women and girls from their communities and places where they were providing humanitarian services for victims of the insurgents' attacks, such as aid workers of the International Committee of the Red Cross.[12] The abduction of these women demonstrates gross dereliction on the part of the government to provide security for its citizens.

NIGERIAN PROSECUTION OF RAPE

Nigerian law criminalizes rape, whether committed in peace time or in a conflict situation, as seen in the penal code,[13] criminal code,[14] the criminal law of Lagos State,[15] the Child Rights Act of 2000,[16] and the Violence Against Persons Prohibition Act of 2015.[17] The Violence Against Persons Prohibition Act of 2015 brought innovations in the legal regime for prosecuting rape in Nigeria by broadening the definition of rape to include sexual invasion of any part of the victim's body.[18] The Act also increases the punishment for rape to life imprisonment and requires perpetrators of rape to register as a sex offender.[19] Internationally, Nigeria is a signatory of several treaties and conventions that condemn or criminalize rape and all forms of sexual violence in conflicts, and protects women against violence, such as the Rome Statute;[20] the African Charter on Human and Peoples' Rights;[21] and the Protocol to the African Charter on Human and Peoples' Rights on the Right of Women.[22]

Despite the comprehensive legal regime available to prosecute offenders for rape, Nigeria has neglected to carry out its obligations. According to the Federal Ministry of Justice in Nigeria, about 1,500 arrests and prosecutions of Boko Haram members took place between 2015 and 2018. The offenses charged include acts of terrorism, concealing information about acts of terrorism, hostage taking, soliciting and rendering support/membership of a terrorist group, and provision of training and recruitment of members of a terrorist group. None of the defendants in these cases were charged with rape. This is despite widespread reports of women and girls being forced into marriages, and being raped or used as sex slaves by Boko Haram, as evidenced by the rescued Chibok girls found pregnant or with babies. In addition, allegations of rape against the military were not investigated independently and transparently before they were dismissed as baseless. This is because the investigations were done by the military itself making it a judge in its own cause.

INTERROGATING THE ACCOUNTABILITY OF THE STATE

The Nigerian Constitution makes security of life and property of its citizens the main responsibility of the government.[23] Though this provision is not justiciable under the Constitution, the African Charter on Human and People's Rights contains similar provisions, which is justiciable.[24] Nigeria is also a signatory to several international treaties and conventions particularly the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women which guarantees protection of women from all forms of violence[25] and internally displaced women from all forms of violence, rape, and other kinds of sexual exploitation.[26] For any of these conventions to be enforceable in Nigeria, they must be ratified and domesticated by an act of parliament. Nigeria ratified the African Charter in 1983 and domesticated it in the same year by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[27] Under Article 18(3) of the African Charter, Nigeria is obligated to "ensure the elimination of discrimina-

tions against women and the protection of the rights of the women stipulated in international declarations and conventions".[28] Based on this provision, it is my view that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, which is an international convention, is enforceable in Nigeria though it has not domesticated it.

The abduction of the Chibok and Dapchi school girls, despite prior intelligence reports, points to the logical conclusion that the Nigerian government has failed in its obligation to protect the rights of women against violence during a conflict. It is also my view that the allegation of rape against the military was handled improperly and falls short of acceptable standards. Nigeria is responsible for acts of its agents and the lack of transparent enquiry into the allegations connotes attempts to cover up the acts of its agent to avoid responsibility. The only way to check this is to ensure accountability.[29] A writer in International Humanitarian Law, Park J., stated that some states, by omission or commission, facilitate the use of rape as a weapon of war.[30] Nigeria's failure to provide security for its citizens enabled the insurgents, so it should be held accountable. Where there is no accountability, states can be docile in the discharge of their responsibility. Responsibility without accountability gives rise to impunity.

Nigeria has also failed in its responsibility to prosecute offenders. When an offense has been committed, it falls on the state to investigate and prosecute the offenders. Under Article 11(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Right of Women, Nigeria is obliged "to bring perpetrators of violence, rape and other forms of sexual exploitation against women to justice before a competent court." Since Nigeria has not shown the will to prosecute offenders of rape committed in conflict, it is unlikely that it will refer the issue to the International Criminal Court (ICC). If the United Nations Security Council, acting under Chapter VII of the United Nations Charter, refers the matter to the ICC, or the Prosecutor of the ICC initiates an investigation into the crimes, by virtue of the power conferred on the Prosecutor under Article 15 of the Rome Statute,[31] they are unlikely to get the cooperation needed from Nigeria for the ICC to effectively prosecute.

How can Nigeria be held accountable? One way is for the African Union to conduct an inquiry into the rape committed in Nigeria during conflict and to request a report of measures taken to secure women and bring to justice persons who perpetrated rape during the conflict. There are already provisions in the African Charter and the Protocol to the African Charter on the Rights of Women requiring state parties to submit a report every two years on the legislative or other measures taken to give effect to the Charter.[32] However, there is no sanction recommended for states that fail to submit a report. This makes submission of the report optional for state parties. To enforce this provision, there should be sanctions for non-compliance. In addition, when a state is in a conflict situation, the state should be required to report efforts taken to protect the rights of women, and measures taken to bring perpetrators of rape in the conflict to justice. This can be done without derogating from the state's sovereignty, as sovereignty is not a cloak to hide from international intervention, and the concept of state sovereignty is equated with responsibility rather than immunity. According to Timothy Zick, "[i]nterventions in the internal affairs of nations in particular those stemming from concerns regarding human rights, are now routine-a circumstance that substantially diminishes a nation's internal sovereignty."[33]

Where it is found that Nigeria's failure to carry out its obligations is willful, then it should be sanctioned. In addition to condemning the action, sanctions can include making the state pay compensation to and rehabilitate the victims. So far, only the rescued Chibok girls have been rehabilitated, while other rescued women and girls are left to pick up the pieces of their lives alone. The rehabilitation of the Chibok girls was done not through a structured state policy, despite existing provisions providing for the establishment of mechanisms and accessible services for rehabilitation for victims of violence against women, but rather as an act of benevolence.[34] This is unacceptable, as the government must consider rehabilitation an obligation on its part, flowing from its failure to discharge its responsibility to its citizens.

CONCLUSION

Nigeria's primary responsibility is the security of lives and property of its citizens. It must secure women in the northeast from rape, by either Boko Haram insurgents or the Nigerian military. The Nigerian Con-

SUNRISE OVER HALEAKALA VIA FLICKR USER EWEN ROBERS, LICENSED UNDER CC BY.

stitution and international conventions, such as the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, all put this obligation on Nigeria. Carrying out this obligation will aid in the prevention of rape as a tool of war. By the same token, the government has an obligation to bring perpetrators of rape in armed conflict to justice. It should do so by either prosecuting these offenders at the national level, or if unwilling to prosecute rape as a war crime, handing offenders over to the International Criminal Court for prosecution. From the analysis in this article, Nigeria has not fulfilled its obligation. The use of rape as a tool of war goes on unabated and impunity is rife. It is my view that putting obligations on states, as done by the African Charter and the Protocol to the Charter on the Rights of Women, without any mechanism for enforcing accountability on the discharge of these obligations, leaves states at liberty to do as they please and these obligations end up no more than mere paperwork.

To break the cycle of rape as a weapon in the Boko Haram armed conflict, Nigeria must be held accountable for the role it plays in the commission of rape as a tool of war, and its duty to prosecute offenders. For an end to come to the use of rape as a weapon of war in armed conflicts, a holistic approach is recommended that involves not only prosecuting the individual offenders, but looking at the role of the state and holding it accountable for its actions and inactions.

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1 See Genesis 34:2; Judges 19:23; 2 Samuel 13:14 (King James).
2 Rome Statute art. 8(2)(xxii), Jul. 17, 1998, 2187 U.N.T.S. 90.
3 Id. at art. 7(1)(g).
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When in Conflict: Guaranteeing the Right to Education in India

by Sanskriti Sanghi*

INTRODUCTION

Since 2007, the military use of educational institutions has been documented in 29 countries, commonly those countries which have been experiencing armed conflict during the past decade.[1] Educational institutions have been taken over, partially or in entirety, in order to be converted into military bases, used for training fighters, used as interrogation and detention facilities, or to hide weapons. Such occupation or use of educational institutions for military purposes, and targeted violent attacks on educational institutions and their infrastructure, disrupt education and expose students to the risks of death, injury, recruitment, and sexual exploitation. To prevent and discourage the military use of educational institutions domestically, there must be action at the international level.

Given that the right to education is recognized in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, a legal framework is needed to protect the right and recognize the repercussions of military use of educational institutions.[2] This article addresses the historical development of the international framework leading up to the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict and the Safe Schools Declaration; and argues for India to endorse these documents.[3]

INTERNATIONAL LEGAL FRAMEWORK

The use of educational institutions by military in armed conflict was first explored as early as 1935 in the Roerich Pact, which stated that educational institutions "shall be considered as neutral and as such respected and protected by belligerents."[4] In international law, a deliberate attack on a school is prohibited and amounts to a serious violation of the laws and customs applicable in armed conflict. This is established in Article 52(2) of the Additional Protocol I to the Geneva Conventions, which recognized that "attacks shall be limited strictly to military objectives,"[5] and must comply with the rule of distinction and proportionality as required in an attack upon an object.[6] Additionally, international humanitarian law states that "intentionally directed attacks against buildings dedicated to education" constitute war crimes.[7]

The Rules of the ICRC Customary International Humanitarian Law Study refer to rules which come from a general practice accepted as law, as opposed to treaty law. These rules are of crucial importance to today's armed conflicts because they strengthen protections offered to victims by filling in the gaps left by treaty law. Rule 7 recognizes that "[t]he parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects."[8] Rule 9 states that civilian objects are not military objectives, and schools are prima facie civilian objects, unless they become military objectives.[9] Further, under Rule 10, civilian objects, such as schools, lose protective status when used for military purposes, such as hosting artillery or being used as a command post.[10] However, there is a rule of presumption that establishes that, "in case of doubt whether an object which is normally dedicated to civilian purposes, such as .... a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."[11] The objective of the Rules referenced herein and the Articles referenced in the paragraph above, within international humanitarian law, is to deter military use of civilian objects, including educational institutions.

The United Nations Security Council (UNSC) has condemned military attacks on schools as one of the

six grave violations affecting children most in times of war.[12] This classification forms the foundation that allows the UNSC to monitor, report on, and respond to abuses suffered by children during conflict.[13] Similarly, the Optional Protocol on the Involvement of Children in Armed Conflict condemns "the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools".[14] Additionally, Goal 4 of the Sustainable Development Goals 2030, entitled Quality Education, lists '[n]umber of attacks on students, personnel and institutions' as an indicator, addressing the need to safeguard education during armed conflict.[15]

In January 2009, a United Nations Committee on the Rights of the Child Report recommended that states "fulfill their obligation therein to ensure schools as zones of peace and places where intellectual curiosity and respect for universal human rights is fostered; and to ensure that schools are protected from military attacks or seizure by militants; or used as centres for recruitment."[16] In 2011, the Security Council adopted Resolution 1998, which highlighted the implications of attacks on schools for the education, safety and health of children, and called for greater action to ensure schools would not be involved in armed conflict.[17] In 2012, in light of increased international attention, a coalition of United Nations (UN) agencies and Civil Society Organizations initiated consultations with experts from around the world to develop guidelines, for both government and non-state armed groups, aimed at avoiding the military use of schools and mitigating the negative consequences of such use.

In 2014, UNSC Resolution 2143 recognized the negative impact of attacks on education and raised the issue of engagement by member states of the Security Council in the formulation of concrete measures to deter the military use of educational institutions.[18] The Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict and the Safe Schools Declaration, which were opened for endorsement at the Oslo Conference in May 2015, provide states with a voluntary, nonlegally binding framework to formulate those deterrence measures. States which endorse these legal instruments demonstrate a political commitment to do more to protect educational institutions during armed conflict. This commitment was mirrored in UNSC Resolution 2225, which expressed "deep concern that the military use of schools in contravention of applicable international law may render schools legitimate targets of attack, thus endangering the safety of children" and urged states to "take concrete measures to deter such use of schools by armed forces and armed groups."[19]

The Guidelines, though not legally binding, specify that parties to an armed conflict should take all necessary measures to avoid impinging on the safety and education of children. The six guidelines urge states to commit to not using educational premises in support of military efforts, and to extend such commitment to the premises even when the institution is not functioning due to the threat of active conflict.[20] An exception is carved out for extenuating circumstances, in which the premises must be utilized for only a limited time, with no remaining evidence of use by military forces, and availability for the school to reopen at will. States are urged to respect the civilian status of educational institutions and to disseminate and incorporate the guidelines into practice throughout the chain of command. It is also imperative for states to recognize that even if an educational institution has been converted into a military objective, it may only be attacked when no other alternative target is feasible. Consequently, states which attack and occupy educational institutions which have been converted into military objectives are also required to ensure that such premises are not used for purposes of their military personnel or activities.

The Safe Schools Declaration, which has been endorsed by 84 states as of February 2019, encourages state initiatives promoting and protecting the right to education, and facilitating the continuation of education during armed conflict.[21] The Declaration highlights that the Guidelines draw on good practice within the international framework and provide guidance to reduce the impact of armed conflict on education. The Guidelines must be used as the focal instrument to construct domestic policy and operational frameworks, develop and adopt a conflict-sensitive approach to education, focus on continuation and re-establishment of facilities, as well as support international collaborative efforts and establish effective review mechanisms.[22] Further, the Guidelines provide impetus for states to collect data on attacks on educational facilities and victims, provide assistance to

victims in a nondiscriminatory matter while investigating allegations of violations of applicable laws, and establish monitoring and reporting mechanisms.

EDUCATION UNDER ATTACK IN INDIA

As per the Education under Attack Report of 2018, between 2013-2017, military use of educational institutions in India was responsible for damaging or destroying more than 100 schools; over 30 cases of abductions, targeted killings, explosive attacks and violent repressions of student protestors; higher dropout rates among girl students due to sexual violence; and increasingly common attacks on higher education due to rising tensions between student political groups in nexus with communal tensions leading to increased violence affecting academics and students.[23]

In India, education is under attack primarily in the North-Eastern states, Eastern states, Jammu, and Kashmir. The country witnessed its highest rates of attack in 2013 during elections in the North-East and in 2016 during the violent protests in the state of Jammu and Kashmir. These areas are relatively more susceptible to disruption due to communal tensions and separatist movements which trigger unrest and require the intervention of the military.[24]

India's deviation from international law and policy protecting schools during armed conflict has led to many threats to education. India must create and implement a domestic legal framework that prevents armed conflict from affecting education.

DOMESTIC LEGAL FRAMEWORK

As per Section 3(2) of the Manoeuvres, Field Firing and Artillery Practice Act, 1938, domestic legislation which deals with power exercisable for the purpose of manoeuvres, "[t]he provisions of sub-section (1) shall not authorise entry on or interference with any … educational institution…."[25] Section 3 of the Requisitioning and Acquisition of Immovable Property Act, 1952, states that where the competent authority is of the opinion that a property is likely to be or is needed for any public purpose, the property should be requisitioned by an order in writing. The provision states: provided that no property or part thereof … is exclusively used … as a school … or for the purpose of accommodation of persons connected with the management of … such school … shall be requisitioned. [26]

The right to education is a constitutional guarantee under Article 21-A of the Constitution of India, read alongside Article 41 pertaining to right to education as a Directive Principle of State Policy, Article 45 pertaining to free and compulsory education for children, and Article 46 pertaining to the promotion of educational interests of the weaker sections of the society.[27] The domestic laws discussed above display the inadequate scope of protection provided to education in general, as well as educational institutions. They present a vacuum in comparison with international law; several of the relevant instruments have not been endorsed by India, namely the Additional Protocols to the Geneva Conventions, the Rome Statute, the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, and the Safe Schools Declaration.

Despite this vacuum, India remains bound by customary principles of International Humanitarian Law and obligations arising under ratified instruments, namely the International Covenant on Economic, Social and Cultural Rights, and the UN Convention on the Rights of the Child. In 2010, the National Commission for Protection of Child Rights recognized these obligations, noting that "[s]chools should never be used as temporary shelters by security forces. The National Commission for Protection of Child Rights is of the view that use of schools by police or security forces violates the spirit and letter of the Right to Free and Compulsory Education Act 2009 because it actively disrupts access to education and makes schools vulnerable to attacks."[28]

ROLE OF THE JUDICIARY IN INDIA

The Indian judiciary is playing a significant role in highlighting the responsibility of the police forces, military, armed groups, schools, students, teachers and educational personnel, identifying deficiencies in the law, and bringing state practice closer to international standards. In Inqualabi Nauzwan Sabha v. The State of Bihar, it was noted: "What is being complained of is that the police has occupied the building of the school with the result that the children are not being sent to school where the police has occupied the class

PHOTO OF CHILDREN STUDYING AT SCHOOL IN TEH NORTH GOA, INDIA VIA WIKIMEDIA USER SALI CHODANKAR, LICENSED UNDER CC BY-SA

rooms. This is depriving the children of education. The correct perspective would be that the police may remain within the district; but, the schools should not be closed for the reason that the classrooms have been converted into barracks. Why should this happen? This is depriving a generation and a class of children from education to which they have a right."[29]

Further, in Paschim Medinipur Bhumij Kalyan Samiti v. West Bengal, the state requisitioned 22 schools to accommodate police forces deployed there to cope with the tensions in the region. Though 10 schools had been handed over, the state was directed to give up possession of the remaining schools which had been requisitioned, within a period of one month.[30]

In Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India, the Court noted that schools, hostels and children home complexes under the control of security forces should be vacated within a provided time period, and such premises should not be allowed to be used by such forces in the future for any purpose.[31] Further, the Court directed the Ministry of Human Resource Development to submit a list of all the schools and hostels which were occupied by security forces, while the Ministry of Home Affairs was directed to ensure that the premises were vacated by such forces. Similarly, in the decision of Nandini Sundar v. The State of Chhattisgarh, the Court held that security forces that had not complied with the direction to vacate all occupied educational institutions were provided one last chance to vacate through a stipulated time period.[32]

INTERNATIONAL CONCERN OVER THE DEVIATION OF DOMESTIC LAWS IN INDIA FROM THE INTERNATIONAL LEGAL FRAMEWORK

The deviation of Indian domestic laws from the international legal framework governing education under attack has also been a subject of concern in the international community. This can be noted through the concluding observations on the report submitted by India under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which reflected that the Committee was concerned at the deliberate nature of attacks on schools by non-state armed groups as well as occupation of schools by state armed forces. The Committee urged India to proactively undertake measures to prevent the attacks on, occupation of, and use of places with a significant presence of children, such as schools, in alignment with international humanitarian law. The Committee further urged India to ensure that schools were vacated in an expeditious manner and to take concrete measures to promptly investigate cases of unlawful attacks or occupation of schools and prosecution and punishment of perpetrators.[33]

Further, the Committee on the Rights of the Child's concluding observations on the consolidated third and fourth periodic reports of India noted, "[t]he Committee … calls upon the State Party … to take measures to… [p]rohibit the occupation of schools by security forces in conflict-affected regions in compliance with international humanitarian and human rights law standards…."[34]

RECOMMENDATIONS TO ENSURE THE SAFETY OF EDUCAITON IN INDIA

In furtherance of the goal to promote and protect the right to education, even when under attack during

situations of armed conflict, India should endorse the Safe Schools Declaration, and commit to incorporating the framework of the Guidelines and intent of the Declaration into domestic policy.[35] Given that India has not provided explicit protection for the right to education within domestic laws, and has neither ratified nor signed nor endorsed the relevant international instruments identified above, it is imperative for India to implement the international legal framework and enact domestic legislation. The framework must expressly prohibit attacks on educational institutions; disseminate and build awareness on such laws, regulations, and policies which prohibit armed forces and groups from using the premises of such institutions; and ensure that all violators of international and domestic protections are held accountable. Further, in order to improve prevention as well as response, India should establish a monitoring mechanism for reporting attacks on education, collecting disaggregated data, and provide training to all armed groups, schools, students, teachers, and educational personnel.[36]

Local negotiations spearheaded by the government should attempt to further efforts at the international and national level through agreements providing educational institutions safe haven by declaring them politics-free zones, banning weapons, and providing a code of conduct for forces. Additionally, India should implement conflict sensitive education and curriculums to minimize the negative effects of attacks due to greater understanding among potential victims. Advocacy for the protection of education from attack should also be carried out at all levels with clearly defined objectives, and with messages communicated to all relevant stakeholders.[37] While endeavouring to prevent, India must also be capable of response. Importantly, it is imperative for India to provide remedies for education-related violations which must be available and effective, including fair functioning of the mechanisms and assistance to all victims seeking access to such mechanisms without discrimination. Physical protection measures must also be implemented by India to shield potential targets and reinforce their protection, as well as programs of alternate delivery of education to ensure non-interruption of education.[38]

CONCLUSION

Attacks on education have significant consequences, both short and long-term. The military use of educational institutions during armed conflict harms the education system, educators, and students. Education is critical for the social and economic recuperation of a society in the aftermath of conflict and crises, and is widely recognized as the foundation for other social, economic, and political rights. Possession and use of schools by the military impedes access to education, and threatens future outcomes for children and society as a whole. In this article, I argued that, by failing to incorporate international standards in domestic law, the right to education in India as guaranteed by the Indian Constitution is hollow.

With the endorsement of an international legal framework, incorporation of international standards within the domestic framework, and measures for protecting education and mitigating the effects of attacks, India's legal framework will be capable of protecting education. India's legal framework must not only expressly prohibit attacks on educational institutions, but must also pave the path for the establishment of a monitoring mechanism, implementation of physical protection and remedial measures for victims of education-related violence, a conflict-sensitive curriculum, and dissemination of information and awareness regarding such laws. Such a framework shall then be reflective of the enabling capacity of education, which is necessary to empower access, capacitate meaningful participation in society, and promote respect for the dignity of all.[39]

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Imbalanced Progress on the Implementation of Anti Domestic Violence Law in China

by Hao Yang and Feng Yuan*

BACKGROUND

Official statistics from the All-China Women's Federation (ACWF) in 2011 show that 24.7 percent of married women in China have suffered at least one form of domestic violence (DV) from their husbands in their marriage.[1] The prevalence rate is believed to be underestimated, as this case only covers DV in marital relations. In a regionally sampled study,[2] thirty-nine percent of Chinese women reported they experienced violence from their current or former intimate partners.

After more than a decade of advocacy by NGOs and women activists, China's national Anti-Domestic Violence Law (DV Law) finally came into effect in March 2016. For the first time, China's law now emphasized the state's obligation to address DV issues and provided a legal framework for DV prevention, justice, and service provision for DV victims.

This law defines DV as the "infringing of physical, psychological or other harm by a family member on another by beating, trussing, injury, restraint and forcible limits on personal freedom, recurring verbal abuse, threats and other means." [3] The definition covers not only marital relations but also cohabitating partners and family members. The DV law also highlights special protection for DV victims who are minors, the elderly, the disabled, pregnant and lactating women, and seriously ill patients.[4] In addition, the law has stipulations on restraining orders, warning letters, and conditional mandatory reporting to help provide better protection for victims and people affected by DV.

However, this law provides a relatively narrow definition of DV and it does not include sexual violence and economic control, which are equally prevalent forms of DV.[5] The DV law also clearly excludes violence against former spouses and intimate partners who are not living together, and it is ambiguous whether the law is applicable to same-sex partners or not.

Since the enactment of the DV law, NGOs in China have played a very proactive role in supporting its implementation. On the other hand, China's government responded at a comparatively slower pace to the need for improving the quality of implementation of the DV law, such as strengthening the capacity of law enforcers. Other stakeholders like employers have remained unaware of the DV Law and their responsibilities for preventing and addressing the impact of DV in the workplace even though the DV law states that employers should take anti-DV actions.[6]

WOMEN'S ORGANIZATIONS' EFFORTS IN PROMOTING THE IMPLEMENTATION OF DV LAW

Women's organizations are the most active actors for implementing the DV Law, particularly NGOs that focus on gender-based violence. They have conducted evaluations of the implementation of the DV law on various scales. For example, Beijing Equality,[7] which was co-founded by one of the co-authors of this article, has developed four evaluation reports regarding implementation progress of the DV law after one year, twenty months, two-year and four-year points, respectively. Given the absence of an official evaluation from the government, the findings from NGO evaluation reports like this provide significant evidence for advocacy and follow up actions for an improved implementation of the DV Law.

NGOs have also carried out considerable capacity building activities for relevant stakeholders including police, lawyers, social workers, community officials, counsellors, media professionals, as well as peer supporters to strengthen their services provided to DV

victims.

In addition, women's NGOs have been working on DV issues in many marginalized groups, such as disabled women, women living with HIV/AIDS, and LGBTI groups. For instance, Common Language[8] started to pay attention to DV issues of LGBTI groups since 2007 and completed the first study in China on DV implications on LBT women in 2009.[9] Based on DV cases among LGBTI groups, Common Language also conducted thorough analysis of gaps of implementation of the DV law, and barriers LGBTI people face when responding to DV.[10] Women's Network Against AIDS China[11] conducted a survey of the DV Experience of HIV Positive Women and Girls in 2016.[12] The survey shows 47.7 percent[13] of women living with HIV/AIDS experienced at least one type of domestic violence and they encountered substantial difficulties in access to justice and service due to their HIV status, low awareness, lack of enabling environment and existing quality service. NGOs have shared findings and policy recommendations from these studies with representatives from the National People's Congress to call their attention and advocate for future policy change. Several NGOs also carried out sensitization activities for service providers to address DV from a marginalized groups' perspective and built capacity for women living with HIV/AIDS, LGBTI and disabled women on preventing and responding to DV.

PROGRESS MADE BY THE STATE SECTORS IN IMPLEMENTING THE DV LAW

Since the enforcement of the law, several government departments at the national level, such as the Ministry of Justice, Supreme Court, ACWF, and local governments in 24 provinces have promulgated supporting measures to provide implementation guidelines for the DV law.[14] Law makers at the national level and in seven provinces have conducted inspections and field visits to monitor the implementation of the DV Law.[15] By March 2020, the four provinces of Shandong, Hunan, Hubei and Guizhou have enacted their provincial anti-DV Regulations.[16]

An important measure stemming from the new law aims to warn perpetrators and protect DV survivors, resulting in warning letters issued to minor offenders by police in most provinces [17] and protection orders were issued by court in most prefectures during the past four years. For example, the court had issued 5,749 protection orders in total by December 2019, with 2,004 protection orders issued in 2019, nearly tripling the amount issued three years ago (687).[18] The applicants of the protection orders tend to become more diverse, for example, the Changsha Women's Federation[19] have taken initiatives in applying for protection orders on behalf of female survivors.

Prosecution and detention took place in some provinces and perpetrators have received legal penalties. According to the Supreme People's Procuratorate, 5,134 people were prosecuted for DV crimes in 2016.[20] During their evaluation, Beijing Equality observed 304 media reports of DV incidents, and in 73 of them the police arrested the perpetrator. In some other cases, the court detained perpetrators who violated the protection order.[21]

Local public security bureaus have started to understand more about DV issues and are being more responsive to DV cases than before. More than ten governments at provincial and municipal levels developed concrete measures for police to handle DV cases and issue warning letters.[22] Local Public Security Bureaus in some areas such as Hunan province have also conducted training sessions on DV for police officers.[23]

The state-owned media increasingly covered DV related news and incidents in March and November, during International Women's Day and International Day of Elimination of Violence Against Women. The media reached out to women's organizations more often for information on DV issues and women's organization themselves also utilized social media to raise their voice related to DV issues. Between 2016 and 2018, at least 5,382 pieces of information on DV were published through various news outlets and forty-two percent of them were released by women's organizations.[24]

GAPS IN IMPLEMENTATION OF THE DV LAW

Despite the progress made during the past four years, there are still considerable challenges in effectively implementing the DV Law.

Although local rules of implementation of the DV law were issued at the provincial level and some govern-

ment departments at the national level also promulgated their supporting measures, there is a lack of comprehensive rules or guidance for implementation at the national level, which is needed to clarify detailed procedures, specific responsibilities and division of labor among different government departments for a more coordinated and collaborative response to DV.

Written warning letters against perpetrators as well as protection orders are being issued by the police and the courts in most provinces for a better protection of the victims. However, due to the inadequate awareness and capacity of the police, the potential of the written warning letters has not been fully utilized. For instance, police received 238 DV cases in Dezhou of Shandong province between January to November 2017, but only issued 28 warning letters.[25] Beijing Equality in their evaluation report stated that police officers in many places were still not aware of their responsibilities of issuing written warnings or the procedures.[26] It is not uncommon for police officers to ignore the request from the survivors for issuing warning letters or not to even file their complaints. Unless serious injuries are involved, the police usually refuse to assist the survivors to go to hospital, examine injuries, apply for protection orders on their behalf, or refer them to other available services.

There is also a limited number of issued protection orders. The approval rate of protection orders was sixty-three percent in 2018.[27] According to Beijing Equality's analysis of 560 Written Judgements, the withdrawal rate had reached 21.5 percent in 2018.[28] In addition, because of the conservative definition of DV in the DV Law, the protection order is rarely applicable or available to former partners or divorced couples who may still suffer from incidents of domestic violence. Local government departments and courts lack necessary human resources and expertise to properly implement judicial means, such as issuing the protection order or conducting follow up actions to ensure compliance by abusers and protection of victims. Finally, judges' inadequate understanding of the functions of the orders and procedures necessary for issuing protection orders also contributes to ineffective implementation.

It is still very challenging for the courts to verify the facts of DV due to insufficient evidence. Sometimes when the facts of DV are verified, the custody of the children is still granted to the perpetrators. Also, the DV Law requires stakeholders, such as trade unions, women's federations, federations of people with disabilities to educate or provide psychological counselling for perpetrators.[29] However, currently there are no such measures taken to rectify perpetrators' behavior and only a few NGOs have provided service for perpetrators.[30]

Although the law offers special protection to some vulnerable people like minors and the disabled, other marginalized groups, such as women living with HIV/AIDS and LGBTI, are still absent from the attention of decision-makers. Based on the DV law, anti-DV practice is no longer limited to married couples and extended to cohabiting partners in some places. However, due to low awareness of this change in the law, stakeholders such as police, village or community committees, and women's federations do not always respond to DV cases in non-marital relationships.

The utilization rate of existing DV shelters is extremely low. According to ACWF, there were over 2,000 shelters available but they only accommodated 149 people in 2015.[31] In addition, many shelters do not meet the needs of DV survivors because they are not well equipped with trained DV practitioners to provide high quality service for victims, such as psychological counselling and legal assistance.

The DV Law encourages multiple stakeholders to collaborate and present a coordinated effort to prevent and respond to DV issues. Concerning the role of key stakeholders, other than governments and social organizations, are listed in the DV Law as one of the players to raise awareness for the public and provide service for DV victims. However, the number of NGOs with a focus on addressing DV is quite limited and most of them are located in urban areas in Eastern and Southern China such as Beijing and Guangdong, leaving other parts of the country in urgent need of anti DV service.[32] Moreover, the anti DV NGOs face challenges of insufficient human resources and funding as well as inadequate technical capacity.[33]

The DV law also identified employers as one of the key stakeholders to prevent and respond to DV's impact in the workplace by educating perpetrators, providing support for DV victims and intervening in ongoing abuses. However, most employers have low awareness

COURT ROOM IN JIANGSU PROVINCE, PEOPLE'S REPUBLIC OF CHINA BY WIKIMEDIA COMMONS USER PTRUMP 16, CC-BY-SA.

of DV, DV law, or their responsibilities for addressing DV in the workplace.[34]

RECOMMENDATIONS ON IMPROVING THE IMPLEMENTATION OF THE DV LAW

Based on the imbalanced progress of implementation of the DV Law and its challenges, NGOs and practitioners urge the National People's Congress to carry out law enforcement investigations, inspections, and issue national level implementation guidelines for the DV law. The definition of DV should include sexual violence, economic control, and DV against a former spouse; elaborate specific procedures for granting protection orders; written warning letters and mandatory reporting; clarify roles and responsibilities among all stakeholders—including the leading agency in facilitating the cooperation among different departments in a coordinated response. It is suggested for the government to address a multi-sector cooperation model explicitly, it should set forth a multi-year anti-DV plan, increase the number of anti-DV projects in government purchased services, support the development of anti DV focused civil society organizations, and regularly monitor and evaluate the anti-DV work and publish DV related data and information.[35]

Related agencies should also continue to strengthen the awareness and capacity for key stakeholders including police, lawyers, judges, prosecutors, women's federations and service providers on gender equality to handle DV cases and their responsibilities for effective implementation of the DV Law.[36]

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Decolonizing Human Trafficking in Cambodia

by Corrin Chow

INTRODUCTION

The 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol") is a prosecution-driven solution to human trafficking.[1] However, under a decolonized analysis, the Protocol ignores victims' and survivors' agency, thus perpetuating ill-fitted solutions. This case study is about Cambodia. In 2008, Cambodia passed national counter-trafficking legislation entitled the Law of Suppression of Human Trafficking and Sexual Exploitation (LHTSE).[2] Although these were celebratory moments, statistics on prosecuted cases and convictions are lacking. The U.S. Department of State, which monitors the Cambodian government's remedial measures, ranked Cambodia's weak efforts in the annual U.S. Trafficking in Persons Report (TIP Report).[3] The Cambodian Phnom Penh Post, an English-newspaper established since 1992, reported government spokesman Phay Siphan speaking against Cambodia's 2019 Tier 2 Watchlist status.[4] He said, "[w]e have failed to satisfy the U.S. but, in line with the code of ethics and culture of Cambodia, we are committed to combatting trafficking."[5] There is a pertinent human trafficking crisis in Cambodia, but implementation is an issue. Since the current criminal justice approach is not procuring favorable results, scrutinizing the current model through a decolonized lens might suggest a more pertinent approach.

A decolonized perspective critiques the Eurocentric and Western bias in international human rights norms and regimes. Makua Mutua best explains this perspective using the savage-victim-savior (SVS) imagery.[6] The savage represents the State or cultural foundations that "choke or oust civil society" or cause the culture to deviate from human rights.[7] Individuals whose dignity and human rights are violated by savage state practices and cultures are perceived as victims. The victim is inherently innocence, helpless, and powerless in the face of the primitive savage. The savior acts as a shield against the savage's tyranny and "protects, vindicates, civilizes restrains, and safeguards."[8]

Embodied in the SVS critique is an understanding that cultural differences and race relations influence and construe who is the savage, victim, or savior. As we assess Cambodia's counter-trafficking efforts, SVS highlights two flaws in Cambodia's LHTSE and enforcement mechanisms. Firstly, Cambodia's internalization of the U.N. Protocol ignored the victim-stakeholder's priorities, and, consequently, Cambodia's relationship with Western influences color the problematic realities of implementing LHTSE.

The influence of SVS on Cambodia's counter-human trafficking measures taken during Cambodia's late 20th-century sociopolitical history. Under the Marxist Khmer Rouge leadership, Cambodia experienced gruesome civil war and the genocide of Cambodia's intellectual class and political dissidents.[9] The United Nations sent the U.N. Transitional Authority in Cambodia (UNTAC) to help re-establish Cambodia in 1992. UNTAC's arrival coincided with an increase in local sex work and the explosion of mostly Western NGOs.[10] Reportedly, when Cambodian Prime Minister Hun Sen was asked what the UNTAC's legacy would be, he replied, "AIDS."[11] The human rights savior created the savagery of sex trafficking within Cambodia that perpetuated Cambodia's victimhood. Certain international NGOs framed the trafficking issue to significant donors by claiming the newly developing Cambodian government was too weak to address the problem.

This western influence and demand on Cambodia continue with the TIP Report. Countries on the Tier 2 Watchlist have not complied with the minimum

standards listed in the U.S. Victims of Trafficking and Violence Protections Act of 2000 and have not demonstrated significant progress.[12] The TIP Report incentivizes the re-structuring of human rights violating states by threatening economic sanctions on totally non-compliant countries.[13]

LEGAL BACKGROUND

The U.N. Protocol's definition of "trafficking in persons" includes many crucial, but non-legal, terms, like: "exploitation" and "abuse of power" that have muddied an otherwise operational definition to detect victims and perpetrators. Cambodia, like many other countries, has adopted the Protocol's definition word for word. In adopting and modeling LHTSE after the Protocol's definitions and priorities, Cambodia misses the opportunity to prioritize the trafficking victim/survivor's priorities. LHTSE features only four articles concerning the victim's welfare: right of nullified and voided exploitative contracts (Article 45), right to damages and restitution (Articles 46-7), right to concealed identity from being published or broadcasted (Article 49). In Cambodia's 2010 Criminal Code to LHTSE, Article 287 criminalizes any prevention of a public agency or "competent private organization" that assists victims or at-risk persons.[14]

Cambodia does have a minimum standards of protection policy, which presents itself as victims-first legislation.[15] The 2009 policy strives to fill in a human rights gap but within a prosecution framework. It includes progressive measures, such as Article 6(10), a victim's right to a reasonable reflection period before making a decision.[16] This recovery time allows a victim to access services and begin recovery without undue pressure to cooperate with law enforcement or make an immediate decision.[17] Unfortunately, these minimum standards fall short of full judicial adherence and implementation.[18]

ANALYSIS

A. Critiquing the Development and Application of Counter-Trafficking Law

Cambodia's 2008 LHTSE amended the 1996 Law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Beings. Under pressure from multiple anti-trafficking NGOs and programs that were looking for significant donor funding, Cambodia "hastily enacted" its 1996 statute without much understanding of trafficking; for instance, the undefined "accomplice" could criminalize law enforcement, protecting the brothels.[19] The statute also criminalized commercial sex work only (disregarding forced labor) and indiscriminately labeled the "victim" as a person who voluntarily consented to engage in commercial sex work.

In the early 2000s, the Bush Administration—who considered all sex work as forced and exploitative—supported Cambodia and other countries with $50 million to pass new anti-trafficking bills.[20] Cambodia, with the consultation of an international group, passed the 2008 LHTSE. However, the 2008 LHTSE did not address the 1996 LHTSE's inconsistencies or leave the emphasis on sex trafficking; neither did it interpret what "exploitation" meant (Keo 2014).[21] According to the Cambodia Center for Human Rights (CCHR) 2010 report, the application of LHTSE has been "inconsistent at best and incorrect at worst."[22] One of CCHR's recommendations regarding victim protection was that the Cambodian government should ensure Cambodia's judiciary recognizes that victim protection is crucial to prosecution, and should implement and adhere to a common minimum standard of care for victims of human trafficking.

B. Benefits of a Decolonized Approach

Cambodia's economic and governance dependency makes it suspectable to the good intentions of foreign organizations and stakeholders.[23] Human trafficking is a horrific violation that should be eradicated. However, the SVS critique prompts an awareness that not all good intentions thoughtfully produce objectives or laws sensitive to power imbalances, colonial influences, and the complexities of contributory factors to human trafficking within the context of the individual's daily world. Legal practitioners, advocates, and policymakers must be aware that the various stakeholders in the counter-trafficking sector may have conflicting interests and/or different priorities (Gallagher and Surtees 2011).[24] Cambodia's anti-trafficking framework cannot be separated from its history of the West's influence. The international community's desire to rescue and redeem Cambodia from its horrific Khmer Rouge is dangerously paternalistic. This paternalism overshadows the deeply imbedded ethnic stereotypes,

ethnic preferences, migrant workers, and misogyny of victimhood.[25] These biases may determine which victims get rescued by law enforcement and their cases prosecuted. Clear demarcations between who is/is not a victim do not provide justice for the diverse perspectives and experiences of Southeast Asian sex workers. Justice calls for making the worker's voice the dominant and influential narrative.

A decolonized approach also recognizes the SVS critique in Cambodia's legislation. Cambodia's legislation was passed with the substantial help and influence of international voices. Cambodia inherited the ideals of the savior without coming into its own voice. The Western condemned Cambodia's governance ideals as savage while simultaneously recasting Cambodia's new democracy as an unblemished project, free and separated from the legacies of its colonial past. As a result, Cambodia's legislative focus on sex trafficking perpetuates a feminization of victimhood, excluding the thousands of trafficked Cambodian men working in Thai fishing vessels.[26] A decolonized perspective encourages identifying which actors and systems support trafficking schemes. Let the survivors and advocates lead the data collection by setting metrics based on their insight into the industry. Cambodia, not a Eurocentric entity, should identify which stakeholders' voices could best navigate through and whose priorities best address anti-trafficking.

CONCLUSION

Some may argue that a victim-centered approach is only as good as the enforcement. They may propose that, since corruption has made cooperation between the Cambodian police and judicial systems weak, perhaps Western intervention would be more helpful than leaving Cambodia's government alone. A Western powers-backed prosecutorial crackdown of senior Cambodian government officials may be best practice to change the culture of corruption from top-down. It may show that counter-trafficking efforts must be taken seriously. Nevertheless, prosecution should not be the only approach. Corruption is a symptom of a cultural norm. In order to tackle a pervasive practice, SVS critique forces human rights practitioners to consider the victims/survivors themselves. Relying on the survivors and advocates and listening to their priorities is how well-meaning interventions can avoid harmful implications.

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Punished for Being Abused: The Unfair Prosecution of Children Affiliated with ISIS

by Mary Kate O'Connell

Since regaining control of their state from ISIS in 2017, Iraqi and Kurdistan Regional Government Authorities (KRG) have arrested and detained approximately 1,500 children for alleged ISIS affiliation.[1] Of the children detained, an estimated 185 have been convicted for terrorism and sentenced to prison in Iraq.[2]

Many of these children were not voluntary affiliates of ISIS and should not be imprisoned for serving as child soldiers. The Paris Principles and Guidelines on Children Associated with Armed Forces of Armed Groups ("Paris Principles") defines a child soldier as a person under 18 who has been recruited or used by an armed force or armed group in any capacity, including, but not limited to, children used as fighters, cooks, porters, spies or for sexual purposes.[3] Since 2014, ISIS has kidnapped, bought, and enslaved children to assist with terrorist operations.[4] ISIS has recruited the children using aggressive propaganda that persuades parents that giving their children to ISIS leads to wealth, honor, and prosperity for the family.[5] In some ISIS controlled areas of Syria, high school and university students were required to pledge allegiance to ISIS to graduate.[6] Once successfully recruited by ISIS, many of these children are placed into religious camps where they are indoctrinated with ISIS' beliefs and missions.[7] Recruited children over the age of ten are then placed into military training.[8] If any child tries to escape or dissent, they are often beaten or killed.[9] ISIS has the most widespread use of child soldiers in modern history and continues to use child soldiers to this day.[10]

KRG's criminalization of children for their involuntary service to ISIS as child soldiers violates international law.[11] Under the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles"), children who escape or are released from involvement with armed forces retain their human rights as children and international law must be applied to any proceedings involving the children.[12] More specifically, under international law, the children may not be subjected to torture or cruel punishment, may not be sentenced to death nor life imprisonment without possibility of release, and may not be deprived of their liberty.[13] The Paris Principles also require that all appropriate action is taken to ensure family re-unification and the re-integration of the child into society.[14] The release process of a child from an armed group is crucial to the child's re-integration, and the child should not be detained or prohibited from receiving rehabilitative services.[15] The KRG is violating the Paris Principles by immediately detaining children released from ISIS control and using torture methods to elicit confessions of ISIS affiliations from children. The KRG has also not taken any necessary steps to assist in the rehabilitation or re-integration of child soldiers released from ISIS.[16]

Punishing child soldiers also violates the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[17] While the UN Convention on the Rights of the Child outlines each child's juvenile justice rights, the 2000 Optional Protocol specifically addresses the issue of children involved in armed conflict.[18] Reaffirming the importance of protecting children's rights, the Protocol describes the harmful impact of armed conflict on children and prohibits the recruitment or participation of any person under the age of 18 in armed conflict.[19] Article 7 of the Optional Protocol specifically requires member states to assist in the rehabilitation and social reintegration of persons under 18 who were recruited and involved in armed conflict.[20] Iraq ratified the Optional Protocol in 2008 which means that the KRG's current detention and sentencing of ISIS child soldiers is in violation of international

law.[21]

As a signer of the Optional Protocol, Iraq should be held accountable for violating Article 7. While the KRG is a semi-autonomous region of Iraq, it is considered part of Iraq by the United Nations. Therefore, since the KRG has violated the 2000 Optional Protocol to the Convention on the Rights of the Child and Iraq is a signing member of this treatise, the UN Security Council should make efforts to intervene in the KRG's punishment and detainment of child soldiers of ISIS. Such efforts should include requiring the KRG to release child soldiers after questioning and to implement reunification plans between child soldiers and family members. Unfortunately, Iraq is not a state member of the International Criminal Court, which means that the ICC's ability to intervene in the KRG's punishment of child soldiers is limited.[22]

Given the recent actions of KRG towards child soldiers released from ISIS control, the international community can and should intervene under the 2000 Optional Protocol to prevent further punishment of child soldiers.[23] The UN Convention on the Rights of the Child requires member states to take corrective action to protect the best interests of children and to allow all children to enjoy basic human rights.[24] KRG is violating the basic human rights of ISIS child soldiers by preventing them from family reunification and using torture methods to elicit confessions. International law requires the reintegration and rehabilitation of child soldiers, and KRG is violating international law by instead detaining, convicting, and imprisoning child soldiers for their involuntary affiliation with ISIS.

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Court of Justice of the European Union Rules Against Polish Law on the Supreme Court

by Ben Phillips

The Europe Union (EU) is embroiled in an internal struggle over the rule of law and preserving its democratic rights and values against creeping authoritarianism. The Polish legislature passed a law that lowered the retirement age of Supreme Court judges to remove current judges and pack the courts with judges that are loyal to the Law and Justice Party. In Commission v. Poland, case C619/18 (6/24/19), Court of Justice of the European Union (CJEU) ruled that the Polish Law on the Supreme Court ("Law on the Supreme Court") was contrary to EU law.[1] The CJEU addressed Poland's practice of packing courts with loyal political appointees and demonstrated how this subverts judiciary independence.[2] This decision is a major development in combating the trend of authoritarian regimes using legal methods to undermine democratic checks and balances.

The Law on the Supreme Court, passed on April 3, 2018, forced Supreme Court judges to retire at the age of sixty-five, unless they are granted an extension by the President. The CJEU struck down this law on June 24, 2019 for violating EU law on rule of law and independent judiciaries.[3] The CJEU is the constitutional supranational court of the EU, and they are often trying to balance protecting the uniformity of EU law and respecting the autonomy of the European member states. Here, the Court held that the Polish law had no legitimate government interest and violated the provisions of the Treaty on European Union (TEU).[4] The CJEU specifically pointed to the principles of independent judiciaries and the irremovability of judges. The EU is currently embroiled in what has been called the "rule of law crisis."[5] Prior to this case being decided by the CJEU, the European Commission referred the matter of the breakdown in the rule of law in Hungary, Poland, and Romania to the Council of Europe.[6] The two major regimes that have brought about this crisis are the Law and Justice Party in Poland and Prime Minister Victor Orban's Fidesz Party in Hungary. These two authoritarian regimes denounce the European judiciary for undue interference with national politics and espouse a form of unchecked nationalism.[7] This CJEU case on Poland's attempted court packing is part of a larger narrative stemming from the "rule of law crisis" and challenges to the principles of democratic governance, rule of law, and human rights law enshrined in the Treaty on the Functioning of the European Union and in the United Nations Declaration of Human Rights.[8]

At first glance, the issue of court packing may not stand out as a democratic or human rights issue. Many countries have packed courts without human rights implications. However, Hungary and Poland are packing their courts to undermine accountability and judicial independence.[9] The right to effective remedy and the right to a fair trial before independent national judiciaries are specifically protected by Articles eight and ten of the United Nations Declaration of Human Rights.[10] The right to effective remedy and fair trial are also protected under Article 47 of the Charter of Fundamental Rights of the European Union.[11] The right to a fair trial and judicial independence are critical to protecting individual rights, and these rights are also imperative for enforcing checks on other human rights abuses as well.

These authoritarian regimes use legal methods to undermine their own institutions and advance their illiberal law and policies. There are concerted efforts in both Hungary and Poland to dismantle democratic protections.[12] These regimes did not gain power all at once. Instead, their leaders and political groups have slowly and strategically subverted their country's democratic institutions and processes in order to entrench themselves in power and destroy the checks and balances within their systems.[13] These regimes

focused on compromising the impartiality of the judiciary, replacing judges and packing courts, and increasing political appointments of loyal judges.[14] The compromised impartiality of the Polish and Hungarian judiciaries have paved the way for attacks on reporters, detaining asylum seekers and immigrants in Hungary, and restricting the rights of Civil Society Organizations and Human Rights organizations to gather freely in Poland.[15] These largely unchecked actions are possible, in part, thanks to the Polish and Hungarian regimes sabotage of their democratic institutions. These actions are the backdrop for the CJEU decision in Commission v. Poland.

The CJEU struck down the Law on the Supreme Court because it violated EU Law. Specifically, the CJEU cited to Article 19(1) of the TEU, "Member States shall provide remedies sufficient to ensure effective legal protection" of EU law and Article 47 of the Charter of Fundamental Rights of the European Union, the right to effective remedy and a fair trial.[16] The Court argued that Poland's compulsory retirement of judges on the Supreme Court undermined the independence and effectiveness of the judiciary, in violation of the fact that domestic courts are also EU courts and must monitor the effective implementation of EU law.[17] The Court further argued that the law compromised the judges' impartiality because the President had complete discretion to extend (or not extend) judicial terms past the retirement age.[18] The Court ruled that court packing and eroding judicial independence violated the principle of rule of law espoused in Article 2 of the TEU, which lays out the fundamental principles of the EU and its member states.[19] This ruling shows that the CJEU and laws of the EU can still be relied on to deal with the rule of law crisis in Europe.

Since the CJEU's judgement, the judges removed by the Law on the Supreme Court have been reinstated.[20] If the CJEU can have such effect in Poland, it can also monitor other laws and policies that undermine judicial independence in Romania and other European countries edging towards illiberal policies and authoritarianism.[21] These governments intentionally compromise their own judiciaries to silence political opposition and circumvent the enforcement of other human rights obligations. However, the effective use of the CJEU and other EU institutions is an important strategy to curb the spread and empowerment of authoritarian regimes. Most importantly, it demonstrates that these countries are still able to be held accountable and cannot completely evade enforcement. Outside of actual changes caused by the CJEU decision, it also represents an ideological demonstration that the EU will take active measures to stand against policies and laws meant to undermine judicial independence and other democratic values. The intervention of the EU and the CJEU is a concrete step toward combatting undemocratic policies and laws that limit access to an independent judiciary and a fair trial.

The CJEU decision on Poland's Law on the Supreme Court is an important moment in addressing the rule of law crisis in Europe. The EU must apply and replicate these processes in the other member states in the EU that are employing similar practices to threaten the independence of their judiciaries. This is imperative to combat the erosion of judicial independence and maintain checks on authoritarian executive and legislative powers. The right to a fair trial and independent judiciary are vital human rights because they protect the rule of law and ensure that other obligations are being enforced.

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A New Approach: Gang-based Asylum in the Age of "Zero Tolerance"

by Caylee Watson

A record number of migrants are fleeing the Northern Triangle. In recent years, about 265,000 migrants have left annually. This number is on track to more than double in 2019.[1] Gang violence, corruption, and a lack of economic opportunity and security challenge Guatemala, El Salvador, and Honduras.[2] Homicide rates in the Northern Triangle have been among the world's highest for decades.[3] It is no secret that the U.S. foreign policy in the 1970s through the 1990s laid the foundation for much of the instability in the region. Over the past twenty years, the U.S. has attempted, with limited effect, to remedy the situation by aiding programs that try to combat the underlying issues causing some of the instability.

During the 2016 presidential campaign, Donald Trump promised to reduce "illegal immigration."[4] When he became president, in addition to developing a scheme to build a wall on the Mexican northern-U.S. southern border, President Trump enacted "zero-tolerance" policies that led to family separation.[5] Since Trump took office three years ago, not only has the United States seen an influx in irregular entries at the southern border, but the zero-tolerance policies may even violate domestic and international law.[6]

For example, in the spring of 2018, the Trump Administration ("Administration") implemented a zero-tolerance policy which sought to criminally prosecute all adults entering the United States irregularly, including asylum seekers, and those traveling with children.[7] Simultaneously, the Administration cut hundreds of millions of dollars in aid to the Northern Triangle because the countries "failed to slow migration flows to the United States."[8] These policies contradict each other — experts agree that cutting off assistance aimed to help programs improve safety and economic security in the region was only going to cause migration to increase.[9] In fact, the policies have failed to slow the number of migrants and have led to overcrowded detention centers and a massive backlog in U.S. immigration courts.

One aspect of immigration policy that the Administration cannot override through proclamation or executive order is asylum law. Under the Refugee Convention and Protocol, the U.S. cannot deny entry to asylum seekers.[10] Domestically, an asylum applicant meets the definition of a refugee under INA § 101(a)(42) if the person seeking asylum is "unable or unwilling to return to . . . [his or her] country [of origin] because of persecution or a well- founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[11]

However, in the past year, alongside the above-mentioned executive orders, the Attorney General ("AG") has decided a number of cases that impede traditional Asylum law.[12] In Matter of A-B- and Matter of L-E-A-, the AG attempted to limit the scope of the frequently utilized protected ground, "particular social group," by asylum applicants fleeing gang violence in the Northern Triangle.[13] Prior to Matter of L-E-A- and Matter of A-B-, an applicant could demonstrate that they were persecuted as a member of a particular social group if they could show that they were persecuted because of gender-based domestic violence or because of their familiar ties. Now, in circuit courts that lack overriding precedent, both Attorney General Sessions' and Barr's interpretations present problems for applicants. This article suggests a supplementary approach—(imputed) political opinion—for attorneys representing asylum applicants fleeing gang-based persecution.

For an applicant to establish their eligibility for asylum on account of political opinion, the applicant must

allege specific facts from which it can be inferred that they hold a political opinion known to the persecutor, and that the persecution occurred on account of that political opinion.[14] The protected ground of (imputed) political opinion is a valid strategy when advocating for victims claiming asylum for gang opposition. For example, although gangs are not "the state," in the Northern Triangle, certain gangs operate as the "de facto" government and wield more power and control over the country and its citizens.[15] The UNHCR explained that "[t]he ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and sociocultural context of the country of origin.[16] In contexts, such as in El Salvador and Guatemala, objections to the activities of gangs may be considered as opinions that are critical of the methods and policies of those in control and, thus, constitute a "political opinion" within the meaning of the refugee definition. For example, individuals who resist recruitment by gangs, or who refuse to comply with demands made by the gangs, such as demands to pay extortion money, may be perceived as holding a political opinion. In addition, the gangs in the Northern Triangle have demonstrated a capacity to challenge states directly by murdering state officials and controlling other corrupt law enforcement, political, or local security officers. Therefore, those victims who resist such authorities are persecuted on account of their political opinion because, in the Northern Triangle, the gangs have infiltrated the state and are in control of the political world.[17]

Although some immigration courts have failed to find asylum based on this approach, the adjudicators explained that they were not presented with enough evidence to show significant gang control of the state. For example, Matter of S-P- held that imputed political opinion may satisfy the refugee definition.[18] Therefore, with some adjustments, advocates can use this case to make valid asylum claims.

Additionally, in Koudriachova v. Gonzales, the Second Circuit emphasized, for imputed political opinion, "the relevant question is not whether an applicant subjectively holds a particular political view, but instead, whether the authorities in the applicant's home country perceive him to hold a political opinion and would persecute him on that basis."[19] When determining authorities, "adjudicators must consider the claim within the context of the country itself." Also, in the Ninth Circuit, the Court in Regalado-Escobar v. Holder, found that opposition to a strategy of violence can constitute a political opinion for asylum purposes.[20]

In their article 'Third Generation' Gangs, Warfare in Central America, and Refugee Law's Political Opinion Ground, Deborah Anker and Palmer Lawrence argue that despite the positive foundation, Immigration Judges dealing with seriously overloaded dockets, limited authority to grant continuances, and completion quotas will be hard-pressed to engage in "complex and contextual factual inquiry."[21] Practitioners should do their best to educate adjudicators through country-condition evidence, expert testimony, memoranda of law, and detailed direct examination of the asylum seeker.

For example, in Marroquin-Ochoma v Holder, the Eighth Circuit indicated that ". . . [e]vidence that the gang is politically minded could be considered evidence that the gang members would be somewhat more likely to attribute political opinions to resisters," but found that a "generalized political motive underlying the gang's forced recruitment" was inadequate evidence to establish that resistance to the recruitment efforts was based on an anti-gang political opinion.[22] More recently, this approach succeeded in the Fourth Circuit case, Alvarez Lagos, where the Court concluded that the country conditions and evidence presented by the applicant showed that Mara 18, a powerful gang in the Americas, imputed her anti-gang political opinion and that opinion was one central reason for her persecution.[23] Expert testimony showed that Alvarez Lagos's failure to comply with the gang's demands and subsequent flight to the United States would be seen by Mara 18 as "a direct challenge to its efforts to establish and maintain political domination within Honduras." As a direct result, she would be "targeted for violence in a manner that was very graphic, and visible to the community." Another expert explained that failure to pay was not simply a refusal to pay a debt, but Mara 18 would feel "compelled to crush what it views as political resistance."

Although the imputed political opinion route may be weaker than the well-established, but recently contested, protected ground of "particular social group," it does not diminish the fact that it is a perfectly valid way to argue a protected category. Under current case law, international law, and conditions in the Northern

Triangle, the Courts are making the correct decisions in recognizing (imputed) political opinion. The idea that opinions or matters that involve gangs might constitute political opinion is supported by the Office of the United Nations High Commissioner for Refugees (UNHCR), which has recently published Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Guatemala (January 2018), El Salvador (March 2016), and Honduras (July 2016).[24] Therefore, the U.S. has a duty under the obligations of the Refugee Convention and Optional Protocol to recognize this protected category.

Not only is (imputed) political opinion based on gang persecution a valid protected category, but it could lead a new age of asylum law practice during zero-tolerance.

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Collective Reincorporation Processes in the Colombia Peace Accord

by Christopher Baumohl

Participating Organizations:

- Comité Permanente por la Defensa de los Derechos Humanos (CPDH)
- Fundación por la Defensa de los Derechos Humanos y del Derecho Internacional Humanitario del Oriente y Centro de Colombia (DHOC)

The following is a summary of a hearing of the 173rd Period of Sessions at the Inter-American Commission on September 26, 2019. Nearly three years after the historic peace accord between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC), many Colombians, especially those in rural areas, are still waiting for conditions to improve.[1] At a hearing before the Inter-American Commission on Human Rights (the Commission) on September 26, 2019, advocates from Comité Permanente por la Defensa de los Derechos Humanos (CPDH) and Fundación por la Defensa de los Derechos Humanos y del Derecho Internacional Humanitario del Oriente y Centro de Colombia (DHOC) argued that the government of Colombia must do more to protect the rights of ex-combatants and promote full implementation of the accord to safeguard Colombia's progress toward peace.

Colombia has been engaged in a protracted battle against guerrilla groups for over five decades, resulting in more than 220,000 deaths.[2] The FARC is the largest of these groups, controlling approximately 18,000 fighters at its peak strength.[3] While some of the smaller guerrilla groups have demobilized pursuant to agreements with the Colombian government, multiple attempts to reach an agreement with the FARC had failed.[4] Ratified on November 30, 2016, the historic agreement between the government and the FARC called for government efforts to address extreme poverty throughout the country, to transform rural Colombia to facilitate greater service provision, and to provide for the reincorporation and political participation of former FARC combatants.[5] In exchange, the FARC agreed to a cessation of hostilities and a transparent and verifiable process for laying down of arms. Both sides reaffirmed their commitment to the promotion, respect, and guarantee of human rights.

The civil society organizations allege the government has failed to implement its obligations under the accord. They asserted that the systematic violation of human rights by state forces are in violation of the American Convention on Human Rights. Further, they claim the government is not sufficiently carrying out its obligations under Chapter 3.2 of the Colombian peace agreement, which calls for the economic, social, and political reincorporation of ex-combatants into civilian life.[6] Camilo Fagua of Fundacíon DHOC emphasized the need for greater support for social, economic, and political reincorporation programs at the state, local, and individual levels. In particular, Fagua explained the National Development Plan fails to sufficiently articulate Colombia's long-term strategic plan for reincorporation and plans to extend it to territories that have not previously been within the state's control.[7] Fagua also emphasized that while there has been a focus on creating sustainable sources of income for ex-combatants, successive governments have only approved thirty-five "productive projects," covering only 2,196 persons out of the more than 13,000 persons active in the reincorporation process.[8]

Furthermore, Fagua called on the government to put an end to systematic violations of human rights of ex-combatants and civil society leaders, carried out in part by Colombian forces. According to Fagua, more than 150 ex-combatants have been murdered since the signing of the peace accord. Fagua highlighted the recent deaths of Carlos Célimo Iter Conde, who was murdered in Caloto on September 25, and Dimar Torres, whose murder by Colombian security forces was initially defended by the Colombian Defense Minister as an accident during a struggle for a weapon.[9] Finally, Fagua lamented the absence of Diego Martínez, a human rights lawyer and legal advisor to the FARC, who was denied entry into the United States.

Colombia was represented by a high-ranking

delegation led by Emilio Archila, Presidential Counselor for Stabilization and Consolidation; Francisco Barbosa Delgado, Presidential Counselor for Human Rights; and representatives from the Office of the Attorney General. Archila continually stressed patience in carrying out the long-term reintegration and state-building programs, which he estimated would take at least seven or eight years. Archila emphasized that the State has a long-term plan based on the census it conducted, and it has invested over $19 million in a variety of programs including health projects and productive projects. He noted that the number of productive projects authorized by the state has been limited because of the quality of the proposals received, and that the government is working with local organizations to improve the quality of the proposals so they may be carried out effectively. Archila reiterated that the State is committed to carrying out its obligations and will continue to support the reintegration of ex-combatants for as long as is necessary.

Colombia stated it has adopted significant measures for protecting ex-FARC members and that it holds regular meetings on protection. According to Archila, the state has enacted measures to protect FARC political campaigns ranging from general de-stigmatization to individual security but that security campaigns would take time to achieve broad success. Archila then addressed the allegations of violence by Colombian security forces; he emphasized that government was committed to protecting ex-combatants like Dimar Torres, and that those responsible for his murder and the ensuing cover-up were in jail and would be held accountable. Colombia proclaimed that President Ivan Duque's administration, led by the Office of the Attorney General, was committed to investigating these murders and will continue to devote the necessary resources to do so effectively. Archila conceded these security concerns are valid and that total success would take time. Archila noted that the Irish peace process is twenty years old and continues to develop, and that Colombia's process was in its infancy. However, Archila asked the Commission to view Colombia's progress in terms of relative improvement. Archila noted that there have been noticeable drops in homicides, kidnappings, and soldier fatalities, and that the government is committed to building on this progress.

The principle concern of the Commission was to address shortcomings in safeguarding the accord. According to Commissioners Macaulay and Urrejola, many of the women they spoke to in Colombia—especially in more rural areas—say public safety has deteriorated since the signing of the accord. These women attributed the security concerns to the increased presence of new armed groups, including the National Liberation Army (ELN) and El Clan del Golfo. Moreover, Commissioner Urrejola emphasized the importance of protecting ex-FARC members from retribution and thanked Colombia for its efforts to investigate and hold accountable those responsible for the violence. Both Commissioners inquired about how the Commission could help address ongoing security concerns. Commissioner Eguiguren, Country Rapporteur for Colombia, emphasized that the reinstatement of ex-combatants is vital to the peace accord, and asked both sides to talk more about specific successes and shortcomings in implementing the peace accord at the societal and individual. Commissioner Eguiguren also praised Colombia for providing salaries to ex-combatants in order to aid their reintegration, however, he asked for more examples of how the State was working to provide means of work to ensure ex-combatants are not wholly dependent on state aid. The Commissioners lauded the Petitioners and the government of Colombia for working to implement the historic agreement and praised the exceptional efforts of the Colombian people to achieve lasting peace. In closing, Commissioner Joel Hernández asked that both parties keep the Commission informed about developments in the deal's implementation.

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Missing and Murdered Indigenous Women and Girls in Canada (Ex Officio)

by Sydney Delin

Participating Organizations:

- Native Women's Association of Canada (NWAC)
- Canadian Feminist Alliance for International Action (FAFIA)
- Indigenous Governance Ryerson University, Toronto, Ontario, Quebec
- Native Women
- Jeremy Matson

The following is a summary of a hearing of the 173rd Period of Sessions at the Inter-American Commission on September 24, 2019. Several organizations participated at a hearing before the Inter-American Commission on Human Rights (IACHR) to update the IACHR on the high rates of murder and large number of missing women and children among Canada's First Nations populations. Both the participating organizations and the state of Canada acknowledged that there is a problem concerning the missing and murdered women and girls. However, Canada is currently in an election period and must wait until October 2019 before taking more concrete action in accordance with the "Caretaker Convention." Francois Jubinville, representative for Canada, appreciated the courage of those who shared experiences with the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry),[1] published June 2019, and was at the hearing to observe and to issue a written statement at a later date. As of January 27, 2020, there has been no such official statement but there have been remarks about the government's work with the First Nations to create a national plan with the help of the Organization of American States.[2]

The high rate of missing and murdered indigenous women and girls in Canada is a result of political, economic, and social inequality dating back to colonialism.[3] In September of 2016, Canada began a two-year independent inquiry into the high rates of missing and murdered women and children.[4] The final report, known as the National Inquiry, is a compilation of testimonies from almost 2,400 individuals within a framework of Indigenous Rights.[5]Recently, Canada passed provisions to Bill S-3 eliminating a discriminatory provision in the Indian Act that revoked "Indian Status" from women who married a man without that status.[6] Bill S-3 reinstates 'Indian status' to those women and their children. This legislation came in response to the UNHRC case, McIvor v. Canada, in which Sharon McIvor complained to the Human Rights Commission about the antiquated discriminatory legislation. At the hearing, McIvor and the Canadian Feminist Alliance for International Action (FAFIA) argued that sex discrimination against First Nation women and girls under the Indian Act is a root cause of violence as found by IACHR, CEDAW, and the National Inquiry.[7]In previous reports, the IACHR expressed concern over the treatment of indigenous women and girls, including claims of forced sterilization and gender-based violence.[8] Canada also met with the IACHR during its 167th period of sessions to discuss the situation of Human Rights of Indigenous Peoples in Canada.[9] The IACHR came to Canada at the request of FAFIA in 2013 to investigate the situation of missing and murdered women and girls before issuing its first report in December 2014, bringing global attention to the issue.

Pam Palmater, the Chair for Indigenous Governance at Ryerson University and lawyer of Mi'kmaw background, explained how Canada created and maintained a structure that enabled violence against First Nations women and girls. Indeed, the National Inquiry found that these structures and policies enabled the genocide of Indigenous peoples.[10] The President of Quebec Native Women Viviane Michel asserted that the government must work with the First Nations communities to create a national plan of action. Lorraine Whitman, president of the National Women's Association of Canada, asked for an expert body to come and support the First Nations in Canada. Whitman also wanted to see concrete actions and commitments from the Canadian government following the findings of the National Inquiry. The other organizations present echoed a request for a working visit from the IACHR.

Interim Representative of Canada at the OAS, Francois Jubinville, began his statement on behalf of the

State by acknowledging the important work of all the organizations present and recognized the strength of those who shared their stories with the inquiry. However, less than two weeks before this hearing, Prime Minister Justin Trudeau called for a federal election for October 2019.[11] The Caretaker Convention in Canada calls for the current government to restrict itself from exercising its authority, besides routine, non-controversial activity, during an election period to prevent binding action on the future government.[12] Because of this, Jubinville was not in a position to answer the questions from the Petitioners. He reiterated the goal of reconciliation between Canada and the First Nations, and he discussed what steps the government had taken, including the allocation of 50 million dollars in funding for the health and healing of survivors, for the commemoration of victims, for review of police practices, and for the creation of a national oversight body. He also noted the 1.7-billion-dollar funding of child care services for Indigenous families set to be distributed over the next ten years.[13] One of the largest steps Canada has taken from the recommendations given by the National Inquiry was amending Bill S-3, which eliminated sex discrimination from the Indian Act. Canada welcomed the IACHR and the international community's participation in advancing indigenous rights around the world.

The Commissioners were primarily concerned with setting up a working visit to Canada after the October 2019 election and stated that they look forward to helping Canada put together a national plan. Commissioner Margarette May Macaulay recognized Canada's first step of amending the Indian Act and acknowledged that Canada is constrained from acting until the October elections.[14] However, she thought an IACHR visit to Canada after the elections to work on a national plan would be important and encouraged participation at every level. Commissioner Flávia Piovesan listed three points of concern: the inclusion of indigenous voices in the process, the engagement of all levels of government, and the adoption of a gender perspective in a national plan. Commissioner Antonia Urrejola Noguera pointed out that Canada has not ratified the ILO's C169, the Indigenous and Tribal Peoples Convention.[15] She reiterated the importance of working on an action plan that looks at both gender issues and race discrimination against the First Nations. Commissioner Esmeralda Arosemena de Troitiño thanked the organizations for all their work and supported an IACHR visit to Canada. The Commissioners applauded the historic National Inquiry and looked forward to helping Canada create a national action plan. The National Inquiry into Missing and Murdered Indigenous Women and Girls concludes that "Canada's past and current colonial policies, actions and inactions towards Indigenous Peoples is genocide. And genocide, as per law binding on Canada, demands accountability."[16] Canada has ratified the Convention on the Prevention and Punishment of the Crime of Genocide and is bound by it under international law.[17] Additionally, Canada is a member of the Organization of American States, though Canada has not yet signed the American Convention on Human Rights.[18] Although there may be delays due to the election, Canada's National Inquiry, the recent bill amendment, and a potential future visit from the IACHR show promise.

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4 Human Rights Watch, World Report: Canada, https://www.hrw.org/world-report/2018/country-chapters/canada.

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6 Indian Act, R.S.C., 1985, c. I-5; Jennifer Greens, Indian Status Could be Extended to Hundreds of Thousands as Bill S-3 Provisions Come Into Force, CBC (Aug. 15, 2019).

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11 PM Justin Trudeau Calls Canadian General Election for 21 October, BBC NEWS (Sept. 11, 2019), https://www.bbc.com/news/world-us-canada-49656611.

12 "Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff, and Public Servants During an Election," GOV'T OF CANADA (Sept. 2019), https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-staff-public-servants-election.html.

13 "Gender Equality Statement," GOV'T OF CANADA (BUDGET 2019), https://www.budget.gc.ca/2019/docs/plan/chap-05-en.html.

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Environmental Protection in the Amazon and the Rights of Indigenous Peoples in Brazil

by Maria Alejandra Torres

Participating Organizations:

- Center for Human Rights and the Environment Institute for Governance and Sustainable Development (IGSD)
- Amazon Watch
- Indian Law Resource Center (ILRC)
- Articulação dos Povos Indígenas do Brasil (APIB)
- Coordenação das Organizações Indígenas da Amazônia (COIAB)
- Instituto Socioambiental
- Asociación Interamericana para la Defensa del Ambiente
- Operação Amazonia Nativa
- International Rivers
- Fórum Teles Pires
- Movimento Xingu Vivo para Sempre
- Justiça Global
- Conselho Indigenista Missionario
- Defensoria Pública da União

The following is a summary of a hearing of the 173rd Period of Sessions at the Inter-American Commission on September 27, 2019. At a hearing before the Inter-American Commission on Human Rights (IACHR) on September 27, 2019, organizations representing civil society urged Brazil to take immediate measures to curtail the fires in the Amazon that have been impacting the environment and isolated Indigenous communities.[1]

A representative of the Terena Indigenous people argued that the current Brazilian president does not respect the provisions of the 1988 Constitution, which protect Indigenous people.[2] He stated that from July to August 20, 2019, more than 3,500 fires have invaded about 148 isolated Indigenous peoples' lands and burned about 3,000 hectares. Loggers and cattle ranchers are cutting down 533 ancient trees per minute. In around 300 Indigenous villages, about 20,000 illegal miners have contaminated water sources with mercury. Consequently, mercury is now present in fifty-six percent of Indigenous women and children in those villages. Because Indigenous people are putting their own lives on the line to save the land from agroindustry activities, the Terena representative begged the President to respect his people and the Amazonian region.

Mr. Vieira, the representative of a research agency, echoed concerns about how environmental crimes have skyrocketed without government sanctions. He noted that from April to July 2019, the government received fifteen alerts of illegal deforestation per day (about a thirty-eight percent increase) but failed to take action. There has been a ninety-five percent increase in deforestation in what used to be areas of environmental conservation. About 114 isolated Indigenous peoples are gravely affected by illegal logging, mining, and planned infrastructure projects. Mr. Vieira lamented how Brazil effectively launched an anti-deforestation policy in 2003, and deforestation dropped by eighty percent from 2004 to 2012, but that policy is presently nonexistent.

Amazon Watch criticized the government for financing companies that are involved in deforestation.[3] The Defensoria Pública da União affirmed that the Brazilian government is obliged to mitigate the destruction of the Amazon by approving a nondiscriminatory plan to stop deforestation.[4] Further, the current administration has violated the right to information, contravening Article 13 of the American

Convention on Human Rights (ACHR), because it is misinforming the public about the gravity of the fires. [5] The organizations further expressed that the government must take immediate measures to protect the right to a healthy environment and to avoid aggression against human rights defenders; it must avoid the forced displacement of Indigenous communities, an obligation under Article 22 of the ACHR.

The State claimed that Brazilian environmental law is among the most advanced in the world and rebutted the gravity of the fires. In the State's view, the fires were caused by the dry season. The State asserted that the average number of fires from January to August of 2019 was less than that of past years. President Jair Bolsonaro signed Decree 9985 on August 24, 2019, authorizing the use of armed forces to guarantee environmental law and order.[6] "Operation Green Brazil," an interagency cooperation between highway police and Amazonian state governments, partially funded by international support, is leading an effective fight according to the State.[7] It has reclaimed 20,000 hectares of land from aggressive actors and detained sixty-eight of those actors. The last speaker, on behalf of the State, began his introductory sentence in an Indigenous language. Continuing in Portuguese, he then added that Brazil has nineteen remote centers that are monitoring the ongoing situation. He assured the civil society representatives that President Bolsonaro is dedicated to protecting Indigenous communities, human rights, and environmental defenders.

Commissioner Urojola explained that the Commission will be releasing a Pan-Amazonian report analyzing the status of Indigenous communities in nine countries. She asked the State whether "Operation Green Brazil" was also providing healthcare to affected Indigenous villages and if there was any early alert coordination between armed forces and Indigenous peoples. Commissioner García Muñoz followed, inquiring about the nature of sanctions on those arrested under "Operation Green Brazil." She also asked the State if it plans on enacting reforestation projects.

The participating organizations responded that the Brazilian Development Bank has not allotted a budget for projects that protect Indigenous peoples. The Terena representative noted that the Brazilian government's data is outdated and that President Bolsonaro's initial dismissal of the situation greatly compromised the impact of the government's eventual response. Further, the government does not consult with Indigenous communities before releasing decrees. Mr. Vieira closed by acknowledging that Brazil has taken a leading role in environmental protection, so he did not understand why the State is presently ignoring that history.

In closing, the State claimed that the media has sensationalized the situation. In response to the Commissioners' questions, the State admitted that it does not have complete information about those detained under "Operation Green Brazil" but maintained that there are seventy-six trials taking place and the detained will be judged appropriately for their crimes.

The IACHR President called for more information on the topic and assured commitment to Civil Society and State efforts. The future of the Amazon, however, will remain in peril if civil society, and Brazil cannot agree on the severity of deforestation.

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1 Organization of American States, Inter-American Commission on Human Rights, https://www.oas.org/en/iachr/.
2 Constituição Federal art. 231 (Braz.).
3 Amazon Watch.org, https://amazonwatch.org/.
4 Defensoria Pública da União, https://www.dpu.def.br/.
5 American Convention on Human Rights, Organization of American States, Nov. 16, 1999.
6 http://www.loc.gov/law/foreign-news/article/brazil-brazilian-president-signs-decree-authorizing-use-of-armed-forces-in-amazon-region/.
7 Reuters, Brazil Environment Agency Launches Operations to Combat Amazon Deforestation, VOICE OF AMERICA (June 8, 2019), https://www.voanews.com/americas/brazil-environment-agency-launches-operation-combat-amazon-deforestation.