

THE CLARION

The IHRC Journal of Human Rights

from the editors

Welcome to the inaugural issue of **THE CLARION: The IHRC Journal of Human Rights**. In these pages we hope to encourage debate, to allow our committee members to explore topics central to the protection of international human rights, to develop and introduce new, exciting voices from around the world, and to further the Committee's mission of advocacy and education inside of the American Bar Association.

As we move forward, we will rely on you, our members, to keep the vibrancy of these pages alive by submitting articles, suggesting topics, encouraging writers to submit, and contributing to the discussions in the other forums of the committee and the ABA. Through **THE CLARION**, we hope to encourage civil and intellectual discourse--a necessary component of the rule of law and of development of law. We hope to galvanize our members to take action, whether through advocacy, engagement with the committee's work around the world, or through individual, direct action. These articles are designed to start the conversation and to continue the work being done around the world. As a result, we need your help and your engagement. This journal, **THE CLARION**, is a way to bring attention to issues of human rights and to call our members to work to defend these rights. It is a clarion call to action and engagement, a first step in addressing the multitude of issues facing human beings.

Human rights are under attack in various ways all over the world. Whether it is the imprisonment or harassment of human rights defenders, the underfunding of a major human rights institution, or silence in the face of untold or unconscionable abuses, the threats are many and great. As a profession dedicated to the rule of law and the protection of human rights, we have a responsibility to protect the law and its servants, to defend against the devaluation of fundamental rights and to engage, educate and advocate in the face of tyranny, lawlessness and cruelty. The mantle of our profession entitles us and binds us to this role. This journal aims to provide both awareness of issues, an opportunity to intervene, and a link between our members and human rights globally--including our home jurisdictions.

This first issue does not have a theme, though future issues will (see page 20). Our intention for this first issue was to encourage a broad swath of topics at first, to show the diversity of issues and to engage as many authors as possible. Future issues will strive to cover as diverse and critical an array of topics as this first issue. But as we begin, we welcome you as authors, readers, discussants and participants. Thank you, and enjoy our inaugural issue.

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INTERNET GOVERNANCE AND HUMAN RIGHTS: ICANN'S TRANSITION AWAY FROM UNITED STATES CONTROL

Daniel L. Appelman*

The Internet has become an important medium that supports several basic human rights, including freedom of expression and privacy.¹ Internet governance, and particularly the policies and procedures that keep the Internet functioning, are essential to ensure that those basic human rights continue to be operational online. ICANN, the Internet Corporation for Assigned Names and Numbers, is a principal actor in Internet governance through its technical management of Internet domain names and addresses; and it also sets policy for information contained in the publicly-available database of registered domain names, called "WHOIS."² The assignment of domain names and the requirements for public disclosure of personal information about registered domain name owners implicate the rights of free expression and privacy respectively.

ICANN is a California nonprofit corporation. Its responsibilities for the technical

functioning of domain names and numbers assignments (Internet Assigned Numbers Authority or "IANA") have been supervised by the United States government, specifically the National Telecommunications and Information Administration ("NTIA"), under a contract with the Department of Commerce.³ In 2014, NTIA announced a plan to relinquish its supervisory role and transition the IANA functions to a global multi-stakeholder community.⁴ Consideration of that transition is now underway. On March 10, 2016, ICANN's Board of Directors delivered the IANA Stewardship Transition Proposal (the "Transition Proposal") to NTIA for review and approval.⁵ NTIA's response is expected shortly.

This paper describes the human rights concerns related to ICANN's transition from stewardship by the U.S. government to an independent, multi-stakeholder organization, reviews and evaluates as inadequate its proposed commitment to human rights as set forth in the Transition Proposal, and suggests certain opportunities for further input by the global Internet community.

* The author is a partner at Montgomery & Hansen LLP in Menlo Park, California.

¹ See, e.g., U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report to the Human Rights Council, Seventeenth Session Agenda Item 3, United Nations General Assembly, U.N. Doc. A/HRC/17/27* (May 16, 2011) (by Frank La Rue) "[T]he Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress" at p.22; and "The Special Rapporteur underscores the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole." at p.1.

² See ICANN, *Welcome to ICANN*, available at <https://www.icann.org/resources/pages/welcome-2012-02-25-en>.

³ See U.S. Department of Commerce, Award/Contract, No. SA1301-12-CN-0035, October 1, 2012, https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf.

⁴ See Press Release, *NTIA Announces Intent to Transition Key Internet Domain Name Functions* (March 14, 2014), available at <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

⁵ IANA Stewardship Transition Coordination Group (ICG), *Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community* (March 2016), available at <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>.

ICANN and Freedom of Expression

ICANN, through its IANA functions, creates policy governing the management of generic and country code top level domains (“gTLDs” and “ccTLDs” respectively) such as .com, .net and .org and .uk, .au and .cn and the introduction of new gTLDs into the Internet’s Domain Names System (“DNS”).⁶ In 2011, ICANN launched a program to accept new gTLDs from registry applicants.⁷ The stated goal was to expand the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the DNS.⁸ New domain names, for example .islam, .gay and .sucks, will have expressive and communicative elements. ICANN’s policies on approving applications for new gTLDs will have a significant impact on who can use those new top level domains and therefore the accessibility of related information on the Internet. For example, the decision regarding who is awarded the .gay gTLD would determine whether it will be used to facilitate communications relevant to the LGBT community worldwide or will be monopolized by someone else for other purposes.

ICANN makes these decisions with respect to the gTLDs and awards new gTLDs through registry agreements with winning

applicants.⁹ The ccTLD manager for each country makes such decisions (or delegates them to others) exercising substantial, but not total, autonomy from ICANN.¹⁰

ICANN and Privacy

ICANN, through contracts with independent Internet domain name registries and registrars, requires the contribution of the names and contact information of domain name owners to a decentralized, publicly-available database called WHOIS.¹¹ Anyone, including governments, that wishes to censor or repress free expression, can find the owner of any domain name in the WHOIS database simply by searching by domain name. In addition, those contracts require the registrars to retain log files, billing records and other personally identifiable information about the domain name owners, and that information may be subject to government inquiries. The availability of this information makes it easier for repressive governments to identify, surveil and repress those who use the Internet to express opposing views or to organize elements of civil society to press for social change. ICANN’s policies with regard to data retention and availability in the WHOIS database thus raise significant privacy concerns.¹²

⁶ *Supra* note 2. See also J. Postel, *Domain Name System Structure and Delegation*, (March 1994), available at <https://www.ietf.org/rfc/rfc1591.txt>.

⁷ See ICANN, *New Generic Top-Level Domains*, <https://newgtlds.icann.org/en/about/program>.

⁸ See ICANN, *New gTLD Program Reviews FAQ*, <https://newgtlds.icann.org/en/reviews/faqs>. “The goals include enhanced competition, consumer choice and consumer trust, increased market differentiation and innovation, additional geographic and service-provider diversity and increased protections.”

⁹ See ICANN, *New Generic Top-Level Domains: Contracting and the Registry Agreement*, available at <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#stats>.

¹⁰ See ICANN, *Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)* (May 1999), available at <http://archive.icann.org/en/policies/icp-1-archived.htm>. ICANN’s contracts with country code managers imposes upon them some obligations, mostly to ensure the stability

and interoperability of their ccTLDs as part of the global domain naming system for the Internet; but none of those obligations are directly related to human rights. See, e.g., the contract between ICANN and Instituto Tecnológico y de Estudios Superiores de Monterrey, the manager for .mx, the ccTLD for Mexico, available at <https://www.icann.org/en/system/files/files/mx-icann-af-22jun09-en.pdf>.

¹¹ See, e.g., ICANN, *Registry Agreement* (January 9, 2014), at p. 60, available at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

¹² *Supra* note 1. The United Nations Special Rapporteur stated at paragraph 84 as follows: “He also calls upon States to ensure that individuals can express themselves anonymously online and to refrain from adopting real-name registration systems.” Some domain name registrars offer proxy and privacy services that shield the domain name owner’s contact information from public view, while many do not.

ICANN's Accountability

The governance of ICANN itself is key to whether the policies and procedures it adopts and imposes upon its participating registries and registrars enhance or weaken Internet-related human rights specifically and human rights in general.¹³ The NTIA required ICANN to adopt a multi-stakeholder model of governance that maintains the openness of the Internet, and warned that it would not accept a transition plan that replaces NTIA's role with a government-led or an inter-governmental organization solution.¹⁴ ICANN has been criticized in the past for permitting its Government Advisory Committee ("GAC") to have excessive influence to the detriment of other stakeholders.¹⁵ The Transition Proposal includes recommendations for enhancing ICANN's accountability by implementing changes to its Bylaws, policies and procedures so as to ensure greater participation by the broader Internet community and by putting in place institutional safeguards against the dominance of any stakeholder group, including the GAC.¹⁶

A full discussion of those recommendations is beyond the scope of this article. However, they include the adoption of a Bylaw affirming ICANN's commitment to respect human rights and, importantly, the development of a framework for interpreting how that commitment should be manifest in ICANN's policies and procedures.¹⁷ The most recent draft of the proposed bylaw reads as follows:

Section 1.2(b)(viii). Subject to the limitations set forth in Section 27.2, within performing its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligations on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value shall not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.¹⁸

Pursuant to Section 27.2(a), the proposed Bylaw would not become effective:

... unless and until a framework of interpretation for human rights ("FOI-HR") is (i) approved for submission to the Board by the CCWG-Accountability [working group] as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.¹⁹

¹³ ICANN policies can affect, not just Internet-related human rights, but human rights in general. State actors, for example, can source information from the Internet about the sexual orientation of an individual and then use that information to oppress that person, not for his activities on the Internet but for his or her sexual orientation.

¹⁴ *Supra* note 4.

¹⁵ See, e.g., Article 19, *ICANN Reform: Recommendations, a policy brief* (March 2014), available at <https://www.article19.org/data/files/medialibrary/37494/ICANN-policy-final.pdf>.

¹⁶ See CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, February 23, 2016,

available at

<https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>.

¹⁷ *Id.* at 31-32.

¹⁸ See Bylaws For Internet Corporation For Assigned Names And Numbers, A California Nonprofit Public-Benefit Corporation (draft dated May 26, 2016), p. 5, available at

<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

¹⁹ *Id.* at 137.

On its face, the proposed Bylaw is far from the commitment that many stakeholders in the human rights and global Internet communities would find meaningful. First, it would obligate ICANN to respect international human rights laws only “*as required by applicable law.*” A brief review of the comments of the working group tasked with drafting the Bylaw²⁰ and a memorandum from that working group’s retained legal counsel²¹ both reveal considerable ambiguity and indecision as to the meaning and scope of those words. Second, it is clear from those working papers that the extent of ICANN’s commitment to comply with international human rights law “as required by applicable law” has been left to the development of the FOI-HR sometime in the future and well after NTIA is no longer looking over ICANN’s shoulder. Third, the draft Bylaw makes clear that ICANN would have no obligation to respond to any human rights violations by others, including any of the parties to which ICANN has contractually delegated some of its responsibilities, such as its approved gTLD and ccTLD managers, registries and registrars.

Thus, the proposed new Bylaw explicitly removes from ICANN any leverage it might otherwise have to obligate parties throughout its chain of governance delegation to respect internationally recognized human rights.

²⁰ See, e.g., <https://mm.icann.org/pipermail/accountability-cross-community/2016-January/010270.html>

²¹ See Memorandum from Sidley Austin LLP and Adler & Colvin to the Cross-Community Working Group on Enhancing ICANN Accountability, *Litigation Risk and Bylaws Provisions on Human Rights* (January 13, 2016), available at <http://tinyurl.com/jdtwzom>.

²² See, e.g., Louis Henkin, et al., *Human Rights* 214 (2nd ed., 2009).

²³ See, e.g., International Covenant on Civil and Political Rights, art. 2(2), Dec. 16, 1966, 999 U.N.T.S. 171 and International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

²⁴ For example, the preamble of the non-binding Universal Declaration of Human Rights declares that not only States, but also “every individual and every organ of society” have a duty “to secure their universal and effective recognition

Applicable Law and Voluntary Guidelines

What could the qualification to respect internationally recognized human rights “*as required by applicable law*” mean? International human rights laws generally impose obligations only on States, at least explicitly.²² ICANN is a corporation, not a State. However, many international human rights treaties impose on States the obligation to enact domestic legislation that would apply to individuals and corporations.²³ Some have argued that this implies a direct legal obligation for non-State actors, including corporations, to respect those rights, even if that obligation is not stated explicitly.²⁴ However, the commentaries of the bodies that interpret those treaties are either ambiguous on the issue or they acknowledge that the only entities bound by them directly are the States Parties themselves.²⁵

So “as required by applicable law” either refers to domestic civil and criminal laws that give effect to internationally recognized human rights or to international laws to which ICANN is not directly subject. If to the former, what domestic laws would be relevant? Which States will have jurisdiction over ICANN? Which States will be in a position to enforce their human rights-relevant civil and criminal laws on ICANN? As an organization having worldwide

and observance”. See also Louis Henkin, “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, *no cyberspace*. The Universal Declaration applies to them all” (emphasis added). Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOKLYN J. INT’L L. 17 (1999).

²⁵ See, e.g., U.N. Human Rights Committee (HRC), General comment no. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (March 29, 2004), paragraph 8, on the obligations in the International Covenant on Civil and Political Rights: “The ... obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.”

operations, the answer is unclear.²⁶ If to the latter, it would appear that the proposed human rights Bylaw will have no binding effect on ICANN and was included in the Transition Proposal merely to placate the human rights constituency without constituting any meaningful commitment.

Globalization, the expansive reach and impact of multinational corporations, the erosion of State power to hold those corporations accountable and the ability of NGOs to mobilize public opinion have all placed increasing focus on corporate responsibility to respect human rights. Since the private sector is not directly subject to international human rights laws and the domestic implementation of those laws varies so widely from country to country, a number of corporations have adopted voluntary codes of conduct. Many of these purport to internalize some of the human rights that are addressed in international treaties, and some corporations also impose those codes of conduct on their supply chains.²⁷ But the scope of those codes of conduct varies widely. ICANN's Transition Proposal doesn't include a code of conduct—only an ambiguous bylaw and a promised framework for implementing of human rights into its policies and procedures.

The United Nations has made several attempts to develop human rights-related obligations for corporations. The most recent of these, the “UN Guiding Principles on Business and Human Rights” (“Guiding Principles”) is a

non-binding, “soft law” set of standards that encourages companies in the private sector to integrate human rights across their relevant internal functions and processes.²⁸ Among its foundational principles are commitments by businesses to respect the human rights and fundamental freedoms recognized in the International Bill of Human Rights (i.e., the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The Guiding Principles also set forth standards for implementation, including that businesses should adopt written policies on respect for human rights and conduct periodic due diligence and reporting to ensure that those policies are consistently adhered to. The Guiding Principles have enjoyed considerable approval and “buy-in” by the private sector. It is therefore surprising that the proposed Bylaw did not at least commit ICANN to adopt those principles.

Other Human Rights Bylaw Concerns

The reader should note that the proposed Bylaw does not mention any particular human rights, including the right to free expression or the right of privacy. Further, the proposed Bylaw makes it clear that ICANN would have no obligation to respond to any concerns about human rights violations by its agents, the managers, registries

²⁶ The Transition Proposal, if accepted by NTIA, would require ICANN to maintain its principal office in Los Angeles. Bylaws, *supra* note 17, at 130. ICANN would therefore remain subject to those laws of the state of California and the United States that give effect to the international human rights treaties that the United States has ratified, but only to the extent that those domestic laws impose obligations on corporations. The Bylaws also authorize ICANN to establish offices elsewhere, so presumably ICANN would also be subject to the laws of those countries that impose the obligation to respect international human rights on corporations.

²⁷ See, e.g., Levi Strauss & Co., *Worldwide Code of Conduct* (2012), available at [\[content/uploads/2014/01/WORLDWIDE-CODE-of-business-conduct.pdf\]\(http://content/uploads/2014/01/WORLDWIDE-CODE-of-business-conduct.pdf\) and Apple Inc., Apple Supplier Code of Conduct \(2016\), \[http://images.apple.com/supplier-responsibility/pdf/supplier_code_of_conduct.pdf\]\(http://images.apple.com/supplier-responsibility/pdf/supplier_code_of_conduct.pdf\).](http://www.levistrauss.com/wp-</p></div><div data-bbox=)

²⁸ See U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also U.N. News Centre, Press Release, *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights* (June 16, 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=38742#.VwgzvfkKUK>.

and registrars around the world to which ICANN delegates substantial Internet governance responsibilities. Finally, as noted above, ICANN's human rights commitment would not become effective until the proposed framework document, the FOI-HR, presumably setting forth the scope of that commitment, is developed and approved by ICANN's board of directors.

Perhaps the meaning of the phrase, "as required by applicable law" and the full scope of ICANN's human rights commitment will become evident when ICANN releases the FOI-HR for public comment. By relegating those activities to Work Stream 2, ICANN insures that that will take place, if at all, after NTIA approves the Transition Proposal, thus leaving NTIA out of the review and approval process for this important component of Internet governance. By then, those who are in favor of a strong ICANN human rights commitment will have lost considerable leverage to move ICANN toward that end.

Some of the most influential stakeholders, including the GAC and the current ICANN Board itself, resisted committing ICANN to any obligation to respect human rights whatsoever. That it was included in the Transition Proposal at all is a victory of sorts, but not a very encouraging one.

U.S. Congressional Interest

The proposed human rights Bylaw is part of a set of revised Bylaws that was approved by ICANN's Board of Directors on May 27, 2016

and submitted to the NTIA for review.²⁹ The NTIA is scheduled to announce whether it accepts ICANN's Transition Proposal, including the proposed Bylaws, by June 10, 2016, although that announcement might be delayed. However, both houses of the U.S. Congress have expressed interest in ICANN's transition issues.

On May 19, 2016, Senators Ted Cruz, James Lankford and Michael S. Lee sent a letter to the U.S. Secretary of Commerce and the head of the NTIA warning that an independent ICANN would increase the power of foreign governments over the Internet, complaining that the Transition Proposal does not adequately address their concerns and requesting that NTIA continue its oversight of ICANN under the current contract until those concerns are addressed.³⁰ On May 24, 2016, Representative Mike Kelly introduced a bill to the U.S. House of Representatives that would require the NTIA to extend its existing contract with ICANN through September, 2019, and thereby delay the transition substantially, unless the agency can certify that it has secured the U.S. government's sole ownership of the .gov [government] and .mil [military] top level domains.³¹ On the same day, the Senate Commerce Committee held a hearing during which several senators voiced reservations about the U.S. government relinquishing supervision of ICANN.³² In that hearing, Senator Marco Rubio said he would send a letter to the NTIA seeking a delay in implementing the transition until ICANN can

²⁹ ICANN, *Approved Board Resolutions | Special Meeting of the ICANN Board* (May 27, 2016), available at <https://www.icann.org/resources/board-material/resolutions-2016-05-27-en>.

³⁰ See Letter from Cruz, Lankford and Lee to Penny Pritzker, Secretary, U.S. Department of Commerce, and Lawrence Strickling, Assistant Secretary for Communications and Information (May 19, 2016), available at https://www.cruz.senate.gov/files/documents/Letters/20160519_ICANNLetter.pdf.

³¹ Bill "[t]o require the National Telecommunications and Information Administration to extend the IANA functions

contract unless it certifies that the United States Government has secured sole ownership of the .gov and .mil top-level domains, and for other purposes", H.R. 5329, 114th Cong. (2016).

³² *Examining the Multistakeholder Plan for Transitioning The Internet Assigned Number Authority: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 114th Cong. (2016). Video available at time of publication of this article at <http://www.commerce.senate.gov/public/index.cfm/2016/5/hearing-to-examine-iana-transition-to-global-multistakeholder-community>.

give greater assurance that its independence will not be jeopardized.³³

None of the reservations expressed by members of the U.S. Congress of which this author is aware focus on the need for a stronger human rights commitment by ICANN.³⁴ However, both the comments in the U.S. Senate hearing and the issues expressed in the Cruz-Lankford-Lee letter address concerns that without continued U.S. government involvement or other stronger safeguards, ICANN is likely to be unduly influenced by the GAC and foreign governments that may be far less respectful of the rights of free expression and privacy than is the United States.³⁵ Indeed, the current Transition Proposal would afford more rights of participation and voting power to the GAC than it currently possesses. In that respect, the concerns of those senators and human rights advocates appear to be aligned.

Although the period for public comment to the ICANN working groups and its Board of Directors closed before this article was published, both NTIA and the U.S. Congress are reviewing the Transition Proposal, including the revised Bylaws, and would presumably welcome communications from those who remain concerned that ICANN's proposed human rights commitment does not go far enough.

Conclusion

Transitioning ICANN to a self-governing institution, free of any oversight by the United States and subject to the whims of its most influential stakeholders, is a risky proposition. If

implemented without sufficient safeguards to guarantee such basic human rights as free expression and privacy, the Internet as we know it now could be in peril.



³³ See Amir Nasr, *Rubio Wants to Delay Transition of Internet Governance*, Morning Consult (May 24, 2016), available at <https://morningconsult.com/2016/05/24/rubio-wants-to-delay-transition-of-internet-governance/>. “Before any plan can be implemented, we [must] ensure that changes in the transition proposal are applied, that they operate as envisioned, and they don’t contain unforeseen problems that could undermine the multi-stakeholder model or that threaten the openness, security, stability the resiliency of the internet.”

³⁴ Indeed, the Cruz-Lankford-Lee letter criticizes the Transition Proposal for including any commitment to

respect internationally recognized human rights as “open[ing] the door to the regulation of content” and unjustifiably expanding ICANN’s core mission. *Supra* note 29, at 2.

³⁵ The governments of Russia, China, Iran and India, among others, have been active in urging more government control over the Internet. See, e.g., JACK GOLDSMITH AND TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 171 (Oxford University Press, Inc. 2006).



RIGHTLESSNESS: THE EXPULSION OF UNACCOMPANIED CENTRAL AMERICAN CHILDREN IN MEXICO AND THE UNITED STATES

Mayra A. Cavazos Calvillo*

"We are not only talking about immigration [authorities], we're talking about other people [authorities] who will shoot you... boom. Because once you're an immigrant, you will always be an immigrant. Whether you like it or not, you're a criminal." –Shelter worker giving advice to 15 year old Honduran children at the southern Mexican border.³⁶

The humanitarian crisis of unaccompanied immigrant children is perhaps a subject that is not as well-known today as the Syrian refugee crisis, but that deserves equal attention. Although it is the sovereign right of a State to expel unlawful aliens and to regulate its internal immigration policies, every State should protect vulnerable groups, such as children, who

are escaping from gang and drug trafficking violence in their countries of origin.

In 2014, 68,541 unaccompanied minors were apprehended in the southern border of the United States,³⁷ the majority of whom were from the Central American Northern Triangle (i.e., Guatemala, Honduras, and El Salvador).³⁸ Likewise, during the months of October 2013 and September 2014, 16,201 unaccompanied children from the Northern Triangle were deported by Mexico.³⁹ The recent flow of unaccompanied children through Mexico into the United States represents an "urgent humanitarian situation" as characterized by President Obama.⁴⁰ As a consequence, Mexico has become a key player in the apprehension and expulsion of Central American children who are seeking refuge in the United States. Mexican authorities have been working closely with the United States in order to mitigate the migration crisis.⁴¹

In light of this migration crisis, Mexico and the United States have adopted dissuasive approaches with the goal of reducing the outflow of young people from Central America.⁴² On one

* Mayra A. Cavazos Calvillo (mcavazos@law.gwu.edu), received her LL.M. in International and Comparative Law at The George Washington University Law School in Washington, D.C., and is a Research Assistant at the Wilson Center. She received her LL.B at the Monterrey Institute of Technology and Higher Education in Monterrey, Mexico.

³⁶ Brent Renaud & Craig Renaud, *Between Borders: American Migrant Crisis*, THE NEW YORK TIMES, October 6, 2015, available at <http://www.nytimes.com/video/world/americas/100000003901101/central-america-child-migrants.html> (last visited Apr 3, 2016).

³⁷ U.S. Department of Homeland Security, *Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 15 Compared to FY 14*, available at <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY14-FY15.pdf>

³⁸ Marc Rosenblum & Isabel Ball, *Trends in Unaccompanied Child and Family Migration from Central America Migration Policy Institute*, January 2016, available at <http://www.migrationpolicy.org/research/trends->

[unaccompanied-child-and-family-migration-central-america](http://www.migrationpolicy.org/research/trends-unaccompanied-child-and-family-migration-central-america) (last visited Apr 3, 2016).

³⁹ Advocacy for Human Rights in the Americas (WOLA), *Actualización de estadísticas: el aumentado control migratorio de México está al nivel de los esfuerzos fronterizos de EE.UU.*, May 20, 2015, available at http://www.wola.org/es/noticias/actualizacion_de_estadisticas_el_aumentado_control_migratorio_de_mexico_esta_al_nivel_de_lo (last visited Apr 9, 2016).

⁴⁰ Letter from Barack Obama, President of the United States, June 30, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

⁴¹ Advocacy for Human Rights in the Americas (WOLA), *Actualización de estadísticas: el aumentado control migratorio de México está al nivel de los esfuerzos fronterizos de EE.UU.*, May 20, 2015, available at http://www.wola.org/es/noticias/actualizacion_de_estadisticas_el_aumentado_control_migratorio_de_mexico_esta_al_nivel_de_lo (last visited Apr 9, 2016).

⁴² Interview with Eric Olson, Associate Director, Wilson Center (Mar. 21, 2014).

hand, the United States has been engaged in a “public information campaign”⁴³ designed to refute statements made by human smugglers to Central Americans to the effect that once children arrive the United States, they will be admitted and afforded protection.⁴⁴ On the other hand, Mexico has adopted the Southern Border Plan (“Programa Frontera Sur”), which has significantly increased the number of apprehensions and deportations of migrants.⁴⁵

When migrating out of Central America, children make this move solely for their best interest.⁴⁶ They seek asylum because of the fear of gang violence and death in their countries of origin⁴⁷ and their cases should be decided in light of their best interest, which is a life free of violence, with access to education and shelter.

Mexico and the United States have adequate laws that provide necessary protections to unaccompanied alien minors, but in practice, many of them are not enforced. Human rights organizations advocating for the rights of children have expressed concern. For example, Kids in Need of Defense (KIND), a Washington, D.C.-based nonprofit organization that provides free legal assistance to unaccompanied immigrant and refugee children, has pointed out that these minors usually do not have legal representation during the expulsion proceedings.⁴⁸ This lack of legal representation makes them vulnerable and places them at risk of being sent

back to their countries of origin where they will be exposed to harm or even death.⁴⁹

The Inter-American Commission on Human Rights (“IACHR”) has stated that Mexico has failed to eradicate practices considered violations of the human rights of unaccompanied children.⁵⁰ For example, even though Mexico is part of the Convention on the Rights of the Child and recognizes that a child is a person under the age of 18, Mexican authorities continue to refer only children under the age of 12 to specialized shelters.⁵¹

In the United States, the Women’s Refugee Commission noted that children have been held for up to two weeks in camps at the border.⁵² Additionally, during detention, these children have not been given adequate food, blankets or appropriate medical attention.⁵³ The IACHR has also pointed out that border agents have made statements that reveal the extent to which these migrant children are mistreated: “I do not believe you” or “On the basis of your claim(s), you will likely not be [granted asylum/allowed to stay], so, if I were you, I would just leave.”⁵⁴

Many researchers and observers agree that the main contributing factors to the current migration of children from Central America to the United States are “chronic violence, economic despair, official corruption, and the

⁴³ Muzaffar Chishti & Faye Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon*, Migration Policy Institute, February 18, 2016, available at <http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon> (last visited Apr 25, 2016).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ JACQUELINE BHABHA, CHILD MIGRATION & HUMAN RIGHTS IN A GLOBAL AGE (2014)

⁴⁷ *Id.*

⁴⁸ Kids in Need of Defense (KIND), *Kind Home Comments*, <https://supportkind.org/> (last visited Mar 28, 2016).

⁴⁹ *Id.*

⁵⁰ Inter-American Commission on Human

Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, Doc. 48/13, December 30, 2013 (Original in Spanish), available at

<http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf>.

⁵¹ *Id.*

⁵² JACQUELINE BHABHA, CHILD MIGRATION & HUMAN RIGHTS IN A GLOBAL AGE 251 (2014).

⁵³ *Id.* at 252.

⁵⁴ Inter-American Commission on Human Rights, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, OAS/Ser.L/V/II.155, Doc. 16, July 24, 2015 (Original in English), ¶118, available at <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

pull of family reunification.”⁵⁵ Unfortunately, the journey through Mexico to the United States is perilous and life-threatening. These children are especially vulnerable to criminal gangs and drug cartels who exploit them for profit. Because of their vulnerable condition, the children are often the victims of robbery, rape and extortion by various criminal gangs, which include even Mexican police.⁵⁶

The 1984 Cartagena Declaration defines a “refugee” as a person fleeing from generalized violence and massive violation of human rights.⁵⁷ The definition of “refugee” from the 1951 Convention and Protocol relating to the Status of Refugees was extended due to the particular situation in Mexico, Central America and Panama.⁵⁸ Therefore, there is a general acceptance, at least in the Americas, that states have the obligation to not return migrants who meet the criteria of “refugee”. Nonetheless, this instrument is not legally binding.

As a consequence, the rights of refugee children have not been given recognition in the territory of many countries along the main migration route to the United States. Many States continue to view these children as unlawful immigrants instead of refugee children in need of protection. This approach, as argued by the IACHR, is contrary to the best interest of the child as expressed in the Convention on the Rights of the Child.⁵⁹

Whenever a State is faced with the question of whether to deport an unaccompanied minor, it should make its determination taking into consideration the best interest of the minor.

Other considerations, such as the State’s economic and political interests, should be subordinate to the best interest of the child. A State should not remove or expel a child from its territory or deny entry to a child when there is substantial evidence that the life or freedom of the child will be threatened in any way should the child be returned to her country of origin. Mexico and the United States should not deny admittance to Central American children or deport them when it is clear that they would be subject to exploitation and violence by criminal gangs and drug cartels in their home countries. These fleeing Central American children deserve to be recognized as refugees and granted that status so that they can receive the protection that they desperately need.



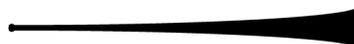
⁵⁵ Eric L. Olson, *how to Address Child Migration from Central America*, WILSON BRIEFS, September 25, 2014, available at <https://www.wilsoncenter.org/publication/how-to-address-child-migration-central-america> (last visited Apr 3, 2016).

⁵⁶ Nick Miroff, *Mexico is Weak Link to Cross-border Immigration Enforcement*, THE WASHINGTON POST, August 3, 2014, available at https://www.washingtonpost.com/world/mexico-is-weak-link-to-cross-border-immigration-enforcement/2014/08/03/54be7f17-da92-49f5-ae1e-6651a49656f4_story.html (last visited Apr 10, 2016).

⁵⁷ Cartagena Declaration on Refugees, *Colloquium on the International Protection of Refugees in Central America, Mexico and Canada*, Nov. 19-22, 1984, available at https://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf.

⁵⁸ *Id.*

⁵⁹ Derechos y Garantías de Niñas y Niños en el Contexto de la Migración y/o en Necesidad de Protección Internacional, Opinión Consultiva OC-21/14, Inter-Am. Ct. H.R. (Aug. 19, 2014), available at http://www.corteidh.or.cr/docs/opiniones/seriea_21_esp.pdf.



THE DOMINICAN REPUBLIC'S FIRST LGBT CHAMBER OF COMMERCE

Jimena M. Conde Jiminián*

The Dominican Republic is the second largest island State in the Caribbean and a main economic partner of its neighboring States. For instance, the Dominican Republic captured 45% of the total sum of foreign investment received in the Caribbean in 2012, making it the major receptor of this type of investment in the Central American and Caribbean region, and the seventh in Latin-America.⁶⁰ In addition, as a party to various free trade agreements, its products enjoy preferential access to more than 900 million consumers around the world, according to its Export & Investment Center.⁶¹ Thus, it comes as no surprise that the Dominican Republic outspokenly fosters investment for its economic and social growth, promoting equality among national and foreign investors, and offering a legal framework that will take due care of them.

However, said efforts fall short in regards to encompassing all sectors that could benefit from said initiatives. Therefore, the goal of equality in investment has not been entirely achieved, since significant economic participation and contributions by minority groups from the Dominican Republic have not always been adequately encouraged. For example, the LGBT community has found it extremely difficult to participate fully in economic activities because of discrimination

against its members, which includes, for example, strong opposition by prominent members of Dominican society against open discussion of any issues that affect members of this community. As a result, companies and organizations that participate in the country's commercial sector avoid publicly supporting LGBT rights in particular or diversity in general through campaigns, endorsement deals or other public initiatives. There is fear that any support of the LGBT community could result in the company or organization being labeled a supporter of the so-called "Gay agenda" by members of religious organizations, politicians or society in general.

In order to counteract this situation, a pioneering partnership was established between a group of Dominican citizens, the National Gay & Lesbian Chamber of Commerce of the United States (NGLCC), and the United States Agency for International Development (USAID) and this led to the inauguration of the first LGBT Chamber of Commerce in the Dominican Republic as part of the NGLCC's fourth LGBT Summit of the Americas.⁶² This organization will provide an inclusive and enabling commercial environment for LGBT entrepreneurs and consumers, as well as for any private or public enterprise that seeks to carry out business with this community. As a result, the inclusion of diversity policies within Dominican economic practices will be furthered, the stability of the country's economic activities will be enhanced and the development of the tourism industry, one of the Dominican Republic's main sources of revenue, will be positively impacted.⁶³

* 2015-2017 ABA's Section of International Law Diversity Fellow

⁶⁰ Dominican Republic Export & Investment Center (CEI-RD), *Invierte en la República Dominicana*, <http://cei-rd.gob.do/es/inversion/invierte-en-la-republica-dominicana/> (last visited: 14/04/16)

⁶¹ Dominican Republic Export & Investment Center (CEI-RD), *DR Exports 2016*, <http://cei-rd.gob.do/rd-exporta-2016/en/home.html> (last visited: 14/04/16).

⁶² *The US launches Dominican gay Chamber of Commerce*, DOMINICAN TODAY, MARCH 2, 2016, available at

<http://www.dominicantoday.com/dr/economy/2016/3/2/58416/The-US-launches-Dominican-gay-Chamber-of-Commerce> (last visited on 14/04/16). See also *Juramentan la primera Cámara de Comercio Gay de la República Dominicana*, DIARIO LIBRE, March 2, 2016, available at <http://www.diariolibre.com/economia/empresas/juramentan-la-primera-camara-de-comercio-gay-de-la-republica-dominicana-BL2915773> (last visited on 14/04/16).

⁶³ *EXCLUSIVE: Dominican advocates, officials to launch LGBT tourism campaign*, WASHINGTON BLADE, February 2, 2015, available at

As expected, however, this initiative has met with varying degrees of rejection from the most conservative sectors of Dominican society, some of which argue that the establishment of such a chamber of commerce has no other purpose than to transform the country's capital into some sort of specially-designed *paradise* for LGBT people.⁶⁴ Other similarly restricted opinions state that this initiative will not benefit society as a whole but a segment of the population characterized by a particular *condition and preference*, which is far from promoting equality.⁶⁵ Yet, contrary to such trends of thought, the granting of equal opportunity for all sectors of Dominican society to participate in entrepreneurial activities and the creation of sustainable businesses, as well as in trade and other commercial exchanges, will significantly transform the country and enhance economic and human development. In the long run, all Dominican society, not just the LGBT community, will benefit from this important and forward-looking initiative.

In sum, the enhancement of LGBT entrepreneurship and LGBT-led business groups in the Dominican Republic through the establishment of the LGBT Chamber of Commerce should be considered one of the first of many diversity- and inclusiveness-oriented endeavors that will take place in the country in the years to come. While this initiative is expected to set the pace for the long and complicated road to recognize LGBT rights and those of other heretofore marginalized groups, there is likely to be significant opposition from some of the country's major civil society organizations (e.g., churches). Nevertheless, the hope is that the Government of the Dominican Republic will support this initiative as part of its

obligation to advance fundamental human rights in the country and address the discrimination that has historically been faced by the LGBT community. Therefore, this first step should be enthusiastically welcomed by the government and seen as a catalyst for the long-awaited change in the treatment of minorities in this important Caribbean State. This initiative should also provide encouragement for the many civil society organizations that have historically advocated for equality and respect for human rights. Perhaps, more important is the fact that this initiative will actually enhance the ability of all the Dominican Republic's stakeholders to contribute significantly to economic growth and development.



<http://www.washingtonblade.com/2015/02/02/exclusive-advocates-dominican-officials-launch-lgbt-tourism-campaign/#sthash.E7aQ07ac.dpuf> (last visited on 14/04/16).

⁶⁴ *Conservadores rechazan Cámara de Comercio LGTB Dominicana*, Acento.com.do, March 2, 2016, <http://acento.com.do/2016/economia/8328242->

[conservadores-rechazan-camara-de-comercio-lgtb-dominicana/](http://www.washingtonblade.com/2015/02/02/exclusive-advocates-dominican-officials-launch-lgbt-tourism-campaign/#sthash.E7aQ07ac.dpuf) (last visited on 14/04/16).

⁶⁵ *Monseñor Masalles: "Es excluyente promover espacios exclusivos LGBT,"* March 2, 2016, available at <http://www.metrord.do/noticias/monsenor-masalles-es-excluyente-promover-espacios-exclusivos-lgbt/ftwpcb---kDhwsBCp06BI/> (last visited on 14/04/16).

SECTION 1045 OF THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2016: THE BELT AND SUSPENDERS TO INTERNATIONAL LAW AND U.S. LAWS AGAINST TORTURE

James Roth*

On November 25, 2015, the day before Thanksgiving, President Obama signed into law the National Defense Authorization Act of 2016 (2016 NDAA).⁶⁶ Among its provisions is Section 1045, which outlaws torture. The anti-torture provision of the 2016 NDAA stipulates that any person in the custody or effective control of U.S. forces, including the CIA, can only be subjected to interrogation techniques authorized by the U.S. Army Field Manual (Manual) on Interrogations.⁶⁷ The Manual contains a specific set of interrogation techniques that interrogators can use and prohibits all others. The Manual explicitly proscribes waterboarding, forced nudity, stress positions, sleep deprivation, forced rectal feeding, beatings and other forms of torture. Section 1045 (also known as the McCain-Feinstein Amendment) also requires that the Manual be regularly reviewed and updated to include only lawful, humane and effective techniques, that it be made public and that the International Committee of the Red Cross be given access to every detainee.

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This marks the first time anti-torture provisions have been included in the NDAA and significantly strengthens and enhances existing laws and treaties, including the Geneva Conventions, Convention Against Torture, the U.S. Anti-Torture Act (1994) and the Detainee Treatment Act of 2006 by incorporating the explicit prohibitions in the Manual into law. The 2016 NDAA enacted into law Executive Order 13491 “Ensuring Lawful Interrogations” which was signed by President Obama on January 22, 2009.

Section 1045 of the NDAA was introduced in the aftermath of the release of the 549-page Redacted Findings and Conclusions and Executive Summary of the Senate Intelligence Committee Report on Torture (Executive Summary on Torture) on December 13, 2012. The Executive Summary was the culmination of a five-year study and investigation by the Senate Intelligence Committee into a program of secret indefinite detention and the use of brutal interrogation techniques during the period from 2001-2009. The Executive Summary is part of the 6700-page full Study that provides comprehensive and excruciating details about the history of the Central Intelligence Agency’s (CIA’s) Detention and Interrogation Program from its inception to its termination. The remaining 6650 pages of the full Study have yet to be released. Although there had been previous news stories and articles and books and reports on the torture program this was the first time that investigators had access to CIA records through

* James Roth is a retired lawyer, writer and human rights activist. He was one of the co-founders of Advocates for Human Rights and the Center For Victims of Torture. He currently lobbies Members of Congress on foreign policy and human rights issues. The Senate Committee on Intelligence and Senate Armed Services Committee consulted with him on the preparation of Section 1045 of the NDAA of 2016.

⁶⁶NDAA’s take effect the following year, so the 2016 NDAA was passed in 2015, just as the 2017 NDAA will be

passed in 2016. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 (2015) (hereinafter “2016 NDAA”).

⁶⁷ DEP’T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS FM 2-22.3 (FM 34-52), vi (2006), <http://www.state.gov/documents/organization/150085.pdf>.

subpoena power. Many human rights organizations and people continue to call on Congress and the Administration to release the remaining 6650 pages of the full Study.

U.S. Senator John McCain (R-Ariz) introduced an amendment to the 2016 NDAA on June 9, 2015 to strengthen and clarify U.S. law prohibiting torture and cruel treatment. It was cosponsored by Senators Dianne Feinstein (D-Calif), Susan Collins (R-Maine) and Jack Reed (D-RI). It became known as the McCain-Feinstein Amendment to the 2016 NDAA. It passed in the Senate with a bipartisan majority by a vote of 78-21. There was no comparable provision in the initial House version of the NDAA.

After wrangling in the Joint Armed Services Conference Committee the amendment was included in the Senate-House 2016 NDAA and passed with bipartisan majorities. President Obama vetoed it on October 22, 2015 over budget issues related to sequestration. After a budget compromise was reached the revised 2016 NDAA was passed in the House by a vote of 370-58 and in the Senate by a vote of 91-3 and signed into law by President Obama.

On October 7, 2015, Senator McCain entered into the Congressional Record a colloquy explaining the handful of changes made to Section 1045 during the Senate-House reconciliation process.⁶⁸ Senator Feinstein asked if the changes would somehow open the door to the use of coercive interrogation techniques and Senator McCain responded “No.”⁶⁹ Senator Feinstein also submitted a statement: “We are

saying with this law that coercive interrogations will never again be used, period.”⁷⁰

With the Senate Intelligence Committee’s detailed and explicit condemnation against torture and the newly strengthened U.S. anti-torture laws one would have assumed that the issue of U.S. torture was resolved.

In January 2015 The Constitution Project had released a poll⁷¹ on Americans’ attitudes towards torture and found widespread approval across the political spectrum for “strengthen[ing] U.S. laws against torture by making it clearer to the CIA and to the military what behavior is legal, and what is illegal, when interrogating people who have information about terrorists.” A strong bipartisan majority of Americans (67%) supported strengthening and clarifying laws against torture. 75% of Democrats, 69% of independents and 56% of Republicans said they would approve of such a proposal.⁷²

The 2016 Presidential Campaign

Then came the 2016 Presidential campaign. The issue surfaced in the Republican primary debates on February 6 when moderators asked if candidates would bring back the explicitly banned technique of waterboarding which involves strapping someone down on a board and simulating killing them by drowning.⁷³ Senator Ted Cruz responded that he would bring back the “enhanced interrogation technique” only in select circumstances saying “I would use whatever methods we could to keep this country safe.”⁷⁴ Senator Marco Rubio sidestepped the question but said the US needed to get tougher on interrogating prisoners.⁷⁵

⁶⁸ 161 CONG. REC. S7186 (daily ed. Oct. 7, 2015)(colloquy of Sens. Feinstein and McCain).

⁶⁹ Id.

⁷⁰ “Feinstein Hails Congressional Passage of Anti-Torture Legislation,” (October 7, 2015), *available at*: <http://www.feinstein.senate.gov/public/index.cfm/2015/10/feinstein-hails-congressional-passage-of-anti-torture-legislation>.

⁷¹ See “Americans Call Torture ‘Immoral,’ Want Congress to Tighten Laws Against It,” *available at* [\[content/uploads/2015/01/2015.01.20_Torture-Poll.pdf\]\(http://www.constitutionproject.org/wp-content/uploads/2015/01/2015.01.20_Torture-Poll.pdf\) \(January 20, 2015\).](http://www.constitutionproject.org/wp-</p></div><div data-bbox=)

⁷² Id.

⁷³ For a full transcript of the debate, see Team Fix “Transcript of the New Hampshire GOP Debate, annotated,” The Washington Post (February 6, 2015), *available at*: <https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/transcript-of-the-feb-6-gop-debate-annotated/>.

⁷⁴ Id.

⁷⁵ Id.

Donald Trump was not restrained, and said to cheers: “I would bring back waterboarding, and I would bring back a hell of a lot worse than waterboarding.”⁷⁶ Jeb Bush, Ben Carson, Rick Perry and John Kasich have all also indicated support for enhanced interrogation techniques including waterboarding.

This did not sit well with Senator John McCain who spent years as a prisoner of war in North Vietnam and suffered torture firsthand and who co-authored the most recent anti-torture law. On February 9 Senator McCain responded from the Senate floor:

“It’s been so disappointing to see some presidential candidates engaged in loose talk on the campaign trail about reviving waterboarding and other inhumane interrogation techniques. It might be easy to dismiss this bluster as cheap campaign rhetoric, but these statements must not go unanswered because they mislead the American people about the realities of interrogation, how to gather intelligence, what it takes to defend our security, and, at the most fundamental level, what we are fighting for as a nation, and what kind of nation we are.”⁷⁷

McCain, Chairman of the Senate Armed Services Committee, stated that the US “stained” its national honor by using torture tactics after 9/11 and that the techniques failed to produce

useful intelligence and did incalculable harm to the nation’s reputation.⁷⁸ He also noted another problem with the campaign proposals to bring back waterboarding and other forms of torture—they were made illegal by Section 1045 of the NDAA that was passed with significant bipartisan majorities and passed into law just last year.⁷⁹

More than 100 Republican national security leaders and professionals including former Cabinet officials vowed to work against Trump’s election in an open letter.⁸⁰

After intense criticism by retired General Michael Hayden,⁸¹ Trump recanted saying on March 4 that he would not order the military to break international laws despite calling for torture of suspected terrorists and the killing of their families. He told The Wall Street Journal he would “use every legal power that I have to stop these terrorist enemies. I do, however, understand that the United States is bound by laws and treaties and I will not order our military or other officials to violate these laws and will see their advice on such matters.”⁸²

The next day Trump reversed course once again and stood by his proposals to subject suspected terrorists to torture even if it goes against the Geneva Conventions saying “We have to beat back the savages.”⁸³ During a rally and news conference on March 5 Trump said he would seek to “broaden” the laws to allow torture including but not limited to waterboarding.⁸⁴

The Geneva Conventions, Convention Against Torture, U.S. Anti-Torture Act and

⁷⁶ Id.

⁷⁷ McCain Statement on Proposals to Revive Torture (February 9, 2016), <https://youtu.be/nVkbcbfcUis?t=55s>.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Thomas Gibbons-Neff, “Trump is ‘fundamentally dishonest,’ say GOP national security leaders in open letter,” The Washington Post (March 3, 2016), *available at*: <https://www.washingtonpost.com/news/checkpoint/wp/2016/03/02/in-new-letter-republican-foreign-policy-experts-declare-war-on-trump/>.

⁸¹ Nick Gass, “Ex-CIA director: Armed forces would ignore Trump” Politico (February 27, 2016), *available at*:

<http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/cia-director-armed-forces-ignore-trump-219918>.

⁸² Damian Paletta and Nick Timiraos, “Trump Reverses His Stance on Torture,” The Wall Street Journal (March 4, 2016), *available at*: <http://www.wsj.com/articles/trump-reverses-his-stance-on-torture-1457116559>.

⁸³ Jeremy Diamond, “Trump on torture: ‘We have to beat the savages,’” CNN (March 6, 2016), *available at*: <http://www.cnn.com/2016/03/06/politics/donald-trump-torture/>.

⁸⁴ Id.

Section 1045 of the National Defense Authorization Act, as well as dozens of U.S. military and intelligence officials and human rights professionals and organizations stand on one side against torture; Donald Trump stands on the other side.

Which side will win?

Those who support torture include not only presumptive Republican Presidential nominee Donald Trump but also former Vice President Dick Cheney, the lawyers at the Office of Legal Counsel at the Justice Department who wrote the infamous “torture memos,” since rescinded and repudiated, other members of the Bush Administration and the CIA, and a significant portion of the American public. Many opinion polls have shown that over 50% of the American public support torture as long as it is conducted by the U.S. This support for torture may be connected to television shows such as “24” and movies such as “Zero Dark Thirty” that have furthered the misconceptions that torture works to find targets like Osama bin Laden and save lives. A handful of academics still quibble over the definitions in treaties and prior U.S. laws, further fueling these myths. The passage of Section 1045 of the 2016 NDAA should put these misperceptions to rest. But Section 1045 has not received the widespread media attention it deserves. Section 1045 closes all the loopholes and that under international and U.S. laws torture is illegal, in addition to being immoral and ineffective. Donald Trump and his supporters need to receive a clear and consistent message that torture is against the law and off the table.



* Legal and Policy Coordinator, The International Corporate Accountability Roundtable (ICAR). The author can be reached at: sara@icar.ngo.

⁸⁵ The Medina case study is based on the author’s experience working as a Legal Intern with Green Advocates International in Liberia in 2011. A similar yet distinct case study from the Liberian context can be found

CORPORATE COLONIZATION: THE PRECARIOUS PROBLEM OF LAND GRABS IN SUB-SAHARAN AFRICA

Sara Blackwell*

About an hour and a half north of the Liberian capital of Monrovia, down a surprisingly smooth paved road, lies the town of Medina. There, the smog and congestion of Monrovia melt away to reveal a lush land full of fresh air and abundant, natural resources. Instead of the Monrovia visuals of blocks upon blocks of gutted buildings that still burn with the scars of civil war, the Medina area is peppered with mud huts topped with thatched roofs, still glistening from the morning rain. Instead of the honking of horns and the blasting of music, sounds of children laughing and mothers pounding cassava permeate the air. Here, life is simple. Or at least it was.

In recent years, these once-familiar images of vibrant villages and bustling markets set up along the side of the road have been suddenly and shockingly interrupted by large, sharp, concrete security checkpoints, blocking access to what lies beyond. In the case of Medina, what lies beyond is hectares upon hectares of former farmland, bulldozed and made barren to make way for the establishment of a palm oil nursery with the aim of preparing millions of young seedlings to overtake hundreds of thousands of hectares of Liberian land.⁸⁵ Leading up to this checkpoint and the now inaccessible swaths of land that lay beyond it, billboards announce the coming of a foreign corporation with a name⁸⁶ once unknown to this small, dusty town but suddenly on the lips of nearly every resident in the area. They talk about

in GLOBAL WITNESS, THE NEW SNAKE OIL: VIOLENCE, THREATS, AND FALSE PROMISES AT THE HEART OF LIBERIA’S PALM OIL EXPANSION (2015), available at file:///C:/Users/Sara/Downloads/New_Snake_Oil_-_July_2015_-_Final_lores%20(1).pdf.

⁸⁶ The name of the corporation in this case study has been omitted for the purposes of this publication.

the taking of their land with an utter lack of consultation and just compensation, the destruction of their crops and culturally significant sites such as graveyards and shrines, the pollution of their air and water sources, and the antagonism and alleged violence against human rights defenders in their area.

Foreign direct investors, such as the palm oil company coming into Medina, are fast contracting with African governments to purchase or lease expanses of land for long-term, infinitely renewable contracts.⁸⁷ Despite promises of development for these countries—which are often plagued by the plethora of problems that inevitably come with poverty—these large-scale contracts are, for the most part, bringing in negative impacts for communities that have long operated under the rules of customary, rather than statutory, land laws.⁸⁸ As a result, many communities are seeing their own land taken out from under them by foreign actors. Thus, despite living during the continent’s post-colonial era, in “independent” African nations, these communities are rapidly and increasingly being colonized by a multitude of corporations who jeopardize their livelihoods and cultures and wreak havoc on the natural environments upon which they depend for subsistence.

In facing this issue, Liberia is certainly not alone. Across the African continent, and in

fact across the world, rural communities in areas seemingly blessed with an abundance of natural resources and arable land are falling victim to these sudden seizures of ancestrally owned property. Better known as “land grabs,”⁸⁹ this modern form of colonialism involves transnational corporations using their vast power and influence over the governments of developing nations to, in effect, buy large sections of the territory of these countries, and the human rights of their inhabitants along with it. Moreover, in African countries such as Liberia, where rule of law is weak, law enforcement is often corrupt,⁹⁰ and security situations remain highly complicated and fragile, land grabs risk broader national security harms to entire nations in addition to direct human rights harms to communities.

Since the formation of the United Nations in 1945 and the emergence of resulting multinational treaties aimed at protecting human rights on a global scale, international human rights law has almost exclusively looked at States as potential rights-violators and, thus, has historically developed in such a way as to primarily assign legal duties to government actors. However, the tide is swiftly shifting in this regard, and the international legal community is now fast at work developing and implementing numerous sets of standards aimed at holding private actors—including foreign

⁸⁷ For a stark visual of such expansion, see the maps presented in *The New Snake Oil?*, GLOBAL WITNESS (July 23, 2015),

<https://www.globalwitness.org/en/campaigns/land-deals/new-snake-oil/>

⁸⁸ See, e.g., Dr. Steven Lawry, *In Sub-Saharan Africa: Time to Legally Recognize Customary Land Rights*, USAID (Aug. 19, 2013),

<http://usaidlandtenure.net/commentary/2013/08/in-sub-saharan-africa-time-to-legally-recognize-customary-land-rights>.

⁸⁹ The International Land Coalition (ILC), a global alliance of civil society and intergovernmental organizations with 152 institutional members over 54 countries, defines large-scale land grabs as land acquisitions or concessions that present one or more of the following characteristics: “(i) in violation of human rights, particularly the equal rights of

women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.” Int’l Land Coalition, *Tirana Declaration* (May 27, 2011), *available at* <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>.

⁹⁰ For more on the intersection of land rights, human rights, and corruption, see *Land, Corruption, and Human Rights*, ICAR, <http://icar.ngo/initiatives/land-rights/> (last visited Apr. 18, 2016).

investors in large-scale land deals—accountable for their adverse human rights impacts. In the past five years in particular, frameworks such as the UN Guiding Principles on Business and Human Rights⁹¹ and the OECD Guidelines for Multinational Enterprises⁹² have aimed to move international law in the direction of legal norms and standards for corporate actors. This notable and consequential evolution is, in large part, a result of progressively globalized markets and increasingly complex dynamics between citizens, governments, and businesses that have garnered international attention, in both positive and negative ways.

While such developments are highly encouraging in the fight for human rights protections in the context of a changing world, international business and human rights standards so far remain voluntary in nature. In June 2014, however, a UN Human Rights Council resolution set up an intergovernmental process toward a binding treaty on business and human rights.⁹³ Yet, the outcome of such negotiations is far from clear at this early stage. While the world waits for these types of processes to yield concrete results, and as the Medina case and so many other cases reflect, serious harms are still occurring on a daily basis as a result of unregulated corporate activities. As such, significant work remains to be done in the international community if legal concepts and binding standards are to adequately address the vast power and impact that corporate actors are having on the basic human rights of our global citizens.

In particular, long-term concession agreements and unmonitored private sector activities in large, rural regions of sub-Saharan

African countries are resulting in corporate capture of local communities and their human rights. The right of these communities and of their sovereign countries to self-determination is under serious threat, and many of the human right harms seen under colonial rule are being repeated, albeit by different actors, today. Thus, in the context of transnational corporations, formal independence has not released African States from patterns of dominance. There is now a moral imperative and practical necessity for international human rights law to continue its evolution in a way that protects our world from its past patterns and mistakes and that puts a stop to colonization by corporate actors.



⁹¹ John Ruggie, Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (2011), *available at* http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

⁹² OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD (2011), *available at* <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

⁹³ Human Rights Council Res. A/HRC/26/L.22, Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (June 26, 2014), *available at* <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/058/99/PDF/G1405899.pdf?OpenElement>.

THE CLARION: FUTURE THEMES AND DEADLINES

The Clarion is pleased to announce the following themes for Volume 2 (ABA Year 2016-2017):

Volume 2, Issue 1: Human Rights and Children (Late Summer/Early Fall 2016)

- Deadline for submission of abstract: June 30, 2016
- Articles and Publication Agreements due: July 15, 2016
- Tentative Publication Date: August 15, 2016

Volume 2, Issue 2: Human Rights in the United States (End 2016)

- Deadline for submission of abstract: August 31, 2016
- Articles and Publication Agreements due: September 20, 2016
- Tentative Publication Date: October 20, 2016

Volume 2, Issue 3: The Human Right to Water (Early 2017)

- Deadline for submission of abstract: January 10, 2017
- Articles and Publication Agreements due: January 30, 2017
- Tentative Publication Date: March 1, 2017

Volume 2, Issue 4: Disabilities and Human Rights (Spring 2017)

- Deadline for submission of abstract (provisional): March 16, 2017

Volume 2, Issue 5: Human Rights Focus: Africa (Early Summer 2017)

- Deadlines for submission of abstract (provisional): May 1, 2017

If you are interested in writing an article on one or more of these themes, please email the Publications Vice-Chairs and IHRCpubs@gmail.com by the listed deadline with an abstract. Please share these topics and any calls for submissions with friends, colleagues, students, and others—even those outside of the legal field.

The Clarion seeks diverse voices and opinions that elucidate human rights issues from a variety of angles. Publications Vice-Chairs will also be soliciting submissions, and would appreciate any recommendations for potential authors, particularly from countries underrepresented in the ABA.



A RIGHT TO BE PROTECTED FROM INSULT OF ONE'S RELIGION?

Iris Leerdam*

In democratic states, freedom of religion is impossible to be taught away. It is considered one of the fundamentals of the democratic society. Nowadays, the (threat of) violence committed in the name of religion is prevalent. Strong condemnations of such actions, and, even more far-going, condemnations of religions, occur. This triggers the question of what exactly is understood under freedom of religion and whether or not there is a right for religious persons to be protected from insult. This question will be addressed in this contribution.

Special Position of Religion

Expressions about religion are speech which falls under freedom of expression, just like other expressions do. Religion, however, is often granted a particular status due to the sensitivity of the matter. In this light, the European Court of Human Rights has put the door ajar to justify restrictions of freedom of speech, for the legitimate reason of “protecting the rights of others”.⁹⁴ It reasoned that the religious feelings of believers ought to be respected.

Although states may have the obligation to enact legislation which protects believers from interference with their religious exercise, this obligation to protect concerns manifestation of religion (for example, prohibiting interference with or disturbing religious worship). However, states are not required to enact explicit legislation that protects people's religious beliefs against insult or criticism.⁹⁵ It thus falls under the state's discretion to decide whether or not to enact such legislation. The question of

desirability of an actual legal right protecting religious persons' feelings is triggered here.

Legislation Restricting Religious Speech

Moral reasons for restricting expressions which insult religious people's feelings could be that they serve no other purpose than to hurt people's feelings. If one knows that one's expression, which does not have much value for oneself, can hurt so many other people, then it could be considered morally wrong to share this anyway, especially if it is one's intention to hurt people. However, making this an actual legal prohibition, is another issue.

Historically, there has been a shift from prevalence of *blasphemy laws* protecting the state in terms of public peace, towards *laws protecting individuals in their religious feelings*. Instead of classic blasphemy laws, where the objective assessment was whether the (majority) god or sacred texts and practices were disrespected, laws protecting the feelings of religious persons have a subjective connotation and deal with “what is perceived” by individuals.

The difference between shocking speech, which is allowed, and religious speech, which is gratuitously offensive and which would not be permissible, is unclear. Not only is it difficult to clearly distinguish between the two, but determination calls for a subjective assessment. There should be a test whether religious persons' feelings are hurt. However, one can hurt people's feelings without intending to do so. Also, the outcome of one's speech cannot always be foreseen. It is very difficult to find out what people's intentions were when they expressed certain statements and to predict people's reactions to expressions. There is a risk of abuse as well, where people could claim that their feelings are hurt, to limit other persons' free speech. If people have to take into account the

* Law graduate, obtained LL.M in International and Public Law at University of Antwerp, Belgium. Interned at Human Rights Law Network Ranchi, India. Currently specialising in Human Rights at the European Inter-University Centre for Human Rights and Democratisation, Italy.

⁹⁴ *Otto-Preminger-Institut v. Austria*, ECtHR, 1994, Case no. 13470/87, (1995) 19 EHRR 34, 421, § 47-49.

⁹⁵ See R. UITZ, *FREEDOM OF RELIGION IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE LAW* (2007).

possible consequences for other people's feelings before every expression, this could lead to self-censorship and have a chilling effect on people's freedom of expression. This can prevent important public debates in a democratic society from taking place.⁹⁶

One can question whether one attacks someone's identity when one attacks a religious belief system. A religion can be said to be an abstract idea, so when this is attacked, this is not directed at any person. Especially in a multicultural society, there has to be room for debate about ideas, even if some people may feel offended or insulted by such discussions. Freedom of religion should be precisely about questioning and defending beliefs, doctrines and ideas and exchanging the latter.⁹⁷ There should be nothing personal about the challenge of ideas even when these challenges are directed at religious beliefs and done so in a harsh way. However, some people feel so intertwined with their religion that they feel it is part of their identity. Thus, when their religion is targeted, they feel targeted personally. This shows how subjective this issue is.

Moreover, making it an actual right to be protected in one's religious feelings, gives judges power to decide how people should express themselves. This is not a question of legal rules, but a subjective assessment of speech, which is not the task of the judiciary.

A last concern has to do with whose religious feelings would be protected. It may be more difficult for believers of minority religions or legally unrecognised religions to be acknowledged in that their religious feelings are hurt. Double standards need to be avoided since alike cases should be treated alike. There is a risk

that this requirement would not be met for all religions equally.

Freedom of Religion vs. Freedom of Speech

Granting rights protecting the religious feelings of persons from injury means imposing a restriction on freedom of speech. The freedom of speech, however, does allow and protect provocation since it is essential in a pluralistic democratic society to permit both ideas that are received favourably and those that offend, shock and disturb.⁹⁸ This principle also allows speech which may insult the religious feelings of others. In the balancing of interests, respect for these people's feelings should be weighed against the right of others to criticize religion under the right to free speech.

This contribution argues that all speech should be treated the same and should be subjected to the same test. Just as for other expressions, the limit for acceptable speech about religion stops where it amounts to hate speech. This goes a lot further than insults. Hate speech is threatening speech that incites and tries to cause action leading to violence, hatred or discrimination.⁹⁹ This can never be allowed. However, there is no justification for restricting insulting religious speech, since other matters can be equally sensitive for some people, but are not subjected to a test whether the same should have been said in a less offensive way. This means that similar situations would be treated differently, which violates the basic principle of equality.

Conclusion

It seems better to protect an extensive freedom of speech on principle, even if that hurts or insults some people's feelings, than to have a society

⁹⁶ See C. Evans, *Religion and Freedom of Expression in RELIGION & HUMAN RIGHTS: AN INTRODUCTION* (J. Witte, Jr. & M.C. Green eds., 2012).

⁹⁷ See A. SCOLNICOV, *RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW: BETWEEN GROUP RIGHTS AND INDIVIDUAL RIGHTS* (2011).

⁹⁸ *Handyside v. the UK*, ECtHR, 1976, Case no. 5493/72, (1976) 1 EHHR 737, § 49.

⁹⁹ See, e.g., Article 19 Policy Brief, "Prohibiting Incitement to Discrimination, Hostility or Violence," 10 (December 2012), available at <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>.

with the opposite principle that one cannot say anything which may lead to people's religious feelings being hurt. Prohibition of insulting speech does not allow debate. Robust public dialogue may occasionally involve insulting speech and should such speech be banned, that could seriously endanger the type of exchange of ideas that is necessary to maintain a functioning democratic system. Protecting the religious feelings of people would prevent the type of public dialogue that is critical for the maintenance of the country's democratic system. Thus, for the sake of true democracy, pluralism, equal protection and legal certainty, it is better to allow insulting religious speech to be expressed. The best weapon against insulting speech is more speech and not less.



CROSSING THE LINE: FIFTH AMENDMENT EXTRATERRITORIAL APPLICATION AFTER *HERNANDEZ*

Andrew Solis*

Barely a day goes by without news updates on the Syrian and other refugee crises. While hundreds of thousands of refugees make their way towards Western Europe seeking asylum, several Balkan nations have amped up their border enforcement trying to keep refugees out.¹⁰⁰ Tensions between the masses of refugees, literally running for their lives, and emboldened border agents, trying to protect the interests of their homelands, were bound to result in conflict. Refugees trying to pass through the Balkans have been met with batons,¹⁰¹ water cannons,¹⁰² tear gas,¹⁰³ and even bullets, causing the UN High Commission on Refugees spokesmen to proclaim that “people trying to seek safety across the borders should not be dying with bullets at Europe’s doorsteps.”¹⁰⁴

Those concerned with the treatment of refugees and aliens at foreign borders need not look to Europe; in fact, they need not look outside the United States’ borders. In *Hernandez v. U.S.*, 785 F.3d 117 (5th Cir. 2015), the Fifth Circuit, *en banc*, held that a U.S. Border Patrol agent was effectively immune from liability for injuries he caused to an alien at the U.S. – Mexico border. On June 7, 2010 young Sergio Adrian Hernandez was playing with his friends

* Andrew Solis received his J.D. (with an international law specialization) and M.P.A. in 2016 from Southern Illinois University.

¹⁰⁰ Chan Sewell, *Balkan Nations Shut Down March of Migrants.*, N.Y. TIMES (Mar. 9, 2016), http://www.nytimes.com/2016/03/10/world/europe/europe-refugee-crisis.html?_r=0.

¹⁰¹ *Video Shows Baton-Wielding Cop Beating Back Refugees at Macedonian Border*, VICE NEWS (Sept. 12, 2015), <https://news.vice.com/article/video-shows-baton-wielding-cop-beating-back-refugees-at-macedonian-border>.

¹⁰² Patrick Kingsley, *Hungarian Riot Police Use Water Cannon Against Refugees*, THE GUARDIAN (Sept. 16, 2015),

<http://www.theguardian.com/world/2015/sep/16/hungarian-riot-police-use-water-cannon-against-refugees>.

¹⁰³ Vassilis Kyriakoulis & Odile Duperry, *Police Fire Tear Gas as Migrants Try to Break Through Greek Border*, YAHOO NEWS (Apr. 10, 2016), <https://www.yahoo.com/news/dozens-hurt-police-tear-gas-migrants-greece-macedonia-003004610.html>.

¹⁰⁴ Matthew Weaver, *UNHCR Demands Investigation After Afghan Refugee Shot Dead in Bulgaria*, THE GUARDIAN (Oct. 16, 2015),

<http://www.theguardian.com/world/2015/oct/16/unhcr-investigation-bulgaria-border-guards-shoot-dead-afghan-refugee>.

on the border when U.S. Border Patrol agent Jesus Mesa, standing on the U.S. side of the border, apprehended one of the youths and fired several shots across the border, killing Hernandez.¹⁰⁵ Hernandez's parents filed suit in U.S. federal court against the U.S. government and agent Mesa in his individual capacity.¹⁰⁶ The Fifth Circuit's original judgment found that Hernandez was protected by the U.S. Constitution's Fifth Amendment and that his parents could proceed with their *Bivens* action against agent Mesa.¹⁰⁷ However, upon rehearing *en banc*, the Fifth circuit found Hernandez was not entitled to constitutional protections and dismissed the case.¹⁰⁸

Hernandez's parents sought *certiorari* by the U.S. Supreme Court and their petition is currently docketed.¹⁰⁹ The Supreme Court should reverse the Fifth Circuit's *en banc* decision (1) because its interpretation of the qualified immunity test is flawed and (2) because it failed to apply the Fifth Amendment extraterritorially under *Boumediene v. Bush*, 553 U.S. 723 (2008).

Qualified Immunity

The Fifth Circuit, *en banc*, reasoned that agent Mesa was entitled to qualified immunity because the laws governing Hernandez's Fifth Amendment rights were not "clearly established" at the time of the incident.¹¹⁰ In other words, no law reasonably put Mesa on notice that his actions would violate the Fifth Amendment.¹¹¹ However, the "clearly

established" prong of qualified immunity does not refer to the specific right to be invoked by the victim of an official's tortious conduct, rather it refers to an objective reasonableness of the official's action "assessed in light of the legal rules that were 'clearly established' at the time" of the incident.¹¹²

If the purpose of the "clearly established" qualified immunity prong is to determine the official's notice of prohibited conduct, the Fifth Circuit's *en banc* holding that "clearly established" refers only to law regarding the victim's rights, and not the law governing the official's behavior, results in an absurd inquiry. Following that ruling, in order for a border patrol agent to be on notice of prohibited conduct, he would necessarily need to know whether the individual he is shooting at is an alien, citizen, lawful permanent resident, or if the individual has sufficient connections to the United States.¹¹³ After all, Hernandez could have been a U.S. citizen visiting Mexico, in which case he would have been protected by the Fourth and Fifth Amendments. Would agent Mesa have acted differently if Hernandez had been a citizen? Nothing in the facts asserted indicates that agent Mesa made an inquiry as to Hernandez's status, or that he used such information to guide his actions.

The better rule is the Fifth Circuit's original decision in this case. The Fifth Amendment states that "no person shall be ... deprived of life ... without due process of law."¹¹⁴ The "no person" language of the Fifth

¹⁰⁵ Complaint at ¶¶ 24-26, *Hernandez v. U.S.*, 757 F.3d 249 (5th Cir. 2014) (3:11CV00027).

¹⁰⁶ *Hernandez v. U.S.*, 757 F.3d 249, 255 (5th Cir. 2014).

¹⁰⁷ *Hernandez v. U.S.*, 757 F.3d 249, 272, 280 (5th Cir. 2014).

¹⁰⁸ *Hernandez v. U.S.*, 785 F.3d 117, 119 (5th Cir. 2015) (*en banc*).

¹⁰⁹ *Hernandez v. U.S.*, 785 F.3d 117 (5th Cir. 2015), *petition for cert. filed* (July 27, 2015) (No. 15-118).

¹¹⁰ *Hernandez v. U.S.*, 785 F.3d 117, 120-121 (5th Cir. 2015) (*en banc*) (explaining that qualified immunity is applicable unless there is a finding that (1) the facts alleged establish a violation of a constitutional right, and (2) the

right at issue was clearly established at the time of the incident, and that the court did not need to address the first prong because the right was not clearly established.)

¹¹¹ *Hernandez v. U.S.*, 785 F.3d 117, 120-121 (5th Cir. 2015) (*en banc*).

¹¹² *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (*citing* *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982)).

¹¹³ *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (holding that an alien outside the U.S. must have sufficient connections to the U.S. to be considered as one of the "people" protected by the Fourth Amendment.).

¹¹⁴ U.S. CONST. amend. V.

Amendment extends its application beyond U.S. citizens.¹¹⁵ Furthermore, aliens are not “non-persons.”¹¹⁶ The law was “clearly established” because any reasonable border patrol agents should know that nothing could justify the unprovoked killing of another person in their line of duty, and that such conduct violates the Fifth Amendment.¹¹⁷ This standard provides clearer guidance to border patrol agents and would not require inquiry into the status of the person with whom they are interacting.

Extraterritorial Application of the Fifth Amendment

In *Boumediene*, the Supreme Court extended the Suspension Clause of the Constitution to noncitizen detainees at Guantanamo Bay, Cuba.¹¹⁸ When determining the Constitution’s extraterritorial reach, the courts should not limit application to *de jure* territory, but rather the determination should turn on practical considerations.¹¹⁹

While the appellate courts are split as to whether *Boumediene* can reach beyond the Suspension Clause, many prominent scholars

agree that it does.¹²⁰ In his *amicus* brief, Dean Irwin Chemerinsky provides several examples of courts that used *Boumediene* (and Justice Kennedy’s concurrence in *U.S. v. Verdugo-Urquidez*) to extend constitutional protections beyond the U.S. border.¹²¹ Chemerinsky also references his peer, Professor Gerald Neuman, who explains that although “the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights.”¹²² Therefore, *Boumediene* must necessarily govern other constitutional claims and its framework should apply in this case.¹²³ The Fifth Circuit originally applied *Boumediene*’s three-part framework and found that Hernandez’s status leaned in favor of Fifth Amendment protections, that the U.S. exercised sufficient control over the U.S. – Mexico border, and the practical concerns to extending the Fifth Amendment were minimal.¹²⁴

¹¹⁵ *Hernandez v. U.S.*, 757 F.3d 249, 268 (5th Cir. 2014) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374-75 (5th Cir. 1987)). The Fifth Amendment’s “no person” language requires broad application as it is distinct from the Fourth Amendment’s “the people” language. “The people” is a term of art used by the framers of the Constitution to refer “to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

¹¹⁶ *Hernandez v. U.S.*, 757 F.3d 249, 268 (5th Cir. 2014) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374-75 (5th Cir. 1987)).

¹¹⁷ *Hernandez v. U.S.*, 757 F.3d 249, 279-280 (5th Cir. 2014) (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002)).

¹¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

¹¹⁹ *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

¹²⁰ Brief for Amicus Curiae Dean Erwin Chemerinsky in Support of the Petitioners, *Hernandez v. Mesa*, 2015 WL 5117958 (No. 15-118).

¹²¹ *Id.* at 7-8 (explaining the holdings of *U.S. v. Wanigasinghe*, 545 F.3d 595 (7th Cir. 2008), *Bayo v.*

Napolitano, 593 F.3d 495 (7th Cir. 2010), *Haitian Ctr. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), and others.).

¹²² *Id.* (citing Gerald Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 *Cornell L. Rev.* 1441, 1458 (Sept. 2014)).

¹²³ *Id.*

¹²⁴ *Hernandez v. U.S.*, 757 F.3d 249, 262 (5th Cir. 2014). *Boumediene* laid out a three-part test for extraterritorial application of constitutional rights: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed rights. *Boumediene v. Bush*, 553 U.S. 723, 766-71 (2008). For more information regarding the nature of U.S. control over the U.S. – Mexico border, see Center for Strategic and International Studies, *U.S.-Mexico Border Security and the Evolving Security Relationship*, (2004) available at http://csis.org/files/media/isis/pubs/0404_bordersecurity.pdf; see also, DEPARTMENT OF STATE, *Smart Border: 22 Point Agreement – U.S.-Mexico Border Partnership Action Plan*, (2002), <http://2001-2009.state.gov/p/wha/rls/fs/8909.htm> (archived pages of Dept. of State website).

Chemerinksy urges the Supreme Court to hear this case because the Fifth Circuit's *en banc* ruling creates a regime where children who play steps away from the U.S. border have lesser protections than the dangerous aliens detained at Guantanamo Bay.¹²⁵ Unfortunately, the facts in this case are not unique as dozens of aliens have been killed by U.S. Border Patrol agents under questionable circumstances.¹²⁶ The Fifth Circuit judges even went on to acknowledge that these incidents are likely to occur again.¹²⁷

Conclusion

While the world seems to focus on the refugee crisis engulfing Europe and how border agents treat those refugees, there are similar concerns close to home. The UNHCR called for investigations after one refugee was accidentally killed by a stray bullet in Bulgaria; meanwhile dozens of aliens have been killed by U.S. Border Patrol agents with seemingly little review or attention. The Fifth Circuit's *en banc* ruling lets U.S. Border Patrol agents invoke qualified immunity because there is no case law specifically holding that aliens on the Mexican side of the U.S. – Mexico border could invoke the Fifth Amendment. The Fifth Circuit's original ruling provides a much clearer standard for finding "clearly established" law on which U.S. Border Patrol agents can model their behavior. Hopefully the Supreme Court will hear this case and find that *Boumediene* extends the Fifth Amendment to aliens in Hernandez's position.



HUMAN RIGHTS DEFENDERS ALERT: THE INTER-AMERICAN COMMISSION

The Inter-American Commission announced on **May 23, 2016** that financial crisis would result in the lay-off of half of the human rights body's staff and the postponement or cancellation of all of the visits planned for the next two sessions of the commission. The Commission blamed its current financial situation on unfulfilled pledges, noting that forty-seven of the seventy-eight regular staff members are supported by funds from donations.

The Commission, in its announcement, sharply questioned how the human rights body is funded. Noting that the current budget provides for less than "\$0.005 per person in the hemisphere each year" and that the Council of Europe allocates 41.5% of its funding to human rights versus the OAS's 6% allocation to the Commission, the IACHR stated its worry that its "structural, systematic lack of funds" would "result in the dismantling of areas essential to its mandate."

If the current crisis continues, the Commission's ability to protect human rights through its processes will be severely curtailed. IHRC members are encouraged to seek out opportunities with NGOs to help ensure that the financial problems facing the Commission do not lead to impunity for human rights violations.

¹²⁵ Brief for Amicus Curiae Dean Erwin Chemerinsky in Support of the Petitioners at 3, *Hernandez v. Mesa*, 2015 WL 5117958 (No. 15-118).

¹²⁶ *Id.* at 13.

¹²⁷ *Hernandez v. U.S.*, 785 F.3d 117, 134 (Prado, J., concurring); *id.* at 121 (Jones, J. concurring).

THE ROLE OF THE INTERNATIONAL LAWYER IN THE EU REFUGEE CRISIS

Hiu Kwan Jenny Poon*

International Human Rights Law (IHRL) challenges human rights abuses when they exist. The purpose of IHRL is to champion the rule of law in civil society, act for the vulnerable, and challenge the “status quo.” In the context of the European Union (EU) refugee crisis, asylum claimants are not only ill-informed about the proper procedure to apply for asylum, but also do not know their rights against *refoulement*.¹²⁸ The international lawyer, in utilizing IHRL, has a role to play in civil society that involves not only participation, but an *active interest* in the protection of vulnerable populations which include asylum claimants. IHRL, in seeking to gain significance and contribute to the legitimacy of international law as a whole, must fill the gap that exists in the current EU refugee crisis by allowing the international lawyer to represent asylum claimants where legal assistance may not be available, play the role of an advisor for the State adjudicating the application process, educate the asylum claimants on their rights and proper procedures, or train asylum officials in the conduct of assessment. Change cannot happen overnight,

“HOW TO” PRACTICE NOTES

but one lawyer at a time, a difference can be made in an asylum claimant’s life, which may include, for some people, the prevention of *refoulement* to death or torture.

For the Asylum Claimant: as an Advocate

One of the main problems contributing to the failure of the Dublin System¹²⁹ is the lack of legal representation for asylum claimants who are fleeing from persecution and who need to meet the threshold necessary to prove a “well-founded fear of persecution.” In fact, it has been suggested that a lack of access to legal aid would be an indirect violation of Article 13 (right to effective remedy) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)¹³⁰ because effective remedy necessarily entails access to legal aid.¹³¹ In the provision of legal assistance to asylum claimants, of particular importance is the need to act for vulnerable groups such as unaccompanied minors,¹³² those who are held in detention awaiting deportation back to their countries of origin where often times, they may face persecution, those who have experienced violence or abuse, and mentally and physically disabled asylum claimants. The international lawyer, in ensuring that legal assistance is available to those asylum claimants who need it, should also ensure the quality of such assistance. For instance, effective legal representation

* The author is a Ph.D. Candidate at the Faculty of Law at Western University, Canada. Her research involves examining the Dublin Rules as an asylum transfer process tool in the European Union and seeing whether the Dublin Rules enable the United Kingdom and Germany to adhere to the principle of non-*refoulement*. She can be reached at: jpoonlaw@gmail.com.

¹²⁸ The right of the asylum claimant or refugee not to be returned to his or her country to face persecution.

¹²⁹ The criteria and mechanism which allocate state responsibility in determining which state is responsible for processing asylum applications among EU member states. The key pieces of legislation include: Dublin Convention (1990), Dublin II Regulation (2003), and Dublin III Regulation (2013).

¹³⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13.

¹³¹ European Council on Refugees and Exiles, Survey on Legal Aid for Asylum Seekers in Europe §3.5.4 (2010).

¹³² The definition of “unaccompanied minor” is: “a person below the age of 18 who arrives in the territory of the [EU] member states unaccompanied by an adult responsible for him or her whether by law or by custom and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the member states” in *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection*, Official Journal of the European Union, art. 2(m).

necessarily involves legal representation from senior practitioners who are well-versed in international refugee law and EU asylum law and policies so that they may adequately advocate for and act in the best interests of the claimant. Quality legal assistance would also mean access to legal interpreters in the language spoken (mother tongue) by the asylum claimant. Legal assistance must also be available without cost to the asylum claimant who, fleeing from a “well-founded fear of persecution,” may not have the resources to afford an expensive senior counsel to advocate on their behalf.

For the Asylum Claimant: as an Educator

The vulnerability of the asylum claimant is compounded by his or her inability to understand the asylum claims process. Asylum claimants, depending on their country of origin, may or may not have a high level of education required to understand a complicated asylum claims process. Regardless of their countries of origin, the domestic asylum procedure will differ from EU member state to member state, so that not one country’s asylum procedures will be an exact mirror image of the other. The international lawyer may assist asylum claimants in understanding the complicated procedures involved in properly submitting an application before an asylum official. The matters which the international lawyer should educate the asylum claimants on may include: their rights under international refugee law and domestic law, procedures involved in filing an application before an asylum official, including documents required and filing deadlines, and programs available to assist the asylum claimant in integrating into the community once refugee status has been granted, including language

courses and basic information on culture and social characteristics of the host State.¹³³

For the State: as an Advisor

There may be instances where an international lawyer’s background and knowledge are useful in advising the State on asylum procedures and policies. It is important to ensure that the State is adhering to its international law obligations, especially its obligation on non-*refoulement*. Ensuring State compliance with international law is a difficult task that is not achievable by the international lawyer alone, which is compounded by the fact that enforcement of international law is a general international law problem.¹³⁴ The two possible solutions in ensuring State compliance with international law are: through an enlarged role of international courts and tribunals, and the increased involvement of nongovernmental organizations (NGOs) in monitoring and encouraging State compliance.¹³⁵ In advocating for asylum claimants before courts and tribunals, and partnering with NGOs, the international lawyer fulfills his or her role in assisting the State in complying with international law.

For the State: as a Trainer

The international lawyer should cooperate and partner with NGOs such as Amnesty International, Human Rights Watch, or the European National Red Cross Societies to assist in the training of asylum officials in how to properly process asylum applications. While the international lawyer cannot and should not impede on State sovereignty and the asylum official’s freedom in adjudicative decision-making, proper training would involve ensuring that asylum officials understand their State’s international law obligations. The asylum

¹³³ Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants, Guidelines on the Reception of Asylum Seekers §17-18 (2001).

¹³⁴ Hannah Moscrop, “Enforcing International Human Rights Law: Problems and Prospects”, April 29, 2014.

¹³⁵ Jutta Brunnee, “Enforcement Mechanisms in International Law and International Environmental Law” in U. Beyerlin, P.T. Stoll, and R. Wolfrum, Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia §4 (2005).

official may be well-trained in the domestic asylum processing procedure, but may lack understanding in fundamental international refugee law principles which their State must adhere to. The international lawyer's background and training in international refugee law may assist asylum officials in carrying out their duties in a number of ways, including but not limited to providing the much needed clarity in international law obligations which the State must comply with, updating on recent developments in international law including any new compliance requirements which asylum officials must be aware of, and practical advice on best practices that are common throughout Europe.¹³⁶ Effective adjudicative decision-making not only depends upon proper training, but also selectivity in the asylum official recruitment process. For instance, the international lawyer may contribute his or her expertise, in cooperation with NGOs, in establishing the criteria for selecting properly educated and experienced asylum officials. The list of criteria which States may consider in the recruitment process includes: psychological and emotional maturity of the applicant, motivation to assist asylum claimants, education level and qualifications, professional experience, and previous experience in assisting people of diverse backgrounds, ethnicities, religions, and cultures.¹³⁷

Conclusion

As discussed above, the role of the international lawyer in the EU refugee crisis cannot be undermined. The international lawyer's role is multifaceted and, in line with the purpose of IHRL, must contribute to ensuring substantive and procedural protections for the vulnerable, and in particular, asylum claimants at risk of *refoulement* back to persecution.

JUDICIAL NEWS BRIEFS

SENEGAL: On May 30, 2016, former Chadian Leader, Hissène Habré, was convicted by the African Extraordinary Chambers of the Senegalese Court system. Habré was found guilty of crimes against humanity, torture and rape and was sentenced to life in prison. Habré had been a disruptive presence during the trial, leading to him being removed from the court more than once. Though he was silent during the hearing itself, at the end he shouted and raised his fists at supporters until he was led away by guards. The charges against Habré stemmed from his rule of Chad from 1982 to 1990. During his rule, tens of thousands of people died at the hands of his government. (Source: Dionne Searcey, "Hissène Habré, Ex-President of Chad, Is Convicted of War Crimes," *The New York Times* (May 30, 2016).)

CÔTE D'IVOIRE: The trial of Simone Gbagbo by the country's *Cour d'Assises* began on May 31, 2016. Gbagbo, the former first lady, is accused of crimes against humanity for her role in post-election violence in 2010-2011. The prosecution alleges that Gbagbo participated in a "crisis committee" that planned violence against opposition supporters, including sexual violence and murder. Gbagbo's prosecution has led to conflict between the government and the ICC about the proper venue for the investigation and the trials. Gbagbo is wanted by the ICC, where her husband awaits trial, though Côte d'Ivoire has indicated that all future trials will occur in Côte d'Ivoire. (Source: "Côte d'Ivoire: Simone Gbagbo Trial Begins," *Human Rights Watch*, (May 30, 2016).)

¹³⁶ *Id.* 28-29.

¹³⁷ *Id.* 28.

THE CLARION

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John Mukum Mbaku & Luke Wilson
IHRC Publications Vice-Chairs
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321 N. Clark Street
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IN MEMORIAM

The IHRC is deeply saddened to inform its membership of the untimely deaths of two indefatigable defenders of human rights and the environment in Honduras. As has been widely reported, Berta Cáceres and Nelson García were murdered by unidentified gunmen in the first few weeks of March. Both Cáceres and García were known for their work in environmental protection and human rights advocacy in Honduras. In particular, both of the victims were connected to the Civic Council of Popular and Indigenous Organizations of Honduras (Copinh). Cáceres founded the group twenty-two years ago, and García was an active member. Through their work, these two human rights defenders had pushed back against state-sponsored projects that threatened indigenous territories and rights. According to the NGO Global Witness, over one hundred environmental defenders have been murdered since 2010 in Honduras. (Source: Nina Lakhani, "Fellow Honduran activist Nelson García murdered days after Berta Cáceres," The Guardian (March 16, 2016).

We remember Berta Cáceres and Nelson García for their passion, courage and sacrifice.

