

International Human Rights

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I. The Multilateral Agreement on Investment

In September 1995, member countries of the Organization for Economic Cooperation and Development (OECD) began negotiating a comprehensive multilateral agreement to promote and protect investment, known as the Multilateral Agreement on Investment (MAI).¹ The goal is to reach an agreement by May 1998. Some non-OECD members (Argentina, Brazil, Chile, Hong Kong-China, and Slovakia) became observers in September 1997, and other non-OECD member countries may be able to accede to the agreement after negotiations are concluded. The draft disciplines, exceptions, and dispute settlement provisions closely resemble the investment chapter in the North American Free Trade Agreement. Three issues of interest to human rights

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1. See generally William H. Witherell, *An Agreement on Investment*, 202 OECD OBSERVER, Oct. 20, 1996, at 6.

advocates are implicated in the MAI negotiations: the Helms-Burton sanctions, labor issues, and environmental protection issues.

Title IV of the Helms-Burton Act² requires the denial of visas to foreign nationals (including corporate officers or controlling shareholders) who traffic in property that the Cuban Government expropriated in 1959.

The United States is addressing arguments that the Helms-Burton sanctions are not consistent with the MAI disciplines that require nondiscriminatory treatment of investors. The MAI's national treatment obligation would prohibit measures that favor U.S. owned investments over foreign owned investments, and the MAI's most-favored-nation treatment obligation requires that investors who are nationals of any MAI country receive the best treatment accorded to any other foreign investors. The outcome of the extensive discussions on the Helms-Burton sanctions could affect the interpretation of the national security exception to the MAI, as well as the interpretation of the national security exceptions to obligations in the NAFTA, the 1994 General Agreement on Tariffs and Trade, and WTO trade agreements, such as the Agreement on Government Procurement. As part of extensive diplomacy regarding these issues, the European Commission and the United States are cooperating to promote democracy in Cuba and protect the human rights of Cuban citizens.

The effect of the MAI on enforcement of labor laws and environmental standards are other key issues according to human rights organizations. Amid calls by nongovernmental organizations (NGOs) for greater participation in the negotiating process, the MAI negotiators met with about forty NGOs to discuss the potential effect of the MAI on labor and environmental standards. The United States, Canada, and European countries are consulting with their respective industries and with NGOs on these issues. Like the NAFTA Investment Chapter, Article 1114, the MAI provides that contracting parties shall not lower such standards to attract investment.

II. Fast Track Reauthorization

Until April 15, 1994, the Trade Act of 1974 authorized the President to negotiate international trade agreements that Congress could accept or reject, but which could not be amended by Congress. The decision to delay the vote on the legislation to reauthorize the President to have fast-track authority in November 1997 was due, in large part, to a lack of support for the legislation arising from labor and environmental interests. The President has committed to seek authority as soon as possible in 1998. The delay could postpone the negotiation of the proposed Free Trade Agreement of the Americas and the WTO agriculture negotiations.

H.R. 2621 states that the President should promote "respect for worker rights and the rights of children and an understanding of the relationship between trade and worker rights" and ensure that other countries do not derogate from measures that deter exploitative child labor, or from health and safety, or environmental protection standards in order to attract investment or to distort international trade.³ Human Rights Watch and twenty-one religious, human rights, development and grass-roots organizations argued that the legislation should contain stronger language establishing a more direct linkage between U.S. trade policy and human rights.⁴

2. 22 U.S.C. § 6091.

3. *Special Report: Senate Finance Poised to Pass Fast Trade Without Labor, Environment*, INSIDE U.S. TRADE, Oct. 1, 1997, at 1.

4. *Human Rights, Development Groups Oppose Pending Fast Track Bills*, 15 INSIDE U.S. TRADE, No. 42, Oct. 17, 1997, at 25.

III. Efforts to Address Exploitative Child Labor Practices

The development and enforcement of international labor standards continues to be a central issue in national and international debates concerning international trade and investment liberalization. In addition, the cause and effect relationship between child labor and poverty is being discussed by the international community. The exploitation of child workers is a persistent ethical and economic problem in many areas of the world. The International Labor Organization (ILO) estimated in 1997 that 250 million children are working illegally worldwide. The ILO, the United Nations Children's Fund (UNICEF), national governments, and non-governmental organizations continue to urge national governments to enforce laws that regulate the employment of young children. In 1996, the ABA House of Delegates adopted a resolution urging the U.S. Government to encourage the ILO to continue its efforts to ban slavery-like commercial exploitation of children and to address such practices as hazardous working conditions. The ABA report suggested that relevant international conventions needed clarification in order to address the current problem.

In 1997, the U.S. Labor Department prepared its fourth report on the problem for Congress, and legislation was introduced, including the Export-Import Bank Reauthorization Act for 1997. The legislation amends the Export-Import Bank Act, which allows the President to block financing for projects in countries that violate human rights, by expressly stating that child labor is considered a human rights issue.⁵ The Tariff Act of 1930 was amended to clarify that products of forced or bonded labor can be excluded from entry into the United States.⁶

Forty-one countries and representatives of nongovernmental organizations attended the International Conference on Child Labor in Oslo, Norway in October 1997. The participants adopted an Agenda of Action against child labor. In Oslo, the ILO announced that it is seeking a convention by 1999 to eliminate the most abusive and exploitative child labor practices, such as prostitution, bonded labor and hazardous work.⁷

IV. World Congress Against Commercial Sexual Exploitation of Children, Stockholm

Government representatives from 122 countries and over 1,000 other participants attended the Congress on combating sex tourism involving children, which was hosted by the Swedish Government on October 27-31, 1996. Interpol conducted a regional conference in Buenos Aires, Argentina in 1997, and will conduct one in Eastern Europe in 1998, and UNICEF is providing financial and technical assistance to national programs in several countries.⁸

V. Burma (Myanmar) Sanctions

The human rights abuses committed by the State Law and Order Restoration Council (SLORC) military government of Burma, and worldwide condemnation of that regime, have

5. An Act to Reauthorize the Export-Import Bank of the United States, S. 1026, 105th Cong., § 11 (1997); H.R. Rep. 392, 105th Cong. (1997); 143 CONG. REC. H10314 (daily ed. Nov. 7, 1997).

6. An Act Making Appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and Certain Independent Agencies for the Fiscal Year Ending September 30, 1998, and For Other Purposes, Pub. L. No. 105-61, § 1634, 111 Stat. 1272 (1997).

7. The Oslo Conference Agenda for Action, background documents, the principal international conventions relating to child labor, a database of national laws and codes of conduct, and information on participating in the Global March are published on the Internet by the Child Rights Information Network at <<http://www.crin.ch>>.

8. The table of contents of the Final Report of the Stockholm Conference is on the Internet at <<http://www.hri.ca/children/reports/wcascsec2.shtml>>. Detailed information on the extensive follow-up activities is at <<http://www.crin.ch/sedoc1.htm>>.

gained widespread media attention. In September 1988, SLORC seized control of Burma, which it renamed Myanmar in July 1989. The regime imposed martial law. Nobel laureate Aun San Soo Kyi and the National League for Democracy won the 1990 general election, but the SLORC ignored the election results and brutally suppressed political activities of Soo Kyi and other members of the National League for Democracy.

According to the U.S. Department of State, the regime has an unacceptable human rights record.⁹ The U.N. Committee on the Rights of the Child and the International Labor Organization have called on SLORC to end the military's use of child labor and forced labor, and the United Nations Human Rights Commission unanimously condemned the regime in 1997. U.S. federal and state law and local ordinances have been passed to weaken the regime. These actions have led to high stakes legal conflicts concerning the application of international trade agreements and U.S. constitutional law.

The U.S. Congress authorized the President to discontinue bilateral financial assistance and to oppose multilateral financial assistance to the Burmese military government in the Omnibus Consolidated Appropriations Act of 1997,¹⁰ and the President imposed these sanctions on May 20, 1997.¹¹ U.S. municipalities and the state of Massachusetts adopted selective public procurement laws, debarring potential contractors that have business ties in Burma. Connecticut, Texas, North Carolina, Vermont and California are considering similar measures. Firms doing business in Burma are listed in the publication, "Multinational Businesses in Burma," published by the Investor Responsibility Research Center in Washington, D.C. Massachusetts law and several of the local selective procurement laws provide that the debarment of contractors shall be determined based on this list. As a result, some companies reportedly have left Burma in order to win local government contracts in the United States, but other companies have remained in Burma.

The city of San Francisco disqualified Ericsson GE for a \$40 million city contract to rebuild the city's emergency radio system based on its parent company's Burma ties.¹² Ericsson GE denied that it did business in Burma, stating that the activities of Ericsson LM, its Swedish parent company, should not be considered under the San Francisco ordinance. San Francisco also rejected Mitsubishi Heavy Industries for a \$123 million contract for a transportation system at the city's airport.¹³ The European Commission and Japan assert that the selective purchasing measures are inconsistent with obligations under the World Trade Organization (WTO) Agreement on Government Procurement that state and local governments will remove public procurement market barriers. The European Union has requested and held two rounds of consultations with the United States under WTO dispute settlement procedures. If the European Union and the United States do not resolve the issue in consultations, the European Union may proceed to arbitration under the WTO procedures.

A consortium of U.S. business interests, USAENGAGE, and other organizations plan to challenge the constitutionality of the state and local selective purchasing laws. Some believe that the selective purchasing laws violate the foreign commerce clause, the preemption clause,

9. BURMA REPORT ON HUMAN RIGHTS PRACTICES FOR 1996, U.S. DEPT. OF STATE, HUMAN RIGHTS COUNTRY REPORTS (Feb. 1997).

10. Foreign Operations, Export Financing and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-121 (1996).

11. Executive Order 13047, 33 WEEKLY COMP. PRES. DOC. 749 (May 20, 1997).

12. P. Chatterjee, *Trade-U.S.: Businesses Declare War on Economic Sanctions*, INTERPRESS SERVICE, Feb. 17, 1997.

13. Ted Bardacke, *American Burma Boycotts Start to Bite*, FIN. TIMES, Feb. 6, 1997, at 6.

the supremacy clause, and the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.¹⁴

VI. The Human Rights Situation in Hong Kong

Following the apparently smooth transfer of sovereignty of Hong Kong to China after 156 years of British rule, concerns over human rights and democracy issues have engendered much anxiety within Hong Kong and elsewhere around the world. These issues involve: China's apparent disregard of the democratic representation that reflects the people's choice, questions of nationality and citizenship, danger of self-censorship, and restrictions on labor rights.

Within hours of the handover, the partially democratically elected legislature, the Legislative Council (with twenty of the sixty members elected democratically through universal suffrage) was disbanded. Subsequently, a Beijing-appointed Provincial Legislature of sixty people began creating a series of new laws, including tighter control on demonstrations and political parties. Prodemocracy activists like Martin Lee and Emily Lau have been dismissed from the legislature. New national security restrictions have been put in place.

An election law has been passed that sharply reduces the number of people who can vote for half the seats in a new legislature to be chosen in May 1998. The franchise in thirty of the legislature's sixty seats will be slashed from 2 million to 180,000, and "corporate voting"—one company, one vote—will be reinstated. According to Hong Kong's Democratic Party, it will win only a quarter of the seats in the May election. The Chinese Government has ensured the reduction in Democratic power in next May's elections by introducing proportional representation for those seats that are directly elected. And with the reinstatement of corporate voting, two-thirds will favor pro-Beijing and business interests.¹⁵

The people of Hong Kong have been deprived of their nationality and their right to change their nationality.¹⁶ The Hong Kong people, prior to July 1, 1997, were known as British Dependent Territories citizens (BDTCs). After that date, they no longer have that status and thus, are eligible to retain another status known as "British National (Overseas)" that allows them to use passports issued by the UK government.¹⁷ However, this does not confer the right of abode in the United Kingdom, and offers little protection. China says that "all Hong Kong Chinese compatriots, whether they are holders of the BDTCs passport or not, are Chinese nationals."¹⁸ But such Chinese nationals could not avail themselves of British consular protection in the Hong Kong Special Administrative Region (HKSAR) and other parts of the PRC. The 1980 Nationality Law of the PRC does not recognize dual nationality for any Chinese national. Therefore, the Hong Kong people have been compulsorily naturalized,¹⁹ absent any form of consent on the part of the people. As to the non-Chinese BDTCs, they may become stateless. Unlike their Chinese counterparts, they were not "bestowed" with Chinese nationality on

14. D. Schmahmann & J. Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997).

15. J. Gittings, *Hong Kong's Next Election 'Will Be Rigged'*, THE GUARDIAN, Oct. 21, 1997, at 10. *Hong Kong Survives its first 100 days of Chinese Rule Dragon*, MAINICHI DAILY NEWS, Oct. 16, 1997, at 11.

16. RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL PERSONALITIES: THE CASE OF HONG KONG, HONG KONG 111 (1997).

17. *Id.*

18. *Id.*

19. See, e.g., Nihal Jayawickrama, *A Right to Nationality: Its Application to Hong Kong*, LEGAL FORUM ON NATIONALITY, PASSPORTS & 1997, 83-106 (J. Arthur McInnis ed., 1997).

July 1, 1997, and will, after 1997, be without any country to call their own or to return to as they live on Chinese territory as aliens.²⁰ The acquisition of Chinese nationality by non-Chinese BDTs is by no means guaranteed either, since it is subject to governmental discretion, and its approval is guided by racially-based nationality principles.

According to the Hong Kong Journalists Association, another immediate danger is self-censorship. Newspapers are reluctant to run interviews of figures critical of China. According to the New York-based Committee to Protect Journalists, local Hong Kong media routinely censor themselves, even though the most critical papers still publish without reprisal. Film distributors in Hong Kong have declined to buy two Hollywood films that deal with Tibet, "Kundun" and "Seven Years in Tibet," apparently because they might offend the Chinese Government.

There has also been a serious restriction to fundamental labor rights in Hong Kong. C.H. Tung has attacked labor laws as "unduly restrictive employment practices."²¹ Three labor laws have been suspended:

- Trade Unions Amendment—which allows the use of trade union money for any purpose, including those of a political nature. Local trade unions could become political bodies connected to foreign political organizations.
- Employees' Rights to Representation, Consultation and Collective Bargaining Ordinance—which allows the fundamental internationally recognized right to collective bargaining. The government claimed that this could adversely affect Hong Kong's economic competitiveness.
- Employment Ordinance—which provides new protection to employees against anti-union discrimination. The government argued that there was already an ordinance serving a similar purpose and that this new law causes confusion.

A commitment to report to the relevant international human rights committees is essential for the protection of human rights in Hong Kong. The pledge by the government of the PRC under the Sino-British Agreement—to ensure that the provisions of the two International Covenants (the ICCPR and the ICESCR), as applied in Hong Kong, remain in force after July 1, 1997—means that China must accept this reporting duty. Meanwhile, Hong Kong has been allowed to submit its own reports on human rights conditions in the face of international pressure.²² The strength of China's tolerance and good faith in allowing this concession remains to be seen.

VII. Human Rights and Environment

Human rights and environmental protection are interrelated in three principal ways.²³ First, the existence of environmental harms impedes the full expression and even compromises the partial expression of other human rights, including the rights to life, health, economic well-being and cultural integrity of present and future generations. Second, environmental degradation

20. MUSHKAT, *supra* note 16, at 115.

21. Linda Choy, *Practices Failure Elsewhere, says Chief Executive*, S. CHINA MORNING POST, Aug. 1, 1997, at 7. *Rights of Workers Curbed in Hong Kong*, THE HERALD (Glasgow), July 17, 1997, at 12.

22. The British Broadcasting Corp., Nov. 28, 1997.

23. See generally Janusz Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT'L J. LEGAL INFO. 24 (1992); Kerry Kennedy Cuomo, *Keynote Address: Human Rights and the Environment: Common Ground*, 18 YALE J. INT'L L. 227 (1993); and Michael J. Kane, *Promoting Political Rights to Protect the Environment*, 18 YALE J. INT'L L. 389 (1993).

exacerbates the effects of, and itself is exacerbated by, other human rights violations including, particularly, racism, and prejudices against the impoverished and other disenfranchised groups. Third, environmental destruction itself may rise to the level of a human rights violation where it undermines the very foundation of a human being's opportunity to live in surroundings that satisfactorily support human life. An environmental right is implicit to the realization of the "inherent dignity"²⁴ of human beings, as well as an integral part of the human rights foundation of "freedom, justice and peace."²⁵ It is found not only through the Covenant on Civil and Political Rights (ICCPR),²⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ and affirmed through the Stockholm Declaration²⁸ and the Rio Declaration,²⁹ but also may be construed independently as a "third-generation" solidarity right.³⁰

"Earth Summit + 5", a special meeting of the U.N. General Assembly convened June 23-27 in New York, evaluated domestic and international progress in implementing sustainable development—development which is environmentally sound and safeguards the rights of future generations—as outlined in the Rio Declaration and its accompanying Agenda 21, Program of Action.³¹ Several pivotal issues were left unresolved, including the developed countries' failure to follow through on promises of aid to developing countries in promotion of environmentally sustainable development and the setting of targets for reducing emissions of greenhouse gases.³² Furthermore, the delegates were unable to agree on a coordinated statement to renew support for the principles of the Rio Declaration.³³

Reaching consensus on an enforceable and legally-binding document advancing the principles of the United Nations Framework Convention on Climate Change, which had been opened for signature at the original Rio Conference, was the subject of the United Nations Conference on Climate Change (the Kyoto Conference) December 1-11. The concluding document of the Kyoto Conference represented a substantial dilution of the original principles, including a lessening of the commitment of developed countries in the reduction of greenhouse gas emissions

24. The Preamble to the Universal Declaration of Human Rights offers one of the best articulations on personal dignity and human rights: G.A. Res. 217A(111), U.N. Doc. A/810, 21, 112, 3 GAOR Res. A/810 (1948) at Preamble.

25. *Id.*

26. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

27. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

28. Declaration of the United Nations Conference on the Human Environment, Stockholm, Sweden, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev.1 (1973), reprinted in 11 I.L.M. 1416. "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. . . . The natural resources of the earth . . . must be safeguarded for the benefit of present and future generation. . . ." *Id.* at princ. 1 and 2.

29. Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/5 (1992) [hereinafter Rio Declaration].

30. See *The Rights of Solidarity: An Attempt at Conceptual Analysis*, Working Group of the Standing Committee of International Non-Governmental Organizations having a consultative relationship (categories A and B) with UNESCO, SS-80/CON.806/COL.4; NGO/80/46/DH/11, 1980 at 3-6. Several scholars have argued that environmental integrity exists as a third generation right. See generally Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L. J. 393 (1989); Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351 (1993).

31. Rio Declaration, *supra* note 29, at Agenda Item 21, U.N. Doc. A/Conf. 151/PC/100/Add. 1 (1992).

32. See FACTS ON FILE WORLD NEWS DIGEST, July 10, 1997, at 491 D1.

33. *Id.*

and a significant extension of the target time frame. Still under contention is the currently exempt status of developing countries to the Convention on Climate Change and the relative and differentiated duties of developed versus developing countries in reversing the effects of greenhouse gases.

On the grass-roots level and in the shadow of the "Denver Economic Summit of the Eight," the International Indigenous Peoples Tribunal on June 19 convened a mock world court to hear testimony alleging human rights and environmental harms.³⁴

China has continued to move forward with plans to construct the Three Gorges Dam across the Yangtsee River. Environmentalists and engineers predict that the dam will displace a record 1.2 million people and cause additional environmental and safety problems, including destruction of the environment of upstream areas of Sichuan Province and Chongqing City and may result in as many as 500,000 deaths from flooding in this densely populated region.³⁵ Additionally, at full capacity, the dam will leave a total of 13 cities and 1,392 towns and villages submerged under water.³⁶ The dam was first proposed by Sun Yat-sen, a leader of the Chinese Communist revolution, and has become a symbol not only of China's economic prosperity, but also of national independence.³⁷

Amnesty International has released human rights guidelines for multinational companies in its Ethical Trading Initiative, which addresses human rights, labor and environmental practices. Dutch-based Shell and British-based BP oil companies have faced widespread protests of their business practices and accusations of environmental and human rights abuses or complicity with despotic governments.

Protests against Shell have targeted its continued involvement in Nigeria, which is said to provide a significant proportion of the revenue for the government's dictatorship.³⁸ Shell is also accused of being partially responsible through its inaction over the government's sentencing to death and execution of human rights and environmental activist Ken Saro-Wiwa and eight others who fought against the resulting environmental destruction and violation of indigenous rights of the Ogoni People.³⁹

BP has been accused of widespread pollution and harm to human life in the Casanare region of Colombia, as well as hiring and supporting the Colombian army to protect BP's operations in that area.⁴⁰ In response to public pressure on these issues, both Shell and BP have drafted supplementary codes of business practices. Shell has also established a "social accountability unit" to examine such concerns.

VIII. UN Moves Toward Establishment of an International Criminal Court⁴¹

The United Nations came a step closer this past December to establishing a permanent International Criminal Court (ICC). On December 15, 1997, the General Assembly adopted

34. Deborah Frazier, *Third World Supporters Rip Exploitation*, ROCKY MOUNTAIN NEWS, June 20, 1997, at 13S.

35. Rone Tempest, *China Puts Its Dam Project on a Firm Course*, LOS ANGELES TIMES, Nov. 9, 1997, at A1.

36. *Id.*

37. *Id.*

38. Editorial Desk, *Citizen Shell*, N.Y. TIMES, Mar. 31, 1997, at A14.

39. *Id.*

40. William Raynor and Richard Halstead, *Colombia's "Dirty War" Embroils BP*, THE INDEPENDENT, June 22, 1997, at 2.

41. This subject is explored in more detail in the article on International Courts and Tribunals in this issue.

by consensus a resolution setting the dates of a treaty conference to be held from June 15 to July 17, 1998 in Rome. The purpose of the Rome high level diplomatic conference is to adopt an ICC statute.

Government delegates, assisted by non-governmental representatives, made slow but steady progress at the fifth Preparatory Committee (PrepCom) session, held December 1-12, 1997. Still, several contentious issues remain. Chief among them is the independence of the ICC. A group of key countries, including the United States, continues to support a highly criticized draft provision in the ICC Statute that would require prior approval by the U.N. Security Council before the ICC could investigate or prosecute cases. At the December PrepCom, however, the United Kingdom broke from this group to support the compromise formulation, or "Singapore proposal," that would instead require the Security Council to act affirmatively to prevent or delay ICC prosecutions, and only within a prescribed period of time.

Other issues addressed at the fifth PrepCom included definitions and elements of war crimes, general principles of criminal law, procedural matters, and state/international cooperation and judicial assistance.⁴² Justice Louise Arbour, Prosecutor of the International Criminal Tribunals for former Yugoslavia and Rwanda, weighed in on the need for the ICC Statute to include explicit obligations for States Parties to cooperate with the ICC to ensure that evidence necessary for the investigation is turned over to the Prosecutor. Justice Arbour concluded, "I am not persuaded that a weak permanent Court is better than no Court at all."

The sixth and final PrepCom session will be held from March 15 to April 3, 1998 to hammer out a working document for consideration by governments at the Rome conference.

IX. Land Mines

The issue of land mines, which kill or maim 26,000 persons (mostly civilians) annually, was a topic of great international interest, focus, and debate in 1997. To the great surprise of even the ban's most ardent supporters, and as a befitting end to 1997, in the first week of December, representatives from 122 nations gathered in Ottawa for the historic signing of a comprehensive ban on the global production, use, stockpiling, and transport of land mines. Significantly, and a great disappointment to many, the major world powers, including the United States, Russia, and China, refused to sign the ban, although they did send representatives to Ottawa, who participated in discussions on mine removal and aid to mine victims. At the last minute, Japan and several other nations did come around and sign the treaty.

While President Clinton says he supports the ban in principle, as well as a global effort to eliminate mines by 2010, he declined support for the treaty at this time, largely because of the failure to carve out an exception for Korea. His view is that removal of the mines in Korea would endanger the lives of the 37,000 U.S. troops stationed there, and create a dangerous situation generally. The United States has pledged to stop using all mines by 2003, except in Korea, and President Clinton says he is committed to including Korea, and supporting the ban in full by 2006. Further support for the ban comes from 60 Senators and 185 House members. Many Vietnam war veterans' groups are also strongly in favor of the treaty, as is

42. Women's non-governmental organizations (NGOs) attended a PreCom to put forth their concern that the ICC investigate and prosecute crimes of extreme violence against women. To that end, the Women's Caucus for Gender Justice in the ICC is lobbying for the ICC statute to provide for *inter alia*, (1) jurisdiction to try persons for serious crimes of sexual and gender violence; (2) reparations for such crimes; and (3) financial resources to ensure the ICC's independence and authority.

the Secretary General of the United Nations, Kofi Annan, who pledged strong U.N. support for the treaty and making the goals of the treaty a reality. At the signing, several countries made commitments to dramatically increase spending for elimination of the mines.

The treaty becomes effective six months after forty countries ratify it, and signatory nations have up to ten years after the treaty's effective date to destroy the mines. Further, the treaty does not eliminate anti-tank mines and has other exceptions. The practical removal of the estimated 100 million mines worldwide is a process that will take decades.

X. Victims of Domestic Violence May Qualify as Refugees Under U.S. Asylum Law

As recognized in numerous international instruments and by U.S. authorities, violence in the home (also referred to as violence in the domestic or private sphere⁴³) is among the most serious violations of women's rights. Protection against violence is a right rooted in the core instruments of international human rights and has been specifically elaborated in various treaties and declarations. The 1995 *INS Gender Asylum Guidelines* acknowledge the principle, now accepted under international law, that "women's rights are human rights, and that women's rights are universal."⁴⁴

Over the last decade, a critical element in the development of women's human rights has been the recognition that many of the serious harms women suffer are inflicted not in a public forum, but rather take the form of cultural or customary practices—or violence in the home imposed at the hands of members of women's families or communities. The rights of women traditionally have been ignored or characterized as private and personal matters, often resulting in women's exclusion from the discourse and implementation of national and international protection altogether. Without the acknowledgment that state responsibility may be implicated by cultural or private repression of women, the internationally recognized principle that "women's rights are human rights" is rendered largely nugatory.

Refugee law has become a visible arena for the recognition of women's human rights and, most recently, for elaboration of domestic violence as a human rights abuse. Refugee law is founded on two international treaties: the United Nations Convention relating to the Status of Refugees and its 1967 Protocol. U.S. refugee and asylum law is based on those treaties.⁴⁵ The term "refugee" is defined as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.⁴⁶

Persons eligible under this definition can obtain protection from return to their home countries and political asylum status in the United States.

43. The Special Rapporteur on Violence Against Women defines domestic violence as "violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law." Report of the Special Rapporteur on Violence Against Women, U.N. Human Rights Commission, U.N. Doc. E/CN.4/1996/53 (1996) [hereinafter U.N. Report on Violence Against Women].

44. INS, Office of International Affairs, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995).

45. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

46. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1997).

A woman whose home government is unable or unwilling to provide protection from violence or other serious harm perpetrated by family members or other persons with whom she lives may also qualify for political asylum under U.S. law. This application of the refugee definition is specifically adopted in decisions of U.S. adjudicators, as well as those of other countries that have granted asylum and refugee claims based on domestic violence.

As has been recognized in international human rights law and discourse, women refugees are more frequently the victims of persecution by non-state actors. This is a central issue in claims based on domestic violence. Asylum law embraces harms by non-state actors; protection from non-state actors is built into the very definition of "refugee" and relates to the core functions of refugee protection. In addition, under international law, including the ICCPR, states have a general duty to prevent and punish violations of human rights by private actors.

International law also places specific responsibilities on states to enforce national laws, including criminal laws, without discrimination. Domestic violence is a gender-specific crime implicating fundamental human rights. As noted in the 1996 report of the U.N. Report on Violence Against Women, "[d]espite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women . . . it is intended to subordinate women as a group on account of their gender, and deprive them of a range of other rights."⁴⁷ U.S. authorities also have recognized the gender-bias in such crimes of violence against women.⁴⁸

Domestic violence often involves repeated physical assaults, under certain circumstances amounting to torture, frequently resulting in death.⁴⁹ These are among the most serious harms within the terms of the international and U. S. definition of the "refugee" and international human rights standards. Where there is evidence of a pattern of failure to address this problem in a serious manner or nonenforcement of applicable criminal laws, state responsibility may be established, and asylum may be granted.

XI. Female Genital Mutilation (FGM)

The practice of female genital mutilation (FGM)—the removal of some or all of a girl's or woman's genitalia—has been recognized as a violation of women's human rights for many years. It is in violation of both the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, FGM continues to be practiced around the world, and is still widely practiced in parts of Africa, Asia and the Middle East.⁵⁰

The Inter-African Committee (IAC) on traditional practices affecting the health of women and children met in Dakar, Senegal, in November 1997. The committee adopted a three-year action plan to accelerate the eradication of FGM and other degrading practices against women and girls. In furtherance of this meeting, the Organization of African Unity pledged to help its fifty-three states to take legal action against traditional practices that harm women and girls.⁵¹

A number of countries are already taking steps to eradicate FGM. But, the issue is complex as it involves deep-rooted cultural traditions. The year 1997 saw many advances in the eradication

47. See U.N. Report on Violence Against Women, *supra* note 43, at 23 & 53.

48. *Id.* at 7, 14, 23 & 53.

49. 1994 U.S.C.C.A.N. 1839 (comments on Violence Against Women Act).

50. Mali's Struggle to Eradicate Female Genital Mutilation (FGM) UNIFEM (1997).

51. *New Anti Female Circumcision Plan of Action Launched*, PAN AFRICAN NEWS AGENCY (Nov. 16, 1997).

of FGM. These advances are the result of battles being waged against FGM by local women in each nation with the support of women's groups around the world. Following is an update on legislation on FGM in Egypt, the Gambia and the United States.

A. EGYPT

In Egypt, FGM is almost universal among women of reproductive age.⁵² However, in 1996, a great step was taken towards the eradication of FGM, when the Egyptian Minister of Health and Population issued a decree forbidding FGM except for medical reasons, and then only with the concurrence of a senior obstetrician. In June 1997, this acclaimed advance was threatened when an administrative court overturned the 1996 decree as unconstitutional. The Judge argued that "a doctor's right to perform their profession according to the law—which allows them to do surgery—cannot be restricted by a ministerial decree."⁵³ The government contested the ruling and on December 28, 1997, the Egyptian Supreme Administration Court overturned the lower court's decision and upheld the 1996 decree banning FGM. This ruling cannot be appealed and violations of the decree will carry a three-year jail sentence. The decision is significant, as Egypt has long been the center of both Islamic scholarship and Islamic jurisprudence;⁵⁴ the decision may set a precedent regarding FGM for other Islamic nations.

B. THE GAMBIA

The practice of FGM in The Gambia has been estimated at almost 100 percent.⁵⁵ On May 17, 1997, a setback to education on FGM occurred when the Gambia Telecommunications (GAMTEL) Director of Broadcasting Services announced a new policy on media treatment of the issues of FGM. The policy, which would have made it more difficult to educate Gambian women and girls on the hazards of FGM, forbade "the broadcast by Radio Gambia (RG) or Gambia Television (GTV) of any programs which either seemingly oppose FGM or tend to portray medical hazard about the practice."⁵⁶ However, in November 1997, following lobbying by the Gambia Committee on Traditional Practices (GAMCOTRAP) and other local and international groups, the Gambia Government made a public announcement that issues of reproductive health including FGM can be announced through the government-controlled media.⁵⁷ Furthermore, the government announced that all NGOs are allowed to make use of the government media with regards to FGM.

C. THE UNITED STATES⁵⁸

During the summer of 1996, the Immigration and Naturalization Service (INS) started to receive appeals for asylum cases based on FGM. The INS judges and officers had no information

52. U.S. DEP'T OF STATE, REPORT ON FEMALE GENITAL MUTILATION IN EGYPT (Sept. 15, 1997).

53. *Egypt: Court Asserts Doctors' Right to Perform Female Genital Mutilation (FGM)* EQUALITY NOW, Women's Action 8.3 (July 1997).

54. Barbara Crossette, *Court Backs Egypt's Ban on Mutilation*, N.Y. TIMES, Dec. 29, 1997, at A3.

55. U.S. DEP'T OF STATE, REPORT ON FEMALE GENITAL MUTILATION IN THE GAMBIA (Sept. 15, 1997).

56. *The Gambia: Government Censorship of the Campaign to Stop Female Genital Mutilation*, EQUALITY NOW, Women's Action 13.1 (July 1997).

57. *The Gambia: Government Rescinds Censorship Policy on Female Genital Mutilation (FGM)*, EQUALITY NOW, Women's Action 13.2 (Dec. 1997).

58. This information is taken in part from a presentation to the Working Group on the Human Rights of Women, by Lois Gochbauer, Office of Asylum, Bureau of Democracy, Human Rights and Labor, U.S. State Department.

to use in their consideration of the cases. Lois Gochbauer, Office of Asylum at the State Department, compiled a general report on FGM and specific reports for the sixteen countries from which the most people have applied for asylum based on FGM. The report was sent to asylum officers and immigration judges who have since used this information in their decisions. The State Department has set up a working group on FGM chaired by Theresa Loar, director of the President's Interagency Council on Women and Senior Coordinator for International Women's Issues.

In September of 1996, the U.S. Congress passed legislation regarding FGM under section 579 of the Foreign Operations, Export Financing and Related Appropriations Act. Section 579 requires that

[t]he Secretary of the Treasury shall instruct the United States Executive Director at each international financial institution to use the voice and vote of the United States to oppose any loan or other utilization of the funds of their respective institution, other than to address basic human needs, for the government of any country which the Secretary of Treasury determines: (1) has, as a cultural custom, a known history of the practice of FGM; and (2) has not taken steps to implement educational programs designed to prevent the practice of FGM.⁵⁹

The legislation went into effect October 1, 1997. The State Department has compiled information on educational programs in countries with a history of FGM to assist the Secretary of Treasury with his determination under section 579.

XII. International Developments in Sexual Orientation Law

Gay and lesbian persons around the world made tremendous legal and political strides in 1997. President Clinton nominated an openly gay man to be the U.S. Ambassador to Luxembourg⁶⁰ and British Prime Minister Tony Blair appointed the first openly gay cabinet member in British history.⁶¹ The new President of Ireland, Mary McAleese, became a founding member of the Dublin campaign for homosexual law reform.⁶²

Other recent gains are even more dramatic. The new Constitution of South Africa expressly prohibited discrimination on the basis of sexual orientation,⁶³ becoming the first country to include "sexual orientation" in its national constitution. The largest political party in Italy adopted a gay rights resolution⁶⁴ and the International Lesbian and Gay Association⁶⁵ won consultative status in the Council of Europe.⁶⁶

The following survey highlights selected developments from 1997 in several areas: (1) anti-gay violence; (2) sodomy law reform; (3) family law, including same-sex marriage and gay adoption; (4) anti-discrimination law; (5) immigration law; and, (6) military service.

59. Foreign Operations, Export Financing and Related Appropriations Act § 579, 22 U.S.C.A. § 262k-2(a) (West Supp. 1998).

60. Lou Chibbaro, Jr., *Clinton Names Gay Man to Post as Ambassador*, WASH. BLADE, Oct. 10, 1997, at 1; *The Advocate Report*, ADVOCATE, Dec. 9, 1997, at 18. *But see* Peter Freiberg, *Hornel Nomination Stalls: Concerns Raised About 'Gay Agenda' and Partner*, WASH. BLADE, Nov. 21, 1997, at 1.

61. *The Year 1997 in Review*, ADVOCATE, Jan. 20, 1998, at 14 (Prime Minister Blair appointed Chris Smith to be the National Heritage Secretary).

62. *The Advocate Report*, *supra* note 60, at 20.

63. S. AFR. CONST., § 9.

64. Christopher Jones, *Italy's Largest Political Party Embraces Gays*, WASH. BLADE, Mar. 14, 1997, at 12.

65. ILGA is a federation of several hundred gay groups and individuals from more than 80 countries.

66. Rex Wockner, *ILGA Achieves Council of Europe Status*, CHICAGO OUTLINES, Nov. 26, 1997, at 11.

A. ANTI-GAY VIOLENCE

Gay, lesbian, and transgendered persons are being killed and tortured around the world.⁶⁷ Homosexual men have been targeted by death squads in Columbia,⁶⁸ Brazil,⁶⁹ and other countries.⁷⁰ Lesbians have been raped in Nigeria as punishment for their activism.⁷¹ The Religious Affairs Department in Malaysia agreed to impose whipping for lesbianism and sodomy.⁷² Iran publicly hanged a gay man, Ali Sharifi, for having same-sex sexual intercourse.⁷³

For the most part, murders and torture of gay, lesbian, and transgendered persons go unpunished. In some cases, such as those alleged in Argentina, the abuse comes from the hands of law enforcement agencies themselves.⁷⁴ In a new development, however, a U.N. mission in Guatemala began an investigation into the October 2 assassination of Luis Palencia, a vocal advocate for gay human rights and HIV issues.⁷⁵ One report suggested that the United Nations was investigating whether the murder formed part of "a pattern of social cleansing" in Guatemala.⁷⁶

B. SODOMY LAW REFORM

Governments around the world have begun to realize that sodomy laws serve no legitimate governmental purpose. For example, as of January 1, 1997, all seven European successor republics of the former Soviet Union (Belarus, Estonia, Latvia, Lithuania, Moldova, Russia, and Ukraine) have repealed the Soviet sodomy law.⁷⁷

While some countries repealed their sodomy laws by legislative action, other countries strike their sodomy statutes by judicial action. A constitutional tribunal in Ecuador struck that nation's sodomy law on November 25.⁷⁸ The case was brought before the Ecuadorian tribunal by petitions with 1,460 signatures supporting repeal of the law.⁷⁹ The signature drive, it was reported, was fueled by the police harassment of gay bars.⁸⁰ With the repeal in Ecuador, the only jurisdictions in Latin America to still have sodomy laws are Chile, Nicaragua,⁸¹ and Puerto

67. *The Advocate Report*, ADVOCATE, Apr. 1, 1997, at 27.

68. *Id.*

69. Christopher Jones, *Report: Hundreds of Brazilian Gays Killed—Recent Report Paints Bleak Picture of Life for Gays in Brazil*, WASH. BLADE, Mar. 7, 1997.

70. Christopher Jones, *Amnesty International Tracks Rights Abuses*, WASH. BLADE, Feb. 29, 1997, at 10.

71. Christopher Jones, *Human Rights Group Confirms Women Raped*, WASHINGTON BLADE, Apr. 11, 1997, at 13.

72. *The Advocate Report*, ADVOCATE, Sept. 2, 1997, at 20.

73. Kai Wright, *Iranian Man Hanged for Gay Sexual Activity*, WASH. BLADE, Dec. 19, 1997, at 14.

74. Kai Wright, *Activists Report Police Abuse of Transgenders*, WASH. BLADE, Oct. 24, 1997, at 14. In at least one case, the officially-sanctioned discrimination in Argentina led to a death of a transgendered person who was stabbed on a street. *Id.*

75. Kai Wright, *UN Panel Investigating Murder: Outspoken Human Rights Advocate Killed in Guatemala*, WASH. BLADE, Nov. 7, 1997, at 14.

76. *Id.*

77. See e.g. *The Advocate Report*, ADVOCATE, Feb. 18, 1997, at 21 (reporting repeal of Russia's sodomy law in a new penal code that entered into effect on Jan. 1, 1997).

78. Kai Wright, *Ecuador Strikes Ban on Sex Between Men*, WASH. BLADE, Dec. 19, 1997, at 14.

79. *Id.* "To file such a petition before the tribunal, applicants had to first gather at least 1,000 signatures demonstrating public support for the action requested in the petition." *Id.*

80. *Id.*

81. *Id.* The penalty for gay sex in Nicaragua is one to three years in prison. Rex Wockner, *Nicaragua Gay Couple Arrested For Getting Married*, CHICAGO OUTLINES, Dec. 3, 1997, at 11.

Rico.⁸² Cyprus, whose sodomy law was declared unlawful in 1993 by the European Court of Human Rights,⁸³ now risks being ejected from the Council of Europe because its parliament refuses to repeal its sodomy law.⁸⁴ The decisions finding sodomy laws to violate human rights were cited in litigation in the United States as well, where activists challenging the Kansas sodomy law placed their struggle in the context of international human rights law.⁸⁵

C. FAMILY LAW

A case arising from Hawaii sparked international debate on whether gay and lesbian couples were entitled to have civil marriage ceremonies.⁸⁶ No country in the world currently allows same sex marriage, although Hungary recently recognized "common law" same sex marriages.⁸⁷

Registered partnerships, a step short of marriage, are recognized in Denmark, the Netherlands, Sweden, Norway, and Iceland. These partnerships are valuable for purposes of property ownership, taxation, pensions, social benefits, inheritance, and divorce, as well as for the social recognition that is so highly valued by those seeking full marriage rights. Adoption is not yet allowed in these countries, although Iceland allows adoption when a gay spouse is adopting a partner's biological child.⁸⁸

D. ANTI-DISCRIMINATION LAW

All but two provinces in Canada now ban discrimination on the basis of sexual orientation.⁸⁹ Alberta, one of the provinces that does not expressly protect gay and lesbian persons, faced harsh questioning in November from the Canadian Supreme Court for this statutory omission.⁹⁰ The court, which considered the situation in Alberta as part of a sexual orientation discrimination case, had ruled unanimously in 1995 that the Canadian Charter of Rights and Freedoms bars discrimination on the basis of sexual orientation.⁹¹ After Alberta argued its case, the legislature in the province of Newfoundland amended its human rights code to ban discrimination based on sexual orientation in employment, housing, literature, and access to establishments and services.⁹²

82. Paul Varnell, *Ecuador's Law Against Gay Contact Overturned*, WINDY CITY TIMES, Dec. 4, 1997, at 8.

83. *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993).

84. Rex Wockner, *Cyprus Government Pleads With Parliament on Gay Sex*, CHICAGO OUTLINES, Nov. 26, 1997, at 11. The Foreign Minister, Yiannakis Cassoulides, reportedly "begged" the House Foreign Affairs Committee to vote to legalize gay-male sex to avoid having the country thrown out of the Council of Europe. *Id.*

85. See Amicus Brief of the Inter-American Center for Human Rights, *City of Topeka v. Movsovit*, No. 96-77372-A (Kan. Ct. App. Nov. 25, 1996) (brief authored by Professors James D. Willets and Sheila Reynolds). See also Lisa Neff, *Court Considers Challenge to Kansas Sodomy Law*, WINDY CITY TIMES, Oct. 23, 1997, at 4.

86. The Circuit Court of the First Circuit in Hawaii found in December 1996 that limiting marriage licenses to heterosexual couples was unconstitutional and in violation of the equal protection clause of HAW. CONST., art. I, § 5. *Baehr v. Miike*, No. 91-1394, slip op. at 45 (Dec. 3, 1996). See also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). An important aspect of the case is that it involves civil marriage ceremonies; there is no suggestion that the state would force any religious group to perform religious marriage ceremonies.

87. See Rex Wockner, *Same-Sex Marriage, Nordic Style*, ADVOCATE, Feb. 4, 1997, at 26.

88. *Id.*

89. The only Canadian provinces without protection for sexual orientation discrimination are now Alberta and Prince Edward Island.

90. Kai Wright, *Justices Blast Omission of Gays in Law*, WASH. BLADE, Nov. 28, 1997, at 12.

91. See *id.*

92. See *id.*

E. IMMIGRATION LAW

France⁹³ joined the growing number of countries, including the United States,⁹⁴ that grant political asylum based on sexual orientation.⁹⁵ Great Britain⁹⁶ and Belgium,⁹⁷ meanwhile, changed their policies in 1997 to allow immigration rights for long-term, same sex partners. Australia, Denmark, the Netherlands, New Zealand, Norway, and Sweden had already recognized long-term gay partners for immigration and residency purposes.⁹⁸

F. MILITARY SERVICE

Some nations allow gay men and lesbians to serve openly in their military branches; other nations prohibit military service on the alleged basis that homosexuality is "incompatible with military service." These exclusionary policies have been successfully defended before national courts that defer to the military's judgment. Great Britain, in a new development, must defend its exclusionary policy before the European Court of Justice, which will hear a case brought by Terry Perkins, a medical assistant with the Royal Navy who was discharged under the ban.⁹⁹ The European Court of Justice will decide whether discrimination based on sexual orientation is "sex discrimination" contrary to the Equal Treatment Directive, and if so, whether this also applies to the armed forces. Activists and observers believe he may prevail in his case before the court, considering that the court previously protected transgendered persons from sexual orientation discrimination in employment.¹⁰⁰

93. Christopher Jones, *France Grants Asylum to Algerian Man*, WASH. BLADE, Feb. 7, 1997, at 10.

94. Since 1994 the United States has granted political asylum to more than 60 foreigners who claimed persecution on the basis of their sexual orientation. *Agenda*, ADVOCATE, Feb. 4, 1997, at 12.

95. See e.g., *Pitcherskaia v. Immigration and Naturalization Serv.*, 118 F.3d 641 (9th Cir. 1997) (Russian lesbian); see also *The Advocate Report*, ADVOCATE, Mar. 4, 1997, at 23; Paul Varnell, *Malaysian Wins Immigration Case, Remains in U.S.*, WINDY CITY TIMES, Oct. 16, 1997, at 10.

96. Rex Wockner, *British Same-Sex Immigration Policy Takes Effect*, CHICAGO OUTLINES, Oct. 29, 1997, at 11.

97. Rex Wockner, *Belgium Welcomes Gays' Foreign Lovers*, CHICAGO OUTLINES, Oct. 29, 1997, at 11.

98. WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 751 (2d ed. 1997).

99. Christopher Jones, *Great Britain Considers Lifting Gay Soldier Ban*, WASH. BLADE, Apr. 4, 1997, at 11.

100. See *id.*