

ACLU  
INTERNATIONAL  
CIVIL LIBERTIES  
REPORT



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## 1. Introduction

By Ann Beeson and Paul Hoffman\*

The protection of civil liberties and human rights across the globe has taken on added urgency in the past year. Following the September 11<sup>th</sup> terrorist attacks, the United States government has been all too willing to sacrifice civil liberties and human rights in the name of national security and the war on terrorism. The United States sets a powerful example for the respect – or disrespect – of human rights around the world. The erosion of fundamental liberties at home is certain to lead to a corresponding erosion of rights elsewhere in the world.

There is a greater need than ever for domestic civil rights organizations like the ACLU to hold the U.S. government accountable for violating international human rights principles in addition to constitutional ones. We must also increase our partnerships with international, national, and local human rights organizations around the world to fight the erosion of rights. In addition to the many developments discussed in detail in the following report, in the past year the ACLU rose to this challenge in a number of ways.

ACLU Executive Director Anthony Romero initiated an innovative joint project with the Human Rights Commission of Pakistan to identify, contact, and document the experiences of Pakistanis secretly detained and then deported by the US government after 9/11. The project, which is ongoing, will send a strong message to the US government that it cannot gain impunity through secrecy; human rights advocates will work across borders to

document and hold the government accountable for any abuses.

In May 2002, we held a plenary session and workshop at the ACLU National Staff Conference, entitled “Using International Human Rights Domestically.” Alice Henkin of the Aspen Institute discussed her training of federal judges in international human rights law. Paul Hoffman outlined recent uses of international law in domestic civil rights litigation. Catherine Powell, the (now former) Executive Director of Columbia’s Human Rights Institute, discussed local, state and federal legislative efforts to adopt international human rights standards. Cheri Honkala of the Kensington Welfare Rights Union inspired everyone with her call for more grass-roots advocacy and community building based on international human rights standards.

In July 2002, the ACLU and many other groups participated in a working conference at Howard University, called “Ending Exceptionalism: Strengthening Human Rights Work in the United States.” Over sixty policy advocates, documentarians, academics, lawyers, and grass-roots advocates discussed specific methods for applying human rights principles to issues such as sovereignty, incarceration, the death penalty, discrimination, immigration, and poverty in the US. The work of the conference is ongoing and is likely to result in the creation of a ground-breaking new US Human Rights Network. The Network would bring together a broad range of activists to promote US compliance with universal human rights standards.

Other efforts to bring together US human rights activists also gained momentum in the last year. Columbia’s Human Rights Institute (CHRI) continued its Bringing Human Rights Home Lawyers Network, which hosts a quarterly meeting of lawyers to discuss specific human rights cases and resources in the US. CHRI also launched the Human Rights Online web site, hosted on [probono.net](http://probono.net), which links

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civil rights and human rights organizations. The web site allows practitioners to share new ideas and resources for challenging injustice in the US, and to make their collective knowledge more accessible to other advocates.

In October 2002, the ACLU and Human Rights Watch announced the creation of a new two-year joint fellowship, the Aryeh Neier Fellowship for Human Rights. The fellow will work with both organizations on joint initiatives to strengthen respect for human rights in the US. Work is likely to include field research in the US, preparation of reports, advocacy, and development of litigation strategies. HRW and the ACLU created the fellowship to honor the legacy of Aryeh Neier. As executive director the ACLU and then of HRW, Aryeh Neier helped guide both organizations into powerful forces for justice and human rights.

We expect to make additional headway next year, with two projects already in the works. First, we are revitalizing the existing ACLU International Human Rights Task Force, to work with ACLU staff, members and the Board to increase the knowledge and use of human rights principles within the ACLU. Second, we have obtained funding to plan and host an intensive two-day conference to train civil rights lawyers around the country to incorporate human rights principles into domestic civil rights litigation. We are hiring a consultant to plan the conference, and she will work closely with a program committee which includes representatives from five key human rights and civil liberties organizations. The conference will be probably be held in Atlanta, Georgia (or elsewhere in the south), sometime in the fall of 2003.

## 2. HUMAN RIGHTS, ANTITERRORIST WRONGS

By: Diane Marie Amann\*

The September 11, 2001, attacks that killed thousands in New York and Washington awakened Americans to a new sense of vulnerability. These were not the first terrorist strikes against the United States; prior assaults had included explosions at Marine barracks in Beirut in 1983 and at U.S. embassies in Africa in 1998. But this time, in a perverse twist, civilians, passengers on civil aircraft, were transformed into tools for commission of international terrorism on U.S. soil. September 11 thus shocked Americans into awareness that their borders, no less than those elsewhere in the world, could be penetrated.

***The Government's Antiterrorism Campaign*** – With this new vulnerability might have come a new willingness to work with other nation-states against a common enemy. Initially, U.S. Secretary of State Colin M. Powell shuttled from state to state building a coalition to intervene militarily against the Taliban regime in Afghanistan, refuge of Osama bin Laden, leader of Al Qaeda, the terrorist network believed to have committed the September 11 attacks. Soon, however, the United States began following its own path.

As a result of the USA PATRIOT Act of 2001 and subsequent measures,<sup>1</sup> internal surveillance increased. Attorney-client conversations, once confidential, were subject to eavesdropping. Federal employees replaced private security guards, and employed more intrusive search methods at airports. Policymakers mulled combining a score of federal agencies into a new, Cabinet-level domestic security sector, to be named the

Homeland Security Department, with much access to intelligence data about terrorism. More than seven thousand persons found in the United States, mostly Arabs, South Asians, or Muslims, received invitations to appear at police stations and answer questions; more than a thousand noncitizens were held in prolonged and secret detention.

Detainees outside the United States endured exceptional treatment. Those whom President George H. Bush presumed members of Al Qaeda were detained indefinitely at a U.S. military base at Guantánamo Bay, Cuba. There they were denied the protection of the U.S. Constitution. Vice-President Dick Cheney justified this by saying of terrorists, ““They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.””<sup>2</sup> Officials endeavored to interrogate detainees, who were refused access to counsel, and the reported silence of many prompted some in the United States to discuss the use of torture to extract confessions.<sup>3</sup> President George W. Bush authorized the use of special military commissions, not bound to observe the panoply of the rights of the accused and not subject to judicial review, for trial of some of the detainees. The rest – and any whom a military tribunal might acquit – faced internment until the United States declared an end to its “war” against terrorism.<sup>4</sup>

The U.S. campaign provoked much criticism from its allies and others around the globe. Sweden pressed for release of its citizens’ assets, frozen by the U.N. Security Council at the United States’ request; Spain signaled that it might not hand over suspected Al Qaeda members unless the United States promised to try them in civilian courts; and several states protested the U.S. plan to seek the death penalty for one defendant, a French national.<sup>5</sup> States pressed for a diplomatic solution to concerns about weapons-making in

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Iraq in spite of U.S. demands for a military assault.

Treatment of Guantánamo detainees sparked international outrage. Photographs of hooded men, in chains and on their knees amid cages, spurred insistence that the United States obey the third Geneva Convention, regarding the treatment of prisoners of war.<sup>6</sup> It requires that a High Contracting Party treat prisoners of war humanely and refrain from demanding information other than that relating to identification. Prisoners of war accused of crimes must receive a fair trial, according to the Convention – at a minimum, the same criminal process that the detaining state would accord its own military personnel. Prisoners not subject to criminal proceedings must be liberated and repatriated as soon as the conflict ends.

The United States resisted application of the Convention, arguing that the alien detainees were not prisoners of war, but rather “enemy combatants” unprotected by the Geneva framework. Eventually it relented with regard to nationals of Afghanistan. Others – nationals of more than two dozen states including Saudi Arabia, Pakistan, Yemen, Algeria, Australia, Sweden, Britain, Belgium, and France – were presumed to belong to Al Qaeda, a nonstate entity. The U.S. government continued to maintain that the Convention did not cover these detainees, more than a third of the Guantánamo captives. It further rejected the Red Cross’ position that executive designation of detainee status did not satisfy the Convention requirement that “a competent tribunal” decide whether a detainee is a prisoner of war.<sup>7</sup>

In late 2002, the United States released four Guantánamo detainees, but brought in about thirty more, increasing the detention population to more than 600 men.<sup>8</sup> The proposed special military tribunals had not yet been established. Nonetheless, officials expanded the group of individuals they deemed unworthy of legal protection. Having discovered that a number of suspected terrorists

were not aliens but rather U.S. citizens, the government maintained that the Supreme Court’s decision in *Ex parte Quirin*, 317 U.S. 1 (1942), authorized it, without any judicial oversight, to curtail liberties of all “unlawful combatants” – even its own citizens found on its own territory.

#### **Legal Challenges to the U.S.**

**Campaign** – Opponents of U.S. antiterrorist measures sought legal recourse. Resorting to one of few potential judicial mechanisms for international scrutiny, a number of U.S. human rights attorneys filed with the Inter-American human rights system a challenge to the conditions of detention at Guantánamo. Even though the United States never ratified the American Convention on Human Rights of 1969, the Inter-American Court of Human Rights had ruled in 1990 that the United States’ membership in the Organization of American States rendered it liable to answer before inter-American human rights bodies.<sup>9</sup> Thus in March 2002, the Inter-American Commission on Human Rights adopted precautionary measures that asked the United States to “take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.” The United States refused, arguing both that the Commission lacked the competence to issue such a decision and that, in any event, the third Geneva Convention does not apply, so that there is no need to consult a “competent tribunal.” The Commission held a hearing on the matter in October 2002.<sup>10</sup>

As this international litigation unfolded, opponents also looked to national law, calling on state and federal judges throughout the United States to examine aspects of the antiterrorism campaign. Here too the executive resisted. In cases relating to Guantánamo, it persisted in its rebuff of the Geneva Convention; in others, it argued that a post-September 11 national emergency justified measures such as protracted and secret detention



and seizure of funds even absent a showing of ties to terrorism. In many cases the executive branch contended that the federal judiciary had no authority to review its decisions. Petitions writs for habeas corpus, by which the U.S. Supreme Court had reviewed proceedings of military tribunals in World War II-era cases like *Quirin* and *Application of Yamashita*, 327 U.S. 1 (1945), were claimed to have no jurisdictional foundation. At a hearing involving Yaser Esam Hamdi, a U.S. citizen captured in Afghanistan, a district court “verbally cuffed” government lawyers for seeking to avoid judicial scrutiny of their assertion that Hamdi did not enjoy the full complement of constitutional rights; as of yet no appellate panel has ruled on the question.<sup>11</sup>

Actual exercise of review did not mean that judges would rule against the executive. To the contrary, one challenge to detention at Guantánamo promptly was dismissed for the reason that government action outside U.S. territory fell outside the reach of the U.S. courts.<sup>12</sup> Judges divided on most questions put before them; for example, whether the executive had abused its statutory power by holding individuals in custody as material witnesses despite the lack of proof of misconduct;<sup>13</sup> whether immigration authorities must disclose names and other information about detainees;<sup>14</sup> whether the government could close immigration hearings in matters that the executive branch had classified of “special interest”;<sup>15</sup> and the degree to which the government had to prove links to terrorism before a suspect’s assets could be frozen.<sup>16</sup>

**Toward Just Decisionmaking** – Judges in the United States sought guidance in their own Constitution – not only its text, but also the values and political structure underlying it. At one end of the spectrum, the U.S. Court of Appeals for the Sixth Circuit warned that “[d]emocracies die behind closed doors,” and a district judge introduced her decision against the government’s use of the material witness statute with this excerpt from a Civil War-era opinion:

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.” *Detroit Free Press*, 303 F.3d at 683; *Awadallah*, 202 F. Supp. 2d at 57 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866)).

At the other end, the Fourth Circuit based its reversal of an order permitting a detained citizen access to counsel on the district court’s “inattention to ... cardinal principles of constitutional text and practice”; specifically, a practice of extreme judicial deference to executive and legislative acts “implicating sensitive matters of foreign policy, national security, or military affairs.” *Hamdi*, 296 F.3d at 281-82. Each opinion struggled to adjudicate novel questions by application of national law. But settled national law often failed to provide an adequate means to just resolution. In tacit acknowledgment of this, one court highlighted the pertinence of the third Geneva Convention to Guantánamo detention even as it deemed itself incompetent to enforce the terms of that treaty. *See Coalition of Clergy*, 189 F. Supp. 2d at 1050 (discussing Convention and commenting that “nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever”).

But continued abdication of jurisdiction could mean that no body will be able to place a check on post-September 11 antiterrorist measures. Longstanding U.S. resistance to orders from inter-American human rights bodies make it unlikely that this regional system will persuade the United States to alter its path. The check, if there is to be one, will have to come from a U.S. judiciary – one that has liberated itself from the confines of an exclusively national constitutional jurisprudence.

Constitutional law must be reformulated to acknowledge and accommodate the pervasive interdependence between United States and the rest of the world. It makes little sense to seek to apply “pure” national law, unaffected by external norms, as the sole vehicle for adjudication of matters replete with transnational components. To limit U.S. judicial power to the territorial borders of the United States likewise seems crabbed, given that executive action is not so confined. To give the U.S. government free rein abroad invites hostility from individuals and states across the globe. It also may work substantive injustice, for it runs the risk of immunizing abuses that would not be tolerated at home. And a premise underlying decrees of deference to executive decisions implicating foreign affairs – that domestic judges cannot acquire the tools to comprehend international matters – is outdated in a century characterized by instantaneous transmission of information. Because national law fails to permit a full and just evaluation of the U.S. antiterrorism campaign, judges ought to look beyond the borders of the United States for international norms that may aid their decisionmaking.

Such an approach is scarcely without precedent. Early U.S. opinions routinely looked to foreign sources when interpreting principles of U.S. law. The practice was not uncommon to federal criminal law as late as the 1960s.<sup>17</sup> Last Term’s decision in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), resurrected the practice of consulting international norms to determine whether punishment offends “evolving standards of decency” and so violates the Eighth Amendment to the U.S. Constitution. In citing the brief *amicus curiae* of the European Union as support for its conclusion that the Constitution forbids execution of a mentally retarded person, the Court rejected three dissenters’ arguments that international values are irrelevant. *Compare id.* at 2249 n.21 *with id.* at 2254-56 (Rehnquist, C.J., joined by Scalia

and Thomas, JJ., dissenting) *and id.* at 2264 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Such values pertain equally to interpretation of the constitutional principles critical to scrutiny of the U.S. antiterrorism campaign; in particular, whether certain intrusions amount to “unreasonable searches and seizures” violative of the Fourth Amendment, and whether the government has afforded “due process” as required by the Fifth Amendment.

The inquiry should begin with examination of human rights law, which holds that individuals enjoy certain rights simply because they have been born human beings. Two of the many recitations of this principle occur in the American Declaration of the Rights and Duties of Man, which the United States endorsed, and in the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified. The first proclaims that “the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality”; the second, that “the inherent dignity of the human person” gives rise to “equal and inalienable rights” that are “the foundation of freedom, justice and peace in the world.”<sup>18</sup> Though not unfamiliar to U.S. legal tradition, the concept has withered in the face of skepticism about its natural law roots and frequent abridgment of rights via judicially created balancing tests. Decisions that sustained government deprivations in the name of state necessity, like *Abrams v. United States*, 259 U.S. 616 (1919), and *Korematsu v. United States*, 323 U.S. 214 (1944), have further diluted its force. Consideration of international human rights law could lead to revitalization of the view that rights vest in humans simply because they are human, and thus cast grave doubt on the contention that the state may deny fundamental rights if the human in question is a noncitizen, or an enemy, or a suspected terrorist.

A court that has embraced the inherent dignity of each human being likely would draw on all available sources to craft a constitutional framework for substantive justice. Obligations the United States has assumed as a state party to the third Geneva Convention thus would become relevant. The claim would not be that the Convention is automatically enforceable in U.S. courts; the structure of treaties, combined with reservations and other mechanisms designed to limit the internal applicability of treaties, often preclude such an argument.<sup>19</sup> Rather, the Convention would stand as an indicator of values to which the United States has subscribed – values that implicate constitutional concepts like due process. A court well might find the fifty-three-year-old Convention ill adapted to the U.S. campaign against terrorism. The promise of liberation and repatriation at the end of the conflict, for example, rings hollow in a “war” without end. Some of the rights the Convention describes – an individual has a right not to answer all questions posed at interrogation, but no right to counsel at interrogation – fall short of standards established in the last half-century. The Convention does not apply, moreover, to anyone found in the United States and there subjected either to interrogation or detention. These failings would not stymie all reliance on the Convention, but rather would point the judge to additional sources of international law in order to develop a full understanding of contemporary values.

These other sources would reveal that the use of official torture, universally condemned as one of the worst international crimes, should be unthinkable. They would underscore the gravity of psychological harm from prolonged incommunicado detention; such harm may violate not only the nonderogable right to be free from torture, but also other human rights.<sup>20</sup> Still other rights would be implicated by heightened surveillance.<sup>21</sup> Finally, the executive’s assertion that it may

wage its antiterrorist campaign by unreviewable fiat also would fare poorly in light of international law’s guarantee of an effective means of redress and its preference for judicial review.<sup>22</sup>

Even at international law, most fundamental rights are subject to derogation. One example is Article 4(1) of the ICCPR, which states: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” This provision is kin to the strict scrutiny a U.S. court should undertake when confronted with state deprivation of fundamental rights, yet promises far more protection for the individual. Its very specificity should cabin governmental action in a way that a catchphrase like “[p]ressing public necessity,” used to justify internment of Japanese Americans during World War II,<sup>23</sup> cannot.

***Reassessing the U.S. Campaign*** – The September 11 attacks marked the debut neither of the struggle against Al Qaeda nor of the assault on U.S. territory; those landmarks had been established no later than the moment the U.S. embassies in Africa were bombed. Ordinary U.S. courts earlier had proved able to adjudicate this and other cases involving international terrorism. As the passage of months failed to bring the dire assaults about which the U.S. government had given constant warnings, the American sense of immediate threat abated. Circumstances thus did not point to the nation-threatening emergency that is a condition precedent to derogation. Nor were U.S. antiterrorist measures tailored to the

articulated threat. Large numbers of non-Americans found in the United States were held in secret, based on traits, such as age, sex, or national origin, shared by many law-abiding individuals. No showing of suspected links to Al Qaeda preceded detention. Similarly, the presidential order that authorized special military tribunals was not limited to persons believed to have committed terrorist acts on behalf of Al Qaeda. The terms of the order easily could be applied to an entirely different context – to Basque separatism, perhaps. And though the national sense of urgency had eased, the measures had not – more than a year after the attacks, no end to antiterrorism measures seemed likely.

In short, under external sources of law would render aspects of the U.S. antiterrorism campaign are invalid. Its devaluation of individuals runs contrary to a founding principle of human rights law, while the length and severity of many measures cannot withstand the exacting scrutiny of derogation analysis. The standards in sources like international human rights and humanitarian law are neither unattainable nor idiosyncratic; to the contrary, many embody a consensus shared by much of the world. U.S. courts seeking to comprehend the contemporary meaning of the constitutional values at stake in antiterrorism measures – for instance, the reasonableness of a search and seizure or the fairness of procedures – properly should take these standards into account. Abandonment of an insular constitutional jurisprudence not only is appropriate in an interdependent world, but also will afford greater security to individual targets of state prerogative.

### Endnotes

<sup>1</sup> See The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162, 107th Cong.; Homeland Security Act of 2002, H.R. Con. Res. 5005, 107th Cong.

(2002); Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597, Nov. 19, 2001; National Homeland Security and Combating Terrorism Act of 2002, S. 2452, 107th Cong. (2002); Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications, 66 Federal Register 55,062 (Oct. 31, 2001).

<sup>2</sup> Peter Slevin & George Lardner, Jr., *Bush Plan for Terrorism Trials Defended*, WASH. POST, Nov. 15, 2001, at A28 (quoting Cheney).

<sup>3</sup> See, e.g., Kevin Johnson & Richard Willing, *Ex-CIA chief revitalizes 'truth serum' debate*, USA TODAY, Apr. 26, 2002, at A12 (quoting William Webster); Alan Dershowitz, *We need a serious debate about the use of torture*, GUARDIAN (LONDON), Nov. 30, 2001, at 23 (suggesting, in letter by Harvard professor of criminal law, that on rare occasions it might be appropriate to issue "torture warrants" as a means of combating terrorism); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A06 (quoting former U.S. Attorney General Richard L. Thornburgh and others who advocated consideration of previously disfavored interrogation techniques).

<sup>4</sup> See U.S.: Presidential Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57833 (Nov. 13, 2001); Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Department of Defense Military Commission Order No. 1, Mar. 1, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (visited March 23, 2002).

<sup>5</sup> See Azhar Cachalia, *We must fight US efforts to erode international justice*, SUNDAY TIMES (JOHANNESBURG), Mar. 17, 2002, <http://www.sundaytimes.co.za/2002/03/17/insight/in04.asp> (visited May 3, 2002) (commentary by a judge of South Africa's High Court); Serge Schmemmann, *Swedes Take Up the Cause of 3 on U.S. Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9; Sam Dillon & Donald G. McNeil Jr., *Spain Sets Hurdle for Extradition*, N.Y. TIMES, Nov. 24, 2001, at A1;

Philip Shenon, *Germany Urges U.S. to Drop Death Penalty Plan*, N.Y. TIMES, Oct. 26, 2002, at A9.

<sup>6</sup> Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950 [hereinafter Geneva Convention].

<sup>7</sup> *See id.*, art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.”).

<sup>8</sup> *See* David Rohde, *Afghans Freed from Guantánamo Speak of Heat and Isolation*, N.Y. TIMES, Oct. 29, 2002, at A14.

<sup>9</sup> *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89*, July 14, 1989, Inter-Am. Ct. H. R., ser. A, no. 10 (1990).

<sup>10</sup> *See* Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures under Article 25 of the Commission’s Regulations, Feb. 25, 2002; Letter of Juan E. Méndez, Commission President, to Jennifer M. Green et al., Ref. Detainees in Guantanamo Bay, Cuba, Mar. 13, 2002 (both on file with author); Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba, Apr. 15, 2002, *reprinted in* 41 I.L.M. 1015 (2002).

<sup>11</sup> Katharine Q. Seelye, *Judge Questions Detention of Americans in War Case*, N.Y. TIMES, Aug. 14, 2002, at A15. The hearing followed a remand opinion, *Hamdi v. Rumsfeld*, 296 F.3d 278, 283-84 (4th Cir. 2001), in which the Fourth Circuit had reserved judgment on the judicial review question. Further appeal was pending in late 2002, even as a second defendant began to litigate a similar challenge. *See* Katharine Q. Seelye, *Court to Hear Arguments in Groundbreaking Case of U.S. Citizen Seized With Taliban*, N.Y. TIMES, Oct. 28, 2002, at A13;

Benjamin Weiser, *‘Enemy Combatant’ Fights to Obtain Counsel*, N.Y. TIMES, Oct. 30, 2002, at A13.

<sup>12</sup> *Coalition of Clergy v. Bush*, 189 F. Supp.2d 1036 (C.D. Cal. 2002). This decision was affirmed in November 2002, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2002).

<sup>13</sup> *Compare* United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (forbidding such use) *with In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (rejecting *Awadallah* ruling and refusing to quash material witness warrant).

<sup>14</sup> *Compare* Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002) (ordering release of detainees’ names) *with* Am. Civil Liberties Union of New Jersey v. County of Hudson, 352 N.J. Super. 44, 799 A.2d 629 N.J. Super. A.D.) (reversing judgment below, which had demanded disclosure of information regarding person detained by immigration authorities), *cert. denied*, 174 N.J. 190, 803 A.2d 1162 (2002).

<sup>15</sup> *Compare* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6<sup>th</sup> Cir. 2002) (condemning blanket closure in such instances) *with* North Jersey Media Group v. Ashcroft, \_\_\_ F.3d \_\_\_, 2002 WL 31246589 (3d Cir. Oct. 8, 2002) (finding no First Amendment right of access to such proceedings).

<sup>16</sup> *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002) (ruling that government-proffered documents showed that Muslim charity was terrorist organization, thus justifying seizure of assets); Global Relief Found. v. O’Neill, 205 F. Supp. 2d 885 (N.D. Ill. 2002) (sustaining Patriot Act provision that permits government, pending further investigation, to freeze a suspect’s asset without demonstrating the suspect’s ties to terrorism).

<sup>17</sup> *See, e.g.,* *Culombe v. Connecticut*, 367 U.S. 568, 595-98 (1961) (discussing at length English Judges Rules, which became a basis for warning requirement enunciated in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

<sup>18</sup> American Declaration of the Rights and Duties of Man, intro., O.A.S. Res. XXX, *adopted by the Ninth International Conference of American States*, Bogota, 1948, OAE/Ser.L/V/I.4 Rev. (1965); International Covenant on Civil and Political Rights, intro., G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The language in the ICCPR tracks that in the introduction to the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), which the United States also endorsed. It is augmented by Article 16 of the ICCPR, which states, “Everyone shall have the right to recognition everywhere as a person before the law.”

<sup>19</sup> *See, e.g., U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992) (reserving freedom to continue some U.S. practices contrary to the terms of the ICCPR, such as executions of minors, and further providing that no rights in the Covenant may be enforced in U.S. courts until Congress enacts implementing statutes).

<sup>20</sup> The ICCPR establishes the right to be free not only “torture,” but also “cruel, inhuman or degrading treatment or punishment,” as nonderogable. ICCPR, *supra* note 22, arts. 4(1), 7. Furthermore, U.S. law enacted to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), includes within the definition of torture, a crime punishable by death, the imposition of “severe mental pain or suffering,” which includes using procedures calculated to disrupt profoundly the senses or personality.” 18 U.S.C. §§ 2340, 2340A(a). Also implicated by this state action are the rights to be free from arbitrary detention and interference with privacy, ICCPR, *supra* note 22, arts. 9(1), 17(1), as well as the right to be treated during detention “with humanity and with respect for the inherent dignity of the human person,” *id.*, art. 10(1).

<sup>21</sup> These would include both the right to liberty and security of the person, ICCPR, *supra* note 22, art. 9(1), and the freedom from “arbitrary or unlawful

interference with . . . privacy, family, home or correspondence,” *id.*, art.17(1).

<sup>22</sup> On the right to a remedy, see *id.*, art. 3(a) (obliging states parties to guarantee persons whose rights have been violated “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”), and *Velásquez Rodríguez Case*, paras. 62-68, 4 Inter-Am. Ct. H.R. (ser. C) (1988) (interpreting guarantee of “effective recourse” in American human rights convention to require that legal avenues be capable of providing relief). On the value of judicial oversight, see ICCPR, *supra* note 22, arts. 3(b), 9(4) (requiring, respectively, that states not only to provide determination by governmental officials, but also “to develop the possibility of judicial remedy,” and that “[a]nyone” detained be permitted “to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful”).

<sup>23</sup> *See Korematsu*, 323 U.S. at 216. Decades later, convictions for resisting internment were set aside after it was shown that officials had fabricated their claims of necessity. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir., 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal., 1984).

### 3. Was John Walker Lindh a Victim of Torture?

By: William J. Aceves\*

#### I. Introduction

On July 15, 2002, John Walker Lindh, the “American Taliban,” made a brief appearance in federal district court for the Eastern District of Virginia. At the hearing, Lindh pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony. He was subsequently sentenced to 20 years in prison.

As part of his plea agreement, Lindh accepted several conditions. He agreed to cooperate with the United States in any subsequent investigations. He accepted future designation as an unlawful enemy combatant if he violated certain provisions of federal law. He assigned to the United States any future profits that he may receive in connection with the publication of information relating to his activities in Afghanistan. Lindh also acknowledged that he was not intentionally mistreated by the U.S. military during his detention. According to the terms of the plea agreement, “[t]he defendant agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn.” Plea Agreement, *United States v. Lindh*, Criminal No. 02-37A, (July 15, 2002).

This statement, however, contradicts allegations made by Lindh in earlier court documents. In several submissions, Lindh had alleged that he was subject to coercion by U.S. military personnel in Afghanistan. These

coercive techniques included: “incommunicado detention; food, sleep, and sensory deprivation; denial of a timely presentment before a magistrate; denial of clothing and proper medical care; humiliation; and failure to inform Mr. Lindh of his rights, to name just a few.” Defendant’s Memorandum of Points and Authorities in Support of Motion to Suppress Involuntary Statements, *United States v. Lindh*, Crim. No. 02-37-A, (Jun 17, 2002), at 1. Indeed, these assertions formed the basis for one of Lindh’s principal defenses: any statements acquired from him through coercion must be suppressed.

Was John Walker Lindh a victim of torture or cruel, inhuman or degrading treatment? The conclusory statements in his plea agreement denying mistreatment are in conflict with the detailed nature of his earlier assertions. If the factual allegations set forth in Lindh’s earlier submissions are true, a compelling case can be made that Lindh was subject to cruel, inhuman or degrading treatment. Indeed, a plausible argument can be made that Lindh was subjected to torture.

#### II. The Case of John Walker Lindh

In June 2001, John Walker Lindh entered Afghanistan to assist the Taliban government in suppressing the Northern Alliance.<sup>1</sup> After receiving military training, Lindh was sent to the front lines of the conflict in northeastern Afghanistan. He was serving the Taliban regime in this capacity when the attacks of September 11, 2001 occurred. After September 11th, Lindh continued to fight on behalf of the Taliban against the Northern Alliance.

On approximately November 24, 2001, Lindh surrendered to Northern Alliance troops under the command of General Abdul Rashid Dostum. At the time of his surrender, Lindh was ill and weak from shock, exhaustion, dehydration, and hunger. He was detained at

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Qala-i Janghi, a military complex near Mazar-e Sharif. On or about November 25, 2001, Lindh was seated on the ground level of the fort when a large explosion occurred nearby. As Lindh attempted to flee, he was shot in the leg and collapsed. Lindh remained on the ground for several hours as gunfire and explosions continued in the fort. By nightfall, the fighting had subsided. With the assistance of several prisoners, Lindh was moved to the basement of the fort, where he would remain for approximately seven days.

During his stay in the basement, Lindh and the other prisoners were subject to repeated attacks. His captors threw hand grenades through the ventilation ducts in the basement, killing several prisoners. They also fired rocket-propelled grenades into the basement. Lindh suffered several shrapnel wounds as a result of these attacks. On approximately the fourth day of Lindh's captivity, fuel oil was poured into the basement and ignited, burning many prisoners. On approximately the fifth day, the basement was flooded with water, drowning several prisoners. Countless prisoners were killed indiscriminately throughout this seven-day period.

On December 1, 2001, Lindh emerged from the basement, where he was immediately detained by Northern Alliance soldiers. He was then transported with other prisoners to Sheberghan, where there was a hospital and prison. U.S. military personnel were located at this facility. Eventually, Lindh was identified as a U.S. national and given medical assistance by U.S. military personnel. According to a U.S. medic that treated him, Lindh had "sustained an apparent gunshot wound in the left leg, was malnourished and in extremely poor overall condition." A U.S. Special Forces officer noted that "Lindh appeared to be suffering from hypothermia, and exposure, and acted delirious." Although Lindh received medical treatment, the bullet was not removed from his leg so that it could be later used as evidence in

any criminal proceedings. While he was receiving medical treatment, U.S. military personnel interrogated Lindh. Afterward, he was transported to a nearby compound, where he was again interrogated.

On the following day, Lindh was bound, hooded, and taken to the Turkish School House at Mazar-e Sharif, where he was kept bound and blindfolded. During this detention, Lindh remained malnourished and dehydrated. He was provided with minimal food and medical assistance. His requests for additional food and medical attention were denied. On several occasions, he was subjected to derogatory remarks by U.S. military personnel. During this detention, U.S. government agents interrogated Lindh. They never informed him of his right to legal counsel. Indeed, his requests for counsel were denied. Despite his injuries, Lindh cooperated with his interrogators. After these interrogations were concluded, Lindh was provided more food.

On December 7, 2001, U.S. military personnel entered Lindh's room and took photographs of him while he was bound and blindfolded. They also made derogatory and threatening statements. Lindh was then transported by aircraft to Camp Rhino, a U.S. Marine installation located 70 miles from Kandahar, Afghanistan. During the transport, he remained blindfolded and handcuffed. The plastic straps used to bind his hands cut into his skin and cut off circulation to his hands. As a result, his wrists remained scarred and numb for several months.

Upon arrival at Camp Rhino, Lindh was stripped naked and bound to a stretcher "with heavy duct tape wrapped tightly around his chest, upper arms, ankles and the stretcher itself." He remained blindfolded. He was then placed in a metal storage container with no windows, minimal ventilation, and no heat source. He was provided with minimal food and little medical attention. Guards shouted epithets at him through the ventilation holes in



the container. Throughout his detention, “Mr. Lindh’s hands and feet remained cuffed such that his forearms were forced together and fully extended, pointing straight down toward his feet.” Eventually, a blanket was placed over his body, which had remained naked and fully exposed until then. When Lindh needed to urinate, his stretcher was propped up into a vertical position. During this detention, Lindh experienced pain from his untreated injuries. Due to his injuries, hunger, and exposure, Lindh was unable to sleep. He remained under these conditions for two days.

On December 9, 2001, Lindh was dressed in a hospital gown and taken from the storage container while blindfolded and handcuffed. He was taken to a tent, placed on a cot, and his blindfold was removed. A person who identified himself as an FBI agent began interrogating him. Despite his request, Lindh was not provided a lawyer. Furthermore, he was not informed that his family had already contacted a lawyer to represent him. The interrogation continued despite Lindh’s physical injuries and mental trauma. After this interrogation, Lindh’s treatment improved. His restraints were loosened, and the duct tape was removed from his body. He was provided with more food and an additional blanket.

On approximately December 14, 2001, Lindh was transferred to the U.S.S. Peleliu, which was located in the Indian Ocean. “Government disclosures indicate that Mr. Lindh was suffering from dehydration, mild hypothermia and frostbite and could not walk when he arrived on board . . . .” While onboard, he was provided with medical assistance and received surgery for his wounds. On January 6, 2002, Lindh was allowed to receive written communications from his parents and the lawyers retained to represent him. Lindh remained on the Peleliu until he was transferred to the United States on January 23, 2002.

### III. Torture and Cruel, Inhuman or Degrading Treatment Are Violations of International Law

The prohibitions against torture and other cruel, inhuman or degrading treatment have long been recognized in international law. *See, e.g.*, Universal Declaration of Human Rights (Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). According to the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* (“*Restatement (Third)*”) § 702(d), “[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment . . . .”

#### A. Torture is a Violation of International Law

The prohibition against torture is recognized in all major international human rights instruments. *See, e.g.*, International Covenant on Civil and Political Rights (“ICCPR”) (Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). The most extensive definition of torture appears in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”). Article 1 defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

official or other person acting in an official capacity.”

The U.N. Human Rights Committee, which was established to monitor compliance with the ICCPR, has clarified the nature of the prohibition against torture in several statements. In General Comment No. 20, the Committee indicated that the prohibition against torture is designed to “protect both the dignity and the physical and mental integrity of the individual.” Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 2. The determination of whether torture has occurred requires an assessment of all the circumstances of the case, “such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.” *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989). Thus, subjective factors can aggravate the effect of certain treatment. The Human Rights Committee has identified numerous acts that constitute torture.<sup>2</sup> *See, e.g., Cariboni v. Uruguay*, Communication No. 159/1983 (abducting petitioner, keeping him hooded, bound, and seated for extended periods of time, providing him with minimal food, and subjecting him to hallucinogenic substances and psychological abuse constitutes torture); *Herrera Rubio v. Colombia*, Communication No. 161/1983 (beating and near drowning, hanging the detainee by his arms, and threatening his family members constitutes torture); *Muteba v. Zaire*, Communication No. 124/1982 (beatings, mock executions, electric shocks, deprivation of food, and incommunicado detention constitutes torture); *Estrella v. Uruguay*, Communication No. 74/1980 (abducting petitioner from his home, blindfolding him, and threatening him with amputation of his hands constitutes torture).

The U.N. Special Rapporteur on Torture, established by the U.N. Commission on Human Rights, has issued many statements on

torture. For example, the Special Rapporteur has indicated that the prohibition against torture “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, such as intimidation and other forms of threats.” Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/56/156 (2001), at para. 3. Accordingly, threats to the physical integrity of the victim “can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials.” *Id.*, para. 8. In his most recent report to the U.N. General Assembly, the Special Rapporteur expressed deep concern about the use of torture in response to terrorism, and he reiterated that international law prohibits any derogation from the prohibition against torture, even in time of war. Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002), at para. 24.

Regional agreements also prohibit torture. For example, the American Convention on Human Rights (“American Convention”) provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” The Inter-American Court of Human Rights, which reviews state compliance with the American Convention, has noted that Article 5 prohibits torture “and that all persons deprived of their liberty should be treated with respect for the inherent dignity of the human person.”<sup>3</sup> The Inter-American Commission on Human Rights, which also monitors compliance with the American Convention, has made similar findings. *See, e.g., Case 10.574 (El Salvador)* (applying electrical shocks to detainee, burning him with cigarettes, beating him, and putting a hood over his head constitutes torture).

Article 3 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms (“European Convention”) provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court of Human Rights, which reviews compliance with the European Convention, has indicated that the prohibition against torture is one of the most fundamental values of a democratic society and is, therefore, non-derogable. As the European Court noted in *Selmouni v. France*, “[e]ven in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” *Selmouni v. France*, 29 E.H.R.R. 403, 440 (1999). In *Selmouni v. France*, the European Court held that severe and repeated police beatings that left marks on the body of a detainee constitute torture. *Id.* at 442-443. See also *Aydin v. Turkey* (1997) (blindfolding, beating, and raping a detainee constitutes torture); *Aksoy v. Turkey* (1997) (stripping detainee with arms tied behind his back and suspending him by the arms constitutes torture).

Finally, the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” The African Commission on Human and Peoples’ Rights, which was established to monitor compliance with the African Charter, has found various actions to constitute torture. See, e.g., *Amnesty International et al. v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (2000) (placing detainees in small cells, soaking them with cold water, and subjecting them to mock executions constitutes torture).

**B. Cruel, Inhuman or Degrading Treatment is a Violation of International Law**

The prohibition against cruel, inhuman or degrading treatment is also recognized in all major international human rights instruments. See, e.g., International Covenant on Civil and Political Rights (Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). The Convention Against Torture prohibits cruel, inhuman or degrading treatment although its definition is limited in scope. Article 16(1) provides that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The U.N. Human Rights Committee has affirmed the prohibition against cruel, inhuman or degrading treatment on numerous occasions. See, e.g., *Tshishimbi v. Zaire*, Communication No. 542/1993 (abducting petitioner and placing him in incommunicado detention constitutes cruel and inhuman treatment); *Mukong v. Cameroon*, Communication No. 458/1991 (placing petitioner in incommunicado detention, depriving him of food, and threatening him with torture and death constitutes cruel, inhuman and degrading treatment).

The prohibition against cruel, inhuman or degrading treatment is also recognized in all the regional instruments. For example, Article 5 of the American Convention on Human Rights provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” The Inter-American Commission on Human Rights has found several acts to constitute cruel, inhuman or degrading treatment. See, e.g., *McKenzie v. Jamaica*, Case No. 12.023 (2000) (keeping prisoners in overcrowded conditions for 23 hours a day with inadequate sanitation, poor lighting and ventilation constitutes cruel, inhuman and degrading treatment); *Valladares*

*v. Ecuador*, Case No. 11.778 (1998) (holding petitioner incommunicado for more than 22 days constitutes cruel, inhuman or degrading treatment); *Congo v. Ecuador*, Case No. 11.427 (1998) (holding detainee in a small isolated cell constitutes inhuman and degrading treatment).

The European Convention for the Protection of Human Rights and Fundamental Freedoms also prohibits inhuman or degrading treatment. Article 3 provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>4</sup> The European Court of Human Rights has recognized that determinations of whether torture or other inhuman or degrading treatment have occurred depend on the unique circumstances of the case and the status of the individual victim. *See, e.g.*, *Tyrer Case*, 2 E.H.R.R. 1 (1978). According to the Court, the distinction between torture and inhuman or degrading treatment derives principally from differences in the intensity of the suffering inflicted. *Ireland v. United Kingdom*, 2 E.H.R.R. 25, 80 (1979). Thus, torture constitutes deliberate treatment that causes suffering of particular cruelty and intensity.<sup>5</sup> The European Court has found various acts to constitute inhuman or degrading treatment. *See, e.g.*, *Tekin v. Turkey* (2001) (blindfolding a prisoner, threatening him with death, providing no bed or blankets, denying food and liquids, stripping him naked and hosing him with cold water, and beating him with a truncheon constitutes inhuman and degrading treatment); *Ribitsch v. Austria* (1996) (beatings and abuse administered by police constitutes inhuman and degrading treatment); *Ireland v. United Kingdom* (1979) (use of five interrogation techniques consisting of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water constitutes inhuman and degrading treatment).

Finally, Article 5 of the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of

man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” The African Commission on Human and Peoples’ Rights has found various actions to constitute cruel, inhuman or degrading treatment. *See, e.g.*, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98 (2000) (chaining detainee to the floor while in solitary confinement constitutes cruel, inhuman or degrading treatment); *Huri-Laws v. Nigeria*, Comm. No. 225/98 (2000) (detaining petitioner in a dirty cell without charge and without access to medical attention constitutes cruel, inhuman or degrading treatment).

In sum, international law prohibits both torture and cruel, inhuman or degrading treatment. A review of international practice affirms the universal, definable, and obligatory nature of these fundamental norms. Indeed, the prohibitions against torture and cruel, inhuman or degrading treatment are so embedded in the pantheon of international law that they have been found to be *jus cogens* norms – non-derogable obligations that bind all states.<sup>6</sup> It is not surprising, therefore, that the United States has accepted the prohibitions against torture and other cruel, inhuman or degrading treatment through its ratification of the International Covenant on Civil and Political Rights and the Convention against Torture as well as through its signature of the American Convention on Human Rights. The United States has also recognized these prohibitions in countless executive, legislative, and judicial pronouncements.<sup>7</sup>

#### **IV. Was John Walker Lindh a Victim of Torture and Cruel, Inhuman or Degrading Treatment?**

Torture and cruel, inhuman or degrading treatment are closely related. The difference between these two violations of international law can be measured by the severity of the act and the degree of suffering.

“Degrading treatment” is an act that tends to humiliate the victim; “inhuman treatment” is the deliberate infliction of severe mental or physical suffering.<sup>8</sup> Torture constitutes the most aggravated form of severe mental or physical suffering. “So, for torture to occur, a scale of criteria has to be climbed. First, the behavior must be degrading treatment; second, it must be inhuman treatment; and third, it must be an aggravated form of inhuman treatment, inflicted for certain purposes.”<sup>9</sup> Thus, torture requires purpose – it is inflicted to threaten, coerce, or punish; cruel, inhuman or degrading treatment has no comparable *mens rea* requirement. In sum, determinations of whether torture or cruel, inhuman or degrading treatment have occurred require an assessment of all the circumstances in the case, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the objective of the perpetrator.

As a preliminary matter, Lindh’s physical and mental condition prior to capture provides an indispensable context for considering his treatment after capture. During his detention by the Northern Alliance, Lindh was subjected to numerous attempts on his life and witnessed the death of many other prisoners. He was shot and wounded. Shrapnel and a bullet were embedded in his body. In addition, Lindh suffered from severe battlefield trauma, hypothermia, and malnutrition.

Once Lindh was detained by U.S. military personnel, his treatment caused further deterioration to his physical and mental condition. He was stripped naked, blindfolded, and taped to a stretcher. He was held in a storage container with minimal ventilation and no heat source. Despite his wounds, Lindh received limited medical attention. The bullet was left in his body – not for medical reasons – but so that it could be used as evidence in criminal proceedings. On several occasions, Lindh was subjected to death threats and intimidation. Lindh’s treatment apparently

improved *after* he was interrogated.

Throughout his detention in Afghanistan, Lindh was not provided legal assistance or contact with judicial authorities.

Treatment of this nature has been found to constitute cruel, inhuman or degrading treatment. In *Ireland v. United Kingdom*, for example, the European Court of Human Rights was asked to consider whether the use of five interrogation techniques constituted torture and inhuman or degrading treatment. The five techniques consisted of the following: (a) wall-standing; (b) hooding; (c) subjection to noise; (d) sleep deprivation; and (e) deprivation of food and water. According to the Court, “[t]he five techniques were applied in combination, with premeditation for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.” *Ireland v. United Kingdom*, 2 E.H.R.R. at 79-80. Based on these findings, the European Court concluded that these interrogation techniques constituted inhuman treatment. They were also “degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” *Id.* at 80.

While the European Court did not find the requisite intensity and cruelty in the techniques to give rise to a torture claim in *Ireland v. United Kingdom*, the Lindh case is quite different. For example, Lindh’s physical and mental condition was already severely weakened when he was captured by U.S. military personnel.<sup>10</sup> He was wounded and malnourished. He was then immobilized and subjected to sensory deprivation. Lindh was also subjected to death threats during his detention. Apart from these factual distinctions, the European Court’s 1978 opinion in *Ireland v. United Kingdom* must be read in historical context. As noted by the European Court in

Selmouni v. France, 29 E.H.R.R. at 442., the definitions of torture and inhuman or degrading treatment set forth in its case law must be interpreted in light of present-day conditions.

[T]he Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in [the] future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

For these reasons, a compelling case can be made that Lindh was subject to cruel, inhuman or degrading treatment.<sup>11</sup> The case law strongly supports this finding. And yet, a plausible finding of torture can also be made. On this claim, several factors require further investigation. Was Lindh’s physical treatment affected by his cooperation during the interrogations? Was Lindh’s medical treatment guided by non-medical considerations? What was the nature and scope of the harassment and threats made toward Lindh? What was Lindh’s mental condition throughout his detention?

While there is a distinction between torture and cruel, inhuman or degrading treatment, no justification exists for either act. They are both firmly prohibited by international law.

## V. Conclusion

Despite the plea agreement denying mistreatment, the United States Government has an obligation to investigate the allegations made by John Walker Lindh. Indeed, the Convention against Torture obligates the United States to examine Lindh’s allegations.<sup>12</sup>

If Lindh’s allegations of mistreatment are verified, those who participated should be held accountable for their acts. Appropriate relief should be provided to Lindh, including rehabilitation and compensation. This may also compel reconsideration of Lindh’s plea agreement.<sup>13</sup>

In a constitutional democracy, state action must conform to the rule of law. Neither military necessity nor public emergency can justify derogation from the most fundamental right protected by our democracy – the right to human dignity.<sup>14</sup> “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”<sup>15</sup>

## Endnotes

<sup>1</sup> This section is based on the Proffer of Facts in Support of Defendant’s Suppression Motions submitted by Lindh to the federal district court for the Eastern District of Virginia. *See* Proffer of Facts in Support of Defendant’s Suppression Motion, United States v. Lindh (Crim. No. 02-37-A).

<sup>2</sup> The Human Rights Committee has noted, however, that it is not necessary “to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.” Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 4.

<sup>3</sup> Neira Alegria et al. v. Peru, 3 INTERNATIONAL HUMAN RIGHTS REPORTS 362, 382 (1996). *See also* Bamaca Velasquez v. Guatemala, 9 INTERNATIONAL HUMAN RIGHTS REPORTS 80, 137 (2002).

<sup>4</sup> The European Convention differs from other international and regional instruments by not using the term “cruel” in its definition of inhuman or degrading treatment. This omission has little, if any, significance.

<sup>5</sup> According to the European Commission on Human Rights, degrading treatment is defined as action that interferes with the dignity of the individual. *East African Asians v. United Kingdom*, 3 E.H.R.R. 76 (1973). “It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as ‘degrading treatment’ in the sense of Article 3, where it reaches a certain level of severity.” *Id.* at 80.

<sup>6</sup> RESTATEMENT (THIRD) §702 cmt. n. A *jus cogens* norm is a peremptory norm that binds all states. No state may assume release from these obligations. *Id.* at §102, cmt. k.

<sup>7</sup> In October 1999, the United States Government issued its Initial Report to the Committee Against Torture describing its compliance with the Convention against Torture. In the Initial Report, the United States Government reiterated that torture and cruel, inhuman or degrading treatment are categorically denounced as a matter of policy and as a tool of state authority.

United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances . . . or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.

Committee Against Torture, “Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America” (Oct. 15, 1999), U.N.

Doc. CAT/C/28/Add.5 (2000), at 5.

<sup>8</sup> *See generally* The Greek Case, 12 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 1969 at 186 (1972).

<sup>9</sup> *See generally* NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 77-78 (2d ed. 1999).

<sup>10</sup> In his concurring opinion, Judge Zekia indicated that the health of the detainee is a relevant factor to be considered in determining whether torture has occurred. *Ireland v. United Kingdom*, 2 E.H.R.R. 25, 109 (1979).

<sup>11</sup> The fact that these acts were committed in Afghanistan does not obviate U.S. obligations under international law. As noted by the Human Rights Committee, “it would be unconscionable to . . . permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (1984), at para. 12(3).

<sup>12</sup> In this respect, the Lindh case is unique. Unlike most cases of torture, corroborating evidence exists in this case. Photographs and video footage confirm several of Lindh’s allegations. Government transcripts provide additional support.

<sup>13</sup> Article 15 of the Convention against Torture provides that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

<sup>14</sup> *See generally* Malcolm D. Evans, *Getting to Grips With Torture*, 51 INT’L & COMP. L.Q. 365 (2002). *But see* Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661 (2002).

<sup>15</sup> *United States v. Robel*, 389 U.S. 258, 264 (1967).

#### 4. Death Penalty Cases

By: Connie de la Vega and Kathleen Dyer

##### A. Juvenile Offenders

**Introduction** – No other nation has executed juvenile offenders at the rate practiced in the United States. In fact, currently the few states in the United States that impose sentences of death to juvenile offenders are among the few remaining organized political entities in the world that continue to execute juvenile offenders. Out of 193 nations in the world, only seven have executed juvenile offenders since 1990. Among those seven nations, all except Iran and the United States have instituted reforms eliminating juvenile offender executions completely. These stark facts suggest that the United States’ current policy is contrary to the standards and policies of almost every other nation in the world. In 2002 alone, the United States executed three additional young men, all of whom committed the crimes of their conviction under the age of 18. In addition to challenging the executions under United States laws, several arguments are being made questioning these sentences under international law.

##### **International Human Rights Arguments In Support of Opposition to Juvenile Death Penalty Sentences**

**Juvenile Death Penalty Sentences Violate the *Jus Cogens* Norm on International Law Prohibiting the Execution of Juvenile offenders** – The prohibition against the execution of persons who were under eighteen years of age at the commission of their crime is

customary international law and it has attained the status of a *jus cogens* peremptory norm of international law.

The major argument raised by international human rights advocates opposed to the United State’s current policy on juvenile death penalty sentences is that it violates the *jus cogens* norm prohibiting the execution of juvenile offenders. A *jus cogens* peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698. To be considered a *jus cogens* peremptory norm, the norm must meet four requirements: 1) it is general international law; 2) it is accepted by a large majority of the states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under the age of eighteen at the date of commission of their crime clearly meets all four of the abovementioned requirements.

First, several treaties, declarations, and pronouncements by international bodies, as well as laws of the vast majority of the nations serve as evidence that the prohibition is general international law. Second, the United States is the only country in the world that has not accepted the international norm prohibiting the execution of juvenile offenders, proving the prohibition is accepted by a large majority of the states. Third, the norm is non-derogable as the ICCPR expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders. And finally, there is no emerging norm that contradicts the current norm prohibiting the execution of persons who were

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under eighteen at the time they committed their crime.

Therefore, the prohibition against the execution of juvenile offenders is a *jus cogens* peremptory norm. In effect, the United States' current policy permitting the execution of juvenile offenders is a clear violation of that norm

**International Treaties Binding on the United States and Customary International Law Prohibit Application of the Death Penalty to Juvenile Offenders** – Because, “[t]here can be no question that the law of the nations prohibits the execution of juvenile offenders,” Blackmun, H. *The Supreme Court and The Law of Nations*, 104 YALE L.J. 39, 47-48 (1994), the United States' current juvenile death penalty policy is in juxtaposition to the law of nations. The United States Constitution as well as International Treaties binding on the United States make the death penalty policies practiced in other countries relevant to the United States' own policy.

The intent of the framers to bind our courts to the law of nations is explicit in our Constitution. For example, Article I, Section 8 Clause 10, of our Constitution grants Congress the power to define and punish offenses against the law of nations. Moreover, the Supremacy Clause, Article VI, Clause 2 deems international treaties to be part of the “supreme law of the land.” Not only does our own Constitution support the notion that the law of nations is relevant to the juvenile death penalty policies of the United States, our country's signatures to the Convention on the Rights of the Child and the American Convention on Human Rights which expressly prohibit the death penalty sentences for juvenile offenders supports this notion as well.

Furthermore, the United States' reservation to Article 6, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR) is invalid. Article 6(5) of the

ICCPR prohibits the death sentence for crimes committed by persons under the age of 18. The United States attached a reservation to the treaty reserving, “the right, subject to its Constitutional constraints, to impose capital punishment on any person, including such punishment for crimes committed by persons below 18 years of age.” Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 653-54 (1992). The reservation is invalid because it is incompatible with the purpose of the treaty, offends a peremptory norm against the execution of persons under 18 at the time of the offense, and attempts to reserve a non-derogable provision (the non-derogation clause of the ICCPR prohibits derogation from Article 6).

#### **Cases Raising These Arguments:**

These international human rights arguments were made on behalf of the defendants in all of the following cases.

**Stanford v. Kentucky** – The above arguments were made on behalf of Kevin Stanford, a black, male, juvenile offender indicted for murder in November of 1981. Despite these compelling arguments, the Supreme Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), noted in its plurality decision that the United States' current practices with regard to the juvenile death penalty does not violate evolving standards of decency.

Stanford's own attorneys and Professor Constance de la Vega from the University of San Francisco School of Law made international human rights arguments on his behalf. In an amici curiae brief, Professor de la Vega urged the Supreme Court to consider international human rights law in juvenile death penalty cases. The brief argued that prohibition of juvenile death sentences is a *jus cogens* norm of international law and by allowing execution of

juvenile offenders, the United States effectively violates that norm. For a more detailed version of the argument see, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 Santa Clara L. Rev. 1041(2002).

Unfortunately, Stanford's petition for writ of habeas corpus was denied on October 21, 2002. However, Justice Stevens wrote a powerful dissenting opinion joined by Justice Souter, Justice Ginsburg and Justice Breyer expressing disdain for the United States' current policy allowing executions of juvenile offenders. In the dissent, Stevens wrote, "The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice." 2002 WL 984217 (Mem).

#### **Arizona v. Aguilar (CR 1997-009340)**

– On March 8, 2001, Defendant Tonatihu Aguilar, represented by Robert L. Storrs and Bruce E. Blumberg, was found guilty of Count II, Murder in the First Degree in the Superior Court of Arizona, Maricopa County, for the death of Sandra Imperial. Following the guilty verdict, the Court conducted a hearing pursuant to ARS § 13-703. Pursuant to the hearing, the Court found that the State proved beyond a reasonable doubt the existence of two aggravating factors: 1) factor ARS § 13-703 (F) (6) that, based on the circumstances surrounding it, the killing of Sandra Imperial was especially cruel; and 2) factor ARS § 13-703 (F) (8) which relates to the conviction by the killing of Hector Imperial, represented in Count I.

Additionally, the Court found that the Defendant proved by a preponderance of the evidence two statutory mitigating factors. First, the Defense proved the existence of the mitigating factor ARS § 13-703 (G) (1) which exists when the Defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to requirements of law is

significantly impaired but not so impaired as to constitute a defense. Secondly, the Defense proved by a preponderance of the evidence the existence of mitigating factor ARS § 13-703 (G) (5) as Defendant's chronological age was 16 years, 8 months and he was an individual with a significant lack of intelligence and maturity, as proved by the testimony of two doctors.

Ultimately, the Court found that the mitigating factors were sufficient to call for a leniency in sentencing. In a challenge to the death penalty, Professor Victor Streib testified about the practice of other western states regarding the juvenile death penalty. Professor Connie de la Vega testified regarding the international standards. The court ignored the international human rights arguments that were made on behalf of the defendant.

**Arizona v. Petronas-Cabanas (CR 199-004790)** – Felipe Pertona-Cabanas plead guilty to count 2 murder in the first degree of Officer Marc Atkinson on July 19, 2002. Felipe was 17 years old at the time of his offense. He was represented by Vikki Liles of Phoenix, Arizona. Evidence presented proved that Felipe was born into extreme poverty in Cerrito de Oro, Guerrero, Mexico. Despite these impoverished conditions Felipe was provided with love and moral support from his family and community. In effort to escape the poverty he grew up in, Felipe came to the United States to find work. It is in the United States that Felipe got caught up in selling drugs and carrying a weapon. Felipe, who had no prior record, expressed remorse for his act very early on. He accepted full responsibility for his act and plead guilty knowing that his pleas would not save him from a life sentence, which is what he received. Sandra Babcock filed an amicus brief on behalf of the Mexican Government challenging the death penalty. Professors Streib and de la Vega also testified.

#### **Inter-American Commission Cases:**

**Alexander Williams** – Alexander Williams, who has been diagnosed with severe schizophrenia, was sentenced to death for a crime he committed as a juvenile. Williams was represented by Brian Mendlesohn of Atlanta, Georgia. The U.S.F. Law Clinic also represented Mr. William in a petition to the Inter-American Commission on human rights. (See 2001 ACLU Report). When Mr. Williams was scheduled to be executed, Lindsay Hortsman wrote a letter to the Inter-American Commission on Human Rights updating the status of the case and requesting immediate assistance on the case. In response to the letter, the Inter-American Commission on Human Rights re-issued a precautionary measure request in his pending case which was forwarded to the Georgia Board of Pardons and Paroles. On February 25, 2002, hours before the execution of Alexander Williams was to be carried out, the Georgia State Board of Pardons and Paroles commuted his sentence to life without parole. This was a success story of the many efforts that were made by so many different people.

**Michael Dominguez (Report No. 62/02 Case no. 12.285)** – Michael Dominguez was convicted and sentenced to death for two homicides that occurred in Nevada in 1993. Michael was 16 when he committed the crimes. He was represented by Mark Blaskey. The international argument made on his behalf before the Inter-American Commission on Human Rights was that the United States' current death penalty policy with respect to juvenile offenders is in violation of an international *jus cogens* norm prohibiting executions of such offenders. The argument was also made that the current death penalty scheme in the United States has resulted in the arbitrary deprivation of life and inequality by the law.

The Commission held that prohibition of executions of offenders under the age of 18 is

a *jus cogens* norm and, accordingly, Michael's death sentence was in violation of that norm. The Commission took into account several factors in coming to this decision. First, it found that since its decision in 1987 in the Pinkerton and Roach cases several developments have occurred including new international agreements and a broadened ratification of existing treaties to explicitly prohibit executions of juvenile offenders who were under 18 years of age at the time of the crime. Second, The United Nations bodies responsible for human rights and criminal justice have consistently supported international human rights agreements prohibiting the execution of offenders who were under the age of 18 at the time of the crime. Third, the international practice over the past 15 years evidences an almost unanimous trend toward prohibiting juvenile offender executions. This trend isolates the United States as the only country that continues to execute such offenders. Fourth, among the states of the United States 38 states and the federal and military civilian jurisdictions authorize the death penalty for capital crimes. Of those 38, 16 have chosen 18 (at the time the crime was committed) as the minimum age for eligibility. Fifth, declaring 18 as the minimum age for death eligibility is consistent with developments in other fields of international law that require 18 as the minimum age for the imposition of serious and fatal obligations and responsibilities. For example, those under age 18 are not allowed to be involved in hostilities as members of the armed forces. Taking all of these factors into account the Commission decided that prohibiting executions of offenders under the age of 18 at time of their offense is a *jus cogens* international norm.

The Commission also noted that in light of this decision governments are obligated to respond by assuring their current death penalty procedures are not in violation of this *jus cogens*

norm. Accordingly, the Commission made the following recommendation to the United States:

1. Provide Michael Domigues with an effective remedy, which includes commutation of sentence.
2. Review its laws, procedures and practices to ensure that capital punishment is not imposed upon person who, at the time their crime was committed were under 18 years of age.

The Commission also emphasized the obligation that OAS member states have to respond to its communications, including those pertaining to petitions that complain of human rights violations attributable to a member State.

In a concurring opinion, Helio Bicudo expressed his own opinion and understanding of the lawfulness of the death penalty in the Inter-American System. In that opinion he expressed his belief that the death penalty brings suffering to the individual who is sentenced. In effect, he argues that there is a contradiction among the articles of The American Convention on Human Rights which reject torture, cruel, inhumane, or degrading punishment or treatment. He also argued that the death penalty is supposed to be inflicted on those guilty of only the most serious crimes. Ultimately, he argues in his concurring opinion that there is a tendency toward restricting application of the death penalty and ultimately it should be abolished.

**Juvenile Executions 2002** – Despite the compelling international human rights arguments made in opposition to juvenile offender death penalty sentences, the United States executed three juveniles this year. The three juvenile offenders executed in Texas this year are Napoleon Beazley, Toronto Patterson

and T.J. Jones. These have been the only executions of juvenile offenders in the world in 2002.

**Napoleon Beazley** – Napoleon Beazley was an African American convicted by an all-white jury for killing a white man during a car jack gone bad. Although he demonstrated extreme remorse and had no prior criminal history he was sentenced to death and executed in May, 2002. On the eve of his execution Napoleon Beazley said to Janet Elliott of the Houston Chronicle, “[i]f I was the last juvenile executed then I would be pleased with that because I’d know that what I’ve done for the last eight years mattered.” Unfortunately, with the United States’ current policy on death penalty sentences for juvenile offenders it appears as if Napoleon Beazley will not be the last juvenile executed. Mr. Beazley was represented by Walter Long and David Botsford of Austin Texas.

For more information on Napoleon Beazley’s case *see* 2001 ACLU Report.

**T.J. Jones** – In this case, the State’s evidence alleged that on February 2, 1994, four youths, including T.J., who was armed with a pistol, approached Mr. Willard Davis. Allegedly T.J. ordered Mr. Davis to get out of his car, Mr. Davis complied, and then T.J. shot him in the forehead and drove away with his accomplices in Mr. Davis’s car. T.J. took full responsibility for his actions.

T.J. was evaluated by Dr. Craig Moore who diagnosed T.J. with schizoid personality disorder, which renders him unable to relate to people and unable to properly participate in the give and take of relationships. Dr. Moore also observed that T.J. might have suffered from a neurological problem indicated by his sudden acts of violence. Despite T.J.’s age of 17 years old, according to Dr. Moore psychologically T.J. was more like a ten or twelve year old. In addition, T.J.’s full scale IQ was tested at 78 (a

score below 70-75 classifies one as mentally retarded according to the American Association of Mental Retardation), and Dr. Moore testified that T.J. was borderline retarded.

Not only did T.J. have psychological and possible mental retardation issues, he suffered physical abuse at home and estrangement from his parents which may have intensified his psychological problems. T.J.'s mother was beaten by his father when she was pregnant with T.J. T.J. was an only child and had to deal with his mother's various male partners. At least one such partner was violent towards his mother. His mother testified that when the violence between she and her partner commenced T.J. would hum, shake, and rock stopping only when the violence stopped.

T.J. was executed on August 8, 2002.

#### **Toronto Patterson** – Toronto

Patterson was an African American who was 17 years old at the time of his offense. On June 6, 1992 Valerie Brewer discovered the body of her sister and her sister's two daughters in her house. No valuables were taken from the house, but the wheels on a BMW in the garage were found to be missing. Valerie knew that her cousin, Toronto Patterson, had recently had his wheels stolen and she immediately thought of him as a suspect. Patterson told police that two Jamaican men forced he and his girlfriend at gunpoint to assist one of the men in removing the wheels from the BMW, while the other distracted Kimberly. Toronto consistently maintained this account of the events of June 6, 1995 and asserted he did not commit the murders. The identity of the killer was a highly contested issue at the trial.

Toronto was raised by his teenage mother, with the help of his grandmother. He was profoundly neglected in his childhood and received regular whippings from his mother. Drug and alcohol abuse were prevalent in Toronto's home life. At the young age of 9, he became the sole caretaker for his terminally ill

baby sister, whose death strongly impacted him. Sadly, these mitigating factors were never presented to the jury. Thus, the jury was never given the opportunity to consider a more human and vulnerable side to Toronto. Toronto was executed on August 28, 2002.

The decision in Toronto's case is particularly significant to the overall issue of juvenile death penalty because of a dramatic dissenting opinion issued by 3 justices. Normally U.S. Supreme Court orders upholding executions are very tightly written and give little explanation beyond permission to carry out the sentence. However, in Toronto's case, three Justices, John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer issued a dissenting opinion. This unusual procedure was a dramatic commentary on the current state of juvenile executions in the United States. The justices expressed reservations about the propriety of executing Toronto in light of the fact that he committed his crime at the young age of 17. They pointed out that the United States is one among only a handful of the world's nations that allow the execution of people who were juveniles when they committed their crime. In an opinion lending hope that the court might reconsider the current policy regarding execution of juvenile offenders, Justice Stevens wrote, "Given the apparent consensus that exists among states and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate to revisit the issue at the earliest opportunity." 2002 WL 1986618 (Mem) (2002).

Not only have members of the Supreme Court spoken suggesting that the United States current policy of allowing death sentences to those who committed their crime of conviction under the age of 18 must be reexamined, several organizations and lady Rosalyn Carter has spoken out on the issue as well. An overwhelming number of groups asked for clemency in all three cases. For example, the

ABA, ACLU, Amnesty International USA, Child Welfare League of America, Human Rights Advocates, Murder Victims Families for Reconciliation, and Youth Law Center all sent letters asking for clemency for the young men. Furthermore, in August, Lady Rosalyn Carter expressed her opposition to the execution of juvenile offenders saying, “[I]t should be an embarrassment to every American that we execute children. The United State is the only country in the industrialized world that still executes anyone, and executing children puts us in the company of Somalia – only Somalia.” She went on to argue that, “We don’t take care of children in our country the way we should, and then when they get into trouble we punish them severely.” Stephen Krupin, *Former First Lady Call for Halt to Executions*, *The Atlanta Journal and Constitution*, Aug. 13, 2002, at A12.

With such compelling arguments and so many people and organizations joining forces to speak out against the execution of juvenile offenders, hopefully our leaders will listen. The United States’ current policy allowing sentences of death to juvenile offenders is a blatant violation of international law. The international human rights arguments in opposition to juvenile offender executions are powerful and it appears that the arguments are not going unnoticed.

Speaking out against the execution of juvenile offenders is not done to minimize the excruciating grief suffered by the family and friends of the juvenile offenders’ victims. Certainly, the crimes committed were tragic and terribly wrong. However, it is a basic standard of decency in America that only the most culpable criminals shall be put to death for their crimes. By their very nature, adolescents who are not fully developed physically, cognitively, or emotionally cannot be considered among the very worst of all criminals. It is absurd that currently in the United States, juveniles are too young to serve in the military or vote, but they are not too young to die for their crimes. The

United States must join with practically every other nation in the world and eliminate juvenile offenders from the possibility of execution.

## **MENTALLY RETARDED OFFENDERS**

**Atkins v. Virginia, 122 S.Ct. 2242** – In this recent Supreme Court decision (decided June 20, 2002) the Supreme Court held that the Constitution prohibits the application of the death penalty to mentally retarded persons. In the decisions, Justice Stevens wrote that executions of mentally retarded persons constitute cruel and unusual punishment prohibited by the Eighth Amendment.

This decision is relevant to the issue of executions of juvenile offenders because some of the same international human rights issues were raised. For example, it was argued on behalf of Atkins that because other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded persons the United States should also disapprove such executions. Furthermore, in the dissenting opinion written in *In re Kevin Nigel Stanford*, 2002 WL 984217, Stevens (joined by Souter, Ginsburg, and Breyer) wrote that the reasons supporting the holding in *Atkins* apply with equal or greater force to the execution of juvenile offenders.

In a related case, *McCarver v. State of North Carolina*, a brief of *amici curiae* was filed in support of Petitioner, Ernest Paul McCarver, raising important international human rights arguments relevant to the juvenile death penalty issue. The brief argued that United States’ policy of executing mentally retarded offenders was inconsistent with evolving international standards of decency. Furthermore, it argued that under the jurisprudence of the Eighth and Fourteenth Amendments, the Court cannot evaluate evolving standards of decency without considering international as well as domestic opinions. Finally, it argued that the growing

international consensus opposing the execution of mentally retarded offenders has increasingly isolated the United States diplomatically. All of these arguments are relevant to the juvenile death penalty issue because, like executions of the mentally retarded, the international consensus is against the execution of juvenile offenders.

## 5. THE NEW REMEDIES OF WITHHOLDING AND DEFERRAL OF DEPORTATION UNDER THE TORTURE CONVENTION

By: Dilan A. Esper\*

In 1985, the United Nations promulgated the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. <http://hrweb.org/legal/cat.html> The Torture Convention defines the offense of torture, Torture Convention, Art. 1 ¶ 1., and requires, among other things, that state parties take effective steps to prevent torture from occurring, Torture Convention, Art. 2., criminalize torture with appropriate penalties that take into account the gravity of the offense, Torture Convention, Art. 4., and permit torture victims to sue the perpetrator. Torture Convention Art. 14. One of the most important provisions of the Convention is Article 3, which prohibits state parties from returning a person to another state where there are substantial grounds for believing that he or she will be tortured. Torture Convention, Art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”).

The United States ratified the Torture Convention in 1995. In 1998, implementing legislation was passed, and pursuant to the implementing legislation, in 1999 the INS promulgated regulations to implement Article 3. 8 C.F.R. §§ 208.16-208.18. These regulations created a new and important remedy for aliens who face the threat of harm upon removal from

the United States, a remedy that supplements the traditional avenue of asylum.

The INS regulations provide that an otherwise deportable alien may seek withholding of removal based on a claim that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal”. 8 C.F.R. § 208.16(c)(2). The testimony of the applicant, if credible, is sufficient to make the required showing, and all relevant evidence should be considered. 8 C.F.R. § 208.16(c)(2) & 208.16(c)(3). Aliens convicted of “aggravated felonies”, who are barred from seeking withholding of removal, may seek deferral of removal under the same standard of proof. 8 C.F.R. §§ 208.16(c)(4) & 208.17(a). Deferral of removal is temporary, subject to review, and does not confer any right on the alien to remain in the United States. 8 C.F.R. § 208.17(b).

The standard for withholding or deferring removal is at once broader and narrower than a traditional asylum claim. Whereas an asylum claimant must prove a “credible fear” of “persecution”, the Torture Convention claimant must meet the more exacting standard that it is “more likely than not” that he or she will not just be persecuted, but tortured. On the other hand, asylum is not available unless the persecution is based on the applicant’s membership in some protected group (such as race, religion, or political affiliation). In contrast, if the likelihood of torture is established under the Torture Convention, the reason for torture is irrelevant. *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002).

### *Defining Torture*

The Convention’s long definition of torture, Torture Convention Art. 1 ¶ 1, contains three elements: “severe pain or suffering, whether physical or mental”, “intentionally inflicted”, “at the instigation of or with the

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consent or acquiescence of a public official or other person acting in an official capacity”. “Severe pain or suffering” is an elastic standard that connotes conduct that is sufficiently extreme and outrageous to fall within the scope of universal condemnation by the international community. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002). The more intense, lasting, or heinous the injury, the more likely that it will constitute torture. *Price*, 294 F.3d at 92.

It is clearly a fact specific inquiry. One court has indicated that “ordinary police brutality” is not torture. *Price*, 294 F.3d at 92; *accord Sevoian v. Ashcroft*, 290 F.3d 166, 176-77 (3d Cir. 2002) (police officer’s punching applicant in the face does not constitute torture). This proposition seems debatable, considering that there’s no doubt that police brutality, such as the beating of Rodney King, inflicts severe physical pain and suffering. Another court has indicated that multiple unjustified arrests, along with deliberately crashing another car into the applicant’s car, does not constitute torture. *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002). Again, this case seems questionable given the broad definition of torture in the Convention, which applies to mental as well as physical pain and suffering. Repeated beatings of the applicant, along with burning him with cigarettes, *was held to constitute torture. Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001). Severe domestic violence may also constitute torture. *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (dictum). A change in a foreign state’s government may show that past torture will not recur and thus permit denial of the application. *Kourteva v. INS*, 151 F. Supp. 2d 1126, 1129 (N.D. Cal. 2001).

The Convention extends both to torture by state actors, and by private actors when a public official consents or acquiesces to the torture. Torture Convention, Art. 1 ¶ 1. The regulations clarify that “[a]cquiescence of a public official requires that the public official,

prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 208.18(a)(7). The Board of Immigration Appeals has held that a “willful blindness” standard is appropriate for determining acquiescence. *In re S-V-*, 2000 WL 562836 (BIA 2000) (en banc). The Fifth Circuit rejected a claim of acquiescence where the Honduran was tortured by landowners and the police and justice system did not prosecute or punish them. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002). The Third Circuit has also rejected a similar claim, holding that only the state’s actions *before* the torture may be looked to in determining acquiescence. *Sevoian*, 290 F.3d at 176. Conversely, when the foreign government *does* arrest and investigate, that has been held to bar a claim of acquiescence. *Ali*, 237 F.3d at 598.

The Convention’s definition of torture contains an exception for “pain and suffering arising only from, inherent in or incidental to lawful sanctions”. Torture Convention Art. 1 ¶ 1. The reason for this is obvious; serving a jail sentence may well inflict severe mental suffering, yet the state’s power to incarcerate criminals is unquestioned and is not thought to be torture. A troubling case, however, concerns a policy that Nigeria apparently has of inflicting additional punishment on drug convicts who are deported from the US, on the ground that they “dishonored” Nigeria. A District Court found that such sanctions were lawful and could not give rise to a Torture Convention claim. *McDaniel v. INS*, 142 F. Supp. 2d 219, 223 (D. Conn. 2001). The “lawful sanctions” provision surely exempts ordinary incarceration, but it could not have been intended as a blanket exemption of incarceration; after all, imprisonment can certainly be used as a form of torture, and *McDaniel* should have left open the possibility of such a claim in the proper case.

### ***Burden of Proof***

As noted above, the regulations set forth that the applicant has the burden of proof and that his or her oral testimony may establish the right to relief. 8 C.F.R. § 208.16(c)(2) & 208.16(c)(3). Such oral testimony, however, may be rejected as not credible. *Efe*, 293 F.3d at 907-08. The State Department report on the country at issue is also of crucial importance in the proceeding; indeed, it is reversible error for the BIA not to consider it. *Abassi v. INS*, 2002 WL 31103027 (9th Cir. Sep. 23); *Efe*, 293 F.3d at 907-08; *Sevoian*, 290 F.3d at 175; *Al-Saher*, 268 F.3d at 1147. Evidence of any past torture of the applicant must also be considered. *Sevoian*, 290 F.3d at 175.

### **Judicial Review**

The Torture Convention claim must first be brought before the INS (an immigration judge, and then the Board of Immigration Appeals), before a claim may be brought in court. *Cruz-Navarro v. INS*, 232 F.3d 1024, 1031 n. 9 (9th Cir. 2000); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000); *Ortiz v. INS*, 179 F.3d 1148, 1152-53 (9th Cir. 1999). Once brought to court, the claim will generally be reviewed for abuse of discretion. *Ontunez-Tursios*, 303 F.3d at 353; *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1301-02 (11th Cir. 2001); *Ali*, 237 F.3d at 596; *Mansour v. INS*, 230 F.3d 902, 906 (7th Cir. 2000). However, aggravated felons are cut off from ordinary judicial review of their deportations under the 1996 immigration statute; they are required to bring a petition for habeas corpus, and they are limited to challenges based on misapplication of the law, *Millian-Zamora v. Ashcroft*, 2002 WL 31408906 at \*1 (E.D.N.Y. Oct. 23); *Sulaiman v. Attorney General*, 212 F. Supp. 2d 413 (E.D.Pa. 2002); *McDaniel*, 142 F. Supp. 2d at 223., and in some courts, a challenge to the factual findings under a deferential “substantial evidence” standard. *Anotine v. United States*,

204 F. Supp. 2d 115, 118-19 (D. Mass. 2002); *Kourteva*, 151 F. Supp. 2d at 1129.

Article 3 of the Convention applies not only to deportations and exclusions, but also to extraditions of persons for trial in a foreign jurisdiction. Thus, the Secretary of State must evaluate any claim under the Convention before authorizing extradition. Normally, executive decisions as to whether to extradite are subject to extremely limited judicial review. However, the Ninth Circuit, in a 2-1 decision, indicated in dicta that such claims would be allowed under the Administrative Procedure Act. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016-17 (9th Cir. 2000).

Under any of these standards, it is difficult to overturn the BIA’s determination. *E.g.*, *Sulaiman*, 212 F. Supp. 2d 413, 416; *Julmiste v. Ashcroft*, 212 F. Supp. 2d 341, 348 (D.N.J. 2002); *Kourteva*, 151 F. Supp. 2d at 1129. However, it is clear that if the BIA fails to consider relevant evidence, *Mansour*, 230 F.3d at 908; *Al-Saher*, 268 F.3d at 1147., or relies on a prior asylum determination that applied a different standard, *Kamalthis v. INS*, 251 F.3d 1279, 1282-83 (9th Cir. 2001), reversal is warranted.

### **Conclusion**

The regulations implementing the Torture Convention are an important tool to protect the victims and potential victims of torture. Perhaps because of the trepidation with which courts enter the area of immigration law, judicial review has so far been relatively narrow in scope, focusing on process errors like the failure to take the applicable State Department reports into account, rather than the substantive claims of applicants. Nonetheless, the Torture Convention remedy represents another means of protecting deportable aliens from grave harm that might be visited upon them if they return to their countries of origin.



**6. LITIGATION UPDATE: A SUMMARY OF RECENT DEVELOPMENTS IN U.S. CASES BROUGHT UNDER THE ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT**

By: Jennifer Green and Paul Hoffman\*

**CASES AGAINST CORPORATIONS DOING BUSINESS IN THE UNITED STATES<sup>1</sup>**

**Doe v. Unocal.**

In 1996, two lawsuits were filed charging the Unocal Corporation and Union Oil Company of California (“Unocal”) with knowingly using forced labor to construct a natural gas pipeline across the Tenaserin region of Burma. Both cases survived Unocal’s motions to dismiss. *Doe v. Unocal*, 963 F.Supp.880 (C.D. Cal. 1987); *NCGUB v. Unocal, Inc.*, 176 F.R.D. 529 (C.D. Cal. 1987).

However, in September 2000, both suits were dismissed by Judge Ronald S.W. Lew. *John Doe I v. Unocal Corp.*, 110 F. Supp.2d 1294, 1310 (C.D. Cal. 2000).

Judge Lew held that the ATCA requires direct participation by Unocal in the wrongful acts. Judge Lew further held that in order for Unocal to have been the proximate cause of the injuries, it would have to have had control over the military regime. Plaintiffs appealed the ruling arguing that there was sufficient evidence of Unocal’s participation with and control over the military security forces to raise material

questions of fact and that the district court erred in requiring evidence of participation and control. Plaintiffs argued that the Nuremberg line of cases controlled, and that Unocal’s conduct was sufficient to create liability based on an aiding and abetting theory.

In the fall of 2002, the plaintiffs in both cases filed new complaints in Los Angeles Superior Court raising purely state law claims. Judge Lew had dismissed these claims without prejudice. In a August 20, 2001, ruling Superior Court Judge Victoria Chaney ruled that collateral estoppel and federal preemption did not act to bar these claims. Unocal filed new motions for summary judgment in early 2002. In a June 10, 2002 ruling, Judge Chaney denied portions of these motions, clearing the way for a trial. Accepting plaintiffs’ “vicarious liability” theory, Judge Chaney held that there were triable issues of fact as to whether there was a joint venture that included Unocal to construct the pipeline. The court further held that there were triable issues on whether Unocal and its co-venturers hired, contracted with, or otherwise retained the SLORC regime as an agent to perform security and other “services” for the project. The upcoming state court trial will primarily focus on these two issues. Unocal has filed a motion to stay the state court proceedings which will be heard on January 27, 2003. If denied, a trial date will be set. Unocal has also filed a petition with the California Court of Appeal asking that Court to block a trial.

On September 19, 2002, the Ninth Circuit issued an opinion reversing Judge Lew’s grant of summary judgment to Unocal. Citing the line of cases beginning with the Nuremberg Tribunals, the appeals court held that plaintiffs could proceed under the ATCA with an “aiding and abetting” theory. Under this standard, plaintiffs need only show that Unocal provided knowing assistance to the direct perpetrators of the human rights violations. The court cited plaintiffs’ evidence that Unocal and its co-venturers provided financial and material

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support to the security forces in holding that there was sufficient evidence to submit the issue to a jury. On October 9, 2003, Unocal filed a petition for rehearing and suggestion for rehearing en banc which was still pending at the end of 2002.

In another interesting development, criminal proceedings have been initiated in France and Belgium against Total officials as a result of their alleged role in the human rights abuses on the pipeline project.

**Wiwa v. Royal Dutch Petroleum**, 96 Civ. 8386 (S.D.N.Y., filed November 8, 1996), 226 F.3d 88 (2d Cir. 2000)

This case charges Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell) with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa and John Kpuinen, two of nine leaders of MOSOP (Movement for the Survival of the Ogoni People), the torture and detention of Owens Wiwa, and the wounding of a woman who was peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under ATCA and the Racketeer Influenced and Corrupt Organizations Act (RICO). The District Court found that there was personal jurisdiction over defendants, but granted defendants' motion to dismiss the complaint on grounds of forum non conveniens (to England, home of Shell Transport & Trading). Plaintiffs appealed the dismissal; defendants cross-appealed the ruling on personal jurisdiction. On September 15, 2000, the Second Circuit issued its decision, which reversed the forum non conveniens dismissal and denied defendant's cross appeal on personal jurisdiction. The Second Circuit then remanded the case for consideration of defendant's motion to dismiss for lack of subject matter jurisdiction. Defendants petitioned for certiorari, but the petition was rejected. The remanded portion of

Shell's motion to dismiss was denied. The ruling contained an important analysis of forced exile as a form of cruel, inhuman or degrading treatment. 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002).

**Wiwa v. Anderson**, 01 Civ. 1909 (S.D.N.Y. filed March 2001)

In March 2001, the former head of the Nigerian subsidiary, Shell Transport & Trading, Brian Anderson, was sued while in New York. He filed a motion to dismiss, which also included a claim that the case should be transferred to England under the forum non conveniens doctrine. The motion was denied in its entirety, and included the rejection of defendant's attempt to use the Nigerian truth commission as a basis for a forum non conveniens dismissal to Nigeria. 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002). For both cases, plaintiffs filed amended complaints pursuant to the Court's order and the cases are now in discovery.

The plaintiffs in both cases are represented by Judith Chomsky, Jennie Green, Paul Hoffman and Beth Stephens of the Center for Constitutional Rights, Anthony DiCaprio of Ratner & DiCaprio, Julie Shapiro, Tom Golden and Nisha Menon of Willkie Farr & Gallagher, and Jodie Kelley of Jenner & Block.

**Kiobel, et al v. Royal Dutch Petroleum, et al.**, S.D.N.Y. 02 Civ. 7618 (KMW). On September 20, 2002, fourteen individual plaintiffs filed a class action charging Shell with complicity for human rights violations committed between 1990-1999 in Nigeria (including purchasing ammunition and providing logistical support of repression of anti-Shell protestors). The plaintiffs are represented by Berger & Montague of Philadelphia.

**Bowoto v. Chevron**, Case No. C99-2506 CAL (N.D. Cal. 1999). This case charges the San Francisco-based Chevron Corporation for its

involvement in a series of three machine gun attacks upon unarmed protesters and people in their homes in Nigeria between May, 1998 and January, 1999. The Plaintiffs were either summarily executed by the gunfire, seriously injured by gunfire during the attacks, burned in a fire set during the attack or tortured by the police thereafter with the complicity of and/or at the request or suggestion of Chevron. In the spring of 2000, Plaintiffs defeated defendant's motions to dismiss the entire complaint to Nigeria on forum non conveniens and act of state grounds, and argued that the protestors' claims did not state claims of international law, and the case is now in discovery. Summary judgment motions are calendared for the spring of 2003.

Counsel on the case are the law firms of Hadsell & Stormer, Traber & Voorhees, Cindy Cohn, Judith Chomsky, Michael Sorgen, EarthRights International, the Working Peoples' Law Center, the Center for Constitutional Rights, Bahan & Herold, and Paul Hoffman.

**Apartheid actions:** A series of cases are currently pending in New York and other courts across the country against a range of corporate defendants for their activities supporting apartheid in South Africa. A series of actions have charged defendants including banks, insurance companies, computer companies. Claims are for forced labor, discrimination, rape and other torture, and other human rights violations.

In June 2002, a class action on behalf of more than 5,000 apartheid victims was filed against dozens of multinational corporations. *Ntsebeza v. Citigroup*, 02 Civ. 4712 (RCC). The companies are accused of rescuing the apartheid regime in the mid-1980s when it faced financial default because of international sanctions. Damages sought are \$50 billion. Counsel includes Fagan & Associates (New Jersey); Nagel Rice Dreifuss & Mazie (New Jersey); Thomas Wareham & Richards (New York);

Dumisa Buhle Ntsebeza (South Africa/Connecticut); John Ngcebetsha and Gugulethu Oscar Madlanga (Randburg, South Africa); Dambusa & Mngandi Incorporated (Eastern Cape, South Africa); Kedibone Molema Attorneys (Pretoria, South Africa), and Padayachi Lloyd (Cape Town, South Africa). Connecticut attorneys Paul Ngoni and associates have filed a related complaint, *Digwamaje v. IBM Corp.*, et al 02-CV-6218 (S.D.N.Y. 2002)

An MDL panel in Savannah, Georgia will hear the motion to consolidate later this year.

On November 12, 2002, the Washington, D.C. law firm of Cohen, Milstein and Hausfeld, with the South African firm of Abrahams, Kiewitz, the Florida firm of Kerrigan, Estes, Rankin & McLeod, LLP, and the Los Angeles firm of Fleishman & Fisher filed a second suit on behalf of the Khulumani Support Group and individual plaintiffs in the Eastern District of New York. *Khulumani v. Barclays National Bank Ltd.* (E.D.N.Y. 2002). The suit targets Swiss, German, U.S., Dutch, French and British banks and companies who had financial ties with the regime.

**Flores v. Southern Peru Copper Corporation**, No. 00 CIV. 9812 (CSH) (S.D.N.Y., filed Dec. 27, 2000). Residents of Ilo, Peru charged defendant with despoilment of the air, land and water through copper mining and refining operations over the last forty years. Plaintiffs claims include violation of the right to life, violation of the right to health, violation of duty to assure sustainable development. Defendant's motion to dismiss was granted on July 16, 2002. 2002 U.S. Dist. LEXIS 13013.

Judge Charles Haight of the Southern District of New York held that plaintiffs had not submitted sources demonstrating an international consensus that high levels of environmental pollution within a nation's borders did not violate the "right to life", "right to health" or "right to sustainable development."

Judge Haight further explained that if he had not held that the ATCA claims were legally unfounded, he would have dismissed the lawsuit on forum non conveniens grounds.

Attorneys for plaintiffs are Wallace Showman of New York, and Schirrmeyer Ajamie, LLP of Houston, TX.

**Sarei, et al v. Rio Tinto, plc**, CV 00-11695-MMM (MANx) (C.D. Cal. Filed 2000). Class action claiming displacement of villages and environmental damage in construction of copper mine in Bougainville, Papua New Guinea. Claims include crimes against humanity (including a medical blockade), violation of the right to life and health and security of person, racial discrimination, violations of international environmental rights and war crimes (including blockade).

Defendant filed a motion to dismiss, and on in October 2001, the U.S. attorney general filed a “statement of interest” that adjudication of this lawsuit could negatively impact the peace accord that has been negotiated by Papua New Guinea. On July 9, 2002, Defendant’s motion to dismiss was granted on the grounds of the act of state doctrine and international comity. 221 F.Supp.2d 1116 (C.D. Cal. 2002). Plaintiffs have filed their opening brief. A decision is not expected until late 2003.

Attorneys for plaintiffs include Steve Berman of Hagens Berman LLP in Seattle, Kevin Roddy of Hagens Berman LLP in Los Angeles, and Paul Luvera and Joel D. Cunningham of Luvera, Barnett, Brindley, Beninger & Cunningham.

**Bano, et al. v. Union Carbide Corporation and Warren Anderson**: 99 Civ. 11329 (JFK) (S.D.N.Y. 1999). Class action lawsuit filed on behalf of survivors and next-of-kin of victims of the Bhopal Gas Disaster of December 2-3, 1984, (the “Bhopal Disaster”) against Union Carbide Corporation (hereafter “Union Carbide” or “the

Company”), as well as its former Chief Executive Officer, Warren Anderson.

Plaintiffs claim that defendants acted with unlawful, reckless and depraved indifference to human life in the design, operation and maintenance of the Union Carbide of India Ltd. (“UCIL”) facility at Bhopal which resulted in the devastating leak of massive amounts of methyl isocyanate (“MIC”) into the city killing thousands and injuring many thousands of its residents. Plaintiffs’ claims also include disregard of any emergency-preparedness or minimal safety precautions, and widespread and severe contamination and environmental pollution of soil and drinking water. Finally, plaintiffs charge civil contempt, abuse of judicial mandate and evasion of lawful process, as well as actual and constructive fraud because of defendants’ failure to comply with the lawful orders of the courts of both the United States and India. Plaintiffs also alleged violations of international law.

Defendants filed a motion to dismiss the amended complaint, deny class certification, and in the alternative, moved for summary judgment. The District Court granted their motion (2000 U.S. Dist. LEXIS 12326) and plaintiffs appealed. On November 15, 2001, the Second Circuit ruled that the lower court had properly dismissed the plaintiffs’ claims under ATCA (because the 1989 settlement precluded any other claims from the 1984 disaster; it never ruled on whether Union Carbide’s actions violated international norms). However, the Circuit ruled that the lower court erred in dismissing the plaintiffs’ common-law environmental claims and remanded on those claims.

The case was brought by Goodkind Labaton Rudoff & Sucharow Llp, Prof. Upendra Baxi, Law Offices of Curtis Trinko, Llp, and EarthRights International.

**Abdullahi v. Pfizer** (S.D.N.Y., filed Aug. 29, 2001): Thirty Nigerian families sued Pfizer for

conducting an unethical clinical trial of an antibiotic (Trovan) on their children in 1996. Defendants moved to dismiss the case to Nigeria on forum non conveniens grounds and that motion was granted on September 16, 2002. 2002 U.S. Dist. LEXIS 17436. The plaintiffs are represented by Milberg Weiss Bershad Hynes & Lerach in New York.

**Saipan cases:** In late September 2002, a final settlement was concluded with seven major U.S. retailers, which for the most part concluded three cases filed on January 13-14, 1999 in U.S. federal court in Los Angeles and Saipan, and in California state court, challenging sweatshop conditions in the garment industry in Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Levi Strauss did not agree to the settlement and continues as a defendant, although they stopped purchasing garments from Saipan after the lawsuit was filed.

Plaintiffs are tens of thousands of foreign guest workers who work for unfair wages in unlawful sweatshop conditions, and nongovernmental organizations challenging the company's violations of California's Business & Professions Code. The defendants were garment contractors and retailers and manufacturers of the CNMI-manufactured garments sold in the U.S.A.

**Doe v. Gap:** Civ. 99-329 (filed C.D. Cal. January 13, 1999): Class action lawsuit of approximately 50,000 young, non-citizen garment workers challenges garment production system on U.S. soil based upon peonage and involuntary servitude, and violations of the rights of women. The complaint alleged violations of the Alien Tort Claims Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO") and torts actionable under the federal indentured servitude and anti-peonage statutes and state common and international law.

After 19 of the defendants settled, and numerous legal battles over venue, the U.S.

District Court for the Northern Mariana Islands ruled against dismissal on October 29, 2001 (decision is posted on [www.sweatshopwatch.org](http://www.sweatshopwatch.org)) (upholding many of the RICO claims, and the false imprisonment claim, and allowing others to be amended without prejudice; dismissing the Thirteenth Amendment claims and the international law claims with prejudice.

**Union of Needletrades Industrial and Textile Employees v. The Gap**, 300474, plaintiffs Global Exchange, Sweatshop Watch, the Asian Law Caucus and UNITE charged unfair business practices under California Business and Professions Codes (alleged clothing retailers including The Gap Inc., Tommy Hilfiger and J. Crew deceived the public about labor abuses at their Saipan factories and that the manufacturers clothes are mislabeled.

On November 12, 1999, the San Francisco Superior Court rejected defendants' motions to dismiss and to divide the case into separate proceedings against each retailer defendant. The case then went into discovery.

**Doe v. Advanced Textile Corp.:** A third case was filed by approximately 25,000 Saipan garment workers in federal court in Saipan against 32 Saipan-based garment contractors under the Fair Labor Standards Act and CNMI laws. Plaintiffs initially attempted unsuccessfully to recuse the judge, who had a longstanding personal relationship with the former President of the Saipan Garment Manufacturers Association and principal shareholder of a leading garment contractor defendant. The judge then ordered Doe plaintiffs to disclose their identities or drop the lawsuit. This ruling was appealed to the Ninth Circuit, which issued an important decision on the use of pseudonyms.

The judge also dismissed all the CNMI legal claims, ruling that they were not



sufficiently related to the federal overtime case to retain them in the same action. He also severed the case into 22 proceedings against each Saipan contractor separately. In response to this ruling severing the case, plaintiffs filed a new amended complaint, adding allegations to explain why the cases should be tried in a single action. Several of the Saipan contractors have challenged these new allegations, and hearings were held in September 2001. In early October, 2001, Judge Munson ordered that some 20,000 current and former garment workers in several countries be provided notice of their right to submit claims for back wages.

In May 2002, the Court ruled that the action could proceed as a class and allowed the earlier settlement to go forward over the remaining merchants' objections. The class certification was upheld by the Ninth Circuit. These rulings have been identified as key to moving settlement negotiations forward.

*Settlement negotiations:* Final settlements with the first 19 defendants who settled the cases include a comprehensive Saipan Code of Conduct to be monitored by Verite, a non-profit international human rights monitoring organization, and a ban on recruitment fees for workers. Settlement negotiations with the other seven defendants concluded in September 2002 also include important monitoring agreements as well as a damage award which brings the total settlement fund to over \$20 million.

The Plaintiffs are represented by the law firms of Milberg, Weiss, Bershad, Hynes & Lerach; Altshuler, Berzon, Nussbaum, Berzon & Rubin, Galloway & Associates, and Bushnell, Caplan & Fielding, LLP. For more information and regular updates, see [www.globalexchange.org](http://www.globalexchange.org), [www.sweatshopwatch.org](http://www.sweatshopwatch.org).

**Presbyterian Church v. Talisman Energy Co., Inc.**, 01 CV 9882 (AGS) (S.D.N.Y., filed Nov. 8, 2001 (amended complaint filed Feb. 25,

2002)) The Presbyterian Church of Sudan and one of its pastors, with the assistance of the American Anti-Slavery Group, filed a class action on behalf of non-Muslims in the Sudan, charging that Talisman has supported the "ethnic cleansing" campaign of the Islamic government in Sudan. The February 2002 amended complaint added the Sudanese government as a defendant.

Talisman filed a motion to dismiss the lawsuit, and requested that the court solicit a U.S. State Department opinion about the consequences of the suit for Sudan's peace process. In September 2002, the Judge refused Talisman's request to consult the State Department. A ruling on defendants' motion to dismiss is still pending.

Plaintiffs' lawyers include Carey D'Avino and Stephen Whinston of Berger & Montague of Philadelphia.

**Bigio v. Coca-Cola**, 239 F.3d 440 (2d Cir. 2000). Plaintiffs alleged that Coca-Cola either purchased or leased their property with full knowledge of the unlawful manner in which it had been seized from the plaintiffs. Defendants' motion to dismiss was granted by the Southern District of New York, which concluded that the plaintiffs had not satisfied the prerequisites for jurisdiction under the ATCA, and that the Act of State Doctrine barred the court's jurisdiction, despite the parties' diversity of citizenship. The Second Circuit upheld the dismissal of the ATCA claims, but stated that the Act of State doctrine does not bar the court from exercising diversity jurisdiction. The court remanded for the purpose of determining whether principles of international comity dictating against exercising jurisdiction, and if they do not, for the court to decide the case on its merits.

Plaintiffs' counsel include Nathan Lewin of Miller, Cassidy, Larroca & Lewin, LLP of Washington, D.C.

**Jota v. Texaco, Inc.** Two consolidated claims, *Aguinda v. Texaco*, S.D.N.Y. Dkt. No. 93 Civ. 7527 (on behalf of residents of the Oriente region of Ecuador) and *Ashanga v. Texaco Inc.*, S.D. Dkt. No. 94 Civ. 9266 (residents of Peru), allege that Texaco polluted the rain forests and rivers in Ecuador and Peru during oil exploitation activities in Ecuador between 1964 and 1992: dumping toxic by-products in local rivers, leaked petroleum into the environment, resulting in physical injuries, including pre-cancerous growths.

On October 5, 1998, the Second Circuit reversed a dismissal on the ground of forum non conveniens. 157 F.3d 153 (2d Cir. 1998). The case was remanded and oral argument was heard in February 1999. In January 2000, the Court ordered additional briefing on whether the case could be heard in Ecuador, given a January 21, 2000 military coup and the 1998 U.S. State Department Country Report on Ecuador. 2000 U.S. Dist. LEXIS 745 (Jan. 31, 2000). On May 30, 2001, the District Court dismissed the case on forum non conveniens grounds to Ecuador (noting that the Peruvian plaintiffs could bring their claims in Peru if they so chose). 142 F.Supp.2d 534 (S.D.N.Y. 2001). In its forum non conveniens analysis, the district court concluded that plaintiffs would be unlikely to demonstrate that Texaco's acts are actionable under ATCA. Plaintiffs appealed.

On August 16, 2002, the Second Circuit affirmed the lower court's decision to dismiss the case, but reasoned differently. Rather than finding that plaintiffs would be unlikely to state a claim for a violation of international law, the Court held that it need not reach the issue because other public and private interest factors would require dismissal even if ATCA expresses a strong U.S. policy interest. The Second Circuit ruled that the dismissal must be conditioned on Texaco's agreement to waive defenses based on statutes of limitation for limitations periods expiring between the

institution of these actions and a date one year subsequent to the final judgment of dismissal.

Counsel for plaintiffs-appellants include the Law Office of Cristobal Bonifaz, Kohn, Swift & Graf, and Sullivan & Damen. *Arias v. DynCorp*, No. 1:01CV01908 (D.D.C., filed Sept. 11, 2001). Class action of 10,000 Ecuadorian Indians charging that U.S. company was contracted to carry out fumigation of illicit crops in neighboring Colombia. Plaintiffs charge that reckless spraying of homes and farms caused illness and death and destroyed crops. ATCA violations charged included crimes against humanity. Defendants' motion to dismiss was briefed in the spring of March 2002. A decision is pending.

Plaintiffs' counsel include the International Labor Rights Fund and Cristobal Bonifaz.

## U.S. OFFICIALS

**Turkmen v. Ashcroft**, E.D.N.Y. (02 CV 2307 (Gleeson, J.)). Class action brought by seven noncitizens who were arrested and detained on minor immigration violations by the Immigration and Naturalization Service (INS) following the September 11, 2001 terrorist attacks, and then kept in detention long after they were ready to leave the United States on final orders of removal or voluntary departure until they were "cleared" of criminal suspicion by the Federal Bureau of Investigation (FBI). The Plaintiffs are, or were perceived by Defendants as, Muslim or Arab. U.S. government official defendants were charged with responsibility for instituting and executing the detention policies to which they were unlawfully subjected.

Plaintiffs' claims included a range of civil rights violations, and international law violations. ATCA violations charged were cruel, inhuman or degrading treatment, arbitrary detention, and violation of the customary international law right of contact with the

detainees' consulates. Plaintiffs also claimed a direct treaty violation under the Vienna Convention on Consular Relations. Defendants filed a motion to dismiss, claiming that the U.S. government must be substituted for the individual defendants for plaintiffs' ATCA claims and that plaintiffs had no right to sue under the Vienna Convention on Consular Relations. Oral argument took place on December 19, 2002. Awaiting decision.

Counsel for the plaintiffs are the Center for Constitutional Rights and Covington & Burling.

**Rasul v. Bush**, Civil Action No. 02-299 (CKK) (D.D.C. filed Feb. 19, 2002); *Odah v. United States*, Civil Action No. 02-828 (D.D.C. filed May 1, 2002). Plaintiffs in these two related cases are post 9/11 detainees held at Guantanamo Bay, Cuba. The *Rasul* action was brought on behalf of 2 British citizens and 1 Australian and petitions, inter alia, that the detainees be released, and that they be able to meet with their counsel. The *Odah* case was filed on behalf of 12 Kuwaitis, and requests a preliminary and permanent injunction allowing the detainees contact with their family members and counsel, and to be informed of the charges against them. Both cases alleged ATCA violations.

The U.S. government filed motions to dismiss, and oral argument was held on June 26, 2002. On July 30, 2002, the District Court dismissed the cases. On the ATCA claims, the court held that no ATCA relief was available to the *Rasul* and the *Odah* plaintiffs because habeas corpus is the only potential remedy for wrongful detention. The court held in the alternative that in order to be sued under ATCA, the government must waive its immunity and there had been no such waiver. 215 F.Supp.2d 55.

Plaintiffs appealed. The appeal has been fully briefed and Oral argument was held on December 2, 2002.

Counsel for the *Rasul* plaintiffs are led by the Center for Constitutional Rights; the *Odah* plaintiffs are represented by Shearman & Sterling.

**Schneider v. Kissinger** Case Number 1:01CV0192 (HHK) (D.D.C., filed Sept. 10, 2001). Case on behalf of family members and estate of General Rene Schneider, former head of the Chilean military in the government of Salvador Allende. The complaint includes claims for summary execution, torture, and arbitrary detention, and charges former National Security Advisor Henry Kissinger and former CIA Director Richard Helms and the United States of America for "designing, ordering, implementing, aiding and abetting, and/or directing a program of activities aimed at, and resulting in the kidnapping and killing of Rene Schneider.

Attorneys for the U.S., Kissinger and Helms at Department of Justice have filed a motion to dismiss the case. The motion argues that plaintiffs claims are barred by the political question doctrine and sovereign immunity, common law immunity, qualified and absolute immunity, and that plaintiffs state no cognizable claim under the TVPA. A decision is pending. Regular updates are available on [www.icaonline.org](http://www.icaonline.org). Michael Tigar is attorney for plaintiffs.

**Alvarez v. United States** – As reported in the 2001 Report, the Ninth Circuit affirmed plaintiff's judgment against one of his kidnappers under the ATCA and reversed the denial of his claims against the United States under the Federal Tort Claims Act. This decision was reported at 266 F.3d 1045 (9<sup>th</sup> Cir. 2001). In March 2002 the Circuit agreed to hear the case *en banc* and vacated the panel opinion. The *en banc* hearing took place on June 18, 2002, in San Francisco. No decision had been issued by the end of 2002.

**Papa v. United States**, No. 00-55051 (C.D. Cal.) 281 F.3d. 1004 (9<sup>th</sup> Cir. 2002)

On February 25, 2002, the Ninth Circuit reversed the dismissal of the *Bivens* claims, FOIA claims and ATCA claims, finding that the claims were timely (applying TVPA 10-year statute of limitations) and that plaintiffs had claims under customary international law. Plaintiffs claim is that INS officials at the El Centro Detention Center were deliberately indifferent to the rights of a Brazilian detainee who was beaten to death in the exercise yard by another detainee who was a gang member. The case was transferred to San Diego on remand and is in the discovery stage.

#### U.S. GOVERNMENT OFFICIALS AND CORPORATIONS

**Jama v. U.S. INS:** On October 1, 1998, nineteen political asylum seekers who were formerly detained in an Immigration and Naturalization Service (INS) facility in Elizabeth, New Jersey won an important ruling against INS officials, a private contractor and its employees. 22 F. Supp. 2d 353 (D.N.J. 1998). The suit is now in discovery. Plaintiffs have successfully obtained documents on 4 other facilities by the contractor, the Esmor Corporation. The plaintiffs have obtained critical protective orders for the immigration records for their clients. Two other cases subsequently filed against the INS have been consolidated for discovery purposes. Summary judgment motions from the defendants, including an argument that U.S. government officials are entitled to qualified immunity, are expected in January 2003.

The plaintiffs are represented by the Constitutional Rights Clinic at Rutgers Law School and the law firm of O'Melveny & Myers.

#### CASES AGAINST FOREIGN OFFICIALS, ORGANIZATIONS AND/OR U.S./FOREIGN CORPORATIONS

**Ashton et al v. Al Qaeda Islamic Army et al**, No. 02 CV-6977; **Beyer et al v. Al Qaeda Islamic Army et al**, No. 02 CV-6978 (S.D.N.Y. filed Sept. 4, 2002); 1,400 victims and survivors of the September 11 attacks on the World Trade Center plaintiffs charge Al Qaeda, Osama bin Laden, 37 Al Qaeda associates, the estates of the 19 terrorist hijackers who died in the Sept 11 attacks, Zacharias Moussaoui, the Taliban and its leader Mohammad Omar, Iraq, Saddam Hussein and 2 sons, the Iraqi intelligence agency, 13 individual Iraqi officials and 64 co-conspirators, including banks, charities, corporations and individuals that are alleged to have provided funds and other support to further the alleged acts of terror against the United States for the last 10 years. The case was brought by the Anti-Terrorism Act, the Torture Victim Protection Act and the Anti-Terrorism and Effective Death Penalty Act.

The plaintiffs are represented by Kreindler & Kreindler of New York.

**Burnett, St. v. Al Baraka Investment and Development, et al.** No. 02-CV-1616 (JR) (D.D.C. Aug 14, 2002). More than 3000 survivors and relatives of those killed in the 9/11 World Trade Center attacks brought suit against defendants including seven international banks, eight Islamic foundations and their subsidiaries and several individuals alleged to be terrorist financiers, including Osama bin Laden and members of the Saudi royal family. This suit also seeks \$1 trillion in compensator, treble and punitive damages.

The complaint has been amended to add dozens of additional defendants, based on new evidence gathered by a team of private investigators. It was brought under the Foreign Sovereign Immunities Act, Torture Victim Protection Act, the Alien Tort Claims Act,

RICO, and tort claims, including wrongful death and conspiracy.

Counsel for plaintiffs include Allan Gerson and Ronald Motley (South Carolina).

**Bao Ge et al v. Li Peng et al**, Civ. No. 98-1986 (D.D.C. 1998) Class action for damages and equitable relief including the release of thousands of prisoners incarcerated in Chinese prisons. An amended complaint was filed December 24, 1998 charging human rights abuses in the Chinese prison system, including that, while incarcerated, prisoners were forced to engage in labor under inhumane conditions. Plaintiffs are 5 current or former inmates of the Shanghai Reeducation Labor Camp in the People's Republic of China. Defendants are Chinese Premier Li Peng, the Chinese Communist Party, the Politburo, the Bank of China, Adidas America and the President of Adidas, Steven Wynne.

On February 9, 1999, defendants Adidas America and the Bank of China filed separate motions to dismiss. The motions argued, inter alia, that the Court lacks subject matter jurisdiction and should therefore dismiss the action under Fed. R. Civ. P. 12(b)(1). Plaintiffs opposed and also moved for jurisdictional discovery. The Bank of China filed for a protective order.

In order to establish whether the activities of the Bank of China were met the test for "commercial exception" to foreign sovereign immunity (28 U.S.C. 1605 (a)(2)), the Court allowed narrow jurisdictional discovery, to be supervised by a Magistrate Judge. The Court also allowed limited discovery about Adidas' relationship with the Bank of China and any imports to the United States from China that were allegedly the result of prison labor. 1999 U.S. Dist LEXIS 10834 (filed D.C.D.C. July 13, 1999).

After this jurisdictional discovery, defendants filed renewed motions to dismiss. On August 28, 2000, the U.S. District Court for

the District of Columbia dismissed the case, stating that the only factual allegation connecting Adidas to the forced labor camps is that while incarcerated some of the plaintiffs stitched soccer balls for Adidas. The court found this to be an insufficient allegation. It further ruled that the Bank of China was an agent of a foreign state and thus immune under the Foreign Sovereign Immunities Act (no exceptions applied.)

Plaintiffs' counsel is John David Hemwenway, Hemenway & Associates, Washington, D.C.

**CASES AGAINST FOREIGN GOVERNMENT OFFICIALS**

**El Salvador cases (Ford v. Garcia; Romagoza v. Garcia)** (S.D. Fla). These two cases were brought against General Guillermo Garcia, El Salvador's Minister of Defense from 1979-83, and General Carlos Eugenio Vides Casanova, Director General of the National Guard during 1979-83, and Garcia's successor as Defense Minister.

The *Ford* case was brought on behalf of six U.S. nuns who were tortured and killed in El Salvador, and their family members. That case went to trial, and a jury found that the defendants were not liable. The decision was upheld on appeal, 289 F.3d 1283 (11<sup>th</sup> Cir. 2002), and plaintiffs filed a petition for a writ for certiorari. Plaintiffs' counsel include the Lawyers Committee for Human Rights.

The *Romagoza* case was brought by three Salvadorans now living in the U.S. who survived torture at the hands of the Salvadoran National Guard and Police between 1979 and 1983. Trial went forward the summer of 2002, and on July 23, 2002, the jury awarded \$54.6 million to the plaintiffs for torture. An appeal is pending. See Beth Van Schaack article in this issue.

**Zhou v. Li Peng**, Civ. No. 00-6446 (S.D.N.Y. filed Aug. 28, 2000). In April 1989, peaceful demonstrators occupied Tiananmen Square in Beijing demanding democratic reforms. After a six-week standoff, the protestors, mainly students, were forcibly removed in a wholesale military attack. Thousands were killed and wounded. In August 2000, on behalf of former student lead Wang Dan and four other survivors of the massacre, CCR filed suit against Li Peng, the Chinese Premier at the time the crackdown at Tiananmen Square was ordered. He was served at a New York hotel. Li Peng has not responded to the complaint, but the U.S.

government challenged whether service through Li Peng's security detail was proper.

On August 8, 2002, the court rejected the U.S. government challenge. 2002 U.S. Dist. LEXIS 14648. Plaintiffs' counsel are the Center for Constitutional Rights.

**Falun Gong cases:** Beginning in July 2001, Falungong practitioners have brought five ATCA suits against top Chinese officials during visits to the U.S. for torture, murder and other human rights violations against Falun Gong members in China.

In July 2001, activists brought a \$50 million suit in New York against Zhao Zhifeng, Public Security Chief of China's Hubei province, and a default judgment has been issued.

In August 2001, Falun Gong served Zhou Yongkang, Communist Party General Secretary of Sicuan province while he was on a visit to Chicago.

On February 7, 2002, Beijing Mayor Liu Qi (and president of the Beijing Organizing Committee for the 2008 Olympic Games) was served with a complaint while on a visit to San Francisco, for the brutal crackdown that has occurred in preparation for the Olympics. The plaintiffs are 2 Chinese asylees in the U.S. and 4 citizens of the U.S. Israel, France and Sweden. Liu Qi was charged with torture, cruel, inhuman and degrading treatment, crimes against humanity and violation of the right to freedom of religion and belief. Liu Qi made no response and CJA filed papers for a default judgment.

At a hearing on May 1, 2002, the magistrate requested additional briefing on several issues, including the act of state doctrine, and he informed plaintiffs that he was requesting an opinion from the U.S. State Department. The State Department issued a letter that the adjudication of the case would impair foreign policy. The court is currently considering the impact of this letter.

In May 2002, Ding Guangen, a politburo member and head of publicity for the communist party's central committee, was served in Hawaii. The Plaintiff is a French citizen, Helene Petite, who was arrested in Tianamen Square during a peaceful protest on November 21, and three unnamed Chinese plaintiffs.

The plaintiffs in these cases are represented by Terri Marsh. The Center for Justice and Accountability is co-counsel in the case against Liu Qi. Updates are available at [www.cja.org](http://www.cja.org).

**Doe v. Lumintang**, (D.D.C. CV0064) (Filed March 28, 2000; Judgment Sept. 10, 2001): Six East Timorese activists sued Indonesian former Vice Chief of Staff Johny Lumintang, charging him with the design and implementation of a program of systematic human rights violations in East Timor which resulted in crimes against humanity and other human rights violations such as their torture and the summary execution of their relatives. The plaintiffs charged that General Lumintang's participation included sending a telegram to military officials in East Timor with orders to take repressive action against independence supporters after the September 1999 vote for independence, and that he signed a covert operations manual outlining terror tactics to deal with political opposition.

Defendant filed no response to the complaint. On June 27, 2000, the District Court filed an entry of default, and in March 2001, the plaintiffs and expert witnesses testified about the damages caused by Lumintang. On September 10, 2001, the court entered judgment against Lumintang for \$66 million -- awarding each plaintiff \$10 million in punitive damages and around \$1 million for compensatory damages for each of their claims. On March 25, 2002, Lumintang entered an appearance for the sole purpose of setting aside the judgment. This has been briefed and is awaiting argument.

Counsel for plaintiffs are the Center for Constitutional Rights, Judith Brown Chomsky, the Washington law firm of Patton, Boggs, the Center for Justice and Accountability, James Klimaski, and Paul Hoffman.

**Reyes et al v. Juan Evangelista Lopez Grijalba** (S.D.Fla filed July 15, 2002). The Center for Justice and Accountability filed a suit against former Honduran military intelligence chief on behalf of six former Honduran citizens. The plaintiffs charge torture and the disappearance of relatives, which occurred as part of a series of abductions, disappearances and extrajudicial killings against political opponents. Plaintiffs charge that Lopez Grijalba, whose positions included the chief of intelligence for the Armed Forces General and the Joint Chiefs, had the legal authority and practical ability to control subordinates who participated in the human rights abuses. Updates are available on CJA's website: [www.cja.org](http://www.cja.org).

**Tachiona, et al v. Mugabe, et al**, 00 Civ. 6666 (VM), 2001 U.S. Dist. LEXIS 18421. Class action on behalf of Zimbabweans claiming that President Robert Mugabe and Zimbabwe's Foreign Minister Stan Mudenge and their political party the Zimbabwe African National Union-Patriotic Front (ZANU-PF) planned and executed a campaign designed to intimidate and suppress peaceful political opposition. Plaintiffs claims include summary execution, torture, terrorism, rape, beatings and destruction of property. On October 30, 2001, the Southern District of New York ruled that Mugabe and Mudenge had head of state and diplomatic immunity, but that the immunity was not for all purposes, and ZANU-PF could be tried through Mugabe. The case contains an extensive analysis of immunities. An order of default was also entered on October 30, 2001.

The U.S. government (not a party) has filed a motion for reconsideration of the portion

of the decision which held that ZANU-PF may be sued through President Mugabe. The U.S. argued that Mugabe and Mudenge were immune from service under head of state and diplomatic immunity and that service upon ZANU-PF through Mugabe was invalid. This motion was rejected. In July 2002, a U.S. magistrate judge recommended a \$73 million judgment against ZANU-PDF for the murder and torture of political opponents under the TVPA. It reserved judgment on the ATCA, and advised plaintiffs that if they chose to proceed under the ATCA, additional briefing was required on the choice-of-law analysis on damages and the applicable law of Zimbabwe. 216 F.Supp.2d 262 (S.D.N.Y. 2002). Plaintiffs chose to proceed under the TVPA only.

Plaintiffs are represented by Theodore Cooperstein of Washington, D.C. and Paul Sweeney of Hogan & Hartson in New York.

**Topo v. Dhir**, 01 Civ. 10881 (JSM) (RLE) (S.D.N.Y.) Plaintiff Pushpa Topo, alleged that the defendants recruited her for a domestic servant position. Her ATCA allegations included trafficking and involuntary servitude, false imprisonment, and various violations of federal and state minimum wage laws. Defendants attempted to force Ms. Topo to reveal her immigration status, but on September 13, 2002, the court granted her a protective order. 2002 U.S. Dist. LEXIS 17190.

Plaintiff is represented by Washington Square Legal Services.

**John Doe I and John Doe II v. Milosevic et al.**, No. 99-cv 11058EFH (D.C. Mass. filed May 17, 1999): Two anonymous citizens of Kosovo sued Slobodan Milosevic and 13 other “co-conspirators” for genocide, war crimes and other gross human rights abuses. Co-conspirators include the Minister of Foreign Affairs of the Federal Republic of Yugoslavia (FRY), the FRY Minister of Information, the FRY UN representative, the head of the

Yugoslav United Left Party and wife and adviser to Milosevic, security officials, and paramilitary officials.

Plaintiffs claim that the conspiracy of the Defendants’ had two primary goals: first, Milosevic and the other defendants committed these violations to eliminate the ethnic Albanian population from Kosova area of Yugoslavia, leaving Kosova populated and controlled by ethnic Serbs; second, defendants intended to conduct a “public relations campaign of disinformation” in the United States, to cover up and conceal the defendants’ activities in order to allow them to continue to commit their unlawful acts without interference.

Defendants have filed no response to the complaint. Plaintiffs have filed a Motion for Default Judgment. Plaintiffs asked for compensatory and punitive damages totalling \$14 million, and proposed that all punitive damages would be payable to Catholic Relief Services or another such entity approved by the Court to support charitable services in Kosovo. A hearing was held on this motion in mid-2001. Judgment is still pending.

Attorneys for plaintiffs are the late Abram Chayes, Jeffrey Bates, Michael Kendall, James Marcellino of McDermott, Will and Emory of Boston.

**Cabello v. Fernandez-Larios,**

**Mehinovic v. Vukovic** – *See*

Sondheimer/Eisenbrandt article (#9) in this issue

**Manlinguez v. Joseph**, 01-CV-7574 (NGG) (E.D.N.Y. filed Nov. 13, 2001). Philippine worker working in Malaysia was brought to the U.S. against her will, kept captive in her employers’ home and forced to work under abusive conditions including inadequate food. Plaintiffs claims included involuntary servitude under the Thirteenth Amendment and its enforcing statute, 18 U.S.C. 1584; ATCA violations, conversion (of Ms. Manlinguez’s



passport and mail), failure to pay overtime, and fraudulent inducement and negligent misrepresentation. Defendants filed a motion to dismiss and this motion was rejected in its entirety. The challenge to ATCA focused merely on whether the claims were timely. 2002 U.S. Dist. LEXIS 15277.

Plaintiff's counsel is Washington Square Legal Services.

**Abiola v. Abubakar**, Case No. 01-70714 (E.D. Mich. filed Feb. 23, 2001). Three Nigerian activists, including the daughter of the assassinated former president Chief Abiola, sued the Nigerian president for his role in the mistreatment of them because of their pro-democracy activities. The defendant was a member of the ruling council until 1998 and then became president. Plaintiffs' claims span 1993-1999. The activists' claims include torture, wrongful death, arbitrary detention, inhuman and degrading treatment, false imprisonment, assault and battery and infliction of emotional distress. Plaintiffs have already submitted to deposition. The defendant was ordered to appear for deposition, but failed to appear.

Defendants filed a motion for summary judgment on January 9, 2002, claiming that the court lacks both personal and subject matter jurisdiction, that head of state immunity applies, and for a forum non conveniens dismissal to Nigeria.

Plaintiffs counsel include Benjamin Whitfield & Associates and The Justice Center, P.C. of Detroit, Michigan.

## CASES AGAINST INDIVIDUALS AND/OR UNINCORPORATED ORGANIZATIONS

### **Doe v. Islamic Salvation Front (FIS) and Anwar Haddam**, 96CV0292 (D.C.D.C)

Nine women and men, and the Rassemblement Algerien des Femmes Democratres (RAFD)--the Algerian Assembly of

Democratic Women--filed a federal lawsuit under the Alien Tort Claims Act in December 1996 against the Islamic Salvation Front (FIS) and one of its top leaders, Anwar Haddam, for crimes against humanity, war crimes and other human rights abuses against the democratic opposition to FIS --including rape, sexual slavery in the form of forced "temporary marriage" and the enforcement of sexual apartheid. Plaintiffs -- feminists, journalists and human rights workers who have opposed the policies of the FIS -- represent a broad movement in Algeria that also opposes the repressive political, economic and social policies of the current Algerian state.

Anwar Haddam's motion to dismiss was rejected in 1998. *Doe v. Haddam*, 993 F. Supp. 3 (D.C.D.C. 1998) and the case is in discovery. In early 2002, the defendant served plaintiffs with contention interrogatories and after their response, filed a motion for summary judgment. That motion has been fully briefed and argument is scheduled for February 3, 2002. Defendant FIS is currently in default.

Plaintiffs' attorneys include the International Women's Human Rights Clinic (IWHR), the Center for Constitutional Rights, and the Washington, D.C. firm of Maggio & Kattar.

### Endnotes

<sup>1</sup> A separate article in this issue by Michael Bazylar discusses the cases against multinational corporations alleging violations occurring during World War II.



## 7. The Vienna Convention on Consular Relations: Recent Developments

By: William J. Aceves\*

### I. Introduction

The Vienna Convention on Consular Relations (“Vienna Convention”) was adopted in 1963 to facilitate the work of consular officials. Vienna Convention on Consular Relations, April 24, 1963, 21 UST 77, TIAS No. 6820. Article 36 of the Vienna Convention provides that foreign nationals must be notified of their right to communicate with consular officials when they are detained by law enforcement officials. If a foreign national requests consular assistance, law enforcement officials are required to notify the appropriate consulate. The purpose of these provisions is twofold. They allow member states to monitor the well-being of their nationals, and they provide foreign nationals with access to consular officials.

In June 2001, the International Court of Justice (“ICJ”) issued a ruling interpreting the Vienna Convention and the requirements of Article 36. In the *LaGrand* case, the ICJ held that the United States violated the Vienna Convention when Arizona officials failed to notify two German nationals of their right to consular assistance.<sup>1</sup> The ICJ found that the Vienna Convention creates individual rights and that the procedural default rule could not be used to prevent consideration of Vienna Convention violations.<sup>2</sup>

Despite U.S. ratification of the Vienna Convention, federal and state law enforcement officials often disregard their obligation to

inform detained foreign nationals of their right to seek consular assistance.<sup>3</sup> In many cases, foreign nationals have been sentenced to death with no opportunity to receive consular assistance at the pretrial, trial, or sentencing stages. While U.S. courts routinely find that the obligation to provide consular notification was disregarded, they refuse to provide any remedy for this Vienna Convention violation.

Two recent cases, however, reached a somewhat different outcome. Both cases involved foreign nationals who were not informed of their right to seek consular assistance and were subsequently convicted and sentenced to death. In both cases, the defendants challenged their convictions, arguing that their Vienna Convention rights were violated. In both cases, the defendants were granted new sentencing hearings. While the Vienna Convention was not dispositive, it played a prominent role in each case.

### II. Valdez v. State of Oklahoma

In 1990, Gerardo Valdez was convicted of murder in Oklahoma and sentenced to death. Despite being a Mexican citizen, Valdez was never informed of his right to communicate with Mexican consular officials. Valdez never raised the Vienna Convention violation during his direct appeal nor did he raise it through post-conviction hearings.

In April 2001, the State of Oklahoma scheduled Valdez’s execution for June 19, 2001. At this point, a relative of Valdez notified the Mexican government of the scheduled execution. This was the first time that the Mexican government learned of Valdez’s conviction and death sentence. The Mexican government immediately retained legal and medical experts to assist Valdez. An investigation revealed that Valdez had experienced head injuries in his youth. Several medical tests confirmed the existence of brain damage. This information was provided to the

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Oklahoma Pardon and Parol Board, which was then considering a clemency petition.

On June 6, 2001, the Oklahoma Pardon and Parol Board voted to recommend clemency. Its decision was based, in part, on the Vienna Convention violation and the newly discovered medical evidence. While Governor Frank Keating granted Valdez a thirty-day stay of execution on June 18, 2001 to consider the clemency petition, he ultimately denied the petition.<sup>4</sup> On August 17, 2001, however, Governor Keating granted Valdez a second thirty-day stay of execution in order to provide Valdez with the opportunity to pursue additional legal appeals. According to Governor Keating, the stay of execution was granted “because of the complicated questions of international law which have been presented by this case.”<sup>5</sup>

On August 22, 2001, Valdez filed a second Application for Post-Conviction Relief with the Oklahoma Court of Criminal Appeals. He raised four grounds for relief: (1) This Court must follow the decision of the International Court of Justice in *LaGrand* and provide relief on the basis of Oklahoma's admitted violation of his rights under Article 36 of the Vienna Convention on Consular Relations; (2) Mr. Valdez is entitled to relief regardless of proof that Oklahoma's violation of Article 36 was prejudicial; (3) This Court must afford Mr. Valdez a full and fair opportunity to challenge his conviction and sentence on the basis of Oklahoma's admitted violation of Article 36; and (4) Mr. Valdez is entitled to a new trial. The Mexican Government submitted an *amicus* brief in support of Valdez's request for a new trial or, at a minimum, for a new sentencing hearing. The *amicus* brief argued that the Vienna Convention and the ICJ's *LaGrand* ruling were binding on the United States and applied to Oklahoma pursuant to the Supremacy Clause of the U.S. Constitution.

With Governor Keating's second stay of execution set to expire, the Oklahoma Court of Criminal Appeals granted Valdez an indefinite

stay of execution. In a brief statement, the Court indicated it needed additional time to consider the “unique and serious matter involving novel legal issues and international law.”<sup>6</sup>

On May 1, 2002, the Oklahoma Court of Criminal Appeals issued its decision in the *Valdez* case, granting the second Application for Post-Conviction Relief and remanding the case for resentencing. *Valdez v. State of Oklahoma*, 2002 Okla. Crim. App. LEXIS 23 (2002).

First, the Court examined Valdez's Vienna Convention claim. Valdez argued that the June 2001 decision of the International Court of Justice in the *LaGrand* case represented a change in the law governing Vienna Convention cases and that this decision was clearly unavailable to him in earlier proceedings. Thus, Valdez argued that the Court should follow the reasoning of the *LaGrand* case and ensure that full effect is provided to individual victims of Vienna Convention violations. *Id.* at \*16-\*17.

In response, the Court determined that its power to apply intervening changes in the law to post-conviction applicants was limited by the Oklahoma Capital Post-Conviction Procedure Act. Under the Act, a defendant seeking to overturn a prior ruling due to an intervening change in the law must establish that the change in the law was unavailable at the time of the direct appeal or original application. Thus, an intervening change in the law could only be used to secure relief at the post-conviction stage if the legal basis for the claim was unavailable earlier. The Court held that the *LaGrand* decision did not constitute a change in the law. The legal basis for the claim – the Vienna Convention violation – was available to Valdez at the time of his first application for post-conviction relief. In addition, the U.S. Supreme Court had indicated in *Breard v. Greene* that the Vienna Convention did not bar application of the procedural default rule. *Breard v. Greene*, 523 U.S. 371 (1998). To

apply the ICJ's ruling instead of the Supreme Court's decision "would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution." *Valdez v. State of Oklahoma*, 2002 Okla. Crim. App. LEXIS at \*23.

Second, the Court considered that "no factual basis of the Petitioner's prior medical problems was ascertained by prior trial or appellate counsel before the filing of Petitioner's prior appeals." *Id.* at \*24. Specifically, the Court noted that no physical, mental, or health history was ever introduced at the trial or sentencing stages. The Court indicated that the failure to introduce this evidence was due to the trial counsel's inexperience.

Moreover, the Court found that trial counsel had failed to inform Valdez of his right to consular assistance, thereby denying Valdez of another resource to assist in his defense. The Court also criticized Oklahoma law enforcement officials, who had contact with Valdez, knew he was a Mexican citizen, and yet failed to inform him of his consular assistance rights.

If Mexican consular officials had participated, the Court found that they would likely have discovered and raised Valdez's physical, mental, and health history at trial, just as they had done at the post-conviction stage.

We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure he received a fair trial and sentence hearing. *Id.* at \*24-\*25.

The Court indicated that Valdez's physical, mental, and health history could have affected the jury's sentencing determination. Thus, "this Court cannot have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime." *Id.* at \*27. Indeed, "there is a reasonable probability that the sentencer might 'have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)).

Accordingly, the Court granted the Application for Post-Conviction Relief and remanded the case for resentencing. While the dissent argued there was no basis for resentencing due to waiver and *res judicata*, the majority disagreed. "The concept of the Rule of Law should not bind this Court so tightly as to require us to advocate the execution of one who has been denied a fundamentally fair sentencing proceeding due to trial counsel's ineffectiveness, particularly when that ineffectiveness is at least in part attributable to State action." *Id.* at \*28.

### III. **United States ex rel. Madej v. Schomig**

In 1982, Gregory Madej was convicted of murder in Illinois and sentenced to death. Although he was a Polish citizen, Madej was never informed of his right to communicate with Polish consular officials. In addition, the State of Illinois failed to notify Polish consular officials of Madej's detention pursuant to the Consular Convention of 1972 between Poland and the United States.

On April 13, 1998, Madej filed a petition for *habeas corpus* relief with the federal district court for the Northern District of

Illinois. The petition set forth 31 claims for relief, including a Vienna Convention claim.

On March 8, 2002, the federal district court issued its ruling on the petition for *habeas corpus* relief. First, the district court considered Madej's Vienna Convention claim. The court acknowledged the existence of a Vienna Convention violation. However, it refused to provide a remedy for the violation. The court noted that the Vienna Convention claim was procedurally defaulted and there was no cause to excuse the default. Moreover, the court found no prejudice. "Thus petitioner's statement to the police would not have been excluded nor would his indictment have been dismissed." *United States ex re. Madej v. Schomig*, 2002 U.S. Dist. LEXIS 380, \*32 (N.D. Ill. 2002).

Second, the district court considered Madej's claim of ineffective assistance of counsel. The court found that no evidence about Madej's background or character was presented at the sentencing stage of his trial. This gave rise to an ineffective assistance of counsel claim. "There can be no confidence in the outcome of a capital sentencing hearing where the defendant was represented by an attorney who failed to present any evidence to counsel against imposition of the death penalty." *Id.* at \*19. On this basis alone, the petition for *habeas corpus* relief was granted. The district court held that the State was required to resentence Madej within sixty days.

Despite the district court's favorable ruling, Madej filed a motion to alter or amend judgment, seeking a new trial or resentencing. Madej raised several grounds in his motion, including a renewed Vienna Convention claim. Specifically, Madej asked the court to amend its prior ruling on the Vienna Convention claim in light of the ICJ's *LaGrand* decision, which had been issued after the submission of his 1998 petition for *habeas corpus* relief.

On September 24, 2002, the federal district court issued its ruling on the motion to

alter or amend judgment. *United States ex rel. Madej v. Schomig*, 223 F. Supp.2d 968 (N.D. Ill. 2002). The court began its analysis of the Vienna Convention claim by noting that the Seventh Circuit had not resolved whether the Vienna Convention created individually enforceable rights. The court indicated, however, that the ICJ's *LaGrand* decision addressed and resolved this issue. According to the district court, "[t]he ruling of the International Court of Justice in *LaGrand* is certainly among the most important developments defining the treaty obligations of signatories to the Vienna Convention." *Id.* at 978. On the question of individual rights, the ICJ ruled conclusively that the Vienna Convention creates individually enforceable rights, "resolving the question most American courts (including the Seventh Circuit) have left open." *Id.* at 979. The *LaGrand* decision also suggested that "courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits." *Id.*

The district court distinguished the Supreme Court's 1998 decision in *Breard v. Greene* on several grounds. In *Breard*, the Supreme Court held that the procedural default rule applied to any claims arising under the Vienna Convention. The district court noted that the ICJ's ruling in *LaGrand* undermined a major premise of the *Breard* ruling – the notion that procedural default rules do not interfere with Vienna Convention obligations. The district court further noted that the *Breard* ruling was of limited precedential value because it was a *per curiam* decision and was decided on an accelerated timetable without full briefing and consideration.

Despite the limitations of *Breard*, the district court found the Supreme Court's decision instructive in establishing the requirements for making a valid Vienna Convention claim. To gain relief, the petitioner must show: (1) that his Vienna Convention rights were violated; and (2) that the violation

had a material effect on the outcome of the trial or sentencing proceeding. “In Madej’s case, the violation of his rights is clear; the effect of the violation, however, is somewhat muddy.” *Id.* at 980. It is doubtful that consular assistance would have affected the outcome of the trial. In contrast, consular assistance could have affected the sentencing hearing. “Particularly in this case, where trial counsel failed completely to undertake any investigation of the client’s life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference.” *Id.*

While the district court granted the motion to alter or amend judgment on the Vienna Convention claim, it denied relief on this claim. “As this Court has already granted Petitioner relief from his death sentence, this issue becomes moot.” *Id.*

Subsequently, the State of Illinois filed a motion for reconsideration, arguing that the district court had chosen to follow international law and ignore the decisions of the Supreme Court. Accordingly, the reconsideration motion asked the district court to disregard the *LaGrand* decision and revise its earlier ruling.

On October 22, 2002, the district court denied the reconsideration motion. *United States ex rel. Madej v. Schomig*, 2002 U.S. Dist. LEXIS 20170 (N.D. Ill. 2002). The court noted that the United States had ratified both the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes. Under the Optional Protocol, the United States had agreed to submit disputes arising out of the interpretation or application of the Vienna Convention to the compulsory jurisdiction of the ICJ. Accordingly, the ICJ’s interpretations of the Vienna Convention are binding upon the United States. “To disregard one of the I.C.J.’s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course.” *Id.* at \*2.

The district court went on to reiterate the significance of the *LaGrand* decision. “After *LaGrand*, . . . no court can credibly hold that the Vienna Convention does not create individually enforceable rights.” *Id.* at \*3. In addition, *LaGrand* acknowledged that the Vienna Convention prohibits the use of procedural default rules to prevent judicial review of purported violations. “This interpretation of the Convention is binding upon the United States and this Court as a matter of federal law due to the ratification of the Optional Protocol.” *Id.* at \*4.

The district court then considered the role that consular assistance could have played in Madej’s case. While consular assistance would not have affected the outcome at the trial stage, it could have played a significant role at the sentencing stage. “What the Consulate almost certainly would have done is provided Petitioner with an attorney who would have assisted in obtaining constitutionally effective assistance at the sentencing hearing.” *Id.* at \*6. Such assistance could have resulted in a different outcome at the sentencing hearing.

Despite these findings, the district court reiterated that it had not granted *habeas corpus* relief based on the Vienna Convention violation. Due to restrictions on *habeas corpus* relief, the court noted it was doubtful that a federal court could premise *habeas* relief on a Vienna Convention violation. As a result, the court indicated that it premised its earlier ruling on the ineffective assistance of counsel claim.

#### **IV. Conclusion**

*Valdez* and *Madej* are significant cases. Both cases recognize the binding nature of the Vienna Convention and the Article 36 obligation to inform foreign nationals of their right to seek consular assistance. Both cases recognize the importance of consular assistance at the pre-trial, trial, and sentencing stages. *Madej* also recognizes the binding nature of ICJ

rulings and the implications of the *LaGrand* decision on U.S. courts.

These cases are also significant because they reveal the potential influence of international law in domestic litigation, including capital litigation.<sup>8</sup> While the Vienna Convention claims were not dispositive, they played a prominent role in each case. Thus, advocates must continue to press for recognition of international law and its status in the United States “as the supreme law of the land.”

### Endnotes

<sup>1</sup> Federal Republic of Germany v. United States (June 27, 2001), located at <http://www.icj-cij.org>. See generally William J. Aceves, *International Decision: LaGrand*, 96 AM. J. INT’L L. 210 (2002).

<sup>2</sup> The procedural default rule precludes a defendant from raising a claim on appeal that was not raised in earlier proceedings.

<sup>3</sup> As a result, the Vienna Convention continues to engender significant scholarly interest. See, e.g., Howard S. Schiffman, *The LaGrand Decision: Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099 (2002); Cara Drinan, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303 (2002); Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT’L L. REV. 857 (2002); Stephanie Baker, *Germany v. United States in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations and Provisional Measures Orders*, 30 GA. J. INT’L & COMP. L. 277 (2002).

<sup>4</sup> Mexican President Vicente Fox contacted Governor Keating and requested clemency on behalf of Valdez.

<sup>5</sup> Press Release, Governor Frank Keating, Governor Grants 30-Day Stay of Execution to Valdez, (Aug. 17, 2001).

<sup>6</sup> John Greiner, *Mexican National Granted Indefinite Stay of Execution*, THE DAILY OKLAHOMAN, Sept. 11, 2001.

<sup>7</sup> In a footnote, the district court also expressed concern about retroactivity. This footnote appears to refer to the Supreme Court’s earlier ruling in *Teague v. Lane*, which had imposed a retroactivity limitation on federal *habeas corpus* actions. *Teague v. Lane*, 489 U.S. 288 (1989). Despite the district court’s apparent concern with retroactivity, it is unclear that the *Teague* rule would apply to preclude review of a treaty violation.

<sup>8</sup> See generally Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427 (2002); John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT’L L. 435 (2002).



## 8. ***Romagoza v. Garcia: Proving Command Responsibility Under The Alien Tort Claims Act And The Torture Victim Protection Act***

By: Beth Van Schaack\*

### I. **Introduction**

On July 23, 2002, in the courtroom of Judge Daniel T.K. Hurley, a South Florida jury returned a \$54.6 million verdict, encompassing punitive and compensatory damages, in favor of three Salvadoran survivors of torture. The case, *Romagoza v. Garcia*, No. 99-8364 CIV-HURLEY, was brought by three Salvadoran refugees—Dr. Juan Romagoza, Carlos Mauricio, and Neris Gonzalez—against two former Ministers of Defense of El Salvador. Plaintiffs were represented by the non-profit Center for Justice & Accountability, with *pro bono* assistance from Bay Area attorneys of Morrison & Foerster LLP, James K. Green of West Palm Beach, and Prof. Carolyn Patty Blum and the University of California Boalt Hall School of Law International Human Rights Clinic.

The verdict heralds a major victory in the worldwide fight against impunity for human rights violations. Most significantly, the case represents one of the first modern cases brought under the doctrine of command responsibility in which the defendant commanders testified in their own defense and cements the doctrine into United States law. The one other recent case in which this occurred, *Ford v. Garcia*, Case No. 99-08359-CV-DTKH, was brought in the same

courtroom and against the same two generals by families of the four United States churchwomen who were raped and murdered by members of the Salvadoran National Guard in 1980. In November 2000, a jury rendered a verdict in the *Ford* case that the generals could not be held liable for the crimes, apparently because the jury was not satisfied that the two generals had “effective control” over their subordinates. The *Romagoza* case thus provides an important precedent for other human rights cases brought against military commanders for the human rights violations of their subordinates and also has in part rectified what many observers felt was an unfair result in the *Ford* case. It also represents one of the first instances in which a defendant in a human rights case under either the ATCA or the TVPA presented a vigorous defense (which involved testifying in their own defense) and in which at least one of the defendants (*Vides Casanova*) is believed to have substantial assets.

### II. **The Parties To The Action**

The case was brought by three plaintiffs, all refugees from El Salvador, against two former Ministers of Defense of El Salvador for abuses during the period 1979-1983. That period was marked by widespread atrocities committed by members of the Salvadoran Military and Security Forces against civilians, including clerics and churchworkers, health workers, teachers, members of peasant and labor unions, the poor, and anyone alleged to have leftist sympathies. A Truth Commission established by the United Nations pursuant to the Salvadoran Peace Accords concluded that tens of thousands of civilians were detained, tortured, murdered or disappeared during the worse 12 years of the civil war ending in 1992 and that 85% of the abuses were attributable to members of the Military and Security Forces, as opposed to unaffiliated death squads or the rebel forces.<sup>1</sup> The plaintiffs were three of the civil

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\* The author, a consulting attorney with The Center for Justice & Accountability and a former associate with Morrison & Foerster LLP, was a member of the trial team. Ms. Van Schaack teaches international law at Santa Clara University School of Law.

war's victims who were fortunate to survive where others perished.

**A. Dr. Juan Romagoza**

Dr. Juan Romagoza, was working in an impromptu health clinic in a church when a detachment of the Salvadoran Army and Security Forces arrived in military vehicles. Because he had medical equipment and what appeared to be military boots, he was captured and taken to a local army base. From there, he was transferred by helicopter to the National Guard Headquarters in San Salvador where he was brutally tortured for 3 weeks. As part of his torture, he was hung by his fingertips with wire and shot through his left arm to signify that he was a "leftist", which destroyed his hands and has made it impossible for him to continue to practice surgery. He was also beaten, raped, starved, electro-shocked, and kept in hideous conditions.

At one point during his detention, Dr. Romagoza was visited by an individual whom his torturers called "*mi colonel*" or "the big boss" and to whom they acted deferentially. Dr. Romagoza could see under his blindfold that the individual was wearing a formal uniform and well-polished boots. This new arrival interrogated Dr. Romagoza about two of his uncles who were in the military, asking him if they were passing weapons to the guerillas. When Dr. Romagoza was eventually released into his uncle's custody, he saw defendant General Vides Casanova talking to his other uncle and recognized the defendant's voice as belonging to the person who had been in the torture room with him.

After his release, which as it turned out was brokered by his uncles in the military, Dr. Romagoza escaped from El Salvador and eventually made his way across the Mexico/United States border. He later received

political asylum and now runs a free health clinic for the Latino population of Washington D.C.

**B. Prof. Carlos Mauricio**

Prof. Carlos Mauricio was teaching agronomy at the University of El Salvador when he was lured out of his classroom and taken to the National Police headquarters in San Salvador. Prof. Mauricio was detained in a secret cell and tortured for approximately nine days, which included being beaten repeatedly with fists, feet and metal bars; being hung for hours with his arms behind his back; and being forced to witness the torture of others. As a result of these beatings, two ribs were broken and his vision was permanently damaged in one eye.

Following this phase of his detention, Prof. Mauricio was inexplicably transferred to a public cell where he remained for another nine days or so. It was at this time that he realized that he would be released. While still detained in this public cell, Prof. Mauricio was visited by a representative of the International Committee of the Red Cross (ICRC), a non-governmental organization based in Geneva that implements the four 1949 Geneva Conventions and their two Protocols by, among other things, monitoring the treatment of prisoners of war. Prof. Mauricio informed the ICRC representative that detainees were being tortured in clandestine cells, but he was informed that the government of El Salvador was not allowing the ICRC to visit any other areas of the building. Prof. Mauricio was finally released due to the intervention of his then father-in-law, who was in the military. Prof. Mauricio believes he was targeted for capture because he had traveled out of the country for schooling (he received a

Masters Degree in Mexico) and worked with *campesinos* (poor farmers) to help them increase their yields.

Prof. Mauricio fled from El Salvador soon after his release and made his way to San Francisco where he got a job washing dishes. He eventually learned English, was granted legal permanent resident status, and was awarded a Masters in Genetic Engineering and his teaching credentials. He now teaches science at a Bay Area school that serves disadvantaged youth.

### C. Neris Gonzalez

Neris Gonzalez was a catechist who taught literacy and simple mathematics to *campesinos* in the province of San Vicente. She was captured one day in the market by members of the National Guard and taken to a local garrison. There, she was tortured for three weeks, raped repeatedly, and was forced to watch others be tortured, mutilated and killed. At the time, she was eight months pregnant. The guardsmen wounded her belly repeatedly, at one point balancing a bed frame on her and riding the frame like a seesaw.

Because of the trauma she suffered, Ms. Gonzalez has no firm memory of how she escaped captivity. She has been able to piece together that she was taken in the back of a truck full of dead bodies to a local dump. At some point, her baby was born, and local villagers heard the sound of her baby crying and rescued her. Her baby died two months later of injuries he had received in utero, but Ms. Gonzalez's only memories of this are what her mother and daughter have told her.

Ms. Gonzalez eventually moved to the United States at the suggestion of a therapist in El Salvador who told her that her flashbacks, anxiety attacks, and the gaps in her memory were due to the torture she suffered and that he was ill equipped to treat her. He told her about the Marjorie Kovler Center in Chicago, which

specializes in working with victims of torture. Ms. Gonzalez eventually moved to Chicago to get the help she needed and obtained political asylum. She now is the Executive Director of an environmental education program there.

### D. The Defendants

The defendants in this action are two former Ministers of Defense of El Salvador. One defendant—General Jose Guillermo Garcia—was Minister of Defense from 1979–1983. At that time, the other defendant—General Carlos Eugenio Vides Casanova—was the Director-General of the National Guard, one of three internal Security Forces under the jurisdiction of the Ministry of Defense along with the Army and other Military Forces. When General Garcia retired in 1983, General Vides Casanova was appointed Minister of Defense. The defendants both arrived in the United States in 1989, and General Garcia later obtained political asylum based on allegations that he was being threatened by leftist forces within El Salvador. They both lived comfortably in South Florida until their presence there was discovered in 1999 by the Lawyers Committee for Human Rights, which had been representing the families of the four churchwomen in their quest for justice and for information about the deaths of the churchwomen.

### III. The Legal Theory: The Doctrine of Command Responsibility

The case was brought under the international legal doctrine of command responsibility. This doctrine has existed as long as there have been military institutions, but it was utilized most prominently during the Nuremberg and Tokyo proceedings following World War II to convict top Nazi and Japanese defendants.<sup>2</sup> Since then, the doctrine has been employed in several ATCA and TVPA cases<sup>3</sup>

and also serves as the basis for prosecutions before the two *ad hoc* war crimes tribunals for Yugoslavia and Rwanda that have been established by the United Nations Security Council. Long a doctrine of customary international law, command responsibility has in modern times been codified in Protocol I to the four 1949 Geneva Conventions,<sup>4</sup> the statutes of the two war crimes tribunals,<sup>5</sup> and the statute of the International Criminal Court.<sup>6</sup> The United States military, for its part, has long endorsed the doctrine that commanders are responsible for the actions of their subordinates.<sup>7</sup>

According to this longstanding doctrine, a military commander can be held legally responsible—either criminally or civilly—for unlawful acts committed by his subordinates if the commander knew—or should have known given the circumstances—that his subordinates were committing abuses and he did not take the necessary and reasonable measures to prevent these abuses or to punish the perpetrators. Thus, the doctrine involves in essence three main elements: (1) The direct perpetrators of the unlawful acts were subordinates of the defendant commander; (2) The defendant commander knew (actual knowledge) or should have known (constructive knowledge) that his troops were committing, had committed, or were about to commit abuses; and (3) The defendant commander failed to take steps to prevent or punish such abuses.

Thus, the plaintiffs (with the exception of Dr. Romagoza who identified General Vides Casanova in the torture chamber) did not argue that the generals personally participated in their detention and torture. Rather, they argued that because the defendants were on notice that their troops were committing abuses but nonetheless failed to properly supervise them or punish perpetrators, the commanders should be held liable for the abuses plaintiffs suffered.

Early on in the life of both cases against the generals, it was clear that a key challenge would be to establish the legal standard

governing when an individual could be considered the legal subordinate of a defendant commander within the understanding of the first prong of the doctrine. With respect to this burden, the two *ad hoc* criminal tribunals have required the prosecution to demonstrate that the defendant commander exercised “effective control” over the individual perpetrators.<sup>8</sup> In other words, a showing of *de jure* command over an individual within a military hierarchy is a relevant but not sufficient showing to satisfy the first prong of the doctrine.<sup>9</sup> Rather, the two war crimes tribunals are requiring a showing of *de facto* control in addition to any *de jure* command.<sup>10</sup> This burden requires the presentation of evidence that, among other things, the commander was actually able to issue orders to his subordinates and to ensure that those orders were carried out. Although this doctrine was developed in the context of the Yugoslav conflict, in which individuals operating without a grant of *de jure* command from any formal state were exercising *de facto* control over individuals committing abuses, the tribunals have applied the effective control requirement within the context of *de jure* commanders as well.<sup>11</sup>

Accordingly, Judge Hurley ruled in the *Ford* case that prong one of the doctrine would be satisfied with proof that defendants exercised effective control over the individuals committing the abuses. The *Ford* plaintiffs appealed this ruling, urging that the *Ford* jury instructions improperly placed the burden on them to prove that the generals had *de facto* control over their subordinates in the National Guard, in addition to *de jure* command, which was uncontested. On April 30, 2002, the Eleventh Circuit Court of Appeals upheld the district court’s jury instructions, requiring the plaintiff to prove that the defendant commander exercised effective control over his troops.<sup>12</sup> The Eleventh Circuit opinion in effect gave the *Romagoza* plaintiffs their marching orders. Accordingly, the jury instructions in the

*Romagoza* case set forth the elements of the doctrine as follows: (1) The plaintiff was tortured by a member of the military, the security forces, or by someone acting in concert with the military or security forces; (2) A superior-subordinate relationship existed between the defendant/military commander and the person(s) who tortured the plaintiff; (3) The defendant/military commander knew, or should have known, owing to the circumstances of the time, that his subordinates had committed, were committing, or were about to commit torture and/or extrajudicial killing; and (4) The defendant/military commander failed to take all necessary and reasonable measures to prevent torture and/or extrajudicial killing, or failed to punish subordinates after they had committed torture and/or extrajudicial killing.

The instructions then went on to explain that “effective control” means that “the defendant/military commander had the actual ability to prevent the torture or to punish the persons accused of committing the torture. In other words, to establish effective control, a plaintiff must prove, by a preponderance of the evidence, that the defendant/military commander had the actual ability to control the person(s) accused of torturing the plaintiff.”

The instructions also clarified that it was not necessary to prove that the defendant commander knew that the plaintiffs themselves would be targeted for abuse; rather, it was sufficient that the defendants knew that subordinates were committing human rights abuses like those suffered by the plaintiffs.

#### **IV. The Defense And Plaintiffs’ Rebuttal**

Given the centrality of the concept of “effective control” to the application of the doctrine of command responsibility, defendants not surprisingly argued in both cases that the civil war in their country had created a state of chaos that rendered it impossible for them to know what their subordinates were doing or to

be able to intervene to prevent abuses or punish perpetrators. This defense proved successful in the *Ford* case, as statements by jurors to the press indicate that they determined that the plaintiffs had not met their burden of proving that the generals had “effective control” over the subordinates who committed the churchwomen’s murders.

The defense verdict in *Ford* was a caution to the *Romagoza* plaintiffs. Accordingly, the *Romagoza* plaintiffs presented an array of expert testimony and documents identifying widespread patterns of torture by members of the Salvadoran military and Security Forces during the period in question. This evidence included reports of torture published in the press and presented to the Generals at the time by non-governmental organizations and U.S. officials, among others. Plaintiffs also demonstrated through expert and percipient testimony that the civilian abuses being committed by the subordinates of the generals were systematic rather than random. In this regard, plaintiffs demonstrated that particular demographic segments were specifically targeted, especially doctors, teachers and church workers who were working with the poor. The plaintiffs themselves were able to testify that even if they were detained by plainclothed persons, each of them was eventually taken to an official government detention center where they were tortured by individuals in uniform.

Plaintiffs also demonstrated that the top military echelons were able to control their troops when they wanted to, for example to implement the banking reform or fight the civil war. In this regard, Professor Terry Karl of Stanford University gave expert testimony describing the violence in El Salvador during the relevant period as a spigot, which could be turned on and off by the military as needed. A retired Argentine colonel—Col. Jose Luis Garcia, whose extensive knowledge of El Salvador stemmed from expert testimony he

provided in the trial of the murderers of the six Jesuits who were killed in El Salvador in 1989—discussed the structure and operation of a military chain of command in general and of Latin American militaries in particular. He also presented expert testimony that the Salvadoran military’s communications and transportation infrastructure were sufficiently developed to enable the defendants to exercise control over their troops. Finally, plaintiffs presented significant evidence of the generals’ failure to denounce abuses, let alone investigate or prosecute perpetrators, despite their ability to do so. In this regard, plaintiffs’ military expert provided examples of what the defendants could have done to curb abuses by their subordinates had they had the will to do so.

The verdict demonstrated that plaintiffs’ evidence persuaded the jury, who found incredible defendants’ denials that their subordinates were committing abuses or claims that in the chaos of the civil war, there was nothing more they could have done. The jury foreperson told journalists afterward that “The generals were in charge of the National Guard and the country... It was a military dictatorship. They had the ability to do whatever they chose to do or not do.”

## Endnotes

<sup>1</sup> See From Madness to Hope: the 12-Year war in El Salvador: Report of the Commission on the Truth for El Salvador, U.N. Doc. No. S/25500 (March 15, 1993).

<sup>2</sup> See Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, *reprinted in* 41 Am. J. Int’l L. 172, 186 (1947) (Nuremberg Judgment). See also *Yamashita v. Styer*, 327 U.S. 1 (1946).

<sup>3</sup> See *e.g.*, *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9<sup>th</sup> Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2<sup>d</sup> Cir. 1995); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D.Ca. 1987);

*Paul v. Avril*, 901 F.Supp. 330 (S.D.Fla. 1994).

<sup>4</sup> Article 86(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (Protocol I), *reprinted at* 16 I.L.M. at 1429.

<sup>5</sup> Article 7(3), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 3175<sup>th</sup> mtg., U.N. Doc. S/25704 (1993); Article 6(3), International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453<sup>d</sup> mtg., U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

<sup>6</sup> Article 28, Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

<sup>7</sup> See, *e.g.*, Department of the Army Field Manual (“AFM”), THE LAW OF LAND WARFARE, 27-10, Art. 501, July 18, 1956 (“[i]n some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control.”)

<sup>8</sup> These two cases were unique in their consideration of international legal precedent. See *Ford v. Garcia*, 289 F.3d 1283 (11<sup>th</sup> Cir. 2002) (noting “The recently constituted international tribunals of Rwanda and the former Yugoslavia have applied the doctrine of command responsibility since *In re Yamashita*, and therefore their cases provide insight into how the doctrine should be applied in TVPA cases.”).

<sup>9</sup> The Yugoslav tribunal has also ruled that a showing of *de jure* command gives rise to a legal presumption that the defendant commander exercised effective control. *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (November 16, 1988). In the *Romagoza* case, plaintiffs argued that the jury should be instructed on the existence and operation of this presumption, otherwise it would be meaningless. However, Judge Hurley made a judicial determination that defendants had presented sufficient evidence to rebut the presumption and thus declined to instruct the jury on the presumption.

<sup>10</sup> *See, e.g., The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (November 16, 1988), at ¶378 (ruling that “in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having material ability to prevent and punish the commission of these offenses.”).

<sup>11</sup> *See Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (March 3, 2000) (requiring evidence of effective control in case against *de jure* commander).

<sup>12</sup> *Ford v. Garcia*, 289 F.3d 1283 (11<sup>th</sup> Cir. 2002). Plaintiffs in *Ford* have petitioned for *certiorari*.

## 9. THE CENTER FOR JUSTICE & ACCOUNTABILITY: HOLDING PERPETRATORS ACCOUNTABLE

By: Joshua Sondheimer and Matthew Eisenbrandt\*

### A. Introduction

Over the past year, the Center for Justice & Accountability (CJA), a human rights law organization based in San Francisco, has won several important victories on behalf of survivors of torture and other abuses in actions in U.S. federal courts against perpetrators of human rights violations. These included obtaining multi-million dollar civil judgments against perpetrators in three cases, and securing three favorable published decisions. This article describes these victories, and other CJA cases and projects.

Founded in 1998, CJA works to prevent torture and other serious human rights abuses by helping survivors hold perpetrators accountable. The principal legal mechanisms on which CJA relies are the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA). 28 U.S.C. § 1350, and note. These laws allow U.S. federal courts to hear civil claims against persons allegedly responsible for severe human rights abuses.

The ATCA, adopted in 1789 provides jurisdiction to federal district courts over cases brought by non-citizens for torts committed in violation of “the law of nations.” Beginning with the Second Circuit Court of Appeals’ landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), U.S. courts have held that conduct which violates the “law of nations” under the ATCA includes human rights abuses prohibited by norms of “customary

international law” -- norms on which there is general agreement among nations, and which are definable and obligatory. Courts have recognized torture, extrajudicial killing, arbitrary detention, cruel inhuman or degrading treatment, slave labor, war crimes, crimes against humanity, and genocide, as among the violations prohibited by customary international law, and which are thus actionable under the ATCA. The TVPA, passed by Congress in 1991, affirmed the application of human rights norms in cases under the ATCA, and extended the ATCA by providing a cause of action to citizens and non-citizens alike for extrajudicial killing and torture.

### B. Victories

#### 1. Bosnian Serb Soldier Found Liable for Torture and Other Abuses with ACLU Assistance

CJA, with lead counsel Paul Hoffman and Gerry Weber of the ACLU of Georgia, won an important victory in April 2002, when Senior Judge Marvin Shoob of the United States District Court for the Northern District of Georgia issued a published decision finding Bosnian Serb soldier Nikola Vuckovic liable for torture and other abuses against four Bosniak civilians (Bosnian of Muslim Slavic ancestry) during the Serb “ethnic cleansing” campaign in 1992. The plaintiffs each were awarded \$35 million in compensatory and punitive damages. The decision, which establishes valuable precedent on a number of international law and ATCA issues, is published as *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322 (N.D. Ga. 2002).

The *Mehinovic* case arose in 1998, after plaintiff Kemal Mehinovic, a Bosniak refugee living in Salt Lake City, learned from a friend that the friend had seen defendant Vuckovic in an Atlanta suburb. Vuckovic and Mehinovic had both lived in the same town of Bosanski Samac and knew each other: Vuckovic’s wife

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\* Joshua Sondheimer is the CJA Litigation Director. Matthew Eisenbrandt is a CJA Staff Attorney.



had worked for Mehinovic in his bakery until April 1992, when Bosnian Serbs and Serb soldiers assaulted the town, took control over the formerly ethnically-mixed local government, and detained and tortured hundreds of Muslim men. Mr. Mehinovic and the three other plaintiffs in the case were among those victims. Vuckovic was one of a number of Bosnian Serb soldiers who severely beat Mehinovic and other Bosniak and Croat civilians held in detention camps in the town.

The victims' lawsuit alleged that Vuckovic was responsible for torture and other forms of cruel, inhuman or degrading treatment; war crimes; crimes against humanity; and genocide. Vuckovic responded to the complaint and was represented by counsel until soon before the trial. However, two weeks before the scheduled trial in October 2001, Vuckovic fired his lawyer and advised the court, through his lawyer, that he was out of the country and would not return for the trial. Judge Shoob allowed defense counsel to withdraw, but kept the trial on calendar as scheduled.

When Vuckovic failed to appear on the first day of trial, October 22, 2001, Judge Shoob struck Vuckovic's answer, and began a two-day bench trial in his absence. Each of the four plaintiffs testified about suffering brutal beatings and other abuses at the hands of Vuckovic and other Bosnian Serbs while they were being held with other Bosniaks and Croats in ad hoc detention facilities in Bosanski Samac. Some plaintiffs testified about being subjected to mock executions or games of "Russian Roulette." Others were beat with rifles and metal pipes, or kicked with boots while prone on the floor. Vuckovic subjected one of the plaintiffs to a long and particularly severe beating, during which Vuckovic forced the near-unconscious plaintiff to lick his own blood off Vuckovic's boots. During the incident, Vuckovic carved a Muslim crescent symbol on the plaintiff's forehead with a knife. Former Human Rights Watch senior researcher Diane

Paul testified as an expert witness about how the abuses suffered by plaintiffs were simply part of a systematic and widespread campaign of abuses committed by Bosnian Serbs against Bosniaks and Croats during the Balkans conflict. CJA arranged for counseling support for plaintiffs during the trial.

On April 29, 2002, Judge Shoob issued his findings and conclusions in the case, awarding each of the four plaintiffs \$10 million in compensatory damages and \$25 million in punitives. The court's decision has already been cited by several other courts, and establishes important precedent by:

- providing the first published judgment on a cause of action for crimes against humanity;
- elaborating on the elements and application of a claim for war crimes;
- recognizing a cause of action for "cruel, inhuman or degrading treatment";
- supporting use of decisions of the international criminal tribunals for Yugoslavia and Rwanda in identifying principles of customary international law;
- recognizing civil liability for persons who aid and abet human rights abuses; and
- supporting substantial damage awards against human rights abusers.

Counsel on the case included lead counsel Paul Hoffman of Schonbrun, DeSimone, Seplow, Harris & Hoffman, LLP in Santa Monica; Gerald Weber, Legal Director of the ACLU of Georgia; and Joshua Sondheimer, CJA. Research and drafting support was provided by Amanda Smith of Brobeck, Phleger & Harrison.

## **2. Salvadoran Generals Found Responsible for Torture**

On July 23, 2002, following a four-week trial, a federal jury in West Palm Beach, Florida returned a verdict of \$54.6 million against two Salvadoran generals, living in Florida since 1989, for their responsibility for the torture of three Salvadorans in the early 1980s. The victorious plaintiffs, Juan Romagoza, Neris Gonzales and Carlos Mauricio, all now live in the United States. This case is discussed in this issue in Professor Van Schaack's article.

## **3. Two Published Decisions in Case Against Officer in Pinochet's "Caravan of Death"**

One month after the 1973 military coup in Chile against the government of Salvador Allende, a group of military officers, operating under the orders of General Augusto Pinochet, traveled by helicopter to several cities in Northern Chile on a vaguely defined "official" mission of reviewing cases against political prisoners detained after the coup. In each town in which they stopped, a dozen or more prisoners were taken from detention in jails or garrisons, and clandestinely executed.

Armando Fernandez Larios, a first lieutenant in the Chilean army in 1973, was one of the officers who participated in this mission, now known as the "Caravan of Death." Fernandez Larios was reported to be one of the most brutal of the group. In 1999, after learning that he was living in Florida, CJA filed suit against Fernandez Larios on behalf of the mother and several siblings of Winston Cabello, a regional planning director in the Allende administration who was one among the more than 70 victims of the Caravan. The plaintiffs all reside in the United States, and three of the four are naturalized U.S. citizens.

Fernandez Larios has a notable background in the United States. He entered the U.S. in 1987 pursuant to a plea agreement with federal prosecutors, in which he confessed to aiding the perpetrators of the 1976 Washington, D.C., car-bomb assassination of former Chilean Ambassador Orlando Letelier and his American assistant Ronni Moffitt. Fernandez Larios served a brief sentence, and eventually settled in Florida, where he currently resides. In 1999, the Chilean government requested Fernandez Larios' extradition in connection with criminal proceedings against former General Pinochet. However, Fernandez Larios' plea agreement with U.S. prosecutors appears to bar his extradition to Chile. An Argentine court also has requested Fernandez Larios' extradition in connection with the assassination of former Chilean general Carlos Prats in Argentina during the 1970's. Both requests remain pending before the U.S. government.

Fernandez Larios, represented by counsel, moved to dismiss the *Cabello* case on grounds that the case was barred by the statute of limitations, that plaintiffs lacked standing, and that the court lacked of subject matter jurisdiction. In an August 2001 decision, *Estate of Cabello v. Fernandez Larios*, 157 F.Supp.2d 1345 (S.D. Fla. 2001), the court held, as a matter of first impression in the Eleventh Circuit both that the TVPA applies retroactively to conduct occurring prior to the TVPA's enactment in 1992, and that its ten-year statute of limitations could be equitably tolled. The court ruled that the concealment of Cabello's body following his death until a 1990 exhumation, and the continuation of a repressive military government until 1990, tolled the statute of limitations until that year, and that plaintiffs' claims thus were not time-barred. The court also found that crimes against humanity, extrajudicial killing, and cruel, inhuman or degrading treatment, are actionable as violations of the "law of nations," under the ATCA, and confirmed the right of Cabello's

siblings to pursue their claims for their brother's summary killing.

Following a renewed motion by defendant to dismiss the lawsuit, the court in June 2002 issued its second published decision in the case, *Cabello v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002), again denying defendant's motion. This second decision also establishes valuable precedent:

- by providing the first detailed discussion in an ATCA case that principles of accomplice and conspiracy liability are well-established as customary international law, and thus apply in actions under the ATCA and TVPA; and
- by providing the first holding in the Eleventh Circuit that relatives of a torture victim who is subsequently killed may bring a claim under the TVPA for the victim's torture, as well as the murder;

Trial in the *Cabello* case is scheduled to begin in late May or early June 2003. Pro bono counsel on the case include Robert Kerrigan of Florida's Kerrigan, Estess, Rankin & McLeod, Leo Cunningham and Nicole Healy of Palo Alto's Wilson, Sonsini, Goodrich & Rosati, and Florida attorney Julie Ferguson.

#### **4. Indonesian General Found Liable for Atrocities in East Timor**

In 1999, the people of East Timor voted by referendum in favor of seeking independence from Indonesia. Following the vote, the Indonesian military and related militia groups unleashed a campaign of terror against East Timorese civilians that included killings, mass forced relocation, and the destruction of towns

and infrastructure. In March 2000, CJA joined with the Center for Constitutional Rights (CCR) in bringing suit on behalf of six victims of this violence against Johny Lumintang, a Lieutenant General and Chief of Staff of the Indonesian Army. The suit alleges that Lumintang bears responsibility as a military commander for systematic abuses committed in East Timor by Indonesian troops under his control following the independence vote.

CJA and CCR served defendant Lumintang while he was visiting in the Washington, D.C. area in March 2000. Lumintang, now the Secretary General of the Indonesian Ministry of Defense, a key position in the armed forces, failed to make any appearance in the case. District Judge Gladys Kessler accordingly found Lumintang in default, and in November of last year entered a default judgment against him.

A hearing on the amount of damages was held in Washington, D.C. on March 27-29, 2001. Three of the surviving plaintiffs came from East Timor and provided emotional testimony about their ordeals, which included arbitrary detention, torture, and the extrajudicial killing of family members. Experts also testified about the widespread and systematic nature of atrocities committed by the Indonesian military and affiliated militias in East Timor, the military command structure, and the psychological impacts suffered by plaintiffs as a result of their experiences.

On September 13, 2001, the court issued its findings and conclusions, holding defendant liable for authorizing and condoning abuses against plaintiffs by troops in East Timor, and awarding plaintiffs a total of \$66 million. The court ruled that defendant Lumintang bore both direct and indirect responsibility as a commander for the abuses suffered by plaintiffs. The judge found that Lumintang had direct responsibility for “planning, ordering, and directing acts carried out by subordinates to terrorize and displace the

East Timor population, to repress East Timorese who supported independence from Indonesia, and to destroy East Timor’s infrastructure following the vote for independence.” He also found that Lumintang bore “command responsibility” for failing to prevent or punish abuses committed by his subordinates that he knew or should have known were occurring.

In March of 2002, defendant moved to vacate the default judgment against him, claiming that the court lacked personal and subject matter jurisdiction. A decision on defendant’s motion remains pending.

Pro bono counsel on the case are Steven Schneebaum & Brian Hendrix of Patton Boggs, LLP, Washington DC; and Judith Chomsky and Anthony DiCaprio, Center for Constitutional Rights. The case is *Doe v. Lumintang*, Civ. No. 00-674 (GK) (AK).

## C. New Cases

### 1. Torture and Disappearances in Honduras

Beginning in the late 1970s, security forces in Honduras began a campaign of abductions and disappearances against alleged political subversives. Hundreds were arrested without charge and tortured in special detention facilities. More than 150 people were disappeared after having been abducted by members of the security forces. The Inter-American Court of Human Rights and Leo Valladares, the National Commissioner for the Protection of Human Rights in Honduras, both found that the Honduran Armed Forces were responsible for this widespread campaign of political repression. The Inter-American Court found that the disappearances were “carried out in a systematic manner.”

Many of these abuses have been attributed to a notorious security unit known as Battalion 3-16. According to the report of Leo Valladares titled “The Facts Speak for

Themselves,” the death squad engaged in a “systematic program of disappearances and political murder” in the early 1980s. The report concludes that Battalion 3-16 was controlled at the highest levels of the Honduran military.

Juan Evangelista López Grijalba, a colonel in the Honduran army, served as the head of the National Investigations Directorate in Honduras in 1981 and as head of the Department of Intelligence for the Armed Forces General Staff in 1982. In those positions, he exercised command over members of Battalion 3-16 and other military figures who carried out torture and disappearances.

In April 2002, López Grijalba was taken into INS detention in Florida for immigration violations. The INS has asked an Immigration Judge to find López Grijalba removable based on false representations he made on immigration papers – in particular, that there were no warrants outstanding for his arrest – and based on his role alleged responsibility for human rights abuses. CJA contacted the Honduran prosecutors, who forwarded one of the original arrest warrants to CJA. The judge cited the warrant as crucial to his decision to deny bond. CJA has also been in contact with Leo Valladares and has provided INS useful information from several Honduran human rights organizations and the National Security Archives.

In July, CJA filed a civil lawsuit against López Grijalba on behalf of six Hondurans, alleging his involvement in and command responsibility for torture, disappearance and extrajudicial killing. The case, *Reyes v. Grijalba*, No. 02-22046-Civ-Lenard, was filed in Miami in the U.S. District Court for the Southern District of Florida. The complaint alleges that members of Battalion 3-16 and other figures acting in coordination with the battalion kidnapped and brutally tortured plaintiffs Oscar and Gloria Reyes in 1982; abducted, tortured and disappeared Manfredo Velásquez, the brother of plaintiff Zenaida

Velásquez and father of plaintiff Hector Ricardo Velásquez, in 1981; and disappeared the brother of plaintiffs Jane Doe I and II. The complaint alleges that López Grijalba exercised command responsibility over Battalion 3-16 and other military and security forces that carried out these abuses. Although Honduran courts have issued indictments and arrest warrants for a number of commanders implicated in the abuses of the early 1980’s, none have been convicted on human rights charges.

Trial in this case is scheduled to begin between Dec. 1-14, 2003.

Pro bono counsel on the case include Robert Kerrigan of Kerrigan, Estess, Rankin & McLeod, and local counsel Stephen Rosenthal of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin.

## **2. Abuse of Falun Gong Practitioners in China**

In 1999, the Chinese Government declared a ban on the practice and support of Falun Gong, a spiritual movement which has gained a broad base of support in China and internationally. The government claims that Falun Gong is an “evil cult” responsible for a variety of crimes and social ills. A crackdown by Chinese authorities against Falun Gong practitioners has been marked by severe human rights abuses: tens of thousands of practitioners have been detained, and torture of practitioners is widespread. Hundreds of Falun Gong followers have died in police custody.

In February, Beijing Mayor Liu Qi visited San Francisco en route to the Salt Lake City Olympics, and was served with a lawsuit brought by CJA on behalf of six practitioners of Falun Gong. The case, titled *Doe v. Liu Qi*, No. C02-0672 CW EC, was filed in the U.S. District Court for the Northern District of California. The suit charges Liu with responsibility for torture; cruel, inhuman or degrading treatment; arbitrary detention; crimes against humanity;

and severe interference with freedom of religion or belief. The case is the first to present a claim for violations of the right to freedom of religion or belief.

Two plaintiffs, Jane Doe I and II, are Chinese citizens who were forced to flee to the United States as a result of the persecution they suffered. They both allege that they were arbitrarily detained, interrogated and tortured by Beijing police. The non-Chinese plaintiffs were detained without charge at a peaceful demonstration and beaten by the Beijing police before being deported from the country. The complaint alleges that Liu authorized the abuses suffered by the plaintiffs and that he exercised superior responsibility over the Beijing police and security forces that carried them out.

Liu Qi failed to make an appearance and CJA moved for a default judgment. The magistrate judge assigned to the case, Hon. Edward Chen, formerly a staff attorney with the ACLU of Northern California, asked for briefing on several key issues, including whether Liu is entitled to sovereign immunity and whether the act of state doctrine renders the case nonjusticiable. The State Department filed a statement of interest suggesting that the Foreign Sovereign Immunities Act (FSIA) provides immunity to sitting officials of a foreign government and that the case is nonjusticiable because it will interfere with foreign policy. CJA has responded, citing Ninth Circuit decisions holding that officials responsible for violations of customary international law act outside the scope of their authority and are not entitled to sovereign immunity under the FSIA, and that liability under the ATCA and TVPA is not limited to former officials. CJA also noted that the act of state doctrine can only be invoked for acts acknowledged as official government acts, and that China does not acknowledge abuses against Falun Gong practitioners as official policy. Further, CJA argued that the case will not disrupt foreign affairs since the State

Department has been, and continues to be, openly critical of Chinese persecution of Falun Gong practitioners.

CJA expects a ruling on these issues soon.

#### **D. Website on Universal Jurisdiction**

CJA, together with Redress Trust based in London, launched the first phase of a website that is viewed by activists and lawyers alike as a key resource in sharing information needed to bring human rights abusers to justice around the world. See [www.uj-info.org](http://www.uj-info.org). The website is designed to provide resources needed to help lawyers, judicial officials, human rights advocates and survivors around the world apply “universal jurisdiction”. That doctrine of international law holds that some crimes are so universally condemned that courts anywhere may hear cases against the perpetrators (assuming the courts may exercise personal jurisdiction). The project idea was generated at a meeting of international human rights organizations, with which we continue to work in close collaboration. We are now developing a user-friendly, web-based central resource for all available information on universal jurisdiction, including legislation and cases, latest developments on advocacy and law reform initiatives, and an up-to-date directory of universal jurisdiction advocates and experts.

For further information about the above cases, including the decisions and key pleadings, please visit the website of the Center for Justice & Accountability: [www.cja.org](http://www.cja.org).

## 10. The Krebs Case, the Inter-American Commission on Human Rights, and U.S. Death Penalty Litigation

By: David Sloss\*

In recent years, the Inter-American Commission on Human Rights (IACHR, or Commission) has developed a body of jurisprudence on capital punishment that is very favorable for capital defendants. Unfortunately, death row prisoners in the United States who might wish to petition the IACHR for relief confront a procedural dilemma. The Commission's Rules of Procedure require petitioners to exhaust domestic remedies before submitting petitions to the Commission.<sup>1</sup> By the time a prisoner has exhausted domestic remedies, though, it may be too late for the Commission to intervene. In fact, since 1996 there have been nine cases in which the United States executed a death row prisoner within days or weeks after the Commission requested "precautionary measures" in an effort to delay a scheduled execution.<sup>2</sup>

In June 2002, we filed a petition with the IACHR on behalf of Rex Allan Krebs, a death row prisoner in California.<sup>3</sup> Mr. Krebs was sentenced to death on May 11, 2001. As of this writing, there has been neither state appellate review nor federal habeas review of his case. Although Mr. Krebs has clearly not exhausted domestic remedies, we invoked one of the exceptions in the Commission's Rules in an effort to circumvent the exhaustion requirement. The Commission deemed the petition inadmissible because Mr. Krebs had not yet exhausted his domestic remedies. Thus, the *Krebs* case illustrates the dilemma confronting U.S. death penalty petitioners. If a petitioner

files too early, he risks rejection on exhaustion grounds. If a petitioner files too late, he may be executed before the Commission reaches the merits of the case.

This brief essay is divided into three parts. The first part provides background information on the IACHR's death penalty jurisprudence and the *Krebs* case. The second part summarizes the major substantive arguments that we advanced in the *Krebs* petition. The third part discusses the exhaustion issue in *Krebs*, and offers some tentative suggestions about how future petitioners might navigate the procedural dilemma that confronts U.S. death penalty petitioners.

### I. Background

**The IACHR's Death Penalty Jurisprudence** – The IACHR applies "a heightened level of scrutiny in deciding capital punishment cases." IACHR, Report No. 52/01, *Garza v. United States*, ¶ 70. This heightened level of scrutiny is justified by the fact that the right to life is the "supreme right of the human being," and the necessary prerequisite for the enjoyment of all other rights. Accordingly, the Commission "considers that it has an obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments." *Id.*, ¶ 70. The Commission applies a heightened scrutiny test in all death penalty cases, regardless of whether the state concerned is a party to the American Convention on Human Rights. Thus, in deciding death penalty cases involving states, like the United States, that are not parties to the American Convention, the Commission borrows liberally from principles articulated in death penalty cases involving states that are parties to the Convention.<sup>4</sup>

The Commission's restrictive approach to the death penalty finds support in the

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jurisprudence of the Inter-American Court of Human Rights. The Court has stated that, although the American Convention does not abolish the death penalty, “the Convention imposes restrictions designed to delimit strictly its application and scope, in order to . . . bring about [the] gradual disappearance” of the death penalty. Inter-American Court of Human Rights, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, ¶ 57, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983). Moreover, the Court has established three types of limitations that apply to OAS member states that have not abolished the death penalty. First, the imposition of capital punishment “is subject to certain procedural requirements whose compliance must be strictly observed and reviewed.” Second, the application of the death penalty is limited to the most serious crimes. Third, “certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.” *Id.*, ¶ 55.

**Domestic Proceedings in the Krebs Case** – On April 2, 2001, a jury convened by the Superior Court of the State of California found Rex Allan Krebs guilty of two murders. On May 11, 2001, the same jury determined that Mr. Krebs should be sentenced to death for his crimes. Before the trial even commenced, Mr. Krebs challenged the California death penalty statute on the grounds that it is inconsistent with U.S. treaty obligations under the International Covenant on Civil and Political Rights (the Covenant). The trial court refused to address the merits of Mr. Krebs’ international human rights defense. Mr. Krebs appealed that decision to an intermediate appellate court and to the California Supreme Court. He even filed a petition for certiorari with the U.S. Supreme Court. No domestic court in the United States was prepared to address the merits of Mr.

Krebs’ Covenant-based defense.

In August 2001, three months after the jury rendered its death sentence, officials notified Mr. Krebs’ trial attorney that he should expect a five year delay before the State would appoint counsel for Mr. Krebs’ initial appeal. Since Mr. Krebs cannot afford to hire his own attorney, he expects to spend five years on California’s death row, waiting for the State to appoint an attorney to represent him *in his initial appeal*. After the State appoints an attorney for his initial appeal, Mr. Krebs can reasonably anticipate that approximately ten more years of legal proceedings will be required before he has exhausted the remedies available under U.S. domestic law.

## II. Substantive Arguments Presented to the Commission

This part summarizes the major substantive arguments that we presented to the Commission on behalf of Mr. Krebs.

**The Right to an Individualized Sentencing Proceeding** – The Commission has previously held that Articles 4, 5 and 8 of the American Convention “require individualized sentencing in implementing the death penalty.” IACHR, Report No. 38/00, *Baptiste v. Grenada*, ¶ 106. Specifically, the individual circumstances of an individual offender, including the character and record of the offender and subjective factors that might have influenced the offender’s conduct “*must be taken into account* by a court in determining whether the death penalty can and should be imposed.” *Id.*, ¶ 105. The same principle applies with equal force to the parallel provisions of the American Declaration, including the right to life under Article I, the right to a fair trial under Article XVIII, the right to humane treatment under Article XXV, and the right to due process under Article XXVI. *See* IACHR, Report No. 52/01, *Garza v. United States*, ¶ 89 (the American



Convention “may be considered an authoritative expression of the fundamental principles set forth in the American Declaration”).

During the sentencing phase of a capital murder trial, California’s death penalty statute permits the introduction of mitigating evidence pertaining to the individual circumstances of an individual offender. CAL. PENAL CODE § 190.3. At Mr. Krebs’ trial, the defense introduced substantial mitigating evidence, including evidence of horrific childhood abuse. Although the jury was permitted to hear this evidence, *the jury was not required to take this evidence into account*, because the relevant statute is exceptionally vague with respect to mitigating factors, and because the statute gives the jury discretion to disregard any such evidence it deems irrelevant.

During the voir dire process that preceded Mr. Krebs’ criminal trial, his attorneys challenged certain prospective jurors for cause on the grounds that they were unwilling to consider mitigating evidence pertaining to the individual circumstances of the defendant. The court, however, rejected these challenges on the grounds that California does not require jurors to consider such evidence. For example, prior to voir dire, juror # 187 answered “no” to the following written question: “Is there any type of information regarding a defendant’s background or character that would be important to you when choosing between life without parole and death (e.g., work record, childhood abuse, brutal parents, alcoholism, former good deeds, illnesses, etc.)?” During voir dire, defense counsel asked juror # 187: “If you’ve rendered the verdict . . . and you feel he’s guilty beyond a reasonable doubt, are you willing at that point to consider what the judge may have called other mitigation factors, which could be some of the things such as abuse, alcoholism, illness, or is that the type of information that you would not be willing to consider?” The juror responded: “No, I wouldn’t consider that.” Defense counsel challenged juror # 187 for cause, but the

judge rejected the challenge on the grounds that California does not require jurors to consider this type of information as mitigating evidence.

By refusing to exclude from the jury prospective jurors who professed their unwillingness to consider mitigating evidence pertaining to the character and record of the offender, California violated Mr. Krebs’ right to an individualized sentencing hearing under Articles I, XVIII, XXV and XXVI of the Declaration.

**The Right to Life** – The Commission has established that Article I of the American Declaration requires States to limit the death penalty to crimes of “exceptional gravity” prescribed by preexisting laws. IACHR, Report No. 57/96, *Andrews v. United States*, ¶ 177. The Commission’s jurisprudence on this matter draws upon the opinions of other international human rights bodies and several national courts. In particular, the Commission has suggested that the crime of “murder” is insufficiently “exceptional” to warrant imposition of the death penalty, absent the presence of some “aggravating factors.” IACHR, Report No. 38/00, *Baptiste v. Grenada*, ¶¶ 103-104.

Although California law defines murder broadly, its death penalty law, by its terms, does not extend to all cases of murder. California law assigns to the sentencing authority the discretion to impose the death penalty only if the criminal defendant is convicted of murder with one or more of the enumerated “special circumstances.” See CAL. PENAL CODE § 190.2(a)(1)-(21). The breadth of the “special circumstances” categories, however, fails to narrow the class of death eligible offenses to crimes of exceptional gravity. The “special circumstances” alleged by the state in *Krebs* illustrate the defects of California’s death penalty scheme.

In *Krebs*, the state alleged two “special circumstances” to warrant application of the death penalty: (1) the “felony murder” special

circumstance; and (2) the “multiple murders” special circumstance. First, the prosecution alleged that Mr. Krebs killed two persons in the course of committing the felonies of rape and kidnapping. These allegations, if proven beyond a reasonable doubt, render his crimes death-eligible under California law, *despite the fact that the evidence at petitioner’s trial demonstrated that one of the charged murders was unintentional*. Under California law, any person who kills “in the commission of, or attempted commission of, or the immediate flight after committing or attempting to commit” any of twelve listed felonies is not only guilty of first degree murder but is also automatically death-eligible, irrespective of the defendant’s mental state. Moreover, the California felony murder rule is itself exceedingly broad. For example, the felony murder rule applies to the most common felonies, including rape, robbery and burglary. And, most importantly, the felony murder rule applies to altogether accidental and unforeseeable deaths. It is clear that the felony murder “special circumstance” fails to limit application of the death penalty to crimes of exceptional gravity.

Second, the prosecution alleged the “multiple murders” special circumstance. That is, the state argued that the death penalty was warranted in *Krebs* because the defendant had committed multiple murders. We acknowledge that the “multiple murders” factor generally serves to limit application of the death penalty to crimes of exceptional gravity. Indeed, the Commission’s jurisprudence supports this argument.<sup>5</sup> However, California’s broad definition of first-degree murder renders the “multiple murders” special circumstance unacceptably broad. As previously discussed, one of the murders in this case was unintentional. The state could nevertheless classify this killing as a “first degree murder” under either of two theories: felony murder (the deficiencies of which are analyzed above) or

“implied malice” murder. In California law, any unlawful killing of a human being with “malice aforethought” is murder. CAL. PENAL CODE § 187. “Malice” may be express or implied. “Express malice” murder requires an intent to kill, while “implied malice” murder requires only an intent to do some act, the natural consequences of which are dangerous to human life. *See, e.g., People v. Silva* (2001), 106 Cal.Rptr.2d 93. Therefore, a defendant acting with implied malice is guilty of first-degree murder even if defendant lacks the intent to kill. CAL. PENAL CODE § 189; *see also People v. Diaz* (1992), 11 Cal.Rptr.2d 353. This broad definition of first-degree murder in California law invalidates an otherwise acceptable narrowing circumstance. In particular, the “multiple murders” special circumstance adequately limits the class of death-eligible offenses only if the defendant has committed two or more intentional killings.

By failing to limit application of the death penalty to the “most serious crimes,” California violated Mr. Krebs’ right to life under Article I of the Declaration.

#### **The Right to a Judicial Remedy –**

Prior to commencement of his trial, Mr. Krebs moved to preclude application of the death penalty on the grounds that imposition of capital punishment would violate his right under article 6 of the International Covenant on Civil and Political Rights “not to be arbitrarily deprived of his life.” In response, the prosecution argued that the court need not address the merits of Mr. Krebs’ Covenant-based defense because the Covenant was not binding on the State of California. The court agreed with the prosecution and refused to address the merits of Mr. Krebs’ Covenant defense. The California Superior Court’s refusal to reach the merits of Mr. Krebs’ human rights defense violated his right to a judicial remedy under Articles XVIII, XXIV and XXVI of the American Declaration.

Article XVIII of the American

Declaration promises that “the courts will protect [an individual] from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” The explicit duty for courts to protect individuals from acts that violate their fundamental rights requires, at a minimum, that courts prevent threatened violations whenever they have the power to do so. Mr. Krebs explicitly requested the California Superior Court to protect him from a capital sentence that would violate his right under the Covenant “not to be arbitrarily deprived of his life.” Although the California Superior Court clearly had the power to protect Mr. Krebs from the impending human rights violation, it refused to do so. The court’s refusal to protect Mr. Krebs from the arbitrary deprivation of life constituted a violation of the United States’ obligation under Article XVIII of the Declaration to “protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”

Article XXVI of the American Declaration provides: “Every person accused of an offense has the right . . . to be tried by courts previously established in accordance with pre-existing laws.” The United States ratified the Covenant in 1992. Upon ratification, the Covenant became the “Law of the Land” under the Supremacy Clause. Thus, in May 2000, when Mr. Krebs raised a Covenant-based defense before the California trial court, Article 6 of the Covenant was a “pre-existing law” within the meaning of Article XXVI of the Declaration. The California court’s refusal to apply Article 6 to Mr. Krebs’ case violated his right under Article XXVI “to be tried . . . in accordance with pre-existing laws.”

Article XXIV of the American Declaration states: Every person has the right to submit respectful petitions . . . and the right to obtain a prompt decision thereon. The individual right under Article XXIV to obtain a prompt decision necessarily entails a right to obtain a prompt decision *on the merits*. The

contrary view – that Article XXIV permits states to decide claims without regard to the merits – is patently absurd.

The Commission’s decision in *Carranza v. Argentina* supports the view that Article XXIV requires a decision *on the merits*. In *Carranza*, the petitioner was a lower court judge in the Superior Court of Justice of the Province of Chubut. IACHR, Report No. 30/97, *Carranza v. Argentina*. He sought the “nullification of a decree issued by the previous military government of Argentina that had ordered his removal” from the bench. *Id.* The Argentine domestic court refused to address the merits of petitioner’s claim, ruling that his claim raised a non-justiciable political question. The Commission held that the Argentine court’s failure to decide the merits of petitioner’s claim violated Article 25 of the Convention, because Article 25 requires that “the intervening body must *reach a reasoned conclusion on the claim’s merits*, establishing the appropriateness or inappropriateness of the legal claim that precisely gives rise to the judicial recourse.” *Id.* ¶ 71.

The *Krebs* case is indistinguishable from *Carranza*. In *Krebs*, as in *Carranza*, the domestic court refused to decide the merits of petitioner’s allegation. The Argentine court in *Carranza* invoked the political question doctrine to justify its refusal to decide the merits of the claim. In *Krebs*, the California Superior Court invoked the doctrine of non-self-executing treaties to justify its refusal to decide the merits of petitioner’s defense. As one distinguished commentator has noted, “the self-executing/non-self-executing distinction [in the treaty context] has come to serve the functions that are served in the statutory and constitutional contexts” by the political question doctrine.<sup>6</sup>

Granted, the Commission decided *Carranza* on the basis of the American Convention, whereas the *Krebs* petition arises under the Declaration. Even so, the Declaration and Convention, in their Preambles, protect the

same essential rights because “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.” The Convention, per *Carranza*, requires the court to “reach a reasoned conclusion on the claim’s merits.”<sup>7</sup> Since the Declaration protects the same essential rights as the Convention, it follows that the Declaration also requires the court to reach a reasoned decision on the merits. In *Krebs*, the California Superior Court’s refusal to reach a reasoned decision on the merits of Mr. Krebs’ human rights defense violated Article XXIV of the Declaration.

### III. Exhaustion of Domestic Remedies

Although Mr. Krebs has not exhausted all available domestic remedies, we argued that his petition was admissible because his meaningful access to those remedies is subject to an “unwarranted delay.”

The issue of exhaustion of domestic remedies is governed by Article 31 of the Commission’s Rules of Procedure. Article 31(1) of the Rules provides: “In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” Article 31(2)(c) provides that the exhaustion requirement shall not apply when “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.” We argued that the unwarranted delay exception recognized in Article 31(2)(c) applied to the *Krebs* case.

Under California and U.S. law, Mr. Krebs has the right to challenge his conviction and sentence through both direct, appellate proceedings and post-conviction, habeas corpus proceedings. Of course, these remedies are “adequate” and “available” only insofar as an individual has meaningful access to the courts.

“When there has not existed effective access to remedies and there has been a delay in the application of justice, the requirement of previous exhaustion of domestic remedies cannot prevent a case of alleged human rights violations from being heard by an international forum such as the Commission.” IACHR, Report No. 10/96, Case 10.636 (Admissibility), Guatemala, ¶ 44. In this case, Mr. Krebs’ meaningful access to the courts is subject to an “unwarranted delay.” Due to his indigence, Mr. Krebs is unable to afford legal counsel. California has informed Mr. Krebs that it will provide him appellate counsel, but *there is currently a five-year delay in appointing counsel for the initial appeal in capital cases*. This delay, according to the state, is caused by administrative complications arising from budgetary constraints. This extraordinary delay in the appointment of counsel constitutes an “unwarranted delay in rendering a final judgment.”

In addition, this delay in the appointment of counsel prejudices Mr. Krebs’ rights under the Declaration. The extended interruption in the appellate process will exacerbate the considerable delays associated with judicial review in capital cases. Since reinstating the death penalty in 1978, California has executed eleven persons; they served an average of thirteen years on death row.<sup>8</sup> Following the jurisprudence of other international human rights bodies, the Commission has recognized that such delays in final judgment violate the human rights of death row inmates. IACHR, Report No. 57/96, *Andrews v. United States*, ¶¶ 46-49. The Commission’s jurisprudence on this issue provides additional evidence that the delay in this case is “unwarranted.”

The Commission, however, summarily rejected these arguments, dismissing the petition for failure to exhaust domestic remedies. In effect, the petition invited the Commission to reconsider the scope of the “unwarranted delay”

exception in death penalty cases. If the Commission had agreed with our interpretation of the unwarranted delay exception, it would have empowered the Commission to intervene in many death penalty cases at a relatively early stage of the proceedings. Recall that eleventh-hour requests for “precautionary measures” are often ineffective because the victim is executed before the Commission has an opportunity to address the merits of the case. Our view is that early intervention might increase the salience of Commission jurisprudence in death penalty cases, increasing the likelihood that domestic courts would incorporate international human rights law into their reasoning. In *Krebs*, for example, the Commission had an opportunity to issue a ruling on the merits in time for Mr. Krebs to invoke this ruling in his appeal and subsequent habeas petition. Although the Commission rejected our interpretation of the delay exception, the general thrust of our approach is, in our view, sound. The question is where might the line be drawn, and what strategies might defense counsel employ to secure a timely Commission ruling on the merits.

Two strategies merit further exploration. First, petitioners might explore the limits of the “unwarranted delay” exception in death penalty cases. This line of argument has tremendous promise, particularly since the Commission has recognized a variant of the “death row phenomenon” claim. Indeed, the decision in *Krebs* may turn more on the fact that the delay was prospective (and hence speculative) than it does on the stage of the proceedings. Perhaps five years hence, the *Krebs* case itself would be decided differently.

Second, petitioners might file with the Commission immediately after a decision by the state supreme court on direct review (and after denial of certiorari by the U.S. Supreme Court).<sup>9</sup> The argument would be that the exhaustion requirement does not apply to federal habeas review because federal habeas petitions are not

an effective remedy. That is, federal habeas review is futile due to the constraints imposed on collateral review of state convictions by the Antiterrorism and Effective Death Penalty Act (AEDPA) and U.S. Supreme Court doctrine. Procedural bars and highly deferential standards of review frequently preclude meaningful review of the merits in federal habeas review of state capital convictions.

## Endnotes

<sup>1</sup> See Rules of Procedure of the Inter-American Commission on Human Rights, art. 31, available at [www.cidh.org/](http://www.cidh.org/).

<sup>2</sup> Richard Steven Zeitvogel (executed on December 11, 1996, five days after IACHR requested precautionary measures); Allen J. Bannister (executed on October 23, 1997, eight days after IACHR requested precautionary measures); Sean Sellers (executed on February 4, 1999, six days after IACHR requested precautionary measures); Joseph Stanley Faulder (executed on June 17, 1999, nine days after IACHR requested precautionary measures); David Leisure (executed on September 1, 1999, five days after IACHR requested precautionary measures); Douglas Christopher Thomas (executed on January 10, 2000, four days after IACHR requested precautionary measures); Shaka Sankofa (executed on June 22, 2000, following three separate Commission requests for precautionary measures); Miguel Angel Flores (executed on November 9, 2000, two weeks after IACHR requested precautionary measures); James Wilson Chambers (executed on November 15, 2000, five days after IACHR requested precautionary measures).

<sup>3</sup> Mr. William McLennan, a defense attorney who represented Mr. Krebs in his trial before the California Superior Court, joined us as co-petitioner before the Commission.

<sup>6</sup> Under Article 19 of its Statute, the Commission has the power to act on petitions alleging human rights violations by states parties to the American Convention. See Statute of the Inter-American Commission on Human Rights, art. 19, available at [www.cidh.org/](http://www.cidh.org/). Article 20 empowers the Commission to examine communications pertaining to alleged human rights violations by member states of the Organization of American States that are not parties to the Convention. See *id.*, art. 20.

<sup>18</sup> See IACHR, Report No. 52/01, *Garza v. United States*, ¶ 95 (suggesting that the “most serious crimes” requirement is satisfied where defendant was convicted of three murders committed as part of a continuing criminal enterprise). Mr. Garza’s case was, of course, significantly different from *Krebs*. Garza was accused of three intentional murders, each of which was committed as part of an illegal drug enterprise supervised by Garza. In that case, the government proved that Garza ordered the execution-style killings in furtherance of a highly organized, extremely violent criminal conspiracy.

<sup>6</sup> See Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int’l L. 695, 711-12 (1995).

<sup>29</sup> See IACHR, Report No. 30/97, *Carranza v. Argentina*, ¶ 71.

<sup>32</sup> California Department of Corrections, *California Executions Since 1978*, available at [www.cdc.state.ca.us/issues/capital](http://www.cdc.state.ca.us/issues/capital).

<sup>34</sup> There is some precedent for this approach. In the case of Michael Domingues, the Commission requested precautionary measures on May 26, 2000, just six months after the U.S. Supreme Court denied certiorari on direct review. See *Domingues v. Nevada*, 528 U.S. 963 (Nov. 1, 1999) (denying certiorari). In the case of Victor Saldano, the Commission requested precautionary measures on March 13, 2000, almost three months before the U.S. Supreme Court granted certiorari on direct review and vacated the death sentence. See *Saldano v. Texas*, 530 U.S. 1212 (2000).

**11. The Inter-American Human Rights System: Activities from Late 2000 through October 2002**

By: Richard J. Wilson and Jan Perlin\*

**General Introduction**

This article continues our analysis of the activities of the two principal human rights organs of the Organization of American States (OAS): the Inter-American Court of Human Rights (the Court), and the Inter-American Commission on Human Rights (the Commission). See Richard J. Wilson and Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 through October 2000*, 16 AM. U. INT'L L. REV. 315 (2001). Almost all of the information contained in this article comes from the published annual reports of the Commission and Court for the relevant periods, plus additional posted information on published reports and decisions found on the web sites for both entities. As in our previous coverage of the work of these bodies, our intention is not to provide an exhaustive catalog of all activity during the relevant time period. Our intent here is to provide readers, particularly non-Spanish speaking human rights lawyers and general readers, with a sense of the highlights and directions of the Commission and Court.

The single most significant system-wide development in 2001 and 2002 was the entry into force of the Inter-American Convention on

the Elimination of All Forms of Discrimination Against Persons with Disabilities, which acquired more than enough ratifications for entry into force on September 14, 2001. (Comm. AR 21, 954).

**I. Actions of the Inter-American Court of Human Rights****A. Peru's Return to the System, and Decisions Dealing with Peru**

[Readers interested in these developments should consult the full version of this article.]

**B. Decisions in Other Contentious Cases on the Merits**

In the past, the Court has traditionally considered contentious cases in three procedural stages: admissibility (called preliminary objections by the Court), merits and reparations. At each procedural stage, the parties submitted written pleadings and made oral arguments. As a result of changes to their Rules of Procedure in 2000, the Court now permits full participation of both the Commission and representatives of the victims in all stages of the proceedings, although victims still do not have standing to take a case to the Court; only the Commission or states may take such action. The decisions below are those contentious cases that survived decisions on admissibility and resulted in a judgment by the Court. In a new procedural development, the Court sometimes decided both the merits and reparations in a single decision, thus obviating the traditional third procedural step. Those decisions are noted here, while traditional, third-stage reparations decisions are discussed below in Section I, D.

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**1. *Bamaca-Velasquez*  
Case (Guatemala) (Merits and Reparations) --**

The victim in this case was a guerrilla combatant, captured during battle, tortured and then murdered by the military. The search for Efraín Bámaca involved Guatemala's judiciary, their Human Rights Ombudsman's Office, the Guatemalan Historical Clarification Commission, (hereafter, Truth Commission), the United Nations Human Rights Verification Mission in Guatemala, all three branches of the United States Government, and the Inter-American human rights system, not to mention the efforts of non-governmental organizations, the press, and independent film-makers. Though his remains were never recovered, this case had provoked an international response well before the Court's judgment was issued in November 2000. Judgment of November 25, 2000.

The attention was due to the efforts by his widow, Jennifer Harbury, a Texas attorney who had met Efraín Bámaca while he was living clandestinely in the Guatemalan countryside, to find him after his capture. The pressure she exercised on the U.S. government led to the exposure of CIA practices that used known human rights violators, suspected of being complicit in the death of U.S. citizens, as paid informants. Her efforts generated a congressional intelligence oversight board investigation of CIA information-gathering practices. She fought for and achieved the declassification of official U.S. Government documents, as well as an acknowledgment by the U.S. Government that it knew Bamaca had been held in captivity for a time before being executed. That perseverance also led to the first inspection by civilian authorities of all the military installations in Guatemala. The inspections were carried out in a single day in 1994 without prior official notice, primarily as a symbolic gesture in the search for her missing husband.

This case was one of a number of cases in which Guatemala recognized its international responsibility. As it turns out, the government's statement was limited to a general understanding that the government hoped to reach friendly settlements. However, that recognition did not include the concession of the facts as alleged by the Commission. The government seemed to prefer to let the historical truth to be established by Guatemalan national courts, despite the fact that they had been manifestly ineffective for the previous seven years during which domestic proceedings had been pending, and the eight years since his disappearance. This argument is akin to that of the former Minister of Defense who, in 1995, declined to allow the State prosecutor access to an army barracks to conduct an exhumation pursuant to credible information that Bámaca was buried there, asserting that jurisdiction had been transferred to the Truth Commission. (para. 89)

The Court proceeded to hear the merits of the case because of the continuing existence of a factual dispute. The Commission alleged that the victim was captured during a battle between guerrilla forces and the Guatemalan military, in March 1992, and that he was held in captivity, tortured and eventually killed. The record as a whole presents a chilling and detailed account of the counter-insurgency tactics used by the Guatemalan military, including the use of violence and intimidation to frustrate judicial investigations and judgments. The testimony is corroborated by both the Recuperation of Historical Memory Report of the Archbishop's human rights office and that of the Guatemalan Truth Commission, issued in 1998 and 1999, respectively, and admitted to the record.

In resolution of the factual dispute, where the State essentially argued that the practice of using captured guerrilla members as intelligence sources was entirely voluntary, and that the existence of prisoners of war was an



exceptional circumstance unique to this case, (para. 125) the Court found, on both circumstantial and direct evidence, that the Guatemalan military had systematically engaged in a practice of forced disappearances of members of the guerrilla forces by, “detaining them clandestinely without advising the competent, independent and impartial judicial authority, physically and mentally torturing them in order to obtain information and, eventually, killing them.” (para. 132). Given the fact that Bámaca was held clandestinely for at least four months by the military after his capture and prior to his death, the Court also found a violation of Article 7(2) (illegal detention as a violation of personal liberty). (paras. 143-4).

Rebutting the State’s factual assertions again, the Court found that both Bámaca and his family members were victims of violations of the right to humane treatment. The State had argued that Bámaca did not have a close relationship with his family members due to the nearly 17 years that he was separated from his family before his death. The Court rejected that assertion, and accepted the Commission’s explanations that his absence was entirely due to considerations of safety for his family, who would have been targeted due to his involvement with the guerrillas, had he communicated with them. In its analysis, the Court points to the novelty of direct testimonial evidence concerning the treatment of a disappeared person while in captivity, and finds an Article 5(2) (torture) violation and an Article 5(1) (right to respect for physical, mental and moral integrity) against his family members, as victims in their own right.

The test for finding inhumane treatment with regard to next of kin is based on recent jurisprudence of the European Court of Human Rights formulated in two cases against Turkey.<sup>1</sup> (fn. 110) It requires an analysis of the intimacy of the family relationship generally, and between individual family members and the

victim, the degree to which the family member witnessed the facts around the disappearance, the family member’s involvement in attempts to obtain information about the fate of their relative, and the State response to those efforts. (para. 163) Making special mention of the efforts expended by Jennifer Harbury to find her husband, the consistent obstacles created by the State, and the anguish generated by the ignorance of his whereabouts, the Court found that both she, Bámaca’s father and his siblings were victims of an Article 5 violation.(para 165-6)

The Court also found violations of the right to life, to a fair trial, judicial protection, and of Articles 1,2, 6 and 8 of the Inter-American Convention To Prevent and Punish Torture. It rejected a claim under Article 3 (right to juridical personality), noting the absence, in the Inter-American Convention on Forced Disappearance of Persons (1994), of any reference to juridical personality as a characteristic of that violation. The Court did not deem it to be an element of the right to life either. The right to truth was deemed to be subsumed in the right to “obtain clarification of the facts relating to the violations and corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.” (para. 201)

Finally, the Court once again took up the issue of the applicability of international humanitarian law norms and treaties to its decisions. Both the State and the Commission agreed that the Court could use the Geneva Conventions, and the provisions of Common Article 3, to interpret obligations under the American Convention. The Commission alleged that Article 29 permits the interpretation of rights under the Convention to avoid diminishing rights guaranteed by other international conventions to which Guatemala is a party. The Court’s findings are worth

reiterating here: “*The Court finds that it has been proved that . . . an internal conflict was taking place in Guatemala ... As has previously been stated . . . , instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavorable conditions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.*” (para. 207) . . . .

“Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3. (para. 208, emphasis added)”

As a consequence, the Court ruled that there was a violation of Article 1(1) (obligation to respect and ensure rights protected under the Convention), for the general impunity with regard to these violations. As in *Paniagua Morales*, the Court defined impunity as, “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and total

defenselessness of victims and their relatives.” (para 211).

The contribution of the *Bamaca Velasquez Case* to the scheme of reparations can be found in the creative proffer of evidence by the Commission, which paints a vivid picture of the suffering caused to the victim and his family. Reparations, Judgment of February 22, 2001. Although not qualified as expert witnesses, a Guatemalan anthropologist and a Guatemalan Mayan-indigenous leader and ex-congresswoman testified in support of the reparations claim. An expert psychologist specializing in trans-cultural evaluations and treatment of trauma also testified. The three witnesses together provided the basis for determining the consequences of the victim’s manner of death and how his life might have been, had he survived. The witnesses substantiated two claims: first, concerning lost wages, that had Efraín Bámaca survived the signing of the Peace Accords, he would have been gainfully employed as a political or community leader on behalf of a reconstituted URNG; and second, that as the eldest son in a Mayan-Mam indigenous family, his loss and the inability of the family to perform a ritual burial of his remains has caused a severe rupture of family cohesion and corresponding suffering.

The psychologist explained that in Mam belief and custom, the deceased members of the family remain present in the emotional “constellation” of the surviving family’s ties. That expert testified to the importance of recovering his mortal remains, which, in the words of the family, lies in the “ability to show respect for Efraín, to have him close and to return him or take him to live with his ancestors,” and for the new generations to be able to share and learn what his life was as is the Mam tradition. Whether spiritual or metaphorical, this lack of closure is experienced by the family and generates continuing anguish and anxiety for them.

The Court reiterated its rule that there is no need to prove non-material damages in the case of a victim's parents. Those emotional ties and resulting suffering from a family member's loss are considered a given, and are not broken by the years that they were separated. Moreover, the Court ruled, given "the particularities of the Mam ethnicity of the Mayan culture, the loss of the emotional and economic support of the oldest son signified great suffering for the Bámaca-Velasquez nuclear family." Compensation for moral damages in the amount of \$25,000 were awarded to Bámaca's father for his suffering at the knowledge at what the victim had suffered, and for the anguish and vulnerability provoked by the non-protection of the State. Bámaca's father also received a proportional share of the \$100,000 award to the victim himself, for his son's suffering prior to his death. The victim's siblings received awards of \$5,000 to \$20,000 each under this rubric, and his wife, \$80,000. In justifying the award, the court pointed to the extraordinary efforts of Jennifer Harbury to locate her spouse or his remains and the consistent obstacles and obfuscation by the State in resisting that search.<sup>2</sup>

Lost wages were awarded to the victim and his surviving wife. The Court refrained from awarding lost wages for the five-year period from his capture to the signing of the Peace Accords in Guatemala, since arguably he would have been employed as a guerrilla commander without any remuneration. However, from the signing of the Peace Accords, and for a reasonable period of his life expectancy, the Court found that he would have been working. With no clear criteria for settling on a projection for wages, the Court awarded \$100,000 in equity. In the distribution of this award, the Court noted that had he lived, Bámaca would have contributed a portion of this income to his parents and siblings, so that the award is divided evenly among his surviving wife, his father and his siblings. Jennifer

Harbury also was awarded lost wages, in consideration of having suspended her employment to dedicate herself to the search for her husband from 1992-1997, and for related health costs; for example, the illness provoked by her hunger strike directed at learning the whereabouts of her husband. In all, money damages were awarded in the amount of \$475,000.00.

In its discussion of other reparations, the Court reiterates the parameters of the right to truth as accruing to both the individual and society as a whole. The decision to frame reparations in this manner is not gratuitous. The State had previously asserted it made several efforts to further the process of identification of the remains of the dead and disappeared after the civil war. The inclusion of the Bamaca case in the report of the Guatemalan Historical Clarification Commission was cited as a form of reparation. The State also invoked the creation of a National Program to Search for the Disappeared, a National Program of Exhumations, and the proposal for a Commission on Peace and Harmony as demonstrations of the government's will to "promote and spur investigations to clarify the cases analyzed by the Court." Bamaca, Reparations Judgment, para. 71. Despite these assertions, to date the only success in identifying victims or calling to account those responsible for the nearly 200,000 dead and disappeared during the civil war have been made by the victims, their families or non-governmental organizations. In fact, many of those individuals and organizations making efforts to clarify past violations have been subject to break-ins, harassment, threats and assaults over the past two years, none of which have resulted in arrests or convictions.

The Bámaca Case is emblematic of the human rights and humanitarian law violations committed during the war, where the State systematically violated the right to life of civilians and defenseless combatants. The Truth

Commission's recommendations, based on a finding that 93% of the victims were killed or disappeared by State agents, have yet to be complied with by the State.

Against this background, the Court ordered the Guatemalan State to adopt all legislative or other measures necessary measures to adapt the Guatemalan legal framework to international human rights and humanitarian law norms and to fully implement those norms on the domestic level. The Court also ordered the State to find Bámaca's remains, to conduct the exhumation in the presence of his widow and family, and to hand his remains over to his family.

**2. *Baena Ricardo et al. Case (270 Workers v. Panama) (Merits and Reparations)*** --The Court's decision on merits and reparations in *Baena Ricardo et al. Case (270 Workers v. Panama)*, Judgment of February 2, 2001, stands out for at least two important reasons. First, the decision deals with the largest number of individual victims before the Court in a single case – 270 state employees who were fired for their participation in a labor rights demonstration. While the Court has dealt with mass violations in the past, this is the first such case to arise in a context in which the victims were not the subject of violent state crimes or widespread civil unrest. Second, the decision deals primarily with worker's rights, an area traditionally associated with economic, social and cultural human rights, as opposed to the Court's traditional focus on gross violations and civil and political rights.

The dispute here arose out of a labor dispute between the Panamanian government and state employees, represented through the Coordinating Organization of State Enterprise Workers Unions. In November of 1990, the government rejected a petition from the Coordinating Organization raising concerns and demands of the union collective, after which the Organization called for a public protest march

on December 4, 1990, followed by a 24-hour work stoppage the next day. The protest march, which was intended to focus attention to the unions' demands, was carried out peacefully with the participation of thousands of workers. (Judgment, at 88(c))

However, in what seems to have been a bizarre coincidence, the march coincided with the escape on the same date by colonel Eduardo Herrera-Hassan from a Panamanian island prison, followed by his subsequent forced takeover of police buildings with other dissident members of the military. The union group's work stoppage, which had begun as scheduled on December 5<sup>th</sup>, was suspended during that day to prevent its being associated with the activities of colonel Herrera-Hassan. No essential public services were interrupted during the work stoppage. The colonel was arrested by U.S. military forces while attempting to mount a march on the national legislature on the morning of December 5<sup>th</sup>, and he was turned over to the Panamanian government that same day. During the critical period in question, the President of Panama, Guillermo Endara, never issued a formal state of emergency or suspension of guarantees.

The next day, December 6, 1990, the government, apparently believing there was a link between the labor action and the dissident military movement, called for the legislature to draft a bill dismissing all of the public employees who had participated in the "organization, convocation or implementation of the work stoppage of December 5, 1990" because of a belief that the workers "sought to subvert the democratic constitutional order and to replace it with a military regime." (Judgment, at 88(i)). Most of the workers suspected of a role in the work stoppage were fired before any legislation was adopted, based on lists developed by managers in the various state agencies in which they were employed.

The Panamanian Legislative Assembly adopted Law 25, designed to address the

government's concerns, on December 14, 1990. The law explicitly provided for retroactive effect as of December 4, 1990, and the law was designed to lapse in December of 1991. Prior to the adoption of Law 25, existing labor law provisions intended to provide due process in dismissal proceedings protected most of the affected state workers. However, the procedure under Law 25 was summary and not subject to appeal. The law permitted the executive's Cabinet Council to fire any public servant who participated in actions "that attempt against democracy and the constitutional order," and the 270 workers who were the subject of this action were all formally found to have violated Law 25 on January 23, 1991. (para. 88(q)) No fired worker was ever charged by the government with complicity or participation in the illicit actions of colonel Herrera-Hassan. Most of the 270 workers involved in the complaint subsequently filed all available administrative appeals, including an action of unconstitutionality of Law 25 itself. The Supreme Court of Panama subsequently found the law to be unconstitutional, but held that its declaration of unconstitutionality only struck down the abstract legal rule, thus leaving the concrete firings of the workers unresolved by the Panamanian courts. Having exhausted all available domestic remedies, the 270 workers sought relief in the Inter-American human rights system.

The Court settled two preliminary matters before addressing the specific violations of the Convention. First, it rejected Panama's argument that Law 25 had arisen in the context of a serious national emergency that justified its implementation. No formal state of emergency had been declared by Panama, and any such emergency would have been subject to the provisions of Article 27 of the Convention, which governs procedures and conditions for suspension of guarantees in states of emergency. (paras. 89-94). Second, the facts and issues in this case presented the Court with its first

opportunity to apply the Protocol of San Salvador, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Panama became a party to the Protocol in 1993, but the Protocol did not enter into force until 1999, well after the events in question here. (AR 2001, 944) Moreover, the treaty has limited direct enforceability through the Commission and Court.<sup>3</sup>

The Commission argued, however, that Panama had signed the Protocol in 1988, thus incurring an international obligation not to act in violation of the object and purpose of the treaty. The government of Panama argued the non-retroactivity of treaties. (Judgment, at paras. 95-98) The Court concluded, somewhat cryptically and without further elaboration or analysis, that the treaty could not be applied retroactively, but that Panama's signature to the treaty nonetheless created a duty "to abstain from committing any act in opposition to the objective and purpose of the Protocol of San Salvador, even before its entry into force." (Judgment, at para. 99). The Court did not further articulate the nature of that duty.

The Court then went on to find violations of Articles 9 (Ex Post Facto Laws), 8(1) and (2) (Judicial Guarantees), 25 (Judicial Protection), 16 (Freedom of Association) and the general obligations provided for in Articles 1(1) and 2 of the Convention. It rejected the argument that Panama violated the workers' right to assembly, protected in Article 15 of the Convention, concluding that the march took place without interruptions or restrictions, that the workers' dismissal was based only on the work stoppage and not the march, nor that any other proof was offered of interference with the right to "peaceful assembly, without arms," protected in Article 15. (148-150)

The Court's findings as to violations of Article 9, on ex post facto application of laws, would seem patently self-evident in the context of the blatant violations perpetrated in the

adoption and implementation of Law 25, were this situation not so common throughout the world. The clarity of the violation here hopefully provides a solid framework for analysis of such *post hoc* attempts by governments to punish dissident behavior in the future. The same seems true with the violations of the right to freedom of association, protected by Article 16, which the Court properly read as “the ability to constitute labour union organizations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.” So long as each person is free to join or not, labor unions have a basic right “to constitute a group for the pursuit of a lawful goal.” (para. 156) In reaching its conclusions on the right to association, the Court drew heavily from a previous decision from the International Labor Organization (ILO) Labour Union Freedom Committee, case N° 1569, which dealt with the same facts, and to which no objection was raised by the State. (paras. 162-165, 171).

The Court’s application of the fair trial guarantees of Article 8, however, was more adventurous. The Court noted that the due process provisions of Article 8(1) explicitly apply not only in criminal proceedings but to “the determination of . . . rights and obligations of a civil, labor, fiscal, or any other nature.” The Court, however, quoted that language to conclude that “the range of due process guarantees established in section 2 of Article 8 of the Convention is applied to the realms to which reference is made in section 1 of the same Article . . .”, and that “the individual has the right to the due process as construed under the terms of Articles 8(1) and 8(2) in both, [sic] penal matters, as in all of these other domains.” (para. 125).

The Court does not discuss or distinguish the explicit language of section 2 of Article 8, which refers to persons “accused of a

criminal offense,” invokes the presumption of innocence in such proceedings, and details the rights of the “accused.” For its analytical base, it relies on decisions of the European Court of Human Rights that extend similar provisions of the European Convention on Human Rights to “disciplinary proceedings.” (para. 128-129) The Court apparently concludes that the flawed administrative procedures for dismissal of the 270 workers are just such proceedings, thus entitling the workers to the explicit guarantees of section 8(2), as well as the general protections of section 8(1). (paras. 131-134).

The Court’s decision reached the issue of reparations, pursuant to Article 63(2) of the Convention, in addition to the merits. The Court found the violations discussed above and ordered the following restitution: (1) that the 270 workers, or their heirs if they are deceased, be paid indemnification of back wages “and other labour rights” under domestic law; (2) that the workers be reinstated or provided with comparable employment alternatives, or where that is not possible, provided with an indemnity for termination of employment; (3) that the workers each be paid \$3,000 in moral damages; (4) and that the group of 270 workers be paid \$100,000 as reimbursement for expenses in seeking protection of their rights, and their representatives be paid \$20,000 for the cost of internal and international proceedings.

### **3. *The Last Temptation of Christ Case (Chile) (Merits and Reparations)***

-- This case deals with Chile’s prior censorship of the film of the same name. Judgment of February 5, 2001. The Commission alleged violations of freedom of thought, expression, religion and conscience, under Articles 12 and 13 of the Convention. The complaint points to the Chilean Supreme Court’s affirmation of an absolute ban on the film “The Last Temptation of Christ” in 1997, based on application of a 1974 law and a 1980 Constitutional provision, both part of the Pinochet legacy.

The case originally was taken to the Commission by an association of Chilean lawyers in representation of some of its members. *Amici* briefs to the Court from other interested parties supported their position, and various legal experts testified on both sides, including the recently named Commissioner, José Zalaquett. Expert testimony went to the issue of how the Court should deal with a constitutional provision and its implementing legislation, both of which effectively violated Convention guarantees. Some experts argued that a domestic constitutional reform would be necessary, while others asserted that a legislative reform would suffice, and still others urged that the law was sufficient to protect rights, but that the Supreme Court had misapplied it. These positions reflected divergent views on the effect and interpretation of international human rights law in domestic legal systems.

A significant component of this debate centered on the Chilean Supreme Court's determination of the parameters of the constitutional right to "honor" and the relationship of that term to religious freedom, to the detriment of both the right to choose one's religion, or lack thereof, and to the freedom of expression. The facts of the case reflect the heated social debate around this issue in Chile, with some litigants at the national level bringing actions by or on behalf of Jesus Christ, the Catholic Church and in their own names. Despite approval of a Constitutional reform by one chamber of the Congress, at the time the Court heard the case, final congressional action was still pending.

The State did not contest the facts, but refused to accept international responsibility by alleging that the current government had introduced a constitutional reform that would remedy the situation domestically. The Court concluded that a system of prior censorship existed in Chile and that its application in the present case resulted in a violation of Article 13

(freedom of expression). The Court reminded Chile that human rights violations are not attributable only to one or another branch of government, but that they accrue to the State as a whole. The judgment pointed to the fact that the Constitutional provision, Article 19 Section 12 of the Chilean Constitution, establishes prior censorship for films and, consequently, qualifies the actions of both the Executive and the Judiciary, thereby generating State responsibility. (para. 72)

On the other hand, the Court found there was no violation of the right to freedom of religion, because the censorship of *The Last Temptation of Christ* "did not deprive or diminish any person's right to keep, change, profess or promote their religion or beliefs with absolute freedom." (para. 79)

The State was ordered to modify its legal framework to remove prior censorship provisions, which violate the obligation to respect and guarantee the right to freedom of expression and thought under the Convention, (Articles 1(1) and 2) and to permit the showing of the film. The judgment was deemed to be sufficient reparation, and costs were awarded, in equity, in the amount of \$4,290.00.

**4. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits and Reparations)***-- The indigenous peoples of the Awas Tingni community live in the richly forested Atlantic coastal region of Nicaragua, an area that they have occupied with other tribal peoples since antiquity. Their traditional communal lands were not formally demarcated, which only became important when the Nicaraguan government agreed to a massive logging concession to a Korean lumber company, Sol de Caribe S.A., or SOLCARSA. Having unsuccessfully exhausted all available domestic remedies to prevent the concession from operation, the community sought the protection of the Commission and Court. The case of the *Mayagna (Sumo) Awas Tingni*

*Community v. Nicaragua*, Judgment of August 31, 2001, is the first substantive decision of the Court in the area of indigenous rights.

The Court found violations of Articles 25 (Judicial Protection) and 21 (Property). Article 25 provides for “simple and prompt recourse . . . to a competent court or tribunal for protection of . . . fundamental rights” in domestic law or the Convention. The Court analyzed the issue from two perspectives, first as to the land titling procedure in Nicaragua and second as to the effectiveness of the relevant domestic remedy, *amparo*, to meet the requirements of Article 25. (para. 115) The Court first reviewed the domestic norms of Nicaragua and concluded that there are protections under that law for indigenous communal real property. (para. 116-122) However, the procedure for titling of such lands is not clearly regulated, (para. 123) and the Court accepted the conclusions of the expert witnesses that “there is a general lack of knowledge, an uncertainty as to what must be done and to whom should a request for demarcation and titling be submitted.” (para. 124) Even the State’s own evidence showed “legal ambiguities” in the titling of indigenous communal lands. (para. 125) Finally, since 1990, no land title deeds have been issued to indigenous communities. (para. 126) This led the Court to conclude that “there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.” (para. 127)

As to the effectiveness of the *amparo* remedy, the Court noted its previous jurisprudence recognizing that the remedy, being simple and brief, meets the required characteristics for effectiveness. (para. 131) Moreover, the Nicaraguan *amparo* remedy itself provides for conclusion within 45 days. In the instant case, two separate actions were filed, one which initially took eight days, but the review of which took more almost a year and a half. (para. 132) The second action took nearly a year from

the time of filing until a decision was reached. (para. 133) Neither of these unjustified periods of delay respect the “principle of a reasonable term” protected by the Convention. (para. 134) The State incurs additional violations of Articles 1(1) and 2 of the Convention for its failure to designate and implement an effective remedy in its domestic norms. (paras. 135-139)

Article 21 of the Convention protects the right to “property,” without further definition. The Court synthesized a definition of property from its other decisions: “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all moveables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.” (para. 144) Applying that definition to the evolving interpretation of the Convention, the Court concluded that “article 21 of the Convention protects the right to property in a sense that includes, among others, the rights of members of the indigenous communities within the framework of communal property.” (para. 148) Thus, the members of the Awas Tingni community have “a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities.” That right, in turn, gave the community the right to have their lands delimited, and during that process, to prevent the State itself, or third parties acting with State acquiescence, from actions which would “affect the existence, value, use or enjoyment” of the area where the community lives. (para. 153)

The Court limited its decision to these two violations, although the Commission had alleged the breach of several other Convention provisions in its final pleadings.<sup>4</sup> (para. 156) The Court “dismissed” the violation of those rights, however, because there were no grounds for the violations set out in the Commission’s brief. (para. 157)



The Court reached the issue of reparations in this decision as well, applying Article 63 of the Convention. It required that the State create an effective mechanism for demarcation and titling of indigenous communal property, and that the State carry out that process within 15 months, “with full participation by the Community and taking into account its customary law, values, customs and mores.” The State is further barred from interference with the property right pending its full establishment. (para. 164) The Court found that the Commission had not proven material damages, but found that the community had suffered “immaterial” (non-pecuniary) damages that require a State investment of \$50,000 “in works or services of collective interest for the benefit of the Awas Tingni Community.” It also ordered payment of an additional \$30,000 to the community and its representatives for expenses and costs. Judge Montiel Argüello, the *ad hoc* judge appointed for this case by Nicaragua, dissented on most issues.

In September of 2002, the Court requested provisional measures of protection under Article 63(2) of the Convention. It ordered the State to prevent any further exploitation of natural resources within the communal lands of the Awas Tingni Community, that the Community be permitted to participate in the planning and implementation of any measures affecting its lands, and that the State investigate and sanction any of the wrongs alleged in the request for provisional measures.

**5. *Las Palmeras Case (Colombia)(Merits and Reparations)*** – The decision of the Court in the *Las Palmeras Case*, Judgment of December 6, 2001, seemed straightforward on the facts but provoked an odd set of opinions on the merits. The case involved an attack on a rural schoolhouse in Las Palmeras, Colombia by military and police forces. In its decision on admissibility, the Court

held that it was barred from direct application of international humanitarian law. As to the relatives of those who had been killed in that attack, the Court found violations of the right to judicial guarantees and judicial protection, under Articles 8(1) and 25(1) of the Convention. (paras. 49-66) The case, however, had three interesting aspects, from an analytical perspective.

First, the Court was deeply divided over the legal effects of a domestic decision by Colombia’s Administrative Law Court of the Council of State, the domestic forum of final appeal in administrative matters. That court had upheld a lower court ruling finding State responsibility for the same incident as that before the Court. The Inter-American Court found that by virtue of the fact that the issue had been “definitively settled under domestic law,” State responsibility “became *res judicata*,” because the Court did not need to provide “approval” or “confirmation” of the domestic tribunal’s conclusion. (paras. 33-34) This conclusion as to the effects of a decision by a domestic administrative tribunal seems to fly in the face of the consistent previous practice of the Court to demand that individual perpetrators of human rights violations be investigated, prosecuted and punished, and not merely that the State accept responsibility for its wrongs.

Second, the reasoning of the judgment on the issue of legal effects of the domestic decision deeply fractured the Court, provoking responses from five of the judges in two separate opinions. The gist of those opinions was that the Court could and should have found separate and distinct violations of international law by the State, particularly as to Article 4, which protects the right to life. The separate opinions are not characterized as dissents; such is seldom the case in the Court’s contentious jurisprudence. However, the separate opinions take strong issue with the judgment itself, leaving one to wonder what constitutes a “majority” view of the law when five of seven

judges write to distance themselves from the Court's "*per curiam*" decision.

Third, in its extended discussion of the factual evidence, the Court rejected the Commission's assertion that one of the victims had been summarily executed. The Commission based that claim on testimony from an internationally recognized forensic ballistics expert suggested by the Court. (para. 45) The Court concluded, with no discussion, that the expert's conclusion, though included in his report to the Court, was "not based on any reasoned logic, and therefore lacked any evidentiary value." (para. 46) Given the Court's generally solicitous consideration of evidence under its rules and practice, this curt dismissal of expert findings is troubling, particularly given the Court's increased reliance on expert testimony in its contentious jurisprudence and the judges' involvement in the selection of an expert they later criticize. The Court ordered the case to proceed to the reparations stage.

**6. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Admissibility, Merits and Reparations)*** – During 2001 and 2002, the Court decided both the admissibility and merits of a collection of death penalty cases from Trinidad and Tobago (Trinidad). The Court first considered Trinidad's preliminary objections in three separate cases, the *Hilaire Case*, the *Benjamin et al. Case*, and the *Constantine et al. Case*. The cases were later consolidated for disposition on merits and reparations under the name *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002 The cases present complex issues on treaty application and treaty reservations, all arising from aggressive efforts by Trinidad to defend its death penalty regime. Because of its desire to speed up executions, Trinidad withdrew its ratification of the Convention on May 26, 1999, one year after its announced intention to do so.<sup>5</sup> The Commission and Court nonetheless

continue to apply the Convention to all cases pending before those bodies that arose when the Convention was in effect.

The major issue in the preliminary objections stage, common to all three cases, was the validity of a reservation formulated by Trinidad at the time of its acceptance of the jurisdiction of the Court. The reservation stated that the Court would only take jurisdiction to the extent that it was consistent with the Constitution of Trinidad. Because the Constitution of Trinidad permits the death penalty, Trinidad attempted to invoke the reservation as a bar to the Court's exercise of jurisdiction in the death penalty cases. Alternatively, it argued that the Court would still lack jurisdiction if it struck down the reservation as incompatible with the object and purpose of the Convention, because the original declaration was conditioned on that reservation, and the declaration itself would therefore be null and void *ab initio*. The Court rejected both positions, relying on decisions in Peruvian cases on the Court's competence, holding that the Court cannot be deprived of its jurisdiction by unilateral acts of the State once that jurisdiction has been accepted. (paras. 81-83, *Hilaire*).

Trinidad's reservation, the Court held, would "totally subordinate the application of the Convention to the domestic law of Trinidad and Tobago, subject to the disposition of the domestic courts." (para. 88) The Court also rejected the government's alternative argument, that if the Court found the reservation incompatible with the Convention, the State's intention was not to accept the jurisdiction of the Court at all. (para. 91) It asserted that the State's argument "would allow it to decide the scope of its acceptance of the contentious jurisdiction of the Court in every specific case, to the detriment of the exercise of the contentious function of the Court." Such discretionary power would deprive the Court, in the exercise of its contentious jurisdiction, of "all efficacy." (para. 91-92) The Court reached

similar decisions on preliminary objections in the *Constantine et al.* and *Benjamin et al.* cases.

The merits decision in *Hilaire et al.*, by virtue of its consolidation with other cases, dealt with a total of 32 defendants on death row in Trinidad, all of whom appear as victims before the Court. (para. 3) At the outset of its opinion, the Court noted that it had issued provisional measures to prevent execution of the alleged victims, but that on June 4, 1999, Trinidad had executed Joey Ramiah, one of the individuals protected by provisional measures. (paras. 26-33) Later in its decision, the Court found that Ramiah's execution violated the right to life in Article 4, and also found a separate violation of Article 4 in the State's "disregard of a direct order of the Court" directing the issuance of provisional measures to preserve Ramiah's life. (para. 198-200)

The heart of the opinion, however, goes to both substantive and procedural questions on the mandatory application of the death penalty by Trinidad. The Court held that mandatory death sentences for all persons convicted of murder in Trinidad violates the Convention's Article 4(1) protection against "arbitrary" imposition of the death penalty, (para. 103) as well as Article 4(2), which limits death sentences to "the most serious crimes." (para. 106) Uniform death sentences for all murder convictions, without recognition that there are varying degrees of seriousness for the crime of murder, does not sufficiently limit the application of capital punishment in a treaty "designed to bring about its gradual disappearance." (para. 99, quoting from OC-3/83) In reaching its conclusions, the Court cited decisions from the Human Rights Committee and the Supreme Courts of India, South Africa and the United States. Because it found violations of Articles 1(1) and 2 along with those of Article 4, the Court struck down Trinidad's death penalty law as facially violative of the Convention. (para. 116)

The Court also found serious procedural flaws in Trinidad's death penalty law. The Court addressed what it called the due process "bundle of rights and guarantees" that take on particular importance when life is at stake because of the "exceptionally serious and irreparable nature of the death penalty." (para. 148). Thus, it found violations of Articles 7(5) and 8(1) of the Convention due to the failure of Trinidad's domestic law to protect the right to trial within a reasonable time; violations of Articles 8 and 25 due to the lack of access to adequate legal assistance for the presentation of constitutional motions on review; and the facial invalidity of a provision of Trinidad's constitution that bars domestic constitutional challenge to certain aspects of the death penalty. (para. 152). Finally, the Court found that the failure to provide for a "fair and transparent procedure" for pursuit of amnesty, pardon or commutation of death sentences violated Articles 4(6) and Article 8's due process guarantees. (para. 186-188)

Article 5 of the Convention protects against cruel, inhuman or degrading punishment or treatment. The Court concluded that the shocking prison conditions in which death sentenced inmates live constitute a violation of that article. (para. 169) Again, the Court relied on jurisprudence from the European Court of Human Rights and the Human Rights Committee in reaching its conclusions.

The Court went on to order reparations in its merits judgment. It barred Trinidad from application of the death penalty law that violated the Convention, and it ordered Trinidad to adopt graduated categories of murder. It ordered the retrial of all 31 individuals who had petitioned the Commission for protection and barred, on grounds of equity, their resentencing to death, even if they were again convicted. The Court ordered payment of \$50,000 for the support and education of Joey Ramiah's son, and \$10,000 to his mother. It directed Trinidad to bring its prison conditions into compliance

with relevant international human rights norms. Finally, the Court ordered \$13,000 in expenses for the representation of the victims in international proceedings before the Court. Although three judges wrote separate opinions on various aspects of the judgment, none dissented from the Court's conclusions.

In September of 2002, the Court rescinded orders for provisional measures in favor of two individuals who had been resented to manslaughter. In the same decision, *James et al. Cases*, Order of the Inter-American Court of Human Rights of September 3, 2002, Provisional Measures, *James et al. Cases*, the Court continued provisional measures for another 39 individuals still under sentence of death in Trinidad.

### C. Advisory Opinions

In a relatively short time period for the Court, it accepted a request from the Commission for Advisory Opinion OC-17 on March 30, 2001 and rendered its decision on August 28, 2002. The opinion, *Legal Status and Human Rights of the Child*, defines a "child" as person who have not yet reached his or her 18<sup>th</sup> birthday. (para. 42) The opinion finds that children are rights-holders themselves, and not merely objects of the law, although different treatment of minors and adults is not *per se* discriminatory. (para. 55) The opinion elaborates the meaning of the term "best interests of the child" and discusses the duties of families, society and the State in relation to children. (paras. 56-91) It delineates the rights of the child in judicial and administrative proceedings. (paras. 92-136) The opinion, in short, provides a rich synthesis of the existing international human rights protections of children.

In May of 2002, the government of Mexico sought an advisory opinion on the rights of migrants in general, and particularly migrant

workers. The Court accepted the request, which will become Advisory Opinion OC-18.

### D. Decisions on Reparations Only

[Readers interested in these developments should consult the full version of this article.]

## II. Actions of the Inter-American Commission on Human Rights

### A. Introduction

In May and June, 2001 amended Rules of Procedure came into effect for the Inter-American Commission and Court, respectively. They represent the culmination of a reform designed to streamline case processing, develop evidence more methodically, promote transparency, and provide for greater victim participation in each stage of the proceedings. The new Commission Rules now contemplate more specific procedures for evidence production, detail the stages of case processing, provide for friendly settlement negotiations at any point in the process, and create a presumption that all cases will be referred to the Court if recommendations to the State go unheeded.

A resolution of the OAS has called for an increased budget for the Commission and the Court, to respond to their increasing activities and responsibilities with regard to the protection of human rights, including providing greater access for individuals to the Inter-American human rights system. The work of the Commission during the period under review reflects this new focus. The volume of case reports has increased and includes a number of older cases. Meanwhile, new cases are being more systematically processed under the new procedural rules.

The governments of Perú, and more recently Mexico, have gone through regime and policy changes, reflected in their new government's openness to human rights concerns. In general, moves towards democratic consolidation have generated significant changes in the legal systems of the primarily non-English speaking countries in the system. Most are engaged in a reform of criminal procedure, provoking a new sensitivity to due process issues and their relationship to human rights protections. Moreover, the new Rules of Procedure provide for the Commission to follow-up on its decisions and evaluate compliance. These changes should translate into more sophisticated analyses in the Commission and Court decisions of due process rights and the right to a judicial remedy.

Several thematic reports will also provide a framework for the consideration of newly admitted petitions on freedom of expression, migrant rights, and the rights of the child. Reports on these themes have been published or are forthcoming.<sup>6</sup> In 2000 a Report from the Office of the Special Rapporteur on Freedom of Expression was published, "... as a fundamental reference tool to guide the development of laws on freedom of expression and as a guide to the interpretation of Article 13 of the American Convention on Human Rights." (Annual Report, 2000, Volume III, para. 2). Pursuant to OAS resolutions in 2001, reports on the rights of all migrants and their families and on the situation of human rights defenders in the Americas are forthcoming. In 2001, the Commission also created a Human Rights Defenders Functional Unit within the Executive Secretary's office in Washington. (AR 2001, at 20, para. 36)

The Commission continued its strong work in the area of indigenous rights as well. In late 2000, the Commission published a report on the situation of indigenous peoples in the Americas.<sup>7</sup> In March of 2001, it published a comprehensive set of authorities and precedents

in international law for the long-pending American Declaration on the Rights of Indigenous Peoples.<sup>8</sup>

Finally, the Commission continued its focus on human rights in specific countries of the Americas, publishing its fifth report on Guatemala and its third report on Paraguay, both in 2001. In both its 2000 and 2001 Annual Reports, the Commission documented developments on human rights in Colombia and Cuba, and in the 2000 Annual Report, it followed up on its own recommendations to the governments of the Dominican Republic, Paraguay and Peru.

This section begins with a review of cases on women's rights and the death penalty during the period under review, followed by human rights issues in the US following September 11, 2001. Cases reflecting the development of the human rights situation in Colombia, Guatemala and Perú follow. Finally, there is a brief discussion of other cases presenting novel issues, followed by a short preview of cases that have been admitted for the Commission's consideration in the future.

## **B. Cases Interpreting Women's Rights in the Inter-American System**

Governments often justify gender distinctions based on cultural difference. In the case of *Maria Eugenia Morales de Sierra v. Guatemala*, a former deputy ombudswoman and Guatemalan attorney, challenged articles of the Guatemalan Civil Code as discriminatory and violative of the right to family (Article 17) and to equal protection (Article 24). Guatemala defended cultural relativism poorly and failed to win out. The Commission upheld a challenge in support of the legal recognition of women's capacity to develop socially, economically and politically in Guatemalan society.

The report, issued in January 2001, references an earlier decision on related issues

and notes that Guatemala complied with many of the previous recommendations through the enactment of legislative reforms. At the same time the Commission urged that the remaining recommendations be fulfilled.

The challenged provisions of Guatemalan law established distinctions based on gender restricting the ability of women to represent the marital union, and giving almost exclusive power to husbands for administering marital property. Other provisions “confer[red] upon the wife the special ‘right and obligation’ to care for minor children and the home,” and restricting married women’s right to “exercise a profession or maintain employment where it does not prejudice her role as a mother and home-maker.” (para. 2) In addition, a husband was permitted to prohibit his wife “from realizing activities outside the home, as long as he provides for her and has justified reasons.” (para. 2). Other provisions give primary responsibility to the husband for representing their children and administering their property, and permitted that “a woman, by virtue of her sex may be excused from exercising certain forms of guardianship”. (para. 2)

The Guatemalan Supreme Court upheld these provisions, despite its recognition that the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), formed part of Guatemalan national law. The judges held that the provisions appropriately “provided for judicial certainty in the allocation of roles within the marriage.” (para. 3, 34)

The petitioner disputed those arguments, asserting that the relationship between the objective sought and the means employed were disproportionate and, indeed, violated the rights to equal protection and family under the Convention. The victim claimed that although her husband had not enforced any of the prerogatives the law afforded him, she was, nevertheless, adversely affected. As a working mother, wife and the co-owner of joint marital property, those provisions

of the Civil Code were applicable to her. Just as the State of Chile had argued before the Inter-American Court in *The Last Temptation of Christ Case*, discussed above, the Guatemala Government communicated its acknowledgment of the inconsistency between the code provisions and both national and international legal obligations, but stated that the executive was unable to contravene the determination of the nation’s highest court.

The Commission’s analysis employed CEDAW’s definition of discrimination and pointed out that it was more complete than prior understandings of discriminatory behavior. The CEDAW definition includes, “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social and cultural, civil or any other field.*” (CEDAW, Article 1. Emphasis added)

The movement in support of equality for women has long recognized that many domestic laws purporting to protect women in fact limit opportunities to act as full members of society. CEDAW’s discrimination definition takes that reality into account when it includes not only gender restrictions or exclusions, but all types of distinctions based on gender. The Commission concluded that, “the overarching effect of the challenged provisions is to deny married women legal autonomy.” (para. 38)

The report also notes that “the gender-based distinctions under study have been upheld as a matter of domestic law essentially on the basis of the need for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacity as wives and mothers.” (para. 37) However, Guatemala’s Constitutional Court, the Commission observed,

had “made no attempt to probe the validity of the assertions or to weigh alternative positions, and the Commission is not persuaded that the distinctions cited are even consistent with the aims articulated.” (para. 37) Thus, the Commission found that the gender-based distinctions were neither proportional nor reasonably justifiable, resulting in a violation of petitioner’s rights under the Convention.

The Commission found violations of Articles 1(1) (obligation to respect and ensure rights), 2 (obligation to enact legal protection measures), 24 (equal protection) and 17(4) of the Convention, “read with reference to the requirements Article 16(1)” of CEDAW. The Commission also found that Article 11 (right to privacy) rights were implicated because the code provisions unduly restricted the individual right to “pursue the development of one’s personality and aspirations, determine one’s identity, and define one’s personal relationships.” (para. 46) The Commission noted that, “married women such as [the petitioner] are continuously impeded by the fact that the law does not recognize them as having legal status equivalent to that enjoyed by other citizens.” (para. 48)

Guatemala exchanged a series of communications with the Commission purporting to demonstrate its compliance with the Commission’s recommendations. (para. 57-76) However, the Commission noted that some discriminatory provisions had not yet been remedied, including the chapeau of one of the articles of the domestic legislation that refers “to the duty of the husband to protect and assist his wife within the marriage,” without imposing a similar condition on the wife, and a provision excusing women from guardianship responsibilities. (para. 79-80) The Commission noted that the duty to protect and assist “is consistent with the nature of the marital relationship,” and it should not be implied as being the sole duty of the husband. With regard to the special relief from guardianship duties for

women, the Commission asserted that it is irrelevant if it is seen as an obligation or a privilege. It is, nevertheless, discriminatory based on conceptions of gender that presume women are inherently weak or incapable. (para. 81-82)

Two other cases illustrating patterns of discrimination against women reveal the prejudices associated with gender-based violence and the consequences they generate. The first relates to domestic violence in Brazil. The second involves the illegal detention, rape and torture of three Tzeltal sisters by soldiers in the Mexican State of Chiapas.

In the case of *Maria Da Penha Maia Fernandes v. Brazil*, Report No. 54/01, Case 12.051 (April 16, 2001, the victim charged that Brazil had, for years, condoned the domestic violence she suffered at the hands of her husband. She was the victim of a 1983 murder attempt by her former husband which left her paraplegic, with numerous additional medical ailments. Her complaint is based on the failure to finalize any judgment against her ex-husband 15 years after his near fatal shooting attack of her. Consequently, she alleged violations of Articles 1(1), 8, 24 and 25 of the American Convention; Articles 3, 4 (a) to (g), 5 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (Belém do Pará Convention);\* Brazil ratified in 1992. and articles of the American Declaration. The Commission found violations of Articles 1(1) (obligation to protect rights), 8 (fair trial) and 25 (judicial remedy), and of Article 7 of the Belém do Pará Convention, insofar as Article 7 obligates the State to act to protect the rights contemplated in Articles 3 and 4 (a) – (g) of that instrument. The Commission also concluded that Articles II (right to equality) and XVII (right to recognition of juridical personality and civil rights) of the American Declaration were violated.

The Commission’s analysis focuses on both the underlying act and the judicial proceedings, despite the fact that the assault occurred in 1983, before Brazil was party to the

Convention. The record reflects that the Brazilian justice authorities demonstrated a patent reluctance to punish the petitioner's husband for her attempted murder, despite more than sufficient evidence. In determining admissibility, the Commission found that the obligations to protect rights under the American<sup>9</sup> and Belém do Pará<sup>10</sup> Conventions are of a continuous nature. Therefore, the violations persist in time, despite the fact that Brazil's adherence to those Conventions occurs well after the underlying acts.

The victim was shot while she was asleep. There was a history of previous violent assaults by her husband, and he had tried to get her to declare him beneficiary of a life insurance policy one week before the shooting. He was proven to have lied on several occasions as to the circumstances of the assault, which he asserted was perpetrated by thieves. There were witness statements implicating him in the crime.<sup>11</sup>

A guilty verdict eight years after the fact resulted in a 15-year sentence that was reduced to 10 years on appeal. The Commission noted that the eight-year delay alone in obtaining the first conviction constituted a denial of Article 8 and 25 rights and Article 1(1) obligations. Three years later, the guilty verdict was overturned based on a time-barred challenge alleging faulty jury instructions. At his subsequent trial, in 1996, the defendant was again sentenced, this time to a 10-year and 6-month prison term. His appeal from that conviction has been pending since April 1997, and so the conviction was not yet final when the Commission decided the case.

The petitioner asserted that the circumstances of this case, and the general pattern of impunity in cases of domestic violence in Brazil, demonstrate the State's systematic failure to take effective measures to prevent and punish this type of violence that disproportionately affects women. The Commission's finding that the State violated its

duties to prevent, punish and eradicate violence against women under the Belém do Pará Convention is based on an analysis of the facts that discerns a "general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors." (para. 56) This finding is based on the circumstances relating to the assault on the petitioner, on national statistics concerning violence against women, and on the State's lethargic response to that violence.<sup>12</sup> The factual information confirming a pattern of State tolerance of violence against women also supports findings of the violation of the equal protection provision of the American Declaration and Convention. The Commission's analysis corresponds here to a definition of domestic violence that includes violence against women, "condoned by the state or its agents regardless of where it occurs." (Art. 2 Belém do Pará Convention).

The final recommendations refer to the obligation of the State to provide a civil remedy to victims. A recommendation is also made to train justice-sector functionaries, and the public as a whole, on how to respond to cases of violence against women, and to establish more fluid mechanisms for preventing, investigating, prosecuting and punishing such crimes.

In the case of *Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico*, Report 53/01, Case 11.565 (April 4, 2001). The names used are pseudonyms., the victims, three Tzeltal indigenous women, were gang raped and subjected to other torture by soldiers while being illegally detained and questioned in a language they did not speak<sup>13</sup> at a military checkpoint in 1994. This assault occurred in the Mexican State of Chiapas, four months after the armed rebellion by the Ejercito Zapatista de Liberacion Nacional began there. The military courts definitively closed the investigation in 1996, citing a lack of evidence. Despite the influence of both racist and political perspectives in this case, it is included here in the section on women rights for two reasons:



first, because the Commission reiterates in clear terms its analysis of rape as a form of torture; and, second, because the State's response to the allegations demonstrates the kind of subtle bias that prevents rape from being understood for what it is: the assertion of power through an act of violence.

Despite a detailed report by a medical doctor showing physical evidence of the gang rape and offering detailed testimony by the victims, the State asserted that the "intention of the petitioners [was] to mislead the Commission," and denied that the events alleged had ever occurred. The State claimed that military checkpoints for purposes of public security were permitted under the Mexican Constitution and that the accusations were an offense to the honor of the armed forces. The State pointed to both the military court's investigation and the failure of the victims to re-submit to a gynecological examination by their designated experts as evidence of the falsity of the claim. In short, the State's defense related essentially to its comparative estimation of the character of the accusers and the accused.

Much of the evidence presented by the victims to the civilian justice authorities and later transferred to the military courts is reproduced in the Commission's report. The testimony gives compelling and detailed accounts of the entire incident, including the detention, gang rape and intimidation, including accusations that the three young victims were supporters of the insurgent indigenous group in the region. Furthermore, the testimony is substantiated by a medical report of a gynecological examination carried out according to guidelines contained in the United Nations *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment*.

The Commission concluded that the Public Prosecutor for Military Justice, "completely ignored the evidence submitted by victims and proceeded to order another

gynecological examination for them." (para 69) That request came a substantial time after the incident had occurred and in spite of the fact that the first medical examination, conducted 20 days after the incident, and qualified as in-depth and professional by the Commission, had been ratified in the Mexican civilian courts. (para. 63) Furthermore, the report of the medical examination documented the fear and anguish that these young women had already suffered upon experiencing a gynecological examination for the first time, under these circumstances. The government's assertion that the victims would have to submit to another such examination was truly a second attempt to victimize them.

In this connection, the attitude of the military justice authorities, as represented by the State, is notably preoccupied with the honor of the military and its mission. According to the Commission's Report, "the State maintains that: 'it is incomprehensible that accusations would be leveled against institutions that are in good standing and enjoy a good reputation such as the Mexican Army, without any evidence other than rumors that merely create insecurity from a legal standpoint and are a most shameful attack against the institutions responsible for National Security, which were moved to the conflict zone for the sole purpose of fulfilling their duty, that is, their constitutional mission of protecting the internal security of the Nation, within a system based on a rule of law and respect for human rights such as exists in Mexico.'" (fn. 14)

The State based its insistence that the charges were an attempt to impugn the honor of the Mexican armed forces on the denials of the accused and the statements of persons living in the area where the checkpoint was located. Those civilian declarations gave general observations concerning the behavior of the soldiers and asserted that they had never seen members of the military mistreat girls, nor had they heard any rumors to that effect. If the allegations were truthful, the State argued, the

victims would have no problems resubmitting to a second medical exam. The report of the military authorities also ridiculed the petitioners' "alleged" attorney, also a woman, characterizing her behavior as "haughty and intimidating." (para.66)

Rather than conduct a serious investigation, the State used the case as a staging ground for discrediting the EZLN and those the State suspected were their sympathizers. At the same time, the State ignored the evidence and the consequences of what these three young women had suffered.<sup>14</sup> The Commission "establishe[d] that, as a result of the humiliation create by this abuse, [as perceived by the community they lived in] the Gonzalez Perez sisters and their mother had to flee their habitual residence and their community." (para. 42)

On the issue of fair trial and judicial remedy, the Commission determined that an investigation and trial in the military justice system of a case concerning criminal conduct against civilians is inconsistent with a democratic rule of law, and reiterated its own previous findings that "military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the Convention." (para. 81) It also reiterated findings and recommendations of the United Nations Special Rapporteur for Torture with regard to Mexico,<sup>15</sup> asserting that the pattern of impunity for torture committed by the Mexican military required that all alleged infractions involving personnel from that institution be tried in civilian courts, even those arising in the discharge of their official duties. (para. 79)

The Commission went on to cite the Belém do Pará Convention, the Inter-American Convention to Prevent and Punish the Crime of Torture, the U.N. Special Rapporteur on Violence Against Women,<sup>16</sup> the decisions of the International Criminal Tribunal for the Former Yugoslavia and its own jurisprudence to reaffirm that rape is a form of violence

prohibited under international law. Moreover, the Commissioners concluded that the rapes committed in this case were acts of torture because the assault took place, "as part of an illegal interrogation conducted by military officers in a zone of armed conflict, and [during which they] were accused of collaborating with the EZLN." (para. 51). Finally, we are reminded that, "Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation. It is a battle of men fought over the bodies of women."<sup>17</sup>

The Commission found violations of the petitioners' rights under Article 5 (right to humane treatment) and Article 11(2) (right to privacy). The mother of the three victims was also found to have suffered inhumane treatment because she had to "stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community." A violation of the rights of the child was also found with regard to the 16-year old victim. The Commission also recognized violations of Articles 8 and 25 of the American Convention, and 6 and 8 of the Convention Against Torture, with regard to the failure to investigate, prosecute and punish the perpetrators. Furthermore, the Commission reiterated its recommendation to carry out "a complete, impartial and effective investigation within the regular criminal courts in Mexico," and unequivocally declared that their recommendation would in no way be satisfied by re-opening a military investigation into the case, as Mexico had suggested in a communication dated October, 2000.<sup>18</sup>

### **C. Decisions on Capital Punishment and Related Issues**

Cases involving the death penalty and related aspects of its administration assumed a high profile in the Commission's contentious jurisprudence during 2001 and 2002, including its referral of the case against Trinidad and Tobago, *Hilaire et al.*, to the Court, as discussed above. All of the capital punishment cases arose in the United States and four countries of the English-speaking Caribbean region: the Bahamas, Trinidad and Tobago, Jamaica and Grenada. In all, the Commission decided six cases on the merits,<sup>19</sup> three cases on admissibility,<sup>20</sup> and at least 26 reported and other new cases involving requests for the issuance of precautionary measures.<sup>21</sup> This section explores some of the common and unique themes in those cases.

All of the Commission's decisions now share the common articulation of the "heightened scrutiny" standard for review of capital cases, which requires international human rights bodies to take a "restrictive approach" in its review of cases involving the imposition of the death penalty. (Edwards, 107; Knights, 57; Thomas, 90; Domingues, 38) The Caribbean decisions on the merits all share virtually identical issues and resolution on a set of issues common to all three countries. First, the cases all raise the question of the mandatory application of the death penalty and the absence of individualized sentencing which the Commission held, in each case, to constitute not only a violation of the right to life in Article 4 of the Convention, but also of Article 5 (protection against cruel, inhuman or degrading punishment or treatment) and Article 8 (right to a fair trial).<sup>22</sup> (Knights, 78; Lamey, 143; Thomas, 108)

Second, the cases shared conclusions as to the absence of an adequate system for the exercise of mercy in capital cases through pardon, commutation or amnesty, which

violates the explicit terms of Article 4(6) of the Convention. The Commission also rejected governments' assertions that commutation powers exercised by the executive infused the review of death sentences with a sufficient element of discretion to permit the initial automatic death sentence for murder. (Edwards, 168; Knights, 105; Lamey, 166; Thomas, 120) Finally, all petitioners prevailed on the question of the adequacy of the conditions of confinement on death row while awaiting execution, which were found to violate Article 5 of the Convention. (Edwards, 198; Knights, 129; Lamey, 202; Thomas, 135)

The Commission's jurisprudence has become increasingly symbiotic with that of national reviewing courts in the death penalty area, at least as relates to the Caribbean. On March 11, 2002, Great Britain's Privy Council roundly endorsed the analysis of the Commission in a series of decisions striking down the mandatory death penalty in Belize, Saint Lucia, and Saint Christopher and Nevis.<sup>23</sup> In reaching its decision, the Privy Council, in addition to its strong reliance on the Commission, relied upon relevant jurisprudence from South Africa, the United States, India, Canada, England, the Human Rights Committee, and the European Court of Human Rights.<sup>24</sup> This reliance on international and comparative sources contrasts sharply with that of the United States Supreme Court in its own death penalty jurisprudence.<sup>25</sup>

Delay in bringing the accused before a judge after arrest, and in the length of time from arrest to trial gave rise to violations of Articles 7(5) and 8(1) of the Convention in one of the Jamaican cases. (Lamey, 178, 188) In the *Thomas* case, the Commission also found a violation of the right to a fair trial, protected by Article 8 of the Convention, when the trial judge demonstrated bias in an instruction to the jury regarding his belief in the defendant's guilt. (Thomas, 138, 144) Due to its disposition of the cases on other grounds, the Commission

declined to reach the issue of prolonged post-conviction detention in the Bahamas cases (Edwards et al., at 225), nor did it address an allegation that Jamaica's method of execution by hanging constitutes a violation of Article 5(2) of the Convention. (Thomas, 136)

Flaws in the provision of counsel, which was available only through legal aid to legally indigent defendants in the cases under consideration, gave rise to a number of violations. The unavailability of legal aid for constitutional motions played a part in two of the Caribbean decisions, giving rise to violations of Article 25. (Knights, 136; Lamey, 225, 226) In *Lamey*, the Commission found that undue delay in providing access to legal aid gave rise to violations of Articles 8(2)(d) and (e). (Lamey, 215) On the other hand, in two cases, the Commission rejected the claims of ineffective assistance of counsel. In *Edwards et al.*, the petitioners raised issues about defense counsel's failure to raise claims of prejudicial publicity during trial, coerced confessions, inhumane treatment by the police and failure to call a medical doctor to attest to the mistreatment. The Commission concluded that those issues "are more appropriately left to the domestic courts." (Edwards, para. 208-215) The issue of ineffective assistance of counsel for failure to investigate viable defenses, raised in *Lamey*, gave rise to the only finding of no violation by the Commission where the claim had not been adequately preserved in the domestic legal system. (Lamey, 217) In two U.S. cases in which the petitions were found to be admissible, claims of ineffective assistance of court-assigned counsel will be reviewed by the Commission in the merits stage. (Graham, 58-59; Martinez-Villareal, 64)

One other Caribbean death penalty case deserves mention. The *Roodal* decision on admissibility is the first published case against Trinidad and Tobago since its denunciation of the Convention. (see discussion above) As such, the petitioner's lawyers grounded their claims

on violations of the American Declaration rather than the Convention. (para. 2) The Commission accepted jurisdiction of the case and agreed to its admissibility based on the violations of the Declaration, having reached a similar conclusion some time ago as to the United States, also a non-State-party to the Convention but still, like Trinidad, a member of the OAS. (para. 24) Nonetheless, the Commission added potential violations of the Convention for its future consideration of the merits, given the fact that some of the misconduct alleged arose before the effective date of Trinidad's denunciation. (para. 25)

The U.S. cases also presented some common themes. Two of the cases present questions as to the application of the Vienna Convention on Consular Relations to foreign nationals on death row in the United States. Under that treaty, detaining officials are required to promptly inform a detained foreign national of the right to contact with their home country's consulate, and, if the detainee so requests, to promptly notify consular officials of the detention. In both of the cases pending before the Commission, the individual petitioners are Mexican nationals. (Martinez-Villareal, 69; Suarez-Medina). In Mr. Suarez-Medina's case, his execution proceeded after the issuance by the Commission of precautionary measures on his behalf, thus giving rise to oral arguments before the Commission in its October 2002 regular session as to whether precautionary measures issued by the Commission are legally binding, as a matter of international law.

Another issue common to two cases before the Commission is that of the execution of juveniles who were below 18 at the time the alleged offense is committed. In its admissibility decision in *Graham (Shaka Sankofa)*, the Commission signaled that it would again take up the question of the legitimacy of the juvenile death penalty in international human rights law. (para. 60) Despite repeated

requests to the government of the United States and the State of Texas for precautionary measures (paras. 5-29), Mr. Sankofa was executed on June 22, 2000.<sup>26</sup> The case is still pending before the Commission on the merits.

On October 22, 2002, the Commission decided the question of the legitimacy of the juvenile death penalty under international law in *Michael Domingues v. United States*. That case had already undergone extensive domestic consideration in the courts, culminating in the denial of review by the United States Supreme Court of a decision of the Nevada Supreme Court that deeply divided over the question of the application of the International Covenant on Civil and Political Rights provisions prohibiting the execution of persons under 18 at the time of their alleged crimes, but upheld the conviction.<sup>27</sup> The Commission found that the imposition of the death penalty on children under 18 at the time of their conduct violates both customary international law and *jus cogens* norms. (para. 84-85) To justify this conclusion, the Commission exhaustively reviewed international law and standards, as well as the law and practice of nations. (para. 40-83)

Curiously, the United States, unlike its engagement with other death penalty issues before the Commission, failed to express its views at all in this litigation until after the Commission had issued an initial report unfavorable to the government. (para. 26, 89) After that report was issued, the government apparently filed an extensive pleading urging the Commission to "withdraw" its report, combined with "supplemental observations." (para. 90). The Commission rejected the government's assertions, explicitly finding that the U.S. could not legitimately claim to be a persistent objector to the norm barring the execution of juveniles. (para. 85, 102) The issue of the validity of the juvenile death penalty already has narrowly missed review by the U.S. Supreme Court on two occasions in 2002, in *Patterson v. Texas*<sup>28</sup> and *Stanford v. Kentucky*.<sup>29</sup>

The question seems likely to reach the Supreme Court this term, and the potential influence of the Commission's decision in *Domingues* cannot be overstated.

One other issue common to two cases before the Commission is not likely to be reviewed by the U.S. Supreme Court. In *Graham* and *Martinez-Villareal*, the Commission will again address the issue of the "death row phenomenon," whereby the petitioner alleges that the prolonged wait for execution in death row conditions can itself constitute cruel, infamous or unusual punishment under Article XXVI of the Declaration. (*Graham*, para. 60, 65; *Martinez Villareal*, para. 70). That issue was again rejected by the United States Supreme Court in the Fall 2002 term, over only one dissent, in a case involving a Florida death row inmate who has spent 27 years awaiting execution.<sup>30</sup>

In *Garza v. United States*, the Commission found violations of Articles XVIII (Right to a Fair Trial) and XXVI (Right to Due Process of Law) when the sentencing jury in Texas heard evidence of four unadjudicated murders in Mexico. (para. 102-110) Although the Commission recommended commutation, the government went ahead with *Garza's* execution on June 19, 2001. The execution followed that of Timothy McVeigh by one week, making it the second federal execution after a delay in application of the federal death penalty for over 35 years. Despite the petitioner's argument that federal inaction on the death penalty over that long a time was a *de facto* abolition of the death penalty, the Commission rejected that argument as a basis for violation of Article I (Right to Life) of the Declaration. (para. 94-95). One Commissioner, Helio Bicudo from Brazil, expressed his view, here and in all subsequent death penalty cases of the Commission, that the death penalty had been abolished through the evolution of the practice of the Inter-American system. (e.g., *Edwards, Knights, Lamey and Thomas*).

When it takes up the issues on the merits, the Commission will also grapple in the *Sankofa* case with questions of violations of the rights to fair trial and due process (Articles XVIII and XXVI of the Declaration) because Mr. Sankofa was procedurally barred from producing strong evidence of his actual innocence of the crimes of which he was convicted. (para. 58-59). These same provisions will come into play in *Martinez-Villareal*, where the Commission will decide the effects of mental illness amounting to incompetence to stand trial or to be executed. (para. 66-68) In both cases, the issues mentioned here are related closely to claims of ineffective assistance of counsel, mentioned above.

Finally, the Commission has increased pressure on the all OAS countries to honor its issuance of precautionary measures in all cases, but particularly in capital punishment cases where execution is imminent. It has expressed its displeasure with failure by the US government to take precautionary measures in stronger and stronger terms, including its stern rebuke to the United States in *Garza*, where it found that the government's failure to honor such requests "undermined" the Commission's ability to investigate and "effectively deprives condemned prisoners of their right to petition in the inter-American human rights system." (para 66) In one hearing before the Commission at its October 2002 regular session of meetings, the Commission heard arguments from the parties in *Suarez-Medina v. United States* as to whether the Commission's precautionary measures had binding legal effect in international law. In that case, Mr. Suarez-Medina was executed in Texas after the issuance of repeated requests for precautionary measures to the U.S. government. This issue may take on increasing importance in the United States in the wake of a decision in the U.S. Supreme Court in October, 2002, in which two Justices dissented from denial of a request for stay of execution grounded solely on

the binding nature of the issuance of precautionary measures by the Commission.<sup>31</sup>

**D. Actions on the U.S. Response to the Attacks of September 11, 2001**

The Commission has responded in two distinct contexts to the actions of the United States government in the wake of the tragic events of September 11, 2001, when commercial aircraft commandeered by terrorists targeted the World Trade Center and the Pentagon, and thousands of civilians lost their lives. First, in its Annual Report for 2001, the Commission noted that the United States took “exceptional measures” after the tragic events of September 11, 2001. The Commission further concludes that although the U.S. is a party to the International Covenant on Civil and Political Rights, it “has not notified the UN Secretary General in accordance with Article 4 of the Covenant of any resort by it to emergency measures that might justify derogation from the United States’ obligations under that treaty.” While the U.S. has no reporting obligations under the American Convention because it is not a party to that treaty, the Commission reiterated its oft-stated conclusion that the United States is “subject to the fundamental rights of individuals” contained in the OAS Charter and the American Declaration of the Rights and Duties of Man. (AR 2001, at 670).

Second, the Commission issued requests for precautionary measures under Article 25 of its Rules of Procedure in two situations where targeted groups sought the Commission’s protection. The Commission is no stranger to issues arising from terrorist attacks, having dealt with terrorism on a regular basis for some time throughout Latin America. The Commission is scheduled to release a major study on the topic of terrorism in the very near future.

In the first and most notable of the cases, the Commission issued a request for precautionary measures to the United States on behalf of detainees in Guantanamo Bay, Cuba. While the Commission’s requests for

precautionary measures often do not attract either media or academic attention, this request received widespread coverage.<sup>32</sup> The petition here was filed on behalf of a group of unnamed by clearly identifiable individuals, all detainees at Guantanamo Bay, Cuba. The Guantanamo petition was coordinated by the Center for Constitutional Rights, based in New York City, in collaboration with the Center for Justice and International Law (CEJIL) in Washington and a small group of legal academics and students. The action was taken in parallel with a federal petition for habeas corpus pursuant to 28 U.S.C. § 2241, filed on behalf of named detainees at Guantanamo. The petition was dismissed for want of jurisdiction because “the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States.”<sup>33</sup> The Commission suffers no such lack of jurisdiction, as its powers reach to extraterritorial acts of nations, particularly in the Americas.

The Commission’s request to the United States seeks the protection of precautionary measures under Article 25 of the Commission’s Rules of Procedure. Such requests are sought in “serious and urgent cases” in order to maintain the *status quo ante* in cases before the Commission, and to protect individuals who are the subject of the litigation from “irreparable harm.” Normally, a request for precautionary measures is sought contemporaneously with the filing of a petition for review on the merits, but in this case, the petitioners sought only precautionary measures. The Commission was emphatic in its assertion that the U.S. government has an obligation to follow their requests for such measures: “The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures . . . is, as with the practice of other international decisional bodies, a well-established and necessary component of the Commission’s processes. Indeed, where such measures are considered essential to preserving the Commission’s very mandate under the OAS

Charter, the Commission has ruled that OAS members are subject to an international legal obligation to comply with a request for such measures.”

The statement that a request for precautionary measures creates “an international legal obligation to comply” is tantamount to an assertion that the Commission’s requests are binding on the countries to which they are issued. The United States asserts in its pleadings to the Commission, however, that, by virtue of its status as a non-State party to the American Convention, the Commission lacks jurisdiction over it, lacks jurisdiction to render any opinion that implicates the application of international humanitarian law, lacks the power to issue binding precautionary measures, and lacks the need to intervene because the detainees’ legal status is clear and they are being well-treated. After submission of additional arguments from the petitioners, the Commission issued an additional communication to the United States on July 23, 2002 stating that “the Commission remains of the view that it has the competence and the responsibility to monitor the human rights situation of the detainees and in so doing to look to and apply definitional standards and relevant rules of international humanitarian law in interpreting and applying the provisions of the Inter-American human rights instruments in times of armed conflict.”<sup>34</sup>

The core of the Commission’s ruling lies in its conclusion that the executive branch of the U.S. government is not entitled to unilateral and unreviewable designation of the Guantanamo detainees as unlawful combatants under international humanitarian law. Such designation has the legal effect of leaving the detainees without any legal protection for so long as armed conflict continues. The detainees are entitled, the Commission concludes, to access to a “competent tribunal” to determine their legal status. The Commission’s interpretation of international humanitarian law is relatively new, but its interpretation of its own



norms by use of other treaties and treaty body decisions is hardly unique in the Commission's history, nor in that of other international tribunals. The Commission heard arguments in its October 2002 regular session on the status of the detainees, and the U.S. reiterated its legal position before the Commission.

The second petition for precautionary measures was filed in June 2002, on behalf of "INS detainees ordered deported or granted voluntary departure." This group is composed of foreign individuals, mostly men of Middle Eastern or Asian nationality, in the United States. These people are taken into custody by the Immigration and Naturalization Service (INS) for minor immigration rule violations such as visa overstays and then kept in custody indefinitely, without criminal charges or the opportunity to leave voluntarily for their home countries. The INS holds closed hearings in these matters, does not release the names of the individuals in question, and refuses to provide public information on the conditions of their confinement or their treatment in custody. The detainees have no effective legal means of challenging their detention.

After repeated requests for information to the United States went unanswered, the Commission issued a request for precautionary measures on September 26, 2002. The request noted that the government had failed to clarify or contradict the petitioners' assertions that there is no basis under domestic or international law for continued detention of these persons, that there is no public information on the treatment of these detainees in custody, and that the detainees have no basis for challenging their status. The request for precautionary measures seeks to protect the detainees' "right to personal liberty and security, their right to humane treatment, and their right to resort to the courts for the protection of their legal rights, by allowing impartial courts to determine whether the detainees have been lawfully detained and whether they are in need of protection."

**E. Cases Arising in Colombia's Internal Armed Conflict**

[Readers interested in these developments should consult the full version of this article.]

**F. Cases Reflecting the Continuing Consequences of Guatemala's Internal Armed Conflict**

[Readers interested in these developments should consult the full version of this article.]

**G. Cases from Peru**

[Readers interested in these developments should consult the full version of this article.]

**H. Other Reported Cases**

[Readers interested in these developments should consult the full version of this article.]

**I. Friendly Settlements**

[Readers interested in these developments should consult the full version of this article.]

**J. Other Recently Admitted Cases**

Cases admitted during the period covered by this report comprise an interesting array of social issues ranging from questions of State obligations towards HIV-positive persons, pensioners and their social security benefits, indigenous peoples and the application of Agreement 169 of the International Labor Organization on Indigenous and Tribal Peoples to rights concerning natural resources on traditional lands. The Commission is examining immigration and nationality rights, freedom of expression for journalists and authors, political rights involving election participation, labor

rights, the violation of the lawyer-client privilege, and the scope of the State's obligation to protect all these rights.

However, the customary complaints of torture, inhumane treatment based on poor prison conditions, violations by security forces and paramilitary death squads with State collaboration or acquiescence, disappearances, extra-judicial executions, arbitrary detentions, and due process violations will also continue to be the subject of Commission decisions in future reports. The countries affected are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panamá, Paraguay, Peru, St. Lucia, Trinidad and Tobago, Uruguay and Venezuela.

Endnotes

<sup>1</sup> Eur. Court HR, *Timurtas v. Turkey*, Judgment of 13 June 2000; and Eur. Court HR, *Çakici v. Turkey*, Judgment of 1 July 1999, para. 98.

<sup>2</sup> Jennifer Harbury engaged in three extended hunger strikes, one of which was held in front of public offices in Guatemala City. She also expended efforts on legal remedies inside and outside of Guatemala. See *Harbury v. CIA*, 403 U.S. 536 (2002).

<sup>3</sup> Article 19(6) of the Protocol provides that the Commission and Court may hear individual complaints that address violations of the right of unions to organize and the right to education, as those rights are articulated in the Protocol.

<sup>4</sup> The Commission alleged violations of "a combination" of the following articles of the Convention: 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family), 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government). Para. 156.

<sup>5</sup> For an excellent treatment of the legal effects of Trinidad's withdrawal, see Natasha Parassram Concepcion, *The Legal Implications of Trinidad &*

*Tobago's Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847 (2001).

<sup>6</sup> See, e.g. *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, AR 2000, at 1415.

<sup>7</sup> *The Human Rights Situation of the Indigenous People in the Americas*, 20 October 2000. (full cite on web)

<sup>8</sup> *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*, 1 March 2001.

<sup>9</sup> Brazil ratified in 1992.

<sup>10</sup> Brazil ratified in 1995.

<sup>11</sup> The Commission concluded that the 1984 police investigation provided clear and decisive evidence “for concluding the trial and proceedings.” (para. 39)

<sup>12</sup> The Report cites studies indicating the “high number of domestic attacks of women in Brazil”, the disproportionate number of women victims in these cases, the fact that 70% of criminal complaints relating to domestic violence are put on hold with no conclusion being reached, and only 2% result in a conviction. Brazil repealed the “honor defense” justification for wife killing only a decade ago, in 1991, although the defense was still asserted without judicial censure at trial. (paras. 45-49).

<sup>13</sup> The victims’ statement revealed that they speak their own indigenous language and understand only some Spanish, but do not speak it. (para. 31).

<sup>14</sup> At present, representatives of the Mexican Government and the petitioners are engaged in discussions regarding compliance with the Commission’s recommendations for reparations and a criminal investigation in the civilian courts, according to CEJIL’s 2001 Annual Report, (Center for Justice and International Law), page 104.

<sup>15</sup> 1998 Report

<sup>16</sup> The complete title is Report Submitted by Radhika Coomaraswamy, Special Rapporteur on violence against women, including its causes and consequences, in accordance with Resolution 1997-44 of the Commission, E-CN.4/1998/54, January 26, 1998.

<sup>17</sup> Fn. 26, citing the Special Rapporteur on Violence Against Women.

<sup>18</sup> The case contains a discussion of the inappropriateness of military jurisdiction to judge facts such as those arising here. See paras. 78-82. The Commission also notes that one of its previous reports on the Situation of Human Rights in Mexico cited that impunity for torture was “commonplace”, and that it is often used “during preventive detention and preliminary investigation phases, as a way of obtaining confessions and/or intimidation.” (para. 87)

<sup>19</sup> *Michael Edwards et al. v. The Bahamas*, Report No. 48/01, Cases 12.067, 12.068, 12.086 (April 4, 2001); *Juan Raul Garza v. United States*, Report No. 52/01, Case 12.243 (April 4, 2001); *Donnason Knights v. Grenada*, Report No. 47/01, Case 12.028 (April 4, 2001). *Leroy Lamey et al. v. Jamaica*, Report No. 49/01, Cases 11.826, 11.843, 11.846, 11.847 (April 4, 2001); *Joseph Thomas v. Jamaica*, Report No. 127/01, Case 12.183 (December 3, 2001); *Michael Domingues v. United States*, Report No. 62/02, Case 12.285 (October 22, 2002).

<sup>20</sup> *Gary T. Graham (Shaka Sankofa) v. United States*, Report No. 51/00, Case 11.193 Admissibility decision (June 15, 2000); *Ramon Martinez-Villareal v. United States*, Report No. 108/00, Case 11.753 Admissibility decision (December 4, 2000); *Balkissoon Roodal v. Trinidad and Tobago*, Report No. 89/01, Case 12.342 Admissibility decision (October 10, 2001).

<sup>21</sup> The Rules of Procedure of the Commission permit it to issue precautionary measures in “serious and urgent cases” in order to “prevent irreparable harm to persons.” *Rules of Procedure of the Inter-American Commission on Human Rights*, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.4 rev. 8 (22 May 2001), at 127, 135. In its Annual Report for 2000, the

Commission sought precautionary measures in two capital cases from Grenada (*Rudolph Baptiste and Donnason Knights*), two cases from Jamaica (*Denton Aitken and Dave Sewell*), two cases from Trinidad and Tobago (*Bakisson Roodal and Sheldon Roach*), and ten cases from the United States (*Douglas Christopher Thomas, Juan Raul Garza, Shaka Sankofa, Victor Saldaño, Michael Domingues, Miguel Angel Flores, Johnny Paul Penry, James Winston Chambers, Alexander Williams and Jose Jacobo Amaya Ruiz*). ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, VOL. 1, OEA/Ser.L/V/II.111, Doc. 20 rev. 16 (16 April 2001). In its Annual Report for 2001, the Commission sought precautionary measures in one capital case from Guyana (*Daniel and Cornell Vaux*), four capital cases from Trinidad and Tobago (*Arnold Ramlogan, Beemal Ramnarace, Takoor Ramcharan, and Alladin Mohamed*), and three cases from the United States (*Thomas Nevius, Robert Bacon Jr., and Gerardo Valdez Maltos*). ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2001, VOL. 1, OEA/Ser.L/V/II.114, Doc. 5 rev. 1 (16 April 2002), at 77, 83-84, 84-85. *James Rexford Powell v. United States*, Precautionary Measures issued on September 19, 2002 (on file with the authors); *Javier Suarez-Medina v. United States*, Precautionary Measures issued on July 29, 2002.

<sup>22</sup> In *Edwards et al. v. The Bahamas*, *id.* at para. 124-154, the Commission performed the same analysis and reached the same conclusions under the American Declaration of the Rights and Duties of Man because the Bahamas are not a party to the Convention. The Commission looked to the terms of Articles I, XXIV, XXV and XXVI (right to life, right to juridical protection, right to an impartial hearing, right to due process of law and to human treatment, and right to petition).

<sup>23</sup> *Reyes v. The Queen* [2002] 2 A.C. 235, 254-255 (Belize). See also *Regina v. Hughes* [2002] 2 A.C. 259 (Saint Lucia); *Fox v. The Queen* [2002] 2 A.C. 284 (Saint Christopher and Nevis). A similar decision is likely to be forthcoming for Saint Vincent and the Grenadines. See the discussion of *Spence v. The Queen* in *Reyes*, *supra* at 268-269. See also Alex Bailin, *The Inhumanity of Mandatory Sentences*, CRIM. L. REV. 641 (United Kingdom August 2002).

<sup>24</sup> *Reyes*, *id.* at 248-256.

<sup>25</sup> Richard J. Wilson, *The Influence of International Law and Practice on the Death Penalty in the United States*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker, Robert M. Bohm and Charles S. Lanier eds., 2d ed., forthcoming 2002).

<sup>26</sup> Mr. Sankofa has been represented at the Commission by students of the International Human Rights Law Clinic at American University's law school.

<sup>27</sup> *Domingues v. Nevada*, 114 Nev. 783, 961 P.2d 1279 (1998), *cert. denied* 528 U.S. 963 (1999).

<sup>28</sup> Dissent from denial of certiorari in separate published opinions by Stevens, J. and by Ginsberg and Bryer J., at 536 U.S. \_\_\_ (August 28, 2002). Justice Stevens' dissent alluded to the "apparent consensus that exists among the States and in the international community" as to the impropriety of the death penalty for juveniles.

<sup>29</sup> Dissent from denial of petition for writ of habeas corpus, Stevens, J. (joined by Justices Souter, Ginsberg and Bryer), at 537 U.S. \_\_\_ (2002).

<sup>30</sup> Dissent from denial of certiorari by Bryer, J. in *Foster v. Florida*, 537 U.S. \_\_\_ (2002); concurrence in denial by Thomas, J., *id.*; statement by Stevens, J. *id.*

<sup>31</sup> *Powell v. Texas*, Application for stay of execution denied by the Court. Justice Stevens and Ginsberg dissent. Unpublished order of October 1, 2002. A petition for writ of certiorari was denied the same day and Mr. Powell was executed.

<sup>32</sup> See, e.g., Inter-American Commission on Human Rights (IACommHR), Washington, Decision of 12 March 2002, 23 HUM. RTS. L. J. 15 (2002); Dinah Shelton, *The Legal Status of the Detainees at Guantanamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of 12 March 2002*, 23 Hum. Rts. L.J. 13 (2002); 41 I.L.M. 532 (2002); *United States (U.S.): Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba [April 15, 2002]* 41 I.L.M.

1015 (2002).

<sup>33</sup> *Rasul v. Bush*, Civil Action No. 02-299, U.S. Dist. Ct. D.C., Memorandum Opinion of July 30, 2002, at 30; now pending before the U.S. Ct. of Appeals for D.C. as *Habib v. Bush*, Case Nos. 02-5284 and 02-5288 (Consolidated).

<sup>34</sup> Letter from Ariel Dulitzky, In-charge of the Executive Secretariat, Inter-American Commission on Human Rights, to the Center for Constitutional Rights, July 23, 2002 (containing text of a communication of the same date from the Commission to the US government).

## 12. HOLOCAUST RESTITUTION IN THE UNITED STATES AND OTHER CLAIMS FOR HISTORICAL WRONGS – AN UPDATE

By: Michael J. Bazylar and Adrienne Scholz\*

### I. INTRODUCTION

In the 2001 edition of this Report, I summarized the lawsuits filed in the United States seeking financial restitution from European and American corporations for their Holocaust-era financial activities. To date, over \$8 billion has been pledged as a result of the Holocaust-era litigation, with elderly Holocaust survivors beginning to receive payments in the latter half of 2001.

Since 1996, when the first Holocaust-era lawsuit was filed, other historical claims have arisen which have adopted the Holocaust restitution movement as a model. All are a direct result of the successes achieved in the Holocaust restitution arena. Three such prominent movements are: (1) the lawsuits filed by victims of Japan and Japanese industry for wrongs committed during World War II; (2) the emerging call for African-American reparations stemming from slavery; and (3) the recent claims being made by survivors of the Armenian genocide for insurance proceeds paid by their deceased relatives.

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## II. HOLOCAUST RESTITUTION EFFORTS IN THE UNITED STATES

### A. Cases Against European Banks

**Swiss banks litigation** – The modern era of Holocaust asset litigation began in October 1996 with the filing of a class action lawsuit against the three largest private Swiss banks – Credit Suisse, Union Bank of Switzerland ( hereinafter “UBS”) and Swiss Bank Corporation – in federal district court in Brooklyn, New York. Thereafter, two other lawsuits were filed against the same banks, with all three actions consolidated in April, 1997, as *In re Holocaust Victim Assets Litigation*, Case No. CV-96-4849 (E.D.N.Y 1996.) In August, 1998, the banks settled the case for \$1.25 billion.

In addition to the Jewish claimants, the following four groups persecuted by the Nazis are also receiving a part of the \$1.25 billion settlement: (1) homosexuals; (2) physically or mentally disabled or handicapped persons; (3) the Romani (Gypsy) peoples; and (4) Jehovah’s Witnesses. In return for \$1.25 billion, plaintiffs agreed to drop all lawsuits against the Swiss banks being sued, as well as “the government of Switzerland, the Swiss National Bank, all other Swiss banks, and all other members of Swiss industry, except for the three Swiss insurers who are defendants in the [federal class action insurance litigation (*see* discussion below)].” Settlement Agreement, paragraph 3, *available at* <[www.swissbankclaims.com](http://www.swissbankclaims.com)>. In effect, the settlement agreement obtained by the two private Swiss banks insulates the entire nation of Switzerland and all its businesses from any kind of litigation – anywhere in the world – having any connection to World War II.

In accordance with American federal class action rules, Judge Korman held a hearing

in November, 1999, to confirm the fairness of the settlement, and in July 2000, did so.

Two sets of appeals also had to be resolved before distribution of the settlement proceeds could begin. In September 2000, the Second Circuit dismissed an appeal by a Polish-American organization that argued that ethnic Poles should be included in the settlement. *In re Holocaust Victim Assets Litigation*, 225 F. 3d 191 (2d Cir. 2000). In July 2001, the Second Circuit dismissed an appeal by three Jewish survivors who claimed that the Plan of Allocation was unfair. *See In re Holocaust Victim Assets Litigation*, 2001 WL 868507 (2d Cir. 2001).

In July 2001, payments of approximately \$1,000 finally began to dribble in to aging survivors. The distribution of the Swiss settlement funds is still going on, albeit slower than expected. By the summer of 2002, less than 200 claims had been processed out of the 32,000 filed, 12,000 of which matched a name on one of the dormant account lists published by the Swiss banks. Out of the \$800 million allocated for those with claims to actual accounts, less than \$20 million had been distributed.

In June 2002, Judge Korman issued a new set of rules aimed to speed up the payment to the dormant account claims. The rules consisted of a new set of relaxed presumptions applicable when assessing claims.<sup>1</sup> Under these presumptions, if evidence of an account is found, then it is assumed that the moneys in the account have not been paid and are due to the claimant, unless there is clear evidence to the contrary. The presumptions were triggered by the Final Report issued by the Swiss government Bergier Commission in March 2002, which found that the Swiss banks engaged in wholesale destruction of records after the war.

The current plan is to have the \$800 million allocated for the dormant account claims to be distributed by sometime in 2003. If the

total amount of the dormant account claims does not fully exhaust the \$800 million fund, a secondary distribution will have to be made. The current status of the Swiss banks settlement is available at [www.swissbankclaims.com](http://www.swissbankclaims.com).

**German and Austrian banks litigation** – German and Austrian banks maintained close business relationships with the Nazis, and profited handsomely from such dealings. In June 1998, three Holocaust survivors, all American citizens, filed a class action lawsuit against the two German banks, charging them with profiteering from the looting of gold and personal property of Jews. Thereafter, other lawsuits were filed against these two banks and other German and Austrian banks for their World War II-era activities.

In March 1999, the lawsuits were consolidated as *In re Austrian and German Bank Holocaust Litigation* in the Southern District of New York before Judge Shirley Wohl Kram. That same month, Bank Austria and its recently-purchased subsidiary, Creditanstalt, settled the lawsuits against them for \$40 million. A fairness hearing was held in November 1999, and Judge Kram approved the settlement in January 2000. *See Bazyler, “Nuremberg in America: Litigating the Holocaust in United States Courts,”* 34 U. Richmond L. Rev. 1, 239-42 (2000).

As of June 2001, no moneys have yet been distributed from the settlement. The current status of the Austrian banks settlement is available at [www.austrianbankclaims.com](http://www.austrianbankclaims.com). Litigation against the German banks continued. However, the “rough justice” settlement reached with the German government and industry in December 1999, and finalized in July 2000, (*see* below) also included the settlement of the claims made against the German banks.

**French banks litigation** – After the Nazis conquered France, French banks began to confiscate the accounts of their Jewish

depositors in a process known as “Aryanization” of the accounts. In late 1997 and early 1998, two class actions were filed against a half dozen French banks in federal court in New York, followed by another action in California state court in San Francisco. *Bodner v. Banque Paribas*, Case No. CV 97-7443 (E.D.N.Y. filed Dec. 7, 1997); *Benisti v. Banque Paribas*, Case No. CV 98-785 (E.D.N.Y. filed Dec. 23, 1998).

The lawsuits also named the British bank, Barclays Bank, and two U.S. financial institutions, Chase Manhattan Bank and J.P. Morgan & Co. These banks had branches in France during the war, and are alleged also to have participated in the confiscation of the assets of their Jewish depositors.

In July 1999, Barclays settled for \$3.6 million, to be paid to the families of its Jewish customers in France who lost their assets during the Nazi occupation.

The other banks declined to settle, and filed motions to dismiss. The motions were denied and, as a result, a settlement was achieved in the last days of the Clinton Administration through the efforts of Stuart Eizenstat, appointed by Clinton as special envoy for Holocaust restitution issues.

The banks agreed to establish two funds to compensate claimants for assets seized by the French banks during the occupation. One fund, with no limits, will pay claimants who have documentation or some other substantiated proof of wartime assets held in French banks. The second fund, capped at \$22.5 million, will compensate claimants with less proof, known as “soft claims,” who will present their case to a commission. Each of the claims approved by the commission will be paid at least \$1500.

## **B. Cases Against European Insurance Companies**

In the time before the two world wars, insurance policies and annuities were popular investment vehicles in Europe. Jews in pre-war

Europe often purchased insurance, and an insurance policy was known as a “poor man’s Swiss bank account.” In 1997, a class action suit was filed in the Southern District of New York against twenty-five European insurance carriers (many of which were later dismissed due to the German settlement, discussed below) on behalf of all those with claims to unpaid Holocaust Era insurance policies. Shortly thereafter, the National Association of Insurance Commissioners, composed of the insurance regulators in all fifty states, created a working group on Holocaust and insurance issues. Some of the regulators began holding hearings, inviting the companies to explain their reasons for non-payment of these pre-war policies.

Prodded by the commissioners from California, New York and Florida, which contain the largest concentration of Holocaust survivors in the United States, five of the insurers sued, formed (and funded) the International Commission on Holocaust Era Insurance Claims, commonly known as ICHEIC, headed by former U.S. Secretary of State Lawrence Eagleburger.

ICHEIC was intended to be a non-adversarial alternative to the American litigation brought against the insurance companies, and correspondingly, the class action suit seemed to have stalled after its creation. In February 2000, after numerous delays, ICHEIC announced that it would begin a two-year claim process to locate and pay unpaid Holocaust-era insurance policies.

Unfortunately, to date ICHEIC has done a poor job. By May 2001, it distributed only \$3 million to claimants, while spending more than \$30 million in expenses. *See* Weinstein, “Spending by Holocaust Claims Panel Criticized,” L.A. Times, May 17, 2001, at 1. Eagleburger’s annual salary alone is \$350,000. In November 2001, the House Government Reform Committee, concerned with the spate of negative press reports about ICHEIC and its work, held a daylong hearing on the issue.



By early 2002, ICHEIC had run up \$40 million in expenses and, of the now 81,000 claims received, made offers on about 1,000 – still only about 1.5 % of the claims received. Moreover, of the 1,000 offers made by the ICHEIC insurers, many were for small sums, nowhere close to the valuation figure established by Eagleburger in his July 1999 directive. According to the *New York Times*, citing several ICHEIC members, some of the offers made by the insurers were as low as \$500, which survivor groups labeled “insulting.” For this reason, as of August 2002, less than half of the offers made by the ICHEIC insurers, (totaling \$20 million, of which \$14 million came from Generali, have been accepted by the claimants.

Several individual California lawsuits, five of which have settled, have yielded higher payments than the amounts distributed individually through ICHEIC.<sup>2</sup> While the settlement terms remain confidential, the *New York Times* reported that one of the California cases alone settled for \$1.25 million. Recently, some of those who had rejected the offers actually brought suit against ICHEIC in California, claiming the offers were unfair and misleading to survivors. *Haberfeld v. Assicurazioni Generali, S.p.A.*, No. BC250565 (L.A. County Super. Ct. May 16, 2001), available at <<http://www.shernoff.com/news/pressreleases/haberfeld.php>> (accessed Nov. 17, 2001). These claims seem to have revived the original class action, as the defendant insurers who were members of ICHEIC moved to have these cases consolidated in multi-district litigation and transferred to New York.

Following the consolidation and transfer, the insurers then moved to dismiss on the theory of *forum non conveniens*, arguing that either 1) ICHEIC was the proper forum for the resolution of these claims, or 2) the claims should be litigated in the various European countries where the contracts arose. On September 25, 2002, Judge Michael Mukasey

wrote a lengthy decision denying these claims. Most importantly, his decision makes clear that ICHEIC, at least from a judicial standpoint, is an utterly “inadequate forum” for the resolution of these policies. *In Re: Assicurazioni Generali SpA Holocaust Insurance Litigation*, 2002 WL 31133027 (E. Dist N.Y. Sept. 25, 2002). It looks as if this seemingly stalled suit is about to become very active again, after an almost three-year hiatus.

In the meantime, several states had also created statutes requiring insurance companies operating in their state to disclose Holocaust era information, enforceable through the insurance commissioners’ licensing authority. The statutes of both Florida and California were challenged by the insurers on several due process grounds, and were struck down at the trial court level. However, in July, the Ninth Circuit reversed the trial court, so the California statute may yet pass constitutional muster. *Gerling Global Reins. Corp of America v. Low*, 296 F.3d 832 (9th Cir. July 15, 2002). (The Eleventh Circuit had already affirmed the trial court’s decision on the Florida statute. *Gerling Global Reins. Corp of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).). The insurers have applied for certiorari to the Supreme Court.

The current status of the ICHEIC claims settlement process is available at <[www.icheic.org](http://www.icheic.org)>.

### **C. Cases Stemming from the Use of German and Austrian Slave Labor**

Between eight and ten million people were forced to work as laborers in factories and camps in Germany, Austria, and throughout occupied Europe during World War II. Approximately 1.25 million of these laborers – now elderly – are alive today.

The reparations program to Jewish victims of Nazi persecution promulgated by West Germany specifically excluded payment

for slave labor. Eventually, close to forty separate lawsuits were filed in various courts throughout the United States against numerous German companies which used slave labor during World War II.

On September 13, 1999, two federal judges sitting in New Jersey issued separate opinions dismissing five of the lawsuits, against Ford Motor Company, *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999), and against German companies Degussa and Siemens. *Burger-Fischer v. Degussa A.G.*, 65 F. Supp.2d 248 (D.N.J. 1999) Both judges held that the suits were precluded by the treaties entered into by Germany and the Allied powers after the war. Some claims against Ford were also found to be time-barred. The dismissals were appealed, but eventually became moot when German government and industry, in December 1999, entered into a preliminary settlement with the plaintiffs' lawyers and representatives of Jewish organizations to resolve all slave labor and related claims for DM 10 billion (approximately \$4.8 billion). In addition to claims for slave labor, the settlement also includes: (1) claims by mothers shipped to Germany whose children were taken away from them and placed in a *kinderheim*, a children's home, where they often died; and (2) claims by survivors of horrific medical experiments conducted by the Nazis, allegedly for the benefit of German private pharmaceutical concerns.

It took over one and one-half years to finalize the German slave labor settlement. Final resolution was achieved in May 2001, when the German parliament gave final approval to a law funding the settlement fund. Under the contemplated scheme for distribution, those forced by the Nazis to work to death – slave laborers, and primarily Jews – who survived the war and are still living will receive payments of up to \$7,500. According to some estimates, approximately 240,000 former slave labor claimants are alive today.<sup>3</sup> Former forced laborers – primarily non-Jews, estimated to

number today approximately 1 million – will be awarded \$2,500 each. In return for the settlement, the plaintiffs' attorneys agreed to drop all the pending slave labor suits.

In June 2001, the checks started to go out. At the outset, claimants did not receive the entire DM 15,000 (\$7,500). Rather, the first set of payments paid out only DM 10,000 (equivalent at the time to \$4650). This led to confusion and disappointment, since the survivors had been told, and the media widely reported, at the time of the settlement and thereafter, that the amount would be DM 15,000 for slave labor claimants. To add to the muddle, the VTNP survivors in the Swiss banks settlement also began receiving at the same time a \$1,000 check from the slave labor portion of the Swiss banks settlement. Many believed that the \$1,000 came from the Germans, since both the German and Swiss funds were processed through the Claims Conference, with only the fine print on the check indicating the source of the funds. Nevertheless, once the German restitution process got going, the flow of funds moved quite quickly. By June 2002, one year after the payments first started to go out, more than DM 2.6 billion, (\$1.3 billion) had been distributed to claimants worldwide, over \$300 million of which was paid to Jewish survivors through the Claims Conference.<sup>4</sup>

Keeping in mind that the primary intent of the Fund was to compensate former slaves, DM 8.1 billion was allocated for this purpose. DM 1 billion was allocated for property losses, which included (1) payments to persons who suffered property losses at the hands of the Nazis but who, for technical reasons, could not collect under existing German indemnification programs and (2) payments for unpaid Holocaust insurance policies issued by German insurance companies. The remainder was set aside for various social and humanitarian projects to help needy survivors and for Holocaust education, designated as “projects of

the ‘Remembrance and Future Fund.’ German Foundation Law, Section 9(7).

As with the Swiss banks’ \$1.25 billion settlement, Germany and its entire private industry, for DM 10 billion have bought for themselves complete legal peace from bothersome American litigation.

Following the German precedent, the Austrian government and Austrian industry likewise agreed to compensate its former slave laborers and other victims of its policies. Under a preliminary agreement reached in October 2000, Austria pledged a total package of \$500 million to settle claims for Holocaust-era seizures of various types. Earlier, Austria had agreed to compensate former slaves and forced laborers, setting aside approximately \$410 million, and to supplement those payments with an additional \$112 million for pension payments to Jewish victims who fled Austria as children.

In February 2001, a month after Stuart Eizenstat put the second Austrian deal together, a suit was filed in federal court in Los Angeles by some of the non-labor claimants against Austria seeking to void the deal. As of August 2002, this lawsuit is still pending. Austria, like Germany before it, is presently withholding payments on this portion of the settlement because of this pending litigation. For the slave labor claims, all lawsuits against Austrian firms were dismissed by the class action lawyers. Over 20,000 former slaves have already received their one-time payout of \$7,000.

#### **D. Cases Regarding Artworks Looted by the Nazis**

Between 1933 and 1945, the Germans stole from both museums and private collections throughout Europe approximately 600,000 artworks. This includes paintings, sculpture, objects d’art, and tapestries. When rare books, stamps, coins and fine furniture are considered, the figure goes into the millions. It took 29,984 railroad cars, according to records from the

Nuremberg trials, to transport all the German-stolen art back to Germany. The value of the art plundered by the Nazis is astounding: \$2.5 billion in 1945 prices, or valued at \$20.5 billion today.

After the war, the Allies set out on the complicated task of returning art and other cultural objects to the country of origin of those whose art had been recovered. While the effort was massive (for example, 60,000 artworks were returned to France, with 45,000 returned to their owners, mostly Jewish), it was only partially successful. Many Holocaust looted artworks are now turning up in surprising places. Museums all over the world have discovered that they are in possession of Nazi-stolen art. Looted art, unlike other areas of Holocaust restitution, has necessarily been approached on an ad hoc, case-by-case basis, rather than by class action litigation. And even though American legal rules involving stolen art may appear to be clear, the actual litigation of Holocaust art claims is, on the whole, complex, time-consuming and expensive.

*Goodman v. Searle*, involving Degas’ *Landscape with Smokestacks*, was the first case brought. Friedrich Gutmann had purchased the Degas in 1932. In April 1939, anticipating the oncoming war, he sent the painting to an art dealer in Paris for safekeeping. In 1943, Gutmann and his wife attempted to escape from Nazi-occupied Holland to Italy, where their daughter Lili was living. They were arrested by the Nazis and sent to concentration camps, where they perished. After the war, the Gutmann children (now with the Anglicized name “Goodman”) attempted to locate their parents’ possessions, but were unsuccessful. In 1994, Simon Goodman, a grandson, was leafing through art books at the U.C.L.A. Art Library where he discovered a photo of the Degas pastel. The book listed the artwork as being in the private collection of Daniel Searle, a Chicago pharmaceutical tycoon.

On December 5, 1995, the Gutmann heirs wrote to Searle demanding the return of the *Degas*. Searle refused, claiming that the artwork rightfully belonged to him. The Goodmans then filed suit in federal court in Manhattan, basing their jurisdiction on the fact that Searle bought the *Degas* there. Searle's attorneys successfully petitioned to have the suit moved to federal court in Chicago. There, Searle's attorneys filed a motion of summary judgment, arguing that the *Degas* had not been stolen by the Nazis, but rather was one of the artworks that Friedrich Gutmann sold prior to his deportation when he began experiencing financial difficulties during the war. The Gutmann heirs disputed this allegation.

The Goodmans also argued that Searle either was, or should have been aware, of the *Degas*' checkered pedigree or provenance. Searle claimed that when he purchased the pastel he relied on the expertise of the curators from the Art Institute of Chicago, a museum where he is a trustee, who assured him that the artwork had a clean provenance. Plaintiffs' attorneys, however, took pre-trial depositions of the two curators who reviewed the provenance of the *Degas* for Searle in 1987. Apparently, the curators missed evidence pointing to flaws in the pastel's ownership records, including the fact that it was once owned by a notorious wartime fence for art looted by the Nazis.

Searle also argued that the claim was time-barred based on the Illinois courts' "discovery rule" in which plaintiffs in a stolen art case must show that they had searched diligently for the work during the intervening time between its disappearance and finding it in the defendant's possession. Since Searle's ownership of the work had been published in several art books over the years, the Goodmans argued that the New York "demand and refusal" law should apply – a much more lenient approach. The court found in favor of the Goodmans, and the case was quickly settled.

In June 1999, the second modern-day Holocaust looted art case to reach litigation –

and the first against an American museum -- also settled. *Rosenberg v. The Seattle Art Museum* was filed in July 1998 in Seattle federal court. The case involved the artwork *Odalisque*, a 1928 painting by Henry Matisse, also known as *Oriental Woman Sitting on Floor*.

Paul Rosenberg, one of the most prominent and wealthy art dealers in pre-war France, acquired the *Odalisque* in 1929. Because Rosenberg was Jewish, he fled France for the United States in 1941. The Nazis then seized more than four hundred of his paintings. After the war, Rosenberg returned to Paris and, by the time he died in the late 1950's, managed to recover most of his stolen art. The *Odalisque*, however, was not one of them.

As with the stolen *Degas*, the legal journey leading to the return of the *Odalisque* came about through pure serendipity. In 1997, Hector Feliciano's *The Lost Museum*, a book describing the numerous artworks stolen by the Nazis and found in France, was published in the United States. Feliciano described many of the missing art works, and included a long discussion of the *Odalisque*. Shortly thereafter, the grandson of Prentice Bloedel, a Canadian timber magnate, was at a party in Seattle, and happened to be flipping through the pages of Feliciano's book, lying on the party host's coffee table. He spotted a photograph of the *Odalisque*, and recognized it as a painting that had been hanging for many years at his grandparents' country home. A year earlier, the Bloedel family had donated the painting the Seattle Art Museum, commonly known by its acronym SAM. The Bloedels then contacted Feliciano. He informed Paul Rosenberg's heirs.

In August 1997, the Rosenberg heirs contacted SAM, informing them of their ownership claim upon the *Odalisque*. In July 1998, the heirs brought suit for the recovery of the painting. In June 1999, while the litigation was ongoing, SAM agreed to return the painting to the Rosenberg family.

The next, and without a doubt the most famous, Holocaust looted art case was the

litigation over the Schiele paintings on loan from Austria to New York's Museum of Modern Art (MoMA). From October 1997 to January 1998, MoMA held an exhibition of artwork by the Austrian modernist painter Egon Schiele, made up of 150 works of art on loan from the Leopold Museum in Austria. Among the Schiele works were two of his paintings, *Dead City III* ("Dead City") and *Portrait of Wally* ("Wally"). The Schiele exhibition was a great success for MoMA. However, as the exhibition was winding down, the heirs of two Holocaust victims contacted MoMA with a most unexpected accusation. *Dead City* and *Wally* were Nazi-stolen artworks. On December 31, 1997, five days before the exhibition was to close, the museum was informed that *Wally* was stolen from Lea Bondi Jaray ("Bondi"), an Austrian Jewish art dealer who fled Austria in 1938. *Dead City* was stolen from Fritz Grunbaum, also an Austrian Jew, who did not survive the war.

The Bondi and Grunbaum heirs requested the museum to hold on to the paintings, allowing them to remain in New York pending determination of their true ownership. MoMA replied that it would deny these requests. Although MoMA expressed sympathy for the claims, Lowry explained that MoMA's loan agreement with the Austrian government required the museum, upon conclusion of its exhibition, to ship the paintings back to Europe.

In a usual stolen property case, a party who seeks the return of alleged stolen property seeks injunctive relief barring its removal from the jurisdiction, but this was unavailable to the heirs because New York law bars parties seeking recovery of a stolen artwork from seeking such relief.

The heirs tried another route. They contacted the New York District Attorney's office. Robert Morgenthau, the Manhattan District Attorney, sprang into action. Hours before the paintings were to be returned to the Austrian government, the District Attorney was able to stop their departure from New York by

impaneling a state criminal Grand Jury which issued a subpoena ordering MoMA to appear as a witness before it, and to produce the two paintings, thereby effectively preventing their departure. MoMA filed legal proceedings in New York State court to quash the subpoena.

In May 1998, the New York Supreme Court judge presiding over the case ruled in favor of MoMA. The District Attorney appealed. In March 1999, the Appellate Division of the New York Supreme Court reversed the decision. *See In re Application to Quash Grand Jury Subpoena Duces Tecum (People v. The Museum of Modern Art)*, 688 N.Y.S.2d 3 (1998). The appellate court held that a subpoena to appear before a Grand Jury and produce evidence did not constitute "seizure" and therefore the issuance of a subpoena upon MoMA was not violative of Section 12.03 prohibiting "a seizure ... upon any work of art." *Id.* MoMA appealed from this ruling. In September 1999, The New York Court of Appeals, the highest court in New York State, reversed the appellate court.. *People v. The Museum of Modern Art*, 93 N.Y.2d 729 (1999). It held that the anti-seizure law permits no exceptions, and applies to any legal proceedings that would result in keeping the paintings in New York beyond its agreed-to loan period. In this case, the court held, because the criminal subpoena issued by the Grand Jury led to an indefinite detention of the paintings in New York, it amounted to a "seizure" of the artworks.

The decision did not sit well with state legislators. In May 2000, the New York State legislature unanimously enacted an amendment to ACAL 12.03, clearly announcing that the law only prohibits seizure in civil, and not criminal proceedings. The amendment was passed despite strong opposition from New York museums. On May 25, 2000, Governor George Pataki signed the legislation into law.

The amendment, however, came too late to be of practical significance to the loaned Schiele works. *Dead City* was shipped back to

Vienna, where it is now safely ensconced at the Leopold Museum. However, within hours of the New York court decision voiding the state subpoena, U.S. Attorney, Mary Jo White, obtained an emergency court warrant allowing the United States Customs Service in New York to seize *Wally*. The federal warrant was issued on the ground that the painting was stolen property knowingly imported into the United States in violation of the U.S. National Stolen Property Act. 18 U.S.C. § 2314 (2000). Contemporaneously with the warrant application, White filed a civil suit in federal court in Manhattan seeking permanent forfeiture of the painting from the Leopold Foundation. Like the warrant, the civil forfeiture action asserted that the Foundation, in violation of National Stolen Property Act, transported *Wally* into the United States knowing it to have been property stolen by Welz. In turn, the Lea Bondi heirs and the Leopold Museum filed competing claims for the painting in the same action.

In July 2000, Judge Michael Mukasey issued his decision in the case, in what is now known as *Portrait of Wally I. United States v. Portrait of Wally*, 105 F.Supp.2d 288 (S.D.N.Y. 2000). In his ruling, he dismissed the U.S. Government's forfeiture case. Judge Mukasey found that the case could not proceed since, under federal law, *Wally* was not stolen property when it was brought into the United States for the MoMA exhibit. According to the court's reasoning, even if the painting was stolen when it was taken from Lea Bondi, it ceased to be stolen property when it was recovered by the U.S. Army from Welz. As a result, the legal predicate that would trigger the National Stolen Property Act -- the property at issue must be "stolen" -- was missing.

White asked Judge Mukasey to reconsider his decision and the opportunity to reargue the case to convince him that he made a mistake. Alternatively, White asked Judge Mukasey to reopen the case, take away his final judgment dismissing the action, and allow the government to file a new complaint in the case -

- in effect to start the forfeiture proceedings anew. The strategy for the last request was to file another complaint that would now make the Government's allegations fit the requirements of the National Stolen Property Act -- *i.e.* to make *Wally* "stolen property."

In December 2000, Judge Mukasey issued *Portrait of Wally II. United States v. Portrait of Wally*, 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000). The motion for reargument was denied. Surprisingly, however, he allowed the U.S. Government to file a new complaint in the case. As explanation for his unusual decision Judge Mukasey noted that "[t]his is not [an] ordinary case ... This case involves substantial issues of public policy relating to property stolen during World War II ... There are more interests potentially at stake here than those of the immediate parties pursuing this lawsuit. *Id.* The next month, the U.S. Government filed its Third Amended Complaint.

In April 2002, twenty-one months after his first decision and over a year after the U.S. Government filed its new complaint, Judge Mukasey issued *Portrait of Wally III. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002). Reversing his ruling of almost two years earlier, the judge now held that *Wally* indeed was "stolen property" under federal law. In this latest opinion, Judge Mukasey also dismissed the jurisdictional arguments made by the Leopold Foundation, MoMA and Austria, which filed an *amicus* briefs. In another defeat for Austria, Judge Mukasey denied defendants' motion to dismiss the Bondi heirs from the lawsuit. Last, he dismissed the separate claim of the grandson of Bondi's husband to the painting.

It was a stunning reversal. Austria's Leopold Foundation will now be forced to go to trial to determine which competing claimant is the rightful owner *Wally*. Once decided, the painting, now in storage with the U.S. Customs Service, will be turned over to its proper owner.

In July 1999, a fourth Nazi-stolen artworks case was filed in New York. The case, *Warin v. Wildenstein & Co., Warin v.*

*Wildenstein & Co.*, No. 115413-99 (N.Y. Sup. Ct. July 27, 1999), involves eight rare medieval Christian manuscripts valued at approximately \$15 million; and the parties are well-known personalities in the art world.

The manuscripts are *Books of Hours*, compilations of devotional prayers that are hand-written on parchment with elaborately designed color illustrations of religious subjects. Commissioned by wealthy European families during the Middle Ages, they date back to the 15th through the 17th centuries. The manuscripts are now in the possession of Wildenstein & Co., a legendary Manhattan art gallery.

The manuscripts allegedly belonged to Alphonse Kann, a renowned Jewish art collector in France. The lawsuit alleges that the manuscripts were part of Kann's collection of twelve hundred artworks, stolen by the Nazis from his villa in 1940 on the outskirts of Paris, after Kann left France for England. The defendants in the New York litigation, then 81-year old (and now deceased) Daniel Wildenstein and his two sons, Alec and Guy, maintain that the manuscripts did not belong to Kann. Rather, the Wildensteins claim that the medieval prayer books were part of the personal collection of Georges Wildenstein, their family patriarch, also Jewish, whose Paris art gallery was likewise looted by the Nazis. While Alphonse Kann fled in 1940 from France to England, Georges Wildenstein came to New York, where he reestablished his art empire.

In September 2001, Judge Marilyn Diamond of the New York Supreme Court, the trial judge presiding over the case, denied the defendants Wildenstein's motion for summary judgment on the grounds that the action was time-barred. In April 2002, the appellate division affirmed her ruling. *Warin v. Wildenstein & Co., Inc.*, 740 N.Y.S.2d 331 (2002). The case is now back before Judge Diamond proceeding through the pre-trial process.

Finally, Austria is also a party to another infamous Holocaust art lawsuit. The lawsuit involves six paintings of Austrian painter Gustav Klimt. The claimant is Maria Altmann, in her late 80's and living in Los Angeles. (See [www.adele.at](http://www.adele.at)) Altmann is the niece and heir of Adele Bloch-Bauer. Adele and her husband Ferdinand Bloch-Bauer were prominent Austrian Jews, living the life of *bon vivants* in pre-war Vienna. The couple were friends of Klimt, and Adele posed as one of his models, including being the subject of some of the paintings in dispute. The paintings have the following titles: *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Amalie Zuckermandl*. The paintings are now hanging in the Belvedere Gallery (the Austrian National Gallery) in Vienna.

Adele Bloch-Bauer died at age 43 in 1925, of meningitis. In her will, executed two years earlier, she named five of the Klimt paintings in dispute (and one other) and asked that Ferdinand donate them to the Austrian Gallery upon his death. In 1936, Ferdinand delivered one of the six paintings named in the will (and not subject to this litigation) to the Gallery. In 1938, in the aftermath of the *Anschluss*, Ferdinand fled Austria to Switzerland. Upon Ferdinand's flight, the Nazis raided and stole his possessions, including his home, his business and his artwork. Some of the Klimt paintings went to the Austrian Gallery and others to other Austrian museums. Ferdinand died in 1945, several months after the war ended. In his last will, written shortly before he died, he did not make any bequests to the Gallery or to any other Austrian institution.

After the war, Ferdinand hired Dr. Gustav Rinesch, an Austrian lawyer and family friend, to locate family property seized by the Nazis. After Ferdinand died, the three Bloch-Bauer heirs continued to retain Rinesch to recover their family's possessions, including the stolen artworks. In 1948, Rinesch negotiated a deal, whereby the heirs made a "donation" of

the Klimt paintings mentioned in Adele's will to the Austrian Gallery in exchange for receiving an export license to bring out of Austria other artworks of the family. Rinesch also acknowledged in writing the validity of Austria's claims to the paintings. According to Maria, neither she nor the other three heirs were ever aware of this deal. She always believed that the other Klimt paintings were donated by her aunt and uncle to the Austrian Gallery before the war.

In 1998, in the midst of the *Schiele* controversy, the Austrian government opened up the Austrian Gallery's archives to private researchers to independently confirm that Austria does not possess wartime-looted artworks. Among other things, researchers revealed not only the 1948 agreement, but also correspondence that indicated it had been a coercive process involving the export permits for their other belongings.

Later that year, a new Austrian restitution law was enacted aimed to return artworks that had been donated to Austrian museums after the war under the coercive policy of withholding export permits. Maria Altmann, as the sole surviving Bloch-Bauer heir, contacted Austria for the return of objects that were kept by the post-war Austrian government under the coercion program, including the Klimt paintings.

In June 1999, the Advisory Board created under the law rejected Altmann's claim to the Klimt paintings, deciding that the Klimt paintings were not coerced from the family but legally came to the Austrian Gallery under Adele's 1923 will and Ferdinand's orally expressed intentions before he fled Austria that the paintings would go the Austrian Gallery upon his death, in accordance with Adele's wishes.

Altmann's attorney proposed to Austria that the matter be resolved by private arbitration between the Austrian Gallery and Altmann. Austria declined. Altmann then prepared to sue in Austria. Here, a major practical problem

arose. Under Austrian law, as in many other countries, a party filing a lawsuit is required to deposit with the court a filing fee amounting to a percentage of the amount sued. The filing fee in Austria is 1.2% of the value of a plaintiff's claim. Because the artworks were worth approximately \$150 million, Altmann was required to deposit a filing fee of \$1.8 million with the court to have her lawsuit heard. A retired dress shop owner, she was unable to do so, and asked for special relief from the Austrian court. The Austrian court granted her a partial waiver, but the reduced fee still amounted to all of her available assets, approximately \$200,000, an amount she maintains she could not pay. Altmann decided to drop her lawsuit in Austria, and, in August 2000, filed her lawsuit in federal court in Los Angeles.

The Austrian defendants asked the court to dismiss this lawsuit on sovereign immunity grounds. Here, Altmann had no choice but to sue Austria and the Austrian Gallery, which under the FSIA, is considered "an agency or instrumentality" of the foreign state.

Judge Florence-Marie Cooper, on May 4, 2001, ruled in favor of Altmann. Judge Cooper found that the suit fell within three exceptions to the general rule of sovereign immunity in the FSIA: (1) property taken in violation of international law, (2) where that property is owned or operated by an agency or instrumentality of the foreign state, and (3) that agency or instrumentality is engaged in commercial activity in the United States.

Austria and the Austrian Gallery took an interlocutory appeal from Judge Cooper's denial of their motion. Before the Ninth Circuit, Austria argued that in denying Austria's motion to dismiss, the district court did not treat Austria fairly, *i.e.* in the same manner that the United States would be treated if our nation and one of its museums was sued in Austrian courts. On March 20, 2002, the appellate panel, took the unexpected step of ordering Altmann and Austria to enter into mediation. This decision



broke new ground. It is the first time that a federal appellate court had ordered a foreign nation to take part in mediation proceedings. Austria, however, was not ready to budge. Only one mediation conference was held, after which the mediation unit at the Ninth Circuit informed the judges that settlement efforts proved fruitless. The case was resubmitted to the three appellate judges for a decision and is still pending.

#### **E. The Case of the Hungarian Gold Train**

The most recent addition to the Holocaust-Era litigation is a case involving Hungarian Jewish assets that were intercepted by the American army near the end of the war. After the German invasion of Hungary in March 1944, Jewish assets were seized in that country. In late 1944 and early 1945, these assets were loaded into a train to be shipped to Germany. The train was intercepted outside Salzburg, Austria by the U.S. Army on May 11, 1945. The property was stored in Salzburg for time, but in 1946, the U.S. Government (despite claims to the contrary from Hungarian survivors) declared it unidentifiable, and disbursed it in various ways that were unknown to the original owners at the time or during the intervening years.

In October 1999, however, a Presidential Advisory Commission released a report on the disposition of the train's assets, and survivors and their heirs subsequently filed suit against the United States for reparations. The complaint alleged three causes of action: 1) an unconstitutional taking under the Fifth Amendment, 2) breach of implied contract of bailment, and 3) violation of international law. The U.S., no differently from the European defendants, moved to dismiss based on lack of jurisdiction, failure of the plaintiffs to state a claim, and that the claims were time-barred.

On August 28, 2002, the District Court for the Southern District of Florida issued its first ruling in the case. Although it dismissed the

Fifth Amendment claim because the plaintiffs were not American citizens (at least not at the time of the event), it also held that the other two claims were not time-barred, through the principles of equitable tolling. Thus, plaintiffs will have an opportunity to proceed on the basis of the contract and international law claims.

### **III. WORLD WAR II-ERA CLAIMS AGAINST JAPANESE COMPANIES**

The suits for Holocaust restitution have now led to claims being filed against Japanese corporations for their use of captured soldiers and civilians as slaves during World War II. Aging victims of Japan's wartime activities began filing their lawsuits in American courts only after seeing the successes achieved by their counterparts in the Holocaust litigation.

Approximately 25,000 American prisoners of war were shipped to Japan and Japanese-occupied Asia to work for private Japanese companies. See Linda Goetz Holmes, *Unjust Enrichment: How Japan's Companies Built Postwar Fortunes Using American POWs*, (Stackpole Books 2001), p. xvii. Additionally, the Japanese captured tens of thousands of British, Canadian, Australian and New Zealander soldiers, who also toiled as slave laborers for Japanese industry, along with local Chinese, Korean, Vietnamese and Philippine civilians. These companies are now some of the largest corporate concerns in the world: Mitsubishi, Mitsui, Nippon Steel, Kawasaki Heavy Industries, and at least forty other Japanese corporations.<sup>5</sup>

The first World War II Pacific Theatre restitution lawsuit was filed in July 1999, by former POW Ralph Levenberg against Nippon Sharyo Ltd. and its U.S. subsidiary. Eventually, victims of Japanese slave labor filed over two-dozen lawsuits against numerous Japanese corporations that had employed slave labor during the war. This litigation gravitated to California, as a result of a state law enacted in July 1999, permitting an action by a "prisoner-

of-war of the Nazi regime, its allies or sympathizers” to “recover compensation for labor performed as a Second World War slave victim . . . from any entity or successor in interest thereof, for whom that labor was performed. The California statute extended the limitations period for filing such lawsuits until 2010.

On September 21, 2000, Judge Walker of the Northern District Court of California dismissed the lawsuits filed by American, British, Australian and New Zealand POWs. *In re World War II Era Japanese Forced Labor Litigation*, 114 F.Supp.2d 939 (N.D. Cal. 2000). The court held that the United States, in the 1951 Peace Treaty with Japan, waived, on behalf of itself and its nationals, all claims arising out of actions taken by Japan and its nationals (including private Japanese corporations) during the war. In September 2001, Judge Walker dismissed the claims of Chinese, Filipino and Korean civilian internees as well. In a 44-page opinion, the court held that the California state law, Cal. Code of Civil Procedure Section 354.6 authorizing such slave labor claims in California courts, was unconstitutional as an infringement on the powers of the federal government to conduct foreign policy. Without the aid of the California law extending the statute of limitations to 2010, the claims were time-barred.

Critical to the court’s rulings was the appearance of the United States government in the litigation. In a Statement of Interest filed with the court, the United States asserted that the above-quoted language of the 1951 Peace Treaty barred claims of the Allied POWs. The court emphasized the “significant weight” to be given to the U.S. government’s statement of interest. The position taken by the U.S. government in the Japanese litigation differed significantly from the position it took in the Holocaust litigation. In the Holocaust slave labor litigation, the government only advised the court that negotiations to compensate the former slave laborers of the German companies were

under way. For the Japanese slave labor claims, however, the U.S. government not only sided with the Japanese companies, but, to date, has failed to press Japan and its private industry to recognize the same type of claims that it forced Germany and its private industry to resolve.

Subsequently, the U.S. government filed two more Statements of Interest, urging that cases filed by (1) alien civilians against private Japanese companies similar to the claims of the allied POWs and (2) claims by sex slaves of the wartime Japanese army - the so-called “comfort women” - also be dismissed. In October 2001, federal district court in Washington, D.C., dismissed the lawsuit filed by the “comfort women” against Japan. All the cases are now on appeal.

As of August 2002, it appears that the restitution movement against the Japanese companies (and Japan) is not achieving the same favorable results as those achieved in the restitution movement launched against the European companies (and European governments) for their wartime activities. While millions of aging Jewish and non-Jewish survivors in the United States and abroad are finally receiving some measure of justice for the wrongs committed against them during World War II by European enterprises, aging POWs and civilians who suffered at the hands of the Japanese industry are being denied the same treatment.

#### **IV. INSURANCE CLAIMS ARISING OUT OF THE ARMENIAN GENOCIDE**

During the Turkish Ottoman Empire, Armenians and other minorities purchased insurance policies from European and American insurance companies that had marketed their policies in the region. Many of the Armenian purchasers perished in the Armenian genocide during and after World War I. Their relatives, some of whom survived the genocide as young children but are now quite elderly, sought

payment from the insurers, claiming that payments was never made.

The first, and to date only, lawsuit filed on these insurance claims, *Marootian v. New York Life Ins. Co.*, was brought by twelve elderly Armenians, all but one of whom resides in the United States, against the American insurance giant New York Life Insurance Company. The insurance company did not dispute that it sold such policies to the Armenian population in Ottoman Turkey. It argued, however, that the suit should be dismissed because all of the policies contained forum selection clauses mandating that if a dispute ever arose about the policies, they would be resolved either before French or English courts. An additional problem was that policies were written and allegedly unpaid almost a century ago, so New York Life could argue that the lawsuits were time-barred.

In 2001, the California legislature enacted a statute similar to the statutes it passed in response to the World War II-era insurance and slave labor litigation. The statute, first, allows suits to collect premiums on Armenian genocide-era policies to be heard in California courts, despite the forum-selection clauses in the policies, and, second, extends the limitations period of such suits to 2010.

In an attempt at damage control, New York Life tried to settle the case, offering \$15 million. While the media initially reported that the case settled for that amount, plaintiffs ultimately rejected New York Life's offer as being insufficient.

Failing to settle, New York Life pressed on with its motion to dismiss. In a significant victory for plaintiffs, in December 2001, Los Angeles federal judge Christina Snyder denied New York Life's dismissal motion. In her decision, Judge Snyder held that, despite the English and French forum-selection clauses in the policies, the case could be tried in federal court in California. "The Court finds that enforcement of the forum-selection clauses in the NYLIC life insurance policies which are the

subject of this action would be fundamentally unfair." *Marootian v. New York Life Ins. Co.*, 2001 U.S. Dist. LEXIS 22274 [\*53] (Nov. 30, 2001). In June 2002, the case entered the discovery stage, and trial is set to begin in spring 2003.

## V. THE CALL FOR AFRICAN-AMERICAN REPARATIONS

One of the most interesting consequences of the Holocaust restitution litigation has been to give fresh impetus to the call for payments to African-Americans by the U.S. government for slavery which ended with the Civil War. African-American Reparation proponents specifically point to the payments now being made for WWII-wrongs as precedent for their cause.

In 1999, prominent African-American activist Randall Robinson published *The Debt*, which forcefully argued for slavery reparations. The book's theme, however, did not gain much interest outside the African-American community until Robinson and others began to use the Holocaust restitution movement as a model for their cause. Robinson now was able to entice superstar attorney Johnnie Cochran to join the cause, and the talk now is of putting together another "dream team" of lawyers – this time to file suit for African-American slavery restitution.<sup>6</sup>

The call for African-American reparations presently has much momentum. The issue has been featured on all the major American television networks and lengthy and incisive articles have been written about it, including a recent piece in the *New York Times* and a cover story in the leading American law magazine, the *ABA Journal*. *Roots & Reparations*, *ABA Journal*, November, 2000.

In 2001, California enacted a law forcing American insurance companies who sold policies insuring slaves as chattel to disclose information about such policies. *Cal. Insurance Code* §§ 13811 - 13813. In May

2002, following the mandate of the California law, five American insurance companies reported that they insured slaves: Aetna, Inc., American International Group, Inc. (AIG), Manhattan Life Insurance Company, New York Life Insurance Company and Royal & Sun Alliance.

The first lawsuit was filed in March 2002 by Ed Fagan. Joining Deadria Farmer-Paellmann, a 36-year-old long-time African-American reparations activist and who in 2000 exposed Aetna's slave insurance policies, Fagan filed his class action lawsuit in federal court in Brooklyn. Farmer-Paellman, on behalf of herself and nearly forty million African-Americans in the United States, sued Aetna and two other name-brand corporations, Fleet Boston Financial Corp. and CSX Corp. (the largest railroad on the East Coast), claiming they profited from slave labor. Apparently, Fleet and its predecessor, The Providence Bank, provided financing for the ships that brought the slaves to the New World. CSX's predecessors used slaves to construct railways across the United States. The suit sought unspecified damages, but Fagan and Farmer-Paellman declared that they would be asking for \$1.4 trillion, the figure alleged to represent the current value of unpaid African-African slave labor and interest.

The next month, the Fagan team filed a second lawsuit, in New Jersey federal court, adding as defendants New York Life, investment firm Brown Brothers Harriman & Co, and railroad Norfolk Southern Corporation. The reparation lawsuits seek to create a "Fund for the African-American People," which can be used to ensure the existence of a vital African-American community in the future.

#### **IV. REPARATIONS FROM APARTHEID SOUTH AFRICA**

Victims of apartheid in South Africa are now seeking compensation from Swiss, German and American institutions who did business in

South Africa during the apartheid years and directly benefited from the apartheid system. Already, Fagan has allied himself with a group of South African lawyers, and this legal team filed a series of class action lawsuits in summer 2002 in federal court in New York and in Swiss courts. Named as defendants are the Holocaust class action lawyers' old nemeses: Switzerland's UBS and Credit Suisse; Germany's Deutsche Bank, Dresdner Bank and Commerz Banks; and also American corporate giants Citibank and IBM. In a throwback to the accusation made against IBM for its dealings with Nazi Germany, IBM is accused of supplying South Africa with computer technology as early as 1952 used to perpetuate the system of institutionalized racial discrimination and repression in apartheid South Africa. In a repeat of the Holocaust restitution scenario, Hausfeld has aligned himself with different group of South African lawyers and activists to pursue similar litigation.

The recently-filed South African apartheid lawsuits are an example of a historical wrong that should not have to wait fifty years or longer for redress. Multinationals that benefited from the apartheid system as late as the 1980s are being sued now.

## VII. **LEX AMERICANA: OTHER MOVEMENTS ADOPTING THE HOLOCAUST RESTITUTION MODEL**

The new trend by governments and corporations to finally “come clean” about the wrongs they committed in the past would not be occurring without the spotlight being shined on their activities through the lawsuits in the United States. American law, in the words of Professor Burt Neuborne, has become *Lex Americana*, being imitated throughout the world, with the Holocaust restitution cases becoming the leading model for victims and their representatives seeking to right past wrongs.

Currently, there are over a half-dozen campaigns being waged in both the United States and abroad for recognition and some measure of compensation stemming from past historical injustices. All are claiming inspiration from the American litigation model represented by the Holocaust restitution movement, and seeking to emulate the results achieved by the Holocaust restitution activists. These include:

**1. Bracero Workers** – claims for unpaid wages by Mexican nationals who worked as temporary guest workers [*braceros*] in the United States during World War II, when an estimated 400,000 Mexican nationals helped to fill jobs left vacant by U.S. workers fighting the war. The class action lawsuit, filed in 2001 in federal court in San Francisco, against the Mexican and U.S. governments, along with four banks, claims that the *braceros* are owed at least \$500 million, including interest, for a portion of the wages withheld from them by the defendants. The attorneys for the bracero plaintiffs are specifically pointing to the compensation obtained by the former German slave laborers as precedent for their suit. Attorneys (which include former Clinton Administration civil rights chief Bill Lann Lee)

say the cases “are similar because they involve not reparations but assets withheld through alleged complicity of foreign governments and financial institutions.”

**2. Sudeten Germans** – claims by Sudeten Germans expelled from Czechoslovakia after World War II as being “enemies of the Czechoslovak people” for properties lost in the aftermath of their expulsion. These former Czechoslovakian citizens and their heirs--a significant number of whom were Nazis or benefited from Nazi Germany’s occupation of Czechoslovakia and who were driven from Czechoslovakia *en masse* at the end of World War II as revenge for the horrors of the Nazi regime--are claiming that, like Holocaust survivors and heirs, they are likewise entitled to compensation and restitution. For more info *see Sudetendeutsche Landsmannschaft/Sudeten German Heritage Union*, at <[www.sudeten.de](http://www.sudeten.de)>

**3. Gurkhas** – claims by the famed Gurkhas from Nepal, known for their ferocity on the battlefield and serving in the British military, for discrimination in pay, promotion and other benefits which they claim were denied to them during their military service in the British Army. Their lawyer is Cherie Booth, QC, wife of British Prime Minister Tony Blair, and a leading human rights advocate of her own right.

### Endnotes

<sup>1</sup> The presumptions are labeled Exhibit A, and are available on the CRT II website, [www.crt-ii.org](http://www.crt-ii.org).

<sup>2</sup> A substantial reason for settlement of these individual suits in California has been the aggressive stance taken by California against the insurers accused of failing to honor Holocaust-era insurance claims. California led the way in enacting new laws threatening suspension of licenses of such insurers (California Insurance Code Sections 790-790.15,

enacted in 1998), requiring the insurers to open their pre-war insurance records (California Insurance Code Section 3800, enacted in 1999), and extending the limitations period for filing suits for such claims until 3 December, 2010 (California Code of Civil Procedure Section 354.5, enacted in 1998). The states of Washington and Florida have followed suit by enacting similar statutes. *See* Holocaust Victim Insurance Act, Fla. Statutes, chapter 626.9543 (1999); Holocaust Victims Insurance Relief Act, Wash. Revised Code Section 48.04.060 (1999) and Holocaust Victims Insurance Act, Wash. Revised Code Section 48.04.040 (1999). The insurance companies have challenged these statutes, asserting that they are unconstitutional. To date, no final ruling has been issued on this question.

planning to file suit. *See* <[www.ncobra.com](http://www.ncobra.com)>.

<sup>3</sup> INTERNATIONAL MONITOR, Aug. 2000, p. 1, available at <[www.comptroller.nyc.gov](http://www.comptroller.nyc.gov)> (website of the Office the New York City Comptroller Alan G. Hevesi).

<sup>4</sup> Besides the former slave laborers, individuals upon whom the Nazis performed medical experiments also began receiving moneys in 2002, most of whom also qualified for payments as slave laborers. Approximately 4,400 claimants sought compensation under the Medical Experiments portion of the German Fund. *See* 34 *University of Richmond Law Review*, 249-256 (medical experiments claims), 256-258 (*kinderheim* claims).

<sup>5</sup> The U.S. government-created Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (“IWG”) is now searching through U.S. archives to ferret out, among other matters, information detailing the wartime activities of Japanese companies. *See* <[www.nara.gov.iwg](http://www.nara.gov.iwg)>, detailing the work of the IWG.

<sup>6</sup> The formal name of the legal team is “The Reparations Coordinating Committee.” Tamar Levin, *Calls for Slavery Restitution Getting Louder*, New York Times, June 4, 2001, at 1. A separate legal team, the “Reparations Litigation Committee,” established by the National Coalition of Blacks for Reparations in America (N’COBRA), is also

### 13. The Cavallo Case and the Future of Universal Jurisdiction

By: Ellen L. Lutz and Naomi Roht-Arriaza\*

The future of “universal jurisdiction” -- the legal principle that allows the courts of any country to try perpetrators of certain horrendous crimes no matter where they were committed.-- may be decided not in Spain or Belgium where most of the indictments have been brought, but by the Mexican Supreme Court. That Court will soon decide whether to extradite to Spain Ricardo Miguel Cavallo, an Argentine citizen accused of participating in over 200 cases of torture and disappearances during that country’s “dirty war” in the 1970s. Like General Augusto Pinochet, Cavallo has been charged by Spanish Judge Baltazar Garzón with genocide, terrorism, and torture.

Cavallo worked at Argentina’s notorious Navy Mechanics School -- called ESMA after its Spanish initials -- run by a special task force under the command of Argentine military junta leader Admiral Emilio Massera. Some 5000 of Argentina’s “disappeared” were held here. Cavallo’s jobs included locating and picking up those tagged for arrest by the machinery of terror, and later supervising the “Fish Tank,” a part of the camp where those prisoners deemed susceptible to “reeducation” worked as slave laborers repairing stolen electronic booty, clipping newspapers, or keeping the camp clean. Ironically, because Fish Tank prisoners were not killed, there were more ESMA survivors to testify against Cavallo than there would have

been had he worked elsewhere.

One of the tasks Cavallo oversaw was the fabrication of false identification papers so that military agents could travel freely. After he returned to civilian life, Cavallo turned this set of skills into a career. His initial capital came from money victims allege he and other Navy officers garnered from the Argentine terror machine practice of forcing detainees and their families to sign over deeds to property and bank accounts. With this stake, he and his associates established a business, TALSUD, that obtained contracts with the governments of Bolivia, El Salvador, Paraguay, Uruguay and Zaire to create a variety of national licensing and vehicle registration services. In 1999 a consortium headed by Talsud was awarded a contract to establish a national vehicle registry for Mexico.

Automobile trafficking is a serious criminal problem in Mexico. The government estimates that some two million of the country’s fourteen million vehicles were smuggled from the United States. Mexicans regularly worry about car theft and feel that police or other officials offer little recourse if their vehicles are stolen. In the 1990s succeeding Mexican administrations embraced privatization as a solution to Mexico’s economic ills, and in 1998, President Ernesto Zedillo convinced the Mexican Congress that it could cut costs and make it more difficult for stolen cars to be traded on the black market by creating a national automobile registry that would be contracted out to private entrepreneurs.

The new enterprise, named RENAVE (the Spanish acronym for National Vehicle Registry), was controversial. It increased the fees Mexicans paid to register their cars, and in the waning days of the PRI government many ordinary Mexicans suspected corruption. Moreover, registration entailed giving a lot of personal information to the government. Skeptics of every political stripe speculated that the whole operation was just a cover to facilitate

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the work of car theft rings. It also would be handy for money launderers who could register non-existent cars and then claim to sell them to explain their sudden wealth. Many state and local governments refused to participate.

Raul Ramos Tercero, Deputy Minister of Mexico's Ministry of Commerce and Industrial Development (SECOFI) was responsible for running a fair and open public tender before awarding the RENAVE contract. Long before Cavallo's identity was revealed, competitors who lost out to the TALSUD consortium cried foul. They claimed the process did not comport with the requirements of Mexico's constitution, that ministers from other key cabinet ministries who sat on RENAVE's board did not attend the session at which the winning consortium was selected, and that the TALSUD consortium was not the low bidder. Ramos retorted that while TALSUD may not have been the lowest bidder, it was the most innovative. The TALSUD-led consortium was the only competitor to propose using smart card technology to identify vehicles and maintain a continuously updated database that not only could track a car's ownership history, but increase the likelihood of collecting on tax payments and fine revenues.

To counter public and political resistance, SECOFI enlisted Cavallo to appear in a series of television ads extolling the virtues of RENAVE. Someone tipped off the editor of the respected daily Mexican newspaper *Reforma* to look into the past of TALSUD and its director. José Vales, *Reforma's* Buenos Aires correspondent, began digging and in the archives of the Center for Legal and Social Studies (CELS), an Argentine think-tank started by human rights activists, he found an old photo of someone named Miguel Angel Cavallo, taken in the 1970s by Victor Basterra, who had worked in the false I.D. shop while an ESMA prisoner.. The photo also had a number: -- 6,275,013 -- that matched the Argentine

identification card Ricardo Miguel Cavallo had used to obtain his residency permit in Mexico. Vales then reviewed the lists of known perpetrators that appeared in several books published in the mid-1980s in Argentina. He found one that listed a Miguel Angel Cavallo, alias Serpico, or Marcelo, or Ricardo. After checking the photo with other former ESMA prisoners, all of whom identified Cavallo, *Reforma* decided to break the story of his true identity

On the day the story broke, the head of the Mexican branch of INTERPOL, Juan Miguel Ponce Edmonson, read the *Reforma* story. Knowing that Spain was interested in trying senior Argentine military officers responsible for dirty war crimes, he decided to check the flights leaving that day for Argentina. He found that there was only one, via Cancun, and that Cavallo's name was on the passenger list. Cavallo had used a false name in Mexico and he was a serious flight risk. That was enough to arrest and hold him for 48 hours. Ponce ordered a deputy to intercept the flight in Cancun and detain him.

Word of Cavallo's arrest in Mexico provoked a flurry of phone calls and e-mails between Spain, Mexico, and Argentina. It was the 24<sup>th</sup> of August, a Friday during the height of Europe's summer vacation season. Judge Garzon, like most of the lawyers involved in the Argentine and Chilean cases in Spain, was out of town. But after a tense twelve hours, Judge Ruíz Polanco, the substitute judge on duty, signed a warrant for Cavallo's arrest and faxed it to Mexico.

Once he was in jail, rumors and conspiracy theories began to swirl around the Cavallo *affaire*. The most widely-shared involved a vendetta by the "dinosaur" old guard of the PRI that wanted to pay back then-president Ernesto Zedillo for loosening up the political system and thereby losing the election for the PRI. An alternative theory held that Cavallo was incidental to a fight over RENAVE



among Zedillo's ex-cabinet ministers, some of whom bitterly opposed privatizing more public services. Cavallo's arrest was intended to sink RENAVE. A third variant was that the whole matter was a fight between rival car theft rings, one of which had ties to Cavallo.

The rumors and conspiracy theories got a boost in the weeks following Cavallo's arrest. Deputy Minister Raul Ramos Tercero, reacting to political unwillingness to participate in RENAVE, claimed that powerful interests with much to lose if their lucrative car smuggling operations were interrupted were behind popular opposition to RENAVE. Days after Cavallo's arrest, Interpol's agent in Cancun, who carried out the arrest, was himself arrested on car theft charges. On September 6, Raul Ramos Tercero's body, with razor cuts to his throat, wrists and legs, was found on a forested hillside on the outskirts of Mexico City. While the death was ruled a suicide, some of the language in the notes left skeptics wondering whether the cause of Ramos' death was being covered up as well.

The fallout from Cavallo's arrest challenged President Zedillo's lame duck administration. Competitors who lost out in the bidding claimed they had informed the Mexican government of Cavallo's past at the time the contract was awarded to the TALSUD-led consortium. Although the government claimed that it had done an adequate background check on Cavallo's business experience and had received letters supporting his reputation from the Argentine and Salvadoran governments, the Mexican government took over RENAVE and canceled the consortium's contract. In doing so it became liable for millions of dollars in damages to the consortium and vulnerable to lawsuits from other bidders as well.

Meanwhile, officials in Zedillo's Foreign Affairs ministry were torn about how to respond to Spain's extradition request. Many were uncomfortable about the potential

implications for Mexican sovereignty and its relations with Argentina if Cavallo were extradited. At the same time, coming on the heels of the Pinochet case, no one wanted Mexico to be seen as harboring a Southern Cone torturer. To decide how to proceed, they turned to the calendar. Under the terms of Mexico's extradition treaty with Spain, Spain had sixty days to explain the basis of its extradition request. Cavallo then had three days to lodge any objections before the request then went before a federal judge for a judicial opinion on whether it met the treaty's requirements. Such an opinion necessarily would take time. That opinion, however, was not binding on the Foreign Ministry, which could override it and make its own determination. The Ministry's word was final, unless the defendant appealed to the courts on constitutional grounds. Zedillo's Foreign Ministry quickly determined that the judicial decision would not be handed down until power had transferred to Vicente Fox and the PAN. They decided to step aside and leave matters to Mexico's courts. If there was to be any political fallout, it would come after they were out of office.

Once the formal request for extradition arrived from Spain, Mexican Judge Jesús Guadalupe Luna Altamirano, took up the case and in December 2000 issued a 345 page opinion to allow Cavallo's extradition on the charges of genocide and terrorism, based on an extensive discussion of international law and legitimacy of universal jurisdiction. He denied jurisdiction for the torture charges on statute of limitations grounds. He found that at the time the offense was committed the normal criminal statute of limitations applied.

In February 2001, Vicente Fox's Foreign Minister, Jorge Castaneda, approved Cavallo's extradition. In addition to backing Judge Luna's decision to allow the genocide and terrorism charges, Castaneda reinstated the torture charges, thereby allowing the case to go

forward in Spain on the easier-to-prove grounds of torture. The Foreign Ministry decision refers extensively to both Mexico and Spain's treaty commitments in the human rights area, but it rests, at heart, on an interpretation of Mexican criminal law involving the cumulation of offenses for purposes of calculating the statute of limitations.

Cavallo then filed a habeas corpus type of writ, known as *amparo*. *Amparo* is a mainstay of Mexican law that provides for judicial review of allegations that the state has violated an individual's constitutional rights. Cavallo hired a new team of lawyers, including an Argentine criminal law specialist with close ties to the Argentine Navy. He began telling the press that if he went to Spain, he would take others down with him: it was not clear whether he meant his ex-military comrades in Argentina or his Mexican business associates, or both. After an intermediate court upheld Judge Luna's ruling, the *amparo* case is now before the Mexican Supreme Court.

If the Mexican Supreme Court decides to extradite Cavallo to Spain for trial, it will mark the first time any country has extradited a defendant solely pursuant to this legal principle, and could provide a substantial precedent for other countries. On the other hand, if the Court determines that he cannot be extradited, the decision – depending on how it is worded – could be a serious blow to the efforts of advocates and non-governmental human rights activists who are trying to persuade governments around the globe to adopt and use this jurisdictional theory. Universal jurisdiction, they argue, is the best means to ensure that torturers, *genocidaires*, and other rights violators at least suffer the stigma of being indicted by a court of law and the inconvenience of being restricted in their ability to travel. It also increases the likelihood that they will be tried and punished either in the courts of the country seeking extradition, or in the domestic courts in the country where the

human rights abuses took place. As the Pinochet case demonstrates, no peaceful, democratic nation wants to appear incapable of rendering justice in cases in which its courts have primary jurisdiction. Even countries with amnesty or immunity laws are likely to find the legal means to try their own wrongdoers rather than face the embarrassment of their trial abroad.

## 14. War on the Court: The International Criminal Court and U.S. Opposition

By: James Ross\*

### Introduction

At a time when the United States is seeking allies to fight international terrorism and calling for “regime change” in Iraq, the Bush administration is conducting a relentless diplomatic campaign against an institution designed to prosecute war criminals and perpetrators of crimes against humanity. The International Criminal Court (ICC) is the most significant development in the promotion of international justice since the Nuremberg Tribunals after the Second World War. It is the realization of a long sought goal to create a permanent judicial forum where the world’s very worst violators of international law can be brought to justice in a courtroom.<sup>1</sup>

The creation of the ICC should have been a moment of American triumph. Instead, for the U.S. government, the ICC represents a dangerous foreign body seeking to impose its own brand of justice on American servicemen and civilians, whether or not the United States is a party to the court, and wherever they happen to be. This article will explore the jurisdiction of the ICC and its procedures for ensuring the fair trial of defendants. It will examine the U.S. government’s objections to the ICC -- and why they are of little merit.

On April 11, 2002, the necessary sixty countries had ratified the Rome Statute of the International Criminal Court (“the Rome Statute”) to bring the treaty into force.<sup>2</sup> This occurred far sooner than those present for the adoption of the controversial Statute in July 1998 had reason to expect. Currently, the

Assembly of States Parties, the body of ICC member states, is engaged in the critical process of choosing the first judges and prosecutors for the court. It is important that the strict set of criteria for the selection of prosecutors and judges -- requiring experts whose reputation, moral character and independence are beyond reproach. An immediate result of the U.S. unwillingness to ratify the Rome Statute is that the United States can neither contribute judges to the ICC nor have any say in who is appointed. The court is expected to be functioning by early 2003. Efforts are well underway in The Hague, the site of the court, to have the physical structure in place by the time the ICC is ready to convene.

### Prosecuting the Most Serious Violators

International concern for the protection of fundamental human rights has grown immeasurably since the Second World War. International instruments such as the Universal Declaration of Human Rights and the four Geneva Conventions of 1949 set out these rights and obligations, but they provide no effective mechanism for enforcing them. Those responsible for the most egregious crimes of the last half-century have generally gone unpunished by the international community. Only since the establishment of the ad hoc international tribunals for the former Yugoslavia and for Rwanda has there been an international forum for prosecuting at least some war criminals. Now, with the creation of the ICC, the problem of global impunity for the worst violators of international law can be addressed more systematically.

The ICC is a court of last resort. It was never intended, nor will it have the resources, to handle a large number of cases. The ICC will have subject matter jurisdiction over war crimes, crimes against humanity and genocide, all of which are defined in the Rome Statute. In the future it may also have jurisdiction over

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crimes of aggression, once that crime is adequately defined. Under what is known as the “principle of complementarity,” the ICC will only have jurisdiction over these offenses when the member country where the crime took place is either unwilling or unable to bring its own prosecution in national courts. This will both ensure that the number of cases reaching the ICC are small and that governments will still maintain the obligation and the right to bring to justice those responsible for the worst crimes on their own soil and before their own courts.

### **ICC Jurisdiction**

The most hotly debated issue surrounding the ICC has been the court’s jurisdiction. The court will not have retroactive jurisdiction and the mechanism for instituting investigations and prosecutions will have tight external controls. Unlike previous international tribunals, including the ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC emphasizes the primary role of national courts in the prosecution of war crimes and crimes against humanity. Nevertheless, in its attempts to gain immunity from the court for U.S. nationals, both the Clinton and Bush administrations have ignored these important safeguards against politically motivated prosecutions.

The jurisdiction of the ICC began on July 1, 2002, the day the Rome Statute entered into force. Only crimes committed after that date are subject to the jurisdiction of the court. Thus, major international crimes committed in the past, whether by Idi Amin or the Khmer Rouge, are not subject to prosecution by the ICC. Past abusers can still be tried in ad hoc tribunals, newly created special “mixed courts” (like the one being set up in Sierra Leone) or by any country willing to try cases of universal jurisdiction (such as now being done in Belgium).

Decisions to investigate and prosecute reside with the prosecutor of the ICC, with important protections. All indictments by the ICC prosecutor require confirmation by a Pre-Trial Chamber of Judges, which will examine the evidence supporting the indictment before it is issued. Both the accused and any concerned countries will have the opportunity to appear before the Pre-Trial Chamber to challenge the indictment.

Under the Rome Statute, the UN Security Council can refer cases to the ICC for investigation and prosecution. The Security Council can also delay prosecutions as well as advance them by asking the prosecutor to suspend any case for twelve months if it feels that ICC proceedings would interfere with its own responsibilities to maintain international peace and security. It was this provision that the United States reinterpreted to gain a Security Council resolution, noted below, that provides a twelve-month suspension on any proceedings against Americans who are UN peacekeepers -- the first of several steps the United States has taken to weaken the court since the Rome Statute went into effect.

The ICC will have subject matter jurisdiction over war crimes, crimes against humanity and genocide. Crimes against humanity had never before been specified in an international treaty, so its detailed inclusion in the Rome Statute is an important addition to international criminal law. The Convention on the Prevention and Punishment of the Crime of Genocide makes mention of an international penal tribunal for the prosecution of genocide, but never established one. The Rome Statute also broke new ground by codifying crimes of sexual and gender violence, including rape, sexual slavery and enforced prostitution, as subject to prosecution as war crimes and crimes against humanity.

The ICC will have personal jurisdiction over crimes committed by nationals of countries who have ratified the Rome Treaty or any

person who commits such crimes in the territory of a ratifying state. The court can prosecute all persons, regardless of their military or political status. Crucially, current government officials, including heads of state or government, are subject to the court's jurisdiction.

The United States has objected to the ICC's jurisdiction extending to nationals of governments who have not ratified the treaty, namely the United States. Because the U.S. is not a party to the Rome Statute, the ICC will only have jurisdiction over crimes committed on American soil if committed by a national of a member state. It will have jurisdiction over Americans who commit crimes on territories of member states. Contrary to U.S. claims, there is nothing unusual in this: U.S. nationals are subject to the jurisdiction of foreign courts whenever they travel abroad. This is a basic and well-established principle of international law. An American who commits a crime in the Netherlands, for example, can be tried by the Dutch courts whether or not any special treaty exists between the United States and the Netherlands.

An important feature of the ICC is called the "principle of complementarity." This means that the ICC does not have primary jurisdiction over national criminal courts, but rather is intended to complement them. States will retain the responsibility and duty to prosecute the most serious international crimes. Only when a state is "unwilling or unable genuinely to carry out the investigation or prosecution" and the case is of "sufficient gravity" will the ICC intervene. Rome Statute, art. 17. That is, a good faith effort by a state to investigate or prosecute a serious case will deprive the court of jurisdiction.

Because the ICC is not intended to replace national courts, they will remain the first line of accountability for prosecuting war crimes and crimes against humanity. One hope is that national courts will gain greater political leverage to prosecute international crimes

themselves and thus forestall an ICC investigation. The Rome Statute envisions efforts to bring national courts in countries that do not meet international fair trial standards up to grade, so that they can obviate the need to remand cases to The Hague. These efforts to improve the administration of justice at the national level may prove to be one of the Rome Statute's most important contributions to international criminal justice.

### **Trial Procedures and Due Process**

The ICC is designed to meet international fair trial standards, such as those found in article 14 of the International Covenant on Civil and Political Rights. Like the ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC contains an amalgam of civil law and common law concepts. Regarding the admissibility of evidence, for instance, the ICC will adopt the flexibility of the civil law system and admit all relevant evidence which has probative value so long as there is no basis for exclusion. While the strict rules (and exceptions) on the exclusion of evidence found in common law systems will not apply, the ICC will exclude evidence obtained in violation of the Rome Statute or internationally recognized human rights if the violation casts substantial doubt on the evidence's reliability or would seriously damage the integrity of the proceedings.

Concerns for the due process rights of the accused were an important consideration in the drafting of the Rome Statute. As a result the ICC contains an extensive list of due process guarantees. While the Rwanda tribunal has been beset by various problems both inside and outside the courtroom, the tribunal for the former Yugoslavia has demonstrated that international courts can meet the highest standards of due process protections.

The rights of defendants before the ICC track those found in the International Covenant

on Civil and Political Rights, but the Rome Statute also provides greater clarity on fundamental protections than can be found in the Covenant. These include: the presumption of innocence, the right to counsel and to have adequate time and facilities to prepare a defense, the right to be present at trial, the right to present evidence and to confront witnesses, the right to remain silent, the right to have a charge proved “beyond reasonable doubt,” the protection against double jeopardy, and the right to appeal the proceedings to a higher body. Defendants will be provided counsel if they cannot afford one, as well as interpreters where necessary. The ICC statute does not permit the death penalty. According to former U.S. State Department legal advisor Monroe Leigh, the list of due process rights guaranteed by the Rome Statute are, if anything, more detailed and comprehensive than those in the American Bill of Rights.<sup>3</sup>

The only significant due process right afforded to defendants in the United States not available under the ICC is that of a jury trial. A majority decision by a chamber of three judges is needed to determine guilt or innocence (an appeals chamber will consist of five appellate judges). Jury trials are not required under international human rights law -- they are not a component of civil law justice systems. Empanelling a jury would not be practical in cases before an international tribunal. The United States has long recognized that fair trials can be had without juries; for instance, the U.S. has concluded extradition treaties with countries that explicitly permit U.S. nationals to be tried without a jury.

The Rome Statute also contains a detailed provision on the protection of victims and witnesses in the proceedings. This is especially important given the seriousness of the crimes, including sexual violence and violence against children, the expected political significance of ICC cases, and the likelihood that many of those intending to testify might be

subject to retribution. However, while the court can take certain measures to protect witnesses -- such as holding parts of proceedings *in camera* and withholding certain personal information where its disclosure would lead to the “grave endangerment” of a witness or their family -- such measures must be taken “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Rome Statute, art. 68.

### **U.S. Objections to the ICC**

The United States was one of only seven nations to vote against the Rome Statute in 1998, joining China, Iraq, Israel, Libya, Qatar and Yemen. By contrast, most U.S. allies, and all NATO states except Turkey, have ratified the treaty. Near the end of his term in December 2000, President Bill Clinton signed the Rome Statute, recognizing that the U.S. Senate was unlikely to ratify the treaty in the foreseeable future. On May 6, 2002 President Bush, in an unprecedented move, revoked (“unsigned”) the U.S. signature on the statute.<sup>4</sup>

The primary opposition of the United States to the Rome Statute is that the ICC might exercise its jurisdiction to conduct politically motivated investigations and prosecutions of U.S. military personnel and political leaders. The Bush administration has argued vociferously that as the world’s only superpower, jurisdiction over U.S. soldiers would limit America’s ability to become involved in necessary military operations. This would prove dangerous not only for U.S. national interests, but for other states, particularly in Europe, that rely on U.S. military might to intervene in difficult situations. As noted, the statute’s safeguards against malicious prosecution make this unlikely. Moreover, were U.S. soldiers to be implicated in war crimes, the U.S. military justice system would preempt any intervention by the ICC. (The U.S. armed forces’ ability to prosecute its own was recently

demonstrated when two U.S. airmen were found responsible for the accidental bombing deaths of Canadian soldiers in Afghanistan.) Finally, U.S. troops have *already* been taking part in armed conflicts in an area under the jurisdiction of an international tribunal. Thousands of U.S. forces deployed in Bosnia and Kosovo have been within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY). With far fewer safeguards than the ICC, and no requirement to defer investigations to national courts, the ICTY has acted responsibly. For instance, when the ICTY was asked to review NATO bombing operations in Kosovo, it decided that there was no basis for proceeding with an investigation.

Unstated, but seemingly lurking behind the scenes is an obsession with a replay of the “Kissinger scenario,” the ongoing targeting of former Secretary of State Henry Kissinger for war crime prosecution before Belgium national courts, which permit universal jurisdiction. (Kissinger could not be subject to ICC prosecution because the court does not have retroactive jurisdiction.)

At the time of the revocation of the U.S. signature on the Rome Statute, the U.S. Ambassador-at-large for War Crimes Issues Pierre-Richard Prosper stated that the United States was “not going to attack, assail, or wage war on the ICC.”<sup>5</sup> But that has not proven to be the case. Despite the U.S. government’s expressed desire to generate support from allied governments in the war against terrorism, the administration has squandered considerable effort and diplomatic good will to gain effective immunity of U.S. nationals from the court’s jurisdiction.

This spring, the Bush administration negotiated a Security Council resolution to provide a blanket exemption for U.S. personnel in UN peacekeeping missions and other UN operations. After failed efforts to obtain exemptions for the handful of Americans in East Timor and Bosnia-Herzegovina, and then an

ironclad exemption for all peacekeeping operations, the Security Council approved a limited, one-year exemption for personnel from non-member states. The Security Council expressed its intention to renew this exemption on June 30 of next year.

Next, the United States, through its diplomatic missions, has asked states around the world to sign so-called Article 98 agreements that would prohibit that state from surrendering to the ICC any U.S. national who is being sought by the court. Article 98 of the Rome Statute was designed to allow states parties the first opportunity to try their own citizens for war crimes, even if those persons were apprehended in other states. The United States is attempting to use this provision to provide immunity from the ICC for its citizens around the globe. To date a handful of states have signed article 98 agreements with the United States, while several others announced that they would not. The European Union announced that it will not turn American military personnel and officials over to the ICC so long as the U.S. guaranteed the suspects would be tried in U.S. courts.

On August 3 President Bush signed into law the American Servicemembers’ Protection Act. Dubbed the “Hague Invasion Act,” the law includes: a prohibition on U.S. cooperation with the ICC; authorization for the President to “use all means necessary and appropriate” to free U.S. personnel detained or imprisoned by the ICC; the threat of withholding military aid to states that join the ICC (except NATO members and other major allies); and the prohibition of participating in UN peacekeeping operations unless U.S. personnel have immunity from the ICC.

It is very unlikely that a U.S. national will ever be the subject of an ICC prosecution. But the U.S. efforts to ensure immunity for its nationals cannot be dismissed as unimportant or another in the long list of examples of U.S. exceptionalism in the international realm. The overall aim of the Bush administration’s efforts

are to create a two-tiered rule of law for international justice -- one that applies to Americans and a different one for the rest of the world. Without equal justice for all, through article 98 agreements or other means, the integrity of the ICC is likely to be undermined. The ability of the court to generate sufficient support from the international community to pursue goals that the U.S. claims it endorses, such as the prosecution of the world's worst war criminals, will be severely hampered. Instead of promoting international justice, the United States has placed itself in the camp of the world's future Pol Pots and Saddam Husseins -- those who have something to fear from a genuinely effective international criminal court.

### Endnotes

<sup>1</sup> Human Rights Watch has written extensively on the court. *See generally* <http://www.hrw.org/campaigns/icc/>.

<sup>2</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at <http://www.un.org/law/icc/statute/rome.htm>. A detailed article-by-article analysis of the provisions of the Rome Statute can be found in *Commentary on the Rome Statute of the ICC*, O. Triffterer, ed. (Nomos Verlagsgesellschaft 1999).

<sup>3</sup> Monroe Leigh, "The United States and the Statute of Rome, 95 American Journal of International Law 124, 131 (January 2001).

<sup>4</sup> According to the Vienna Convention on the Law of Treaties, a state that has signed a treaty "is obliged to refrain from acts which would defeat the object and purpose of a treaty ... until it shall have made its intention clear not to become a party to the treaty." Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679, art. 18.

<sup>5</sup>"US Abandons International Criminal Court Treaty," Agence France-Presse, May 6, 2002.



## 15. SUMMARY OF DEVELOPMENTS AT THE 53rd SESSION OF THE UNITED NATIONS SUB- COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

By: David Weissbrodt, Bret Thiele, Mayra Gómez, and Muria Kruger\*

### I. Introduction

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The United Nations Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) met at the Palais des Nations, the European Office of the UN in Geneva, Switzerland, from 30 July through 17 August 2001 for its fifty-third session. The Sub-Commission is a subsidiary body of the UN Commission on Human Rights (Commission) and is comprised of 26 independent human rights experts, elected by the Commission, who act in their personal capacity rather than as government representatives. Under the principle of geographic distribution, the Sub-Commission has seven members from Africa, five from Latin America, five from Asia, three from Eastern Europe, and six from the Western Europe and Other group of nations (including Australia, Canada, New Zealand, and the United States).

The mandate of the Sub-Commission includes human rights standard-setting and preparing studies of current human rights issues in all parts of the world. Because of its role in initiating action within the United Nations human rights system and its accessibility to non-governmental organizations (NGOs), each year hundreds of human rights activists from scores of countries travel to Geneva to attend and address the session of the Sub-Commission. This year, 1,059 persons participated in the Sub-Commission session, including 726 NGO representatives and 281 government observers.

The Sub-Commission develops resolutions that are presented to, and are often adopted by, the Commission on Human Rights. Members of the Sub-Commission also prepare working papers and comprehensive studies on human rights problems and issues. This year’s session generated 24 resolutions and 22 decisions. Since many treaties and other human rights instruments have been promulgated, the Sub-Commission has de-emphasized its standard-setting function and has given greater attention to developing strategies aimed at promotion, problem solving, implementation, and the effective use of international pressure to

improve human rights situations around the world.

At its fifty-third session the Sub-Commission went through a substantial restructuring resulting from the reforms adopted by the Commission at its fifty-sixth session in April 2000. That restructuring was evident in the agenda of the 53<sup>rd</sup> session, which was substantially revised and rationalised for the first time in many years. The agenda for the fifty-third session contained only seven agenda items as opposed to the fourteen agenda items discussed in previous years. This year, the Sub-Commission had specific agenda items under which it discussed human rights situations in various countries; the administration of justice; economic, social, and cultural rights; and the prevention of discrimination and protection of indigenous peoples and minorities. Additionally, the agenda included an item on “Other Human Rights Issues” under which a range of human rights concerns and studies were discussed. Gone from previous agendas were specific items on the implementation of human rights of women, contemporary forms of slavery, the rights of children and youth, and freedom of movement. Most of these topics, however, were addressed under the “Other Human Rights Issues” item. The prevention of discrimination, the rights of indigenous peoples, and protection of minorities, until this year addressed under separate agenda items, were combined into one agenda item.

Each year the Sub-Commission elects a Bureau with one representative from each regional group to lead the session. At this year’s session the Sub-Commission elected Mr. David Weissbrodt (expert from the United States) as Chairperson. It was the first time in the history of the Sub-Commission that a U.S. citizen was elected to serve as Chairperson. In his opening address to the Sub-Commission, Mr. Weissbrodt recalled the many contributions the Sub-Commission has made over the years to advance human rights, including its close

interaction with NGOs, its work on specific country situations, and the unique contributions of its working groups. He also noted, however, that the Sub-Commission had been challenged to seek new ways to focus its efforts and make useful contributions to the promotion and protection of human rights. In addition, he indicated that the Sub-Commission can continue to play a unique role within the United Nations by cooperating more closely with the treaty bodies, and in particular by responding to their requests for substantive studies of pressing human rights issues. To complete this year’s Bureau, the Sub-Commission elected Mr. Paulo Sergio Pinheiro (expert from Brazil), Mr. Soo Gil Park (expert from the Republic of Korea), and Mr. Stanislav Ogurtsov (expert from Belarus) to be Vice-Chairpersons; and Mr. Godfrey Bayour Preware (expert from Nigeria) to serve as the Rapporteur.

The High Commissioner for Human Rights, Ms. Mary Robinson, addressed the Sub-Commission during its first meeting on 30 July 2001. In her statement, the High Commissioner acknowledged her gratitude for the unique contribution that the Sub-Commission has made and continues to make not only to the United Nations but also to the world community. By means of example, she mentioned past accomplishments such as the elaboration of international standards, the development of a better understanding of human rights through the study of important issues, the role the Sub-Commission has played in the creation of new thematic mechanisms of the Commission on Human Rights, as well as the role it has played in preventing violations throughout the world. She also noted the valuable contribution that NGOs have made to the successes of the Sub-Commission.

The High Commissioner thanked the Sub-Commission for the strong role it has played with respect to the struggle against racism, racial discrimination and xenophobia, and noted that the Sub-Commission should be

proud of the role it had in making the World Conference Against Racism a reality. She also took time to note the work of the Sub-Commission's thematic working groups, specifically recognizing the contributions of the Working Group on Minorities, the Working Group on Indigenous Populations, and the Working Group on Contemporary Forms of Slavery. With respect to economic, social, and cultural rights, she reaffirmed the need to ensure that globalisation becomes a positive force for all the world's people, and that the Sub-Commission has been called upon to help achieve that objective through a comprehensive examination of the impact of globalisation on human rights as well as the establishment of a Social Forum to create dialogue and exchange on this important topic.

Ms. Robinson also welcomed the progress of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations, and in particular the elaboration of human rights guidelines for all business enterprises. She pointed out that corporations, their managers, and their personnel have a strong duty to abide by the Universal Declaration of Human Rights and other international human rights principles in the course of their activities and she encouraged further definition of that duty and progress on the human rights guidelines for companies.

## **II. Innovative Procedural Reforms**

This year the Bureau experimented with a number of procedural reforms in an effort to enhance the efficiency and effectiveness of the Sub-Commission. Those reforms were generally well received by members and observers of the Sub-Commission alike. For instance, debates on each agenda item were restructured around reports, working papers, and substantive issues, so that there was some cohesiveness to the Sub-Commission's deliberations. Inter-active discussions were

fostered and a "question and answer" format was used particularly during the early part of the session when there was sufficient time. The Sub-Commission held a closed joint meeting with the Expanded Bureau of the fifty-seventh session of the Commission on Human Rights, at which they exchanged views aimed at improving co-operation between the two organs. The participants agreed to hold similar closed meetings on an annual basis. The Sub-Commission avoided a lengthy and unnecessary procedural debate in public on its working rules, procedures, and timetable at the very beginning of its annual session by holding that discussion in a private meeting. In addition, to the extent there was sufficient time available, the Sub-Commission drafted many of its resolutions in private sessions rather than engage in the spectacle of the public drafting of resolutions by such a large group. Further innovative reforms included the Bureau inviting authors of working papers and comprehensive studies, as well as chairpersons of working groups, to meet informally with interested parties for more open and less formal discussions regarding their work. The Chairperson met regularly with NGOs at the beginning of each week of the session to discuss the Sub-Commission's progress. The Sub-Commission continued the tradition of the past three years in starting its sessions promptly for each meeting and was able for the first time in many years to manage its debates so that there was no need to diminish the speaking time of observers towards the end of the session. The Sub-Commission found a balanced approach to discouraging government criticisms of other governments that may belong in the context of the intergovernmental Commission, but are not generally appropriate in an expert body such as the Sub-Commission. Furthermore, for the first time the Sub-Commission Chairperson was authorized to discourage personal attacks upon any participant and that authority was occasionally used.

**A. Debate on Reparations and the World Conference Against Racism**

On 1 August, after the list of speakers under agenda Item 2 (violations of human rights) was exhausted, the Chairperson used the opportunity to open the floor for a general dialogue. This spontaneous discussion proved to be one of the more engaging to occur at this year's session. Mr. El-Hadji Guissé (expert from Senegal) raised the topic of reparations for slavery, the slave trade, and colonialism. Other members soon joined the discussion, many of whom noted that the Preparatory Committee (Prep. Comm.) for the World Conference against Racism was meeting in the Palais des Nations at that very time.

As for slavery and the slave trade, there were differences of opinion among members of the Sub-Commission with respect to the appropriate scope of reparations. For example, some members believed that there should be a time limit imposed whereby only victims who are presently living or their next-of-kin should receive compensation. Similarly, some sought to limit reparations for acts that were considered crimes at the time they were committed, arguing that to do otherwise would be to impose *ex post facto* legal obligations. Others countered, however, that slavery and the slave trade resulted in the theft of wealth from colonised regions of the world, which continues to have present consequences for residents and governments of those regions many years later. Additionally, it was argued that slavery and the slave trade constituted crimes against humanity when they occurred.

Turning to the topic of colonialism, many agreed that debt relief offered by former colonial powers toward their former colonies should be explored as a kind of reparation. Such a suggestion, it was contended, would link past wrongdoings and present consequences.

Sub-Commission members generally agreed that their comments should be transmitted to the Prep. Comm. It was eventually decided that the sentiments of the Sub-Commission should be transmitted in the form of a resolution that addressed responsibility and reparation for massive and flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery and of colonialism, as well as during wars of conquest. On 6 August a resolution was adopted and relayed to the Prep. Comm. by Mr. Paulo Sergio Pinheiro (expert from Brazil), the Sub-Commission's representative at the World Conference. The resolution, *inter alia*, suggested various means of reparation including co-operation in development of affected peoples, debt cancellation, implementation of the "Tobin tax," technology transfers, and restoration of cultural objects. In the resolution, the Sub-Commission stated that it was "convinced that such recognition and reparation will constitute the beginning of a process that will foster the institution of an indispensable dialogue between peoples whom history has put in conflict for the achievement of a world of understanding, tolerance and peace."

**I. The Sub-Commission's Debate on Country Situations**

The Commission decided in April 2000 to "approve and implement comprehensively and in its entirety" the report of its inter-sessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights. That report recommended a series of significant changes that, for the past two sessions, have altered the ways in which the Sub-Commission considers specific country situations. Namely, that report recommended that while the Sub-Commission should continue to debate country situations not being dealt with by the

Commission, and while it should also be allowed to discuss urgent matters involving serious violations of human rights in any country, the Sub-Commission should not adopt country-specific resolutions. In addition, the Commission's Working Group recommended that the Sub-Commission refrain from negotiating and adopting thematic resolutions that contain references to specific countries. With the decision by the Commission to implement its Working Group report and the subsequent approval by ECOSOC, those recommendations became directives to the Sub-Commission.

#### **A. Review of Past Work Addressing Country-Specific Situations**

Prior to the Commission decision to alter the working methods of the Sub-Commission vis-à-vis specific country situations, the Sub-Commission had for many years adopted resolutions identifying at least a few countries in which human rights situations required expressions of UN concern. In the recent past, the Sub-Commission took action with regard to human rights violations in Bahrain, Belarus, the Congo (Kinshasa), the Democratic People's Republic of Korea, Mexico, Peru, and Togo – all nations that had not been the subject of significant Commission attention, but where serious human rights problems had arisen. In 1999, for example, the Sub-Commission continued to refine its approach on country matters and took important steps towards developing strategic uses for draft resolutions. It was noted that the ability to prepare draft resolutions on country situations was a very effective means of attaining leverage that helped to encourage a constructive dialogue and negotiation between the Sub-Commission and governments responsible for human rights violations. That approach resulted, not in a large number of adopted country-specific

resolutions, but rather in an unprecedented series of Chair statements accompanied by concrete commitments voiced and put on the public record by various governments to improve the human rights situations within their respective nations. In using this approach, the Sub-Commission was able to show its ingenuity, expertise, and competence by addressing some of the most severe human rights situations in the world and, more importantly, by achieving tangible results.

In many cases, government representatives took negotiations seriously because it was in their interest to avoid a Sub-Commission resolution that would draw international attention to their particular human rights situation. One example of a successful negotiation occurred in 1998, when the Sub-Commission had before it a draft resolution on the human rights situation in Bahrain. While the Sub-Commission did not end up adopting this resolution, during the process of negotiation the Government of Bahrain agreed to remove its reservations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of Bahrain agreed also to allow the UN Working Group on Arbitrary Detention to visit the country. It is unlikely that even this modest success would have occurred had the Sub-Commission been unable to adopt a resolution on Bahrain. Now that the capacity to adopt country resolutions has been taken away, the capacity of the Sub-Commission to do concrete and effective work has been reduced.

#### **B. The Importance of Country Specific Resolutions**

There are a number of reasons why the use of country specific resolutions by the Sub-Commission has been of value to the international human rights community. First and foremost, as indicated above, when handled

appropriately, country resolutions, Chair statements, and even mentioning a particular situation (*e.g.*, in Tunisia) have proved successful as tools for persuading governments to undertake human rights improvements. Second, the Sub-Commission provided an opportunity to address developing human rights crises or emergency situations immediately as opposed to waiting for the Commission's next session, which may be up to seven months away. After all, within 30 days after the Sub-Commission session ended the world had dramatically changed – with the close of the World Conference against Racism and the attacks of September 11<sup>th</sup>. World developments move so fast that it is important for the Sub-Commission to respond to the contemporaneous events. Third, because country work has attracted the attention of governments, inter-governmental organizations, and NGOs, it has maintained a high degree of visibility on both thematic and country-specific human rights concerns. The resulting transparency has helped ensure not only the Sub-Commission's effectiveness, but also has given human rights situations much-needed visibility. Fourth, because the Commission cannot possibly, for political and/or practical reasons, shed light on all countries in which there are severe and consistent patterns of human rights abuse, the Sub-Commission has used country specific resolutions to help identify and place pressure on those countries which may have otherwise been forgotten or overlooked by other human rights bodies. Fifth, the Sub-Commission should be able to apply its expertise to particular situations. First and foremost, as indicated above, when handled appropriately, country resolutions have proved most successful as tools to gain leverage in the context of persuading governments to undertake human rights improvements. Second, because country work has attracted the attention of governments, inter-governmental organizations, and NGOs, it has maintained a high degree of

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In 2001, Mr. Louis Joinet (expert from France) presented an especially noteworthy intervention before the Sub-Commission, highlighting that the Sub-Commission had in the past taken several positive initiatives relating to country situations. In particular, Mr. Joinet drew attention to the previous work of the Sub-Commission with regard to the human rights situations in Togo, Bahrain, Peru, and the Democratic People's Republic of Korea.

In the case of Togo, Mr. Joinet noted that in 1999 the Sub-Commission had drafted a resolution addressing the reported disappearance of dozens of persons within Togo. Mr. Joinet told the Sub-Commission that a Minister from the Togolese Government had phoned him on several occasions asking him to withdraw the resolution. Yet, in the end, Mr. Joinet noted that a fruitful dialogue had resulted between the Sub-Commission and the Togolese Government; Togolese officials became increasingly engaged with the Sub-Commission, a Chairperson's statement was adopted in lieu of

the original resolution, and a joint UN-OAU (Organization of African Unity) mission was established to look into violations of human rights in Togo. In the end, it had been a constructive process and a final report on the situation was produced.

In the case of Bahrain, a resolution was similarly proposed and withdrawn after constructive negotiations with the Government. Mr. Joinet told the Sub-Commission that since that time, important political changes have taken place within Bahrain, and the Sub-Commission played an important role in pressuring for positive reforms. In the case of Peru, Mr. Joinet noted that he had drafted a simple resolution requesting that impunity not be extended to all cases under the laws of that country. At first, there was a very sharp response from the Government, but then a more substantive review of the situation began. Mr. Joinet reminded the Sub-Commission that the Working Group on Arbitrary Detention went to investigate the conditions of detention within the country, and that there had been excellent co-operation with the Government.

With the Democratic People's Republic of Korea (DPRK), the Sub-Commission had for several years adopted resolutions addressing the situation of human rights in that country, and many times the Government had reacted sharply – even threatening to withdraw from the International Covenant on Civil and Political Rights. But ultimately, Mr. Joinet pointed out, there was in fact a dialogue. Mr. Joinet stated that he himself had met with many representatives of the DPRK, and he recently learned that the Government had sent its periodic report under the Civil and Political Covenant. The DPRK has also taken some timid positive steps in terms of establishing diplomatic relations with other countries and recently there have been meetings between the leaders of the DPRK and the Republic of Korea.

As Mr. Joinet was able to point out, because the Sub-Commission had the authority

to adopt country resolutions, it was also able successfully to negotiate with the representatives of several countries in order to produce tangible, positive results in the area of human rights. The Sub-Commission was able to pursue a range of strategies when addressing country situations and these tools provided the Sub-Commission with a degree of flexibility and versatility in dealing with country situations, and therefore allowed the Sub-Commission to enhance the scope and effectiveness of its work. Unfortunately, the Sub-Commission is now discouraged from adopting country specific resolutions and is thus less able to replicate the results it has achieved in the past. The inability to pursue country work openly and diligently has significantly hampered the Sub-Commission's ability to promote and protect human rights around the world.

Regardless of these limitations, however, the debate at the Sub-Commission concerning country situations continues to be vibrant. As Ms. Françoise Hampson (expert from the United Kingdom) pointed out during this year's session, while "some might argue that there was no reason for the Sub-Commission to continue its discussion of violations in specific countries if it could no longer pass resolutions on the matter," she disagreed, noting that, "silence is the best friend of human rights violations."

To summarize the Item 2 debate itself, there was some discussion of new, urgent matters involving serious violations of human rights in countries that were also under consideration in the Commission. Accordingly, Ms. Hampson raised the issue of the recent, serious escalation of violence in the Israeli-occupied territories. In addition two NGOs raised concerns about developments in the occupied territories. NGOs also brought to the attention of the Sub-Commission new developments in both Afghanistan and the Chechen Republic of the Russian Federation.

With regard to country situations not currently being dealt with in the Commission, members of the Sub-Commission addressed human rights concerns in regard to Angola, Bhutan, Brazil, China, the Democratic People's Republic of Korea, the detention of aliens throughout Europe, the demonstrations against the G-8 meetings and the alleged police brutality in Genoa, Italy, as well as situations in France, Cyprus, Greece, Guatemala, Indonesia, the Ivory Coast, Jammu and Kashmir, Japan, Liberia, Marshall Islands, Mexico, Nepal, the Philippines, Russia, Saudi Arabia, Sri Lanka, Tanzania, United Kingdom (Northern Ireland), and the United States.

NGOs added concerns during the debate about Algeria, Belarus, Bhutan, Brazil, Cameroon, Egypt, Guatemala, India (Jammu & Kashmir), Indonesia (as to the Moluccas), Japan, Malaysia, Mexico, Nepal, Pakistan, the Philippines, Saudi Arabia, Tunisia, Turkey, the United States (as to military operations in Vieques, Puerto Rico), Uzbekistan, and Western Sahara. Furthermore, written statements submitted by NGOs under this agenda item, included allegations concerning violations against Tibetans in China, as well as concerns in India, Northern Uganda, and Peru. In addition, a detailed NGO statement filed under this agenda item identified alleged caste discrimination practices in Bangladesh, Burkina Faso, Burundi, Cameroon, Egypt, Guinea, Japan, Mali, Mauritania, Mauritius, and Nepal.

Eleven government observers spoke during Item 2, including Algeria, Azerbaijan, Bahrain, Bhutan, Democratic People's Republic of Korea, Egypt, Indonesia, Iraq, Malaysia, Pakistan, and Turkey. Of these 11 governments, five spoke in right of reply and Bahrain, Bhutan, Pakistan, and Turkey took the opportunity during their interventions to announce major new reforms on human rights initiatives during the past year, and commitments to continued implementation of these and other human rights changes.

In the end, the Sub-Commission did adopt two resolutions and two decisions that, arguably, related specifically to particular country situations. A resolution on the situation of women and girls in territories controlled by Afghan armed groups raised the issue as to whether or not it was within the limits of the Commission's decision for the Sub-Commission to make reference to a particular country situation under certain circumstances. As in 2000, the principal sponsor of that resolution, Ms. Halima Warzazi (expert from Morocco), drafted the resolution so as to make reference to territories controlled by Afghan armed groups rather than to name Afghanistan explicitly. Although some Sub-Commission members expressed doubt as to whether this action was permitted, others noted the urgency of the situation and that the Commission had not expressly disapproved of previous Sub-Commission resolutions on this subject. Despite the doubts expressed by some Sub-Commission members, they were unwilling to break consensus and the resolution on the "Situation of women and girls in territories controlled by Afghan armed groups" was adopted without a vote. This resolution voiced deep concern over the plight of women and girls in Afghanistan and encouraged the international community to "continue to follow very closely the situation of women and girls in the territories controlled by Afghan armed groups and bring the necessary pressure to bear so that all the restrictions imposed on women, which constitute flagrant and systematic violations of all the internationally recognized economic, social, cultural, civil and political rights, are removed." In addition, the resolution congratulated United Nations agencies and NGOs on ". . . the measures and programmes adopted with a view to lending support and assistance to women and girls in the territories controlled by Afghan armed groups and strongly encourages them to continue their efforts despite the difficulties encountered."



Similarly, the Sub-Commission adopted a decision, without a vote, addressing the human rights situation of the Iraqi population. The decision principally focused on the grave humanitarian consequences of the sanctions regime imposed upon Iraq and did not criticize directly the Iraqi Government or any government supporting the sanctions, but did recognize the role of sanctioning governments and the Iraqi Government in the ongoing humanitarian crisis facing that population. For instance, the decision urged “the international community and all Governments, including that of Iraq, to alleviate the suffering of the Iraqi population, in particular by facilitating the delivery of food, medical supplies and the wherewithal to meet their basic needs.” Through this decision the Sub-Commission once again appealed “to the international community, and to the Security Council in particular, for the embargo provisions affecting the humanitarian situation of the population of Iraq to be lifted.”

A resolution on “Systematic rape, sexual slavery and slavery-like practices” was also adopted without a vote. While this resolution was partly inspired by the plight of the “comfort women” who were held in sexual slavery by the Japanese army during World War II, the resolution did not identify Japan by name. Rather, the resolution dealt thematically with the issue of sexual slavery, and expressed deep concern not only about past abuses, such as those suffered by the “comfort women,” but also noted that “systematic rape, sexual slavery and slavery-like practices are still being used to humiliate civilians and military personnel, to destroy society and diminish prospects for a peaceful resolution of conflicts,” and “that the resulting severe physical and psychological trauma endanger not only personal recovery but post-conflict reconstruction of the whole society.” The resolution also reflected the controversy presently occurring as to the accuracy of Japanese textbooks portraying

events during World War II in encouraging “States to promote human rights education on the issues of systematic rape, sexual slavery and slavery-like practices during armed conflicts, ensuring the accuracy of accounts of historical events, in the educational curricula.”

Further, the Sub-Commission adopted a decision on discrimination based on work and descent. The decision arose from the Sub-Commission’s consideration of a working paper presented by Mr. Rajendra Kalindas Wimala Goonesekere (expert from Sri Lanka). He observed that discrimination based on work and descent, often associated with caste systems, is particularly prevalent in certain countries. Indeed, Mr. Goonesekere’s report noted that “the most widespread discrimination on the basis of work and descent occurs in societies in which at least a portion of the population is influenced by the tradition of caste, including the Asian countries of Bangladesh, India, Nepal, Pakistan, and Sri Lanka.” The report examined five specific countries -- India, Sri Lanka, Nepal, Japan, and Pakistan. The report generated a lively discussion and the Sub-Commission ultimately authorized Mr. Goonesekere to prepare “an expanded working paper on the topic of discrimination based on work and descent in other regions of the world” for presentation to the Sub-Commission in 2002. One possible implication of the decision was that Mr. Goonesekere should focus on countries other than the five he had chosen to consider in his first report.

#### **IV. Realization of Economic, Social, and Cultural Rights including the Right to Development**

##### **A. The Social Forum**

This year the Sub-Commission devoted a day to a discussion on plans for holding the first Social Forum during the Sub-Commission’s fifty-fourth session in August

2002. The first half of the day was used to allow Sub-Commission members, NGO and government representatives, and other interested parties to discuss the role the Social Forum will play while the afternoon meeting involved a panel discussion on the same topic by high-level experts.

Mr. José Bengoa (expert from Chile) has been the principal advocate for the Social Forum. He began the discussion by saying that the Forum should focus on globalisation, free trade, and threats to poor countries in the labour markets. He stressed that a key objective of the Social Forum should be to achieve an effective incorporation of economic, social, and cultural rights into a global policy, to create partnerships between private enterprise and international financial institutions to help economic development, to enhance consideration of the environmental aspects and responsibilities of globalisation, to increase social accountability, and especially to set up a process whereby the effects of economic globalisation would be considered in advance, before policies were established, so as to ensure that their positive effects were shared equitably between the developing and developed world, and to ensure that their negative effects on vulnerable populations were reduced.

For the first time in its history the Sub-Commission held a special debate involving a panel discussion of outside experts. The panel discussion to select the principal topics for next year's forum modeled the innovative approach the Social Forum is expected to pursue. The panel of high-level experts this year included Hina Jilani, UN Special Representative of the Secretary-General on the Situation of Human Rights Defenders; George Abi Saab, a Member of the World Trade Organization's Dispute Settlement Body; Andrew Clapham, a Professor at the Graduate Institute of International Studies in Geneva; and Rubens Ricupero, Secretary-General of the United States Conference on Trade and Development. Other participants in

the discussion included Paul Hunt, Special Rapporteur of the Committee on Economic, Social and Cultural Rights; Alfredo Sfeir-Younis, Special Representative of the World Bank to the United Nations and the World Trade Organization; Miloon Kothari, Special Rapporteur on Adequate Housing of the Commission on Human Rights; Lee Swepston of the International Labour Organization; and Patricia Feeney of Oxfam.

Most of the participants mentioned that the Social Forum needed to fill a unique niche and to avoid duplicating the work of other UN bodies. Ms. Jilani and Mr. Ricupero thought that the Social Forum might ameliorate the present practice of governments making important decisions without consulting, or even allowing information to reach, their respective constituents. The Social Forum might also consider whether international human rights law binds international organizations, such as the World Bank, the International Monetary Fund, and the World Trade Organization. Mr. Clapham noted that under international law, intergovernmental organizations are bound by such international law, as are the States that comprise and are the homes of such institutions. He stressed that international financial institutions should consider the human rights impact of their activities and include persons potentially affected by their activities in their decision-making processes. The representative of the International Monetary Fund (IMF) and World Bank believed, however, that international human rights law does not bind those institutions.

Mr. Clapham envisioned the Social Forum as providing a context in which government officials representing States at international financial institutions and government officials representing States at human rights bodies could better connect and thereby bring human rights concerns into the decision-making processes of the financial institutions. Several other participants agreed

that the Social Forum should fulfil a unique role by bringing together all international actors that affect economic and social rights so that they can better work towards achieving the UN's overarching goals, including the eradication of poverty and the promotion and protection of human rights.

After considering all the comments and suggestions arising out of this preparatory meeting, the Sub-Commission adopted a resolution on the Social Forum. Most importantly, the Sub-Commission decided that the principal issue for the first session of the Social Forum in 2002 should be: "The relationship between poverty reduction and the realization of the right to food." The Sub-Commission also indicated that the mandate of the Social Forum will be (1) "to exchange information on the enjoyment of economic, social and cultural rights and their relationship with the processes of globalization"; (2) "to follow up on situations of poverty and destitution throughout the world"; (3) "to propose standards and initiatives of a juridical nature, guidelines and other recommendations for consideration by the Commission on Human Rights, the working groups on the right to development, the Committee on Economic, Social and Cultural Rights, the specialized agencies and other organs of the United Nations system"; and (4) "to follow up the agreements reached at the major world conferences and the Millennium Summit, and to make contributions to forthcoming major international events and discussion of issues related to the mandate of the Social Forum."

The resolution also set forth various themes to be addressed by the Social Forum in future years, including (1) the interaction between civil and political and economic, social and cultural rights; (2) the relationship between poverty, extreme poverty and human rights in a globalized world; (3) the effect of international trade, finance and economic policies on income distribution, and the corresponding

consequences on equality and non-discrimination at the national and international levels; (4) analysis of international decisions affecting basic resources for the population, and in particular those affecting enjoyment of the right to food, the right to education, the right to the highest attainable standard of physical and mental health, the right to adequate housing and the right to an adequate standard of living; (5) analysis of the impact of international trade, finance and economic policies on vulnerable groups, especially minorities, indigenous peoples, migrants, refugees and internally displaced persons, women, children, older persons, people living with HIV/AIDS, people living with disabilities and other social sectors affected by such measure; (6) the impact of public and private, multilateral and bilateral international development cooperation on the realization of economic, social and cultural rights; (7) follow-up of agreements reached at world conferences and international summits, particularly the Copenhagen World Summit for Social Development, and in other international bodies, concerning the link between economic, commercial and financial issues and the full realization of human rights; and (8) social and economic indicators and their role in the realization of economic, social and cultural rights.

Importantly, the resolution also extended an invitation to participate not only to NGOs in consultative status with the UN, but to other NGOs and particularly to newly emerging actors in the South, such as grass-roots organizations, community organisations, trade unions and associations of workers, representatives of the private sector, and others. If the attention paid to the Social Forum at this year's meeting is any indication, there should be a very lively debate with respect to how economic, social, and cultural rights can and should be promoted and protected in a globalising world when the Social Forum convenes next year for its first substantive

meeting. In April 2002 the Commission on Human Rights accepted the Sub-Commission's proposal that the Social Forum be held for two days just prior to the Sub-Commission's 2002 session. Accordingly, it is more likely that the Sub-Commission will have sufficient time to devote to the important issues that will arise during the Social Forum.

### **B. Sessional Working Group on Transnational Corporations**

There is increasing concern about large businesses that operate beyond the reach of any one State. Many of these large corporations, commonly referred to as transnational corporations (TNCs), may already be subject to some international norms, but they are often able to use their great political and economic power to evade national legal limits. Industry groups, trade unions, NGOs, intergovernmental organizations (IGOs), and others have begun to respond to this issue. One response has been the creation of codes of conduct for adoption by TNCs themselves, trade unions, industry groups, and others. Codes of conduct generally delineate the principles a TNC or other business entity should follow in regard to such issues as worker's rights, consumer and environmental protection, security arrangements and other human rights concerns. The UN Secretary-General, Kofi Annan, has addressed this issue by launching the Global Compact initiative at the World Economic Forum in Davos in February 1999. The Global Compact asks businesses voluntarily to support and adopt nine core principles dealing with human rights, labour, and the environment.

The Commission on Human Rights' Working Group on the Right to Development recommended the adoption of new international legislation and the creation of effective international institutions to regulate the activities of TNCs and banks. In response to this request, in its resolution 1998/9 of 20

August 1998, the Sub-Commission established a sessional working group to examine the methods and activities of TNCs for a three-year period.

At the first meeting in 1999, the Working Group adopted its agenda for the first three years, which included gathering information on the present activities of TNCs; collecting data on how TNCs affect the enjoyment of civil, cultural, economic, political, and social rights, including the right to development and the right to a healthy environment; and asking Mr. David Weissbrodt to prepare a draft code of conduct for TNCs. At its second meeting in 2000, in its recommendations for future work, the Working Group invited Mr. Weissbrodt to revise and update his draft standards on the human rights conduct of companies.

During the Sub-Commission's fifty-third session, the Working Group re-elected Mr. El Hadji Guissé as its Chairperson-Rapporteur. Mr. Vladimir Kartashkin (expert from the Russian Federation), Mr. Miguel Alfonso Martínez (expert from Cuba), Mr. Soo-Gil Park (expert from the Republic of Korea), and Mr. David Weissbrodt were the other members of the Working Group.

Also at this year's meeting, the Working Group considered papers submitted by three experts. The Chairperson-Rapporteur, Mr. Guissé, submitted a paper on the impact of TNCs' activities on the enjoyment of economic, social, and cultural rights. Mr. Asjborn Eide (expert from Norway) submitted a paper on the responsibilities and procedures for implementation and compliance on human rights guidelines for TNCs. Further, Mr. Weissbrodt submitted four papers including: an introduction to the draft guidelines, the draft guidelines, a background paper on source materials for the guidelines, and a report of a seminar to discuss the guidelines. The Working Group also received written technical comments

on the draft guidelines from the International Labour Office.

The discussion following the introduction of these documents focused around several key issues. These issues are explained below with a brief discussion on the renewal and expansion of the mandate for the Working Group.

### **1. Binding or Voluntary?**

The first issue was whether the draft guidelines should be implemented as a voluntary set of guidelines, or if the Working Group should pursue a binding set of guidelines. From the beginning, there was a high degree of consensus that the Working Group should pursue a binding set of guidelines. Several arguments were raised in favour of binding guidelines. First, purely voluntary guidelines may only reproduce the efforts of many other groups that have already created and implemented avenues to encourage businesses to adopt voluntary guidelines. Second, an NGO speaker noted that there was an urgent need for practical methods of enforcing human rights standards against TNCs and that voluntary guidelines do not contain any methods of enforcement. Third, States are sometimes too weak or too focused on attracting international investment so that the State cannot or will not stand up to TNCs. International standards could be used to encourage governments to stand up to TNCs.

Some concerns were expressed about binding guidelines. First, international corporate responsibility standards should not diminish the responsibilities and obligations of States to protect human rights. States still carry the primary obligation to enforce laws within their respective boundaries and States should not be able to abrogate these obligations or depend on enforcement from an outside body. Second, most participants in the Working Group session noted that it may take many years to

produce a treaty relating to TNCs and other businesses. At the same time these participants expressed a desperate need to hold TNCs accountable as soon as possible rather than waiting for years to develop a treaty. Third, there was also a concern that a binding instrument could only represent a watered-down version of the necessary standards.

Participants in the Working Group concluded that eventually the Guidelines should be binding as “soft law”, or as an authoritative interpretation of existing treaties and other international legal obligations. One expert noted that in light of the need for speed, a set of soft law guidelines would have a clear advantage. The soft law method would result in an immediate standard and methods of implementation, while still not foreclosing the option of developing a treaty at a later time. Soft law standards may be adopted at any one of the many different levels within the UN, although they are ordinarily considered more authoritative if they are adopted by higher organs such as the General Assembly. The Draft Guidelines could be adopted and promulgated: (1) by the Working Group; (2) by the Sub-Commission; (3) by the Commission on Human Rights; (4) by the Economic and Social Council; and/or (5) by the General Assembly.

### **2. All Businesses or only TNCs?**

A second issue was whether the guidelines should apply only to TNCs or to all companies. While some participants at the Working Group session in the August 2001 session indicated that TNCs are the source of the most serious problems, the great majority of the participants seemed to agree that the guidelines should apply to all companies. Participants were concerned about the difficulty of defining “transnational companies.” They noted that TNCs would be more likely to comply with standards that apply to all companies. Transnational corporations might

also be capable of avoiding compliance with narrow standards applicable only to TNCs by transforming themselves into a group of national companies.

Several participants in the Working Group session, however, argued that national companies should be regulated by the State in which they are located and the role of the State should not be reduced through UN adopted guidelines. The purpose of the Working Group, those same people argued, was to examine the activities of TNCs that are currently functioning beyond the borders of any one national framework and create an international framework to hold these actors accountable. They argued that the inclusion of other businesses went beyond the mandate to “identify and examine the effects of the working methods and activities of transnational corporations . . .”

A middle ground considered that the guidelines should be written with binding standards that apply to TNCs and other companies. Accordingly, the guidelines should recognize the responsibilities of larger and more influential companies to use their greater influence to promote human rights in their respective communities. The Draft Guidelines before the Working Group at its third meeting incorporated this third suggestion; the Guidelines applied to all businesses, but TNCs were given unique responsibilities when their size and power enable them to evade national responsibilities and to do other things smaller companies may be unable to do.

### **3. Continued Mandate**

Because the Working Group did not come to a full consensus on many of the above and other issues, and because there is still much need for more discussion on implementation, the Working Group’s mandate was renewed for another three years. The renewed mandate contained many of the tasks in the original

mandate, and simultaneously increased the scope of the mandate by adding several new tasks. The mandate’s renewed tasks include: (1) examining, receiving, and gathering information on the effects of the working methods and activities of TNCs on the enjoyment of economic, social, and cultural rights and the right to development; (2) compiling a list of various existing regional and international agreements on investment, trade, and services, in relation to the activities of TNCs, and their impact on human rights, and an analysis of their compatibility with various international human rights instruments; (3) requesting the Secretariat to prepare each year a list of countries and TNCs, indicating, in U.S. dollars, their gross national product and financial turnover; and (4) considering the scope of the obligation of States to regulate the activities of TNCs, where their activities have or are likely to have a significant impact on the enjoyment of economic, social, and cultural rights and the right to development, as well as civil and political rights of all persons within their jurisdiction.

The Sub-Commission’s resolution also asked the Working Group to contribute “to the drafting of relevant norms concerning human rights and TNCs and other economic units whose activities have an impact on human rights.” This formulation indicates that the Working Group should develop standards that focus on TNCs but also cover other companies. With the renewed mandate, the Working Group will next meet during the fifty-fourth session of the Sub-Commission. Each of the authors of the documents considered at the 2001 session were encouraged to update their work for the next meeting, “taking into account the comments and contributions from experts and any other sources, particularly the specialized agencies of the United Nations system, including the International Labour Organization, the World Health Organization and the United Nations Educational, Scientific and Cultural

Organization, so that a binding instrument can be drafted.”

### **C. Resolutions on Economic, Social, and Cultural Rights**

This year the Sub-Commission adopted a number of resolutions addressing economic, social, and cultural rights as well as activities that potentially affect those rights. These resolutions covered a range of issues including extreme poverty, drinking water and sanitation, the right to food, the non-discrimination clause in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the draft Optional Protocol to the Covenant on Economic, Social and Cultural Rights. Resolutions on related issues included those covering intellectual property and human rights, globalisation, and the liberalisation of trade in services and human rights.

With respect to the subject of extreme poverty, the Sub-Commission considered a request from the Commission to explore possibilities for the implementation of existing human rights norms and standards as a means of combating extreme poverty. The Sub-Commission concurred with its parent body that such a study is needed and appointed four of its members -- Mr. Paulo Sergio Pinheiro (expert from Brazil), Mr. Yozo Yokota (expert from Japan), Mr. El-Hadji Guissé (expert from Senegal), and Mr. José Bengoa (expert from Chile) – to prepare a working paper on the need to develop guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty. The working paper will be considered by the Sub-Commission at its fifty-fourth session.

The subject of the right to drinking water and sanitation generated a great deal of discussion as well. In 2000 the Sub-Commission requested that the Commission authorise a comprehensive study on this topic.

In April 2001, however, the Commission failed to approve that request. Many members of the Sub-Commission expressed dismay that the Commission failed to authorise such an important study and decided to renew the request, even though the Commission had never previously authorized a study that it had previously refused. The resolution, importantly, requested the author of the proposed study to “define as accurately and as fully as possible the content of the right to water in relation to other human rights.” This request is important as it addresses one of the shortcomings of the original working paper, namely its failure to articulate the basis in international law for a right to water. As the right to water can be implied from numerous explicit rights, such as the right to adequate food, the proposed study would prove valuable if it does indeed accurately and fully explain that basis. In April 2002 the Commission on Human Rights reversed its previous position and authorized the study on the right to drinking water and sanitation.

The resolution on the non-discrimination clause in Article 2(2) of the ICESCR resulted from a request of the Committee on Economic, Social and Cultural Rights. With the resolution, the Sub-Commission charged one of its members, Mr. Fried Van Hoof (expert from The Netherlands) with the task of preparing a working paper on the above topic. Mr. Van Hoof is expected to submit the working paper to the Sub-Commission at its fifty-fourth session in order that the feasibility of a comprehensive study can be discussed.

The resolution on the draft Optional Protocol, while welcoming the appointment of an Independent Expert of the Commission charged with examining the question of the draft Optional Protocol, stated once again that an inter-sessional open-ended working group of the Commission is the appropriate mechanism to examine such a question and reiterated its

suggestion to the Commission that such a working group be established at its next session.

As mentioned above, several resolutions were adopted that touch upon economic, social, and cultural rights to some degree. The resolution adopted on intellectual property and human rights, for instance, reminded governments of the primacy of human rights obligations under international law over economic policies and agreements. This reminder was aimed in part at governments participating in the review of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). Regarding TRIPS, the Sub-Commission urged governments to ensure that the implementation of the TRIPS Agreement does not negatively impact the enjoyment of human rights and reiterated that as currently drafted the treaty poses actual or potential conflict with the realisation of economic, social, and cultural rights, in particular the rights to self-determination, food, housing, work, health, and education. The resolution also requested the High Commissioner for Human Rights to seek observer status with the WTO with respect to the review of the TRIPS Agreement and to hold an expert seminar to consider the human rights dimension of the TRIPS Agreement.

Similarly, the resolution on liberalisation of trade in services and human rights expressed the Sub-Commission's concerns regarding the General Agreement on Trade in Services (GATS). In the resolution the Sub-Commission, *inter alia*, called upon governments to ensure that the formulation, interpretation, and implementation of policies related to the liberalisation of trade in services did not negatively affect the enjoyment of human rights.

## V. Administration of Justice

This year, Ms. Hampson (expert from the United Kingdom) presented an intervention

on United Nations Peacekeeping Operations, which were undertaken to help build institutions based on accountability and the rule of law. At the time of her intervention, Ms. Hampson noted that there were United Nations Civilian Police (CIVPOL) serving in Bosnia, Kosovo, East Timor, and elsewhere. But when these officers committed crimes, they were most often not punished. In Bosnia, for example, United Nations Civilian Police have diplomatic immunity. The highest punishment the United Nations can impose is repatriation to the home country, and the home country is not obligated to investigate any crime or to report back to the United Nations. Recently, Ms. Hampson noted that there were reports that an officer had purchased a woman from a brothel for 6,000 Deutsch Marks. In Kosovo, an officer raped a 14-year-old mentally-handicapped girl. The officer was repatriated and currently there are no criminal charges against him although the whole prosecutor's file was sent to his country's permanent mission in New York. Additionally, three officers are currently under investigation for trafficking women from Serbia into Kosovo.

Further, military forces serving in Kosovo have committed numerous violations of human rights law, and victims have little or no access to an effective remedy. Some Kosovo Force (KFOR) contingents believed that under Security Council Resolution 1244, they could expropriate property without paying for it. Some contingents have built bases or roads on land owned by private individuals. KFOR spent nearly one year developing a claims commission to deal with these types of complaints, but at the time of the Sub-Commission session it was still not functioning.

Ms. Hampson argued that in a climate in which all legal responsibility was denied within Kosovo, it could not be left to individual victims and local lawyers to submit reports. After all, the KFOR and the officers were supposedly there, under a United Nations mandate, to serve as a model for compliance



with human rights standards. At the very least, the Special Rapporteur for the former Yugoslavia, relevant thematic rapporteurs and the Human Rights Committee, when examining the reports of States whose forces or whose police take part in peacekeeping operations, should address this problem as a matter of urgency. Ms. Hampson also urged the Sub-Commission to address the effective accountability of peacekeeping forces and members of the United Nations police force who were acting in the name of the international community.

As a result of her intervention, the Sub-Commission adopted a decision on the “Scope of the activities and the accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations (i.e., all operations of a peacekeeping or peace enforcement nature under a United Nations mandate).” This decision expressed concern “at the allegations of serious violations of human rights on the part of personnel serving in peace support operations,” and entrusted “Ms. Françoise Hampson with the task of preparing, without financial implications, a working paper on the scope of the activities and the accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations, for submission to the Sub-Commission at its fifty-fourth session.”

In its consideration of the administration of justice, the Sub-Commission also adopted a resolution addressing “International co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.” This resolution affirmed “that within the framework of international co-operation in the search for, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the highest priority should be given, independently of the

circumstances in which these violations are committed, to legal proceedings against all individuals responsible for such crimes, including former heads of State or Government whose exile serves as a pretext for their impunity.” The resolution also urged all States “to co-operate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity.”

Furthermore, the Sub-Commission considered a working paper on discrimination in the criminal justice system authored by Ms. Leili Zerrougui (expert from Algeria) and initially prepared for the Sub-Commission’s sessional Working Group on the Administration of Justice. The working paper, *inter alia*, discussed how discrimination was still a widespread problem, with each region of the world having its own particular type of discrimination in courts, police stations, and prisons. The Sub-Commission, expressing its concern about the extent of discrimination in criminal justice systems, requested Ms. Zerrougui to continue her research and submit a final working paper on the subject to the Sub-Commission at its next session.

## VI. Studies

### A. Globalization

Mr. Joseph Oloka-Onyango (expert from Uganda) and Ms. Deepika Udagama (alternate from Sri Lanka) presented their progress report on globalisation and its impact on the full enjoyment of all human rights. In the report, the Special Rapporteurs stressed that while much has been achieved in the struggle to apply the principles of equitable globalisation to every individual, much still remained to be done. The report called for heightened vigilance on the part of States, members of civil society, and all those concerned with the promotion and protection of human rights. As to specifics, the

report discussed the impact of intellectual property rights on human rights, suggesting that any document addressing trade-related intellectual property rights to emerge from Member States of the World Trade Organization (WTO) contain specific language to the effect that no provision in the agreement prohibits members from taking measures to provide access to medicines at affordable prices and to promote public health and nutrition. The report also examined mechanisms, including in particular the dispute settlement mechanism in operation at the WTO as well as poverty-directed efforts at the World Bank and the IMF, including the Highly Indebted Poor Countries Initiative. In addition, the report illustrated how the international financial and trade institutions are bound by international law, including international human rights law, and indicated that subsequent reports will provide further support for that conclusion. The report closed with some specific recommendations regarding the content of the TRIPS Agreement and potential conflicts of that agreement with human rights.

With respect to the dispute settlement mechanism of the WTO, the Special Rapporteurs called for more transparency. The report criticised the closed panel meetings and panel decisions adopted anonymously. The report also called for professionalisation of the panels with the costs of accessing a panel being borne by the WTO and not by aggrieved States. The report noted that, as it currently stands, the panel is often comprised of employees of the WTO who disproportionately come from developed countries.

Some aspects of the report were challenged by representatives of the World Bank and the IMF, both of which, according to their representatives, were not bound by international human rights law. This stance was challenged by many of the experts on the Sub-Commission, including Mr. Yozo Yokota (expert from Japan), Mr. Asbjørn Eide (expert

from Norway), Mr. Fried Van Hoof (expert from The Netherlands), Mr. Soo Gil Park (expert from the Republic of Korea), Mr. Fisseha Yimer (expert from Ethiopia), and Mr. Vladimir Kartashkin (expert from the Russian Federation), all of whom agreed that such bodies are indeed bound by international human rights law and that Member States of such organisations cannot derogate from their respective obligations simply by being a party to a trade or financial agreement. Indeed, as Mr. Yokota pointed out, even if one were to accept the argument that the IMF is not bound by treaties entered into subsequently by Member States, as the IMF contended, it was bound by customary international law.

Representatives of the WTO did admit that international human rights law does bind that organization. Furthermore, the WTO had begun to participate in a dialogue with the Special Rapporteurs regarding its human rights obligations. That dialogue, as well as the lively involvement of the WTO, IMF, and World Bank in the 2001 session, was welcomed by the Sub-Commission, which encouraged similar discussions with all pertinent bodies.

#### **B. Studies Undertaken Pursuant to the Sub-Commission's Cooperation with the Treaty-Monitoring Bodies**

One way in which the Sub-Commission contributes to the field of human rights is by co-operating with the treaty-monitoring bodies. In an effort to further such co-operation, the Sub-Commission has prepared studies for the benefit of those bodies.

In continuing its ongoing co-operation with the Committee on the Elimination of Racial Discrimination (CERD), in particular, the Sub-Commission received a progress report on the concept and practice of affirmative action and a preliminary report on the rights of non-citizens.

This year the Sub-Commission considered requests from CERD and the Committee on Economic, Social and Cultural Rights (CESCR) to conduct additional studies on topics suggested by those bodies. In addition, the Sub-Commission responded to a 1997 request by CERD by authorizing Mr. Paulo Sergio Pinheiro to prepare a working paper on property restitution for refugees and other displaced persons. Further, the Sub-Commission responded to a 2000 request from CESCR by entrusting Mr. Fried Van Hoof with the task of preparing a working paper on the non-discrimination clause in Article 2(2) of the Covenant on Economic, Social and Cultural Rights.

### **1. Affirmative Action**

Special Rapporteur Mr. Marc Bossuyt, former Sub-Commission expert from Belgium who now serves on CERD, presented his progress report on the concept and practice of affirmative action. Mr. Bossuyt told the Sub-Commission that he had sent a questionnaire to governments over a year ago and was still awaiting replies. He also discussed the report's focus, which was to delineate the scope that affirmative action programmes should take.

Sub-Commission experts commented that there would always be controversies surrounding affirmative action programmes. Many suggested that it would be helpful to have a comparative analysis of the effect of affirmative action programmes in various countries. The Sub-Commission also noted that affirmative action efforts were especially important in the field of education.

### **2. Rights of Non-Citizens**

Mr. Weissbrodt, as Special Rapporteur, presented his preliminary report on the rights of non-citizens. As had been the case in regard to the study of affirmative action, this working

paper was in response to a 1997 request from CERD. The report explored the rights of non-citizens under relevant international and regional standards and examined in particular developments since the 1985 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.

The Special Rapporteur reiterated his concern that existing standards have not adequately protected the human rights of non-citizens and that, as CERD had itself said, governments have increasingly been making distinctions between different categories of non-citizens and between non-citizens from different nations. He also expressed concern that those distinctions may contravene international law.

Mr. Weissbrodt solicited input from NGOs, governments, and other interested parties as he embarked on the next phase of his study. That phase will include an update of relevant jurisprudence, a survey of factual situations around the world, and an analytical examination of how the international legal regime currently addresses and should address those situations. The Sub-Commission requested authority from the Commission for dissemination of a questionnaire to assist in gathering information for this study. Mr. Weissbrodt will present his progress report when the Sub-Commission next meets in August 2002.

### **3. Property Restitution for Refugees and Internally Displaced Persons (IDPs)**

The issue of refugee and IDP return received attention by the Sub-Commission at this year's session. On 16 August the Sub-Commission appointed one of its members, Prof. Paulo Sergio Pinheiro, to author a working paper on the topic of the return of refugees' and displaced persons' property. That working paper will not only provide an examination of current international, regional, and national

standards relating to property restitution but will also lay the groundwork for a more comprehensive examination of this matter.

It is envisaged that the working paper will focus particularly on housing restitution for returning refugees and displaced persons. Issues to be covered will include an analysis of the role housing restitution plays in ensuring the voluntary, safe, and dignified return of displaced persons to their homes and when compensation in lieu of restitution is appropriate.

Mr. Pinheiro is expected to present his working paper to the next session of the Sub-Commission in August 2002.

### **C. Other Studies**

Other working papers and studies presented at this year's session of the Sub-Commission included those on discrimination against indigenous peoples, and on terrorism and human rights. Working papers authorised at this year's session for presentation at the 2002 session include examinations of indigenous peoples' permanent sovereignty over natural resources; the question of the trade and carrying of small arms and light weapons and the use of such weapons in the context of human rights and humanitarian norms; the testing, production, storage, transfer, trafficking or use of weapons of mass destruction or with indiscriminate effect, or of a nature to cause superfluous injury or unnecessary suffering, including the use of weaponry containing depleted uranium; and human rights and bioethics, including the implications of the Universal Declaration on the Human Genome and Human Rights. Additionally, the Sub-Commission authorised expanded working papers on reservations to human rights treaties, measures provided in the various international human rights instruments for the promotion and consolidation of democracy, and, as mentioned above, discrimination based on work and descent.

## VI. Working Groups

The Sub-Commission makes a unique contribution to the human rights field through its four inter-sessional working groups on minorities, indigenous populations, slavery, and communications. The working groups provide the possibility for a participatory study of current issues, trends, and difficulties in thematically important areas, and involve monitoring of human rights problems by providing a channel for the airing of grievances. For example, there is no other venue in the United Nations where minority issues are being addressed as intensively as in the Working Group on Minorities. The Working Group on Indigenous Populations has also made important strides in the past by drafting a proposed declaration on indigenous rights and continuing to hear the concerns of indigenous communities from around the world. The other working groups, too, help maintain the Sub-Commission's distinct role in protecting and promoting human rights.

Each working group is composed of one Sub-Commission expert from each of the five geographic regions. All of the working groups – with the exception of the Working Group on Communications – are open to participation by observers. Consequently, they have become important fora for NGOs, interested individuals, and others to participate in a discussion of a particular subject. In addition, expert participation in working groups allows Sub-Commission members to focus on a particular area of interest or expertise. Further, the working groups allow for reports of human rights violations and give governments the chance to respond.

The working groups on minorities, indigenous populations, and slavery each compile a report of their respective sessions, to submit to the Sub-Commission's plenary session. In addition, these working groups may place proposals before the Sub-Commission to

take action with respect to a particular issue. As such, the working groups can influence the agenda and the performance of the Sub-Commission.

### A. Working Group on Minorities

In 2001 the Working Group on Minorities convened for its sixth session from 14 to 18 May. This Working Group is a subsidiary body of the Sub-Commission and was authorised by the Commission on Human Rights in its resolution 1995/24 of 3 March 1995, and endorsed by the Economic and Social Council in its resolution 1995/31 of 25 July 1995. By decision 1998/246 of 30 July 1998, the Economic and Social Council extended the mandate of the Working Group with a view to its holding one session of five working days annually. In accordance with its mandate, the Working Group is expected to: "(a) review the promotion and practical realization of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; (b) examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; and (c) recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities."

At its seventh session, the Working Group re-elected Mr. Asbjørn Eide (expert from Norway) as Chairperson-Rapporteur. The Working Group was also comprised of the following experts of the Sub-Commission: Mr. José Bengoa (expert from Chile), Mr. Vladimir Kartashkin (alternate from Russia), Mr. Soli Sorabjee (expert from India), and Mr. Sik Yuen (expert from Mauritius). Representatives of 50 governments, 69 NGOs, 38 scholars, and 10 inter-governmental organisations attended this year's session of the Working Group.

The Working Group has taken a topic-by-topic approach, focusing on matters such as intercultural and multicultural education for minorities, the role of the media in regard to minorities, and generally on constructive ways to handle situations involving minorities. During its session, the Working Group considered four principal themes: (1) reviewing the promotion and practical realisation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; (2) examining possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; (3) recommending further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national and ethnic, religious and linguistic minorities; (4) determining the Working Group's future role in promoting and protecting the rights of minorities.

At its seventh session the Working Group discussed the practical realisation of the Declaration at the national level, providing opportunities for NGOs, government observers, and other participants to review developments in different parts of the world and discuss possible solutions to minority problems. This theme allowed for a more in-depth examination of the right to effective participation of minorities in the society of which they form a part. Special attention was given to an examination of integrative approaches to minority protection.

At its eighth session in May 2002, the Working Group will examine integrative measures for the better protection of the rights of minorities as well as mainstreaming of the human rights of minority persons in national development plans and international development co-operation.

## **B. Working Group on Indigenous Populations**

Among its many past accomplishments, the Working Group on Indigenous Populations has made a decisive contribution by drafting the Declaration on the Rights of Indigenous Peoples and giving indigenous peoples a voice at the international level. The Working Group's mandate is to: "review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, together with information requested annually by the Secretary-General, and to give special attention to the evolution of standards concerning the rights of indigenous populations."

The Working Group also plays an important role in reviewing developments related to the situation of indigenous communities throughout the world, providing a unique forum for indigenous peoples from all over the world to assemble in Geneva, exchange experiences, engage in a dialogue with their respective governments, and develop common proposals addressed to the UN system. Every year, hundreds of indigenous human rights advocates from all over the world participate in the Working Group on Indigenous Populations and it continues to rival the Sub-Commission in levels of attendance.

In 2001 the Working Group on Indigenous Populations convened for its nineteenth session from 23 to 27 July. At its first meeting the Working Group elected Ms. Erica-Irene Daes (expert from Greece) as Chairperson-Rapporteur. Other members of the Working Group were Mr. Miguel Alfonso Martínez (expert from Cuba), Mr. El-Hadji Guissé (expert from Senegal), Ms. Iulia Antoanella Motoc (expert from Romania), and Mr. Yozo Yokota (expert from Japan). Representatives of 33 Member States, 5 United Nations bodies and specialized agencies, and 271 indigenous and non-governmental

organizations attended the Working Group. A total of 1,033 persons attended the nineteenth session of the Working Group.

The principal theme of this year's session was "Indigenous peoples and their right to development." Many speakers addressed this year's theme, commenting that indigenous views and values should be incorporated into the concept of development. Similarly, many called for indigenous knowledge and traditions to be taken into account in the planning and implementation of development projects, and that the notion of development should thus be based on a balance between Western or mainstream and indigenous views of development.

In a resolution adopted on 15 August, the Sub-Commission recommended that the United Nations Development Programme and the World Bank present their new policy guidelines on indigenous peoples at the twentieth session of the Working Group. The Sub-Commission also invited members of the Group to prepare working papers containing proposals and suggestions for possible future standard-setting and on indigenous peoples' permanent sovereignty over natural resources. The Sub-Commission also asked the Working Group at its twentieth session to continue its consideration, as a principal theme, of "Indigenous peoples and their right to development."

### **C. Working Group on Contemporary Forms of Slavery**

The Working Group on Contemporary Forms of Slavery is the only mechanism in the UN system for monitoring compliance with several multilateral human rights treaties relating to slavery and slavery-like practices. This Working Group has taken the initiative in developing programs of action against the sale of children, child prostitution, and child

pornography; on child labour; on prevention of the traffic in persons and the exploitation of the prostitution of others; and on economic exploitation including the rights of domestic and migrant workers, bonded labour, forced labour, and slavery-like practices in armed conflicts.

The Working Group is a subsidiary body of the Sub-Commission and Commission and was established pursuant to Economic and Social Council decisions 16 (LVI) and 17 (LVI) of 17 May 1974. The Working Group was established in 1975 and has met regularly before each session of the Sub-Commission. This Working Group's mandate is to: "review developments in the field of slavery, the slave trade and the slavery-like practices, of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others, as defined in the Slavery Convention of 1926, the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the Convention of 1949 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others."

In 2001, the Working Group on Contemporary Forms of Slavery convened for its twenty-sixth session from 11 to 15 June. This year the Working Group elected Mr. Rajendra K. Goonesekere (expert from Sri Lanka) as Chairperson-Rapporteur. The other members of the Working Group were Mr. Stanislav Ogurtsov (expert from Belarus), Mr. Pinheiro (expert from Brazil), Mr. van Hoof (expert from The Netherlands), and Ms. Halima Warzazi (expert from Morocco). As neither Mr. Paulo Sergio Pinheiro nor his alternate, Mr. Hector Fix-Zamudio (expert from Mexico), could attend, they were replaced by Mr. Miguel Alfonso Martínez (expert from Cuba). Representatives of 19 governments and 20 NGOs attended the 2001 session of the Working Group.

This year the Working Group paid particular attention to the topic of trafficking in

persons -- a theme decided upon at its previous session in 1999 and reaffirmed in 2000. As such, the Working Group listened to a number of interventions regarding trafficking in persons. Most speakers welcomed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), but they also expressed their concern about some of the provisions, particularly in regard to the protection of the victims of trafficking. Many participants regretted the fact that too often, persons who have been trafficked continue to be considered and treated like criminals, often because of their undocumented immigration status, rather than being treated as victims of the crime of trafficking. Other provisions of the Trafficking Protocol were also discussed.

On 15 August the Sub-Commission, taking note of the report of the Working Group, adopted a resolution concerning seven sub-themes examined at this year's session. These sub-themes included traffic in persons and exploitation of the prostitution of others, prevention of the transborder traffic in children, the role of corruption in the perpetuation of slavery and slavery-like practices, misuse of the internet for the purpose of sexual exploitation, migrant workers and domestic migrant workers, and eradication of bonded labour and elimination of child labour; and the sale of children, child prostitution, and child pornography.

The Working Group decided that its principal theme for 2002 will be the exploitation of children, particularly in the context of prostitution and domestic servitude and in 2003 will be the issue of contemporary forms of slavery related to and generated by discrimination, in particular, gender discrimination, focusing attention on abuses against women and girls, such as forced marriages, early marriages, and sale of wives.

## **VII. Future of the Sub-Commission**

There was a general feeling that the Sub-Commission was again emerging as an expert body filling a unique role in the promotion and protection of human rights. The previous two elections to the Sub-Commission strengthened its expertise in the area of economic, social, and cultural rights, and that expertise is manifesting itself in a number of thoughtful and timely studies and resolutions, including those on globalisation, international trade and human rights, the effect of intellectual property on human rights, and the relationship between businesses and human rights. The Sub-Commission, of course, has not lost sight of the continuing importance of civil and political rights, and this year continued its contribution to the examination of the administration of justice, including discrimination in the criminal justice system.

The Sub-Commission, however, was somewhat hindered by time constraints. The Sub-Commission did not have enough time to draft resolutions with adequate consultations among members. Both draft resolutions and studies were not made available in time for thorough consideration as the Secretariat itself lacked the time to prepare the relevant documents. Responding to this problem, the Sub-Commission unanimously requested the Commission to restore the four-week duration of its annual session. Inspired by its meeting with the Commission, the Sub-Commission further proposed that the Commission seek authority from the Economic and Social Council to provide at least an advisory decision about Sub-Commission requests for studies and other concrete measures at its September meeting rather than having to wait until March/April for a decision by the Commission. Those two measures will make it possible for the Sub-Commission to fulfill more effectively its "think-tank" role and have the kind of deliberations that will avoid the spectacle of the public drafting of resolutions.



## 16. Revised Guide to Human Rights Research on the Web

by: Marci Hoffman\*  
Revised July 2002

As we all know by now, the Web has become the primary resource for accessing human rights information, documents, and other materials. This guide will focus on some of the major human rights and related Web sites that are crucial to the ongoing research efforts of human rights lawyers, activists, researchers, and scholars. Web sources for the following types of materials will be highlighted in this guide: research guides, treaties and international instruments, other important human rights documents and reports, status information, jurisprudence and case law, and primary Web sites.

A new feature of this research guide is a topical supplement that focuses on researching specialized topics within the area of human rights. This topic of the first supplement is researching economic, social and political rights. This document points out the best Web sites for researching the rights enumerated in the **International Covenant on Economic, Social and Cultural Rights**. See the end of the main research guide for this specialized research tool.

### A quick note about searching the Web...

Before we get started, just a quick note about using search engines for locating relevant materials on the Web. While most researchers use search engines, such as Google or Alta Vista, to locate documents, it is important to note that search engines alone cannot possibly search the entire Web. In fact, a good deal of

the content available on the Web cannot be accessed through search engines at all because it is contained in Web databases. Therefore, it is important that researchers use a combination of search engines, Web catalogs (also called directories or indices), and Web guides (such as this one) to locate relevant documents and information. For more information on this issue, see *The Nuts and Bolts of Search Engines*, by Gail Partin in What's Online in International Law (ASIL Newsletter, September-October, 2001)

<<http://www.asil.org/newsletter/wol015.htm>>.

### I. Research Guides and Bibliographies

One of the best places to begin research on a human rights topic is with a research guide or bibliography. Listed below are some of the major research tools.

1) Marci Hoffman, *ASIL Guide to Electronic Resources for International Law: Human Rights*

<<http://www.asil.org/resource/humrts1.htm>>.

This guide contains other relevant chapters on treaties, the UN, international criminal law, and a new chapter on international organizations.

2) Human Rights Program, Harvard Law School, *Getting Started in Human Rights Research: On-Line and Off-Line Resources*  
<<http://www.law.harvard.edu/programs/HRP/Publications/research.html>>.

3) Elisa Mason, *Update to Guide to Country Research for Refugee Status Determination*  
<<http://www.llrx.com/features/rsd2.htm>> and  
*Update to Annex: Human Rights, Country and Legal Information Resources on the Internet*

<[http://www.llrx.com/features/rsd\\_bib2.htm](http://www.llrx.com/features/rsd_bib2.htm)>.

See also *Guide to International Refugee Law Resources on the Web*

<<http://www.llrx.com/features/refugee.htm>>.

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4) Rights International, The Center for International Human Rights Law Inc., *The Rights International Research Guide for International Human Rights Lawyers* <<http://www.rightsinternational.org/links.html>>.

5) United Nations Dag Hammarskjöld Library, *United Nations Documentation: Research Guide on Human Rights* <<http://www.un.org/Depts/dhl/resguide/spechr.htm>>.  
See also the specialized research guide on *international law* <<http://www.un.org/Depts/dhl/resguide/specil.htm>>.

6) University of Toronto, *Women's Human Rights Resources* <<http://www.law-lib.utoronto.ca/Diana/>>. An excellent place to start researching any women's human rights issue. Also links to some useful research guides on human rights and related topics.

## II. Compilations of Human Rights Instruments

Since international human rights law is treaty based, locating the necessary instruments is usually the first place to begin research in this area. The Web offers many sites for obtaining the full-text of the most important treaties and international instruments. A good strategy is to begin with the body that promulgated the instrument. This section will outline the major Web resources for human rights instruments as well as the sources that provide information about the issuing body itself.

### 1) United Nations High Commissioner for Human Rights <<http://www.unhchr.ch/>>

In 1995 the Office of the High Commissioner for Human Rights/Centre for Human Rights "embarked upon the

development of what is hoped will become the most complete source of information available on the Internet concerning United Nations action in the field of human rights." It contains information on the human rights activities of the UN. The most important human rights instruments are available full-text, but they lack complete citations. Ratification and status information is also available. Other human rights related documents, reports, and resolutions from various UN bodies are available. This should be one of the first places to begin research for UN human rights documents and information. Languages: English, French and Spanish

Primary features of this site include:

#### a. International Human Rights Instruments

<<http://www.unhchr.ch/html/intlinst.htm>>  
A good collection of basic treaties and instruments.

#### b. Treaty Body Database

<<http://www.unhchr.ch/tbs/doc.nsf/>>  
Contains documents issued by the treaty bodies. In addition to documents, there is information about the committee members, reporting status by country or treaty, and status of ratification by country or by treaty.

#### c. Charter-based Bodies Database

<<http://www.unhchr.ch/huridocda/huridoca.nsf/documents?openframeset>>  
Contains documents issued by the Charter-based bodies, arranged by body, country, mandate, subject, symbol, and year.

### 2) United Nations Home Page

<<http://www.un.org>>

This site provides information about the UN (history, list of member states, the UN Charter, the ICJ Statute, an online tour, and a calendar of conferences and observances), information about publications and databases and access to UN news and documents. Direct access to the **Human Rights** page <<http://www.un.org/rights/>> provides links to many important UN pages, such as the UNHCHR (see above), international criminal tribunals, and treaties. Languages: Arabic, Chinese, English, French, Russian, and Spanish.

#### a. United Nations Treaty Collection

<<http://untreaty.un.org/>>

This site provides access to the full text of over 40,000 bilateral and multilateral treaties contained in the *United Nations Treaty Series* (in the authentic languages, and English and French translations) as well ratification and status information from the *Multilateral Treaties Deposited with the Secretary General*. The UNTS section offers basic and advanced searching options. The basic option offers title word and popular name access. The electronic version of *Multilateral Treaties Deposited with the Secretary General* offers more up-to-date status information than the paper version. Access is provided through a topical table of contents and a new alphabetical and searchable index. This collection also contains the texts of recently deposited multilateral treaties. Some newly added features include the *Monthly Statement of Treaties and International Agreements* and the *UN Treaty Series Cumulative Index* – two sources previously only available in print. Access to this database is by subscription, see subscription

information

<<http://untreaty.un.org/English/howtoreg.asp>> for more information.

Languages: English and French.

#### b. UN Documentation Centre

<<http://www.un.org/documents/>>

This collection contains a selection of official documents from the Secretary-General, the General Assembly, the Security Council and the Economic and Social Council. Note that the General Assembly resolutions are available from 1977 to present and Security Council resolutions go back to 1946. The archive for other documents varies depending on the issuing body. This site also offers access to **UN-I-QUE** (a database offered by the UN Dag Hammarskjöld Library designed to provide quick access to document symbols) <<http://lib-unique.un.org/lib/unique.nsf>> and a **research guide on UN documentation** <<http://www.un.org/depts/dhl/resguide/>>.

Languages: Arabic, Chinese, English, French, Russian, and Spanish.

#### c. UN Action Against Terrorism <<http://www.un.org/t>>

This site is a recent addition to the UN Web site. It contains documents, statements, and reports from various UN bodies and agencies involved in this issue. Documents and information from the Security Council Counter-Terrorism Committee, established pursuant to Resolution 1373 (2001), are available from this site <<http://www.un.org/Docs/sc/committees/1373/>>. Under the “Documents” tab, you will find the country reports mandated by that resolution.

**3) University of Minnesota Human Rights Library** <<http://www1.umn.edu/humanrts/>>

The Library contains a collection of more than 10,400 international human rights treaties, instruments, and other documents. These documents can be accessed by subject matter

<<http://www1.umn.edu/humanrts/instrtree/ainstls2.htm>>, by instrument list

<<http://www1.umn.edu/humanrts/instrtree/ainstls1.htm>> or by using one of the search mechanisms

<<http://www1.umn.edu/humanrts/searchdevices.htm>>. Many of the documents contain authoritative citations and many of the instruments are available in French and Spanish (also with complete citations). Where possible, this site links to ratification information. There is also a large collection of UN documents

<<http://www1.umn.edu/humanrts/un-orgs.htm>> materials from other regional systems (European, African and Inter-American)

<<http://www1.umn.edu/humanrts/regional.htm>> and a good collection of links to other Web resources

<<http://www1.umn.edu/humanrts/links/links.htm>>. A helpful tool is the meta-search device that allows the user to search for documents on multiple human rights Web sites from a single form

<<http://www1.umn.edu/humanrts/lawform.html>>. Languages: English, French, Spanish and some Russian. Some documents are available in Arabic, via Internet Explorer (<http://www1.umn.edu/humanrts/arabic.html>).

**4) Multilaterals Project** (Tufts University, Fletcher School of Law and Diplomacy) <<http://fletcher.tufts.edu/multilaterals.html>>

Contains a variety of full-text treaties, including many human rights instruments. No citations are provided however. There is a

searching mechanism available and a chronological list of agreements. This site also provides a general link to the UN Treaty Collection and other treaty secretariats.

### 5) Netherlands Institute of Human Rights (SIM), Human Rights Treaties

<<http://www.law.uu.nl/english/sim/instr/>>

A good collection of primary treaties and instruments. Provides information on signatures and ratifications. Languages: Dutch and English.

## III. Specialized Sites

### 1) International Labour Organization (ILO)

<<http://www.ilo.org/>>

This is an outstanding Web site. Begin by selecting the International Labour Standards page which provides access to important documents and information <<http://webfusion.ilo.org/public/db/standards/normes/index.cfm?lang=EN>>. Other topical areas of interest include employment, social protection, and social dialog.

Access to the following ILO legal information services are available:

a. **ILOLEX** (database of international labour standards containing over 75,000 full-text ILO documents)

<<http://ilolex.ilo.ch:1567/english/index.htm>>

b. **Ratification information** (comprehensive ratification information by country, convention, and comparative information)

<<http://ilolex.ilo.ch:1567/english/newratframeE.htm>>

c. **NATLEX** (bibliographic database featuring national laws on labour, social security and related human rights)

<<http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E>>

d. **ILODOC** (documents and publications of the ILO, some full text online)

<<http://ilis.ilo.org/ilis/engl/ilodoc/eintilo.htm>>

Other databases are also available. Languages: English, French and Spanish.

See also the **ILO Research Guide** (Cornell Law Library's ILO Mirror Site). This mirror site contains a detailed bibliography on international labor issues <[http://www.lawschool.cornell.edu/library/International\\_Resources/iloguide.htm](http://www.lawschool.cornell.edu/library/International_Resources/iloguide.htm)>.

### 2) United Nations Educational, Scientific and Cultural Organization (UNESCO)

<<http://www.unesco.org/>>

Provides information about the organization, current events, publications, programs, documentation and databases. There is a section called **Legal Instruments**

<<http://www.unesco.org/general/eng/legal/index.shtml>> that provides some of the relevant human rights conventions and agreements and some full text documents. For example, UNESCO's *Standard-setting Instruments in Human Rights*

<[http://www.unesco.org/human\\_rights/hrcontent.htm](http://www.unesco.org/human_rights/hrcontent.htm)>. UNESCO's procedure for examination of human rights complaints is also available full text

<<http://www.unesco.org/general/eng/legal/hrights/>>. In addition to legal instruments, documents issued by UNESCO are available <<http://unesdoc.unesco.org/ulis/>>.

Languages: Arabic, Chinese, English, French, Russian, and Spanish.

### 3) United Nations High Commissioner for Refugees (UNHCR) <<http://www.unhcr.ch/>>

This Web site is the primary source for information on refugee related issues. The extremely valuable REFWORLD site is no longer available and most (but not all) of the information is now available from the “Research/Evaluation” page <<http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=research>>. From this page, access the following databases:

#### a. Country of Origin and Legal Information

<<http://www.unhcr.ch/research/rsd.htm>>  
>  
Contains a variety of country reports, legal documents, news, and maps.

#### b. UNHCR Library

<<http://www.unhcr.ch/research/library.htm>>  
Allows you to search the UNHCR’s collection of refugee and related materials.

See also the “Protecting Refugees” page <<http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=protect>> which contains information about legal protection and the 1951 Refugee Convention, including the “travaux préparatoires.” Languages: Bulgarian, Chinese, Czech, English, French, German, Japanese, Korean, Polish, Portuguese and Spanish.

### 4) Council of Europe (COE) Portal

<<http://www.coe.int/>>

This site contains information about the COE, its activities and the **European Treaties** collection <[http://conventions.coe.int/treaty/EN/cadreprincipal.htm](http://conventions.coe.int/treaty/EN/cadreprincip.htm)>. In addition to human rights treaties,

it contains treaties related to social matters, bioethics, penal, public and international law and other subject areas. This is a wonderful collection that provides the user with access to the texts of the treaties, list of declarations and reservations, and an explanatory report. Of great importance is the signature and ratification information for each Member State.

Languages: English, French.

#### a. Council of Europe, **Directorate General of Human Rights**

<[http://www.coe.int/T/E/Human\\_rights/](http://www.coe.int/T/E/Human_rights/)>

The Directorate General of Human Rights focuses on a variety of activities: Human rights convention, Economic and social rights, Preventing torture, National minorities, Combating racism, Equality between women and men, and more. This is a good page to find out what is COE is doing in the area of human rights. Languages: English and French.

#### b. Council of Europe, **European Committee for the Prevention of Torture** <<http://www.cpt.coe.int/en/>>

This page contains information about the Convention for the Prevention of Torture as well as information about the activities and reports of the Committee. Under Publications, you will find the convention, background information, rules of procedure, and other information related to the convention. The CPT has a database that includes all reports of the CPT, public statements, “substantive” sections of CPT Annual General Reports <<http://hudoc.cpt.coe.int/>>. Languages: English and French.

**c. European Court of Human Rights**

<<http://www.echr.coe.int/>>

The official Web site of the Court contains general information on the court, pending cases, judgments and basic texts (such as the Rules of Court). A list of recent judgments is also available. **HUDOC** is the Court's database containing the case-law of European Convention on Human Rights <<http://www.echr.coe.int/Hudoc.htm>>. Languages: English and French.

**d. Council of Europe, Commissioner for Human Rights**

<<http://www.commissioner.coe.int/>>

Provides access to documents issued by the Commissioner, such as reports, opinions, recommendations, and other documents.

For more information on the documentation issued by the Council of Europe, see Anne Burnett, *Guide to Researching the Council of Europe*. This guide focuses on information and documentation on a variety of topics, including human rights <<http://www.llrx.com/features/coe.htm>>.

**5) Organization of American States (OAS)**

<<http://www.oas.org/>>

This is the official homepage of the OAS. It contains a great deal of information about the OAS, its charter, resolutions, annual report of the Secretary General, treaties and conventions, speeches and statements and press releases. Some of the documents available at this site are full-text (resolutions, annual reports, speeches, etc.). The OAS' Documents & Speeches page contains the full text of resolutions, treaties and conventions.

Languages: English, French, Portuguese, and Spanish.

a. **Inter-American Commission on Human Rights**

<<http://www.cidh.oas.org/DefaultE.htm>>

The Commission page contains **annual reports** from 1970-2001 as well as some country reports and other publications <<http://www.cidh.oas.org/publications.htm>>. Many of the older reports are only available in Spanish. There is also a link to the **Basic Documents** <<http://www.cidh.oas.org/basic.htm>> that contains the full-text of the instruments as well as status and ratification information. Languages: English, French, Portuguese and Spanish.

b. **Inter-American Court of Human Rights**

<<http://www.corteidh.or.cr/index-ingles.html>>

This page contains information about the Court, some jurisprudence (advisory opinions, decisions and judgments) press releases, and other information. Some of the cases are available only in Spanish. This site can be difficult to access. Languages: English and Spanish.

c. **Inter-American Commission of Women**

<<http://www.oas.org/cim/default.htm>>

This page contains information on the Inter-American conventions relating to women as well as some documents. There is a **Brief History of Women's**

**Human Rights in the Inter-American System**, but it is only available in Spanish at the moment. Languages: English and Spanish.

IV. **Humanitarian Law**

1) **International Committee of the Red Cross** <<http://www.icrc.org/>>

The documents here are quite good: basic rules of humanitarian law, the Geneva conventions, information on ratifications, accessions and successions and humanitarian law issues (war at sea, land mines, famine and war, etc.). See the **International Humanitarian Law (IHL)** database, a collection of "91 treaties and texts, commentaries on the four Geneva Conventions and their Additional Protocols, an up-to-date list of signatures, ratifications relating to IHL treaties and full text of reservations" <<http://www.icrc.org/ihl>>. See also the National Implementation Database, includes data on the implementation of international humanitarian law at the country level. Implementing laws, regulations, and case law can be accessed by State or keyword <<http://www.icrc.org/ihl-nat>>. The ICRC also provides brief narratives on a variety of topics, such as **International Humanitarian Law in Brief and Treaties and Customary Law** (these are available from the IHL page). Languages: English, French and Spanish.

2) **International Federation of Red Cross and Red Crescent Societies** <<http://www.ifrc.org/>>

Current information on humanitarian issues from around the world. Contains links to other Red Cross/Red Crescent organizations on the Internet. Under publications, see the **World Disasters Report and Code of Conduct**. Languages: English, French and Spanish.



3) **ReliefWeb** <<http://www.reliefweb.int/>>

ReliefWeb is a project of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). It provides current information on the humanitarian relief operations. There is also a library filled with reports related to population, migration, world emergencies and many other issues. See also the archive on natural disasters. This site provides access to lots of useful information.

**V. Status, Reservations and Declarations**

Locating status and ratification information as well as reservations and declarations for an instrument is of primary importance in international human rights law. This can be a daunting task when relying on paper sources. Now, there are many sources on the Web for this kind of information - and they are usually quite up-to-date.

1) **UN, Multilateral Treaties Deposited with the Secretary-General**  
<<http://www.untreaty.un.org/>>

This material is part of the **United Nations Treaty Collection**. This publication is available in print, but it is updated almost daily on the Web. Access information through a topical list, see chapter IV for human rights. Each treaty record contains entry into force information, status, the UNTS citation (if there is one), and a list by country which includes signature and ratification dates. The text of country declarations, reservations, and objections are also provided. A link to the full-text of the treaty is available. A recent addition is an alphabetical index and a searchable index. One of the biggest advantages of using this tool online is that is **much** more current than the print version. This is a fee-based service, see

subscription information for more details  
<<http://untreaty.un.org/English/howtoreg.asp>>.

2) **UNHCHR, Treaty Body Database**  
<<http://www.unhchr.ch/tbs/doc.nsf/>>

This database was established to monitor the implementation of the principal international human rights treaties. The database provides information on submission of reports by States, documents issued by the treaty bodies, and reporting and ratification information. Full-text documents are available as well as status and submission information. Documents can be accessed in a variety of ways (by treaty, country, symbol, etc.).

3) **Basic Documents Pertaining to Human Rights in the Inter-American System**  
<<http://www.cidh.oas.org/basic.htm>>

This site offers signature and ratification information for several of the Inter-American human rights treaties. Other OAS treaty signature and ratification information can be accessed through the Treaties and Conventions section of this site  
<<http://www.oas.org/EN/PROG/JURIDICO/english/treaties.html>>.

4) International Labour Organization Conventions, **Information on Ratifications**  
<<http://ilolex.ilo.ch:1567/english/newrat/frameE.htm>>.5) **United Nations High Commissioner for Refugees**, States Parties to the Convention are listed under the “Legal Protection” section of the “Protecting Refugees” page  
<<http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=protect>>.

- 6) **International Committee of the Red Cross** <<http://www.icrc.org>> and the **IHL** database <<http://www.icrc.org/ihl>>.
- 7) Each treaty included on **Council of Europe** treaties page includes a link to the chart of signature and ratification information <<http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>>.
- 8) If the U.S. is a party to the agreement, consult tools such as **Treaties in Force (TIF)** <[http://www.state.gov/www/global/legal\\_affairs/tifindex.html](http://www.state.gov/www/global/legal_affairs/tifindex.html)>. TIF is also available on Lexis (INTLAW/Treaties and International Agreements). Update Treaties in Force (since it is issued only once a year) by consulting **Treaty Actions** (supposed to be issued monthly) <<http://www.state.gov/s/l/c3428.htm>>. Archived Treaty Actions from 1997 are also available on this page.
- \* A note of caution when using the State Dept. Web site, with the new administration, many portions of the current Web site do not have complete (or current information) <<http://www.state.gov/>>. It may be necessary to consult the archive for certain pieces of information <<http://www.state.gov/index.html>>.
- 9) **Netherlands Institute of Human Rights (SIM), Human Rights Instruments** <<http://www.law.uu.nl/english/sim/instr/>>
- Provides information on signatures and ratifications for most primary treaties and instruments.
- For more information on ratification information on the Web as well as useful phone

numbers, see the **Treaties Chapter** of the *ASIL Guide to Electronic Resources for International Law*

<<http://www.asil.org/resource/treaty1.htm>>.

## **VI. Jurisprudence, Case law, Decisions and Reports**

This section contains information from human rights courts, like the European Court of Human Rights as well as from the bodies established under the major human rights instruments, like the Human Rights Committee. Keep in mind that only a small portion of this information is available in electronic form. Most of the documents are still only available in publications from the issuing body (UN, COE, etc.) or reprinted in other sources (such as *International Legal Materials*, *Human Rights Law Journal*, *International Human Rights Reports*, etc.).

### **1) United Nations**

There are a few good Web resources for reports of States parties, concluding observations or comments, general comments and recommendations and other basic documents submitted to and issued by the UN Treaty Bodies.

#### **a. Treaty Body Database at the UNHCHR Web site**

<<http://www.unhchr.ch/tbs/doc.nsf/>>

#### **b. University of Minnesota Human Rights Library, United Nations Documents**

<<http://www1.umn.edu/humanrts/un-orgs.htm>>

Both of these sites will have documents from the following UN bodies: Commission on Human Rights, Human Rights Committee, Committee Against

Torture, Committee on the Elimination of Discrimination Against Women, Committee on the Rights of the Child, Committee on the Elimination of Racial Discrimination and Committee on Economic, Social and Cultural Rights.

### **2) European System**

#### **a. European Court of Human Rights (pending cases and judgments)**

<<http://www.echr.coe.int/>>

#### **b. Council of Europe Case-Law collection (HUDOC)**

<<http://hudoc.echr.coe.int/hudoc/>>

### **3) Inter-American System**

#### **a. Inter-American Commission. Annual Reports**

<<http://www.cidh.oas.org/publications.htm>>

#### **b. University of Minnesota Human Rights Library, Inter-American Commission, Annual Reports**

<<http://www.umn.edu/humanrts/cases/commissn.htm>>

#### **c. Inter-American Court Jurisprudence**

<[http://www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html)>

#### **d. University of Minnesota Human Rights Library, Inter-American Court on Human Rights Advisory Opinions and Contentious Cases**

<<http://www.umn.edu/humanrts/iachr/iachr.html>>

#### **e. Inter-American Human Rights Database**

Contains annual reports, session reports, and special reports of the Inter-American Commission since 1960 <<http://www.wcl.american.edu/pub/humright/digest/index.html>>. Languages: English and Spanish.

#### 4) Collections of Decisions

a. **INTERIGHTS, International Law Reports Database**  
<<http://www.interights.org/icl/>>

Contains summaries of decisions from various human rights tribunals. The full-text of the decisions are available from INTERIGHTS.

b. **INTERIGHTS, Commonwealth Human Rights Case Law Database**  
<<http://www.interights.org/ccl/>>

This database provides summaries of recent human rights decisions from national courts in Commonwealth jurisdictions through a browse facility and a search engine.

c. **Netherlands Institute of Human Rights (SIM) Case Law Database**  
<<http://sim.law.uu.nl/SIM/Dochome.nsf?Open>>

This site provides access to the databases containing summaries of the case law of the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination. There is also a database containing information on judgements of the European Court of Human Rights and the concluding comments of the United Nations treaty bodies have been made accessible. Coverage varies. Users must

register to use the databases, but there is no charge for access. Languages: Dutch and English.

#### 5) Other

a. **International Court of Justice**  
<<http://www.icj-cij.org/>>

b. **International Criminal Tribunal for the Former Yugoslavia**  
<<http://www.un.org/icty/index.html>>

c. **International Criminal Tribunal for Rwanda**  
<<http://www.un.org/law/rwanda/>>  
<<http://www.ict.rwanda.org/>>

d. **International Criminal Court**  
<<http://www.un.org/icc/>>

e. **Reports of Cases before the Court of Justice**  
<<http://www.lawschool.cornell.edu/library/cijwww/icjwww/idocket.htm>>

f. **The University of Michigan Law School, Refugee Caselaw Site**  
<<http://www.refugeecaselaw.org/Refugee/Default.asp>>

g. **World Court Digest.** A compendium of the Jurisprudence of the International Court of Justice <<http://www.virtual-institute.de/en/wcd/wcd.cfm>>

#### VII. Country Reports

Many international organizations produce reports on the human rights conditions in various countries. Human rights activists and lawyers rely on these reports for asylum proceedings and when appearing before various treaty bodies and tribunals. Be sure to consult *Update to Guide to Country Research for Refugee Status Determination* by Elisa Mason, a

useful guide to country documentation  
<<http://www.llrx.com/features/rsd2.htm>>.

1) **Amnesty International Country Reports**  
<<http://www.amnesty.org/ailib/>>. This is a wonderful collection of AI reports arranged by country, region, or theme.

2) **Asylumlaw.org**  
<<http://www.asylumlaw.org/>>. The “case support” database has over 800 documents by country or theme. See also the “legal tools” section of this site.

3) **Center for Gender and Refugee Studies**  
<<http://www.uchastings.edu/cgrs/>>.

4) **Human Rights Watch, World Report**  
<<http://www.hrw.org/wr2k1/>>. See also publications list for other reports  
<<http://www.hrw.org/research/nations.html>> as well as the “documents by country” section  
<<http://www.hrw.org/countries.html>>.

5) **ICRC Annual Report**  
<[http://www.icrc.org/eng/operations\\_country](http://www.icrc.org/eng/operations_country)>.

6) **International Helsinki Federation for Human Rights**  
<<http://www.ihf-hr.org/index.htm>>. Produces a variety of reports on many topics: religious freedom, human rights abuses in OSCE countries, and fact-finding missions.

7) **Lawyer’s Committee for Human Rights Web site** <<http://www.lchr.org/home.htm>>. LCHR produces a variety of reports, some of which are available on its Web site.

8) **ReliefWeb**  
<<http://www.reliefweb.int/w/rwb.nsf>>. Contains a large number of documents from many different organizations.

9) **UNHCR, Public Information Section Country Profiles**  
< <http://www.unhcr.ch/cgi-in/texis/vtx/rsd?search=coi&source=AAUNHCRPROF>>

10) **UNHCR, Research: Country of Origin and Legal Information**, contains many country reports <<http://www.unhcr.ch/research/rsd.htm>>

11) **UNDP, Human Development Reports**  
<<http://hdr.undp.org/>>.

12) **UNICEF, State of the World's Children**  
<<http://www.unicef.org/pubsgen/sowc02/>>.

13) **U.S. Dept. of State Country Reports on Human Rights Practices**  
<<http://www.state.gov/g/drl/hr/c1470.htm>>. There is also a link to archived reports from 1993-1999. See also the reports against torture and racial discrimination  
<<http://www.state.gov/g/drl/hr/>>. The religious freedom reports are available on this Web site  
<<http://www.state.gov/g/drl/irf/>> as well as the new Trafficking in Persons Report  
<<http://www.state.gov/g/tip/rls/tiprpt/>>.

## VIII. Lists and Newsgroups

Listservs and newsgroups are valuable tools for the human rights researcher. They provide a mechanism for communicating with other researchers and activists as well as provide information on action alerts and documentation. For more information on how to subscribe as well as information on other law related lists, see the **Lists, Newsgroups and Networks Chapter** of the *ASIL Guide to Electronic Resources for International Law*  
<<http://www.asil.org/resource/lists1.htm>>.

## IX. Other Relevant Web Sites

These Web sites are good places to begin one's research since they link to many other relevant sources.

### 1) AAAS Directory of Human Rights Resources on the Internet

<<http://shr.aaas.org/dhr/>>

A good collection of links to hundreds of human rights organizations worldwide. Also includes links to many electronic publications on the Internet. See also *Getting Online for Human Rights, Frequently Asked Questions and Answers about Using the Internet in Human Rights Work*

<<http://shr.aaas.org/Online/Cover.htm>>.

### 2) American Society of International Law

<<http://www.asil.org/>>

A good place to begin researching the Web for international law sources. Be sure to check the *ASIL Guide to Electronic Resources for International Law*. The *Guide* contains 11 chapters, including the UN, Treaties, Human Rights, Environmental Law, International Criminal Law, Private International Law and Lists, Newsgroups and Networks, International Economic Law, and International Organizations

<<http://www.asil.org/resource/Home.htm>>.

### 3) Amnesty International Online

<<http://www.amnesty.org/>>

This is the official Internet site for AI. It contains the most up-to-date information -- new document summaries, publications from AI (including the annual country reports) and links to other sites.

### 4) Annual Review of Population Law

<[http://www.law.harvard.edu/programs/annual\\_review/annual\\_review.htm](http://www.law.harvard.edu/programs/annual_review/annual_review.htm)>

This database contains summaries and excerpts of legislation, constitutions, court decisions, and other official government documents from every country in the world relating to population policies, reproductive health, women's rights, and related topics.

### 5) Derechos — Human Rights

<<http://www.derechos.org/>>

This Web site offers a variety of human rights information, including reports on human rights violations, actions, links and documents. Information is organized by country and by issue; an index and a search engine allow for easy finding of materials. The focus is on Latin America and many of these documents are only available in Spanish.

### 6) Forced Migration Online

<<http://www.forcedmigration.org/>>

The first component of this collection is now available. This new site is a searchable digital collection of about 3,000 full-text grey (unpublished) literature documents.

### 7) Human Rights Internet

<<http://www.hri.ca/welcome.cfm>>

Human Rights Internet is an international network of human rights organizations, documentation centre and publishing house. This site contains many things including UN documents, education materials, resource guides and lists of links.

### 8) International Helsinki Federation for Human Rights

<<http://www.ihf-hr.org/>>

Provides a wide variety of reports on various human rights issues, such as religious freedom, rights of national minorities, and freedom of expression and access to information.

9) **OneWorld Online** <  
<http://www.oneworld.net/>>

"OneWorld is dedicated to promoting human rights and sustainable development by harnessing the democratic potential of the Internet." It contains news, thematic guides and other resources.

10) **Women's Human Rights Page**  
<<http://www.law-lib.utoronto.ca/diana/>>

This wonderful site continues to be one of the best resources on women's human rights. The site has recently been reorganized and the materials are now available in a new resources database. The materials are organized into articles, documents and links. Other useful materials are available as well, such as fact sheets, publications, and research guides.

## X. Conclusion

The Internet continues to have a profound impact on the way people research and use information, especially in the area of human rights. As the Web has grown as a primary source for human rights information and documentation, so has the need for tools for navigating through the maze of resources. Diligent researchers should not rely solely on search engines to locate relevant materials. Hopefully, this guide will act as such a tool for helping human rights researchers identify, locate, and obtain the materials and information necessary for their work. Please send comments and questions to Marci Hoffman at [hoffmamb@law.georgetown.edu](mailto:hoffmamb@law.georgetown.edu).

### Supplement to Revised Guide to Human Rights Research on the Web

#### Researching Economic, Social and Cultural Rights on the Web

July 2002

A new feature of this article is a specialized research guide on **economic, social and cultural rights** (ESC rights). This guide will highlight some of the major Web resources available for researching this topic.

ESC rights are enumerated in the **International Covenant on Economic, Social and Cultural Rights**, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

The **text of the covenant** is available on the UN High Commissioner for Human Rights (UNHCHR) Web site <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>. This version of the text also includes "general comments on implementation." This site also provides updated status information and the text of country declarations and reservations. Alternatively, the text and related information is available from the University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instr/b2esc.htm>>.

Many **other international instruments** contain provisions that promote economic, social and cultural rights, such as the ILO conventions on labor and employment, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child. For assistance in locating these related instruments, see Section II of the main research guide, "Compilations of Human Rights Instruments." For more information, see *Economic, Social and Cultural Rights: A Guide to the Legal Framework*, prepared by the Center for Economic and Social Rights <<http://www.cesr.org/text%20files/escrguide.PDF>>.

Some of the basic economic, social and cultural rights include:

- right to work

- right to food
- right to health
- right to education
- right to housing

## I. General Resources on Economic, Social and Cultural Rights

### A. Documents and Background Information

- **UNHCHR, Related international Instruments**

<<http://www.unhchr.ch/html/intlinst.htm#develop>>

These related international instruments include the Declaration on Social Progress and Development, the Declaration on the Right to Development, and the Declaration of the Principles of International Cultural Co-operation.

- **UNHCHR, Treaty Body Database**

<<http://www.unhchr.ch/tbs/doc.nsf>>

Contains the full-text of States reports, concluding observations, decisions, views, etc. related to the Committee on Economic, Social and Cultural Rights.

- **UNHCHR, Committee on Economic, Social and Cultural Rights**

<<http://www.unhchr.ch/html/menu2/6/cescr.htm>>

Provides information about the Committee and its work. Includes the text of the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

### B. General ESC Rights Web Sites

- **UNHCHR, Economic, Social, and Cultural Rights**

<<http://www.unhchr.ch/html/menu2/issecon.htm>>



<sup>0</sup> “US abandons International Criminal Court treaty,” Agence France-Presse, May 6, 2002. This complete resource page contains links to documents, news, the draft protocol, the Committee’s page, as well as other topical pages. The topics include: extreme poverty, transnational corporations, employment, right to food and education, and more.

- Amnesty International, **Economic Relations**  
<[http://web.amnesty.org/web/web.nsf/pages/ec\\_home](http://web.amnesty.org/web/web.nsf/pages/ec_home)>

Provides information about economic relations and human rights, including AI campaigns and briefings. The Economic Relations documents links to the library of AI documents on the topic.

- **Center for Economic and Social Rights** <<http://www.cesr.org>>

This site contains links to many documents and publications about particular economic and social rights, such as the right to food, education and work. It also has links to other sites and organizations concerned with social and economic rights.

- **International Network for Economic, Social and Cultural Rights**  
<<http://www.escr-net.org/EngGeneral/home.asp>>

This organization is a coalition of organizations and activists dedicated to advancing economic, social and cultural rights. Of particular interest is the database of “legal jurisprudence” on these rights.

- Human Rights Watch, **Economic, Social & Cultural Rights**  
<<http://www.hrw.org/esc/>>

List of recent Human Rights Watch reports that address, at least in part, economic, social and cultural rights, including the rights to health care, education, and fair conditions of labor.

## C. Selected E-Publications

- *Circle of Rights Economic, Social & Cultural Rights Activism: A Training Resource*  
<[http://www.hrusa.org/hrm\\_aterials/IHRI\\_P/circle/toc.htm](http://www.hrusa.org/hrm_aterials/IHRI_P/circle/toc.htm)>.
- *Economic, Social and Cultural Rights: A Guide to the Legal Framework* (Center for Economic and Social Rights, January 2000)  
<<http://www.cesr.org/text%20files/escrguide.PDF>>.
- Stephen A. Hansen, *Thesaurus of Economic, Social, and Cultural Rights: Terminology and Potential Violations* (2000)  
<<http://ip.aaas.org/ethesaurus.nsf/Main?OpenFrameSet>>.
- Allan McChesney, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook* (2000)  
<<http://shr.aaas.org/escr/handbook>>.
- *UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights*  
<<http://www.unhchr.ch/html/menu6/2/fs16.htm>>.

## II. Selected Web Sites by Topic

Economic, social and cultural rights is a enormous and varied area. The sites listed below are just a few the many resources available on the Web for this topic.

## A. Labor

- **International Labour Organization**  
(ILO) <<http://www.ilo.org>>

See the main section of this guide for general information about the ILO Web site. Of particular interest, see the Business and Social Initiatives Database <<http://oracle02.ilo.org/dyn/basi/vpisearch.first>>. Includes comprehensive information and documents on private sector initiatives that address labor and social conditions in the workplace.

- **Global March Against Child Labor**  
<<http://globalmarch.org/index.html>>

This site contains lots of articles related to various child labor topics, such as child trafficking, domestic child labor and children being used as soldiers. It also has some other documents and reports.

- **LaborNet** <<http://www.labornet.org/>>

This site has a forum where users can access newgroups related to labor. It also provides lots of news articles. This sites also has links to other labor organizations, news organizations, legislative resources, and multimedia resources.

- **Workers' Rights Consortium**  
<<http://www.workersrights.org/>>

This organization was created to help enforce manufacturing Codes of Conduct

adopted by colleges and universities for the manufacture of goods with their school logos. It contains information about the organization's activities as well as links to other groups concerned with workers' rights. See also the links to the factory reports that the organization compiles. It contains a list of news articles related to their work and a list of links for other organizations involved with workers' rights.

## B. Business and Human Rights

- **Business and Human Rights: A Resource Website**  
<<http://www.business-humanrights.org/index.html>>

This "online library" provides links to information about business and human rights. It provides a variety of searchable categories, such as by sectors, country, groups, campaigns, and legal accountability.

- **Business for Social Responsibility**  
<<http://www.bsr.org/BSRServices/HumanRights.cfm>>

BSR provides in-depth reports on key human rights subjects including child labor, codes of conduct, discrimination, external monitoring, forced labor, health and safety, independent monitoring, rights of indigenous peoples and several others. BSR also provides copies of its magazine articles and publications pertaining to business and human rights

- **The Global Compact**  
<<http://65.214.34.30/un/gc/unweb.nsf/>>

The Global Compact is a challenge to world business leaders to enact human rights, labor, and environmental principles. The

resources section links to some databases and studies in these areas.

- **UNHCHR, Business and Human Rights: A Progress Report**  
<<http://www.unhchr.ch/business.htm>>

This report notes the progress made by the business community regarding the human rights principles noted in the Global Compact.

- University of Minnesota Human Rights Library, **Links related to Business and Human Rights**  
<<http://www1.umn.edu/humanrts/links/business.html>>

A good collection of links to resources related to business and human rights. See also the collection called "Human Rights Guidelines for Business"  
<[http://www1.umn.edu/humanrts/links/code\\_s.html](http://www1.umn.edu/humanrts/links/code_s.html)>.

### C. **International Financial Institutions**

- **African Development Bank**  
<<http://www.afdb.org>>

This site contains information exclusively on Africa and what claims to be the "premier financial development institution of Africa." The site lists environmental studies and project studies. There is also a link detailed economic information about African nations.

- **Asian Development Bank**  
<<http://www.adb.org>>

This site has information exclusively about economic development in Asia. The site also has a link to news releases for the ADB

as well as statistics and news releases about individual Asian countries. Also, there is access to information on what development obstacles exist in Asia and what is being done to combat them.

- **Inter-American Development Bank**  
<<http://www.iadb.org>>

This site contains information about this developmental bank for the Americas.

- **International Monetary Fund**  
<<http://www.imf.org>>

There is a great deal of information available on this site. See the country information section and browse or search the publications collection.

- **Organization for Economic Cooperation and Development**  
<<http://www.oecd.org>>

The documents and research resources available on this site are plentiful. You can search this site by themes including agriculture, education, labor, health, trade and about 20 more.

- **World Bank**  
<<http://www.worldbank.org>>

This site is the main site for the World Bank, as well as the starting point for specific questions about what is happening in individual countries or regions. There is a wealth of statistics and data on different areas of the world.

- **Development Topics**  
<http://www.worldbank.org/html/extdr/thematic.htm>>

Information and documents on a variety of development topics, such as globalization, poverty, social protection and labor, social development.

- **Documents and Reports**  
<<http://www-wds.worldbank.org/>>

Access to over 14,000 documents and reports created by the World Bank.

- **International Financial Institutions Research Site**  
<<http://www.wellesley.edu/Economics/IFI>>

This site lists research material on the international financial institutions, with separate listings for the International Monetary Fund (IMF), the World Bank Group and other major multilateral institutions. The listings include basic references, books and monographs, published articles and recent working papers. There is also Web links collection.

#### D. Codes of Conduct

- **Business and Human Rights: Corporate Codes of Conduct**  
<<http://www.business-humanrights.org/Codes-of-conduct.htm>>

This Web site has news articles going back to 1996. It has links to guidelines prepared by NGO's and human rights advocates, by business associations, by governments, and by combinations of NGO's, businesses and governments.

- **Fair Labor Association**  
<<http://www.fairlabor.org/index.html>>

The Fair Labor Association (FLA) is a nonprofit organization established to protect the rights of workers in the United States and around the world. The FLA Charter Agreement creates a first-of-a-kind industry-wide code of conduct and monitoring system. The Web site provides copies of the workplace code of conduct and monitoring procedures, profiles on participating companies, news articles and fair labor resources and links.

- **Public Policies to Promote Corporate Social Responsibility: Codes of Conduct**  
<<http://www.multinationalguidelines.org/>>

This site provides the history of global codes of conduct, and the UN Global Compact, the OCED Guidelines and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The site has a comparison chart on the three different codes listed above and links to government sites from around the world, and international and other organization sites dealing with corporate social responsibility.

- **Social Accountability International**  
<<http://www.cepaa.org/>>

Formerly known as the Council on Economic Priorities Accreditation Agency (CEPAA), SAI was established to develop and verify the implementation of voluntary corporate social responsibility standards. The site provides information about their standard for workplace conditions and accreditation criteria.

- **Worker's Rights Consortium**  
<<http://www.workersrights.org/index.asp>>

The WRC aids colleges and universities with the enforcement of manufacturing Codes of Conduct. The site has factory reports, copies of news articles on WRC, and the Model Code of Conduct affiliates agree to require of their licensees. A collection of links to other similar sites is also available.

## E. Right to Food

- 1) **Food and Agriculture Organization (FAO), Right to Food**  
<<http://www.fao.org/legal/rtf/rtfood%2De.htm>>

This FAO site focuses on the right to food. It provides information on the concept of the right to food and the organizations activities. It also provides links to UN documents and FAO publications and statements. This site provides a time line of events related to the right to food and a list of other concerned organizations.

- 2) **World Food Summit, Five Years Later**  
<<http://www.fao.org/worldfoodsummit/english/index.html>>

Contains information about the 1995 World Food Summit, as well as what progress has been made. See the documents section for a large collection of official documents and related information.

- 3) **Foodfirst Information & Action Network (FIAN)**<<http://www.FIAN.org>>

This NGO documents violations of this right and responds through lobbying, campaigning and education. Their Web site

details specific cases where the right to food is being violated and suggests ways in which people can get involved, including providing the necessary information to participate in mass mailing campaigns.

- 4) **Food First Institute for Food and Development Policy**  
<<http://www.foodfirst.org/>>

This organization seeks to increase awareness of this issue. Produces books, reports, and other publications. The site has news articles pertaining to the right to food. See the "Resource Library" for an extensive listing of other Web sites devoted to the right to food and related human rights.

- 5) **The Human Right to Adequate Food (World Alliance on Nutrition and Human Rights)**  
<<http://www2.hawaii.edu/~kent/tutorial2000/titlepage.htm>>

This text provides detailed information malnutrition and its causes and governmental involvement in the right to food. In addition, there is detailed information about the history and organization of the international human rights system, the right to food, national and other rights systems, rights and entitlements, governmental obligations, accountability mechanisms, and international law.

- 6) **International Food Policy Research Institute** <<http://www.ifpri.cgiar.org/>>

This site includes lots of documents, reports and articles pertaining to the right to food as well as detailed information about research ongoing in countries around the world. The site also contains many links to other organizations and to databases and catalogues concerned with the right to food.

7) **United Nations Special Rapporteur on the Right to Food**

<<http://www.righttofood.org/>>

Defines the right to food and the duties of the Special Rapporteur (Jean Ziegler) and the research unit. The site provides links to reports, documents, and gives some information about the first World Food Summit.

8) **UNHCHR, Special Rapporteur on the Right to Food**

<<http://www.unhchr.ch/html/menu2/7/b/mfood.htm>>

Links to UN documents related to the right to food, news, and related issues.

**F. Right to Health**

1) **Francois-Xavier Bagnoud Center for Health and Human Rights**

<[http://www.hsph.harvard.edu/xfbcenter/international\\_hhr.htm](http://www.hsph.harvard.edu/xfbcenter/international_hhr.htm)>

The International Health and Human Rights program promotes and catalyzes thinking and action in health and human rights by impacting governmental and nongovernmental action both in countries and through the work of international organizations. The site gives recent activity reports of the program from July 1997 to present. The site also provides access to the table of contents and abstracts from its journal - *Health and Human Rights*.

2) **Global Lawyers and Physicians**

<<http://www.glphr.org/index.htm>>

GLP's major goal is to facilitate cooperative work on human rights by lawyers and physicians with a primary focus on health.

The site has health related news and a health and human rights database.

3) **Harvard Research Guide: Right to Health**

<<http://www.law.harvard.edu/programs/HRP/guide/rg4i-iii.html#anchor221450>>

This guide contains a list of books, articles, periodicals, newspapers, indices, guides and bibliographies pertaining to the right to health.

4) **The Human Right to Health: The People's Movement for Human Rights Education**

<<http://www.pdhre.org/rights/health.html>>

This site provides excerpts of provisions of human rights laws that guarantee everyone the human right to health. It also includes government commitments made at the Earth Summit in Rio, the International Conference on Population and Development in Cairo, the World Summit for Social Development in Copenhagen, the Habitat II conference in Istanbul.

5) **Physicians for Human Health, The Health Rights Connection**

<<http://www.phrusa.org/healthrights/index.html>>

This site provides health rights news, reports and events and links to other health rights organizations

6) **University of Minnesota Human Rights Library, Health and Human Rights Links**

<<http://www1.umn.edu/humanrts/links/health.html>>

This site contains links to many health and human rights Web sites.

7) **The World Health Organization**  
<<http://www.who.int/home-page/>>

This site has searchable health topics listed in alphabetical order that includes Web references related to the topic. It has an information resources page with links to its library, publications, catalogue, and multimedia resources. It also provides a link to the World Health Assembly documentation, which governs the WHO.

a. **International Digest of Health Legislation**

<<http://www.who.int/m/topics/idhl/en/index.html>>

Contains summaries of national and international health legislation and, where possible, includes links to other Web sites that contain the full text of the legislation.

2) **World Health News – Harvard School of Public Health**  
<<http://www.worldhealthnews.harvard.edu/>>

The site covers critical public health issues from around the world. It includes special features prepared by the Harvard School of Public Health, such as videotaped interviews with experts, as well as access to radio and television coverage of important breaking public health news stories from Web sites of leading news organizations.

**G. Right to Education**

1) **Global Campaign for Education**  
<<http://www.campaignforeducation.org/>>

Of particular interest to the researcher is the “Reports and Resources” page  
<[http://www.campaignforeducation.org/\\_html/docs/welcome/frameset.shtml](http://www.campaignforeducation.org/_html/docs/welcome/frameset.shtml)>. This

page contains briefings, position papers, and other informative documents.

2) **Right to Education Project** (Raoul Wallenberg Institute)  
<<http://www.right-to-education.org/>>

This site provides primers on major themes, reports of the Special Rapporteur (Katarina Tomaševski), and information about legal status. Provides a good collection of links to organizations involved in education.

3) **UNESCO, Education**  
<<http://www.unesco.org/education/index.shtml>>

Tremendous amount of information on various education themes and the work being done by UNESCO.

4) **UNHCHR, Special Rapporteur on the Right To Education**  
<<http://www.unhchr.ch/html/menu2/7/b/medu.htm>>

Links to UN documents on and by the Special Rapporteur as well as news and related information.

**H. Right to Housing**

1) **Centre on Housing Rights and Evictions** (COHRE) <<http://www.cohre.org/>>

An international human rights organization committed to ensuring the full enjoyment of economic, social and cultural rights, with a particular focus on the right to adequate housing and preventing forced evictions. The “Library” contains many documents and publications on housing and related topics.

2) **The Centre for Equality Rights in Accommodation** (CERA)

<<http://www.web.net/cera/>>

CERA promotes human rights in housing and related issues. The site provides access to a number of reports and documents. The library has a number of full-text reports and articles. While the focus is Canada, there is information on other regions of the world as well.

3) **The Centre for Housing Policy**

<<http://www.york.ac.uk/inst/chp/Welcome.htm>>

This organization specializes in housing research. The “research” page links to many reports on various issues within housing, such as housing and social security. Some full-text discussion papers and research reports are available under “publications,” others can be ordered.

4) **UNHCHR, Special Rapporteur on Adequate Housing**

<<http://www.unhchr.ch/html/menu2/7/b/mhous.htm>>

Links to UN documents, news, and related information by and about the Special Rapporteur (Miloon Kothari) and the right to housing.

### **III. Conclusion**

This overview of economic, social and cultural rights just scratches the surface of this immense area. Thorough researchers should consult both the main research guide on human rights as well as this specialized topical section to locate the many relevant instruments, documents and related Web sites. Please send comments and questions to Marci Hoffman at [hoffmamb@law.georgetown.edu](mailto:hoffmamb@law.georgetown.edu).



## 17. PENAL REFORM INTERNATIONAL – WORKING FOR HUMAN RIGHTS AND ACCESSIBLE JUSTICE WORLDWIDE

By: Jenni Gainsborough\*

There are more than eight and a half million people known to be imprisoned in the jails and detention centers of the world. In some regions, as many as 70% of prisoners are pre-trial detainees and often they spend more time in prison awaiting trial than they would under the maximum sentence for the crime they are charged with. Sickness, malnutrition and brutality are day-to-day realities for many prisoners, including women and children.

Increasingly, prison has become the first response to crime instead of the last resort. As a result prison populations are increasing in most countries of the world with extremely damaging social and economic consequences for individuals, communities and nations.

In response to these problems, a group of people with extensive experience in working for reform in many countries founded Penal Reform International (PRI) in 1989. The improvement of the conditions and treatment of prisoners and the development of effective and accessible justice systems are the foundation of the work of the organization which has now grown to be the world's largest penal reform organization.

PRI seeks to achieve penal reform, recognizing diverse cultural contexts, by promoting:

- The development and implementation of international human rights instruments with

regard to law enforcement, prison conditions and standards;

- The elimination of unfair and unethical discrimination in all penal measures;
- The abolition of the death penalty;
- The reduction of the use of imprisonment throughout the world;
- The use of constructive non-custodial sanctions which encourage social re-integration while taking into account the interest of victims.

It is a key tenet of PRI's work that they only establish projects where they have the support of the government and of local non-governmental organizations. Without those ingredients sustainable change is very unlikely to occur. While the organization can bring seed money with it – much of it from international governments and aid organizations – it recognizes that long-term success will depend on projects working within existing economic realities.

For the same reason, PRI places a great deal of emphasis on training and in particular on train-the-trainer programs to be sure that the knowledge “belongs” to the system and will continue to be extended and reinforced after PRI's direct involvement has ended.

PRI is headquartered in London and Paris and has regional programs in Sub-Saharan Africa, Eastern and Central Europe and Central Asia, South Asia, Latin American and the Caribbean and North Africa and the Middle East. Its first US office was opened in Washington DC in September. The organization has consultative status with the United Nations and with the Council of Europe and observer status with the African Commission on Human and Peoples' Rights

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\* Jennie Gainsborough is the Director of PRI in the United States.

PRI works closely with the Special Rapporteur on Prison and Conditions of Detention in Africa, facilitating her visits on investigative missions and the publication and dissemination of the visit reports. It has also initiated programs to improve the treatment of juveniles and developed community service programs in several African countries. Publications describing the programs are disseminated widely and translated into many languages and model programs are adapted and replicated to other countries as appropriate.

In Rwanda at the end of 2000, there were more than 124,000 defendants in jail awaiting trial accused of genocide and crimes against humanity. This was a huge burden on a country struggling to re-establish economic and social normalcy. The Rwandan parliament passed a law introducing *gacaca* (popular) tribunals to try the less serious of these cases. Penal Reform International (PRI) was asked to assist in the design and introduction of community service as one of the sentences available to the *gacaca* tribunals with programs based on principles developed by consensus among justice officials, survivors of the genocide and NGOs. PRI subsequently trained a Rwandan national to take over coordination of PRI's support work and assembled a team of experts to research and report on community responses to the *gacaca* program.

In Malawi, PRI supports a paralegal advisory service bringing people from civil society into prisons to educate prisoners about the legal process they face and to ensure individual prisoners are dealt with according to the law and that their cases are not "lost" within the system. As a result, hundreds of remand prisoners being held unlawfully have been released and others have been able to leave prison as a result of bail, discharge or release on compassionate grounds. This program is now being adapted and replicated in Benin.

In South Asia, work on juvenile justice and women and children in prison are particular

features of PRI's program activities. In Russia and Eastern and Central Europe, alternatives to imprisonment and prison health – particularly ways to reduce the levels of HIV/AIDS, tuberculosis and hepatitis-C – have been the main focus.

PRI has developed an international training program and materials for prison staff on human rights in prison and the use of the UN Standard Minimum Rules for the Treatment of Prisoners Training of trainers workshops have been conducted in Moscow and Bucharest to prepare teams of skilled trainers across Central and Eastern Europe, and Central Asia. Each of the workshops was held in conjunction with a policy-oriented conference. The initial group of trainees subsequently carried out workshops for government officials, prison staff, NGOs and others, including journalists and community leaders to promote alternatives to imprisonment, penal reform and a more humane and fair application of justice. Training programs are also being developed in Latin America, Iran, Pakistan and Bangladesh and other countries world wide.

A program for training lawyers involved in defending capital cases has been developed in the Caribbean.

While PRI works primarily with national governments and local NGOs to instigate and support penal reform, it also provides technical assistance to international organizations. A PRI team recently visited Afghanistan to meet with UN officials, other international government organizations, Afghan authorities, prison administration and NGOs to identify the steps necessary for the reestablishment of the penal system in the devastated country in conformity with international standards for human rights.

The role of the United States in influencing penal policies in developing countries receiving international aid was a primary factor in the decision to open a PRI office in Washington DC. The office will

facilitate contacts with international aid and development organizations headquartered in Washington and encourage them to see issues of access to justice and penal reform as central to the establishment of democracy, good governance and improved public health in developing nations.

The Washington office will also establish working relationships with U.S. organizations active in penal reform, juvenile justice and the abolition of the death penalty to provide an international perspective on these issues, and to facilitate the exchange of information and best practices between reformers, policy makers and criminal justice professionals here and overseas.

PRI-Washington will also provide a resource for journalists and others looking at U.S. criminal justice policy within an international framework – comparing and contrasting our policies and practices with those of other nations and those required by international standards, agreements and covenants.

PRI's international board includes Alvin J. Bronstein, the founding Director and now Director Emeritus of the National Prison Project of the ACLU. He will play a major role in advising and guiding the PRI-Washington office director, Jenni Gainsborough.

For more information about the organization and its work in the U.S. and the rest of the world, visit the PRI web page [www.PenalReform.org](http://www.PenalReform.org) or contact PRI's Washington office director, Jenni Gainsborough, at 202 721 5610 or email at [JGainsborough@PenalReform.org](mailto:JGainsborough@PenalReform.org).

## 18. RECENT ILRF CASES TO ENFORCE HUMAN RIGHTS UNDER THE ATCA.

By: Terry Collingsworth\*

### A. Introduction

The International Labor Rights Fund (ILRF) has been working since its 1986 inception to develop mechanisms for enforcing labor rights in the global economy. Using traditional tools such as research, education, policy promotion, and advocacy can only make as much progress as governments, multinational companies, and other parties who have power in the global economy are willing to agree to concede. Accordingly, the ILRF has tried to use administrative processes to enforce labor rights, particularly the Generalized System of Preferences Act (GSP). 19 U.S.C. §§ 2461-66 (1986). This is a created a process wherein “beneficiary developing countries” received duty free access to the US market, in exchange for specific conditions, including respect for “internationally recognized worker rights.” *Id.* § 2462 (a)(4). Compliance with the standard was based on a process whereby “any person” could petition the US Trade Representative to terminate trade benefits to of a beneficiary country for noncompliance with the standard. However, enforcement of GSP and other administrative processes is dependent upon the executive branch, and is almost always politicized as a result.

The ILRF has been actively searching for an enforcement tool that would provide a fair hearing to claims of labor rights violations

by multinational firms. Recent cases under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, now provide the most promising opportunity to bring justice to workers in the global economy. The language of the ATCA, dating back to 1789, provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The ATCA was revived from its dormancy by *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), a case based on a torture claim brought against a former official of the government of Paraguay. The court’s landmark decision launched a very effective tool to enforce human rights norms. Applying the plain language of the ATCA, the court held that an alien could sue in U.S. federal court for a “tort” that violates the “law of nations.” The court had no trouble finding that torture violated the law of nations, and avoided the necessity of ruling on whether a private party could be liable since the defendant had been a state actor when the violations occurred.

Since *Filartiga*, the ATCA has been used with increasing frequency to reach direct perpetrators of human rights abuses. In addition, numerous cases have been brought against corporate defendants that have aided and abetted, or otherwise participated in, human rights violations as part of business operations in partnership with repressive governments. In this respect, the ATCA offers to provide a significant new aspect to human rights law and reach private actors for human rights violations.

### B. The ILRF’s Cases Under the ATCA.

This section will describe the factual basis for the four of five current ATCA cases the ILRF has initiated, and will provide an assessment of their status. Relevant documents may be found on ILRF’s website

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\* Terry Collingsworth is the Executive Director of the International Labor Rights Fund. For general information on the ILRF’s programs and activities, see [www.laborrights.org](http://www.laborrights.org).

([www.laborrights.org](http://www.laborrights.org)). See Litigation Update, *supra*, for a discussion of the *Unocal* litigation.

**1. Exxon Mobil and Genocide, Murder and Torture in Aceh, Indonesia.** – There have been credible reports dating back several years that Exxon Mobil Corporation, and its predecessor companies, Mobil Oil Corporation and Mobil Oil Indonesia (hereinafter collectively referred to as “Exxon Mobil”), hired one or more military units of the Indonesian national army, known as the Tentara Nasional Indonesia (“TNI”), to provide “security” for their gas extraction and liquification project in Aceh, Indonesia. As would be expected to happen with certainty, Exxon Mobil’s use of the same brutal troops that brought us East Timor as their sole security force has resulted in systematic torture, murder, rape, and acts of genocide against the local population of Achanese people. Exxon Mobil has never used its considerable power over its mercenary security force to demand that human rights violations against the local population be stopped. However, in March, 2001, when the civil conflict raging between Achanese separatists and the government threatened Exxon Mobil’s expatriate staff, the company immediately shut down the operation and demanded more security and a “guarantee” of safety for its employees. Never did Exxon Mobil include a demand that new security procedures also extend to local villagers. Quite the contrary, a demand for more security is certain to bring more troops and more human rights violations, apparently an acceptable consequence for Exxon Mobil.

On June 20, 2001, the ILRF filed an ATCA claim in the Federal District Court for the District of Columbia, No. 01-1357 CIV, on behalf of 11 villagers from Aceh who were victims of human rights abuses by Exxon Mobil’s TNI Unit 113. The general theory of the case is that Exxon Mobil knowingly

employed brutal military troops to protect its operations, and the company aided and abetted the human rights violations through financial and other material support to the security forces. In addition, the security forces are either employees or agents of Exxon Mobil, creating liability based on respondeat superior or vicarious liability.

Like *Unocal*, Exxon Mobil’s primary defense appears to be that the human rights violations may very well be occurring, but the company did not specifically intend this result, and therefore the company cannot be liable. Exxon Mobil asserted this position in its motion to dismiss. This position goes to the heart of whether we can use the ATCA to change the corporate mentality that somehow allows a company like Exxon Mobil to defend doing business with a known human rights violator by constructing some sort of Faustian wall which allows a company to accept the benefits of known human rights violations, and the profits of a project that requires the participation of the human rights violator, but is not responsible for the violations. Many of the private defendants in the Nuremberg cases were charged with using slave labor procured by the Nazi regime. They argued that although their companies benefitted from the slave labor, the companies were required to use the slave labor, and in many cases, did not affirmatively intend to use slaves. The Nuremberg Tribunal definitively established the principle that, absent a true necessity defense, the literal gun to the head requiring compliance, the defendants were liable for knowingly benefitting from the slave labor. Those who opportunistically increased production and profits based on the availability of slave labor provided by the Nazis were uniformly convicted.

The Ninth Circuit’s *Unocal* decision addresses directly whether Exxon Mobil can defend based on its claim that it was not directly involved in the human rights violations. Indeed, Exxon Mobil relied heavily upon Judge Lew’s

grant of summary judgement in its motion to dismiss, and argued that the fact patterns were essentially identical. One presumes that the fact pattern remains identical, but now the legal conclusion has been reversed.

Exxon Mobil's motion to dismiss is still pending. The motion was argued on April 9, 2002. Following the argument, at Exxon Mobil's request, the court sought the views of the State Department on the litigation. In a remarkable effort to seize for the executive branch the right to veto litigation under federal statutes, William H. Taft IV, the State Department's Legal Advisor, submitted a letter claiming that the lawsuit would interfere in U.S. relations with the government of Indonesia. The letter further asserted that the litigation could interfere with U.S. investment in Indonesia, and explicitly asserted that it is a foreign policy objective of the U.S. government to advance the interests of U.S. businesses abroad. This blatant effort to abrogate the separation of powers doctrine will hopefully not be successful. The court has yet to issue an opinion on the pending motion to dismiss, but did permit the parties to brief the issue of the legal effect, if any, of the State Department's letter.

**2. Coca-Cola and Anti-Union Death Squads in Colombia.** – Colombia is a human rights basket case due to lawless activities of the right wing paramilitaries, as well as the leftist guerrillas. The paramilitaries in Colombia are particularly well known for murdering, abducting and torturing trade union leaders. For the past 10 years, Colombia has lead the world in the number of murders of trade unionists. More than 52 trade union leaders have been killed so far this year, 128 were killed in the year 2000, and in the last 10 years, over 1,500 have been murdered. A much larger number have been subjected to torture, including regular threats of death, unlawful detention, and kidnapping. For years there has been comprehensive public reporting on the

systematic human rights violations occurring in Colombia, including the specific targeting for murder and other human rights violations of trade union leaders and members.

Much of the violence against trade unionists in Colombia is directed at leaders of unions at multinational firms, including the Coca-Cola company. One union representing workers at Coca-Cola, Sinaltrainal, has sustained heavy losses of leaders and members who were employed by the company. Since at least 1996, Sinaltrainal has been writing letters to Coca-Cola and to the U.S. Embassy in Bogota demanding that the targeting of trade union leaders at Coca-Cola bottling plants be stopped. Neither institution favored the union with a reply, and the Government of Colombia failed to take action to find and arrest the paramilitary commanders, who in some cases, were specifically identified by victims or other witnesses.

Having no other options and facing ongoing violence, Sinaltrainal requested ILRF and the United Steelworkers Union to file an ATCA case against Coca-Cola and its Colombian bottlers. The case was filed in the Federal District Court for the Southern District of Florida, No. 01-03208-CIV, on July 21, 2001. Plaintiffs are Sinaltrainal, and five individuals who have been murdered, tortured, and/or unlawfully detained. They are seeking to hold Coca-Cola, and two of its Colombian bottlers liable for using paramilitaries to engage in anti-union violence.

This case also presents the issue of corporate liability for acts of subsidiaries or agents. There is no question, based upon eyewitness testimony and records from investigations of the Government of Colombia, that, for example, Isidro Gil was murdered inside the Coca-Cola bottling plant in Carepa by paramilitaries that were invited into the plant by the manager of the plant. The day after Mr. Gil's murder, the paramilitaries returned to the plant to complete their task of destroying the

trade union. The paramilitaries collected resignation letters of the remaining union members, after promising that those who refused to resign would meet the same fate as Isidro Gil. Coca-Cola's defense is not that the murder and terrorism did not occur. Rather, Coca Cola argues that it, the most international of companies, cannot be liable in a U.S. federal court for what happened in Colombia. Coca-Cola also argues that it does not "own" and therefore does not control, the bottling plants in Colombia. Again, the case presents an opportunity to develop a standard under which a multinational company cannot have the best of both worlds by profiting from human rights violations but limiting liability to a local entity that is a mere facilitator for the parent company's operations.

The court held oral argument in April, 2002, and no decision has been issued yet.

An additional feature of the Coca-Cola litigation is that it has served to focus a campaign seeking to get Coca-Cola to accept responsibility for violence in its bottling plants, wholly apart from any potential legal liability under the ATCA. The campaign is using factual information developed from the investigations connected to the litigation, as well as traditional human rights reports, to support specific demands to Coca-Cola to publically denounce the violence in Colombia, to make clear to the paramilitaries that such violence is not in Coca-Cola's interest, to cease all formal or informal working relationships between paramilitary forces and managers of the bottling plants, to agree to a specific provision that prohibits Coca-Cola bottling plants from participating in violent activities, and permit trade unions representing Coca-Cola workers to monitor compliance with the provision. The major participants in the campaign in the U.S. are the International Brotherhood of Teamsters, the United Steelworkers Union, the International Food and Commercial Workers Union, the U.S. Labor Education Project, and the ILRF. In addition,

the Canadian Labour Congress, has recently joined. Information about the campaign is available at [www.Cokewatch.org](http://www.Cokewatch.org). The campaign provides a hopeful model of cooperation to change corporate behavior that supports or tolerates human rights violations.

### **3. Del Monte's Death Squads in**

**Guatemala** – Fresh Del Monte Produce (Del Monte) is one of the world's largest producers of fresh fruit products. In Guatemala, Del Monte is a successor to the notorious United Fruit Company, and it owns and operates several banana plantations there. These plantations have long been unionized by SITRABI, one of the most respected and professional unions in Guatemala. In 1999, Del Monte and SITRABI were in tense negotiations regarding a massive layoff of workers in violation of the collective bargaining agreement. At an impasse that left hundreds of union members out of work, the leaders of SITRABI announced that there would be a walk out the next day of the remaining workers. The evening before the planned work stoppage, Del Monte employees organized a violent group of local thugs and abducted the five key leaders of SITRABI. They were taken to their own headquarters and tortured with guns and threats of death. After enduring the torture for several hours, the union leaders agreed to call off the work stoppage, resign from the union, and leave the area. Two of the leaders were forced with guns to their heads to make an announcement on the plantation radio system that the work stoppage was canceled. Then, they signed personalized resignation letters that had been prepared by Del Monte employees. Eventually, after further torture, they were told they could leave, but were assured that they would be killed if they ever returned to the plantation area.

The five leaders escaped to Guatemala City, and filed criminal charges against their attackers. The U.S. embassy encouraged this as a test case of the post-peace accords justice

system. Regrettably, the legal system reverted to form and the attackers were found guilty of lesser crimes. They were permitted to walk out of the court after paying nominal fines. As all concerned were convinced that the five SITRABI leaders would be killed in retaliation for bringing charges against Del Monte's thugs, the U.S. embassy arranged for work visas and the five leaders and their families relocated to the U.S., and Del Monte bought the plane tickets. Shortly thereafter, the ILRF filed an ATCA case on behalf of the five former SITRABI leaders seeking damages from Del Monte for torture and unlawful detention. The case, No. 01-3399-CIV, was filed in the Federal District Court for the Southern District of Miami.

The Del Monte case is somewhat unique in that there should be no question of the parent company's legal liability because Del Monte is structured to ensure that the parent retains control and ownership of local operations. Del Monte adds to the development of the law because the case directly raises issues of using otherwise actionable violence in violation of the law of nations to suppress trade union rights. Thus, the plaintiffs are seeking to hold Del Monte liable for violations of the fundamental rights to associate, organize and bargain collectively, rights that are central to trade unionism.

The court has yet to schedule an argument. After permitting initial discovery and setting a trial date for March 10, 2003, the court stayed further discovery pending a decision on Del Monte's motion to dismiss. The briefing was completed in July, 2002, and the parties are awaiting a decision.

**4. DynCorp's Air Strikes Against Ecuadoran Farmers** – The controversial "Plan Colombia" includes a cruel throwback concocted by what must have been frustrated commanders of the war in Vietnam – the US government contracted with DynCorp to spray

fumigants on coca plants in Colombia to eradicate a major source of the cocaine exported to the U.S. The plan is inherently flawed. There are serious, well documented concerns that the spray is harmful to humans and livestock, and that it kills legitimate food crops in the area, such as corn and yucca. Further, even if it did destroy coca plants, the small farmers who relied upon the sale of their coca crop are left with no livelihood, often driving them to join the guerillas to have access to food. Wholly apart from these major effects documented in the target area of Colombia, DynCorp is also spraying farmers on the Ecuadoran side of the border with the same effects. In this new era of heightened concern about terrorism, a group of at least 10,000 Ecuadoran subsistence farmers, who have no dispute with the U.S. government and who do not cultivate illegal drug crops, are being subjected to sustained, deadly aerial assaults financed by the U.S. government through DynCorp.

A group of villagers who are all suffering serious health effects from the fumigant, and one couple whose child died from exposure to the poison, initiated a class action lawsuit against DynCorp charging the company with wrongfully spraying them with a poison that, whatever the justification of Plan Colombia, was not supposed to hit Ecuadorans. The ATCA case charges DynCorp with murder, wrongful death, crimes against humanity, and numerous other property crimes. The case was filed in Federal District Court for the District of Columbia, No. 1:01CV01908, moments before the terrorist attacks on New York and Washington, D.C.

While the case does not present traditional issues of labor rights violations in the global economy, it is an extremely important opportunity to clarify what constitutes terrorism, and whether one country's objections, however well meaning, can ever justify violating the human rights of innocent civilians. Filed on



September 11, 2001, just moments before the federal courts were closed due to the terrorist attacks on New York and Washington, D.C., the case is more than a symbol of the other side of the coin -- indeed, the other side of the world. The U.S. cannot maintain its pose of righteous indignation if it allows its own forces and resources to be used against noncombatant civilians.

Dyncorp filed a motion to dismiss in January, 2002, raising the political question doctrine as its primary defense. The issues were fully briefed by April, 2002, and the case remains pending the court's decision on the motion.

**5. The Assassination of Union Leaders at Drummond Coal** – In March, 2002, the ILRF filed another case addressing the ongoing violence against trade union leaders in Colombia. This case, against Drummond Coal, an Alabama corporation that purchased a large mining operation in Colombia, involves the serial assassination of trade union leaders representing the workers at Drummond's Colombian mine. The workers are represented by an well-established union, Plaintiff SINTRAMIENERGETICA. The leaders of the union, in early 2001, were engaged in heated negotiations with Drummond over several key issues, including the demand that the company provide better security for workers to protect them from paramilitaries that were based, along with regular military, on Drummond's property. According to several witnesses, the paramilitaries were operating as a private security force to protect Drummond's facilities from the FARC, the leftist guerrillas. On March 12, 2001, in the midst of the negotiations, two of the union leaders, President Valmore Lacarno Rodriquez, and Vice President Victor Hugo Orcasita Amaya, were pulled off a company bus by paramilitaries who said in front of all of the workers on the bus, "these two have a problem with Drummond." Lacarno was shot in the head

in front of the other workers. Orcasita was taken away in a car, and his dead body, which showed clear evidence that he had been tortured was found later that day. The union was paralyzed without its two leaders, and for a time no one would take over the leadership posts out of fear that they too would be killed. Finally, in September, 2001, Gustavo Soler Mora stepped up to assume the Presidency. He renewed negotiations with Drummond, and expressly sought to bargain for better security arrangements for the workers. On October 5, 2001, within weeks of becoming President, he too was pulled off a bus and murdered by paramilitaries.

The ILRF represents the surviving family members of the three murdered trade union leaders. The case was filed in the Federal District Court for the Northern District of Alabama (CV-02-BE-0665-W). Drummond filed a motion to dismiss, and the issues have been briefed. The court heard argument in September, 2002, and the parties are awaiting a decision.

### **Conclusion.**

The ATCA cases brought by the ILRF and others highlight the crisis of enforcement of human rights standards. Absent the prospect of a viable ATCA case, there would be no recourse for the victims of international human rights violations. These companies are confident that the host governments will not enforce local laws because the governments are themselves participants in the human rights violations. This frames the reality of the global economy. Governments that continue to violate human rights, or that are willing to overlook violations by private parties in order to encourage investment, and private investors willing to work with and support those rogue governments, are the beneficiaries of a global economy that trusts no one on economic

matters, but relies essentially upon voluntary compliance with human rights standards.

Until there is some globally applicable mechanism to address labor and human rights violations, victories in the ATCA cases will do much to remedy current violations and deter future violations.

## 19. The ACLU/North Carolina Committee on International Human Rights

By: Slater Newman\*

Our Committee was founded in 1989, at about the time that recently-elected ACLU President Nadine Strossen called for increased ACLU involvement in international civil liberties. (The founding of this International Civil Liberties Report may also have occurred at about this time). Not long after, our affiliate was among the founding members of the Human Rights Coalition of North Carolina, and has since, mainly through our Committee, been continually involved in its activities. Our Wake County and Western North Carolina chapters are among the 31 local and statewide groups which support the Coalition. (See current listing below).

The purpose of the Coalition is "to enhance among citizens of our state the knowledge, understanding and appreciation of human rights as elucidated in such documents as the Universal Declaration of Human Rights and the Bill of Rights of the United States Constitution." The Coalition is affiliated with the Children's Rights Network, with the NGO Coalition for an International Criminal Court and with North Carolinians for the Ratification of CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women).

1. This year Governor Easley and the Mayors of Asheville, Carrboro, Chapel Hill, Greenville, Raleigh, Reidsville and Thomasville each issued a proclamation for Human Rights Day/Week and/or Bill of Rights Day. Events scheduled for this week included:

December 5 (Thursday). 6:30 p.m. Raleigh. NCState University Club.

Seventh Annual International Human Rights Award Dinner honoring Mary-Lou Leiser Smith of Chapel Hill, who has been a leader in education and advocacy for a just peace in the Middle East.

December 9 (Monday) 5:30 p.m. Raleigh. Rotunda of the Stste Capitol. Celebration of the 54th anniversary of the Universal Declaration of Human Rights and of the 211th anniversary of the Bill of Rights. Speaker - Rev. W. W. Finlator, former National Vice-President of the ACLU. December 10 (Tuesday) noon. Greenville. Pitt County courthouse. Reading of the Universal Declaration of Human Rights and of the Bill of Rights.

December 10 (Tuesday) noon. Raleigh. Wake County court house. Reading of gender-neutral version of the Universal Declaration of Human Rights. Dutch-treat lunch, "birthday" cake and singing to follow.

December 13 (Friday) noon. Chapel Hill. Downtown post office. Reading of the Bill of Rights.

Most of the activities were sponsored by ACLU chapters and ACLU members (in communities in which there are no chapters).

During United Nations Week, the Coalition cosponsored (with the United Nations Association of Wake County) a public reading in downtown Raleigh of the Universal Declaration of Human Rights by 5th- and 6th-grade students from the Emma Conn Global Communications Elementary School.

2. Our Committee is comprised of six members, two of whom are members of the affiliate Board of Directors. We have kept the ACLU/NC affiliate Board apprised of our activities through written (and sometimes oral)

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\* Chair, ACLU/NC Committee on International Human Rights

reports at each Board meeting, and have kept the ACLU/NC membership informed through articles we have prepared for LIBERTY, the affiliate quarterly newsletter.

3. We encourage each affiliate to establish a committee on international human rights. We would be pleased to help in any way we can. We encourage, also, the establishment of statewide (and/or local) human-rights coalitions. Toward that end a list of our Coalition's supporting groups is appended, indicative of the kinds of organizations which might participate.

Finally, we are interested in learning about the activities of committees on international human rights (if such exist) in other affiliates and about other statewide and local international human-rights coalitions.

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Supporting groups are:

American Civil Liberties Union (North Carolina affiliate)  
American Civil Liberties Union (Wake County chapter)  
American Civil Liberties Union (Western North Carolina chapter)  
Amnesty International (Group 213)  
Community Church of Chapel Hill Community  
United Church of Christ (Raleigh)  
Interfaith Alliance of Wake County  
Martin Luther King, Jr. Memorial Committee  
National Association of Social Workers (NC chapter)  
North Carolina Academy of Trial Lawyers  
North Carolina AFL-CIO  
North Carolina Association of Black Lawyers  
North Carolina Association of Educators  
North Carolina Association of Human Rights Workers

North Carolina Association of Women Attorneys  
North Carolina Council of Churches  
North Carolina Human Relations Commission  
North Carolina NOW  
North Carolina Peace Action  
North Carolina Society for Ethical Culture  
Pullen Memorial Baptist Church: Peace and Justice Mission Group (Raleigh)  
Raleigh-Apex Branch, NAACP  
Raleigh Human Resources and Human Relations Advisory Commission  
Raleigh NOW  
Raleigh Peace Action  
Raleigh Religious Society of Friends  
United Nations Association (North Carolina Division)  
United Nations Association (Wake County chapter)  
United Nations Association (West Triangle chapter)  
Unitarian-Universalist Fellowship of Raleigh  
Women's International League for Peace and Freedom (Chapel Hill/Durham branch)