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Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children

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HUMAN RIGHTS

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BRIEF

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United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole”

by Richard J. Wilson*

On January 10, 2003, Amnesty International sent a letter to the Bush administration noting that exactly a year had passed since the U.S. military began to place a group of detainees at Guantánamo Bay, Cuba. Amnesty International called the prisoners’ situation a “legal black hole,” referring to the fact that the U.S. government continues to argue that the nearly 650 detainees from an estimated 40 nations are not entitled to any of the legal protections of U.S. domestic law or international human rights law.

On February 25, 2002, a group of petitioners filed the first international legal challenge to those detentions with the Inter-American Commission on Human Rights (Commission). The petition was coordinated by the Center for Constitutional Rights, based in New York City, in collaboration with the Center for Justice and International Law in Washington, D.C.; the Human Rights Law Clinic at Columbia University in New York City; Judith Chomsky, a private practitioner; and myself, acting in my personal capacity. After the initial filing, a number of additional law professors, NGOs, and lawyers from England and France joined in signing onto the petition, which was filed in parallel with a federal petition for habeas corpus on behalf of named detainees at Guantánamo pursuant to 28 U.S.C. § 2241, a federal statute by which federal courts grant writs of habeas corpus. The federal action, *Rasul v. Bush*, filed in the United States District Court in Washington, D.C. and later consolidated with a similar case involving Kuwaiti nationals in detention in Cuba, was dismissed for want of jurisdiction because “the military base at Guantánamo Bay, Cuba is outside the sovereign territory of the United States.” On March 11, 2003, the U.S. Court of Appeals for the District of Columbia, under the case name *Al Odah Khaled v. United States*, affirmed the ruling of the district court on similar grounds.

The petition with the Commission was filed to bring together the existing evidence regarding the status and treatment of the Guantánamo detainees, to bring media and community attention to the situation of the detainees, and to obtain a prompt and hopefully favorable interpretation of the international legal obligations of the United States with regard to those detainees. It accomplished all of those goals.

Who Are the Detainees at Guantánamo?

All information about the detainees at Camp Delta and previously at Camp X-Ray in Guantánamo Bay, and the conditions of their confinement, is based upon publicly available information gleaned from press reports both here and abroad. The U.S. government refuses to release the names, nationalities, or addresses of any of the detainees. Detainees are allowed only limited correspondence rights with members of their families, and all access into Camp Delta has been barred except for a limited number of diplomatic missions from detainees’ home countries and a visit from the International Committee of the Red Cross, which communicates only privately with the government in question after such visits.

The detainees are mainly nationals of Middle Eastern and Asian countries such as Saudi Arabia, Pakistan, Egypt, and Kuwait, although there are also nationals from European

countries and Australia. The U.S. government maintains that all of the prisoners are either members of the Taliban government’s armed forces or of the al-Qaeda terrorist network. All were taken into custody after the beginning of U.S. military actions in Afghanistan on October 7, 2001, although many were not taken prisoner in Afghanistan itself. Six Algerian prisoners, for example, were taken by the U.S. military from Bosnia, while one Australian national was taken from Egypt and a British national was taken from Zambia. More than 200 al-Qaeda suspects picked up in six European countries reportedly were transferred to custody in Guantánamo.

President Bush issued a military order on November 13, 2001, authorizing the detention and trial by military commission of any current or former member of the al-Qaeda organization, as well as anyone who aids or abets its work or harbors its members. Military commission sentences allow for the imposition of the death penalty based on non-unanimous decisions and are subject to limited review in civilian courts. No known trials have been carried out on Guantánamo or elsewhere by those commissions to date. None of the detainees has been charged publicly with any criminal offense, and none has been provided with access to counsel or the courts. Although the president recognized in February 2002 that Taliban detainees “are covered by” the Geneva Conventions, he also concluded that

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neither the Taliban soldiers nor al-Qaeda detainees are entitled to prisoner of war status.

Interrogation of the Guantánamo detainees began on January 23, 2002, and is presumably ongoing. No detainee has been permitted to have access to a lawyer prior to or during that questioning. Furthermore, there is no indication that any of the detainees has been informed of his or her rights under the Vienna Convention on Consular Relations, which permits a foreign national to promptly contact and meet with a consular representative of his home government, or any of the other international instruments that apply to the United States and protect the fundamental human rights of the detainees. Such instruments include the International Covenant on Civil and Political Rights; the American Declaration of the Rights and Duties of Man; and the Geneva Conventions, particularly the third, which deals with prisoners of war.

At the time of the initial filing of a petition with the Commission, the government had detained 254 prisoners. As of early February 2003, 640 prisoners were in detention. The Defense Department has budgeted for up to 2,000 inmates at Camp Delta, with contingency expenditures permitted over the next 20 years. In mid-2002, the press carried graphic pictures of the arrival of some of the detainees at Guantánamo in shackles and blackened goggles. Reports indicate that prisoners are refused access to calendars and watches. Interrogation can take place regularly at all times of day and night. As of September 2002, reports indicated that nearly 60 prisoners were being treated for psychiatric problems, and in January 2003, there were four new suicide attempts reported by the detaining officials themselves, bringing the attempts officially reported to 14 since the facility's opening (press sources placed the number of suicide attempts at "at least 30" during 2002). To date, the only reported releases from Camp Delta are five elderly and infirm detainees returned to Afghanistan.

Amnesty International and Human Rights Watch, as well as other NGOs and foreign governments, have criticized U.S. actions relating to the Guantánamo detainees, particularly after the release of recent press reports stating that up to ten percent of the detainees were determined to have no intelligence value during their interrogations in Afghanistan. Much



Credit: AFP Photo/Roberto Schmidt

U.S. military police handle a detainee at Camp X-Ray on January 17, 2002. In April 2002, the U.S. government transferred the detainees from Camp X-Ray to Camp Delta, also in Guantánamo Bay, Cuba.

more alarming are recent reports that the U.S. military admits to the use of "stress and duress" interrogation techniques condemned as torture or cruel and inhuman treatment by many international bodies. Officials have also reported to the press that some terrorist suspects have been surrendered without proper legal process to countries in which the United States is well aware that torture is used to extract information. No administration official has disputed or denied these reports to date. The unrebutted reports of torture and transfer of detainees to countries known to practice torture led to the filing of another petition with the Commission by the Center for Constitutional Rights and others, detailing those allegations in early February 2003. As of this writing, the Commission has requested additional information from the petitioners. On March 4, 2003, the petitioners submitted additional information responding to the Commission's requests, as well as new

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A related request for precautionary measures was filed with the Inter-American Commission on Human Rights by human rights NGOs in June 2002, on behalf of "INS detainees ordered deported or granted voluntary departure." These detainees are foreign individuals, mostly men of Middle Eastern or Asian nationality, detained within the United States. The Immigration and Naturalization Service (INS), now a part of the new Department of Homeland Security, took these individuals into custody for minor immigration violations such as visa overstays and kept them 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. Furthermore, the detainees have no effective legal means of challenging their detention. While their exact numbers are unknown, recent detentions in conjunction with new "alien registration" requirements may take the number of detentions above 2,000, although some individuals have reportedly been released or deported.

After repeated requests to the U.S. government for information went unanswered, the Commission issued a formal 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 Commission's request asks the U.S. government for precautionary measures 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."

facts relating to deaths in custody of prisoners held at the U.S. air base at Baghram, Pakistan and other secret locations. Those reports coincide with press concerns for the treatment during interrogation by U.S. officials of Khalid Shaikh Mohammad, reportedly one of Osama bin Laden's closest aides, who was arrested in Pakistan in early March.

Responses of the Inter-American Commission on Human Rights to Post-September 11 Events in the United States

The Commission has been active in its responses to the U.S. war on terrorism, not only with the Guantánamo detainees but on other fronts as well. 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 noted in that regard that although the United States 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." Although the United States has no reporting obligations under the American Convention on Human Rights regarding declarations of emergency measures because it is not a party to that treaty, the Commission also 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.

Second, on October 22, 2002, the Commission issued its comprehensive Report on Terrorism and Human Rights, which provides a legal framework and general recommendations regarding governmental responses to acts of terrorism, with which it has had extensive experience throughout the Americas. The Commission has dealt with cases and situations arising from guerrilla or insurgent organizations known for their use of terrorist methods, such as Peru's Shining Path, as well as state terrorism, such as some of the responses to Shining Path and other insurgencies in Peru by the government of former president Alberto Fujimori. Although the report does not address the issues in any national context, there is little doubt it is addressing the United States when it states, in its recommendations, that member states of the OAS must "refrain from the use of . . . military tribunals or commissions to try civilians," and further that:

in situations of international armed conflict, when an individual has committed a belligerent act and falls into the hands of an adversary and a doubt arises as to their status as a privileged or unprivileged combatant or civilian, *[the government must] convene a competent tribunal to determine the status of the detainee*, and ensure that such persons enjoy the protections of the Third Geneva Convention. . . (emphasis added).

It is this last recommendation that also lies at the heart of the decision by the Commission in response to the February petition mentioned above. The petition sought only the issuance of precautionary measures, not a ruling on admissibility or the merits. The rules permit the issuance of such measures "in serious and urgent cases" in order "to prevent irreparable harm to persons." The rule is designed to protect the existing status and legal protections for the alleged victims while the action is pending before the Commission, making it akin to a request for injunctive relief. The Commission's rul-

ing on precautionary measures does not constitute a ruling on the merits. Normally, a request for precautionary measures is sought contemporaneously with the filing of a petition for review of human rights violations on the merits, but in this case, the petitioners sought only precautionary measures. Because it was one of the first rulings on any aspect of the government's new war on terrorism, it received extensive publicity, both nationally and internationally.

On March 12, 2002, the Commission issued one of its most extensively documented requests for precautionary measures ever issued to the United States under Article 25 of its Rules of Procedure, a request that it later reiterated on May 28, 2002. The Commission concluded in its request that the detainees are all "subject to the authority and control" of the U.S. government, wherever they are physically located. Despite U.S. government arguments to the contrary, the Commission has jurisdiction over the detainees in Guantánamo because its powers reach to the extraterritorial acts of nations under an "authority and control" test similar to that used by the European Court of Human Rights. After the Commission's initial request for precautionary measures in March, the U.S. Department of State's Office of the Legal Adviser filed an extensive legal defense of the administration's Guantánamo policy in a 40-page submission to the Commission in April. That submission was the most fully articulated legal justification of U.S. policy filed with any tribunal up to that time, as the first legal challenge to the Guantánamo detentions in the United States was dismissed almost immediately for lack of standing of the petitioners in *Coalition of Clergy, et al. v. Bush et al.*, a decision that was subsequently upheld on appeal.

As it has in the past, the U.S. government argued that the Commission lacks jurisdiction over the United States and is thus wholly without authority to bind the United States with its decisions. The government went on to defend its policies on the merits, however. The gist of that pleading and others that have followed was the assertion that the Guantánamo detainees, by virtue of the president's determination that they are "unlawful combatants," thereby enjoy no legal protections. Thus, they may be held at the military's discretion until the cessation of hostilities, which the executive branch asserts to be the end of the government's war on terrorism. The detainees do not enjoy the protection of basic human rights, the government argued, because those rights have been pre-empted by the more specialized and precise legal concepts of the "separate and distinct humanitarian law rules at issue." Neither can the detainees claim the protections of humanitarian law, however, because the president has properly designated them as unlawful combatants, by which designation they fall outside of the protection of the Geneva Conventions. Thus, while the government asserted that it treats some of the detainees in a fashion consistent with the obligations of humanitarian law, it maintained that it has no legal duty to do so pursuant to human rights or humanitarian law. Thus, according to the government, the detainees legally fail to qualify for any legal protection whatsoever.

The Commission anticipated both the issues of jurisdiction and the merits of the government's claims in its March letter to the State Department. First, it was emphatic in its assertion that the U.S. government has an obligation to follow requests for precautionary measures:

The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures . . . is, as with the practice

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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 member states are subject to an international legal obligation to comply with a request for such measures.

As to the merits of the government's claim, the Commission concluded that the detainees "remain the beneficiaries at least of the non-derogable protections under international human rights law." The applicable international norms, the Commission asserted, require that "a competent court or tribunal, as opposed to the political authority, must be charged with ensuring respect for the legal status and rights" of the detainees. It is noteworthy that the Commission did not pre-judge the outcome of such a court proceeding, suggesting that were the United States to comply with the due process requirements of both human rights and humanitarian law, it could achieve the very outcome it now seeks to defend.

After submission of additional arguments by the petitioners, including the executive branch's assertions as to the application of the Geneva Conventions to the detainees, the Commission issued an additional communication to the United States on July 23, 2002. The Commission weighed the new evidence submitted by both parties, but reiterated its conclusion that "doubts continue to exist concerning the legal status of the detainees," and that the responses by the government "confirm the Commission's previous finding that, in the State's view, the nature and extent of rights accorded to the detainees remain entirely at the discretion of the U.S. government." By the explicit language of its decision and its invocation of numerous cases in which it had interpreted the American Declaration in light of humanitarian law obligations, the Commission also rejected the U.S. government's limited reading of the decision of the Inter-American Court of Human Rights (Court) in the preliminary objections decision in *Las Palmeras v. Colombia*, in which the Court ruled that the Court and Commission cannot directly apply the Geneva Conventions. The Commission, like the Court, nonetheless continues to use Geneva Convention norms as a means to interpret or clarify otherwise ambiguous provisions of human rights law.

The Commission also heard oral arguments in its October 2002 regular session on the status of the detainees, during which the United States reiterated its legal position without change or compromise. The recent adverse ruling by the court of appeals makes it likely that a full petition on the merits of the claim will be filed with the Commission as soon as domestic remedies are fully exhausted.

Finally, on March 18, 2003, the Commission issued a renewed request to the U.S. government for precautionary measures on two grounds. The request reiterated the earlier concerns for the status of the detainees at Guantánamo. It also stated that the new factual allegations regarding torture or other ill-treatment of detainees "raise questions concerning the extent to which the United States' policies and practices in detaining and interrogating persons in connection with its anti-terrorist initiatives clearly and absolutely prohibit treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under international norms." The letter further "requests information from [the U.S.] gov-

ernment concerning the location, status and treatment of individuals detained by the United States in other facilities in connection with its post-September 11, 2001 anti-terrorist initiatives."

Responses by United States and British Domestic Courts to the Executive Branch's "Unlawful Combatant" Claims

The United States judiciary generally has shown little willingness to intervene in cases involving the Guantánamo detainees and other cases involving assertions by the government of unlawful combatant status of detainees or accused persons. The issue is complicated not only because of disputed issues of territorial jurisdiction in the Guantánamo cases, but also because of the general unwillingness of the judicial branch to intervene in what it perceives to be foreign policy issues within the nearly exclusive prerogative of the executive branch. Moreover, because the administration has cast all of these cases as matters arising from combat and war, rather than as violations of criminal law, the courts similarly couch their reluctance to intervene in terms of executive discretion in the exercise of war powers and the military.

The U.S. government, through coordinated efforts of federal prosecution and immigration authorities, also has taken extensive measures to hide the identities of alien detainees, both in Cuba and here at home, and to obstruct legal access to courts or counsel for all detainees, ostensibly to permit interrogations to continue unimpeded and to prevent contacts within terrorist networks. Because of the difficulties experienced by alleged terrorists such as Yaser Hamdi, José Padilla, and Zacarias Moussaoui to achieve favorable treatment from the courts, the Inter-American Commission appears to be one of the few deliberative bodies willing to address the weaknesses in the Bush administration's legal arguments.

The cases of Hamdi, Padilla, Moussaoui, and John Walker Lindh, the so-called "American Taliban," raise complex issues of international law regarding prisoner and combatant status, as well as proper access to and treatment before the courts. As early as July 2002, the federal district court judge in *United States v. Lindh* had ruled that Lindh, a U.S. citizen who had taken up arms with the Taliban, could not invoke the protections of the Geneva Conventions by arguing that he was a lawful combatant—a soldier—fighting a war on the side of the Taliban. José Padilla, a U.S. citizen arrested in Chicago on a material witness warrant, was designated as an "enemy combatant" by the president and is now being held at a naval detention center in South Carolina without formal charges. In December 2002, a federal district court judge in New York affirmed the president's authority to designate Padilla as an "enemy combatant" but nonetheless concluded that he was entitled to the assignment of defense counsel in the exercise of the court's discretion over habeas corpus petitions, rejecting various government arguments that intervention by a lawyer on Padilla's behalf was inconsistent with legitimate goals of intelligence gathering and prevention of further attacks. The judge recently reaffirmed that ruling while expressing his irritation with the government's legal position. For example, he characterized the arguments of the Department of Justice and solicitor general as "permeated with the pinched legalism one usually encounters from non-lawyers."

The United States Court of Appeals for the Fourth Circuit, one of the most conservative federal courts in the nation, went further in its pro-government reasoning in *Hamdi v. Rumsfeld*. On January 8, 2003, that court held, like the other

Attacks from Within: Zimbabwe's Assault on Basic Freedoms through Legislation

by Jamal Jafari*

Personal freedoms in Zimbabwe have disintegrated over the past few years as President Robert Mugabe has compromised the civil and political rights of citizens to maintain his grip on power. In the face of mounting opposition to his rule, Mugabe has severely restricted the rights of journalists to express themselves freely, the rights of opposition political parties to hold rallies and meetings, and the rights of citizens to assemble freely. These rights are protected under the Constitution of Zimbabwe, as well as international covenants to which Zimbabwe is a party. These restrictions have been codified in two news laws—the Access to Information and Protection of Privacy Act (AIPPA) of 2002 and the Public Order and Security Act (POSA) of 2002. Both laws were instituted prior to a contentious presidential race in March 2002 and have allowed Mugabe to solidify his hold on power by subrogating any opposition while claiming to uphold the rule of law. This effort, which assured him an electoral victory despite failing to meet international election standards, will have far-reaching consequences on the rights of Zimbabweans to assemble, speak, and conduct a free press for years to come. In addition, Zimbabwe's problems come at a time when the rest of the continent is moving toward democracy and transparency. The failures of Zimbabwe will reflect poorly upon pan-African efforts to achieve these goals.

Background

President Mugabe has ruled Zimbabwe since it gained independence in 1980. After maneuvering to head the largest army that fought against white minority rule, he came to power espousing reconciliation with the white population that had previously ruled Rhodesia, as Zimbabwe was formerly known. Mugabe initially attempted to establish a *de jure* one-party state with his ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF) as the sole legal political party. He did not succeed, however, and created a *de facto* one-party state instead.

During the formative stages of Mugabe's rule, the administration did not tolerate dissent. In the early 1980s Mugabe sent the North Korean-trained Fifth Brigade of the Zimbabwe National Army to the Matabeleland region of the country, where it killed 20,000 people. Matabeleland, a base for many critics of Mugabe and ZANU-PF, was home of the Ndebele people who were united behind Joshua Nkomo and his Zimbabwe African People's Union party (ZAPU), which opposed Mugabe's centralization of power. Nkomo eventually agreed to a power-sharing agreement in which he would serve as vice president as long as he merged his party with ZANU-PF, thus eliminating the only major opposition party. This massacre, known in Zimbabwe as the Gukuruhundi, or "the rains that cleanse," set the tone for Mugabe's response to future attempts at political opposition.

From the late 1980s until the late 1990s, small political parties emerged, such as the Zimbabwe Unity Movement (ZUM), to contest an occasional parliamentary seat or run a symbolic presidential candidate who had no real chance of unseating Mugabe. Even though these parties posed no practical risk to Mugabe due to limited exposure and support, he did not hesitate to resort to violence and intimidation to ensure that no opposition party gained a foothold in Zimbabwean politics. For example, a ZANU-PF television ad broadcast during the 1990 presidential race threatened constituents who did not wish to support ZANU-PF. The announcer of the ad, which



Credit: UN/UNMEE photo by J. Avrambura

Robert G. Mugabe, President of the Republic of Zimbabwe, addressing the United Nations General Assembly on September 12, 2002.

featured a car crash, stated: "This is one way to die. Another way is to vote for ZUM. Don't commit suicide. Vote ZANU-PF and live."

Mugabe's hold on power began to crumble in September 1999, when the opposition Movement for Democratic Change (MDC) was born out of the labor movement. The MDC demonstrated its strength in February 2000 when it mobilized an effective campaign to defeat a referendum on a draft constitution written by ZANU-PF that would greatly expand the powers of the president. This was the first defeat ZANU-PF ever suffered at the polls. Four months later, the MDC emerged from a bloody parliamentary election campaign to win almost 50 percent of the elected seats. In the process, ZANU-PF members killed hundreds of people and tortured thousands, the vast majority of them MDC members.

The presidential election was due to be held in less than two years. ZANU-PF's efforts to use violence and intimidation failed to defeat the MDC. In subsequent court challenges, the MDC nullified the elections of several ZANU-PF members of Parliament after the Zimbabwe High Court ruled that ZANU-PF's heavy-handed campaign tactics created an illegal advantage for the ruling party. Although many judges who ruled against ZANU-PF were forced to resign, opposition support continued to grow. It was clear that the traditional tactic of violent suppression of opposition would not be enough to ensure Mugabe's re-election. To enhance its candidate's chances of winning the presidency, ZANU-PF resorted to instituting new laws in order to limit dissent, free expression, and free assembly.

The Public Order and Security Act of 2002

POSA, which was passed in January 2002, replaced the Law and Order Maintenance Act of 1960 (LOMA), one of the few pieces of legislation retained from the Rhodesian era. LOMA generally outlined police powers, state security measures,

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and the limits of personal freedom as they related to state security. LOMA was considered to be a draconian piece of legislation that served the interests of the white minority. Ironically, the Rhodesian regime often invoked this statute to inhibit the revolutionary forces and their supporters who now rule Zimbabwe. Mugabe kept LOMA in place after independence mainly due to its effectiveness in suppressing dissent against the government. The decision to replace LOMA came after years of public criticism over its colonial roots and the Mugabe regime's desire to restrict opposition to the government beyond the boundaries of LOMA.

Effects of the Public Order and Security Act on Freedom of Expression

Although LOMA was generally considered restrictive, POSA has maintained, and in some instances expanded, limitations on personal freedom, including freedom of expression. POSA retains the provision of LOMA that criminalized insulting the president, although the passage of POSA reduced the penalty from five years of imprisonment to one. Section 16 of POSA criminalizes the making of virtually any negative comment about the president in his professional or personal capacity. This section also criminalizes any printed or broadcast "abusive, indecent, obscene or false statement" directed toward the president. Although there is no independent electronic media within Zimbabwe, virtually any writer at an independent newspaper could be arrested for criticizing the president. In practice, however, the government has chosen to prosecute journalists under AIPPA rather than rely on this provision.

An additional provision of POSA that inhibits the right of free expression is section 15, which prohibits making any false statements prejudicial to the government, or any oral or written false statements that may, *inter alia*, adversely affect Zimbabwean defense or economic interests, or undermine public confidence in defense and law enforcement agencies. The determination of what constitutes a "false statement" is left up to the executive. This provision not only affects any local or foreign journalist writing about Zimbabwe, but also severely hinders human rights groups and other advocacy organizations that serve as a check on the government. If the press and non-governmental organizations are stripped of their power to criticize the state, critical debate in Zimbabwe will come to a virtual halt.

Another new clause incorporated into POSA is section 12, which addresses causing disaffection among the police forces. Under this clause, any person who commits an act that may be construed as attempting to cause the police or defense forces to withhold their loyalty, services, or allegiance, or to commit a breach of discipline, may be fined 20,000 Zimbabwe dollars (U.S.\$357) and imprisoned for up to two years. Because most police stations have close ties to government-sponsored militias and often apply the law selectively, many opposition supporters who report acts of political violence to the police are told that the police cannot help MDC members.

According to section 12, any person who makes public statements condemning the actions of the police or suggesting that they should uphold the rule of law may be a target for prosecution. For example, MDC official Kenneth Mathe was arrested and brought before a magistrate in the resort town of Victoria Falls on January 24, 2003 for violating section 12(a) of POSA. In an interview with the opposition newspa-

per *Daily News*, Mr. Mathe commented on reports that police and members of the armed forces were beating civilians in the area after the murder of an Australian tourist. He likened the events to the Matabeleland massacres in the 1980s. The police interpreted his statement as "causing disaffection amongst members of the Police Force or Defense Forces," arrested him, and released him on bail pending trial.

Effects of the Public Order and Security Act on Freedom of Assembly

Section 5 of POSA addresses acts of subversion. The language of section 5 is so broad, however, that even peaceful protests may be subject to prosecution. Specifically, subsection 2(iii) of this act makes "coercing or attempting to coerce the Government" a crime punishable by up to 20 years of imprisonment. "Coercing" is defined as "constraining, compelling or restraining" through "boycott, civil disobedience or resistance to any law, whether such resistance is active or passive . . . if accompanied by physical force or violence or threat of physical force or violence." Thus, any participant in a rally or a mass stayaway may be subject to prosecution under this clause. This would include any participant in a rally that is later attacked by a government-sponsored militia, which occurs with some regularity.

Section 17 of POSA, which addresses public violence, has been expanded to apply to anyone who "forcibly disturbs the peace, security or order of the public . . . or invades the rights of other people." On the surface, the objective of this provision seems to preserve the peace by punishing rioters. A closer examination reveals that it can be applied to anyone who objects to the operations of the state. For example, Raymond

Majongwe, secretary-general of the Progressive Teacher's Union of Zimbabwe (PTUZ), was twice arrested under section 17 while leading a nonviolent national teacher's strike in October 2002. Each time, he was arrested for approaching teachers at schools and encouraging them to join the strike. During the first arrest he was badly beaten in police custody and prevented from seeking medical attention for days. During the second arrest he was tortured by having electrodes applied to his genitals and his mouth. The police told him to call off the strike and not to talk to the press.

In general, POSA strengthens the police force and equips it with broader powers to inhibit demonstrations. Section 25, which regulates public gatherings, has enabled police to approve, disapprove, or shut down virtually any public gathering at will. Any person who wishes to hold a public gathering must provide advance notice to the authorities, who then have the power to determine the duration, location, and route of the gathering. The authorities may deny any request for a public gathering if they claim it will cause public disorder, a breach of the peace, or an obstruction to any thoroughfare. Any organizer of a public gathering who fails to seek approval from the state may be fined up to \$10,000 Zimbabwe dollars (U.S.\$179) and imprisoned for up to six months according to section 24(6). In addition, section 27 gives the police the power to prohibit any gathering within a specific police district for up to three months. Section 28 provides that the organizer of any public gathering who has breached any aspect of POSA relating to such gatherings may be held civilly liable for damage that results from the gathering. Further, section 31 states that any person at a public gathering who "engages in disorderly or riotous conduct; or uses threaten-

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ing, abusive or insulting words; or behaves in a threatening, abusive or insulting manner” may be liable for a fine up to \$50,000 Zimbabwe dollars (U.S.\$893) and may be imprisoned for up to two years. Police have even required advance notice of political discussions taking place at public places in the capital city of Harare.

Officials have relied on POSA when arresting elected MDC officials. On January 11, 2003, Harare Mayor Elias Mudzuri, his deputy mayor, and several members of the city council were arrested and charged with addressing an illegal gathering under section 25(1) of POSA, which regulates public gatherings that may cause “public disorder; or a breach of the peace; or an obstruction of any thoroughfare.” According to the British Broadcasting Corporation, at the time of their arrest, the officials were holding a meeting with residents at the city council building and were discussing municipal issues such as water, sewage, and roads.

Because POSA was passed two months before the presidential election, the restrictions on public gatherings had a serious effect on the campaign for the presidency. President Mugabe addressed roughly 50 rallies during that period and all ZANU-PF rallies were allowed to proceed unhindered. In contrast, Morgan Tsvangirai, the head of the MDC and its candidate for president, managed to hold only eight rallies. The MDC secured a court order to prevent the police from interfering in a rally in February 2002, but cancelled the rally after police refused to provide security in the face of mounting threats. In all, the police used POSA to disrupt or prevent 83 MDC rallies between January and March 2002. They often prevented MDC meetings in private homes as well, and disrupted a meeting between Mr. Tsvangirai and diplomats held at a hotel. The police disrupted several gatherings of the Zimbabwe Election Support Network, an organization devoted to voter education and free and fair elections, after classifying the gathering as political and therefore subject to the provisions of POSA.

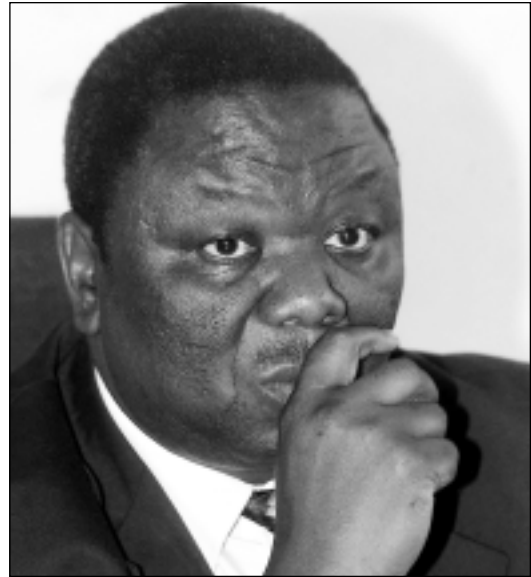
The Access to Information and Protection of Privacy Act of 2002

The Zimbabwean Constitution has never explicitly guaranteed freedom of the press, although it does guarantee free expression to all citizens in section 20, which has been interpreted to include journalists. Before AIPPA was passed in March 2002, journalists were prevented from publishing information that contained state secrets or could be proven to be defamatory. There was no law hindering the ability of journalists to operate, except for a statute regulating electronic media.

Accreditation of Journalists and Mass Media Outlets

AIPPA has drastically changed the work of journalists in Zimbabwe. Among other measures, it has created a Media and Information Commission (Commission) to oversee the press, has imposed a strict registration policy on journalists, and has introduced severe penalties for publishing false information. Three members of the Commission are chosen by officials from journalist organizations and three by associations of media owners, while the remaining members are chosen by the minister of information under orders from the president. The minister has the power to accept or reject any members nominated by journalists and media owners and holds the final decision, along with the president, as to who sits on the Commission.

The Commission has the power to register any individual journalists and all mass media outlets, including newspapers, magazines, news services, and any organization that derives revenue from news collection and dissemination.



Credit: AFP Photo/Aaron Ujumu

Morgan Tsvangirai, leader of the Movement for Democratic Change (MDC), at a press conference in Harare, criticizing the ZANU-PF-led government for physically abusing members of his party during a mass stayaway opposing Zimbabwean president Robert Mugabe's human rights record and dictatorship.

Sections 65 through 77 of AIPPA specify who may be a mass media owner, the manner in which he or she must apply for registration, and the manner in which he or she must operate in order to retain registration with the Commission. Section 65 provides that all mass media owners must at least be citizens of Zimbabwe. In addition, all partial owners must be permanent residents of Zimbabwe. Under section 69, the Commission may refuse to register any organization that violates the Act and may suspend or nullify registration due to bankruptcy of any owner or membership in a banned organization pursuant to section 71.

In a country where there is little internal capital investment, section 71 severely hampers the ability of news organizations to raise money. In addition, the mandatory registration of journalists amounts to the requirement of approval from the government to practice as a journalist. In practice, local journalists are initially granted registration, but renewal by the Commission is delayed or halted for those who have been particularly critical of the government. A journalist cannot report freely on government activities if he or she is worried about the nullification of his or her registration.

Journalists are subject to individual registration according to sections 78 through 90 of AIPPA. Under section 79, all journalists must apply to the Commission for registration that must be renewed annually. Only Zimbabwean citizens and permanent residents are eligible to receive this type of accreditation. Section 79(4) stipulates that any foreign reporter may be accredited for a maximum of 30 days. Therefore, all reporters from outside the country must get prior approval from the government and inform it of the subject of their work. A foreign media outlet may set up a permanent office in Zimbabwe, but only with prior approval from the Commission according to section 90.

As a result of the passage of section 79, numerous foreign journalists have been denied entry into Zimbabwe after their requests for temporary accreditation were denied. Among those denied visas were Sally Sara of the Australian Broad-

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casting Corporation and David Blair of the British Daily Telegraph who was immediately deported upon arrival. Further, the government alleges that it accredited 580 journalists before the March 2002 presidential election, but a private media watchdog group, the Media Institute of Southern Africa, suggests that number is closer to 72.

Local reporters have been most affected by the registration policy. For example, Fanuel Jongwe, a senior reporter for the *Daily News*, was arrested on January 27, 2003 in the town of Zvishavane along with five foreigners and charged under section 79 of AIPPA, which prohibits practicing journalism without a license from the Commission. The five foreigners, reported to be members of the World Lutheran Foundation (WLF), were charged under section 72, which prohibits running a media outlet without authorization. Jongwe stated that he had been invited to cover the WLF's activities as a development organization in the area. The group was later released after police confiscated a laptop, notebooks, cameras, and literature.

Effects of the Access to Information and Protection of Privacy Act on Freedom of Expression

Possibly more troubling to journalists than the accreditation issue are the new restrictions on freedom of expression imposed by AIPPA. Section 64, entitled "Abuse of Freedom of Expression," criminalizes usage of mass media outlets to commit a criminal offense or publish a false record. Anyone who violates this section may be fined up to \$100,000 Zimbabwe dollars (U.S.\$1786) and may be sentenced to up to two years in jail. While many countries hold journalists civilly liable for defamation, criminal liability serves to stifle the free expression of information due to the threat of imprisonment.

Individual journalists are also criminally liable from publishing false information under section 80, which provides penalties if a journalist "falsifies or fabricates information, publishes falsehoods . . . or contravenes any of the provisions" of AIPPA. The definition of a falsehood is left up to the Commission and the minister of information. The penalties for violating this section are up to a \$100,000 Zimbabwe dollars (U.S.\$1786) fine and up to two years in jail.

These sections of AIPPA have been used repeatedly to detain journalists who publish stories that criticize the government. In April 2002, Geoff Nyarota, the editor-in-chief of the *Daily News*, was arrested under section 80 after publishing a story accusing the Registrar General of Elections of releasing contradictory information to different media outlets concerning the results of the presidential election. In his subsequent legal challenge, Nyarota was remanded to prison until early 2003 while the government considers whether section 80 of the AIPPA violates section 20 of the Constitution, which guarantees freedom of expression. In total, at least 16 journalists were arrested and charged under section 80 from the time of the presidential election until early July 2002.

Zimbabwe's Responsibilities under the Zimbabwean Constitution and International Law

AIPPA's Compliance with the Constitution and International Law

AIPPA has sparked fierce constitutional debate within Zimbabwe. Section 20 of the Constitution maintains that

every citizen has the "freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence." There are exceptions to this right. In Section 20(2) (a), exceptions are made in the interest of "defence, public safety, public order, the economic interests of the State, public morality or public health." AIPPA goes one step further, however, and restricts freedom of expression on the basis of accuracy of information as perceived by the state. This is clearly a limitation the Constitution did not intend, and is currently being debated by the courts.

In addition, the provisions of AIPPA outlined above violate Zimbabwe's obligations under international law. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Zimbabwe is a state party, guarantees freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The only restrictions that may be imposed are those that are provided for by law and aim to protect the rights or reputations of others, national security, public order, public health, or morals. Any restriction must be justified as

"necessary" for achieving one of these purposes. General Comment 10, which elaborates on the implementation of Article 19, is clear that a state party may impose restrictions on the right to freedom of expression only if such restrictions do not jeopardize the right itself.

AIPPA's requirement that journalists provide accurate information is in violation of Zimbabwe's international obligations. Although most international bodies recognize some restrictions on press freedom to protect national security, AIPPA's prohibition against publishing false information regardless of content surpasses acceptable international norms. By making journalists criminally liable for their reports, AIPPA has trampled on internationally recognized components of a free press by imposing illegitimate restrictions on journalists' right to freedom of expression. Further, the restrictions on the press not only inhibit journalists' right to impart information, but they also jeopardize the public's right to receive information. Unless AIPPA is amended, a truly free word may never again be published in Zimbabwe, in turn stifling public debate among Zimbabweans.

Zimbabwe also has obligations as a state party to the African Charter on Human and People's Rights (ACHPR). Article 9 states that "every individual shall have the right to receive information," and "every person shall have the right to express and disseminate his opinions within the law." AIPPA certainly violates this provision by withholding registration from some independent journalists and prosecuting others for publishing allegedly false information. Imposing such limitations violates the Constitution, making its legal application dubious. In addition, AIPPA contradicts the spirit of Article 9 of the ACHPR.

AIPPA also contradicts nearly every provision of the Windhoek Declaration (Declaration) (1991) governing freedom of the press in Africa. Zimbabwe signed this document, which was drafted during the General Conference of United Nations Educational, Scientific and Cultural Organization in 1989 and later passed by the UN General Assembly. The Declaration establishes that a free press is essential to a functioning democracy and every effort should be taken to remove gov-

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ernment restrictions on the press, establish constitutional guarantees of press freedom, and protect journalists from prohibitions on their freedom of expression. Specifically, the Declaration states that “African States should be encouraged to provide constitutional guarantees of freedom of the press” Additionally, the Declaration asserts that “African Governments that have jailed journalists for their professional activities should free them immediately.”

These documents represent the will of Africa and the will of the world in allowing free speech. By preventing free access to information through the restrictions in AIPPA, Zimbabwe is turning its back on regional and international standards to which it previously agreed to adhere. Throughout its current crisis, Zimbabwe has repeatedly said that African problems demand African solutions, but this argument holds little weight considering the disrespect Mugabe has shown to standards of free speech outlined by the ACHPR.

POSA’s Compliance with the Constitution and International Law

Zimbabwe has contravened sections of its own Constitution and provisions of international law by passing and implementing POSA. Section 21 of the Constitution guarantees the right to assembly and does not provide for the sweeping authority POSA gives to officers of the state to restrict such gatherings. Further, Section 20 provides for freedom of expression and makes exceptions only for the protection of national security, defamation, and other circumstances relating to the general public welfare. POSA’s restrictions on freedom of assembly, including breaking up private meetings and outlawing all public assembly in certain areas for up to three months certainly contradict the Constitution, even if state security is considered. The assembly itself should always be guaranteed even if the content of the discussions at certain gatherings may be regulated, in extreme circumstances, in the interests of security.

POSA also contradicts many provisions of the ICCPR. Article 21 guarantees the right of peaceful assembly and only provides for exceptions for situations “necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” Preventing peaceful demonstrations as stipulated under POSA cannot be considered necessary in a democratic society. These internationally recognized provisions, if implemented, would allow Zimbabweans of all political persuasions to assemble peacefully. As POSA is written, this is not possible.

Article 11 of the ACHPR states that every individual shall have the right of free assembly provided he abides by the law. As provisions of POSA itself may be unconstitutional, certain provisions may violate Article 11 regarding to peaceful assembly. These provisions represent the will of Africa to protect peaceful assembly. POSA’s restrictions on assembly and criticism of the president contradict the will of Zimbabwe’s neighbors and the previous will of Zimbabwe itself.

Conclusion

POSA and AIPPA represent an assault on the freedoms of the Zimbabwean people guaranteed to them under the ICCPR, the ACHPR, and their own Constitution. A careful examination of both acts reveals that they were designed in part to aid the government during the presidential election and were used afterward to silence opposition voices and journalists in the independent media. Unchallenged, they create a virtual police state in which the government can deny

any public assembly (even gatherings in private homes), prosecute any person for a perceived threat or insult to the government, prevent journalists from expressing themselves, and prosecute journalists who disseminate information contrary to the official version of events. While sections of these acts are being challenged in court, they represent a trend by Mugabe and the government of Zimbabwe to put self-preservation before the rights of the people.

These pieces of legislation are symptomatic of the larger problem of Mugabe’s autocracy and disregard for the needs of the Zimbabwean people. At age 79 and a hardened veteran of many physical and political battles, it is unlikely that he will have a change of heart and loosen his grip on basic freedoms. As internal dissent is suppressed, the key to the reinstatement of these rights lies within the international community, starting with Zimbabwe’s neighbors. As Zimbabwe dwindles deeper in its political and economic problems it relies more on international organizations such as the Commonwealth, an organization composed mainly of Britain and its former colonies, and the Southern African Development Community (SADC). To date, SADC has offered mild criticism, and the Commonwealth renewed its suspension of Zimbabwe for a second year due to gross neglect of human rights. Despite mounting criticism, African powers such as South Africa and Nigeria have shielded Zimbabwe from further action by the Commonwealth while SADC has taken little significant action.

South African President Thabo Mbeki recently suffered a setback to his “quiet diplomacy” efforts with the Mugabe regime. Days after using POSA to arrest MDC Vice President Gibson Sibanda for his involvement in leading successful mass stayaways protesting the government, Minister of Justice Patrick Chinamasa announced that neither POSA nor AIPPA would be amended in any way because the government is “under siege” from the MDC. The government had considered the idea of amending POSA and AIPPA as a way of easing sanctions and gaining favor among international bodies, but eventually abandoned this plan.

The test of Africa’s future begins with Zimbabwe. If the ideals of the African Charter are going to be realized, ushering in an era of democracy and peaceful transfer of power through free and fair elections, Zimbabwe must be used as a model. African leaders must join the international call for “smart” sanctions targeted at Zimbabwe’s leadership, not its suffering population. The Commonwealth and SADC should strip Zimbabwe of any power within their organizations until a legitimate election has been held. Most importantly, all nations should condemn the restriction of basic rights and the establishment of an autocracy where a democracy once existed. If all nations, especially African nations, condemn Mugabe’s tactics, he might be convinced to leave office and hand over power to a more moderate government. Only then can Zimbabweans hope to enjoy the rights guaranteed to them by their Constitution and the laws of humanity. ☸

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The Case of Myrna Mack Chang: Overcoming Institutional Impunity in Guatemala

by David Baluarte and Erin Chlopak*

On February 20, 2003 the Inter-American Court of Human Rights (Inter-American Court or Court) concluded a three-day hearing regarding allegations that the Republic of Guatemala violated numerous provisions of the American Convention on Human Rights (American Convention) due to its role in the 1990 murder of Guatemalan anthropologist Myrna Mack Chang. Attorneys from the Inter-American Commission on Human Rights (Inter-American Commission or Commission), the Center for Justice and International Law (CEJIL), and Hogan & Hartson L.L.P. filed this case seeking a declaration of the responsibility of Guatemala and reparations for damages suffered by the victim's next of kin. The hearing was a major step in both the struggle for justice in the Mack case and the effort to expose the impunity enjoyed by state officials in Guatemala.



Myrna Mack Chang with her sister Helen and daughter Lucrecia.

Credit: The Myrna Mack Foundation

displaced individuals, generated international awareness of the extreme poverty and violence suffered by these populations and exposed the military's role in creating such conditions. The military, still the ruling authority in Guatemala despite the façade of a civilian government, quickly deemed Myrna an "internal enemy" and set the machinery of the EMP into motion.

On the evening of September 11, 1990, as Myrna prepared to leave AVANCSO for her home, she was accosted, brutally stabbed 27 times, and left in the street for dead. Since Myrna's murder, her sister, Helen Mack, has worked tirelessly to bring Myrna's killers and those responsible for planning her murder to justice. Helen has pursued remedies in both domestic and international fora in an effort to overcome Guatemala's recognized tradition of impunity for human rights violations.

Background: The Civil War in Guatemala

Throughout the 1970s and 1980s, the Guatemalan population was subjected to a "dirty war." The Guatemalan military used every means at its disposal to maintain its historic control over the country's power structure and rid the countryside of the Guatemalan National Revolutionary Unity (URNG), a leftist guerilla movement in opposition to the Guatemalan government. A "scorched earth" campaign waged throughout rural Guatemala left 440 villages totally destroyed, some 200,000 civilians dead or disappeared, and more than a million people displaced. The military's tactics, however, were not confined to the Guatemalan countryside. As early as the 1960s, semi-official death squads had become a common means to deal with civilian opposition leaders in Guatemala. During the 1980s, an intricate system for the surveillance and "disappearance" of such individuals had been established within the Ministry of Defense. The Estado Mayor Presidencial (EMP), a high-ranking military unit officially charged with the protection of the president and his family, was widely known to carry out these covert directives. The targets were named by the highest ranking military officials, and were systematically eliminated by groups of EMP officers. By the mid-1980s, the military deemed its campaign successful enough to permit the election of a civilian president, a gesture that many viewed as liberating Guatemalan society.

In 1986, Myrna Mack Chang, a highly regarded anthropologist, collaborated with several colleagues to found the Association for the Advancement of Social Sciences in Guatemala (AVANCSO). AVANCSO was a social science research facility conceived as a means to explore the impact of the country's decades-old civil war on Guatemalan society. Myrna conducted an in-depth study of "internally displaced" populations—Indigenous Peoples left without homes and denied the benefits of refugee status because they remained within Guatemala's national boundaries. The publication of Myrna's research, including testimonials of internally

Helen Mack's Search for Justice in the Guatemalan Courts

Helen's efforts to seek justice for her sister have spanned more than a decade. From the initial investigation into Myrna's murder to the ultimate conviction of two of the responsible parties, however, the Guatemalan government, acting on behalf of those accused of Myrna's murder, frequently refused to cooperate, and at times, actively obstructed the judicial process. These improprieties in Guatemala's criminal prosecution of the Mack case began with the initial investigation of Myrna's murder. No fingerprints were taken from the crime scene; investigators failed to obtain blood samples as well as a complete set of photographs of her wounds; and although fingernail samples were obtained, they were discarded before a laboratory technician could analyze them. In addition, investigators never examined the clothing Myrna was wearing when she was killed.

Perhaps most disturbing was the Guatemalan police's handling of a 60-page report completed by the detectives assigned to investigate Myrna's assassination. In this September 29, 1990 report, detectives concluded that Myrna's assassination was politically motivated, and they named Sergeant Major Specialist Noel de Jesús Beteta Álvarez as one of two individuals suspected in her killing. (The investigation failed to uncover the identity of the second suspect.) Rather than submitting this report to the courts, the police turned over a 13-page, abridged version, which lacked any mention of military involvement in Myrna's assassination. Additionally, this report replaced the investigators' characterization of the crime as "politically motivated" with a finding that the crime was simply a robbery. It was not until nearly ten months later that the existence of the original 60-page police report was disclosed in court through testimony offered by one of the detectives who had authored the report. One month after offering this testimony, while preparing to flee Guatemala in response to threats against his life, the detective was assassinated just outside of police headquarters. His killers remain unidentified.

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Despite the irregularities that characterized the investigation, on February 12, 1993, a Guatemalan trial court convicted Sergeant Major Specialist Noel de Jesús Beteta Álvarez, one of Myrna's assassins, and sentenced him to a 25-year prison term.

In addition to pursuing the prosecution of those responsible for carrying out Myrna's assassination, Helen Mack sought justice against the individuals alleged to have planned the murder: high ranking military officers in the EMP, including General Edgar Augusto Godoy Gaitán, Colonel Juan Valencia Osorio, and Colonel Juan Guillermo Oliva Carrera. Her efforts were frustrated, however, when the same court that convicted Beteta declined to permit the case against these "intellectual authors" to proceed. The court's refusal was improper in that it foreclosed proceedings before the suspects were indicted. In furtherance of its own impropriety, the court also placed the burden of identifying additional suspects in the case upon the Office of the Human Rights Ombudsmen, when the institutions actually responsible for making such determinations are the courts and the public prosecutors' office.

Also frustrating Helen's struggle to seek justice against the intellectual authors of Myrna's murder was the fact that her efforts were entirely unsupported by the public prosecutors working on the case. While Helen filed multiple appeals to keep the investigation open against both the second unnamed material author and the alleged intellectual authors, the public prosecutors joined only to investigate the second material author. Following the denial of these appeals, Helen filed a final appeal with the Guatemalan Supreme Court, which in turn overruled the lower court's decision and permitted the proceedings against the alleged intellectual authors to move forward.

Following this February 1994 holding, Helen pursued the prosecution of Valencia, Oliva, and Godoy, though her efforts were met with intense resistance and numerous challenges. In March of 1994, only one month after the Guatemalan Supreme Court permitted the case to proceed, the parties accused of planning Myrna's murder individually filed *amparo* petitions—extraordinary writs requesting the immediate protection of a jeopardized constitutional right—with the trial court, challenging the Supreme Court's holding. Although the trial court ultimately denied the petitions, it failed to make its decision until December 6, 1994, and further failed to give notification of its denials until March 9, 1995, three months later. In addition to postponing the proceedings, these delays violated the Guatemalan Code of Criminal Procedure, which mandates that courts give notification of their decisions within one day of the date on which the decision is reached.

In late March of 1995, an additional complication emerged. The Mack case was transferred by the Supreme Court from a civil trial court to a military tribunal, despite the international customary practice and international precedent requiring human rights violations to be prosecuted in civil rather than military courts. Helen filed multiple challenges to the transfer. In spite of Helen's efforts, the case was not returned to a civil court until July of 1996, when the Guatemalan legislature passed a law eliminating the jurisdiction of "special military tribunals." This resulted in the transfer of all cases pending in military courts to civil courts, including the Mack case. Despite what appeared to be a conclusive resolution of this issue, the following months were characterized by judicial



Credit: Erin Chlopak

Counsel for Guatemala at the hearing before the Inter-American Court of Human Rights.

efforts to avoid exercising jurisdiction over the Mack case. In light of the clarity and simplicity of the new law, such efforts seem to have stemmed from fear among the judges of the ramifications of being associated with the Mack case. Once again, Helen Mack's extraordinary efforts brought a final resolution to this jurisdictional issue, and by the end of 1996, the case was able to proceed.

In the midst of these numerous setbacks was yet another complication. The July 1996 law dissolving Guatemala's "special military tribunals" also instituted changes in Guatemala's Code of Criminal Procedure. These changes resulted in a dilemma: the proceedings that had taken place prior to July 1996 had been conducted in accordance with provisions that had been nullified by the new law. Therefore, the court was faced with the question of how to conduct the remaining proceedings and how to treat those proceedings conducted in accordance with provisions that no longer existed.

In November of 1997, more than a year after the new law was passed, the Guatemalan Constitutional Court ordered that the Mack case be prosecuted under the new Code of Criminal Procedure. In so holding, the Court vacated all proceedings against the alleged intellectual authors conducted under the repealed code of criminal procedure, including those proceedings that generated evidence in compliance with the new law. This result served to delay the proceedings even further.

The last major legal complications in the Mack case arose out of the 1996 enactment of the National Reconciliation Law. The result of a peace settlement between the Guatemalan government and the URNG, this law facilitated the URNG's re-incorporation into Guatemalan civil society by granting amnesty to persons who committed political crimes during the country's internal conflict. In January 1997, the alleged intellectual authors of Myrna Mack's assassination applied for immunity under the new law, asserting that the crimes with which they were charged were "political" crimes falling within the boundaries of the provision. Upon the denial of their applications for immunity, the alleged intellectual authors filed numerous appeals and *amparos*, while simultaneously reapplying for amnesty with a different court. Despite the fact that their initial applications had already been denied by an equally competent court, the new court agreed to consider the applications. Ultimately, the new court denied the applications for amnesty, but in light of the fact that amnesty

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applications had already been filed with another court, the proper response would have been to decline consideration of the applications outright. Because this unjustified consideration of repeated applications for immunity was not concluded until four months after the new applications were filed, it further compounded the delays already hindering the proceedings and wasted the time of all parties involved.

Finally, in addition to the numerous dilemmas that characterized the judicial proceedings against the alleged intellectual authors of Myrna's assassination, Helen's efforts were further hampered by extra-judicial obstacles. Beyond the detective who was assassinated outside of police headquarters, a number of witnesses, as well as one of the judges involved with the case, were intimidated to such an extent that they chose to go into exile.

On January 29, 1998, Godoy, Valencia, and Oliva finally were ordered to stand trial for planning and ordering the assassination of Myrna Mack. Throughout these proceedings, the defendants continued to abuse their right to file *amparos*, seeking the extraordinary relief on multiple occasions while failing to exhaust alternative measures, as required before such writs are filed. The defendants' excessive filing of *amparos* further hampered the expediency of the proceedings. In addition to the defendants' efforts to delay the proceedings, other representatives of the Guatemalan state also obstructed the judicial process by failing to comply with multiple discovery requests made by Helen Mack.

On March 3, 2000, Guatemala acknowledged institutional responsibility for Myrna's murder and for the delay of justice in the Mack case. Two-and-a-half years later, on October 3, 2002, a Guatemalan civil court convicted Juan Valencia for ordering the assassination of Myrna Mack, sentencing him to 30 years in prison. Valencia's superiors, Godoy and Oliva, both were acquitted due to the court's finding that there was insufficient evidence of their direct involvement in the planning of Myrna's assassination. Helen's appeal of these acquittals is pending.

Petition to the Inter-American Commission on Human Rights

Almost immediately after Myrna's murder, Helen Mack, as the representative of Myrna's next of kin, began to seek the involvement of the Inter-American Commission on Human Rights in order that they might oversee the domestic criminal investigation and trial. The Guatemalan Human Rights Commission, a national human rights commission, presented a petition against the State of Guatemala to the Inter-American Commission on September 12, 1990, denouncing Myrna's murder. Five days later, the Inter-American Commission opened case number 10.636.

On March 5, 1996, after carefully observing the domestic investigation and judicial proceedings, the Commission declared the Mack case admissible in accordance with Articles 46, 47, and 48 of the American Convention. Petitioners and Guatemala subsequently filed a series of allegations regarding the merits of the case, which the Commission took under review. In accordance with Article 48(f) of the American Convention, the Commission held hearings with the goal of mediating a friendly settlement between the parties. During those hearings, the Guatemalan state acknowledged institutional responsibility for the extra-judicial killing of Myrna Mack, a gesture that led to the signing of a compromise agreement on March 3, 2000.

This compromise agreement embodied a number of significant steps toward justice. In acknowledging international responsibility, Guatemala agreed to reinstate the case against the alleged intellectual authors and ensure that the proceedings could progress without further delay. As a means to ensure Guatemala's compliance, the compromise agreement also included a formal request to the Inter-American Commission to assign representatives in Guatemala with the mandate to oversee the proceedings and verify respect for due process and judicial guarantees.

The verifiers presented their first and second reports on August 23, 2000 and October 5, 2000, respectively, expressing their belief that the Guatemalan state was not serious about advancing the prosecution of the intellectual authors nor was it doing everything within its power to ensure fairness in the proceedings. As a result, Helen desisted in her efforts to reach a friendly settlement.

On March 8, 2001, pursuant to Article 50 of the American Convention, the Inter-American Commission approved report No. 39/01 (Report), in which the Commission detailed its findings on the Guatemalan proceedings in the Mack case. The Commission found that the Guatemalan state had deprived Myrna Mack of her right to life, in violation of Article 4 of the American Convention. The Commission concluded that Myrna's murder resulted from a military operation planned and executed by officials in the EMP. The first step of the operation involved singling out Myrna because of her professional work, the second was to kill her, and the third was to cover up the identities of the material and intellectual authors, ensuring their impunity. Secondly, the Report concluded that the Guatemalan state had not done everything within its power to investigate the crime sufficiently so as to facilitate the prosecution of those responsible within a reasonable period. The report also noted that the state tolerated interference with the proper administration of justice, and in as much, violated the rights to a fair trial and judicial protection under Articles 8 and 25 of the American Convention, respectively.

The Inter-American Commission also reported that the state had a responsibility to investigate extra-judicial killings with the goal of fully prosecuting all those responsible, and that Guatemala did not fulfill this responsibility. In using state actors to perpetrate Myrna Mack's extra-judicial killing and shielding those responsible from prosecution, Guatemala violated its obligation under Article 1(1) to assure respect for all of the rights and freedoms enumerated in the American Convention.

Finally, the Report declared that, under international law, Guatemala's acknowledgment of institutional responsibility was legally valid, and required the state to redress the damages caused to Myrna Mack's next of kin. The Report emphasized that more than a year had passed since Guatemala acknowledged responsibility and it had made no genuine effort to penetrate the shield of impunity that protected the intellectual authors of Myrna's murder.

Based on these findings the Inter-American Commission made certain recommendations, asking that the state of Guatemala conduct a thorough and impartial investigation with the goal of bringing those responsible to justice; adopt measures to assure that Myrna's next of kin receive adequate reparations for the damages they suffered; remove all obstacles preventing the case from going forward; and dismantle the EMP as soon as possible, in compliance with the 1996

Peace Accords. The Inter-American Commission forwarded the Report to Guatemala on March 19, 2001, and Guatemala responded by revoking its March 2000 admission of institutional responsibility for the death of Myrna Mack and denying central facts of the case. The Commission determined that Guatemala failed to demonstrate genuine intent to comply with the recommendations and referred the case to the jurisdiction of the Inter-American Court on June 14, 2001.

On July 26, 2001, the Inter-American Commission filed an official petition in the Inter-American Court against the state of Guatemala regarding the Mack case. Two months later, Guatemala filed its response in the form of preliminary objections. In these objections, Guatemala once again retracted its earlier admission of institutional responsibility, stating that the Commission had misunderstood this earlier gesture to mean that the state itself was responsible for the murder. Guatemala claimed that because domestic remedies had not been exhausted, the Inter-American Court did not have jurisdiction over the case. In addition, Guatemala argued that the state could not be responsible for the murder of Myrna Mack, a crime that had been committed by individuals who were being prosecuted for their unlawful acts.

On November 29, 2001, the Inter-American Commission filed its response to Guatemala's preliminary objections. The Commission invoked Article 46(2), which provides that the exhaustion of domestic remedies requirement does not apply when the necessary remedies either do not exist, are ineffective, or present unjustifiably long delays. The Commission made its decision on admissibility after observing that domestic efforts to obtain justice were thwarted by an incomplete investigation, unjustifiably long delays in the judicial proceedings, intimidation of witnesses and judges, and the withholding of discoverable evidence. The Commission found that the conviction of one of the three alleged intellectual authors, which had occurred since the Commission filed its petition with the Court, did not change the fact that Guatemala failed to comply with basic requirements of ensuring justice, as set forth in the American Convention. In light of the Commission's determination that domestic remedies were effectively exhausted, the Inter-American Court had jurisdiction over the case to determine whether Guatemala violated international law in enabling the assassination of Myrna Mack and ensuring impunity for those responsible.

Proceedings before the Inter-American Court of Human Rights

From February 18-20, 2003, the Inter-American Court heard oral arguments and testimony regarding the merits of the Myrna Mack case. On the first day of the hearing, both sides gave their opening statements, after which representatives of the Guatemalan government sat passively, declining to cross-examine the petitioners' first four witnesses. Among those who testified were Myrna's daughter, Lucrecia Hernández Mack, who offered a dramatic account of the pain she has suffered as a result of her mother's death, and Myrna's sister, Helen Mack, who discussed the Guatemalan state's institu-

tional responsibility for Myrna's assassination, as well as the legal and extra-legal delays that have prolonged the domestic judicial proceedings for over 12 years.

The following day, before the petitioners examined their remaining nine witnesses, representatives of the state of Guatemala withdrew from the proceedings, stating their refusal to be present during testimony that discredited the Guatemalan government. This was the first time in the history of the Inter-American Court that a state withdrew from ongoing proceedings. Nevertheless, following the Court's own procedural rules, the hearing continued in the state's absence. Witnesses offered testimony regarding the flawed investigation into Myrna's assassination; the institutional involvement of Guatemalan intelligence agencies, particularly

the EMP, in ordering and carrying out political assassinations; the pronounced threat that Myrna's work posed to the Guatemalan government; the extensive delays that have characterized the domestic criminal proceedings; and the psychological injuries suffered by Myrna's family as a result of her brutal murder and the obstacles they have encountered in their efforts to obtain justice on Myrna's behalf.

On the final day of the international proceedings, both petitioners and a representative of Guatemala returned to present

closing arguments. Following a summation of the barriers to justice that plagued the domestic proceedings in the Mack case, petitioners asked the Court to award reparations in the form of two scholarships—one for a law student and the other for an anthropology student—in Myrna's honor, and an order that a memorial to Myrna be erected in Guatemala. Petitioners further asked the Court to award monetary reparations for the pain they have suffered as a result of their loss, as well as for the pain Myrna suffered at the time she was killed. Finally, petitioners implored the Court to order the Guatemalan government to dismantle the EMP and take additional affirmative steps to ensure that human rights violators no longer enjoy impunity.

In a very brief closing argument, the representative of the Guatemalan state noted that the domestic proceedings in the Mack case were ongoing and that the Inter-American Court should not act in a manner that would interfere with Guatemala's pursuit of justice in its own courts. The state's representative also discussed the political importance of moving forward, urging the Inter-American Court not to be swayed by the emotionally charged testimony of the petitioners' witnesses. The Inter-American Court is expected to render its decision in the Mack case between the summer and fall of 2003.

The Significance of the Mack Case

The Mack case demonstrates the fundamental inability of Guatemalan political and legal institutions to protect the human rights of the Guatemalan people and provide swift justice when those rights are violated. The case also illustrates Guatemala's ongoing tradition of assuring impunity for individuals who, acting on behalf of the state, violate domestic and international human rights laws. More broadly, the Mack case is emblematic of the type of litigation that comes before

Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict

by Shara Abraham*

In recent years a body of international norms and standards for protecting children affected by armed conflict has emerged. Of particular importance is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol), which entered into force on February 12, 2002. The Optional Protocol sets 18 as the minimum age for compulsory military recruitment. It also requires that states mandate a minimum age, never less than 15, at which they will accept voluntary military recruits.

Although the enactment of the Optional Protocol is a laudable achievement, it is abundantly clear that child soldiers continue to be employed at increasingly alarming rates. One statistic illustrates the depth to which armed conflict continues to deleteriously affect children: more than 300,000 children under 18 are engaged in conflict, serving as combatants in nearly 75 percent of the conflicts around the globe. While protracted conflicts ensue from Asia to South America, potential conflicts loom on the horizon as well. Such conflicts test the capacity of the Optional Protocol to protect children in conflict and serve as reminders that the enactment of international instruments alone has not stopped the aggressive mobilization of the world's youngest and most vulnerable population.

The most effective means of ending this offensive practice is a multi-faceted approach. Governments, international agencies, and local actors must continue to pressure armed forces to stop recruiting and deploying child soldiers. Human Rights Watch recently noted that several armed opposition groups in Burma appear to be responding to such pressure. It also is important to curb the easy availability of small arms and military aid, both of which facilitate the use of child soldiers. Additionally, it is critical to reduce the risk of child recruitment. Governments should regularize recruitment procedures and prosecute those who violate rules precluding underage recruitment. Educating parents and local communities about national and international law strengthens their capacity for advocacy, protection, and monitoring, thus potentially minimizing the risk of recruitment. Further, child soldiers often are products of impoverished and desperate socio-political environments. Addressing these root causes is another key component of reducing the risk of recruitment.

Additionally, demobilization and rehabilitation programming is important. The establishment of peace creates an opportunity for war-torn states to begin directing energy and resources toward the victims of conflict. Peace agreements thus ought to include specific measures pertaining to the demobilization and reintegration of children, including the creation of jobs for youth and rebuilding schools and local communities. As the tenable peace in post-conflict Sierra Leone demonstrates, developing a protective environment for demobilized child soldiers and laying the groundwork for reunification is important. Absent meaningful and effective implementation of disarmament, demobilization, and reintegration programming, post-conflict situations could once again degenerate into conflict.



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Drawing by a former child soldier in Sierra Leone.

From Impressionable Youth to Ruthless Killer: The Phenomenon of the Child Soldier

Across each continent countless states are submerged in conflict. In armed conflicts from Sierra Leone to Burma to Colombia, fighting between government forces and non-state armed groups has led to the destruction of entire communities. Murder, rape, and torture of the local population are the predominant tactics that government and opposition groups employ to strike terror and maintain power. The aggressive recruitment of child soldiers enables such campaigns of terror around the world. Government and rebel forces abduct and forcibly conscript children, violently quashing their innocence and transforming them into fighters and sex slaves.

Abducted and forcibly recruited by armed forces, children in armed conflicts suffer two-fold as both witnesses to atrocities and perpetrators of unspeakable crimes. Many child soldiers fight on the front lines; others are used as spies, messengers, and servants. For young girls, recruitment leads to particularly atrocious suffering. Young girls often are employed as sexual slaves and are subject to rape, sexual abuse, and sexual harassment.

Child soldiers are appealing to armed forces for various reasons, including the fact that children are easy to arm and control. Children are easy to manipulate because they are

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obedient and unlikely to question orders. As the Coalition to Stop the Use of Child Soldiers notes, governments and armed groups use children because they are “easier to condition into fearless killing and unthinking obedience.” Armed forces consider children to be useful soldiers because of the ability to arm children with newly developed lightweight and easy to fire weapons. Also, armed forces frequently assign children to a fatally dangerous task because of their size and agility: the laying and clearing of landmines.

Armed forces employ countless tactics to turn young children into murderers. Drugs and alcohol are forced upon children to dull their sensitivity to pain. In all too many conflicts, sheer terror and a desperate struggle to survive lead children to war. This practice of brutalizing children and transforming them into hardened killers creates a moral and political dilemma for states in conflict with regimes that employ child soldiers. Conflict with such regimes requires a state to simultaneously condemn the use of child soldiers as a violation of international law, yet remain aware of the threat they pose.

International Legal Mechanisms

International Labor Organization Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was adopted in June 1999 and was the first international legal instrument to legally recognize child soldiering as a form of labor. In fact, the convention deems child soldiering to be one of the worst forms of child labor. Article 3(a) specifically states that the worst forms of child labor include “all forms of slavery or practices similar to slavery, such as . . . forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.” Convention 182 is also the first international treaty to set 18 as the minimum age for military participation.

Convention 182 precipitated the development of a body of international norms and standards for protecting children affected by armed conflict. As Secretary-General Kofi Annan noted during a recent Security Council meeting on children and armed conflict, on January 23, 2003, there is growing evidence of an increased international commitment to the protection of children and child soldiers. Secretary-General Annan emphasized the importance of two landmark instruments — the Rome Statute of the International Criminal Court (Rome Statute) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts — both of which entered into force this past year and significantly strengthen existing protections for children in armed conflict.

The Rome Statute defines the use of child soldiers under 15 as a war crime. Consistent with this definition, the International Criminal Court has jurisdiction over the war crime of conscripting or enlisting children under 15 into national armed forces or armed groups and of using children as active participants in hostilities. Additionally, the Rome Statute contains an expansive definition of “participation in hostilities.” The statute explains that “use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.”

The Optional Protocol, which has been signed by over 100 countries and ratified by more than 40, presents perhaps the most useful tool for combating the employment of chil-

dren in warfare. This landmark instrument represents universal opposition to the harmful impact of armed conflict on children. The underlying Convention on the Rights of the Child (Convention) generally defines a child as any person under the age of 18, yet sets 15 as the minimum age for military recruitment and participation in armed conflict. The Optional Protocol amends the Convention by making 18 the minimum age for conscription. This change is significant because it marks a shift in international opinion regarding the age at which it is acceptable to conscript children.

The first three articles concern direct participation in hostilities, compulsory recruitment, and voluntary recruitment, respectively. Article 1 stipulates that states parties “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.” Article 2 requires states parties to ensure that persons who are under 18 are not compulsorily recruited into the armed forces. Article 3 has been lauded as a particularly significant achievement. This provision that states parties raise the minimum age for the voluntary recruitment of persons into their armed forces from that set out in the Convention. The second paragraph of this article authorizes states parties to determine the minimum age at which it will permit voluntary recruitment into its armed forces. Where a state party permits voluntary recruitment under the age of 18, states must comply with the following minimum safeguards as set forth in Article 3, paragraph 3(a): (1) recruitment must be genuinely voluntary; (2) recruitment must be conducted with the informed consent of the person’s parents or legal guardians; (3) recruits must be fully informed of military duties; and (4) recruits must provide reliable proof of age prior to acceptance into national military service.

The fourth and fifth articles of the Optional Protocol pertain to non-state armed groups and establish a framework for holding non-state armed groups accountable for child soldiering. Article 4 explicitly states that “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” The Optional Protocol further provides that application of its principles is not contingent on the existence of an armed conflict, rendering questions as to whether a situation amounts to an armed conflict irrelevant. Perhaps most importantly, the Optional Protocol requires all states parties to endeavor to prevent the recruitment and use of children under 18, rather than limiting this obligation to parties involved in a particular conflict.

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The Optional Protocol also addresses post-conflict issues, including demobilization of child soldiers. Article 6 provides that persons “recruited or used in hostilities” are to be demobilized and accorded “all appropriate assistance for their physical and psychological recovery and their social reintegration.” Notably, the language makes clear that children voluntarily or forcibly recruited into armed groups, as well as non-state forces, are to be included in demobilization and reintegration efforts.

Assessing the Optional Protocol

During the Optional Protocol’s brief existence it has been both lauded and criticized. As Casey Kelson, coordinator of the Coalition to Stop the Use of Child Soldiers, recently remarked, “This first anniversary of the Optional Protocol should not be a celebration but a time to call upon other countries to join the international community in condemning this appalling practice.”

In an article entitled, “Children in Conflict: Assessing the Optional Protocol,” Center for Defense Information senior analyst Rachel Stohl articulated five strengths of the Optional Protocol: (1) it establishes an international standard for the employment of children in conflict; (2) it codifies a legal norm by which states can be held accountable; (3) it sets a minimum age requirement that makes it more difficult for governments and non-state actors to fabricate the ages of children employed in armed conflict; (4) it encourages states to implement existing national laws and policies or enact domestic standards that will reflect the standards enunciated in the statute; and (5) it raises public awareness regarding the use of child soldiers.

The Optional Protocol is not, however, flawless. As Stohl concedes, “The Optional Protocol is a compromise.” In particular, its effectiveness suffers from vagueness. For instance, Article 1 stipulates that states “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.” The deliberate vagueness of this provision enables states to determine what constitutes “all feasible measures” and define “direct part in hostilities.” By setting the standards by which they are judged, states may easily escape the scrutiny of the international community. The Optional Protocol also breaks with standard international norms concerning protocols. Generally, a country is prohibited from becoming a party to a protocol unless it ratifies the parent agreement. The Optional Protocol permits states that have not ratified the Convention, such as the United States, to ratify the Optional Protocol, in turn undermining the spirit of the Convention. Although much can be gained by allowing states to commit themselves to the Optional Protocol even where such states are unwilling to accept all of the terms of the Convention, some argue this loophole effectively diminishes the significance of the Convention.

Further, the Optional Protocol is not comprehensive in its approach to tackling the employment of young children in armed conflict. For example, the Optional Protocol fails to adequately address the issue of voluntary recruitment of chil-

dren under 18. Additionally, the Optional Protocol fails to delineate a means for encouraging adherence on the part of non-state groups. Non-state groups did not participate in crafting the content of the statute, potentially rendering it difficult to persuade their adherence. Finally, there is a glaring absence of monitoring, verification, and enforcement provisions. The absence of such critical components inevitably will hinder the Optional Protocol’s implementation.

The United States Congress has conducted its own preliminary assessment of the Optional Protocol. The Congressional Human Rights Caucus of the United States Senate recently sponsored a briefing on child soldiers. The purpose of the briefing was to highlight the continuing plight of children in armed conflict and address implementation and enforcement of the Optional Protocol. The briefing focused on countries that have been submerged in conflict for years, in some instances even decades, highlighting Burma, Cambodia, and Uganda as the most egregious cases of the use of child soldiers. As the various speakers at the briefing demonstrated, the pervasive use of child soldiers continues unabated in spite of the ratification of the Optional Protocol and increasingly unified international opposition.

The Role of the Optional Protocol in Protracted Conflicts: Burma

To assess the potential effectiveness of the Optional Protocol, it is useful to consider it in the context of protracted conflicts, such as the internal conflict in Burma. Protracted

conflicts like Burma underscore the shortcomings of the Optional Protocol. The State Peace and Development Council (SPDC), Burma’s military government, crushed pro-democracy demonstrations in 1988. Following this victory over democracy, the military government immediately directed energy toward building its armed forces, capitalizing on the nation’s youth. In many instances, young boys are forced to choose between imprisonment and military service. Some children even

voluntarily join opposition groups in hopes of avenging past abuses by the Burmese army.

With more than 70,000 boys serving in Tatmadaw Kyi, the government’s army, Burma is estimated to have the largest number of child soldiers in the world. Armed opposition groups in Burma also recruit child soldiers. The United Wa State Army, the largest armed opposition group, utilizes approximately 2,000 child soldiers.

Burma’s use of child soldiers is characterized by excessive brutalization. Should a child be brave enough to refuse enlistment, that child likely is sent to a local army base or recruitment camp and beaten into submission. Following recruitment, Burmese child soldiers, some as young as 11, are subject to beatings during training, forced to commit human rights abuses against civilians, and prohibited from contacting their families. Further, children face severe reprisals if they attempt escape.

A primary source of recruits is the Ye Nyunt system, or “Brave Scouts.” Boys as young as seven engage in military training at the Ye Nyunt camps and are later transferred to Su Saun Yay recruit holding camps. All recruits entering the government army first endure brutalization and isolation in the

Following recruitment, Burmese child soldiers, some as young as 11, are subject to beatings during training, forced to commit human rights abuses against civilians, and prohibited from contacting their families.

Su Saun Yay camps. Young recruits performing training exercises are routinely beaten, sometimes to the point of unconsciousness. The brutalization continues at one of twenty formal military training camps. As with initial recruitment, escape is severely punished. The most common punishment entails forcing the entire group of trainees, often numbering more than two hundred, to line up and beat the escapee. The brutalization continues even after deployment as these Burmese child soldiers are forced to carry out brutal acts. Although some opposition groups have begun to respond to international pressure by reducing the recruitment and deployment of child soldiers, the SPDC and the United Wa State Army continue to ignore such pressure. In fact, the SPDC adamantly denies that it has even recruited and deployed children.

Burma's use of child soldiers violates its domestic law as well as its commitments under the Convention, which Burma ratified in August 1991. Notably, Burma has not ratified the Optional Protocol. Even if Burma were to ratify the Optional Protocol, its effectiveness is dubious. Among the flaws Rachel Stohl highlighted, the Optional Protocol fails to adequately address voluntary recruitment of children 18 and under. Thus, the Optional Protocol would be powerless with respect to the scores of children that voluntarily join the Burmese government army or non-state armed groups. Additionally, the dearth of monitoring, verification, and implementation provisions impedes the Optional Protocol's potential effectiveness, particularly in a situation such as that in Burma where the key players consistently refute their utilization of child soldiers.

The Role of the Optional Protocol in New Conflicts: Iraq

The Optional Protocol may potentially play a role in the protection of children before conflict emerges as illustrated by the war in Iraq. International attention focuses almost exclusively on Saddam Hussein's development of weapons of mass destruction. With international scrutiny centered on the threat of chemical and biological weapons, Saddam Hussein's regime deliberately recruits children into its armed forces with impunity. With the onset of the war with Iraq, the international community must address the ineluctable fact that war will almost certainly entail combat with children. The Iran-Iraq War and the Gulf War are instructive because reports suggest that children fought among Iraqi forces during both conflicts.

The Iraqi regime has been training children as young as ten years old since the mid-1990s. Peter Singer, an analyst with the Brookings Institution, recently reported that Baghdad is home to nearly 8,000 child soldiers. As Singer explains, "A common means for totalitarian regimes to maintain control is to set their country on a constant war footing and militarize society." Recruiting and training children, and perhaps most importantly, indoctrinating their impressionable minds with extremist ideology, enables Saddam Hussein to consolidate his hold over the Iraqi people. These were the tactics Nazi Germany employed to a frighteningly effective degree. Comparing Iraqi child soldiers with Hitler Youth, Singer noted that Iraqi child soldiers could similarly "operate with unexpected and terrifying audacity."

Recruiting and training children, and perhaps most importantly, indoctrinating their impressionable minds with extremist ideology, enables Saddam Hussein to consolidate his hold over the Iraqi people.

National law and policies perpetuate the mobilization of Iraq's children. Article 1 of the Iraqi Constitution states that "[t]he defence of the homeland is a sacred duty and honour for citizens." The 1969 Military Service Act sets the minimum age for compulsory recruitment at eighteen. It is unclear what the minimum age for voluntary recruitment is; sources such as the Center for Defense Information indicate it may be as young as fifteen. In fact, the Revolutionary Command Council is authorized to determine whom it may conscript during wartime.

Supplementing national law and policies that permit traditional recruiting and conscription, military training schools and military youth organizations are predominantly responsible for the mobilization of Iraq's children. A host of military training programs and youth organizations were launched following the Gulf War. For instance, in 1998 the Iraqi government initiated a military-preparedness project designed to equip all Iraqi citizens between the ages of 15 and 65 with basic self-defense and small arms training. The government also developed military training camps for children between 12 and 17. These military camps have trained more than 23,000 children in the usage of light arms and Ba'ath ideology, which espouses pan-Arabism, socialism, and resistance to foreign interference. Political scientists have even likened Ba'ath ideology

to European fascism. Additionally, numerous military youth groups are employed to train Iraq's youth. The Ashbal Saddam, or Saddam Lion Cubs, with members as young as ten, is but one organization whose training includes the use of small arms, hand-to-hand combat, and infantry tactics. The U.S. State Department's Human Rights Report on Iraq notes that families who do not enroll their children in these programs face sanctions, such as the loss of their food ration cards. Because sanctions are imposed for failure to enroll, enrollment is not functionally voluntary. The report also noted that the failure to register children in the Fedyayeen Saddam, or Saddam's Martyrs, generally results in the denial of school examination results. The Fedyayeen Saddam reportedly is comprised entirely of children, numbering between 18,000 and 40,000 troops.

The near certainty that Saddam Hussein will deploy children makes it incumbent upon the international community to address the use of child soldiers. Presented with this disturbing reality, the shortcomings of international instruments such as the Optional Protocol are evident. Iraq has neither signed the instrument nor taken any steps toward preventing the use of children in armed combat or limiting their participation in military training programs. In fact, it is conceivable that Iraq's utilization of child soldiers will only increase as the war unfolds. Yet as reported in the *Independent*, among other sources, it appears the Pentagon has not explicitly prepared for facing child soldiers in combat. Given the psychological trauma that accompanies military combat with children, as well as the public relations debacle that inevitably will ensue, it is shocking that American forces did not address the issue before troops were deployed. Lacking such preparedness, the United States will find itself in a precarious position: the United States must condemn the use of child soldiers as a violation of international law yet remain vigilant against the threat they pose.

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As war with Iraq demonstrates, the usefulness of the Optional Protocol is undermined when rogue states are at issue. Iraqi law and policies controvert the standards enumerated in the Optional Protocol and conflict with a developing international consensus opposed to the recruitment and deployment of children under 18. Because Iraq is not obligated to abide by the Optional Protocol, a concerted campaign of international pressure may, therefore, be the most effective tool for protecting Iraqi children.

Conclusion

The development of international norms and standards concerning the involvement of children in armed conflict is significant. In particular, the widespread acceptance of the Optional Protocol is cause for optimism. Precarious peace processes, protracted conflicts, and the threat of new conflicts nonetheless demand a vigilant and concerted commitment from the international community. Such conflicts also illustrate the shortcomings of the Optional Protocol. Buttressed by mechanisms for implementing, reporting, and monitoring, as well as a more explicit declaration concerning voluntary recruitment, the Optional Protocol could be employed more effectively to protect children affected by armed conflict. International condemnation of the use of child soldiers warrants a strengthened Optional Protocol with a capacity for comprehensive protection of children from conflict. Yet given the Optional Protocol's limitations, ending the deplorable practice of child soldiers requires a multi-faceted approach. Such an approach should include application of internal and international pressure, reduction of the risk of

child recruitment, implementation of demobilization and rehabilitation programming, and prosecution of those who recruit and deploy child soldiers. 🌐

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*** This article was drafted in anticipation of the war in Iraq and does not take into account the recent events in the region.*



the Inter-American Court every year. It exemplifies the extent to which human rights abuses occur in the Americas and evidences the potential for the inter-American system to play a definitive role in removing the shield of impunity for those who plan and carry out such abuses.

A decision in favor of Guatemala would set a precedent that limits the extent to which the Inter-American Court can exercise its jurisdiction to evaluate the efficacy of domestic systems of justice in addressing violations of fundamental human rights.

Indeed, the convictions of one of the individuals suspected of carrying out Myrna's assassination and one of the three accused of planning the crime were important triumphs in Helen Mack's endeavor to seek justice on her sister's behalf. In light of such achievements, the Court could choose to construe strictly the requirement of exhausting domestic remedies and refuse to find the state in violation of the Convention where it had made progress in the pursuit of justice.

If the Inter-American Court decides the case in favor of the petitioners, the decision would add force to the existing jurisprudence that recognizes the Court's jurisdiction over

cases pending in domestic fora when such domestic proceedings have been unreasonably delayed or ineffectively prosecuted. Specifically, this decision would establish the precedent that although prosecution and conviction of some state actors responsible for planning or executing human rights violations are important steps toward fulfilling a state's international legal duties, they are insufficient when others who shared responsibility for such violations continue to enjoy impunity. Finally, such a decision would underscore states' institutional responsibility for state actors who are involved, at all levels, in planning or carrying out human rights violations. 🌐

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A Wink and a Nod: The *Hoffman* Case and Its Effects on Freedom of Association for Undocumented Workers

by Jill Borak*

On March 27, 2002, the United States Supreme Court held that undocumented immigrants improperly discharged by U.S. employers for union organizing activities are not entitled to back pay. The case, *Hoffman Plastic Compounds, Inc. v. NLRB* (*Hoffman*), has generated widespread concern—both domestically and internationally—among workers and advocates who worry that *Hoffman* represents a substantial reduction in labor rights for workers. Advocates fear the decision creates a chilling effect on reports of employer abuse by undocumented workers in the United States and curbs freedom of association for all U.S. workers. Beyond U.S. borders, the decision violates international human rights norms; the United States, by denying employment protections to undocumented workers, discriminates against them based on their immigration status.

Workers' Rights within the Human Rights Framework

The right of workers to form a union is protected as an aspect of the freedom of association contained in a number of international human rights instruments. While contemporary slavery and abusive child labor are examples of severe violations of the rights of workers that shock the conscience, the human rights of workers are also threatened when employers seek to quash union-organizing activities through tactics such as intimidating or discharging union supporters. The United Nations Universal Declaration of Human Rights of 1948 (UDHR), in Article 23(1) and (4) respectively, proclaims that “everyone has the right to work,” and “everyone has the right to form and to join trade unions for the protection of his interests.” Fifty years after the adoption of the UDHR, the International Labor Organization (ILO) noted the relationship between the protection of workers’ rights and the full achievement of human potential in its Declaration of Fundamental Rights and Principles at Work of 1998. To that end, this Declaration set forth four core workers’ rights principles, the first of which is freedom of association (the right to organize and join trade unions) and the effective recognition of the right to collective bargaining (the right of workers to seek improvements in their working conditions as a group rather than individually). Other principles of this Declaration include the elimination of forced labor, child labor, and employment discrimination.

The National Labor Relations Act

Administered by the National Labor Relations Board (NLRB), the National Labor Relations Act (NLRA) regulates the labor-management relationship for many employees and companies in the United States and provides most private sector employees the right to organize, bargain collectively, and engage in peaceful strikes and picketing. The NLRA also prohibits unfair labor practices, which may result from either employer or employee action, such as employer discrimination against employees for union organizing activities and employee secondary boycotts. One of the NLRB’s main functions is to review allegations of unfair labor practices and institute remedial measures available under the NLRA. These remedial measures include posting notices of unfair labor practices at worksites, obtaining employer commitments not to violate the NLRA in the future, reinstating

unlawfully discharged employees, and distributing back pay to such employees. No private rights of action are permitted under the NLRA, and no fines or other penalties are levied against employers committing unfair labor practices.

Back pay, under the NLRA, is monetary compensation, including interest, for the wages not earned by a worker because of the employer’s unfair labor practice violation. In most cases, reinstatement with back pay is the remedy for employee complaints of being discharged for pro-union activities. If the worker takes another job between the date of the unlawful discharge and the NLRB’s decision, the earned wages are deducted from the amount the violating employer must pay. This limit to the back pay remedy illustrates that the purpose of the NLRA is not to punish employers, but to restore employees to their status before the unfair labor practice occurred. The NLRB awards back pay to approximately 20,000 workers each year.

Shortcomings of the NLRA

Critics of the NLRA remark on the inadequacy of the remedial system. Many employers consider remedies like back pay for workers to be routine business costs that are worth the expense to suppress union activities. Orders to post written notices of violations and “cease and desist” orders are likewise not taken seriously by employers, because they carry no economic consequences. Furthermore, supervisors and managers, independent contractors, employees of certain small businesses, domestic service workers, agricultural workers, and public-sector employees are exempt from protection under the NLRA. Although other federal, state, or local statutes may cover these workers, the U.S. government estimates that as many as one-quarter of U.S. workers—32 million individuals—lack collective bargaining rights under any federal or state statute.

The Supreme Court’s recent decision in *Hoffman* may significantly limit undocumented workers’ rights under an already insufficient NLRA. The Court’s decision may also lead to a reduction of undocumented workers’ rights under other labor laws, through a broad application of *Hoffman* by the courts or through a chilling effect directly caused by the case. In a broader sense, the decision calls into question the commitment of the United States to promoting freedom of association and preventing employment discrimination.

Hoffman Plastic Compounds, Inc. v. NLRB

In January 1992, the NLRB found that Hoffman Plastic Compounds, Inc. illegally discharged several employees, including an undocumented worker from Mexico, because the employees were union supporters. In its decision, the NLRB reasoned that the most effective way to further U.S. immigration policies would be to provide the protections and remedies of the NLRA to undocumented workers whose employers commit unfair labor practices.

The Supreme Court’s decision in *Hoffman* reversed the NLRB, 5-4, reasoning that the NLRB decision undermined federal statutes and policies outside the scope of the NLRA. The Court found the NLRB’s prescribed remedy inconsistent

with the Immigration Reform and Control Act (IRCA), which prohibits employees from submitting fraudulent identification documents to secure work and prohibits employers from knowingly hiring undocumented workers. Although the Court affirmed its earlier rulings in *Sure-Tan v. NLRB* and other related cases, reaffirming that undocumented workers are employees covered under the NLRA, the Court stated that allowing undocumented workers to receive back pay would encourage workers' evasion of immigration authorities, condone prior violations of the immigration laws, and encourage future violations. The Court disagreed with the NLRB's contention that by limiting the undocumented worker's back pay award to the time when the company became aware of his status, the NLRB accommodated the IRCA. Instead, the Court found that the NLRB's position focused on employer misconduct while discounting the misconduct of employees. Moreover, the Court reasoned that the orders to "cease and desist" and to post a notice to its employees were sufficient sanctions against the company.

The Dissent

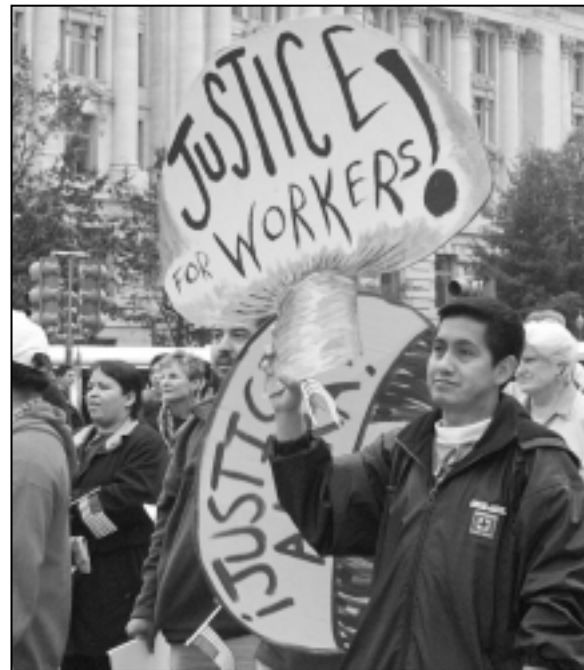
The dissenting members of the Court maintained that the back pay award would not undermine U.S. immigration policy. Reports from all the relevant government agencies—including the U.S. Department of Justice, the agency then responsible for enforcement of the immigration laws—supported this point. The minority disagreed that orders to post notices and to cease and desist were sufficient sanctions against employers. Back pay, the minority noted, serves not only as compensation to employees, but also as a deterrent to employers who commit unfair labor practices. With back pay, employers lose money after violating the law; with notices, however, employers lose nothing.

As expressed in the dissenting opinion, the Court's decision may encourage employers to hire workers that are potentially undocumented "with a wink and a nod." The dissent predicted *Hoffman* will create a preference among employers for hiring undocumented workers, because employers may hire undocumented workers confident that the workers will not qualify for remedies under U.S. law. Indeed, undocumented workers are often less likely to complain about unfair wages and working conditions and to defend their rights due to their immigration status and related fear of deportation.

In a final irony, the *Hoffman* decision may secure an effect opposite to that intended by the Court, making both labor and immigration policy vulnerable. The employer preference for undocumented workers will likely increase the number of undocumented immigrants seeking to enter the United States. Therefore, far from upholding U.S. immigration policy, as hoped by the majority, the *Hoffman* decision may actually undermine it.

Effects of the Hoffman Decision on the Rights of Workers

Issues immediately raised by the *Hoffman* decision include the relevance of immigration status in cases where workers allege their employers have committed labor violations, and the applicability of the decision to other labor laws. Since the Supreme Court's decision is predicated on a worker's immigration status, employers have begun to argue that evidence of workers' undocumented status is relevant to their cases. Advocates report a sharp rise in the number of cases where employers request that courts order an inquiry into the immigration status of the employees; most courts, however, have refused to compel workers to disclose their immigration sta-



Credit: National Employment Law Project

Protesters demanding economic justice for workers.

tus. Similarly, after the *Hoffman* decision, immigrants' and workers' rights advocates reported an increase in employers who argue that undocumented workers simply have no labor rights. Some federal agencies, such as the Department of Labor and the Equal Employment Opportunity Commission, have attempted to limit *Hoffman*'s impact by stating that the decision does not necessarily apply to laws other than the NLRA.

Action in International Forums in Response to the Hoffman Decision

The impact of the *Hoffman* decision is not limited to the rights of individual undocumented workers. The decision also affects immigrant workers, and more broadly all U.S. workers. Therefore, the Mexican government, the AFL-CIO, and other groups have recently attempted to use international pressure to limit *Hoffman*'s impact on workers' rights.

Request for an Advisory Opinion from the Inter-American Court of Human Rights

On May 10, 2002, in response to discriminatory laws and precedents such as the *Hoffman* decision, the government of Mexico submitted a request for an advisory opinion from the Inter-American Court of Human Rights (Inter-American Court). In the request, the Mexican government noted that the protection of immigrant workers' rights is a matter of particular interest because many Mexican nationals migrate outside of Mexico. They then become targets for exploitation because of their vulnerability due to their immigration status. Specifically, the Mexican government requested that the Inter-American Court give its opinion as to whether a state may limit workers' rights based on immigration status, or if such a practice violates the principles of non-discrimination and equality before the law. The Mexican government observed that undocumented workers are subject to hostile treatment and are considered inferior in relation to others under the laws of some states. In the government's view, when any state

authorizes different treatment of work-related rights solely on the basis of the immigration status of a worker, such action is discriminatory.

The American Convention on Human Rights (American Convention), Article 64(1), authorizes the Inter-American Court to issue advisory opinions interpreting treaties concerning the protection of human rights in the American States. The purpose of an advisory opinion is not to compel states to change their laws, but to determine the scope of the obligations of members states of the Organization of American States (OAS) under international law. The opinion also seeks to assist states in complying with and applying human rights treaties without bringing a complaint against any state. The government of Mexico asked the Inter-American Court to consider concrete rather than theoretical situations in which states may take actions that might limit the rights of immigrant workers.

A concrete example of United States treatment of undocumented workers was offered by a group of U.S. labor, civil rights, and immigrants' rights organizations that submitted an amicus brief to the Inter-American Court in January 2003, supporting the Mexican government's request. The brief, pointing to the *Hoffman* decision and relevant U.S. labor laws, supports the position that the United States denies basic protections to workers based on their immigration status, and that U.S. labor laws violate international norms of non-discrimination and freedom of association. The brief discusses provisions of several laws explicitly excluding undocumented workers from the scope of their protection. For example, temporary non-immigrant agricultural workers are exempted from the Migrant and Seasonal Agricultural Worker Protection Act, the primary U.S. labor law for the protection of agricultural workers. Undocumented workers are excluded from the Unfair Immigration-Related Employment Practices Act, which protects workers against employment discrimination based on citizenship and national origin. These and other laws, the groups argue, clearly demonstrate the discriminatory nature of U.S. law concerning undocumented workers. Such discrimination violates fundamental international norms of non-discrimination.

Unauthorized Labor Force by Industry, 2001 (in thousands)		
Industry Group	Total Unauthorized	U.S. Labor Force
Construction	620	9,670
Manufacturing	1,190	20,830
Durable	580	12,670
Non-durable	610	8,150
Wholesale and Retail Trades	1,410	29,850
Restaurants	700	7,720
Others	720	22,130
Services	1,320	41,960
Business	390	2,350
Private Household	250	1,050
Other	690	38,570
Other Industries*	350	37,990
Total Workers	5,300	143,640

* Other industries include transportation, communication; finance, insurance and real estate; mining and public administration.

This information was published in a March 21, 2002 report by the Pew Hispanic Center entitled, "How Many Undocumented: The Numbers behind the U.S.-Mexico Migration Talks," by B. Lindsay Lowell and Robert Suro.

Although the organizations acknowledge that international law recognizes the right of states to control the flow of immigration across their borders, international law prohibits many forms of discrimination against immigrants regardless of their immigration status. Once an immigrant is present in a country's territory and secures employment, the organizations contend, the state is not free to deny the immigrant's fundamental workplace protections, even if the worker is undocumented. In short, the organizations take the opposite view of the U.S. Supreme Court's reasoning in *Hoffman* that immigration policy must prevail over protection of the rights of workers. The organizations rely on provisions of the American Declaration of the Rights and Duties of Man (the American Declaration); the American Convention; the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the UDHR; and the ILO Convention Concerning Discrimination in Employment. Each of these international instruments expressly prohibits discrimination on the basis of national or social origin or other status.

The organizations also argue that U.S. law violates international norms by failing to protect undocumented workers' freedom of association. They cite several instruments applicable to the United States that protect rights inherent in the right to freedom of association, including the rights to organize a union, bargain collectively, and strike. The instruments include the American Declaration, the American Convention, the OAS Charter, the ICCPR, the ILO convention on the Freedom of Association and Protection of the Right to Organize, and the ILO Convention regarding the Right to Organize and Collective Bargaining. The ILO conventions do not recognize any exception to the freedom of association. The American Convention, ICCPR, and ICESCR recognize only narrow exceptions to the freedom of association for purposes of national security, public safety, health or morals, the rights of others, and public order. The organizations concede that the public order exception could be implicated by the *Hoffman* decision, but argue that denial of freedom of association to workers is not a necessary or proportional response to the goal of immigration control.

Any advisory opinion issued by the Inter-American Court will not legally bind the United States. The Inter-American Court has no jurisdiction over the United States, but the organizations nonetheless hope that the request for an advisory opinion provides an opportunity to clarify the obligations of members of the inter-American system to protect undocumented workers. The organizations note that undocumented workers are uniquely vulnerable to human rights abuses, and point to the need for strong regional standards for the protection of undocumented workers' rights.

Complaint to the ILO Committee on Freedom of Association

In November 2002, the AFL-CIO filed a complaint with the ILO's Committee on Freedom of Association (CFA), claiming the *Hoffman* decision violates key international labor conventions. The CFA receives complaints concerning violations of freedom of association directly from workers' and employers' organizations. Although ILO conventions codify the basic rights associated with the freedom of association, a state need not have ratified the conventions for a complaint to be filed. The authority for the examination of complaints comes from the ILO Constitution, agreed to by all member states of the ILO. Therefore, although the United States has

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not ratified key conventions such as the ILO Convention on the Freedom of Association and Protection of the Right to Organize, or the ILO Convention on the Right to Organize and Collective Bargaining, complaints may still be heard against the United States before the CFA.

The AFL-CIO, a federation of 66 national and international unions representing approximately 13 million workers in the United States, alleged that the *Hoffman* decision violated the ILO Convention on the Freedom of Association and Protection of the Right to Organize, by creating a distinction based on immigration status. The complaint further maintained that *Hoffman* violates the requirement of the ILO Convention on the Right to Organize and Collective Bargaining for adequate protection against acts of anti-union discrimination. Finally, *Hoffman* is alleged to violate the ILO Declaration of Fundamental Principles and Rights at Work by denying the freedom of association to undocumented workers.

The complaint illustrates that the rights of all workers are diminished by the *Hoffman* decision. Union organizers will not be able to reassure undocumented workers that they will be protected if fired for pro-union activities. Since most undocumented workers are employed alongside documented workers and U.S. citizens, the AFL-CIO predicts union organizational efforts will result in employee fear and division. Such a climate will adversely affect all workers.

The AFL-CIO's complaint is not likely to result in a direct change to the *Hoffman* decision. Although the United States has accepted jurisdiction and review by the CFA of complaints filed against it under these conventions, the ILO has no enforcement powers. In past complaints before the ILO the United States took no action to implement the organization's recommendations. If the CFA makes an ultimate finding that the United States has encountered problems in guaranteeing freedom of association, the implementation of such a decision will follow guidelines established for all ILO member states: the CFA will simply ask the government to report to it on the status of the problem.

Conclusion

The General Accounting Office, the independent investigatory office of the U.S. Congress, recently concluded that *Hoffman* goes beyond merely limiting undocumented workers' available remedies, to effectively diminish their collective bargaining rights. Advocates have further argued that the decision promotes employment discrimination against immigrant workers and diminishes the freedom of association enjoyed by all workers in the United States. Despite the reluctance of federal agencies and many courts to expand *Hoffman*'s reach beyond the NLRA, nothing exists to prevent a broad application of the case or to remedy the decision of the U.S. Supreme Court. Due to the anti-immigrant climate that currently prevails in the United States, it is unlikely that federal legislators will propose legislation to assist undocumented workers. The onus falls on advocates at state and local levels to promote workers' rights, and on international human rights forums to continue to exert pressure on the U.S. government to balance its immigration policy with the rights of workers. ☉

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Conflict Mapping: Innovation in International Responses in Post-Conflict Societies

by Wendy S. Betts and Gregory Gisvold*

During 2002, as part of its ongoing efforts to move past the ravages of its brutal civil war, the new government of Sierra Leone issued a request for the assistance of an international nongovernmental organization (NGO) to perform a "Documentation and Conflict Mapping Program." It was envisioned that this effort would help the local populace develop a sense of ownership of, and partnership in, the government's attempt to establish a just accountability for past wrongs. The program would pursue two related objectives: presenting basic information about the government's accountability efforts, specifically regarding the Special Court for Sierra Leone, and documenting the individual and collective experiences of Sierra Leoneans to create a balanced, accurate picture of the events of the civil war, specifically those occurrences that may constitute crimes within the jurisdiction of the Special Court.

This move by the Sierra Leonean government to seek NGO participation in governmental functions is remarkable in that it is indicative of a development in the manner in which international organizations respond to societies torn by conflict. One of the most important features of this development is the possibility for cooperation, both among nongovernmental organizations and between the nongovernmental and intergovernmental communities. An evaluation of the origins, benefits, and opportunities of "conflict mapping," including a mapping project recently undertaken in Kosovo, is useful to assist the improvement of initial efforts already undertaken in anticipation of future projects, such as in Sierra Leone.

A paradigm shift is underway with respect to international responses to conflict. The international community has renewed its interest in holding perpetrators of mass human rights violations accountable for their actions. The 1990s saw the establishment of two ad hoc international tribunals for the former Yugoslavia and Rwanda, the deployment of international judges and prosecutors in East Timor and Kosovo, and now the development of the joint international-domestic Special Court in Sierra Leone. The other side of the accountability coin, the establishment of the "truth" of the past, which is often undertaken through a truth commission, has seen growth as well. From groundbreaking work during the 1980s in Latin America, truth commissions have been established in South Africa as well as in East Timor and now, in parallel with the Special Court, in Sierra Leone.

In the last decade, the international community has sought accountability for human rights violations more aggressively and has significantly reworked its efforts to redevelop societies fractured by conflict. The international community, through the United Nations, has responded to several recent conflicts with expansions of peacekeeping responsibility. Intergovernmental monitoring missions have likewise expanded, as evidenced by the European Community monitors in Bosnia, the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe (OSCE), and the United Nations missions in Bosnia and Sierra Leone. To greater or lesser extents, the territories of Bosnia, Kosovo, and East Timor have also come under the jurisdiction of international administrations.

In short, in a multi-polar, post-cold war international environment, governments and multilateral institutions are more willing to intervene in or otherwise become part of the affairs

of states and regions. One result of this willingness to intervene will likely be more missions in more post-conflict regions. As many scholars have noted, the tasks, responsibilities, and risks of doing so are enormous. With increasingly scarce resources, the international community must develop more strategic means of responding to violent conflict and its aftermath. The international community should adapt its responses to such conflict to include among its available resources the information, skills, and experience of NGOs.

The effectiveness of the international community in post-conflict prosecution and reconciliation depends in large part upon its access to accurate, verifiable information regarding the events that occurred. This information must be credible and comprehensive, thereby allowing the international community to target manpower and funds where they are most needed. Without such information, it is difficult for the international community to make these resource allocation decisions.

As the international community becomes increasingly willing to address conflicts more aggressively, the rapid response capability of international and national NGOs is also expanding. However, the ability of multilateral institutions to work with, and incorporate the resources of, NGOs into the overall effort is relatively undeveloped. The need for improvement in this area is especially pointed in the cases of accountability and rule of law endeavors. NGOs have substantial experience promoting justice and human rights. If, as has happened in Bosnia, Kosovo, East Timor, and now in Sierra Leone, multilateral institutions and intervening governments take the lead in accountability and rule of law development, they must work harder to bring the innovation, experience, and dexterity of NGOs into their efforts.

Conflict Mapping Revisited: From Political Science Analysis to Practical Accountability Solutions

The Sierra Leonean government's decision to request the assistance of an NGO to undertake its conflict mapping exercise is hopefully indicative of a developing understanding of the expertise and efficiency the nongovernmental community can provide to post-conflict societies. In publishing its request, the government of Sierra Leone may have recognized that there are some aspects of judicial and legal reform that governments or intergovernmental organizations are not well suited to perform. Nevertheless, the choice of the term "conflict mapping" is significant in that it is being used in an accountability context, as opposed to its traditional application in political science analysis. Sierra Leone has thereby taken the first steps towards providing a foundation for joint international-national as well as intergovernmental-nongovernmental cooperative efforts to promote accountability and the rule of law in Sierra Leone.

The term "conflict mapping" may or may not have been chosen deliberately by the members of the Sierra Leonean government's task force that created the organizational outlines of the Special Court. It is, however, gaining new currency in an age that is seeing a new iteration of the melding of politics and law. Originally, as the writings of political scientist Paul Wehr indicate, the term was part of the lexicon of political science; it was a methodology for studying conflict through

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separating the constituent parts of a conflict, such as the historical background, parties, issues involved, and context within which the conflict is occurring so as to better devise means of resolving it. This sort of conflict mapping was largely an intellectual exercise with practical benefits once serious efforts to resolve the conflict had begun. Decisions about intervention and mediation could be made on the basis of a well documented map. Such a map allows parties who may be too invested in particular details of a conflict to understand a larger process with which they may not be familiar.

The original purpose behind the idea of a conflict map echoes today in the accountability and development objectives of the international community. Specifically, multilateral institutions now promote justice and reconciliation as mutually reinforcing goals to help a society move past a conflict. The United Nations has endeavored through the international tribunals for Rwanda and the former Yugoslavia to hold those most responsible for atrocities during conflict accountable and thereby give the populations of those regions a measure of justice. The underlying idea is that if the international community holds these individuals responsible in an impartial manner, there will be no need for retribution and the conflict cycle can come to an end. Likewise, truth commissions serve a similar goal: assembling a picture of the past, of what happened, and publishing it for all to see and hear, creating a space for society to acknowledge what occurred and thus contribute toward ending the conflict. Both of these goals contain the implicit assumption that a society that benefits from such international accountability assistance will take the opportunity to develop, re-invigorate, or strengthen its domestic means of nonviolent conflict resolution through the rule of law.

Accountability mechanisms must begin their work with a sense of who did what to whom and where. Whether performed by a court or truth commission, the inquiry that leads to accountability begins with the actions, orders, and omissions of individuals and the resultant impact on those victimized. Thus, a conflict map is crucial. In cases of mass human rights violations during armed conflict, a conflict map of the sort contemplated by Sierra Leone outlines the universe of events and provides a verifiable starting point for a society overcoming impunity. This information is the foundation of either bringing indictments or of concentrating scarce investigative resources. The results of the mapping can be used in the establishment of an accepted national history that acknowledges the past, helping to enable and embolden the public to call for a new way forward. Likewise, the same results can aid the effort to bring perpetrators to justice by providing evidence for courts and tribunals. It also provides a roadmap to humanitarian assistance needs, a basis for targeting reconciliation projects, a guideline for judicial reform, and a platform for civil human rights education.

Recent examples of the need for this sort of mapping information abound. In the course of investigating the Kosovo conflict, it was accurately anticipated that the answer to why Kosovar Albanians fled the province in 1999 would figure prominently in subsequent efforts to hold individuals accountable for crimes committed during this time. Likewise, in the aftermath of the terrible events in Guatemala during the 1980s, the question of whether or not genocide had been committed against the country's highland Indian population

became fundamental both to ending the conflict there as well as to the success of the Guatemalan Historical Clarification Commission. Sierra Leone now represents the next example of this need. Its experimental combination of a domestically based judicial accountability mechanism, the Special Court, and non-punitive investigative accountability mechanism, the Truth and Reconciliation Commission, is more likely to be successful if provided with the information generated by conflict mapping.

NGOs and Conflict Mapping

The conflict mapping project contemplated in Sierra Leone and its antecedents provide important examples of the possibilities that arise from cooperation between development and human rights NGOs and between governments or multilateral institutions and NGOs. Conflict mapping requires close cooperation between these two important types of NGOs that respond to conflict situations, and between the NGO community and international multilateral institutions. The NGOs responding to conflict situations generally include a few having a human rights focus and many having a development mandate. Human rights organizations, such as Human Rights Watch, Amnesty International, and Federation des Droits de l'Homme, are often first on the ground in regions

likely to experience or already experiencing conflict, gathering information for their narrative reports. These human rights organizations are also at the forefront of ensuring that human rights principles and standards develop in response to the inevitable capacity of individuals and governments to create original means of repression. From the genesis of United Nations human rights treaties through the current day, human rights organizations have provided crucial impetus and information to support the development of the international law of human rights. Along the way, they have developed substantial skill in advocacy, education, fact-finding, and information dissemination.

Development organizations are also active in human rights work, particularly in building local capacity and encouraging societal change toward a culture of human rights, such as through the promotion of the rule of law. In post-conflict environments, development and human rights NGOs find common ground. Indeed, both types of NGOs have collaborated to assist accountability efforts of the international community. NGOs have provided the International Criminal Tribunal for the former Yugoslavia (ICTY) with significant documentary, statistical, and testimonial evidence. They have also worked closely with the ICTY's Outreach Programme to increase awareness of the ICTY, its mission, accomplishments, and limitations. Truth commissions have benefited as well. NGO assistance to the Guatemalan Historical Clarification Commission and to the South African Truth and Reconciliation Commission was central to those organizations' very existence as well as to their efforts to interview deponents about human rights violations, manage the volumes of data collected, and accurately report them. Indeed, without the assistance of NGOs, these particular bodies would have been significantly less successful.

Conflict mapping is fundamentally different from human rights reporting. Narrative human rights reporting—that most common to “first reporter” human rights organizations—

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usually involves portraying a situation through a few particular instances of grievous human rights violations. The reporting organization thereby calls the attention of its targeted audience to the likelihood that others are suffering similar wrongs, someone is at fault, and something can be done by the audience. This is the basic premise of human rights reporting: highlight a larger problem with a few significant examples, and suggest a course of action to ameliorate the problem and prevent its recurrence. The power of these reports lies in the implications of the shocking nature of what they report. While valuable, such narrative reports have a fundamental drawback: they can give concrete information about few events and individuals.

Creating a conflict map involves data collection and reporting on a larger and different scale from more common forms of human rights reporting. It includes a quantitative analysis that can identify trends and patterns of abuses not readily apparent from narrative reporting. This aspect of conflict mapping enables it to help verify the extent and distribution of alleged atrocities. It is a more comprehensive representation of the conflict—the forest, not the individually impressive trees. As Dr. Patrick Ball of the American Association for the Advancement of Science (AAAS) has illustrated, this relatively new manner of human rights reporting utilizes established statistical methodologies to help answer the important questions of what happened to whom and who did what when. The answers to these simplistically stated but complex questions have evidentiary value not only in the crucible of courtroom proceedings, but also in the more reconciliation-oriented efforts of truth and reconciliation commissions. Whether the goal is retributive justice or the promotion of a kind of national healing, the starting point is nearly always “what can we say for sure?” Obviously, conflict mapping will not and should not displace mainstream human rights reporting; rather, they should complement each other. In a more interventionist world, international actors will benefit from the collection and presentation of large amounts of data from a variety of sources. Human rights and development organizations should find new opportunities for collaboration therein.

Providing Important Evidence for Accountability Mechanisms: The Conflict Mapping Project in Kosovo

Perhaps one of the most recent and comprehensive examples of this collaboration is the conflict mapping exercise recently undertaken in Kosovo by the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI), AAAS, and their partners. Immediately following the cessation of hostilities of the Kosovo conflict, many organizations moved into Kosovo to report on events that occurred there. These organizations, which included human rights organizations as well as more development-focused organizations, collected interviews and other information regarding the terrible events that occurred during the conflict. Ultimately, most published their findings in narrative reports.

After the publication of their individual reports, a number of these human rights organizations agreed to pool their data with that collected by development organizations to form the foundation for creating a statistical analysis of the conflict. What

emerged was a powerful form of conflict mapping that brought together in a comprehensive format information about the events of the conflict: the migration of Kosovar Albanians from Kosovo; killings committed around the province; and the NATO bombing campaign. These events were analyzed as they occurred geographically as well as over time, thereby forming a picture of how these complicated events interacted with each other during the conflict. In a subsequent report, the original foundation of data was expanded with the addition of information gathered by the OSCE and the ICTY.

The resultant conflict map had significant evidentiary value. The report, like any high-quality scientific study, analyzed the data in an effort to determine whether it supported or contradicted hypotheses regarding whether the exodus of Kosovar Albanians from Kosovo was related to the actions of the Kosovo Liberation Army (KLA), the bombing campaign conducted by the North Atlantic Treaty Organization (NATO), or the actions of Yugoslav forces. These hypotheses dealt with the most prominent political and legal issues implicated by the Kosovo conflict, which in turn made the answers to these hypotheses fundamental to the work of the ICTY.

ABA/CEELI and AAAS found that killings and refugee flow occurred in a regular pattern characterized by three phases. In each phase, a high volume of killing and refugee flow was followed by a much lower level of killing and refugee flow. Moreover, killings and refugee flow tended to occur at the same times and places. Using common statistical methodologies, the authors were able to demonstrate a supportable estimate of 10,356 Kosovar Albanians killed during the conflict. The authors were able to state that the data was inconsistent with the hypotheses that KLA activity or NATO air strikes were causes of the refugee exodus from Kosovo, but was consistent with the assertion that the activities of Serb forces caused the refugee flow. The information was eventually presented as expert evidence in the trial at the ICTY of former Yugoslav President Slobodan Milosevic.

As the international community responds to future internal and international conflicts with peacekeeping missions, transitional administrations, and accountability mechanisms, having an understanding of the important political and legal issues means understanding where and when who did what to whom.

Building Local Capacity

In addition to the evidentiary value of conflict mapping, by its very nature, it can have an important capacity building impact on the local community. Capacity building is an organizational goal human rights and development NGOs share, though it is perhaps more fundamental to the work of the latter. It is also a goal NGOs are uniquely qualified to meet and intergovernmental institutions are relatively unprepared to pursue. Analysis of the progress of the intergovernmental institutional efforts in Bosnia, East Timor, and Kosovo suggest strongly that, by comparison, NGOs are making steadier advances in capacity development. Through close work and cooperation with local institutions and organizations, international development and human rights NGOs ultimately seek to leave an organizational legacy. They work to promote the development of indigenous institutions that can carry on the work begun together.

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Again, the Kosovo conflict mapping project provides a useful starting point. First, it is important to note that the project was founded in nongovernmental organization cooperation. Human rights and development NGOs pooled their data and were able to achieve an effect that they likely could not have achieved individually. In addition, these NGOs all worked with local organizations. For example, ABA/CEELI helped develop and improve the operational capacity of three local partners while working alongside them to gather data. Its first interviews were conducted with Kosovar refugees in Albania with the Albanian umbrella NGO, The Center for Peace Through Justice (The Center). Later, ABA/CEELI worked closely in Kosovo with the Albanian human rights NGO, Council for the Defense of Human Rights and Fundamental Freedoms and with the Croatian NGO, Partnership for Social Development.

Each of these cooperative projects involved crucial assistance to these regional NGOs. Interviewing projects involved training the regional NGO personnel in international law, project design and implementation, and financial management. In addition, the regional NGOs were able to work with their international counterparts to create a “foundation”—such as technology, publications, and a track record of experience—that will be important for their future development. For example, to support the work of the ICTY Outreach Programme, ABA/CEELI and The Center created a short brochure outlining the basic principles of international humanitarian law. The Center continues to use the brochure today, long after the conflict mapping project has ended.

Capacity Building through Technology Innovation and Transfer

Ultimately, the basic mission of any international effort in a post-conflict society is to establish the conditions necessary for withdrawal of the international personnel, which requires capacity building among local personnel. While transfer of experience and training is important, it is equally vital to equip local NGOs with the modern tools employed by international organizations and the expertise to use them. Accountability mechanisms, especially those established with international assistance, will utilize modern methodologies and tools. Providing a local organization with training in financial project management and a few computers is a useful endeavor, but teaching its personnel to use sophisticated database or Web publishing technology as part of their operations enables these organizations to work effectively after the internationals have departed. The former is the initial development step of providing basic tools for operations, while the latter is a step toward promoting the local organization’s fundamental independence.

By way of example, consider database technology. Modern database technology, when applied with the correct protocols, can be utilized to identify trends in the often chaotic settings in which war crimes and incidents of human rights violations occur. Therefore, modern database technology is a basic requirement for indigenous nongovernmental actors and organizations to continue the work begun by and with international NGOs to document the events of the conflict. Initially, in their project in Kosovo, ABA/CEELI and AAAS trained their local partner organizations in the basic skills necessary to accomplish the project: interviewing skills, project management, and financial record keeping. These are important skills for any nascent organization; however, AAAS has since taken this effort one step further in other post-conflict soci-

eties. In Sri Lanka, AAAS is working with a coalition of NGOs, providing technical assistance to establish a local capacity for sophisticated data collection and analysis. As part of this effort, AAAS is using and will leave with this local NGO coalition database technology developed by AAAS and ABA/CEELI during their Kosovo project. As a result of this technology transfer, the Sri Lankan groups will have the human rights information management techniques and technology to contribute to their peace process through the eventual establishment of a “massive, objective and undeniable statistical record of human rights violations” in Sri Lanka.

Conclusion

As international involvement in conflict mitigation has increased, the nature of the information required and demanded by the international community has also expanded and changed. A growing need now exists for comprehensive quantitative studies to complement more traditional narrative human rights reporting. The manner in which such conflict mapping is undertaken should serve not only to express the conflict and its major trends and effects in quantitative and statistical terms, but also to transfer important skills and technology. The very process of the study should include a concerted training and transfer effort to empower local NGOs in communities affected by the conflict.

The growing interventionist tendencies of the international community and its concomitant emphasis on accountability require a focus on both documenting mass human rights abuses and building local capacity for seeking accountability. This focus must engage the efforts of human rights and development NGOs. The success of, and lessons to be learned from, projects like the CEELI/AAAS project in Kosovo suggest that closer cooperation between multilateral institutions and NGOs is crucial. Prospective projects, such as the one in Sierra Leone, also demonstrate the need for this cooperation if multilateral institutions and NGOs are to effectively assist conflict mitigation efforts.

That a sea of change in international relations and the application of international human rights principles is upon us is no longer the subject of debate. Rather, the challenge now facing governments, multilateral institutions, foundations, and nongovernmental organizations around the world is one of collaboration and innovation. Intergovernmental and nongovernmental organizations must begin to explore new means of collaborating, even if doing so means opening previously closed bureaucracies. The decision of the Sierra Leonean government provides both an example and opportunity to begin this exploration. Within the nongovernmental community, organizations and individuals must pursue technological solutions and other original ideas and mechanisms as a means of making this type of collaboration more efficient and effective. International actors should share their experiences and innovations widely and promote the creative use of their advances in support of international accountability mechanisms and the rule of law generally. Parochialism in human rights reporting and development dilutes scarce resources in the field and undermines shared goals. 🌐

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The Threat of Article 23 to Civil Liberties in the Hong Kong Special Administrative Region

by Inbal Sansani*

On February 26, 2003, the government of the Hong Kong Special Administrative Region (HKSAR or Hong Kong) of the People's Republic of China formally introduced a preliminary draft of a controversial new national security bill to Hong Kong's legislature. Opponents of the proposed legislation, including pro-democracy camps within the Legislative Council, Hong Kong's legislative body, as well as local civil and human rights groups, fear that China could use the new laws to suppress certain fundamental rights and freedoms. Despite efforts to curtail dilution of the national security measures proposed in the original draft, following a three-month public consultation period and a series of domestic and international protests, the bill still poses a serious threat to civil liberties in the HKSAR.

Background

The HKSAR, located on the southeastern coast of China, consists of Hong Kong Island, the Kowloon Peninsula, and the New Territories. The area constituting Hong Kong proper consists of 236 islands and part of the Chinese mainland. On July 1, 1997, China reclaimed Hong Kong, a territory that its last feudal regime, the Qing Dynasty, ceded to Great Britain at the end of the Opium War in the mid-1800s. The convergence of two nations with a similar ethnic makeup but radically different political and economic systems has been the subject of consistent international scrutiny.

The 1984 Sino-British Joint Declaration on the Future of Hong Kong (Joint Declaration) insured that Hong Kong's 1997 reversion to Chinese control after 155 years of British colonial rule would not undermine its success as a major trading, manufacturing, and industrial partner. The Joint Declaration provides that Hong Kong will retain, for 50 years, the same legal and economic systems, rights and freedoms, and basic way of life that existed therein before the handover of sovereignty. The treaty binds China to allow the people of Hong Kong a high degree of autonomy—except in matters of defense and foreign affairs—under the twin dicta of “One Country, Two Systems,” China's policy, stemming from former president Deng XiaoPing's approach to the reincorporation of the Hong Kong lands and governmental system under the umbrella of the People's Republic of China, with the goal of maintaining the status quo in this region.

In 1990, China's legislature, the National People's Congress, approved the Basic Law of the HKSAR, which entered into force with the 1997 change of sovereignty. It serves as Hong Kong's “mini constitution,” ensuring the implementation of the basic policies contained in the Joint Declaration. Subject only to China's constitution, the Basic Law is the supreme law of Hong Kong and functions as the territory's principal constitutional instrument. The Basic Law protects individual rights and freedoms in two limited ways: (1) it lists specific rights enjoyed by Hong Kong citizens; and (2) it expressly incorporates the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), and international labor conventions. Article 39 of the Basic Law provides this safeguard: “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” of the HKSAR.



Credit: Epoch USA, Inc.

The National Security Statute drafted pursuant to the requirements of Article 23 of the Basic Law was submitted on March 1, 2003 to the Legislative Council for first and second readings, and has passed. More than 20 council members from the Democratic Party, the Civil Human Rights Front, and the Employee Union left the meeting before the first reading to show their opposition. They burned a symbolic copy of the Blue Bill (the current stage in the legislative process for Article 23) in the parking lot outside the Legislative Council building.

The Chinese Government's Introduction of Article 23 into the Basic Law

After a million Hong Kong people demonstrated locally in support of the pro-democracy movement at Beijing's Tiananmen Square in June 1989, China added Article 23 to Hong Kong's Basic Law. Article 23 requires that the HKSAR “enact laws on its own to prohibit any act of treason, secession, sedition, and subversion against the Central People's Government,” addressing issues of state secrets and the activities of foreign political organizations in Hong Kong. Rather than directly prohibiting treason, sedition, and subversion, or precisely defining these crimes, Article 23 mandates that the HKSAR enact laws to define and penalize such actions. Although acts constituting the crimes delineated in Article 23 have not been an issue in the HKSAR to date, the Hong Kong government is nevertheless required to implement laws to address these crimes under Article 23.

The Chinese government seems to have introduced Article 23, at least in part, to avoid future anti-Chinese demonstrations by the people of Hong Kong. Although the original 1988 draft of Article 23 merely requested that Hong Kong enact laws by February 1989 against “any act designed to undermine national unity or subvert the Central People's Government,” the draft of Article 23 had evolved to include both concepts familiar to Hong Kong's common law system and the constitutional requirement to implement national security legislation—laws that “prohibit any act of treason,

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secession, sedition, or theft of state secrets.” The final draft of Article 23, published in April 1990, nonetheless, stipulates that the HKSAR “enact laws on its own to prohibit any act of treason, secession, sedition, and subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

Due to China’s generally dismal human rights record, specifically the June 1989 Tiananmen Square massacre and the subsequent promulgation of Article 23, the Hong Kong government enacted the Bill of Rights Ordinance in 1991. The Bill of Rights compensates for inadequacies in the Basic Law’s enumeration of individual rights by providing many additional rights and freedoms for Hong Kong residents. The Bill of Rights reiterates almost verbatim the provisions of the ICCPR, thereby making those enumerated rights directly applicable to the citizens of Hong Kong. The Bill of Rights combines with the Joint Declaration and the Basic Law to ensure that the provisions of the ICCPR remain in force after the 1997 handover and are implemented through Hong Kong domestic law.

The HKSAR’s Proposals regarding the Implementation of Article 23

On September 24, 2002, the government of the HKSAR published the Consultation Document on Proposals to Implement Article 23 of the Basic Law (Consultation Document). Although having the actual power to implement Article 23 is an important aspect of the HKSAR’s autonomy, concern over the necessity to implement Article 23 has plagued Hong Kong since the Basic Law came into effect in July 1997 with the end of British colonial rule. A three-month consultation period with local NGOs and the general public followed the Consultation Document’s introduction, after which the Hong Kong government explained in a press release that it had carefully considered each submission. Secretary for Security Regina Ip Lau Suk-Yee said that the submissions were classified into four categories, including: (1) submissions from organizations; (2) submissions from individuals; (3) submissions in the form of standard letters and pre-printed opinion forms; and (4) signature forms.

Together with the subsequent legislative work, most notably the introduction of draft bills to the Legislative Council scheduled to occur between January and July 2003, the implementation of Article 23 represents one of the most important constitutional developments in the HKSAR since its establishment more than five years ago. Indeed, the implementation of Article 23 is a major test of whether the concept of “One Country, Two Systems” enshrined in the Basic Law can be executed in a way that strikes a proper balance between Beijing’s directives and the status of civil liberties enjoyed by the population of the HKSAR.

Criticisms of the HKSAR’s Proposals to Implement Article 23

Although for five years the government of the HKSAR avoided the inevitable controversy that would surround the introduction of legislation implementing Article 23, increas-

ing pressure from Beijing and the HKSAR’s legal obligation to implement legislation caused the government to move forward with the Consultation Document. Critics of the government’s approach to implementing Article 23 legislation claim that the consultation exercise is incomplete in that the Consultation Document outlines the government’s broad policy and intentions in a lengthy document to which specific responses are difficult to formulate. Opponents criticize the glaring ambiguities in the Consultation Document and argue that in the context of treason, secession, sedition, subversion, theft of state secrets, and increased police powers, the smallest errors in legal drafting or in the legal definitions provided by the new laws can easily have draconian consequences.

The government explains that implementing Article 23 would not compromise either the region’s liberal features or laissez-faire economy. It argues that since Britain, Canada, and the United States have legislation similar to Article 23, then Hong Kong, as a part of China, should also have it. Opponents to the implementation of a broad Article 23 argue that the aforementioned countries balance comparable legislation with democratic attributes including, *inter alia*, regular elections, a vibrant civil society, and a

powerful, free press, each of which Hong Kong lacks. In theory, therefore, any arbitrary application of anti-secession or subversion laws in those countries would be subject to plausible counter-pressures by one or all of the available democratic elements. Additionally, the Hong Kong chapter of Amnesty International posits the inclusion of sedition as an example of the excessive proposals to implement Article 23.

The organization claims that according to current legal thought, sedition laws are archaic and unprincipled and are no longer used in the majority of countries that have retained sedition laws.

The Scope of the Original Proposals to Implement Article 23

Although the government of the HKSAR is obligated to implement Article 23, domestic and international human and civil rights organizations are concerned with the scope of the provisions as outlined in the Consultation Document. The Consultation Document stemmed from existing Hong Kong law as set out in the Crimes Ordinance (covering, *inter alia*, treason and sedition), the Societies Ordinance (addressing activities of foreign political bodies in Hong Kong), the Emergency Regulations Ordinance, and the Official Secrets Ordinance. The Consultation Document included chapters on treason, secession, sedition, subversion, theft of state secrets, foreign political organizations, investigation powers, and procedural matters. Although Article 23 recognized that “the manner in which the state’s sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ,” the breadth and ambiguity of the proposals drew significant international attention.

Another far-reaching example of the proposals to implement Article 23 can be found in the Hong Kong government’s addition of a new mechanism for banning any organization “affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security.” The Hong Kong Human Rights

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Monitor (HKHRM) labeled this proposal “sinister,” because Article 23 does not reference links between organizations in the HKSAR and mainland organizations. The HKHRM was suspicious of the Hong Kong government’s inclusion of a proposed restriction that the promulgation of Article 23 does not require.

A proposal to ban organizations on security grounds based on a link with the Chinese mainland had the potential to permit the Chinese government to ban any organization of which Beijing disapproves. In addition, any branch of an organization banned by China for state security reasons could be banned in the HKSAR at any time, and the Hong Kong government was not even required to conduct any independent investigation. This provision would have effectively made the laws of the Chinese mainland applicable in the HKSAR.

According to the February 2003 draft law, any group of two or more persons, regardless of location, will be considered a “Mainland organization” if the group was formed or established on the Mainland or its main place of business is in the mainland. Further, a Hong Kong group is considered “subordinate” to a “Mainland organization” if any of its policies are determined, directly or indirectly, by the “Mainland organization.”

A main complaint of Hong Kong NGOs is that many of the offenses outlined in the Consultation Document are adequately covered by existing legislation, since Hong Kong’s current laws already contain considerable regulations on the seven crimes prohibited in Article 23. Therefore, most members of Hong Kong’s legal and administrative communities maintain that another anti-subversion law is unnecessary. The Hong Kong government insists on passing the law, however, although the suggested definitions of the crimes are ambiguous and could potentially create avenues for abuse.

Another major criticism of the HKSAR’s proposals is that the concepts of government and country are confused and used interchangeably in the proposed document. In a democratic country, citizens are empowered to monitor and check the government, whereas the proposed enactment of Article 23 equates opposing the government with opposing the country. In addition, speech deemed provocative may be regarded as illegal in oral, written, and electronic forms. People who express or hear such speech and fail to report it would be regarded as complicit in the crime. Finally, the law extends to Hong Kong permanent residents, regardless of their current residence, as well as to people who are in the HKSAR, regardless of their nationality, including people who visit or transit through Hong Kong. The possible effects of Article 23 are chilling in that its violation may result in as much as a life term in prison.

Under the Article 23 legislative proposals, police powers would also be expanded, enabling officers to enter and search residential buildings, confiscate materials, and make arrests at any time without a search warrant. Such practices would not differ from the random searches practiced in Mainland China. The human and civil rights community is outraged by these proposals in part because, rather than modernizing existing legislation, the Hong Kong government has created new offenses such as sedition. In addition, the implementation proposals have increased penalties for offenses included in existing legislation, including greatly increased prison sentences and unlimited fines.

The Legal Bases for Criticizing Proposals to Implement Article 23

Condemnations of the proposals for the implementation of Article 23 are based on a few key instruments, most notably the Joint Declaration and the ICCPR. For example, Article 3(5) of the Joint Declaration provides that HKSAR law ensures rights and freedoms including, *inter alia*, those of the person, speech, press, and association. A fundamental critique of Article 23, therefore, is that its provisions are in breach of the Joint Declaration because they apply legal concepts from mainland China that are incompatible with the rights and freedoms Hong Kong guarantees in Article 3(5).

These provisions also violate Article 39 of the Basic Law which stipulates that restrictions placed on the rights and freedoms enjoyed by Hong Kong residents must not contravene the ICCPR, the ICESCR, and international labor conventions as applied to Hong Kong. Article 23 also requires that the HKSAR prohibit, among other matters, “subversion against the Central People’s Government.” Such a prohibition, however, would be contrary to ICCPR articles relating to freedom of expression (Article 19) and association (Article 21). Further, prohibition against subversion would contravene Article XIII of Annex 1 to the Joint Declaration, which states that the HKSAR will protect the rights and freedoms of inhabitants and other persons within the region, and that the ICCPR and the ICESCR shall remain in force. Finally, the proposals also run counter to the spirit of safeguarding fundamental rights and freedoms as upheld in Hong Kong’s Bill of Rights.

The HKSAR Government’s “Concessions” and “Clarifications”

Although the Hong Kong authorities do not admit that some of the provisions first found in the Consultation Document have been diluted, this has occurred as a result of public pressure. On January 28, 2003, approximately one month after the end of the three-month consultation period, HKSAR Chief Executive Tung Chee-hwa discussed the outcome of the consultation exercise and assured the public that after an extensive analysis and examination of the views expressed during the period the Executive Council, Hong Kong’s cabinet, had clarified certain legislative proposals and delineated clear directions for the drafting work to begin. The government plans to pass the legislation by July 2003. Despite Tung’s confidence that the rights and freedoms of Hong Kong’s people will remain fully protected after the enactment of laws promulgating Article 23, widespread reservations continue to haunt a broad spectrum of organizations in the HKSAR. In response to opinions expressed during the consultation period, the government has decided to exempt foreign nationals from prosecution for treason, for example, and has also abolished the offense of seditious publication. In an attempt to safeguard freedom of the press and the free flow of information, the government has also limited the definition of “unauthorized access” to protected information, restricting it to access through criminal means such as hacking, theft, or bribery. In a January 28, 2003 press release outlining changes to the Consultation Document, Secretary for Security Ip said that more precise definitions and clearer concepts have been included in the implementation proposals. For example, the government restricted the definition of the crime of “levying war” under the offense of treason from “a riot or insurrection involving a considerable number of people for some general public purpose” to actual war or armed

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conflict. Further, the government abolished the offense of misprision of treason, committed when a person knows that another person has committed treason but fails to disclose this information to the proper authority within a reasonable amount of time. In its list of concessions, the government also provided a clearer definition of a new class of protected information originally entitled “relations between the Central Authorities . . . and the HKSAR.” The new definition is confined to information on matters concerning the HKSAR that are within the responsibility of the Beijing Central Authorities under the Basic Law. Moreover, disclosure of such information would constitute an offense only if it is damaging to the interests of national security. Although the Article 23 clarifications released in late January were welcomed in Hong Kong business circles, pro-democracy legislators and human rights activists dismissed the changes as minimal and maintained that the proposed law, despite its changes, would ultimately violate the “One Country, Two Systems” principle upon which the 1997 handover of sovereignty was based by outlawing local groups linked to organizations banned in mainland China. Law Yu Kai, director of HKHRM, criticized the concessions as minor, citing the proposals as still insisting on the protection of national interest “as a pretext to protect one-party rule in China.”

Introduction of the Draft Bill to Hong Kong’s Legislative Council

Although a blue paper containing the draft legislation was issued to Hong Kong’s legislature on February 26, 2003, this process excluded members of the public from voicing their concerns. Prior to the bill’s introduction, leading democratic politicians, lawyers, the Hong Kong Bar Association, and newspaper editorials had all called for the government to publish a white paper setting out the actual drafting of the new legislation, including legal definitions. The government consistently rejected this proposal. In response to the bill’s introduction, Hong Kong’s Democratic Party is pushing for withdrawal on the ground that it lacks public support. The limits of public pressure are evident in the continued inclusion of certain provisions in the proposed legislation. For example, the original proposal to ban organizations based on a link with the Chinese mainland on security grounds is more tightly defined and subject to review by the courts, a check previously missing. Albeit in a modified form, the legislation still allows the Chinese authorities to use Beijing’s directives to ban an organization on the Mainland as the basis for banning affiliated bodies in Hong Kong—without providing reasons for so doing. The government of the HKSAR posits the fact that a decision to impose a ban can be challenged in the courts as a limiting test on the legislation’s power. However, the text of the law shows that “the Court may order that all or any portion of the public shall be excluded during any part of the hearing,” thereby allowing secret court trials. Further, the text states that a hearing can “take place without the appellant being given full particulars of the reasons for the proscription” and that the Court can “hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him.” This manipulated access to the court system undermines any sort of balance of the power of proscription that a the right to a court hearing could have provided. The HKSAR government also “points to various tests that would have to be met before a ban could be imposed, such as

being satisfied that it is necessary for national security.” It does not seem difficult for government officials to convince themselves that the appropriate standards for banning an organization have been met; judiciaries everywhere are reluctant to question governments on national security matters.

Conclusion

Despite its willingness to modify other unpopular proposals, the Tung administration’s refusal to abandon the subversion law, which would empower the government of the HKSAR to ban local organizations linked to organizations that are outlawed on the mainland, calls into question the government’s claim that it is simply fulfilling its duty to implement Article 23. This particular proposal goes beyond what Article 23 requires, strongly suggesting that Beijing, for the first time since the 1997 handover, will gain power to play a role in which groups are banned in the HKSAR.

Beyond the consultation period and the current legislative work occurring in the HKSAR, the context for this debate is the Basic Law’s appeal for greater democratization, a goal that requires serious attention by the local authorities. Hong Kong has always been known for its rule of law, the independence of its judiciary, the free flow of information, and all of the fundamental freedoms guaranteed under the Basic Law. These freedoms have contributed to Hong Kong’s status in the international community, and its appeal to investors. Implementing the proposed Blue Paper for the implementation of Article 23 would quickly and definitively curtail these freedoms. 🌐

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Birth Registration: An Essential First Step toward Ensuring the Rights of All Children

by Jonathan Todres*

Birth registration—the official recording of a child’s birth by a government agency—is one of the most important events in a child’s life. Birth registration establishes the existence of the child under law and provides the foundation for ensuring many of the child’s rights. Although birth registration alone does not guarantee that a child will have access to adequate healthcare, receive an education, or be free from abuse or exploitation, its absence leaves a child at significantly greater risk of a range of human rights violations. Despite the importance of birth registration, according to UNICEF, approximately 50 million newborn babies are not registered each year, accounting for over 40 percent of the children born annually.

Birth Registration Defined

Birth registration is the process by which a child’s birth is recorded in a civil register by the applicable government authority. This step provides the first legal recognition of the child, and generally is required for the child to obtain a birth certificate. A child’s birth record typically includes the name of the child, the names of his or her parents, the name of the attending healthcare professional or birth attendant, and the date and place of birth. Once this information is provided, the birth record is signed by the local registrar and filed with the relevant government agency for that region. The birth record may also include the name, address, and nationality of each parent. Such additional information, along with the child’s place of birth, can help establish the nationality of the child. Although birth registration can be achieved in a variety of ways, the registration of a newborn child typically is facilitated by the local hospital where the child is born or the community healthcare worker present at the birth. If the birth does not take place in a hospital or is not presided over by a community health worker, the parents are expected to take their child to the local government office to register the child as soon as possible after the birth.

Current Data on Birth Registration Rates

Although the issue of unregistered children is a global problem, most unregistered children are found in developing countries. The problem of unregistered children is most prevalent in sub-Saharan Africa and South Asia, where over 70 percent and 63 percent of births go unregistered in each region, respectively. In the Middle East/North Africa region, 31 percent of children are not registered, and in Asia and the Pacific the rate is 22 percent. In addition, 14 percent of children born in Latin America and the Caribbean region are not registered. By comparison, only 2 percent of births in industrialized countries are not registered.

Nearly half the countries for which data is available fail to register at least one in ten children born within their jurisdiction. In 39 countries, over 30 percent of all children under age five were not registered at birth, and in 19 of these countries, over 60 percent of such children were not registered at birth. For example, registration rates in Bangladesh and Tanzania are reportedly less than 15 percent, while Nigeria registers only 30 percent of newborns. Meanwhile, in India and Nepal, little more than one third of the children under five have been registered. In addition to these and other countries where the registration systems currently in place have great room for improvement, a small number of coun-

tries, including Eritrea, Ethiopia, Namibia, Oman, and Somalia, have no birth registration system at all. Still others, such as the Democratic Republic of the Congo, have birth registrations systems that have essentially collapsed due to civil war or internal strife.

Disparities between birth registration rates exist not only from country to country but also within the borders of individual countries. Generally, birth registration systems are more effective in urban centers than in rural areas. For example, in Niger the birth registration rate is 85 percent in urban areas but only 40 percent in rural areas. In Indonesia, 47 percent of births in urban areas are registered compared to only 20 percent of births in rural areas. In addition to the failure of some birth registration systems to reach rural areas effectively, certain populations—particularly refugees, internally displaced groups, and children of indigenous or migrant populations—are particularly at risk of not having their children registered. Such populations are often already at risk of exploitation and the failure to register these children increases that risk.

Finally, even though most industrialized countries have very high birth registration rates, the approximately two percent of children who go unregistered in these countries are often overlooked and relegated to the margins of society. As a result, such children are often subject to the same human rights violations typically thought to be prevalent only in poorer, more resource-constrained environments, and they too need the benefit of birth registration.

The Right to Birth Registration

The United Nations Convention on the Rights of the Child (CRC), the most widely ratified international human rights treaty, recognizes birth registration as a fundamental human right. Immediately after setting forth the child’s most basic and fundamental right (the child’s “inherent right to life”) in Article 6, the CRC recognizes the right to birth registration in Article 7, as birth registration provides the initial foundation for the fulfillment of other rights of the child. Article 7 of the CRC establishes that each child “shall be registered immediately after birth and shall have the right from birth to a name, [and] the right to acquire a nationality. . . .” Importantly, the CRC requires each child to be registered immediately after birth so that there is no delay in officially recognizing the existence of the child and granting that child access to the privileges and protections afforded to each member of society. In addition to the CRC, the International Covenant on Civil and Political Rights (ICCPR) also establishes that “[e]very child shall be registered immediately after birth and shall have a name” and that each child “has the right to acquire a nationality.” This right to birth registration is impor-



Students in primary school in Dar Es Salaam, Tanzania.

Credit: UN/UNMEE photo by J. Avamburu

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tant not only as an individual right but also because it enables each child to assert a broad range of other human rights, including not only civil and political rights but also economic, social, and cultural rights.

Implications of Birth Registration for Children's Civil and Political Rights

The Right to a Name and Nationality

First and foremost, birth registration is fundamental to securing the child's rights to a name, identity, and nationality—rights recognized by both the CRC and the ICCPR. Birth registration officially records a child's birth, providing the first legal recognition of the child, and generally is required in order to obtain a birth certificate. As a birth record or birth certificate typically includes such details as the child's birthplace and information on the child's parents, it can help establish the nationality of the child and the child's right to know his or her parents. By contrast, if the child's birth is not registered and neither his or her nationality nor citizenship is established, the child is vulnerable to being left stateless. Having set forth the right to a name and nationality in Article 7, the CRC reinforces its importance in Article 8, by mandating that states parties respect "the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference," and requiring that "Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

The CRC and the ICCPR are not the only human rights instruments that acknowledge the fundamental importance of birth registration and the child's right to a name and nationality. Article 15 of the Universal Declaration of Human Rights, which though a non-binding declaration is regarded by many as customary international law, affirms that "[e]veryone has the right to a nationality." In addition, the right to birth registration and the right to a name and nationality are also set forth in the Convention on the Reduction of Statelessness, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This proliferation of international declarations and treaties reflects the consensus that a child's rights to a name and nationality, rights which can be secured in large part through birth registration, are fundamental rights upon which many others are predicated.

The Right to Be Free from All Forms of Exploitation

Registration of a child's birth offers benefits beyond securing the child's right to a name and nationality. Although birth registration does not provide guarantees by itself, birth registration can assist in efforts to combat various forms of exploitation of children. Falsification of a child's age and identity is harder to detect among unregistered children. Therefore, the illicit trafficking of children, whether for purposes of inter-country adoption, child labor, or child prostitution, often thrives in areas where birth registration rates are low. Thus birth registration plays an important role in a government's efforts to protect children from all forms of exploitation, including child labor (CRC, Article 32), sexual exploitation (CRC, Article 34), the sale or trafficking of children

(CRC, Article 35), and any other form of exploitation of children (CRC, Article 36). Article 38 of the CRC and the Optional Protocol to the CRC on the involvement of children in armed conflicts also set forth prohibitions on the involvement of children in armed conflicts, the enforcement of which again relies on the ability to establish the age of the child. Low birth registration rates increase the incidence of underage recruitment, such as in Myanmar and the Central African Republic. The right to be free from all forms of exploitation is also set forth in Article 8 of the ICCPR, which prohibits "slavery and the slave-trade in all their forms."

The Right to Protections in the Juvenile Justice System

The impact of birth registration also extends to the juvenile justice system, as access to certain protections are contingent on the child's ability to prove his or her age or nationality. Article 37 of the CRC establishes guidelines for juvenile justice and requires countries to treat any child deprived of his or her liberty "in a manner which takes into account the needs of persons of his or her age." Being able to prove that a child is a juvenile affords a child the additional protections required under international law, as well as national laws, while in custody and may ensure that the child is not prosecuted as an adult.

Additional Civil and Political Rights beyond Childhood

Finally, the impact of birth registration extends beyond the adolescent years. A birth certificate may also be required to vote, obtain a passport, be a candidate for office, or otherwise participate in the civic and political affairs of one's country.

Implications of Birth Registration on Children's Economic, Social, and Cultural Rights

The Right to Healthcare

Pursuant to Article 24 of the CRC, states parties "recognize the right of the child to the enjoyment of the highest attainable standard of health" and are required to "pursue full implementation of this right." The right to enjoy "the highest attainable standard of physical and mental health" is further recognized in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires that states parties take steps necessary for the "healthy development of the child." Despite these requirements, each year more than ten million children die before they reach the age of five, and most of these deaths are preventable. Ineffective birth registration systems play a role in this crisis, as unregistered children are harder to reach for community healthcare workers and may be overlooked entirely in public health planning. As such, these children may not gain access to immunization programs and other important healthcare programs (e.g., 26 percent of the world's children under 2 years do not receive immunizations for diphtheria, pertussis and tetanus). Even where a child's family can provide access to community health centers, a birth certificate may be required to obtain free or subsidized immunizations, thus illustrating the importance of early birth registration for all children.

The Right to an Education

Birth registration is also important in ensuring each child's right to education, as recognized under Article 28 of the CRC and Article 13 of the ICESCR. For example, birth certificates are required for enrolling in school in certain coun-

tries, including Cameroon, Lesotho, Sudan, and Yemen. Thus, a child whose birth was not registered may be unable to obtain an education. In other countries, such as Malaysia, birth certificates are not required to enroll in school but still form a barrier because they are required for those students applying for educational scholarships. This type of economic obstacle has a greater impact in poorer regions, which also generally have lower birth registration rates. Elsewhere, birth certificates are needed to obtain a primary school diploma and thus advance to secondary school, as in Turkey, or are required in order to sit for exams, as in Sri Lanka. In each of these cases, unregistered children are at a disadvantage and may find it impossible to overcome these obstacles to obtaining an education. Today, it is estimated that approximately 120 million primary school age children are not in school. Without adequate educational opportunities, these children are more vulnerable to the various forms of exploitation discussed above, including forced labor, prostitution, and involvement in armed conflict. Effective birth registration systems can help ensure that children will have access to schooling.

The Right to Be Free from Economic and Social Exploitation

Beyond providing healthcare and education to children, states must take additional steps to protect children from economic and social exploitation, as mandated by Article 10 of the ICESCR. Birth registration can play a role in combating other violations of economic and social rights, among them child labor. Article 32 of the CRC requires countries to take the measures necessary to eliminate harmful child labor practices. In addition, Article 7 of the ICESCR recognizes the “right of everyone to the enjoyment of just and favourable conditions of work” including fair wages, “safe and healthy working conditions,” and “reasonable limitation of working hours.” Article 10 of the ICESCR specifically addresses the issue of children, stating that

Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Similar protections are set forth in Article 32 of the Charter of Fundamental Rights of the European Union .

In addition to these obligations under international law, most countries have enacted child labor laws, yet the exploitation of child laborers persists. An estimated 250 million children between the ages of 5 and 14 work for a living. In Kenya, for example, where the rural birth registration rate is 57 percent, an estimated 3.5 million children aged 6 to 15 work, more than one quarter of all children in the country. Enforcement of child labor laws requires the capability of proving the ages of children involved, a process made much more difficult when dealing with unregistered children whose ages cannot be confirmed accurately. In addition, as unregistered children do not exist in any government records, their absence from school as a result of forced labor may not even draw the attention of authorities.

The same holds true in cases of child prostitution. The global sex trade continues to expand at an alarming rate, as over



Credit: The International Federation of the Red Cross and Red Crescent Societies/Marho Kobié

Red Cross volunteers vaccinating children against yellow fever in Côte D'Ivoire.

one million children are drawn into the world sex trade each year. While it is difficult to obtain precise statistics or determine the exact correlation between unregistered births and trafficking of children for prostitution, children whose births go unregistered and thus have no identity under any government's records are much more difficult to track. As a result, these children are clearly more vulnerable to such exploitation.

Additional Economic and Social Rights beyond Childhood

Birth registration and the ability to assert one's nationality may also prove important in terms of securing additional economic and social rights during adulthood. Providing official identity documents is a common step in securing employment. Later in life, proof of nationality may be necessary to receive social security, a right set forth in Article 9 of the ICESCR, which states that “States Parties . . . recognize the right of everyone to social security, including social insurance.”

The Impact beyond Unregistered Children

Failure to obtain universal birth registration may contribute to harmful realities for all children of a community, even those who have been registered. Obtaining accurate population statistics is essential in social services planning for any government and in ensuring that adequate resources and budgets are made available to address the needs of the population. If a government's birth records are incorrect, it may not allocate adequate resources to immunization programs, education budgets, or programs designed to combat exploitation. Moreover, developing countries may request and receive insufficient international aid based on this underreporting of births. As a result, unregistered children who gain access to the local healthcare system or schools may receive inadequate care or education because government budgets and planning have not accounted for these children. Further, even those children whose births are registered may suffer as they may find themselves accessing an over-burdened social services system. Finally, as birth registration systems are often less effective in poorer rural areas of a country, these areas which may have the greatest actual need may receive dramatically insufficient resources or aid.

Developing Successful Birth Registration Programs

Despite the clear mandate set forth under international law, the latest figures on birth registration demonstrate

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urgent need for additional action. Birth registration must become a priority for all countries, as it starts the child on the path to receiving the full benefits of society to which every individual has a right.

At the international level, there are indications that birth registration is receiving greater priority. The value of birth registration was recognized at last year's United Nations Special Session on Children, as the final outcome document and Plan of Action adopted by the UN General Assembly included the requirement that governments "[d]evelop systems to ensure the registration of *every* child at or shortly after birth, and fulfil his or her right to acquire a name and a nationality, in accordance with national laws and relevant international instruments" (emphasis added). The inclusion of this language remedied a significant oversight in the previous Plan of Action adopted at the World Summit for Children in 1990, which neglected to mention birth registration at all. In addition, the Committee on the Rights of the Child has emphasized the importance of improving birth registration rates in its observations and recommendations on reports submitted by a number of states parties, including Bhutan, Cambodia, the Dominican Republic, India, and Paraguay. Finally, UNICEF and nongovernmental organizations, working in conjunction with civil registry offices in numerous countries, have begun implementing programs designed to establish new birth registration systems or further strengthen existing ones.

To date, a number of countries have developed successful birth registration systems. Uzbekistan has provided an incentive-based system, in which the state pays a bonus to parents registering their children. As a result, in Uzbekistan almost 100 percent of children under age five are registered. Other countries have had success even without offering a financial incentive, often by building on their existing health-care infrastructure. For example, in Algeria, 92 percent of children are born in medical facilities and registered immediately. As a result of this approach, 97 percent of children born in Algeria are registered within five days of their birth.

Still other countries have much lower registration rates but are making efforts to address this issue. Bangladesh has commenced a program in collaboration with UNICEF to reach unregistered children in remote areas and establish a better system for newborns in the future. This pilot program shows signs of success. For example, in Rajshahi, Bangladesh, birth registration rates improved from below 12 percent in 1997 to over 70 percent in 2002. This improvement is attributed to a number of factors, including: effective decentralization of the registration process, which helps reach poorer populations; reliance on existing networks, which encourages collaboration and minimizes costs for establishing new networks; and an awareness program designed to educate parents on the value of birth registration. Such programs may offer important lessons for other countries working to improve the effectiveness of their birth registration systems.

Recommendations for Improving Birth Registration Rates

The experience of countries working to implement successful birth registration systems suggests the need to focus on three key areas in order to achieve universal birth registration: education, law, and local factors.

First, greater emphasis must be placed on educating both government leaders (at national and local levels) and the general public on the importance of birth registration for children. Birth registration must be considered not just a

bureaucratic exercise in record-keeping; rather, governments must recognize it as a significant child rights issue. If government leaders are not convinced of its importance, the political will to implement or strengthen birth registration systems

is likely to be insufficient. In turn, governments must educate parents on the value of birth registration so that parents better understand its importance in ensuring the rights of their children.

Second, countries must review their laws and take steps to remove any legislative barriers to birth registration. Specifically, governments should revise applicable laws or regulations with a view toward simplifying the process of birth registration, removing any existing economic barriers (e.g., charges for birth certificates), encouraging immediate registration without penalizing children who are registered later, and finding ways in which the law can help minimize fear among refugees or other displaced persons who may suspect that registering their newborn children will lead to deportation or other harm. In addition countries that require the presence of the father to register a birth or have patriarchal nationality laws that grant citizenship based only on the father's nationality, must also review such laws to eliminate gender discrimination.

Finally, governments must properly account for local factors, including geographic and cultural barriers, in implementing birth registration systems. In a number of countries, the disparity in registration rates between urban and rural areas is significant, as it is often difficult or expensive for families in remote areas to travel to the designated civil registry office to register their children. Governments must also address concerns among ethnic minorities and other vulnerable populations who for cultural or other reasons may be unaware of the value of birth registration or fearful that registration of their children will lead to government recrimination. Failure to account for these local factors will likely cause such programs to fall far short of success.

Focusing on these three areas should help improve the success rate of birth registration programs around the globe. In turn, comprehensive birth registration will enable each child to begin his or her life recognized as a person under the law, entitled to the full benefits and protections of society. While birth registration is essential, it remains only a first step. At every stage thereafter, governments still have a great deal of work to do in order to ensure the rights of all children. Such work will be made easier, and will ultimately be more successful, if all children are registered immediately after birth. 🌐

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Mastering the art of writing in Karachi, Pakistan.

Credit: UN/UNICEF photo by J. Aramburu



THE WAR CRIMES RESEARCH OFFICE PRESENTS: NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

by Maria Allison and Leslie Wilson*
edited by Susana SáCouto*

International Criminal Tribunal for Rwanda Appeals Chamber

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A

On January 27, 2000, Trial Chamber I found Alfred Musema guilty of genocide and crimes against humanity (for extermination and rape) but not guilty of complicity in genocide, conspiracy to commit genocide, crimes against humanity (for murder and other inhumane acts), or violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber sentenced Musema to life imprisonment. Musema appealed both the conviction and the sentence. On November 16, 2001, the Appeals Chamber rendered its Judgment in *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A.

Musema's first ground of appeal alleged that the Trial Chamber failed to apply the correct burden and standard of proof to the facts before it and, thereby, made errors of law and fact in its assessment of the evidence. In particular, Musema challenged the Trial Chamber's findings with regard to the credibility of Prosecution witnesses and took issue with the Trial Chamber's rejection of the alibi he raised at trial. The Appeals Chamber dismissed all of Musema's arguments except those regarding the rape of Nyiramasugi on May 13, 1994. With respect to that charge, the Appeals Chamber noted that the Defense's submission of out-of court statements by Witnesses CB and EB contradicted Prosecution Witness N's testimony during trial. The Appeals Chamber found that if the testimonies of all three witnesses had been presented, a reasonable tribunal of fact would have reached the conclusion that there was reasonable doubt as to Musema's guilt. The Appeals Chamber concluded that the Trial Chamber's factual and legal findings regarding the rape of Nyiramasugi were incorrect and had occasioned a miscarriage of justice. Accordingly, it quashed the conviction against Musema for the crime against humanity involving rape.

In his second, fourth, and fifth grounds of appeal,¹ Musema argued that the Trial Chamber did not ensure his right to a fair trial in that it failed to respect his right to be informed promptly and in detail of the nature of the charges against him, his right to have adequate time for the preparation of his defense and, lastly, his right to be tried without undue delay. Specifically, in his second ground of appeal, Musema claimed that his right to adequate time for the preparation of his defense was prejudiced by the Trial Chamber's decision to allow the Prosecution to add witnesses to the initial witness list, to call an expert witness, and to call witnesses whose written statements were not disclosed to the Defense 60 days before the trial date, as required by the ICTR Rules of Procedure and Evidence. The Appeals Chamber dismissed Musema's argument, holding that Musema had waived his right to appeal this issue by failing to raise it at trial.

In the fourth ground of his appeal, Musema alleged that the Trial Chamber erred by allowing the Prosecution to add new charges to the Indictment during the trial. In the fifth ground, Musema alleged that the Trial Chamber erred by finding that the Prosecution's failure to formally serve him with the Amended Indictment did not infringe his rights under Articles 19 and 20 of the ICTR Statute. The Appeals Chamber deemed it unnecessary to consider these last two grounds of appeal since both concerned Count 7 of the Indictment

(crime against humanity for rape), which was quashed based on Musema's first ground of appeal. However, the Appeals Chamber observed in dicta that when granting the Prosecution leave to amend an indictment, the Trial Chamber must respect the Accused's fundamental rights and "the more belatedly the amendment is effected, the more it is likely to penalize the Accused."

In his sixth ground of appeal, Musema argued that the Trial Chamber erred in finding him guilty of both genocide and crimes against humanity (for extermination) based on the same set of facts. In addition to ruling that cumulative charging of offenses is generally permitted, the Appeals Chamber applied the criteria discussed in the *Čelebići* ICTY Appeal Judgment to determine when multiple convictions based on the same set of facts may be entered or affirmed. Quoting from *Čelebići*, the Appeals Chamber stated that: "multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other." Applying the *Čelebići* test, the Appeals Chamber held that the convictions for genocide and crimes against humanity (extermination) are permissible since there are distinct elements under each crime. The distinct element in genocide is an intent to destroy a targeted group in whole or in part. Extermination as a crime against humanity requires proof that the act form part of a widespread or systematic attack against a civilian population. Thus, the Appeals Chamber dismissed Musema's sixth ground of appeal.

In his appeal against the sentence, Musema argued that the Trial Chamber erred by failing to: 1) consider the need to develop a range of sentences based on an accused's role in the broader context of Rwanda's conflict; 2) pass a sentence commensurate with other sentences imposed by the ICTR for genocide convictions; and 3) duly consider the mitigating factors in his case. Articulating the standard of review for sentences imposed by the ICTR, the Appeals Chamber noted that it would not revise a sentence unless it believed that the Trial Chamber had committed a "discernible error" in exercising its discretion, or failed to follow the applicable law. While acknowledging the existence in ICTY jurisprudence of a general principle that sentences should be graduated according to the relative position of a convicted person in a command structure, the Chamber emphasized that the gravity of the offense is the primary consideration in imposing sentence. Noting that Musema's offenses were of the utmost gravity, the Appeals Chamber found that Musema had failed to demonstrate that the Trial Chamber ventured outside its "discretionary framework in imposing the maximum sentence of life imprisonment" and dismissed Musema's first argument. After an assessment of the aggravating and mitigating circumstances in Musema's case, the Appeals Chamber found material differences between his case and that of *Serushago*, who plead guilty to one count of genocide and three counts of crimes against humanity (murder, extermination, and torture), and dismissed his second argument. In response to his third argument, the Appeals Chamber found that Musema failed to demonstrate that the Trial Chamber erred in exercising its discretion as to the weight accorded to

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the mitigating circumstances in his case. In affirming the sentence, the Appeals Chamber noted that the quashing of the conviction for the crime against humanity (for rape) had no impact on its dismissal of Musema's appeal, as "[t]here is no doubt that the Trial Chamber's findings as to the sentence to be imposed on Musema would have been the same if it had acquitted Musema of the charge in question."

Judge Shahabuddeen supported the judgment but wrote separately to clarify his understanding of two issues: 1) the reliability of evidence; and 2) the test for upholding a conviction based on additional evidence admitted during appellate proceedings. He stated that in general, the credibility of evidence must be assumed, rather than assessed, at the admissibility stage; reliability is a component of credibility and, as such, goes to weight of the evidence and must be assessed later. However, a different rule applies with respect to hearsay evidence. Because of its nature, hearsay evidence may require an initial determination of reliability at the admissibility stage. Even then, ICTY jurisprudence demonstrates that definitive proof of reliability is not necessary as a condition of admissibility; rather provisional proof is all that is required at that stage. Secondly, Judge Shahabuddeen noted that the test for upholding a conviction based on additional evidence submitted at the appellate level should be whether such evidence could have been a decisive factor in reaching the decision below, not whether the conclusion reached by the tribunal below on the assessed evidence was one which no reasonable tribunal would have reached on that evidence.

The Prosecutor v Clément Kayishema and Obed Ruzindana Appeal, Case No. ICTR-95-1-A

On May 21, 1999, the Trial Chamber rendered its judgment in the case of Clément Kayishema and Obed Ruzindana, who were both accused of involvement in the massacres that took place in the *préfecture* of Kibuye in 1994. The Trial Chamber convicted Clément Kayishema of four counts of genocide and sentenced him to life in prison. Obed Ruzindana was convicted of one count of genocide and sentenced to 25 years imprisonment. The Trial Chamber found the accused not guilty of crimes against humanity, finding that those charges were fully subsumed by the counts brought under the charge of genocide, and acquitted the accused of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Both accused appealed the conviction and the sentence. The Prosecution appealed the judgment and sentence against Ruzindana. On June 1, 2001, the Appeals Chamber rendered its judgment in the case of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A.

In his appeal, Kayishema argued that the trial was unfair and that the Trial Chamber erred in its: 1) assessment of his role as *préfet*; 2) evaluation of his individual and command responsibility as *préfet*; 3) assessment of the meaning and application of civil defense to the Rwandan conflict; and 4) findings and application of the law regarding the crime of genocide. Ruzindana also claimed that the trial was unfair. In addition, he alleged that the Trial Chamber erred in law and fact with respect to its: 1) assessment of intent; 2) findings regarding individual responsibility; 3) findings on his role regarding the crime of genocide; 4) findings on common criminal intent; 5) findings on his personal status; 6) findings regarding his alibi defense; and 7) appraisal of the Prosecution's evidence. With respect to sentencing, both Kayishema and Ruzindana alleged that the Trial Chamber erred in its assessment of the aggravating and mitigating circumstances in their case. Because several issues and grounds of appeal overlap, the Appeals Chamber grouped together some grounds of appeal and addressed others separately. Similarly, this summary will discuss the general issues decided by

the Appeals Chamber rather than addressing each ground of appeal separately.²

Fair Trial Issues

The Appeals Chamber rejected all arguments presented by Kayishema in ground one and Ruzindana in ground eight of their respective appeals that they were denied a fair trial. Kayishema alleged his trial was unfair for various reasons, including that: 1) the Tribunal was under the political influence of the United Nations and the government of Rwanda and, therefore, lacked independence; and 2) the Trial Chamber violated the principle of "equality of arms" by failing to, *inter alia*, guarantee the parties equality of means and resources. Noting that the Tribunal is a judicial organ independent of other UN organs and that Kayishema failed to articulate any particular pressure allegedly exerted by Rwanda on the Tribunal, the Appeals Chamber rejected Kayishema's first argument. The Chamber also rejected Kayishema's argument that the principle of "equality of arms" had been compromised. Citing the standard adopted by the ICTY Appeals Chamber in the *Tadić* case, the Chamber noted that the rule providing the parties with equal opportunity to present their cases does not compel an equality of resources.³

Ruzindana claimed he was denied a fair trial because, as a result of the lack of specificity in the indictment, he was not promptly informed of the nature of the charges against him or allowed adequate time and resources to prepare his defense. The Appeals Chamber rejected his claim because he had neither raised this issue at trial nor alleged special circumstances that would have permitted the Chamber to consider the issue on appeal.

Defense of Alibi

Both Kayishema and Ruzindana raised several arguments relating to their alibi defenses, including that the Trial Chamber erred by shifting the burden of proof to the accused and incorrectly assessing the evidence submitted in support of their alibi defenses. The Appeals Chamber rejected Kayishema's claim that the Trial Chamber shifted the burden of proof to the defense. Relying on the *Foca* and *Čelebići* cases, the Chamber affirmed that it is the duty of the Prosecution to prove the guilt of the accused beyond reasonable doubt, even when an alibi defense is raised. In other words, while the accused must provide the Prosecution with notice and the evidence upon which he will rely to establish his alibi, the Prosecution retains the burden of establishing the truth of the facts in the indictment. The accused must merely produce sufficient evidence to raise reasonable doubt regarding the Prosecution's case. The Appeals Chamber found that Kayishema failed to provide sufficient evidence to raise such doubt.

In his sixth ground of appeal, Ruzindana asserted that the Trial Chamber erred by failing to consider the evidence relating to his alibi defense in a comprehensive manner. The Appeals Chamber noted that it was bound to respect the Trial Chamber's approach as long as it was reasonable. The Appeals Chamber stated that the Trial Chamber had not only considered individual witness statements, but also conducted an overall assessment of the evidence in order to verify the credibility of the witnesses and to evaluate whether the evidence raised doubt regarding the accused's presence at the site of the alleged massacres. Noting that such an approach was reasonable, the Appeals Chamber dismissed Ruzindana's claim.

Genocide

In his sixth ground of appeal, Kayishema alleged errors in the Trial Chamber's findings on the evidence offered to prove the crime of genocide, in addition to the manner in which the Trial Chamber applied the law to the facts when assessing Kayishema's individual circumstances. The Appeals Chamber

confirmed that the Trial Chamber has broad discretion with respect to its analysis of evidence for fact-finding purposes. Noting that a successful challenge must show that the Trial Chamber's analysis was unreasonable, the Appeals Chamber concluded that Kayishema failed to meet this burden and, thus, rejected his challenge on this matter. In particular, the Appeals Chamber rejected Kayishema's claim that he lacked the requisite *mens rea* for the crime of genocide because he had ordered 72 children who survived the massacre to be taken to a hospital. The Chamber noted that in light of all the evidence presented, this fact had little bearing on whether Kayishema possessed the requisite *mens rea*.

On the mixed factual and legal ground of appeal relating to the interpretation of the word "*meurtre*," the Appeals Chamber affirmed the Trial Chamber's conclusion that there is "virtually" no difference between "*meurtre*" and "killing" within the context of genocide. The Appeals Chamber concluded that even if there were a difference between the two terms, both refer to intentional but not necessarily premeditated murder and that, in any event, such interpretation would not improve Kayishema's case.

Ruzindana's first ground of appeal asserted that the Trial Chamber erred in its findings on *mens rea*. Specifically, he asserted there was no proof that he had the requisite specific intent to commit the crime of genocide. The Appeals Chamber concurred with the Trial Chamber's conclusions that while explicit manifestations of criminal intent are often rare, intent may be demonstrated by persistent patterns of conduct and inferred from an individual's utterances and actions. Therefore, the Trial Chamber appropriately considered this kind of evidence in arriving at the conclusion that Ruzindana possessed the requisite intent. Noting the distinction between motive and intent, the Appeals Chamber also rejected Ruzindana's claim that his personal motives for acting the way he did precluded the presence of the requisite *mens rea* for genocide. Finally, the Appeals Chamber accepted Ruzindana's argument that the Trial Chamber failed to define the phrase "persistent pattern of conduct." However, it noted that because such a pattern is not an element of the crime of genocide, the Trial Chamber was not obliged to define it.

The Chamber also rejected Ruzindana's third ground of appeal, in which he claimed that a nexus was required between the manner in which genocide was carried out and the personal circumstances of an accused. Specifically, Ruzindana claimed genocide requires proof that the accused had the means or resources necessary to prepare for and commit genocide. The Chamber held that proof of such a nexus is unnecessary under the law.

Individual Responsibility

In his second ground of appeal, Ruzindana argued that the Trial Chamber erred in finding him individually responsible for committing killings because the Prosecution failed to establish a resulting death. Citing the *Tadić* case, the Appeals Chamber noted that the test for direct commission under Article 6(1) of the ICTR Statute is whether the individual directly participated in the crime and had the requisite knowledge. The Chamber concluded that establishing individual responsibility does not require a showing that the individual's actions resulted in death. However, where there is a question regarding the material fact of whether a death resulted, it is appropriately determined by the Trial Chamber in its assessment of the evidence. The Appeals Chamber noted that the Trial Chamber had found Ruzindana responsible for at least one death, that of victim Beatrice. Additionally, the Appeals Chamber noted that individual responsibility under Article 6(1) of the ICTR Statute attaches not only to direct physical

participation, but also to acts of participation that contribute to, or have an effect on, the commission of the crime. The Appeals Chamber recalled that Ruzindana was also found individually responsible under Article 6(1) for instigating, ordering, committing and otherwise aiding and abetting in the preparation and execution of a massacre with genocidal intent. As proof of resulting death is not a necessary element in the determination of individual responsibility under Article 6(1), the Appeals Chamber dismissed this claim.⁴

Although Ruzindana's fourth ground of appeal was not clear, the Appeals Chamber interpreted his claim to be that the Trial Chamber erred in its definition of criminal responsibility on the basis of participation in a common purpose or design and in its application of this definition to his case. Citing the *Tadić* case, the Appeals Chamber noted that this mode of participation in one of the crimes under the ICTR Statute does not require that the plan or purpose be previously arranged or formulated. Therefore, while meeting physically or by telephone may be a relevant factor to be considered, those acts are not constitutive of the *actus reus* element required for individual responsibility to attach pursuant to the common purpose doctrine. Thus, this claim was dismissed.⁵

In his third ground of appeal, Kayishema challenged the Trial Chamber's findings regarding his individual criminal responsibility for genocide. In particular, he challenged the Chamber's findings regarding his intent and actual participation in the crime. The Appeals Chamber noted that intent may be inferred from an individual's participation in a crime, particularly from his aiding and abetting behavior. The Appeals Chamber affirmed the Trial Chamber's finding that Kayishema had the requisite criminal intent because the combination of his authority and passive presence at crime sites amounted to tacit encouragement. Additionally, the Appeals Chamber dismissed Kayishema's claim that the Trial Chamber erred in finding actual participation, noting that the Appellant had failed to show that any of the Trial Chambers findings were so unreasonable as to result in a miscarriage of justice.

In his second ground of appeal, Kayishema challenged the Trial Chamber's finding of criminal command responsibility under Article 6(3) of the ICTR Statute. He suggested that the Trial Chamber erroneously concluded that as *préfet*, he had *de jure* authority over the assailants present during the massacres in question. Further, he claimed that as he had no *de jure* authority, he could not in fact exercise any authority over those individuals, such as preventing or punishing the crimes in question. Citing the *Čelebić* case, the Appeals Chamber noted that the appropriate test, whether in the context of *de jure* or *de facto* authority, was whether the superior had effective control over the persons committing the alleged crimes. The Appeals Chamber found that Kayishema failed to show that the Trial Chamber's findings regarding his effective control were so unreasonable as to result in a miscarriage of justice.

Additional Fact-Finding Issues

In their appeal, the Appellants challenged the Trial Chamber's evaluation of witness credibility and other evidence. The Appeals Chamber reaffirmed that the Trial Chamber retains broad discretion with respect to determining witness credibility and overall assessment of the evidence.

In his claim that the Trial Chamber made factual errors with respect to its genocide analysis, for instance, Kayishema argued that testimony regarding injuries sustained by a witness should have been corroborated. The Appeals Chamber rejected the argument, stating that under *Tadić*, corroboration was not necessary. In his third ground of appeal,

NEWS FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

by David Baluarte*

Inter-American Commission on Human Rights

The Implications of Sentencing Aliens without Consular Notification

Case 11.753: Ramón Martínez Villareal

On October 10, 2002, the Inter-American Commission on Human Rights (Commission) issued Report No. 52/02 on the merits of Case 11.753 regarding Ramón Martínez Villareal. This report is the culmination of an investigation initiated on May 16, 1997 against the United States concerning the murder conviction of Ramón Martínez Villareal, a Mexican national. Mr. Martínez Villareal was convicted of two counts of first degree murder on May 20, 1983, and has since been incarcerated and placed on death row in Arizona. The petitioner, the Center for Justice and International Law, alleged five violations of Mr. Martínez Villareal's rights: the failure of the United States to provide notice of consular assistance under Article 36(1) (b) of the Vienna Convention on Consular Relations (Vienna Convention) to which the United States is bound; the failure of the United States to provide and guarantee effective assistance of counsel to Mr. Martínez Villareal; the failure of the United States to take into account Mr. Martínez Villareal's mental competence at the trial and sentencing phases of his criminal proceeding and its obligation not to execute Mr. Martínez Villareal due to his mental incompetence; the delay in Mr. Martínez Villareal's execution; and the unequal application of the death penalty throughout the United States. The petitioner claimed that these violations of Mr. Martínez Villareal's rights by the United States contravene Articles I (right to life, liberty, and personal security), II (right to equality before law), XVIII (right to a fair trial), and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (American Declaration).

Analysis

The Commission limited its analysis of the merits to the petitioner's first claim, based on its finding that the United States' failure to comply with Article 36(1) (b) of the Vienna Convention was a sufficient basis to find violations of the rights to a fair trial and to due process of law under the American Declaration. The Commission further noted it would apply a heightened level of scrutiny, consistent with the restrictive approach previously taken by the Commission and other international human rights authorities in considering issues regarding the imposition of the death penalty.

In response to the government's argument that the Vienna Convention does not vest any private rights in a criminal defendant, the Commission stated that, based on the current jurisprudence of the Inter-American Court of Human Rights, it does not have competence to adjudicate the United States' responsibility for violations of the Vienna Convention *per se*. The Commission nonetheless maintained that Mr. Martínez Villareal's right to information and consular assistance under Article 36 of the Vienna Convention constitutes a fundamental component of the due process protections to which he is entitled pursuant to Articles XVIII and XXVI of the American Declaration. Accordingly, the state's failure to respect and ensure this obligation constituted serious violations of Mr. Martínez Villareal's rights to a fair trial and due process. In arriving at this conclusion, the Commission considered current developments in international law in the decision of the International Court of Justice in the *LaGrand* case and the decision of the Inter-American Court of Human Rights in Advisory Opinion 16, which asserted that Article 36

of the Vienna Convention creates individual rights that give rise to the international responsibility of a state.

At no point did the United States ever allege that Article 36(1) (b) had been satisfied. Rather, it claimed that the Mexican Consulate should have been on notice because of the media attention attracted by Mr. Martínez Villareal's arrest. The Commission not only found this defense to be insufficient, but stated that the possible knowledge of the Mexican consular staff did not address Mr. Martínez Villareal's right to be informed of his right to consular assistance.

In evaluating the importance of the state's compliance with Article 36 of the Vienna Convention, the Commission noted that granting consular assistance to a criminal defendant helps ensure the protection of the defendant's due process rights through the provision of services, including translation, the collection of mitigating evidence from the defendant's country, and the preparation of an adequate defense. In this case, the Commission considered that the record showed that Mr. Martínez Villareal was arrested and tried without having a clear understanding of the proceedings. Mr. Martínez Villareal did not speak English, his attorney did not speak Spanish, and the earlier stages of the proceedings were not translated into Spanish. The record also reflected that Mr. Martínez Villareal did not understand the purpose or composition of the jury. There was further evidence that Mr. Martínez Villareal suffered from mental deficiency at the time of the trial against him, and that this mental deficiency was not adequately explored by his attorney. Based on these findings, the Commission held that the United States' failure to comply with the Vienna Convention placed it in violation of Articles XVIII and XXVI of the American Declaration. The Commission further concluded that if the United States executes Mr. Martínez Villareal, it will be violation of Article I of the American Declaration.

Recommendations

In light of the Commission's finding regarding the violation of Mr. Martínez Villareal's rights to due process and a fair trial, it urged the United States to retry the case in accordance with the protections prescribed by Articles XVIII and XXVI of the American Declaration. If a retrial in compliance with these protections is not possible, the Commission recommended Mr. Martínez Villareal's release. The Commission further advised the United States to review its laws and procedures relating to foreign nationals who are arrested and incarcerated to assure that consular notification is integrated into the earliest stages of criminal proceedings. The Commission announced that it would continue to evaluate the measures adopted by the United States with respect to the above recommendations until it reaches full compliance.

Establishing an International Ban on the Execution of Juveniles *Case 12.285: Michael Domingues*

On October 22, 2002, the Commission issued Report No. 62/02 on the admissibility and the merits of case 12.285 regarding Michael Domingues. Mr. Domingues was convicted of two counts of first-degree murder and sentenced to death for crimes he committed when he was 16 years old. On May 1, 2000, the Commission received a petition from the Magnus Hirschfield Center for Human Rights and Mark Blaskey of the Clark County Public Defender on behalf of

ALUMNI PROFILE

by Inbal Sansani*



Nomi Dave, a 1999 J.D. graduate of the Washington College of Law (WCL), is currently working as an associate protection officer with the United Nations High Commissioner for Refugees (UNHCR) in Guinea, West Africa. Ms. Dave is a member of the Junior Professional Officers (JPO) program, which provides opportunities for nationals of different countries to work with UN agencies for a two-year period. She applied to the JPO program through the U.S. government, which sponsors JPOs for UNHCR and the World Food Program. Although Ms. Dave is a staff member of the UNHCR, her position is funded through the U.S. Department of State. Upon acceptance to the program, she was posted to the UNHCR Branch Office in Conakry, Guinea. At this duty station, she works primarily with refugees from Cote d'Ivoire, Liberia, and Sierra Leone, which are currently the main sources of the refugee population in Guinea.

Ms. Dave's work focuses on the protection of refugees, including analysis of issues pertaining to international refugee law and the legal and physical protection of refugees. In addition, UNHCR addresses other human rights issues affecting refugees, including arbitrary arrest and detention, freedom of expression, freedom of movement, and rights specific

to the needs of women and children in the refugee community. According to Ms. Dave, the most challenging aspect of her work involves addressing the basic needs of individuals and groups on a daily basis. Each morning she greets a queue of refugees outside the UNHCR office. She explains that this group may include people who have not eaten for days, people who have nowhere to sleep, or those whose spouses or siblings have been arrested. One of her first lessons was that working at UNHCR involves a variety of responsibilities including counseling, social services, and informal dispute resolution in addition to engaging in legal analysis.

Immediately after law school Ms. Dave worked as a researcher and writer for the UN Secretariat in New York, focusing on economic and social affairs. Ms. Dave's advice to law students is to study topics that they find stimulating and to keep focused on their chosen fields of interest. Her favorite law school experience was participating in the International Human Rights Law Clinic, which she found to be both instructive and enjoyable.

Ms. Dave is currently beginning to explore new areas of interest in the law, including issues of cultural rights, economic and social development, and the protection of children and the elderly in conflict situations. She plans to pursue writing opportunities in the future. 🌐

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Mr. Domingues. The petition alleged that by sentencing Mr. Domingues to death for crimes he committed while he was a juvenile, the United States breached Articles I (right to life), II (right to equality before the law), VII (right to protection for mothers and children), and XXVI (right to due process of law) of the American Declaration. The petitioner alleged that the United States violated Article I of the American Declaration by breaching the *jus cogens* norm prohibiting the execution of juveniles. The petitioner further argued that the use of the death penalty in a limited number of U.S. states resulted in arbitrary deprivation of life and inequality before the law in the United States.

Analysis

After ruling that the case was admissible based on evidence that Mr. Domingues had been denied a substantive appeal of his "illegal sentence" and had therefore exhausted all domestic remedies, the Commission considered the merits of the claim, focusing first on the allegation that the United States violated a *jus cogens* norm. The Commission indicated that it would apply a heightened level of scrutiny reserved for capital cases. The Commission began its analysis with its 1987 decision, *Roach and Pinkerton v. United States*, in which it determined whether a *jus cogens* norm that prohibits the execution of juveniles existed. The Commission held in *Roach and Pinkerton* that, although there was a recognized *jus cogens* norm among member states of the Organization of American States (OAS) that prohibits the execution of chil-

dren, there was no consensus as to the age of majority. Based on the precedent set by that decision, the Commission defined the question before it as being whether, since 1987, the international community had established 18 as the age of majority.

In determining whether a *jus cogens* norm had developed for the age of majority since its 1987 decision in *Roach and Pinkerton*, the Commission considered the development of international treaty law, United Nations resolutions and standards, domestic practices within individual states, and practices within the United States. The Commission noted numerous developments that it considered indicative of an international consensus on 18 as the age of majority. In reaching its conclusion, the Commission relied on the fact that 191 states are currently parties to the UN Convention on the Rights of the Child, which provides that no person under the age of 18 shall receive the death penalty; that 64 countries have acceded to or ratified the International Covenant on Civil and Political Rights, which provides that death sentences shall not be imposed on individuals below the age of 18; that 5 member states of the OAS have ratified or acceded to the American Convention on Human Rights, which prohibits the execution of persons below the age of 18; that 49 countries have abolished the death penalty since 1986 (making the total of nations that do prohibit the death penalty 111), and that 20 additional countries that have not carried out an execution in 10 or more years; and that 16 states in the United States have expressly chosen the age of 18 as the minimum age for

courts above, that Yaser Hamdi, a U.S. citizen captured during battle in Afghanistan, was properly designated an unlawful combatant under the president's war powers. The court, however, also held that the Third Geneva Convention was a non-self-executing treaty, meaning that Hamdi could not invoke its provisions without further congressional action to implement the treaty domestically. To the contrary, the district court decisions in both *Lindh* and *Padilla* found the treaty to be self-executing. The court's decision effectively leaves Hamdi, now in custody in a naval detention center in Norfolk, Virginia, without access to counsel or further access to the courts.

Two other related decisions recently before domestic courts merit mention. In late January 2003, the trial judge in the federal trial of Zacarias Moussaoui ruled in a closed hearing that Moussaoui should be provided with access to Ramzi Binalshibh, the self-described coordinator of the September 11, 2001 terrorist attacks in the United States and also in U.S. custody, in order to be able to effectively prepare Moussaoui's defense to capital charges of his own involvement in those attacks. Close followers of the trial suggest that the government's resolve not to permit the two alleged terrorists to meet may compel them to seek the first known trial before a military commission, a decision which would unquestionably raise further criticism of such tribunals. Finally, in Boston, the judge who recently sentenced Richard Reid, the admitted al-Qaeda "shoe-bomber," was praised for his strong condemnation of Reid during the sentencing hearing. The judge, responding to assertions by the defense that Reid was a combatant in a war, responded by repeatedly asserting, "You are not an enemy combatant—you are a terrorist." By that reference, the judge seemed to suggest that the criminal law, not the law of war, was the way to deal with terrorism, thus ironically undermining the administration's assertions that their actions are justified as legitimate actions in the war on terrorism.

The term "legal black hole" in reference to the status of the Guantánamo detainees seems to originate with a decision by the British courts in *R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*. In this case, a British national named Feroz Ali Abbasi, a Guantánamo detainee since January 2002, complained to British judges that he had been without access to a court or any other tribunal, or even to a lawyer, since his arrival in Guantánamo. His representatives sought to compel the British Foreign Office to take some action on his behalf to challenge his arbitrary detention in Cuba. The British court declined, noting that there were several legal actions pending in the United States dealing with the matter, and that Mr. Abbasi is "within the sole control of the United States executive." The court did note, however, that although Mr. Abbasi's detention as an "illegal combatant" may ultimately be justified,

the judges found it "objectionable . . . that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal." It was in that context that the British tribunal expressed its profoundest desire that the U.S. courts assume jurisdiction so as not to leave Mr. Abbasi in arbitrary detention in that "legal black hole" alluded to by Amnesty International and others. The British court also noted that the issue of the validity of the detention in Guantánamo Bay was pending before the Inter-American Commission on Human Rights, but that "it is as yet unclear what the result of the Commission's intervention will be."

Finally, the Canadian courts also may take on the issue of the Guantánamo detentions. Press reports in February of 2003 indicate that a former member of Parliament asked the Quebec Superior Court to rule whether Canadian soldiers in Afghanistan had surrendered alleged enemy soldiers to the U.S. military for transport to Guantánamo in violation of Canada's obligations under the Geneva Conventions. The filing of the suit followed criticism of the government in the Canadian House of Commons for its failure to determine if those captured were prisoners of war prior to their surrender.

The core of the Commission's precautionary measures ruling lies in its conclusion that the executive branch of the U.S. government is not entitled to unilateral and unreviewable designation of the Guantánamo detainees as unlawful combatants under international humanitarian law. What is common to all three of the domestic court decisions in the cases involving Lindh, Padilla, and Hamdi is the courts' assumption that there was no doubt as to the status of the individuals involved in those cases; all were legitimately and properly designated as "illegal," or more properly "unprivileged" combatants, by the executive branch. The petitioners' position in the Guantánamo case relies on Article 5 of the Third Geneva Convention, which requires that the detainees are entitled to a presumption of protection of the Third Convention "until such time as their status has been determined by a competent tribunal." Their argument also relies on customary law and the assertions of many leading international law experts who maintain that the detainees are entitled to a presumption of treatment as privileged combatants until a competent tribunal has determined their status. The detainees must be designated as civilians, combatants, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat. The Commission's view is not a radical position but one consistent with established interpretations of international human rights and humanitarian law. ☉

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eligibility for the death sentence. In considering this and other evidence, the Commission established that a *jus cogens* norm had developed that prohibits the execution of people under 18. The Commission found that the United States violated this norm in the *Domingues* case and breached Article I of the American Declaration.

Recommendations

Based on these findings the Commission recommended that the United States offer Mr. Domingues a commutation of sentence. The Commission further recommended that

the United States review its laws and procedures to ensure that the death penalty is not imposed on anyone who was under the age of 18 at the time of his or her crime. The Commission announced that it would continue to evaluate the measures adopted by the United States with respect to the above recommendations until the United States reaches full compliance. ☉

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LEGISLATIVE WATCH

Legislative Watch reports on U.S. legislation relevant to human rights and humanitarian law. This list is not meant to be comprehensive.

To Provide for the Withholding of United States Contributions to Any United Nations Commission, Organization, or Affiliated Agency That Is Chaired or Presided over by a Country That Has Repeatedly Provided Support for Acts of International Terrorism, and for Other Purposes, H.R. 800

Major Sponsor: Rep. Vito Fossella (R-NY)
Status: Forwarded to the House Committee on International Relations in February 2003.

Substance: This legislation seeks to halt U.S. funding to any United Nations commission, organization, or affiliated agency chaired by any country, the government of which the U.S. State Department has labeled a supporter of acts of international terrorism. The bill provides that the funding will cease until the president determines that the UN body is no longer chaired by such country, and it has revised its leadership succession system by setting minimum standards for leadership positions and eliminating automatic rotation of such positions.

The Terror Immigration Elimination Act, H.R. 488

Major Sponsor: Rep. Ron Paul (R-TX)
Status: Introduced and referred to the House Committee on the Judiciary in January 2003.

Substance: This legislation seeks to limit the number of student and diversity immigrant visas granted to nationals of Saudi Arabia, countries that support terrorism, and countries not cooperating fully with U.S. antiterrorism efforts. The Act will also deny student and diversity immigrant visas to anyone coming from a country currently on the U.S. State Department's list of countries sponsoring terrorism.

To Provide Compensation for the Families of Noncombatants Killed in United States Military Actions in Afghanistan after September 11, 2001, H.R. 602

Major Sponsor: Rep. Major R. Owens (D-NY)

Status: Referred to the House Committee on International Relations in February 2003.

Substance: This legislation recognizes the loss of innocent civilian lives resulting from U.S. military action in Afghanistan following September 11, 2001. The bill calls for direct compensation in the amount of \$10,000 to the family of each noncombatant national of Afghanistan who was killed as a direct result of U.S. military actions in Afghanistan after September 11, 2001.

Global Climate Security Act 2003, S. 17

Major Sponsor: Sen. Tom Daschle (D-SD)

Status: Referred to the Senate Committee on Environment and Public Works in January 2003.

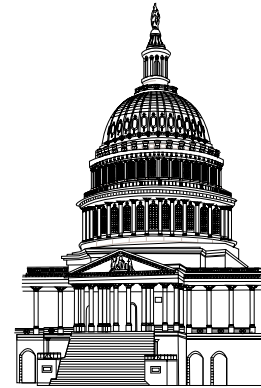
Substance: This legislation calls on the president and the Congress to prioritize the preparation for and reduction of the risks of global warming and climate change. The Act emphasizes the need for the president to satisfy the U.S. commitment under the United Nations Framework Convention on Climate Change and lays out mechanisms to achieve these goals. The Act calls for a commission to facilitate the fulfillment of this commitment, including legislation to adopt cost-effective and technologically feasible measures that would reduce net greenhouse gas emissions in the United States and elsewhere. The Act also calls on Congress to pass a multi-pollutant bill to reduce carbon dioxide, nitrogen oxide, sulfur dioxide, and mercury emissions from power plants and to create and promote clean energy domestically and globally. Further, the legislation requires a national greenhouse gas emissions inventory and registry. The Environmental Protection Agency (EPA) would operate the emissions data collection program with mandatory reporting for all sources of emissions above the threshold levels determined by the EPA. Additionally, the Act authorizes \$2 billion annually for grants to states or local governments for utilizing greenhouse gas data collection, inventory, and trading systems; instituting emissions reduction or sequestration projects; and participating in research, planning, and modeling efforts.

Prosecuting Remedies and Tools against the Exploitation of Children Today Act of 2003 (PROTECT Act), S. 151

Major Sponsor: Orrin G. Hatch (R-UT)

Status: Passed in the Senate on February 24, 2003 and referred to the House Committee on the Judiciary.

Substance: This legislation amends federal criminal code provisions regarding child pornography to prohibit: (1) advertising, promoting, distributing, or soliciting in interstate or foreign commerce any material constituting a virtual obscene visual depiction of a minor, or an actual visual depiction of a minor engaging in sexually explicit conduct; or (2) offering or providing to a minor any such visual depiction to induce the minor to participate in any illegal activity. The Act limits an accused's affirmative defense that the alleged child



pornography was not produced using actual minors and that the defendant did not promote the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct. The legislation sets penalties for knowingly producing, distributing, receiving, or possessing an obscene visual representation of the sexual abuse of children. Visual representation, according to the Act, includes a depiction of any kind (including a drawing, cartoon, sculpture, or painting) that: (1) depicts a minor engaging in sexually explicit conduct and that is obscene; or (2) depicts an image that is or appears to be of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, and that lacks serious literary, artistic, political, or scientific value. The Act makes clear that it is not a required element of the offense that the minor depicted actually exist, but specified circumstances must exist, such as the element of interstate or foreign commerce, including via computer, related to any communication involved in or made in furtherance of the offense. Further, the Act amends the Victims of Child Abuse Act of 1990 to authorize disclosure of child pornography by an electronic communication service provider to state officials for purposes of enforcing state law. The Act also sets penalties for using or inducing a minor to engage in sexually explicit conduct outside of the United States to produce any visual depiction of such conduct for transportation to the United States and authorizes civil remedies, including injunctive relief and punitive damages, for child pornography offenses. ☉

Congress Condemns Executions by Stoning

by Chanté Lasco*

Introduction

In March 2002, a Sharia Court in Nigeria sentenced Amina Lawal, a 30-year-old Nigerian woman, to death by stoning for having a child outside of wedlock. Despite the fact that the Sharia penal code is unconstitutional under Nigerian law, the federal government of Nigeria has not required those northern states of Nigeria that have chosen to institute Sharia law to abolish such codes in favor of secular penal codes. Amina Lawal's case brought international attention to the issue of execution by stoning, and was highly publicized in the media by organizations such as Amnesty International and on programs including the Oprah Winfrey Show. The international community expressed outrage at the cruelty of the penalty itself, as well as the sexual discrimination apparent in any legal system that punishes women for adultery at a disproportionate rate. In response to such publicity, the Nigerian government has made assurances that it will not carry out the penalty against Lawal.

Unfortunately, Amina Lawal is not the only potential victim of this barbaric practice. In 2001, Safiya Hussaini was sentenced to death by stoning in a case very similar to Lawal's. Fortunately, Hussaini's case was dismissed on appeal in March 2002. In response to these and other similar cases, Representative Betty McCollum (D-MN) introduced House Concurrent Resolution 26 in the U.S. House of Representatives, a bill "condemning the punishment of execution by stoning as a gross violation of human rights."

An Overview of the Legislation Introduced in the House

House Concurrent Resolution 26 highlights the fact that stoning is often "applied to women who have been accused of adultery, some of whom are coerced into prostitution, or even raped." While the bill does not focus solely on women, it recognizes that "women around the world continue to be disproportionately targeted for discriminatory, inhuman, and cruel punishments." Additionally, the resolution argues that execution by stoning is an "exceptionally cruel form of punishment that violates internationally accepted standards of human rights, including those set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." The resolution also cites Amnesty International in characterizing "execution by stoning as 'a method specifically designed to increase the victim's suffering.'" The bill concludes by requesting that the president formally communicate the resolution to governments imposing this cruel punishment and urge the suspension of death by stoning. It also requests that the president direct the secretary of state to work with the international community to repeal stoning laws and adhere to international human rights standards.

Implications of House Concurrent Resolution 26

For those individuals condemned to death by stoning, this resolution provides support that is more symbolic than

practical. Expressing congressional condemnation can help call attention to an issue and perhaps exert diplomatic pressure on nations employing this method of execution. The effectiveness of this resolution, however, is hampered by the fact that the United States continues to use the death penalty, even if it does so by way of methods it considers more humane, such as lethal injections and electrocution, rather than stoning. This practice places the United States in the company of such countries as Afghanistan, China, Iraq, Libya, and Myanmar, while 111 countries have abolished the death penalty entirely.

As the International Helsinki Federation for Human Rights has noted, "The use of the death penalty by the USA is a 'failure of moral leadership.'" This organization further stated that there is a need for the United States "to abide by Helsinki principles and international standards if we are to convince other states of the importance of those standards to human rights and freedoms." Amnesty International has also addressed the likelihood that the United States may be viewed as hypocritical, focusing on the fact that the United States executes prisoners for crimes they committed as minors, in violation of international law. In addressing this concern, Amnesty International stated that "The USA's repeated claims that it is the most progressive force for human rights in the world are contradicted by its blatant flouting of the global moral and legal consensus that killing people for their childhood crimes is wrong." According to Amnesty International, other organizations such as the Organization of American States, the UN High Commissioner for Human Rights, Defense for Children International, and the American Bar Association have also called for an end to the execution of prisoners for crimes committed before the age of 18. In the face of such widespread opposition to U.S. death penalty policy by international human rights organizations, it is difficult for U.S. lawmakers to convince other death penalty countries that methods such as stoning are inhumane.

Conclusion

House Concurrent Resolution 26 calls attention to a very important issue and denounces the brutal practice of stoning, noting specifically that it is predominantly used against women. It is commendable that our lawmakers are taking a stand to help those sentenced to stoning, particularly condemned women, around the world. Until the United States joins the international community in renouncing the death penalty entirely, however, the U.S. government will continue to lack the moral legitimacy required to effect real change on this issue. 🌐

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BRIEF COMMUNITY NEWS

In an effort to broaden communication between human rights groups around the world, the *Human Rights Brief* is proud to host the "Brief Community News." The "Brief Community News" is published in every issue, and the *Human Rights Brief* invites submissions from all human rights groups. It is our hope that nongovernmental organizations (NGOs) will use this space to inform others about their programs, successes, and challenges. To contribute, please see the information at the end of the article.

Mexican Commission for Defense and Promotion of Human Rights (CMDPH)

CMDPH, a civil society organization, has worked since 1989 to promote international human rights standards within Mexico. The organization has also worked to defend human rights in Mexico within international and regional human rights systems. This year, CMDPH has been working on a campaign to stop violence against women in the Ciudad Juárez and in the northern state of Chihuahua. Since 1993, more than 300 hundred women have been killed in Ciudad Juárez in a series of gender-based serial killings and domestic violence incidents. Recently, the problem appeared to be expanding through Chihuahua, in large part because of the discriminatory manner in which authorities are handling the situation. In many instances, authorities have attempted to justify the killings by focusing on the manner in which the women lived. Three hundred fifty Mexican and international organizations, including Amnesty International, are working with CMDPH to stop the killings and promote the accountability of authorities. CMDPH has already prepared reports for the Inter-American Commission on Human Rights and the United Nations regarding this campaign. Currently, CMDPH is working with local organizations in Ciudad Juárez and in the state of Chihuahua to compile the information necessary to bring unsolved cases before the Inter-American Commission on Human Rights. For more information about the work of CMDPH, please e-mail comunicacion@cmdpdh.org, or visit its Web site at <http://www.cmdpdh.org>.

The Palestinian Human Rights Monitoring Group (PHRMG)

PHRMG is a Palestinian, independent, nongovernmental organization working to end human rights violations committed against Palestinians in the West Bank, Gaza Strip, and East Jerusalem. PHRMG's main task is monitoring the ever-changing human rights situations for Palestinians. The group's field researchers responsibilities include keeping abreast of local developments, pursuing long-term monitoring tasks, and responding to urgent human rights situations in order to record eyewitness testimonies of victims, witnesses, and other actors. PHRMG also works on outreach programs that aim to educate both Palestinians and the international community about the human rights violations committed against Palestinians. These outreach programs include publication of a bi-monthly magazine, the "Palestinian Human Rights Monitor," distributed throughout the West Bank, Gaza Strip, and East Jerusalem in Arabic and English; and maintenance of one extensive Web site that includes information about human rights violations committed against Palestinians, in both Arabic and English.

Recently, PHRMG established the Settler Watch Hotline. The hotline provides Palestinian victims of settler violence a phone number to call 24-hours a day where they can receive legal advice or assistance from a PHRMG lawyer. The hotline has successfully empowered Palestinians to file complaints and utilize the legal process when they are victimized. By providing legal advice to people who would have otherwise not filed a complaint, the hotline has also forced the Israeli courts to address complaints that were previously often overlooked or disregarded. PHRMG is currently updating its programs to coincide with the

evolving human rights situation in Palestine and to meet the needs of the Palestinian people. For further information about the organization's activities, please contact Tara J. Close, public relations officer, at admin@phrmg.org, or visit the organization's Web site at www.phrmg.org.

Indian Social Institute (ISI)

ISI is a social center committed to working toward the creation of a society based on the values of justice, equality, freedom, and fraternity in India. The organization, which was founded over 25 years ago, is run by the Jesuits and works to empower India's Dalits, tribals (India's indigenous peoples), women, and other disadvantaged groups in Indian society by providing legal literacy training, human rights education and support.

From July 14-28, 2003, ISI will host a course entitled, "Legal Resources for Social Action and Empowerment." Today, social activists require a minimum level of legal knowledge and expertise to make their work effective and useful. To become more efficient in providing assistance, social activists need to be equipped with adequate legal knowledge. Many ordinary Indian people, particularly Dalits, tribals, and women, suffer unnecessary injustice and hardship for want of legal awareness and guidance. ISI believes that social activists and those working at the grassroots level, if provided with adequate legal training, have the potential to make social change and empower disadvantaged groups. This potential needs to be exploited fully and effectively in order to achieve social change and build a just society.

For more information about all of ISI's programs, please contact D. Albert, coordinator of the Human Rights & Legal Service Unit, at devalbert@yahoo.co.in.

Corporation for Peace and Development in Magdalena Medio (CDPMM)

CDPMM is a non-profit organization currently working in the Magdalena Medio region of Colombia, one of the country's most violent regions due to fighting between paramilitary groups trying to control the area. The violent deaths in the Magdalena Medio region equal the number of violent deaths in all of Colombia's other regions combined. The organization's Peace and Development Program in Magdalena Medio (PDPMM), is a dynamic social process that works to empower citizens networks to make changes in their communities' economic development. The program has two main objectives: 1) to create a sustainable human development, equal for all; and 2) to create a culture of peaceful coexistence and a common space for all, based on democratic principles that respect common interests and human rights. In December 2002, the PDPMM process was used in Micoahumado, Bolívar, in order to work toward protecting citizens' freedom from the actions of illegal armed groups in that community.

In addition to the organization's Peace and Development Programs, CDPMM works to overcome poverty and to achieve a peaceful coexistence in 29 regions distributed through 4 departments in Colombia. The backbone of CDPMM is a citizen's network comprised of citizens and social organizations working together voluntarily to achieve their objectives.

BADIL, Resource Center for Palestinian Residency and Refugee Rights


The BADIL Resource Center, located in Bethlehem, provides a resource pool of alternative, critical, and progressive information regarding Palestinian refugees and their quest to achieve a just and lasting solution for exiled Palestinians based on their right of return.

This year, BADIL will launch the International Expert Forum for the Promotion of Palestinian Refugee Rights (Expert Forum).

continued on next page

The exclusion of international law, human rights standards, and UN resolutions from past Israeli-Palestinian negotiations has been extremely detrimental to Palestinian refugees and has contributed to the breakdown of the political process. BADIL asserts that the Expert Forum will bring together legal and academic experts, politicians, and practitioners of refugee and general human rights law to pave the way toward treaty-based human rights solutions to the Palestinian refugee issue in accordance with UN Resolution 194. The first international seminar, "The Role of International Law in Peacemaking and Crafting Durable Solutions for Palestinian Refugees," will be hosted by the University of Ghent in Ghent, Belgium from May 22-23, 2003. Additional seminars will follow in Europe and Cairo, focusing on property restitution, international and regional protection mechanisms, and obstacles to the implementation of refugee return and restitution.

In March, BADIL will publish, in Hebrew, an information packet on the Right of Return. The packet will be based on BADIL's Arabic and English language information packets pub-

lished on the same topic in 2000. BADIL's Hebrew packet was created in order to answer the questions and concerns raised in the Israeli debate about Palestinian refugees' right to return to their homes and properties now located in Israel. The Hebrew language packet will serve as a tool for exploring the potential of a rational, rights-based dialogue with Israeli peace and human rights activists, educators, academic researchers and journalists. The packet will include facts and figures, responses to frequently asked questions, and international legal briefs and testimonials from Palestinian refugees regarding their vision for a just and durable solution to their plight. For more information about BADIL, please e-mail info@badil.org, or visit its Web site at www.badil.org. 

The Human Rights Brief is accepting submissions for the next edition of "Brief Community News," which will be published in September. If your organization has an event or situation it would like to publicize, please send a short description to hbrief@wcl.american.edu, and include "Brief Community News" in the subject heading of the message. Please limit your submission to two paragraphs. The Human Rights Brief reserves the right to edit for content and space limitations.

War Crimes, continued from page 38

Kayishema also challenged the Trial Chamber's assessment of the credibility of the witness who identified him. The Appeals Chamber dismissed the argument, holding that it is within the Trial Chamber's discretion to assess the probative value of testimony, including how to resolve apparent contradictions.


Similarly, in ground seven of his appeal, Ruzindana suggested that the Trial Chamber erred in not using established criteria to analyze the credibility of Prosecution witnesses; in particular, he claimed that accepting the testimony of one witness on a particular matter was unreasonable and unreliable. In its rejection of Ruzindana's claim, the Appeals Chamber noted that it is impossible to draw up an exhaustive list of criteria for the assessment of evidence, given that the circumstances of each case are different and that a judge must rule on each case in an impartial and independent manner. Dismissing Ruzindana's specific claim, the Chamber reasoned that accepting the uncorroborated testimony of a witness does not necessarily constitute error.

Sentencing

Kayishema's ground eight and Ruzindana's ground nine challenged the Trial Chamber's analysis of aggravating and mitigating circumstances in general, and with respect to their particular circumstances. As a general point, the Appeals Chamber noted that the Trial Chamber has broad discretion in weighing mitigating and aggravating circumstances at sentencing. Additionally, the Appeals Chamber stated that, pursuant to Articles 6(4) and 23 of the ICTR Statute and Rule 101, the Appellant must prove that the Trial Chamber acted beyond its discretion in sentencing the accused.

The Appeals Chamber rejected Ruzindana's claim that by taking into account the heinous means by which he committed the killings, the Trial Chamber confused a material element of the crime with an aggravating circumstance. The Appeals Chamber reasoned that the fact that an act of killing supported a conviction of genocide does not prevent a separate finding that the manner in which it was carried out gave rise to an aggravating factor. It also concluded that there was no abuse of discretion in the way the Trial Chamber weighed the aggravating against the mitigating circumstances in his case.

The Appeals Chamber also rejected Kayishema's claim that the Trial Chamber punished him twice by identifying his position of authority as an essential element in the crime of genocide and an aggravating factor. The Chamber explained

that although a mere finding of command authority cannot be considered an aggravating circumstance, the manner in which an accused exercises that authority can be an aggravating circumstance. In addition, the Chamber found that the zeal shown by the accused in committing the crimes and the harm suffered by the victims were properly characterized as aggravating factors. Finally, the Appeals Chamber stated that even if the Trial Chamber had erred in finding that Kayishema's denial of guilt and assertion of an alibi constituted aggravating factors, such error did not invalidate the sentence imposed since the primary aggravating factor was the gravity of the offense. 

**Maria Allison, author of the summary of the Kayishema and Ruzindana appeals, is a political analyst in the District of Columbia. Leslie Wilson, author of the summary of the Musema Appeal, is a J.D. candidate at the Washington College of Law.*

***Susana SáCouto is the legal coordinator of the War Crimes Research Office at the Washington College of Law.*

ENDNOTES

¹ Musema withdrew his third ground of appeal.

² The Appeals Chamber did not address the merits of the Prosecution's appeal, finding the appeal inadmissible because of the Prosecution's failure to file its appellate brief on time and to demonstrate good cause for filing out of time. In his dissenting opinion, Judge Shahabuddeen concluded that the Prosecution had filed its appellate brief on time and that even if it had not, the Appeals Chamber could have granted the Prosecution an extension of its own accord, as, in his opinion, the Prosecution had demonstrated good cause for an extension of time to file.

³ Kayishema raised three additional arguments supporting his unfair trial claim, namely that: 1) the expression "persons responsible for" in Security Council Resolution 955 and procedural improprieties in the case compromised his right to the presumption of innocence; 2) the court failed to adhere to the adversarial principle; and 3) the Prosecution failed to timely disclose evidence. The Appeals Chamber dismissed all three arguments, finding the first two allegations meritless and rejecting the third claim because it had not been raised at trial.

⁴ In support of his argument regarding the insufficiency of evidence provided by the Prosecution on the specific intent requirement of genocide, Ruzindana also challenged the Trial Chamber's findings regarding his authority during the events in question, claiming the Prosecution had not established that he had either *de jure* or *de facto* authority. Noting that neither is required for a finding of individual criminal responsibility under Article 6(1) of the ICTR Statute, the Appeals Chamber rejected this argument as well.

⁵ Ruzindana's fifth ground of appeal asserted that the Trial Chamber made errors of fact with respect to its analysis of his personal status. This ground failed because Ruzindana failed to put forward an argument in support of his claim.

On February 26, 2003, the Center for Human Rights and Humanitarian Law (Center) at the Washington College of Law (WCL) hosted the Honorable Nilmario Miranda, minister of human rights of Brazil, at WCL. Minister Miranda met with WCL students, administrators, and faculty, and gave an address entitled, "Human Rights in Brazil in the 21st Century." He was accompanied by a delegation of Brazilian dignitaries, including Ambassador Valter Pecly of the Brazilian Mission to the Organization of American States (OAS); Ambassador Hidelbrando Valadares, director general of the Department of Human Rights in Itamaraty; Minister Antônio Carlos Nascimento Pedro, head of the Human Rights Division within the Department of Human Rights in Itamaraty; and Secretary Silvio Albuquerque from the Brazilian Mission to the OAS.

In March, the Center launched the first Indigenous Rights Training Institute (IRTI), co-directed by Center executive director Hadar Harris and Dr. Osvaldo Kreimer, rapporteur of the OAS Working Group on Indigenous Rights and special advisor to the secretary-general of the OAS. The Institute was sponsored by the Inter-American Development Bank, the Open Society Institute, and the Inter-American Institute of Human Rights, and brought together 35 indigenous rights leaders and experts from 14 countries to attend an intensive two-day training session on emerging issues in international law. Participants included attorneys, activists, diplomats, and government officials. The IRTI provided participants with a unique opportunity to learn about cutting-edge international legal issues (including topics such as self-determination, land use, environmental law and sustainability, intellectual property, and human rights) and discuss how these issues relate to indigenous rights. The IRTI included lectures by Dean Claudio Grossman; Santiago Cantón, executive secretary of the Inter-American Commission; Professor Maivan Lam; Professor Marcos Orellano; Professor Durwood Zaelke; Professor Daniel Bradlow; and Professor Peter Jaszi.

The Center and WCL's Program on Law and Government co-sponsored the centerpiece conference of the Washington College of Law Founder's Events, co-chaired by Hadar Harris and Jamin Raskin, WCL professor of constitutional law. The conference, entitled, "International Perspectives on the Right to Vote and Political Democracy in the United States," took place at the Library of Congress on March 20. The conference brought together international experts, legal academics, and civil rights activists to discuss and debate the state of political democracy in the United States. The conference sought the input and comparative expertise of international election experts from the OAS, the UN, and the Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe. In addition, U.S.-based activists and academics, including Wade Henderson of the Leadership Council for Civil Rights, Harvard Professor Alan Keyssar, Michael Maurer of the Sentencing Project, and Tim Cooper from Democracy First, attended the conference.

This semester, the Center selected its first Student Advisory Board, a highly qualified and committed group of students who will assist in developing programming, creating infrastructure, and promoting the Center's activities. Student Advisory Board members have a wealth of experience in the fields of human rights and humanitarian law. They have lived and worked in countries as diverse as Brazil, Turkmenistan, Guatemala, and Zimbabwe, and they have worked for national and international nongovernmental organizations. The Center's Student Advisory Board members for 2003 are David Baluarte, Julia Graff, Sarah Hymowitz, Jamal Jafari, Christine Louise Lin, Chai Shenoy, and R. Michael Waller.

The Munching on Human Rights series, which the Center launched last semester, continued with programs by Professor Claudia Martin, "A Road Map to the Regional Human Rights Systems," and Professor Paul Williams, "International Law and Peacemaking: Stories from the Field." The Munching on Human Rights series is a monthly lunch and learn non-credit introductory course on human rights and humanitarian law for students without an international law background. The series was instituted this year and has had an overwhelming response, with over 100 students attending each session.

Additionally, the Center sponsored an interactive discussion with returned Peace Corps volunteers who debated whether the Peace Corps and similar programs positively affect international development or promote American cultural imperialism. First-year WCL students Kat Fotovat (Moldova), Sarah Hymowitz (Turkmenistan), Jey Jeyalingam (Benin), Roger Phillips (Togo), and Stephanie Richards (Ukraine), shared their experiences and insights.

From May 18–23, 2003 the Center will sponsor the Eighth Annual Inter-American Human Rights Moot Court Competition. Forty-five teams from around the world will convene at WCL for the only trilingual (English-Spanish-Portuguese) moot court competition based on the inter-American human rights system. The competition includes presentations of written memorials and oral arguments based on a hypothetical case, seminars on human rights law, and activities with governmental and international nongovernmental organizations located in Washington, D.C. This year's hypothetical is a compelling case involving the derogation of rights under a state of emergency declared by a democratically elected government facing intense political and economic pressures. The competition is open to students enrolled in a juris doctor degree program or its equivalent. For more information about the Inter-American Human Rights Moot Court Competition, see www.wcl.american.edu/humright/mcourt. ☉



CENTER FACULTY/STAFF NEWS

John Cerone, executive director of the War Crimes Research Office and adjunct professor of law at American University's Washington College of Law (WCL), coached the first WCL student team to participate in the Concours Jean-Pictet. This international humanitarian law moot court competition was held in Greece in March 2003.

Robert K. Goldman, professor of law and co-director of the Center for Human Rights and Humanitarian Law (Center), was interviewed by Pacifica Radio on January 9, 2003 regarding the United States Supreme Court's decision that the U.S. government's indefinite detention of "enemy combatants" is permissible. On January 13 the Canadian Broadcasting Company interviewed him regarding the United States policy on targeted assassinations. In January 2003 Professor Goldman also conducted a live interview with Radio Nacional de España on the prospects of war with Iraq and issues concerning civil liberties in the United States in the wake of September 11; an interview in Spanish with BBC Worldwide radio on the report of the UN inspectors and the Bush administration's reaction to the report; and an interview with Efe Spanish News Agency regarding President Bush's comments on Iraq contained within the State of the Union Address.

Claudio Grossman, dean and co-director of the Center, was invited to serve as the keynote speaker for Peru's Human Rights Day commemorations by the Commission on Human Rights of the Congress of Peru in December 2002. Also in 2002, Dean Grossman published, "Reflecciones sobre la carta internacional de los derechos humanos" ("Reflections on the international charter of human rights") in *Las Comisiones de Verdad y los Nuevos Desafíos en la Promoción de los Derechos Humanos (Truth Commissions and New Challenges in the Promotion of Human Rights)*, Santiago, Chile. Dean Grossman was a guest speaker at the Fred J. Hansen Institute of Peace Studies lecture series at San Diego State University in February 2003. Also in February, he led a breakout session entitled "Changes at a Global Level—Post 9/11/01" at the American Bar Association Mid-Year Deans' Meeting in Seattle, Washington. In March 2003, Dean Grossman chaired the Accreditation Committee for the Middle States Commission on Higher Education for the Inter-American University of Puerto Rico School of Law.

Hadar Harris, executive director of the Center, recently organized and facilitated the Indigenous Rights Training Institute, which brought together 35 indigenous leaders and experts from around the world to discuss emerging issues of public international law as they relate to the rights of Indigenous Peoples. In March 2003, Ms. Harris gave an interview to WTOP radio about the Indigenous Rights Training Institute. Also in March, Ms. Harris delivered a paper and moderated a panel discussion of international experts at the WCL Founder's Centerpiece Conference entitled, "International Perspectives on the Right to Vote and Political Democracy in the United States," held at the Library of Congress.

Claudia Martin, visiting associate professor and co-director of the Academy on Human Rights and Humanitarian Law, participated in a seminar from February 3–5, 2003 on "International Protection of Human Rights and Methodologies to Teach Human Rights Law" in Quito, Ecuador. During this seminar, which was coordinated by the Academy on Human Rights and Humanitarian Law in cooperation with the Pontificia Universidad Católica de Quito (PUCE), and the Centro de Derechos Económicos y Sociales in Ecuador, Professor Martin lectured on new developments in the case law of the Inter-American Court of Human Rights. In addition, Professor Martin, together with Professor Diego Rodríguez Pinzón, submitted an amicus brief before the Inter-American Court on Human Rights regarding Advisory Opinion 18. This brief was produced in partnership with the Human Rights Program of Universidad Iberoamericana, Ciudad de México, as part of their current project on human rights legal education. This spring, Professor Martin and Professor Rodríguez Pinzón will co-publish a law review article entitled, "The International Status of the Rights of Elderly Persons."

Diane Orentlicher, professor of law and co-director of the Center, presented commentary at a January 2003 Symposium on Justice for International Crimes Committed in the Territory of East Timor, held at the University of Melbourne Law School in Melbourne, Australia. The symposium was co-sponsored by the Asia Pacific Centre for Military Law and the Judicial System Monitoring Programme. Also in January, Professor Orentlicher was invited by the Council on Foreign Relations to serve on a Task Force on Iraq. In February 2003, Professor Orentlicher presented a lecture on "Universal Jurisdiction after Pinochet: Prospects and Perils," at the University of California, Irvine. Professor Orentlicher was also quoted in an article appearing in the February 8, 2003 issue of the *National Journal* entitled "Safe Harbor for Saddam."

Diego Rodríguez Pinzón is currently a visiting associate professor, co-director of the Academy on Human Rights and Humanitarian Law, and director of the Human Rights Legal Education-Partnership Projects in Ecuador and Colombia. Professor Rodríguez Pinzón co-organized the first seminar on "International Protection of Human Rights and Human Rights Legal Education," from February 3–5, 2003. Professor Rodríguez Pinzón also gave a lecture on "The Inter-American Commission on Human Rights: Current Issues and Practice." Professor Rodríguez Pinzón, together with Professor Martin, submitted an amicus brief before the Inter-American Court on Human Rights regarding Advisory Opinion 18. This spring Professor Rodríguez Pinzón and Professor Martin will co-publish a law review article entitled, "The International Status of the Rights of Elderly Persons."

Herman Schwartz, professor of law and co-director of the Center, was interviewed in January 2003 by NBC Nightly News regarding President Bush's federal court nominations.

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Staff News, continued from previous page

Professor Schwartz also conducted an interview with the Associated Press in January regarding Chief Justice Rehnquist's request for higher pay for judges. This interview was reproduced by 13 other news sources, including *USA Today*, the *Houston Chronicle*, CBS News, the *Baltimore Sun* and *Dallas Morning News*.

Richard Wilson, professor of law, co-director of the Center, director of the International Human Rights Law Clinic, and director of the WCL Clinical Program, gave a lecture at Columbia Law School in New York City entitled "Litigating U.S. Human Rights Cases before the Inter-American Commission

on Human Rights" in February 2003. On February 8, Professor Wilson participated in a panel discussion at the International Law Weekend West 2003, held at Loyola Law School of Los Angeles. The panel was entitled, "Death Penalty Litigation and the Use of International Law to Interpret the Constitution." At this event, Professor Wilson spoke on the amicus curiae brief he authored for the European Union in *Atkins v. Virginia*, the U.S. Supreme Court's decision striking down the application of the death penalty to persons with mental retardation. From February 26-28, 2003, Professor Wilson traveled to the Czech Republic, serving as the sole U.S. judge on a panel of international jurists judging a moot court competition focusing on refugee law for teams from Central and Eastern Europe. 🌐



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