

Fall 9-1-2002

# The Challenge of Creating 'A World Fit for Children'

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## Recommended Citation

Jonathan Todres, The Challenge of Creating 'A World Fit for Children', Hum. Rts. Brief, Fall 2002, at 18.

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# HUMAN RIGHTS

Center for Human Rights and Humanitarian Law

# BRIEF

A LEGAL RESOURCE FOR THE INTERNATIONAL HUMAN RIGHTS COMMUNITY

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# Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act

by Beth Van Schaack\*

On July 23, 2002, in the courtroom of Judge Daniel T.K. Hurley, a South Florida jury returned a \$54.6 million verdict, encompassing punitive and compensatory damages, in favor of three Salvadoran survivors of torture. The case, *Romagoza v. García*, was brought by three Salvadoran refugees—Dr. Juan Romagoza, Professor Carlos Mauricio, and Neris González—against two former ministers of defense of El Salvador. The plaintiffs were represented by the non-profit Center for Justice & Accountability, a San Francisco-based human rights law firm, with *pro bono* assistance from Bay Area attorneys of Morrison & Foerster LLP, James K. Green of West Palm Beach, and Professor Carolyn Patty Blum and the University of California Boalt Hall School of Law International Human Rights Clinic. The defendants were represented by Kurt Klaus, Jr., a criminal defense and family law solo practitioner based in Florida.

The verdict heralds a major victory in the worldwide fight against impunity for human rights violations. Most significantly, the case is one of the first modern cases in which defendant commanders, fully contesting the allegations and testifying in their own defense, have been held liable for human rights violations exclusively under the doctrine of command responsibility. The case, therefore, served to further cement the doctrine into United States law. The other recent case in which the plaintiffs relied solely on the doctrine of command responsibility, *Ford v. García*, was brought in the same courtroom against the same two generals by families of the four United States churchwomen who were raped and murdered by members of the Salvadoran National Guard in 1980. The two cases were filed concurrently in May 1999 and proceeded in parallel until 2000, when the churchwomen's case went to trial. In November 2000, a jury rendered a verdict in the *Ford* case that the generals could not be held liable for the crimes, apparently because the jury was not satisfied that the two generals had "effective control" over their subordinates. The *Romagoza* case thus provides an important precedent for other human rights cases brought against military commanders for the human rights violations of their subordinates and has also in part rectified what many observers felt was an unfair and flawed result in the *Ford* case due to problems with the jury instructions.

## The Statutory Basis for the Suit: The Alien Tort Claims Act and the Torture Victim Protection Act

The case was brought under two United States statutes that allow victims of human rights violations to sue perpetrators and other responsible parties in United States courts. The Alien Tort Claims Act (ATCA), was enacted in 1789 as part of the First Judiciary Act, which provided that "the district court shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States." The language allowing aliens to sue for torts committed in violation of the laws of nations was later codified as the ATCA, 28 U.S.C. §1350. The plaintiff(s) must be an alien and the defendant(s) may be a U.S. or a foreign citizen or corporation. By most accounts, the ATCA was enacted to respond to certain incidents involving foreign actors that made clear that under

their original grants of jurisdiction, the federal courts were impotent in the face of violations of the law of nations involving non-nationals. The ATCA remedied this jurisdictional gap by allowing the federal courts to adjudicate tort claims under the law of nations, i.e., international law.

The ATCA was little used until 1978, when the family of a Paraguayan youth who had been kidnapped and murdered learned that the policeman who tortured the young man to death was living in the United States. The family enlisted the help of the Center for Constitutional Rights in New York, which brought suit in the United States District Court of the Eastern District of New York under the ancient statute. The district court dismissed the case on jurisdictional grounds, ruling that it felt it was bound by precedent to construe the "law of nations" narrowly so as not to reach the treatment by state agents of citizens of that state. The Second Circuit in *Filártiga v. Peña-Irala*, however, reinstated the case by announcing: "Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties." The *Filártiga*s were eventually awarded over \$10 million in damages, and the defendant was deported.

The modern-day cause of action under the ATCA was bolstered by a more recent and complementary statute, the Torture Victim Protection Act (TVPA), which is codified as a note to the ATCA. The passage of the TVPA was mandated

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by the United States' signature and eventual ratification of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), which obliges states party to enact implementing legislation allowing victims of torture to "prosecute or extradite" suspected torturers and provide victims with a right to reparation. Accordingly, the United States Congress passed the TVPA in 1991, and President George H.W. Bush signed the law in 1992 in order to implement the Torture Convention's obligations with respect to civil redress.

The TVPA provides that

- (1) An individual who, under actual or apparent authority, or under color of law, of any foreign nation—subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Thus, the TVPA creates a federal cause of action specifically for torture and summary execution committed anywhere in the world. Both the plaintiff(s) and the defendant(s) may be U.S. or foreign citizens, as long as the defendant acted under color of law of a foreign nation. The legislative history makes clear that in passing the TVPA, Congress intended to codify the *Filártiga* result and extend the right of access to federal courts to U.S. citizens with international law claims. This history also stresses the importance of protecting human rights around the world and of granting victims of torture and extrajudicial killing access to U.S. courts.

Pursuant to the Torture Convention, Congress also amended the federal criminal code at 18 U.S.C. §23409(a) to provide that: "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." In contrast to other nations, the United States has yet to initiate any prosecutions for torture despite the legal ability, and indeed obligation, to do so. As a result of this inaction, victims of human rights violations seeking justice in the United States are limited to civil redress.

Since *Filártiga*, there have been dozens of civil suits brought under the ATCA and the TVPA in the United States arising out of human rights abuses around the world, including claims of genocide, torture, summary execution, disappearance, arbitrary detention, crimes against humanity, and war crimes. The ATCA is also increasingly being invoked against corporate defendants for complicity in human rights violations including forced labor, extrajudicial killing, and environmental harm. So far, the majority of the cases against individual defendants has resulted in default judgments, because personal jurisdiction over the defendant was based on transient jurisdiction, or the defendant simply fled the jurisdiction once suit was filed or after filing unsuccessful motions to dismiss. As a result, enforcing the multi-million dollar judgments obtained in these cases has proven difficult. Thus, the case against the Salvadoran generals marked one of the first instances in which a defendant in a human rights case, under either the ATCA or the TVPA, presented a vig-



Credit: The Center for Justice & Accountability

Plantiffs Carlos Mauricio and Neris González celebrate after the jury delivered the verdict.

orous defense by testifying in his own defense, and in which at least one of the defendants is believed to have substantial assets.

### The Parties to the Action

The case was brought by three plaintiffs, all refugees from El Salvador, against two former ministers of defense of El Salvador for abuses during the period of 1979-1983. That period was marked by widespread atrocities committed by members of the Salvadoran military and security forces against civilians, including clerics and churchworkers, health workers, teachers, members of peasant and labor unions, the poor, and anyone alleged to have leftist sympathies. A Truth Commission established by the United Nations pursuant to the Salvadoran Peace Accords concluded that tens of thousands of civilians were detained, tortured, murdered, or disappeared during the worst 12 years of the civil war, which ended in 1992. The Truth Commission maintained that 85% of the abuses were attributable to members of the military and security forces, as opposed to unaffiliated death squads or the rebel forces. The plaintiffs in this action were three of the civil war's victims who were fortunate to survive, where others perished.

### Dr. Juan Romagoza

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

At one point during his detention, Dr. Romagoza was visited by an individual whom his torturers called "*mi coronel*," or "the big boss," and to whom they acted deferentially. Dr. Romagoza could see under his blindfold that the individual was wearing a formal uniform and well-polished boots. This new arrival interrogated Dr. Romagoza about two of his uncles who were in the military, asking him if they were passing weapons to the guerillas. When Dr. Romagoza was

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eventually released into his uncle's custody, he saw General Vides Casanova, one of the defendants in the case, talking to his other uncle and recognized the defendant's voice as belonging to the person who had been in the torture room with him.

After his release, brokered by his uncles in the military, Dr. Romagoza escaped from El Salvador and eventually made his way across the Mexican border into the United States. He later received political asylum and now runs a free health clinic for the Latino population of Washington, D.C.

### **Professor Carlos Mauricio**

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

Following this phase of his detention, Professor Mauricio was inexplicably transferred to a public cell where he remained for about nine days. It was at this time that Professor Mauricio realized he would be released. Professor Mauricio was finally released due to the intervention of his then father-in-law, who was in the military. Professor Mauricio believes he was targeted for capture because he had traveled out of the country for schooling and worked with *campesinos* (peasants) to help them increase their yields.

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

### **Neris González**

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

Because of the trauma she suffered, Ms. González has no firm memory of how she escaped captivity. She has been able to piece together that she was taken in the back of a truck full of dead bodies to a local dump. At some point, her baby was born, and local villagers heard the sound of her baby crying and rescued her. Her baby died two months later of injuries

he had received in utero, but Ms. González's only memories of this are what her mother and daughter have told her.

Ms. González eventually moved to the United States at the suggestion of a therapist in El Salvador who told her that her flashbacks, anxiety attacks, and the gaps in her memory were due to the torture she suffered and that he was ill-equipped to treat her. Ms. González's therapist told her about the Marjorie Kovler Center in Chicago, which specializes in working with victims of torture. Ms. González eventually moved to Chicago to get the help she needed and obtained political asylum. She now is the executive director of an environmental education program there.

### **The Defendants**

The defendants in this action were two former ministers of defense of El Salvador. One defendant, General José Guillermo García, was minister of defense from 1979–1983. At that time, the other defendant, General Carlos Eugenio Vides Casanova, was the director-general of the National Guard, one of three internal security forces under the juris-

diction of the ministry of defense along with the army and other military forces. When General García retired in 1983, General Vides Casanova was appointed minister of defense. The defendants both arrived in the United States in 1989, and General García later obtained political asylum based on allegations that he was being threatened by "leftist forces" within El Salvador. Both defendants lived comfortably in south Florida until they were discovered in 1999 by the Lawyers Committee for Human Rights, which had been representing the families of the four churchwomen in their quest for justice.



Trial counsel Peter Stern, Beth Van Schaack, and James Green.

Credit: The Center for Justice & Accountability

### **The Legal Theory: The Doctrine of Command Responsibility**

Both Salvadoran cases were brought under the international legal doctrine of command responsibility. This doctrine has existed as long as there have been military institutions, but it was utilized most prominently during the Nuremberg and Tokyo proceedings following World War II to convict top Nazi and Japanese defendants. Since then, the doctrine has been employed in several ATCA and TVPA cases (including the cases against ex-President Ferdinand Marcos of the Philippines; the self-proclaimed president of Republika Srpska, Radovan Karadžić; and Héctor Gramajo, a former Minister of Defense of Guatemala) and also serves as the basis for prosecutions before the International Criminal Tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR). Long a doctrine of customary international law, command responsibility has in modern times been codified at Articles 86 and 87 in Protocol I to the four 1949 Geneva Conventions, Articles 7(3) and 6(3) of the statutes of the two war crimes tribunals, and Article 28 of the statute of the International Criminal Court. The United States military has long endorsed the doctrine that commanders are responsible for the actions of their subordinates, as is expressed in the Department of the Army's Field Manual, for example.

According to this longstanding doctrine, a military commander can be held legally responsible—either criminally or

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civily—for unlawful acts committed by his subordinates. A commander is found liable if he or she knew—or should have known given the circumstances—that his or her subordinates were committing abuses, and he or she did not take the necessary and reasonable measures to prevent these abuses or punish the perpetrators. The doctrine involves, in essence, three main elements:

1. The direct perpetrators of the unlawful acts were subordinates of the defendant commander;
2. The defendant commander knew (actual knowledge) or should have known (constructive knowledge) that his troops were committing, had committed, or were about to commit abuses; and
3. The defendant commander failed to take steps to prevent or punish criminal conduct by subordinates.

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

In the early stages of both cases against the generals, it was clear that a key challenge would be to establish the legal standard governing when an individual could be considered the legal subordinate of a defendant commander within the understanding of the first prong of the doctrine. With respect to this burden, the ICTY and ICTR have required the prosecution to demonstrate that the defendant commander exercised “effective control” over the individual perpetrators. This approach is most clearly set out in the ICTY judgment in *The Prosecutor v. Delalić et al.* According to this approach, a showing of *de jure* command over an individual within a military hierarchy is a relevant, but not sufficient, showing to satisfy the first prong of the doctrine. Rather, satisfaction of the first prong of the doctrine requires a showing that a commander exercised *de facto* control over subordinates. This burden requires the presentation of evidence that, among other things, the commander was actually able to issue orders to his subordinates and to ensure that those orders were carried out. Although this approach was developed in the context of the Yugoslav conflict, in which individuals operating without a grant of *de jure* command from any formal state were exercising *de facto* control over individuals committing abuses, the tribunals have applied the effective control requirement to prosecutions against *de jure* commanders as well, for example, in *The Prosecutor v. Blaškić*.

Given the strength of this international precedent, Judge Hurley ruled in the *Ford* case that prong one of the doctrine of command responsibility would be satisfied with proof that the defendants exercised effective control over the individuals committing the abuses. After long deliberations with the parties, this standard was eventually concretized in instructions on the law for the jury. The *Ford* plaintiffs appealed this ruling and the resulting jury instructions, urging that it was uncontested that the generals exercised *de jure* command over their subordinates in the National Guard and that the *Ford* instructions improperly placed the burden on



Trial counsel Joshua Sondheimer and Carlos Mauricio.

Credit: The Center for Justice and Accountability

the plaintiffs to prove effective command as well, which they argued was an affirmative defense of the defendants. The Eleventh Circuit Court of Appeals recently upheld the district court’s jury instructions, requiring the plaintiff to prove that the defendant commander—either *de jure* or *de facto*—exercised effective control over his troops. The plaintiffs in *Ford* have petitioned for *certiorari*.

The Eleventh Circuit opinion, in effect, gave the *Romagoza* plaintiffs their marching orders in terms of the command responsibility jury instructions. Accordingly, the instructions in the *Romagoza* case set forth the elements of the doctrine as follows:

- 1) The plaintiff was tortured by a member of the military, the security forces, or by someone acting in concert with the military or security forces;
- 2) No independent superior-subordinate relationship existed between the defendant/military commander and the person(s) who tortured the plaintiff;
- 3) The defendant/military commander knew, or should have known, owing to the circumstances of the time, that his subordinates had committed, were committing, or were about to commit torture and/or extrajudicial killing; and
- 4) The defendant/military commander failed to take all necessary and reasonable measures to prevent torture and/or extrajudicial killing, or failed to punish subordinates after they had committed torture and/or extrajudicial killing.

The instructions then explained that “effective control” means that

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

Thus, in contrast to the *Ford* case, the term and definition of “effective control” was not contained in the formulation of the doctrinal elements themselves. Rather, it appeared in a subsidiary explanatory paragraph, which likely served to de-emphasize the concept for the jury. The instructions also clarified that it was not necessary to prove that the defendant commander knew that the plaintiffs themselves would be targeted for abuse; rather, it was sufficient that the defendants

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# United States Court Finds Unocal May Be Liable for Aiding and Abetting Human Rights Abuses in Burma

by John Cheverie\*

On September 18, 2002, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court's decision to grant summary judgment to the defendant Unocal Corporation in the *Doe v. Unocal* lawsuit. The Ninth Circuit's decision, which allows the landmark case against the California-based gas and oil giant to go forward, stands for the important proposition that corporations can be held legally accountable for aiding and abetting a foreign government's human rights abuses in violation of international law.

In 1997, the United States District Court for the Central District of California agreed to hear *Doe v. Unocal*. The lawsuit filed by Burmese peasants alleging Unocal's legal responsibility for human rights abuses, including forced labor, murder, and rape, committed by the Burmese military on behalf of Unocal's Yadana gas pipeline project. The decision in *Doe v. Unocal* marked the first time a U.S. court asserted the jurisdictional authority, granted under the Alien Tort Claims Act (ATCA), to determine a corporation's liability for human rights abuses in violation of international law in a foreign country.

Three years after the initial filing, the district court found that the plaintiffs had presented evidence that Unocal knew of and benefited from the alleged human rights abuses. Despite these findings, however, the court dismissed the plaintiffs' case. The court reasoned that Unocal's knowledge of and deriving benefits from human rights violations were insufficient to establish that Unocal wanted these human rights violations to occur. Recently, the U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision, allowing the lawsuit against Unocal to proceed.

## Background

A man is shot at by Burmese soldiers for fleeing forced labor on the Yadana project. In retaliation for his flight, the soldiers kick his wife and baby into a fire. The child dies a few days later. Burmese soldiers assigned to the pipeline rape women in villages along the route and summarily execute villagers who are too weak to participate in the forced labor program connected with the Yadana project. These are only a few examples of the abuses connected with Unocal's Yadana project.

In 1992, Unocal acquired an interest in the Yadana natural gas pipeline project, becoming a co-venturer with France-based Total, S.A. (now Total-Fina-Elf) and the Burmese military junta's Myanmar Ministry for Oil and Gas Enterprises (MOGE). Unocal decided to invest in Burma, and

work in tandem with the Burmese government, despite Unocal's knowledge of the junta's notorious and well-deserved reputation as one of the worst human rights violators in the world. Unocal's own consultants pointed out that "the government habitually makes use of forced labour to construct roads" and that "in such circumstances Unocal and its partners will have little freedom of manoeuvre." A U.S. Department of State report from the same year mirrors the assessment of Unocal's consultants in pointing out that the Burmese military routinely conscripts forced laborers and porters.



Construction of the Yadana pipeline.

Credit: EarthRights International

The project's goal was to exploit the Yadana natural gas field located off Burma's coast in the Andaman Sea by extracting gas from the underwater field and transporting it via a pipeline from Burma into Thailand. The portion of the pipeline in Burma is about 40 miles long, and extends from the Burmese coast across Burma's Tenasserim region to the Thai-Burma border. The Tenasserim region is a fragile area of pristine forests inhabited by indigenous ethnic minority groups as well as many endangered species. A Yadana project contract made MOGE responsible for providing security on the pipeline project.

Future abuse in Burma was particularly foreseeable at the time Unocal made its decision to invest in the Yadana project as Unocal entered Burma immediately following a 1988 military crackdown and an election fiasco in 1990. In 1988, the Burmese military junta violently repressed non-violent demonstrations calling for democracy and human rights, in what is often referred to as Burma's Tiananmen Square. The uprising resulted in thousands of deaths, and thousands of people were jailed without trial. Following the crackdown, the military dictatorship dubbed itself the "State Law and Order Restoration Council" (SLORC, herein used to describe the Burmese government and military and, at times, MOGE), renamed Burma "Myanmar," and instituted martial law.

In 1990, SLORC bowed to citizens' demands for multiparty elections but refused to recognize the election results when the National League for Democracy (NLD) won a convincing victory. SLORC further responded to the election results by intimidating and placing under house arrest NLD leaders, including 1991 Nobel Peace Laureate Aung San Suu Kyi, and placing some under arbitrary arrest and detention. Since the election incident, Aung San Suu Kyi and other NLD leaders have requested that the international community not invest in Burma in hopes of undermining the dictatorship's

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unjust rule. In 1997, the Clinton administration responded by imposing an embargo on new investments in Burma. Because the embargo did not have retroactive effect, however, the biggest U.S. investor in Burma, Unocal, was not forced to leave.

Due to Unocal's knowledge of past human rights abuse in Burma, the alleged human rights abuses that came with the Yadana pipeline project were completely foreseeable. Pursuant to its contract with Unocal and Total, MOGE drastically increased the SLORC military presence along the pipeline route. Not surprisingly, with the increased military presence came a corresponding increase in human rights abuses. SLORC used its well established modus operandi of human rights abuse to provide not only pipeline security, but also to forcibly relocate entire villages for the benefit of the construction of the pipeline. In addition, SLORC's use of forced labor and portering to clear land for the pipeline and to build pipeline infrastructure has been well documented. In the process of using forced labor, forced portering, and forced relocation to benefit the project, SLORC committed other human rights abuses including rape, torture, and extrajudicial killing.

To this day, Unocal is aware that both state governments, including the U.S. government, and non-governmental organizations, such as Amnesty International and Earth-Rights International (ERI), continue to cite the Burmese military dictatorship's egregious human rights violations. A 2001 U.S. Department of State report cites "the [Burmese] Government's extremely poor human rights record and longstanding severe repression of its citizens," and reports that the junta continues to maintain repressive control over the country through intimidation, arbitrary arrests and detentions, physical abuse, and other human rights abuses. The report goes on to describe Burma's security forces' "serious human rights abuses," citing credible reports of extrajudicial killing, rape, and torture, among others. The State Department also reports that over 1,500 political prisoners are being held in Burma. International organizations, including the United Nations and the International Labor Organization (ILO), also continue to document and decry the human rights situation in Burma. A 1998 ILO report found "abundant evidence . . . showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military."

### **The Lawsuit's History**

In 1996, plaintiffs from Burma's Tenasserim region brought a lawsuit against Unocal and two top Unocal executives John Imle and Roger Beach (Unocal), Total, MOGE, and SLORC for SLORC's abusive behavior connected to the Yadana pipeline project. ERI and others, including the Center for Constitutional Rights, Hadsell & Stormer, and the Law Offices of Paul Hoffman, filed the lawsuit on the plaintiffs' behalf in the U.S. District Court for the Central District of California. A similar lawsuit was filed by the International Labor Rights Fund. The plaintiffs sought damages and injunctive and declaratory relief from the defendants for SLORC's violations of U.S. federal and state law.

The plaintiffs claimed, in part, that Unocal was directly and vicariously liable for SLORC's human rights abuses in violation of international law, connected to the pipeline project, pursuant to the ATCA. The ATCA grants U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The plaintiffs claimed that the defendants violated international laws prohibiting forced labor, murder, and rape.

### ***The Federal District Court's Decision to Assert Jurisdiction over the Claims against Unocal***

Unocal responded to the plaintiffs' complaint by filing a motion to dismiss for lack of jurisdiction. In 1997, the district court granted Unocal's motion in part by dismissing the plaintiffs' lawsuit against MOGE and SLORC. In addition, the court later dismissed the plaintiffs' claims against Total for lack of personal jurisdiction. However, the court denied Unocal's motion to dismiss in part, holding that the lawsuit could proceed against Unocal. The court's decision marked the first time a U.S. federal court held that it could find a private U.S.-based corporation liable for violations of international law committed abroad under the ATCA.

The court's decision to dismiss the plaintiffs' claims

against MOGE and SLORC was based on its determination that it could not assert jurisdiction over them as a foreign state's agents or instrumentalities under the Foreign Sovereign Immunities Act (FSIA). In U.S. law, it is presumed that foreign states, and their agents and instrumentalities, are immune from U.S. courts' jurisdiction. The only way that this presumption of immunity can be rebutted, and

jurisdiction can be established, is if one of the limited exceptions delineated in the FSIA is met. Here, the court held that MOGE's and SLORC's alleged activities did not fit into one of the exceptions provided for under the FSIA. As a result, the court refused to rebut the presumption that MOGE and SLORC were immune from U.S. courts' jurisdiction, and dismissed the plaintiffs' case against them.

At the same time, the court rejected Unocal's argument that the court should refuse jurisdiction over the defendants under the act of state doctrine. The act of state doctrine is a discretionary, judicially made doctrine (unlike the FSIA which is a statute) that directs U.S. courts to consider international comity and U.S. domestic separation of powers issues when deciding whether or not to hear a particular lawsuit. The doctrine suggests that courts ought to decline jurisdiction when hearing a case that would require a U.S. court to judge the acts of another sovereign state's government or require the U.S. judicial branch to interfere with responsibilities delegated to the other branches of government. Here, the court determined that comity and separation of powers considerations did not compel the court to decline jurisdiction over the case because of the U.S. government's overall condemnation of the Burmese regime.

Most notably at this stage, the court rejected Unocal's motion to dismiss the plaintiffs' ATCA claims. Unocal's motion contended that only states can violate international law and that, by definition, the ATCA failed to provide the

**Due to Unocal's knowledge of past human rights abuse in Burma, the alleged human rights abuses that came with the Yadana pipeline project were completely foreseeable.**



court with subject matter jurisdiction over the plaintiffs' claims against a private, non-state actor like Unocal. The court rejected Unocal's argument, holding that state actors as well as states can violate international law, and that the state action requirement could be met if the plaintiffs established that Unocal was directly or vicariously liable for SLORC's international law violations.

Additionally, the court found that at least the plaintiffs' forced labor were of the kind that did not require any state action under international law. Specifically, the court noted that the plaintiffs' forced labor claims amounted to allegations of slavery, one of a limited number of egregious international law violations for which non-state actors can be held liable under the ATCA. Therefore, the district court asserted subject matter jurisdiction over the plaintiffs' claims by determining that the plaintiffs had pled sufficient facts to state a claim against Unocal pursuant to the ATCA.

### ***The Federal District Court's Decision to Grant Unocal's Summary Judgment Motion***

Following discovery, Unocal filed a motion for summary judgment. At this stage, Unocal argued before a different judge of the same court that the plaintiffs had failed to present evidence establishing a genuine issue of material fact such that a reasonable factfinder could return a verdict in the plaintiffs' favor. At the end of August 2000, the district court granted Unocal's motion for summary judgment as to the plaintiffs' federal claims and dismissed the plaintiffs' state law claims without prejudice.

Regarding the plaintiffs' ATCA claims requiring state action, namely the murder, rape, and torture claims, the court found that the plaintiffs presented evidence demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.

Despite these findings, the court nonetheless dismissed plaintiffs' claims by holding that the claims failed as a matter of law because the plaintiffs could neither show that Unocal engaged in state action nor controlled SLORC. In terms of Unocal's engagement, the court stated that the plaintiffs presented no evidence that Unocal "participated in or influenced" SLORC's unlawful acts or "conspired" with SLORC to commit the alleged human rights abuse. The court also held that the plaintiffs presented no evidence that Unocal "controlled" SLORC's decision to commit the alleged human

rights abuses. Therefore, the court decided that Unocal's knowledge of and benefiting from SLORC's unlawful conduct was not enough to hold Unocal potentially liable for the plaintiffs' ATCA claims requiring state action.

The district court held that the plaintiffs' forced labor claims, the ATCA claims not requiring state action, failed as a matter of law as well. In so ruling, the court found that Unocal's knowledge of and acceptance of benefits from SLORC's forced labor practices surrounding the pipeline project were not sufficient, but that proof of Unocal's "active participation in the unlawful conduct" was required to impose liability on the corporation. The court took the "active participation" standard from the Nuremberg Trials, and explained its overall position by stating that

The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice. However, because such a showing is insufficient to establish liability under international law, Plaintiffs' claim against Unocal for forced labor under the Alien Tort Claims Act fails as a matter of law.

The plaintiffs appealed the decision regarding the ATCA and other federal law claims to the U.S. Court of Appeals for the Ninth Circuit and filed the state law claims, which had been dismissed without prejudice, in a California state court. The lawsuit filed in California state court survived summary judgment and is set to go to trial in February 2003. The appeal was argued before a panel of Ninth Circuit judges in December 2001.

### ***The Ninth Circuit's Decision to Reverse the District Court's ATCA Ruling***

On September 18, 2002, the U.S. Court of Appeals for the Ninth Circuit (Court) reversed the district court's grant of

Unocal's summary judgment motion on the plaintiffs' ATCA claims for forced labor, murder, and rape. Specifically, the Court found that Unocal may be liable for aiding and abetting SLORC's forced labor, murder, and rape practices.

### ***The Ninth Circuit Disagrees with the District Court's Liability Standards***

Regarding the forced labor claims, the Court agreed with the district court's decision on Unocal's motion to dismiss that the plaintiffs did not have to demonstrate Unocal was a state actor but could hold Unocal indi-

vidually liable for SLORC's violations under international law. In so doing, the Court identified forced labor as one of the limited number of international law violations not requiring state action by equating forced labor with "a modern variant of slavery." The Court disagreed, however, with the district court's ruling on summary judgment that the plaintiffs were



Helipad used to facilitate the construction of the Yadana pipeline.

Credit: EarthRights International

required to show that Unocal's conduct rose to the level of "active participation" in SLORC's forced labor practices.

The Court explained that the district court mistakenly borrowed the "active participation" standard from the Nuremberg Trials. The Court pointed out that in Nuremberg the "active participation" standard was utilized to overcome the German industrialist defendants' necessity defense. The necessity defense is applicable when "it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." Here, the Court found that Unocal did not and could not invoke the necessity defense. Unlike the industrialists under the Nazi regime, Unocal was under no compulsion to do business with the Burmese military. As such, deprived of the context required to invoke the necessity defense, the Court held that the district court erred by citing Unocal's "active participation" in SLORC's forced labor activities as the relevant standard.

The Court went on to say that, even if "active participation" had been the correct standard, the district court misapplied the standard considering the evidence presented by the plaintiffs. The Court determined that the plaintiffs had presented evidence sufficient to raise a genuine issue of material fact as to whether or not Unocal had "actively participated" in SLORC's forced labor practices. The Court explained that the evidence showed that Unocal resembled the defendants in the *Krupp* case before the Nuremberg Tribunal. In *Krupp*, the Tribunal held that the defendants met the "active participation" standard because they "well knew that any expansion [of their business] would require the employment of forced labor." Here, the Court stated that there was evidence that Unocal knew that expanding its business in Burma would require forced labor. The evidence cited by the Court includes Unocal President John Imle's statement that "if forced labor goes hand in glove with the military yes, there will be more forced labor [as a result of SLORC's protecting the pipeline]."

Regarding the murder and rape claims, the Court held that the District Court erred in requiring the plaintiffs to meet the state action requirement and show that Unocal "controlled" SLORC's decision to commit alleged murder and rape. The Court held that there is no state action requirement where the alleged international law violations were committed in the context of perpetrating crimes that do not require state action, such as slavery. The Court reasoned that, because the plaintiffs' allegations of murder and rape allegedly "occurred in furtherance of a forced labor program," and because forced labor is "a modern variant of slavery," the plaintiffs need not meet the state action requirement for their murder and rape claims. Therefore, as with the forced labor claims, the Court found that Unocal may be held individually liable, as a non-state actor, for SLORC's alleged murder and rape connected to the project.

It follows, and the Court so held, that the district court erred in requiring the plaintiffs to establish proximate cause by showing that Unocal "controlled" SLORC's alleged decision to murder and rape the plaintiffs. The Court found that, because no showing of state action is required, the plaintiffs need show only foreseeability to establish the requisite prox-

imate cause. Using the same reasoning, the Court concluded that the same liability standard should be used when assessing all of the plaintiffs' forced labor, murder, and rape claims.

#### ***The Ninth Circuit's Aiding and Abetting Liability Standard***

The Court determined that aiding and abetting is the appropriate liability standard, and that under this standard the plaintiffs had established that Unocal may be liable for SLORC's violations of international law under the ATCA. The Court held that the aiding and abetting standard under the ATCA is "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime." The aiding and abetting standard that the Court applied was based in international law.

Given the record in *Doe v. Unocal*, the Court determined that international law was the appropriate source for the applicable aiding and abetting liability standard. The Court looked specifically to recent decisions of the International Criminal Tribunals for the former Yugoslavia and for Rwanda to help determine the current aiding and abetting standard to be used under the ATCA.

The Court found useful the aiding and abetting standard defined in the *Prosecutor v. Furundžija* case before the Yugoslavia Tribunal, describing it as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime." The Court also looked to the aiding and abetting standard in the U.S. domestic Restatement (Second) of Torts: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The Court ultimately applied a "slightly modified *Furundžija* standard." By taking out the "moral support" portion of the *Furundžija* rule, the Court was left with "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime." The Court explained that this aiding and abetting standard was appropriate because it was rooted in and consistent with the Nuremberg precedent in the context where the necessity defense was inapplicable.

Under this standard, the Court determined that the plaintiffs established genuine issues of material fact concerning Unocal's liability for aiding and abetting SLORC's forced labor, murder, and rape. The Court found that a reasonable factfinder could conclude that Unocal's alleged actions met the aiding and abetting standard's *actus reus* requirement because the plaintiffs submitted evidence that Unocal provided SLORC with "practical assistance or encouragement which had a substantial effect on the perpetration" of the crimes of forced labor, murder, and rape. The Court explained that Unocal's "practical assistance or encouragement" of SLORC's abuses was supported by evidence showing that Unocal may have hired SLORC to provide pipeline security and build pipeline infrastructure in exchange for money and food. The Court's assertion was also supported by evidence that Unocal used photos, maps, and surveys to show SLORC where to provide security and build infrastructure. In addition, the

**The Court determined that aiding and abetting is the appropriate liability standard, and that under this standard the plaintiffs had established that Unocal may be liable for SLORC's violations of international law under the ATCA.**

# The Gender Gap: Treatment of Girls in the United States Juvenile Justice System

by Ossai Miazad\*

Girls under the age of 18 have become the fastest-growing segment of the juvenile justice population in the United States. This trend has raised concerns over the treatment of girls in a traditionally male-oriented juvenile justice system. Two major issues have surfaced identifying a gap in treatment of girls compared to that of boys in the system. First, girls may be incarcerated for conduct that is more tolerated in boys; and second, once in detention facilities, girls may receive poorer treatment and have less opportunity for rehabilitation than do boys.

Both girls and boys who enter the juvenile justice system in the United States and face confinement are often subjected to brutal physical force, cruel punishment, and overcrowding coupled with low staff levels as well as inadequate healthcare, mental health counseling, and educational programs. The growing number of girls in this population faces the additional burden of entering a detention system largely tailored for a male population. If the goal is one of rehabilitation, as articulated by national and international standards, then detention facilities' female populations require distinct programs and treatment because girls' backgrounds and needs are significantly different from those of boys. As a 1999 Amnesty International Report on juvenile justice in the United States noted, "There is an important difference between equality in the availability of services and equity, or fairness." Fairness, as the report points out, is related to the level of services provided as it correlates to the juveniles' needs. The special needs of girls must be taken into consideration to guarantee that they receive equal opportunity for rehabilitation.

## Profile of Girls Entering the Juvenile Justice System

Females accounted for 27 percent of the juvenile arrests reported in 1999. According to the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the percentage of female arrests for most types of crime increased from 1980-2000. Despite this increase, girls continue to be arrested largely for non-violent crimes. According to FBI Uniform Crime Reports, the largest numbers of arrests among girls are for larceny, typically shoplifting, and for running away.

According to the OJJDP, the typical female entering the juvenile justice system is between the ages of 14 and 16, is from a minority community, lives in a poor neighborhood with a high crime rate, and has been the victim of physical, sexual, and/or emotional abuse. OJJDP reports that females in detention facilities tend to be younger than their male counterparts. A high percentage of female "delinquents," a reported 70 percent, have a history of sexual abuse, compared to a reported incidence rate of 30 percent reported incidents

for boys. Hans Steiner, professor of psychiatry at Stanford University School of Medicine, reports in a survey of youth labeled as juvenile offenders by the California Youth Authority, that girls scored high with respect to the prevalence of disorders such as posttraumatic stress disorder (PTSD), anxiety and depression, as well as behaviors such as physical and verbal aggression and delinquency. Dr. Steiner concluded that because girls experience more physical and sexual abuse, they tend to exhibit psychopathology including PTSD, suicidal behavior, disassociative disorder, and borderline personality disorder, more frequently than do boys. The study also found that aggressive behaviors are four times more common in girls than in boys. Other patterns that are more common among females include eating disorders and lower levels of self-esteem. Teen pregnancy is another factor unique to the female juvenile population.

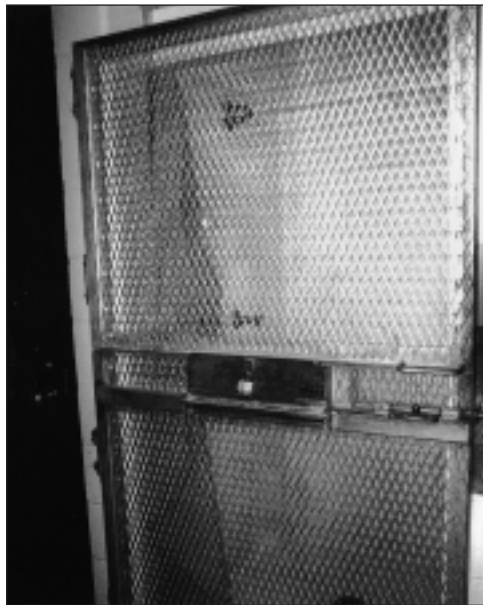
## The Gender Gap

### The Over-Incarceration of Girls

Between 1988 and 1997, girls' rate of detention increased more than twice that of boys. Research shows that the source of the increase is gender bias in the system and a systematic failure by a male-oriented system to understand the issues unique to girls. Although one might expect this increase to indicate higher levels of violent behavior among girls, the OJJDP suggests that the increase is not likely attributable to an increase in violent behavior in this population. According to its report, if growth in violent behavior led to an increase in assault arrests, then the arrest rate should have also increased in other categories of violent crime arrests such as robbery. More likely explanations of the increase in assault arrests are the re-labeling of girls' family conflicts as violent offenses, and changes in law enforcement practices

resulting in mandatory arrest laws for incidents regarding domestic violence.

According to a joint study by the American Bar Association and the National Bar Association, girls are more likely to find themselves detained for minor offenses that could be better dealt with in a less restrictive manner. In its 1999 National Report, the OJJDP revealed that while only 11 percent of juveniles in detention facilities for delinquency offenses (including criminal homicide, sexual assault, robbery, aggravated assault, burglary, theft, arson, and drug trafficking) were female, the proportion of females detained for committing status offenses was considerably higher. Status offenses refer to juvenile violations that would not be considered illegal if committed by an adult. The 1999 OJJDP National Report cites that girls comprise 63 percent of detained runaways;



Credit: Mark I. Soler

The steel door to the shower in the girls' unit of the South Dakota State Training School, a juvenile prison. Male staff in the vicinity could observe the girls while they were showering. The Youth Law Center filed suit against state officials for the abusive conditions of confinement of youth at the facility. This prison is no longer in use.



47 percent of detained truants (unjustified failure to attend school); 44 percent of detained incorrigibles (serious or persistent misbehavior of a child, making reformation by parental control impossible); 35 percent of those held for underage alcohol offenses; and 28 percent of those detained for curfew violations. A study on detention patterns across various United States detention sites, conducted by the Annie E. Casey Foundation's Juvenile Detention Alternative Initiative (JDAI), supports the assertion that girls are more likely than boys to be detained for less serious offenses. In one JDAI study, 29 percent of girls were detained for minor offenses (public disorder, probation violations, status offenses and traffic offenses), compared to 19 percent of boys. The results of the joint bar study as well as juvenile justice expert opinions suggest that law enforcement's paternalistic attitudes have contributed to the growing number of girls in detention, especially with regard to status offenses such as running away, curfew violations, and loitering.

Although Congress passed the Juvenile Justice Act prohibiting the incarceration of status offenders in 1974, a 1998 amendment to the Act provides an exception for cases in which a youth violates a "valid court order." This exception gives courts the authority to confine female status offenders for contempt or for violations of court orders. Studies indicate that girls are more likely to face incarceration for contempt.

For instance, a Florida study found that the typical male entering the juvenile justice system had a 3.9 percent chance of incarceration, which increased to 4.4 percent if he was found in contempt. In comparison, the typical female entering the juvenile justice system had a 3.9 percent chance of incarceration that increased to 63.2 percent if she was held in contempt. Studies suggest that girls are more likely to be detained for technical violations of parole or probation than boys. In studying one location, the JDAI study found that girls were nearly three times more likely than boys to be detained for probation and parole violations. JDAI findings of detention recidivism indicate the existence of a gender gap in recidivism for probation violations, warrants, and program failure offenses. Across JDAI study sites, girls comprised only 14 percent of the total population. Of those, however, 30 percent returned to detention within one year, with 53 percent returning due to warrant, probation, parole violation, or program failure. Only 41 percent of boys returned to detention for the same offenses. Those girls returning twice within one year for the same reasons totaled 66 percent, as compared to 47 percent for boys. Finally, in comparing girls and boys returning to detention three times within one year, girls had a return rate of 72 percent versus 49 percent for boys.

Evidence suggests that the system fails to address appropriately the gender dimension of juvenile delinquency. For

example, the disproportionate representation of girls in runaway arrests is likely related to the equally disproportionate number of incarcerated girls who report sexual abuse. Reports indicate that girls who are victims of sexual abuse are more likely to run away, and that girls are more likely than boys to be detained for running. The system also routinely misdirects its attention on the behavioral problems of "delinquent" girls rather than the underlying depression that is so common within this population.

### *Principle of the Least Restrictive Alternative*

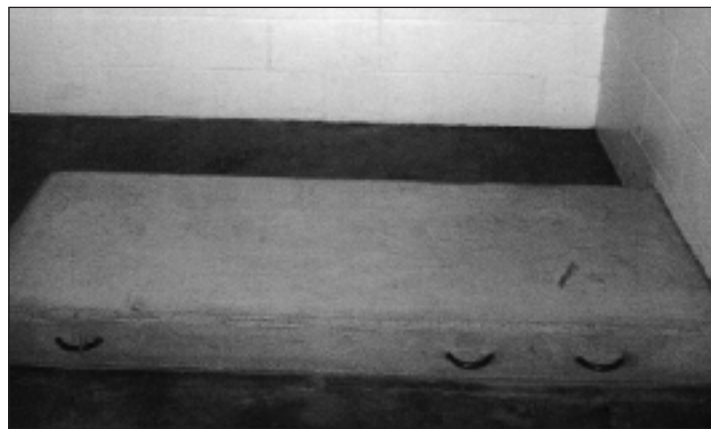
International legal standards and many state statutes mandate the use of the least restrictive alternative when addressing juveniles in the justice system. The least restrictive alternative recognizes that depriving a child of her liberty and removing her from her community will likely have significant repercussions, and should be avoided whenever possible. Considering that girls enter the justice system

largely for non-violent offenses, it is difficult to imagine incarceration as the "least restrictive alternative." U.S.-based organizations, such as Girls Incorporated, have noted the correlation between the lack of community-based services for girls, and the fact that girls are being incarcerated in increasing numbers and for less serious offenses.

Article 37(b) of the UN Convention on the Rights of the Child (CRC) asserts that detention or imprisonment of a child should be used only "as a measure of last resort and for the shortest appropriate time period."

Notably, the United States

and Somalia are the only two UN member states that have not ratified the CRC. International minimum standards related to juvenile justice also advocate against excessive incarceration. Although these standards do not have the legal authority of treaties, the UN General Assembly, in which the United States is represented, has adopted them. Point 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN Rules) supports imprisonment as an option of last resort. Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) espouses the "principle of proportionality" stating that the reaction to a juvenile offense should be in proportion to the circumstances of both the juvenile and the offense. Further, Rule 17 of the Beijing Rules suggests that, "[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum." During the recent UN General Assembly Special Session on Children, international child rights experts highlighted the principle of detention as a last resort, and criticized New York City's overuse of detention centers and its plans to expand the city's juvenile jail system.



Credit: Mark I. Soler

A concrete slab that served as a bed in a lockdown cell in the girls' unit of the South Dakota State Training School. Staff handcuffed the girls, shackled their ankles, and restrained their wrists and ankles to the sides of the slab. Girls were left in four-point restraints for hours at a time.

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## **Failed Rehabilitation**

### *Insufficient Mental Health Care*

Rehabilitation can be a difficult struggle for girls as they enter a system of treatment and controls created for a male juvenile delinquent population. The mental health needs of the entire juvenile justice population are severely underserved, but for the female population, the impact is particularly devastating due to their overwhelming need for mental health care. Research indicates that girls in the juvenile justice system have different and arguably greater therapeutic needs. One study of the mental health condition of delinquents concluded, “The female delinquents in the sample manifested more depressive and anxious symptoms than their male counterparts, presented a greater suicide risk, and evidenced more severe abuse histories and traumatic after effects of that abuse.” Other studies of male and female delinquent adolescents have led to the conclusion that girls’ problematic or criminal behaviors are typically related to abusive, sexually exploitative, or traumatizing home life, whereas boys’ criminal activities are typically related to their involvement with antisocial peers.

There is a notable absence of programming specifically directed toward assisting incarcerated girls. Detention centers often fail to screen for more general mental health needs or for prior sexual abuse. Furthermore, those staffing detention centers often lack training that would sensitize them to the issues of mental illness and prior abuse among the female detained population.

International standards, U.S. laws, and national correctional standards explicitly provide that children deprived of their liberty are entitled to physical and mental health care services. A federal district court judge in Connecticut recently held in *Emily J. v. Weicker* that the state’s neglect of mentally ill and traumatized children in its juvenile detention centers violates their Fourteenth Amendment right to due process. The judge reasoned, “It is essentially undisputed that these children are not getting timely and adequate mental health services. In fact, the evidence shows that their condition can, and has, become worse while being held in detention. That adds up to a violation of their Fourteenth Amendment due process right to timely and adequate medical care.”

Point 1 of the UN Rules requires, “The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles.” More specifically, Point 27 asserts the need for immediate psychological evaluation of a child entering detention to determine the appropriate level of care and programming. When special rehabilitation is required, Point 27 mandates the creation of an individualized treatment plan for the child. Further, Rule 26.2 of the Beijing Rules articulates, “Juveniles in institutions shall receive care, protection and all necessary assistance—social, educational, vocational, psychological, medical and physical—that they may require because of their age, sex, and personality and in the interest of their wholesome development.”

### *Violence*

Girls are often re-victimized once in detention centers. For example, interviews with girls in detention centers across the United States indicate the use of demeaning and sexually abusive language by staff. Girls subject to detention by the California Youth Authority reported being called “hood rat,” “slut,” and “little hooker.” In a detention center in Massachusetts, girls described being called “whore” and “trash.” This abuse is coupled with a lack of effective accountability mechanisms in many facilities.

Point 87(a) of the Beijing Rules reads, “No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever.” Further, the Eighth Amendment of the U.S. Constitution prohibits the imposition of cruel and unusual punishment. The U.S. Supreme Court, and lower courts, have interpreted the prohibition of cruel and unusual punishment, and other provisions of the U.S. Constitution, as guaranteeing individuals in prisons and jails a range of rights in matters such as physical safety, medical care, access to the courts, and procedural safeguards in disciplinary hearings.

The rapid increase of girls entering detention centers has led to overcrowding in some facilities, often resulting in increased use of restraints and isolation as mechanisms of control. According to Francine Sherman, director of Boston College of Law’s Juvenile Advocacy Project, facilities are inconsistent in training staff in gender appropriate restraint methods for girls. Professor Sherman notes that use of such measures can prove particularly harmful considering that some of these girls may be pregnant and that many girls may relive the trauma of sexual and other forms of abuse when restrained or placed in isolation.

Despite international standards prohibiting inhuman and degrading treatment, solitary confinement of children is a common punishment in U.S. juvenile facilities. The UN Rules specifically prohibit punishing children by using “closed or solitary confinement,” on the grounds that such confinement is cruel, inhuman or degrading treatment that may compromise a child’s physical or mental health. Studies show that isolation increases the risk of suicide in adolescents. While isolation is dangerous and ineffective for the juvenile justice population generally, given that twice as many girls as boys attempt suicide, the risk for girls is perhaps even more severe.

## **Gender-Specific Approaches: National and International Law**

Facilities in the United States should implement gender-sensitive programming in detention facilities to comply with U.S. and international legal standards focusing on the best interests of the child and on rehabilitation. Girls entering a system that does not take their special circumstances and needs into consideration are likely to have less opportunity for rehabilitation. This absence of rehabilitation likely translates into harmful repercussions for the future of both girls in detention and society in general.

### *National Standards*

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP) sets forth specific requirements for states to meet in order to access federal juvenile justice funds. It was not until 1992, as part of the Reauthorization of the JJDP, that states applying for federal grants were required to identify gaps in their ability to provide services to girls entering the system. The new voluntary standards for facilities commissioned by the OJJDP specify the need for gender-specific services. The OJJDP considers that, “programs to address the unique needs of female delinquents have been and remain inadequate in many jurisdictions.” Additionally, most states reference “rehabilitation” and/or “best interests and welfare” of the child in their Juvenile Court Acts. For example, the Pennsylvania purpose clause for juvenile corrections reads, “The purpose of the youth development centers is to promote and safeguard the social well-being and general welfare of minors of this Commonwealth by providing social services

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and facilities for the rehabilitation of delinquent minors who require care, guidance and control.” In Illinois, the purpose clause for delinquency proceedings includes the development of educational, vocational, social, emotional and basic life skills [to] enable a minor to mature into a productive member of society.” Meeting the purpose of rehabilitation requires that the juvenile detention system, both structurally and substantively, recognize and address the particular needs of the female population.

### International Standards

Many human rights requirements relating to incarcerated children are evaluated under international standards that do not have the legal authority of treaties. They have, however, been adopted by the UN General Assembly, providing a certain level of moral force. Additionally, the United States participated in their drafting and agreed on the necessity of their adoption. International minimum standards on juvenile justice, through their emphasis on rehabilitation and the best interests of the child, advocate for gender-specific programming. Rule 26.4 of the Beijing Rules reads, “Young female offenders placed in an institution deserve special attention as to their personal needs and problems.” Further, Point 28 of the UN Rules mandates that juvenile detention should only take place under conditions that take into account the unique needs and circumstances of the child, according to specified categories including gender. Finally, Point 12 of the UN Rules requires that, “[j]uveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and

sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.”

### Conclusion

While national law has moved toward recognizing the dilemma posed by a growing number of girls entering a juvenile justice system ill-equipped to address their needs, the current voluntary standards have not been sufficient in encouraging many jurisdictions to improve their services for the female juvenile population. National lawmakers should create greater incentives and provide stricter guidelines, encouraging facilities to implement gender-specific programming. Considering the overwhelming number of traumatized and sexually abused girls who enter the juvenile justice system, it is unconscionable to deprive them of their liberty while also denying them access to counseling and treatment.

State legislatures must evaluate the effectiveness of the services provided to girls in state detention facilities and allocate funding for the development of appropriate programs and the hiring and training of staff. In addition, states should move toward exercising the “least restrictive alternative” by exploring community-based alternatives to incarceration. Community-based alternatives can move the United States away from a trend of over-incarceration of girls and closer to meeting both nationally and internationally prescribed goals of rehabilitation. 🌐

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### Unocal, continued from page 9

Court held that the plaintiffs provided evidence showing that Unocal’s alleged assistance had a “substantial effect” in perpetrating the alleged abuses because the abuses “most probably would not have occurred in the same way” if Unocal had not hired and directed SLORC.

Second, the Court held that a reasonable factfinder could conclude that Unocal’s actions met the *mens rea* requirement of the aiding and abetting standard because Unocal knew or should have known that its actions would assist SLORC in committing crimes. The Court based this finding on the district court’s holding that the plaintiffs’ evidence suggests that Unocal knew of and benefited from SLORC’s human rights abuses connected with the project.

It should be noted that the Court did not preclude other theories of liability by choosing to apply an aiding and abetting standard in *Doe v. Unocal*. The Court specifically stated that the plaintiffs’ claims that Unocal is liable for SLORC’s human rights abuses under other liability theories, like joint venture, agency, negligence, and recklessness, may be viable theories in this case and other ATCA cases. In fact, the concurring judge in the Ninth Circuit decision would have reversed the district court’s summary judgment decision for Unocal using the federal common law liability theories of agency, joint venture, and reckless disregard.

### Conclusion

The Ninth Circuit’s *Doe v. Unocal* decision is important for a number of reasons. Specifically, the decision reaffirms the important principle that forced labor is tantamount to slav-

ery. It also reaffirms the district court’s decision at the motion to dismiss stage that corporations can be held liable for violations of international law under the ATCA. Most importantly, however, the decision sets out a well reasoned liability standard that comports with well established principles of law.

The recent *Doe v. Unocal* decision is in no way revolutionary in that it simply applies legal standards, established since Nuremberg, in a way that holds transnational corporations accountable for their involvement in human rights abuses in violation of international law. At the same time, the decision does not go so far as to state that a corporation can be held liable for a government’s abuses simply by doing business in a country, as misinformed critics claim. The Ninth Circuit’s aiding and abetting liability theory tempers the unreasonably high “smoking-gun” liability standard that the district court attempted to apply at the summary judgment stage. This “smoking-gun” standard flew in the face of basic legal liability concepts by making it necessary for Unocal subjectively to want SLORC to commit human rights abuses.

The Ninth Circuit’s decision is important because it defines a standard for liability, based on well established legal concepts and plain common sense, that puts transnational corporations on notice that if a corporation knowingly assists or encourages the perpetration of a crime, the company will be held responsible for its actions. 🌐

*\*John Cheverie is the J.B. and Maurice C. Shapiro public service fellow at EarthRights International (ERI) and a 2003 J.D. candidate at The George Washington University Law School. ERI ([www.earthrights.org](http://www.earthrights.org)) is co-counsel for the plaintiffs in Doe v. Unocal.*

# Toward Revitalizing Economic, Social, and Cultural Rights in Africa: *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*

by Danwood Mzikenge Chirwa\*

At its ordinary session held October 13-27, 2001, the African Commission on Human and Peoples' Rights (Commission) delivered a landmark decision involving the direct application of a range of economic, social, and cultural rights entrenched in the African Charter on Human and Peoples' Rights (African Charter). The African Charter is currently the only regional human rights instrument that incorporates economic, social, and cultural rights as well as civil and political rights and subjects all of these rights to a complaint procedure. The judgment handed down by the Commission in *The Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria* (SERAC Case) marked the first decision that directly addresses the enforcement of economic, social, and cultural rights since the Commission became operational in November 1987.

## Recapturing the Debate on the Justiciability of Economic, Social, and Cultural Rights

Whether economic, social, and cultural rights are capable of judicial enforcement elicited heated debate in the United Nations during the drafting of the International Bill of Human Rights. The outcome of the controversy was the bifurcation of the Universal Declaration of Human Rights into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The contention that economic, social, and cultural rights are different in nature from civil and political rights was central to the decision to adopt the two instruments. Animated by the Cold War, Western countries maintained that economic, social, and cultural rights are ideals to be attained. The countries argued that enforcement of these rights is programmatic and costly, and therefore dependent on the availability of state resources. Furthermore, they argued that economic, social, and cultural rights lack specificity and entail intricate policy decisions regarding their implementation. The Western countries' view is that the judiciary is not institutionally competent and not democratically legitimate enough to make such difficult policy choices, therefore rendering judicial enforcement inappropriate.

Although socialist countries made persuasive arguments for the equal treatment of economic, social, and cultural rights and civil and political rights, the adoption of the two Covenants marked victory for the West on the issue. While the ICCPR has a provision for judicial enforcement, the ICESCR provides for state reporting as the ultimate supervisory mechanism. The right of petition by individuals or groups alleging violations of these rights fell away from the ICESCR with the rejection by the UN of a complaint procedure as an additional implementation measure.

Since the two Covenants were adopted in 1966, economic, social, and cultural rights have enjoyed marginal status as compared to civil and political rights. Although later international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) make no distinction among categories of rights, the enforcement mechanisms do not



Ogoni villagers from the Bori region in Nigeria.

provide for the adjudication of economic, social, and cultural rights. Only recently has serious consideration been given to boosting the monitoring mechanisms of economic social, and cultural rights. At the international level, efforts regarding judicial enforcement resulted in the adoption of an optional protocol concerning economic, social, and cultural rights to CEDAW on March 12, 1999. A similar draft optional protocol to the ICESCR was concluded in 1996 and is pending before the Commission on Human Rights.

## The African Charter: A Brief Introduction

The African Charter was adopted in 1981 by the Organization of African Unity (OAU), marking the introduction of a third regional human rights system in the world, after the creation of the European and inter-American systems. Adopted partly due to external pressure on African governments to develop a human rights regime on the continent and partly as a response to the massive human rights violations committed by African leaders such as Idi Amin of Uganda, Dr. Banda of Malawi, Emperor Bokassa of Central African Republic, and Mengistu of Ethiopia, the African Charter is distinctive in its attempt to attach an "African fingerprint" on human rights discourse.

Human rights scholars have acclaimed the African Charter for including economic, social, and cultural rights as well as civil and political rights in one binding instrument. Its preamble affirms the cardinal principle of interdependence and indivisibility of all human rights by expressly declaring, "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality." Among other rights, the African Charter gives express recognition to the right to property, the right to work, the right to enjoy the best attainable state of physical and mental health, the right to education, and the right to family protection, including special measures for the protection of the aged and disabled.

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It is striking to note that the economic, social, and cultural rights enshrined in the African Charter are formulated as direct entitlements of individuals or groups. This is unlike the ICESCR, which uses such language as “the state undertakes to recognize” and “the state undertakes to take steps.” The advantage with the Charter’s formulation is that it allows more room for the application of these rights to non-state actors, who are increasingly regarded as having human rights obligations. Furthermore, the economic, social, and cultural rights provisions in the Charter are couched in such a way as to create immediate obligations. By contrast, the ICESCR qualifies these rights with such phrases as “progressive realization” and “to the maximum of available resources.” This formulation of the ICESCR was adopted to emphasize economic, social, and cultural rights as ideals to be attained depending on the availability of resources, as opposed to civil and political rights, which are deemed to be precise and immediately claimable. In 1990, the Committee on the ICESCR clarified in General Comment 3 that the term progressive realization implies an obligation of states to move as expeditiously and effectively as possible towards the attainment of the right in question. The Committee further stated, based on extensive examination of state reports, this term engenders a core obligation to ensure the satisfaction of minimum essential levels of each of the rights. In comparison to the ICESCR, Chidi Odinkalu, a leading scholar on the African regional system of human rights, has argued that the creation of immediate obligations by the Charter enables the Commission to adopt a “violations approach” to the implementation of these rights. This approach allows the Commission to make decisions based on real-life situations and specific allegations, as opposed to the ICESCR, which requires that countries, according to their level of resources, develop different performance standards for each right over time.

As part of bolstering the principle of interdependence of all rights, the African Charter entrenches third generation rights, which the international system has persistently sidelined. Third generation rights are the newest set of rights to be recognized by the international community. They include the right of all peoples to freely dispose of their wealth and natural resources (Article 21); the right to economic, social, and cultural development (Article 22); and the right to a generally satisfactory environment favorable to their development (Article 24). These rights arise out of the demand by the Third World countries for global redistribution of power, wealth, and other important standards. Also described as solidarity rights, these rights require that all members of the international community make concerted efforts for their realization. They are therefore critical to the enjoyment of both economic, social, and cultural rights and civil and political rights. The *SERAC Case* highlights the importance of these rights in the African context.

Significantly, the African Charter proffers the same enforcement mechanism to all categories of rights. Under Articles 47, 55, and 56, the African Commission hears complaints alleging violations of any rights recognized in the Charter and the standing requirements for bringing cases before the Commission is admirably broad. Individuals as well as non-

governmental organizations (NGOs) with observer status in the Commission can commence cases against a state. The Commission grants observer status to any organization working in the human rights field whose objectives and activities comply with the fundamental principles of the OAU Charter and the African Charter. The organization must also declare its financial resources and must have an established structure. Apart from engaging in public interest litigation, NGOs with observer status are given wide space to participate in the sessions of the Commission, including making statements and proposals, asking questions, commenting on promotional reports, and submitting amicus briefs.

Despite these positive aspects, the Charter has received wide-ranging criticisms from international and African scholars. Disapproval has primarily focused on the Charter’s weak enforcement mechanism, since the Charter chose to rely on the Commission instead of a court. This choice was motivated

by the OAU’s preference for a diplomatic and bilateral dispute settlement mechanism. The argument was that confrontational litigation, common to Western legal systems, is alien to African culture. Participants also feared that on the basis of the apparent insufficiency of political will at the time, African governments would not ratify the Charter if it provided for

a court. Thus, the Commission was established as the body to promote human rights, although it has no powers of enforcement, cannot award damages or condemn an offending state, and can only make recommendations to the parties when a violation of a right is found.

Recognizing these weaknesses, the OAU adopted the Protocol to the African Charter establishing an African Court on Human and Peoples’ Rights on June 9, 1998. Five of the 15 states needed to bring the Court into operation have ratified the Protocol: Burkina Faso, The Gambia, Mali, Senegal, and Uganda. Predictably, the Protocol empowers the Court to provide remedies for violations such as compensation and provisional measures to avoid irreparable harm. Provision is made for the Council of Ministers to monitor the execution of judgment.

The Charter’s recognition of third generation rights has been further criticized for being redundant since they have no specific content and can be realized through the implementation of already recognized individual rights. Professor Joe Oloka-Onyango described the exclusion of these rights from the Charter, such as the right to housing and shelter; the right to social security; the right to adequate standard of living; and freedom from hunger, as a “significant letdown.” Additionally, some commentators have expressed pessimism regarding the African Commission’s ability to translate the provisions of the Charter into practice.

### **SERAC Case**

#### **The Facts**

The complainants brought an action against the Nigerian government for violations of an array of economic, social, and cultural rights committed by the state-owned National Nigerian Petroleum Company (NNPC) and Shell Petroleum Development Corporation, in which the NNPC held a majority of shares. The complaint alleged that the companies exploited oil in Ogoniland, Nigeria without regard for the environment or

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health of the local communities. Toxic wastes were deposited into the local environment and waterways without developing or properly maintaining appropriate facilities intended to prevent the wastes from affecting surrounding local villages. The resulting water, soil, and air contamination caused serious short- and long-term health problems, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancer, and neurological and reproductive complications.

The complaint further alleged that the Nigerian government not only condoned these harmful operations but aided in their perpetration by placing the legal and military powers of the state at the disposal of the oil companies. It also alleged that the Nigerian Army carried out a series of ruthless military operations, including the burning and destruction of houses and food, and the killing of people and their livestock. The government neither monitored the oil companies nor required them to consult with the Ogoni people on issues concerning the development of their land. The government of Nigeria did not respond to the Commission's notification of the complaint, therefore the Commission accepted the complaint's allegations as facts.

### **Admissibility**

Two NGOs, the Social and Economic Rights Action Centre and the Center for Economic and Social Rights, brought this action to the Commission on behalf of the Ogoni people. Because a domestic tribunal or court in Nigeria had not heard the complaint, a decision had to be made whether it was admissible within the requirements of the exhaustion of local remedies rule. Under Article 56(5) of the Charter, a complainant must exhaust all local remedies before approaching the Commission. According to the Commission's previous jurisprudence, this rule serves to give the responding government notice of the violation, thereby affording it an opportunity to remedy the situation. However, the rule is not enforced if there are no adequate or effective remedies, or if the complaint discloses gross violations of human rights.

Relying on this well established exception to the exhaustion of local remedies rule, the Commission declared the Ogoni complaint admissible. The Commission found that the action alleged many atrocities committed by the oil companies. Secondly, it found as fact that the military government passed several decrees making the prospect of receiving a domestic remedy impossible. Finally, the Commission took the view that the government of Nigeria had ample notice to remedy the situation given the enormous international attention focused on the circumstances in Ogoniland. For these reasons, the government could not insist on the exhaustion of local remedies rule to justify dismissal of the complaint.

### **The Merits**

#### *Obligations and Indivisibility of Human Rights*

The Commission emphasized that all rights generate the duties to respect, protect, promote, and fulfill. The Commission underscored that these obligations engender a combination of positive and negative dimensions. The duty to respect requires that the state should refrain from interfering in the enjoyment of all fundamental rights. The duty to

protect obliges the state to protect rights-holders against other subjects by, among other things, legislation and provision of effective remedies. The duty to promote enjoins the state to ensure that individuals are able to exercise their rights and freedoms by, for example, promoting tolerance, raising awareness, and even building infrastructures. The duty to fulfill is a positive expectation on the state to make a good faith effort toward realizing the rights. For instance, according to the Commission, this could consist of the direct provision of food or other basic needs. The Commission emphasized that the application of these duties varies depending upon the right under consideration. Thus, the full enjoyment of some rights demand that the state take concerted action consisting of more than one of those duties.

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#### *The Rights to Physical and Mental Health and the Right to a Clean Environment*

The Commission found that the Nigerian government violated the right to health and a third generation right to a clean environment by directly contaminating water, soil, and air; harming the health of the Ogoni people; and failing to protect them from the harm

caused by the oil companies.

In reaching this conclusion, the Commission underlined that the right to a clean and safe environment is enshrined under Article 24 of the African Charter. According to the Commission, the right to a clean environment is extremely critical to the enjoyment of economic, social, and cultural rights "in so far as the environment affects the quality of life and safety of the individual." This right, it held, requires a state "to take reasonable . . . measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."

Regarding the right to enjoy the best attainable state of physical and mental health, under Article 16(1) of the Charter, and the right to a generally satisfactory environment favorable to development, recognized under Article 24 of the Charter, the Commission held that governments are prohibited from directly threatening the health and environment of their citizens. The Commission found that the duty to respect these rights largely entails non-interventionist conduct from the state, such as refraining from carrying out, sponsoring, or tolerating any practice, policy, or legal measures that violate the integrity of the individual.

The Commission stated that compliance with both the right to health and the right to a clean environment must include ordering, or at least permitting, independent scientific monitoring of threatened environments and requiring and publicizing environmental and social impact studies prior to any major industrial development. These rights also require that the state must undertake appropriate monitoring, provide information to the communities exposed to hazardous materials and activities, and guarantee meaningful opportunities for individuals to be heard and participate in development decisions affecting their communities. The Nigerian government, it was held, failed to discharge these obligations.

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### *The Right to Natural Resources*

Whether a group of people within a state may constitute “a people” has long been contested, especially in the context of the right to self-determination. In *Katangese Peoples’ Congress v. Zaire*, for instance, the African Commission acknowledged the controversy but avoided defining the term, “a people.” Likewise, the Commission did not define the term in the present case, but it found that the right of the Ogoni people, under Article 21 of the Charter, to dispose of their wealth and natural resources had been violated. This finding was based on the fact that the oil exploitation in Ogoniland was pursued in a destructive and selfish fashion without any material benefit to the local population. By implication, the Commission considered the Ogoni population to be “a people.”

### *State Liability for Acts of Private Actors*

Drawing on jurisprudence from the Inter-American Court of Human Rights and the European Court of Human Rights, the Commission postulated that a state violates its duty to protect rights if it allows private persons or groups to act freely and with impunity to the detriment of recognized rights. The Commission found that the Nigerian government had given a “green light” to the oil companies to commit human rights violations. Nigeria’s failure to protect the Ogoni people from the selfish acts of the oil companies amounted to a violation of Article 21.

### *The Right to Life*

Furthermore, the Commission stated that the right to life is the most fundamental of all human rights. This right was violated by the Nigerian government when it permitted its security forces to commit widespread terrorism and killings and allowed pollution and environmental degradation, making living conditions in Ogoniland a “nightmare.” The Commission also cited the destruction of land and farms as part of its rationale that the right to life was violated.

### **Violations of Rights beyond the Charter**

#### ***The Right to Food and Housing***

Interestingly, the Commission also found violations of the rights to housing and food, which are not expressly recognized under the Charter. It determined, quite innovatively, that the right to housing or shelter is implicitly entrenched in the rights to property, family protection, and in the right to enjoy the best attainable state of mental and physical health. Likewise, the Commission inferred the right to food from the rights to life and health and to economic, social, and cultural development.

The Commission held that the minimum core of the right to shelter obliges the state not to destroy its citizens’ houses, let alone obstruct efforts by individuals or communities to rebuild lost homes. The duty to respect this right requires that the state and its agents refrain from carrying out, sponsoring, or tolerating any practice, policy, or legal measure that violates the integrity of the individual or infringes upon the freedom of an individual to use available resources necessary for satisfying individual, family, household or community housing needs. The duty to protect includes the prevention against violations by any individual or non-state actors like landlords, property developers, and landowners.

According to the Commission, the right to shelter goes further than the provision of a roof over one’s head. It encom-



Children collecting water in Ebubu, Nigeria.

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passes the right to be left alone and to live in peace, whether or not a person has actual shelter. It also extends to the protection against forced evictions. The destruction of houses, homes, and villages and the harassment and obstruction of those who attempted to rebuild their homes were held by the Commission to be massive violations of the right to shelter.

The Commission underlined that the right to food is inseparably linked to the dignity of human beings and, it was therefore essential for the enjoyment of other rights such as health, education, work, and political participation. The right to food binds states to protect and improve existing food sources and ensure access to adequate food for all citizens. The minimum core of this right obliges the government to desist from destroying or contaminating food sources or allowing private actors to contaminate food sources or prevent peoples’ efforts to feed themselves. The Commission found that the Nigerian government violated its obligations under this right by destroying, and allowing the private oil companies to destroy, food sources. In addition, the Commission found that the Nigerian government had obstructed the Ogoni people from feeding themselves.

This is the first time the Commission has found violations of rights not expressly enshrined in the Charter. The Commission, however, has interpreted the provision of the Charter generously in the past in order to ensure better protection of human rights. For example, it has done so in respect of clawback clauses, such as “subject to law” and “in accordance with law,” to several human rights provisions. The Commission has construed these clauses, which provide room for state parties to impose restrictions on given rights through legislation, narrowly so that they permit limitations to rights so long as those limitations do not defeat the purpose of the Charter.

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# The Challenge of Creating “A World Fit for Children”

by Jonathan Todres\*

In May 2002, for the first time in its history, the United Nations convened a special session of the General Assembly dedicated entirely to children. Attended by nearly 180 country delegations, including over 60 heads of state, approximately 1,700 NGO representatives from over 100 countries, and several hundred youth delegates, the UN Special Session on Children (Special Session) provided governments the opportunity to assess their countries' progress on issues affecting children since the adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and the 1990 World Summit for Children (World Summit). The Special Session also offered states the opportunity to reaffirm their commitment to improving the well-being of all children. Despite progress since the World Summit in a number of areas, the Special Session reinforced that a significant amount of work remains. The Special Session culminated with the production of a final outcome document entitled “A World Fit for Children,” establishing a plan of action and specific goals for improving children's lives in four priority areas: promoting healthy lives; providing quality education for all; protecting children against abuse, exploitation, and violence; and combating HIV/AIDS.

## Priority Areas for Children

Healthcare remains an essential element in the survival and development of children, particularly in the early years of life. Since the World Summit, which established a uniform plan of action focused primarily on healthcare and basic education for children, over 100 countries have reduced their under-five mortality rate by one-fifth, and 63 of these countries achieved the World Summit goal of a one-third reduction. As a result, the lives of three million children are saved each year. Still, each year over ten million children die before the age of five, largely due to preventable causes. An additional 150 million children suffer from malnutrition. In 2000, malnutrition was associated with 60 percent of all childhood deaths. Such figures highlight the continued importance of improving children's access to healthcare.

While the CRC has recognized “the right of the child to education” and the World Summit set the goal of universal access to basic education, reality has fallen short, as approximately 120 million out of 700 million children of primary school age remain out of school. Such lack of access to education heightens the vulnerability of these children. Not only do these children miss opportunities that can arise through education, but they are also at much greater risk of exploitation through child labor, forced prostitution, and involvement in armed conflict.

Abuse and exploitation of, and violence against, children continue to be enormous problems, as children are particularly vulnerable to human rights violations. Political obstacles, such as not having the right to vote, as well as developmental issues not only make children more susceptible to exploitation, but also leave them less capable of drawing attention to violations of their rights once they occur. As a result, children are at great risk of becoming victims of violence and exploitation, whether as targets of trafficking for purposes of sexual exploitation or child labor; as victims of armed conflict, often either forced into fighting at a young age or caught in a war they did not start; or as refugees fleeing their homes in hopes of a safer place to live and survive. Today, for example, over one million



Credit: UNICEF/HQ/02-0185/Paula Bronstein

Accompanied by performers and Nobel Peace Prize laureate Rigoberta Menchu, UNICEF executive director Carol Bellamy addresses the audience at the close of the gala concert at the Special Session.

children enter the global sex trade industry each year, with increasingly younger children, many under the age of 10, drawn into the sex trade. Further, an estimated 250 million children between the ages of 5 and 14 work for a living, nearly half of them full time. In the past decade, approximately 2 million children have died as a direct result of armed conflict, and 20 million children remain displaced as a result of armed conflict and human rights violations. Such victimization and exploitation of children are among the most tragic examples of human rights violations today.

Finally, the priorities of the Special Session and its outcome document reflect the reality that the HIV/AIDS epidemic is such cause for concern that it must be recognized as its own priority area and not just one of the many issues under the rubric of healthcare. By 2000, over 10 million young people were infected. According to UN estimates, 500,000 children under the age of 15 died of AIDS in 2000, while another 600,000 of the same age were newly infected with HIV. In addition, the HIV/AIDS crisis has led to numerous other problems, ranging from the growing number of orphans due to AIDS (in 2000, an estimated 2.3 million children lost their mothers or both parents to AIDS), who are often increasingly vulnerable to various forms of exploitation, to the global sex trade industry's demand for younger and younger children as a result of the often mistaken belief that younger children are less likely to be infected.

## The Outcome Document of the Special Session

Although the Special Session was the first such session of the UN General Assembly dedicated entirely to children, the development of international standards on the rights of the child dates back to the early part of the 20th Century with the adoption of International Labor Organization conventions on child labor and the prevention of trafficking, as well as other broader declarations, such as the Declaration of the Rights of the Child by the League of Nations in 1924. Since then, the international community has promulgated numerous declarations and conventions reflecting its vision of a better world for children, the most recent of which is the Special Session's

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outcome document. The outcome document offers a focused set of goals on which governments can concentrate for the next decade in order to alleviate the suffering of millions of children, and also proposes methods for mobilizing resources to achieve these goals.

Unlike the CRC, the final outcome document is not a legally binding document; however, it remains very important in the global effort to improve the lives of children around the world. The role over the past decade of the World Declaration and Plan of Action, promulgated at the World Summit, suggests the importance and potential impact of the outcome document from the Special Session. The World Declaration and Plan of Action are among the most closely monitored and implemented international commitments of the past decade. Some 155 countries prepared national programs of action to implement the World Summit goals, with many countries producing annual reports tracking progress toward attaining these goals.

Like the World Declaration and the Plan of Action from the World Summit, the Special Session's outcome document calls upon countries to develop or strengthen their national plans of action for improving children's lives, and to report regularly on their progress. In addition, the outcome document calls upon the UN Secretary-General and UNICEF to continue monitoring the progress of nations in reaching the Special Session's goals. The outcome document also offers NGOs a detailed agenda for use in lobbying their governments to make progress on key issues affecting children. Already, a number of NGOs, including the NGO Committee on UNICEF and Amnesty International, have produced reports outlining the promises and commitments made by individual governments at the Special Session, and have indicated that they intend to monitor governments to ensure that they fulfill these promises.

The outcome document provides an additional benefit, in that it offers a level of specificity as to the goals in each of the four priority areas that generally cannot be found in a legally binding convention like the CRC. These goals include setting precise levels of improvement, expressed as a percentage, that governments are expected to achieve in the areas of healthcare, education, and the fight against HIV/AIDS. Working in tandem with the CRC, the outcome document helps to establish clear goals in the most important areas affecting children, so that governments can work more effectively toward bettering the lives of all children.

### Key Issues at the Special Session

Efforts to reach agreement on the remaining issues and produce a final outcome document by the close of the Special Session highlighted two important points, neither of which should be overlooked. First, while a tremendous amount of work is necessary to create "a world fit for children," widespread agreement exists on the majority of issues, and a clear majority of governments are committed to action in these areas. Second, there are a small number of contentious issues that should not detract from the success of achieving consensus on almost all the issues but must be handled carefully to avoid having them become obstacles to progress on all issues affecting children.

The final negotiations on the outcome document during the Special Session reflected this dynamic. Eighteen months of negotiations leading up to the Special Session had resulted in agreement on all but a few particularly sensitive issues



Youth delegates respond to questions during a press conference at the Special Session.

including how the outcome document should treat each of the following issues: (1) child rights and the CRC in particular; (2) abortion, sex education, family planning, and reproductive health; (3) the death penalty in juvenile justice cases; and (4) specific financial commitments by industrialized countries to developing countries. That the United States found itself in the midst of the debate over these final issues only complicated matters, given the prominent role it plays in the international arena.

### *Child Rights and the Convention on the Rights of the Child*

Coming into the Special Session, 192 countries had ratified the CRC, so there was strong support for language recognizing the CRC as the most important resource on the rights of the child. The United States and Somalia were the only countries that had not ratified the CRC; the United States signed it in 1995, and Somalia signed the CRC during the Special Session and announced its intention to ratify the CRC in the near future (East Timor, which gained independence in July 2002, has indicated that the CRC will be the first international treaty it ratifies). The Bush Administration, which to date has indicated that it will not seek to ratify the CRC, objected to language stating that the CRC was *the* authoritative expression of child rights. As a result of U.S. objections, the final outcome document avoided speaking about child rights in a number of contexts and described the CRC only as "contain[ing] a comprehensive set of international legal standards for the protection and well-being of children."

Assuming that Somalia and East Timor ratify the CRC in the near future, the United States will stand alone as the sole nation preventing the CRC from becoming the first human rights treaty to achieve universal ratification. Universal ratification would be a significant milestone, not only symbolically but also in the further development of customary international law. Moreover, the impact of universal ratification of the CRC would extend to other human rights treaties and the international human rights movement in general. Any concerns about the current U.S. position, however, must be addressed in a balanced and constructive manner, as support already exists in the United States—within the government, among many NGOs, and in the public—for many provisions of the CRC, as well as the CRC as a whole. Particularly notable is that in June

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2002 the Senate voted to give its advice and consent to ratify the two Optional Protocols to the CRC on the involvement of children in armed conflict and on the sale of children, child prostitution, and child pornography. The Bush Administration has indicated its support for the Optional Protocols but has not stated if or when it would ratify them.

Given this support for many of the provisions of the CRC, it is important to understand the precise nature of the Bush Administration's objections, determine what ratification of the CRC would actually mean in practice in the United States, and explore ways in which both sides can bridge the gap and find a position that all can support. Moreover, whether the Bush Administration formally seeks to ratify the CRC should not prevent the United States from examining the principles underlying provisions of the CRC and taking steps to improve the lives of children in the United States and around the globe. Equally important, the United States, as arguably the most influential player on the international scene today, must balance its concerns regarding the perceived impact of ratification within its borders with an awareness that its support of the CRC or lack thereof can have a significant impact on the CRC's effectiveness. This is particularly important given that the majority of the most vulnerable children in terms of the four priority areas highlighted in the outcome document live in developing countries.

#### ***Reproductive Health and the Issue of Abortion***

The United States expressed strong reservations to several provisions related to reproductive health in an effort to ensure that any references to reproductive healthcare could not be read to include abortion, or family planning programs that include abortion. Instead, the United States pushed to include language calling for the promotion of sexual abstinence as a key element in ensuring healthy lifestyles. While the United States received support from the Vatican on this point, many countries in Europe, Latin America, and Africa supported broader language related to reproductive health issues involving children. In the end, the final outcome document adopted a compromise position, including neither the language that the United States wanted nor the language it sought to avoid. Even after this compromise was reached, the Bush Administration took the additional step of placing an explanation of its position on abortion and family planning in the official record of the Special Session. Included as part of this statement was the following:

The United States understands the terms "basic social services, such as education, nutrition, health care, including sexual and reproductive health," "quality health care services," "reproductive health care," "family planning," or "family planning services," "sexual health needs," "sexual health," and "safe motherhood," in the document to in no way include abortion or abortion-related services or the use of abortifacients.

Although the above statement suggests a hard-line stance by the Bush Administration on this issue, other portions of the United States' official explanation of its position suggest a more balanced view and possibility of future opportunities for dialogue. For example, the U.S. statement also read, "The United States fully supports the principle of voluntary choice in family planning and reiterates that in no case should abortion be promoted as a method of family planning, and that women

who have had recourse to abortion should in all cases have humane treatment and counseling provided for them." This issue likely will continue to be divisive, as demonstrated just by the range of views on abortion within the United States. Even while disagreement persists on the issue of abortion, efforts must be made to address related reproductive health issues affecting children, such as teenage pregnancy and the spread of HIV/AIDS among young people.

#### ***Use of the Death Penalty in Juvenile Justice Cases***

A majority of countries, led by European Union members, sought to include language in the final outcome document abolishing the imposition of the death penalty on individuals under the age of eighteen at the time the crime was committed. The United States objected to the inclusion of any language that barred the use of the death penalty in juvenile justice cases. Although the United States was the primary opponent of those calling for the abolition of the death penalty, it did have some support, primarily from Sudan and certain Arab countries. As a result of the dispute on this issue, the final outcome document resolved to call upon governments to:

Protect children from torture and other cruel, inhuman or degrading treatment or punishment . . . [and] to comply with the obligations they have assumed under the relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the [CRC] and articles 6 and 14 of the International Covenant on Civil and Political Rights.

Because the United States is not a party to the CRC, and it has limited the application of the International Covenant on Civil and Political Rights (ICCPR) through a reservation preserving its right to impose capital punishment on any person under 18 years of age, the above language imposes no obligation on the United States. In addition, because the compromise language is similar to language previously used in resolutions by the UN Commission on Human Rights, it adds little in the way of additional obligations for other countries.

Like the issue of abortion, the death penalty figures to remain a point of contention, as the general trend toward abolition of the death penalty in many parts of the world conflicts with the current U.S. government's continued support of capital punishment. The United States' insistence on reserving the right to issue death sentences to youths angered many delegates to the Special Session, as well as many NGO representatives from U.S. organizations. Despite this disagreement, common ground can be found in developing approaches to other areas of juvenile justice and in developing programs that help keep youth out of the juvenile justice system.

#### ***International Development Assistance***

Finally, as to specifying levels of international development assistance, industrialized countries ultimately resisted including language committing them to reaching the aid target of 0.7 percent of gross domestic product, and therefore such language was dropped. Underlying the debate over development assistance is the very real concern that resource-constrained countries simply are limited in how much they can do without any additional assistance. More than half of the people on earth – over 3 billion – subsist on less than \$2 per day, and 1.2 billion – half of whom are children – live in absolute poverty, surviving on less than \$1 a day. Poverty and economic

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growth, or lack thereof, are clearly key factors; according to a WHO/World Bank special report, poor children are up to six times more likely to die before age five than are children from families with greater economic resources. Poverty's impact extends well beyond the first five years of a child's life, and additional steps must be taken, both within these poor countries and by wealthier industrialized nations, to promote economic development and ensure that greater resources are available to help these children and their families.

That said, economic development alone cannot account for all variations in health status. For example, both Honduras and Senegal have roughly the same per capita income – \$600 per year – yet life expectancy in these countries is 69 and 51 years, respectively. Thus, not only is it important to ensure the availability of adequate resources, but governments and international organizations must do a better job of ensuring that such resources are used more effectively. Recently, the issue of debt relief has garnered increasing support, which should help alleviate some of the financial strain on the poorest countries of the world. Development assistance nonetheless remains at levels of approximately one-third of the 0.7 percent target agreed by the UN General Assembly over 30 years ago. Although there was no agreement at the Special Session to commit to any specified target, nothing exists to prevent industrialized countries from increasing their commitments to support the children of developing countries.

#### Opportunities in the Face of Disagreement

Despite the areas of disagreement described above, it is important to remember that consensus was reached on many of the issues affecting children, and the language of the final outcome document reflects governments' commitment to a number of important policies and goals, including: reducing infant mortality by at least one-third over the next decade and by two-thirds by 2015; increasing primary school enrollment or participation in good quality, alternative primary education programs to at least 90 percent by 2010; protecting children from all forms of abuse, neglect, exploitation, and violence; and reducing the prevalence of HIV infection among young men and women aged 15 to 24 by 25 percent globally by 2010, and reducing by 50 percent the number of infants infected with HIV.

These issues, and others, provide large areas of common ground on which to work to improve the protection of children's rights and to ensure their well-being. Moreover, many of these issues are interconnected and can, and must, be approached from multiple angles, ranging from recognizing and protecting the rights of each child to developing and implementing better social services to address the needs of all children. From the outset of a child's life, her rights and well-being are implicated. Birth registration and the right to a name and nationality, which are provided for in Article 7 of the CRC, are essential first steps, as the lack of a birth certificate may prevent the child from receiving immunizations and other health care and social assistance that would otherwise reduce the chances of infant mortality. Proper documentation is also needed so that the child is permitted to enroll in school. In turn, better primary healthcare and the opportunity to attend school help keep the child healthy and reduce the chances that she will become a victim of child labor or sexual exploitation. Additional resources are necessary to ensure that the child remains healthy, stays in school, and continues to develop

through the adolescent years. The end to, or prevention of, armed conflict will further ensure that the child can develop in a safe environment, and that available resources can be invested in the child's health and education rather than arms. In other words, governments must adopt a comprehensive approach to the well-being of children, providing not only access to healthcare and education but also ensuring that the child's right to life and to freedom are adequately protected, as are the child's right not to be subjected to abuse, violence, and exploitation.

This understanding was evident among the sessions involving NGOs from around the world that engaged in thoughtful dialogue on pressing issues such as child protection, healthcare, education, trafficking in children, violence against children, HIV/AIDS, and child labor. Governments need to commit to this as well. The Special Session and its outcome document have outlined priority areas for the next decade which, if its goals are met, should help to create a world that is better "fit for children."

Even though issues on which there is disagreement, such as abortion or the use of the death penalty, may garner more attention due to their sensitive nature, governments and NGOs must not allow them to detract from the fact that there is agreement on the vast majority of issues affecting children today. Accordingly, it is essential that all governments take the necessary steps to meet the goals set forth in the outcome document of the Special Session and to remain open to constructive dialogue on the few remaining issues where differences persist. This balanced approach will offer children the best hope of developing to their fullest potential. 🌐

*\*Jonathan Todres is vice chair of the ABA Subcommittee on the Rights of the Child. Mr. Todres served as a member of the ABA delegation to the UN Special Session on Children. The views expressed in this article are those of the author.*

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# Rights of Religious Minorities in Nigeria

by Ismene Zarifis\*

Several states in Nigeria have enacted a Nigerian-adapted version of the Sharia criminal code, a set of legal provisions based on the principles and morals of Islam. The Sharia criminal code, as adapted and applied in Nigeria, is the subject of recent controversy because its implementation violates fundamental rights. Although Sharia criminal law provisions safeguard some internationally protected rights in certain circumstances, such as a Muslim's freedom of religion, implementation of Sharia law violates other fundamental rights such as the right of minorities to practice the religion of their choice, the right to life, and the right to be free from cruel, inhuman or degrading treatment or punishment. Religious minorities in Sharia-declared states are suffering widespread discrimination and harsh penalties that violate Nigeria's international human rights obligations. They have reacted to the infringement of their right to freedom of religion with violence. As a result, inter-religious conflicts have claimed thousands of lives since the introduction of Sharia in January 2000.

## Background

Nigeria is a secular federation consisting of 36 multi-religious states. In this system, a strong federal government controls states possessing local autonomy. Although state governors may decide matters concerning their own states, all states are bound to respect the Nigerian Constitution. Secular federalism also allows states to make decisions satisfying the interests of their residents without affecting the residents of other states.

The two predominant religious communities in Nigeria are the Muslims, located mostly in the north and accounting for 50 percent of the population, and the Christians, located mostly in the south and accounting for 40 percent of the population. Ten percent of the population practices indigenous religions. Many people practice elements of Christianity or Islam and indigenous religions. In a country as religiously diverse as Nigeria, secular federalism has been effective for maintaining peaceful co-existence, discouraging religious conflicts, and encouraging religious tolerance.

The Nigerian Constitution upholds the ideals of a secular state by prohibiting the adoption of an official religion under Article 10, and guaranteeing the freedom of religion in Article 38. Historically, Sharia courts exercised limited jurisdiction over personal and family matters and were available to Muslims who elected to resolve their disputes in such courts.

Contrary to constitutional provisions prohibiting state-mandated religions, several governors of northern Nigerian states have unilaterally extended Sharia law to criminal offenses, making it applicable to all individuals within the

state's jurisdiction. According to the Nigerian Constitution, a person may not be convicted for any Sharia offense unless that offense and its punishment are enacted by the National Assembly or State House of Assembly. Where Sharia penal codes are declared without codification by the National Assembly or State House of Assembly, the codes are unconstitutional. Despite the violent reaction by the non-Muslim minority to the introduction of Sharia in the northern state of Zamfara, several other states in northern Nigeria followed

the Zamfara example. Imposition of Sharia penal law violates rights under international law and subsequently threatens peace and security because groups whose human rights have been violated react with physical violence. States invoking Sharia penal law have relied on a Nigerian constitutional provision, which states that "the Sharia Court of Appeal may exercise such other jurisdiction as may be conferred upon it by the law of the State." At the time of this writing, this provision had yet to be interpreted by the Supreme Court of Nigeria. Regardless of the constitutionality of Sharia penal law, the imposition of severe penalties for certain lesser offenses has raised concerns within the international community

about the violation of fundamental rights protected by international human rights instruments.

## Sharia Law in Nigeria

Sharia, or Islamic law, is a religious set of principles based on the Quran (Islamic holy text), the Sunna (teachings of the Prophet Mohammed), the Ulama (religious scholars) and the Qiyas (case law). These principles are applicable to public and private behavior in everyday life. Sharia may be used to guide the acts of an individual or group of individuals in society and may be used to resolve disputes between individuals or nations. The Nigerian Constitution provides for a Sharia Court of Appeals at the state and federal levels, but these courts' jurisdictions are limited to considering only matters of Islamic personal or family law.

## Offenses and Penalties under Sharia Law

Sharia criminal law sets forth a number of crimes and penalties that are the object of much criticism from the international human rights community. The following are examples of the most seriously contested offenses and their respective punishments under the Zamfara state's version of Sharia law. For the offense of alcohol consumption, Article 150 of the Sharia penal code mandates caning and imprisonment whether the alcohol consumption is conducted in a public or private place. This provision exclusively protects



Safiya Huseini was sentenced to death by stoning for allegedly committing adultery. She was acquitted on procedural grounds.

Credit: Stephan Faris



Islam, as there is a strict ban on the consumption of alcohol by all adherents to the faith. Article 127 punishes the offense of adultery with caning of one hundred lashes if unmarried, and imprisonment or death by stoning if married. Article 129 punishes the crime of rape with caning of one hundred lashes or imprisonment if unmarried or death by stoning if married. Similar punishments are mandated in Articles 130 and 133 for the crimes of sodomy and incest. These penalties, although protecting Islamic religious principles, mete out harsh penalties that violate the right to life and, in many cases, may reach the threshold of torture or cruel, inhuman or degrading punishment.

The crimes of theft and robbery are considered two of the most serious crimes under Sharia law. Theft is punishable by amputation of the right hand for the first offense, amputation of the left foot for a second offense, amputation of the left hand for a third offense, and amputation of the right foot for a fourth offense. The fifth offense of theft is punishable by imprisonment. The initial penalty for robbery imposes a life sentence when the offense is committed without causing death or seizing property, and amputation of the right hand and the left foot when the property was seized but no death occurred. In cases in which death is caused during a robbery, the law imposes the death penalty. These penalties are seriously contested by members of the international human rights community, such as Human Rights Watch, due to their apparent violation of the right to life and the right to be free from torture or cruel, unusual, or degrading punishment. Furthermore, by their nature, these crimes are not uniquely offensive to an Islamic value system, but constitute common crimes that require regulation by a standard system of law enforcement.

### **Nigeria's International Human Rights Obligations**

Nigeria is a party to a number of international human rights treaties, which bind Nigeria to respect and ensure the human rights of all individuals within its territory. Nigeria is a party to the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women, and the African Charter on Human and Peoples' Rights, among others. In addition, a number of international instruments such as the Universal Declaration of Human Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) are binding as customary international law.

According to Article 14 of the Vienna Convention on the Law of Treaties, once these international treaties have been ratified a state party is bound to carry out its international obligations and may not invoke its domestic law as justification for non-implementation. Thus, the federal government of Nigeria has the ultimate responsibility to ensure that human rights are respected in the territory. As a result, state-declared Sharia law may not be invoked as a reason for

non-implementation of Nigeria's international human rights obligations.

### **Human Rights Implications of Sharia Law on Religious Minorities and Other Sectors**

The restrictions on freedom of religion violate Article 27 of the ICCPR, which protects persons belonging to religious minorities from being denied the right to practice their religions "in community with the other members of their group." The imposition of Sharia criminal law infringes on the right of religious minorities to practice their own religion and penalizes them for acts not tolerated under Sharia. The right to be free from religious discrimination is further protected in the Minorities Declaration. It is important to note that not all Nigerian Muslims support the new laws. Those Muslims who prefer to be judged by a constitutionally mandated court, in accordance with the Nigerian penal code, are precluded from this option in Sharia-declared states.

The application of Sharia law also regulates consumption of alcohol, imposes gender segregation in schools, mandates the dress code of women and restricts women's freedom of movement. A particular source of concern is the religious enforcers who mete out harsh, on-the-spot punishments against female Muslims and non-Muslims for violating the dress code or for travelling alone in taxis. Despite some declarations that Sharia law will be applicable to Muslims only, there have been a number of documented cases where the opposite is true,

especially in cases in which religious enforcers have administered on-the-spot punishments of individuals they believed were in violation of Sharia. Furthermore, Human Rights Watch reports that in the Sharia legal tradition, the rules of evidence and rights of appeal and legal representation applied to Muslims are different than those applied to non-Muslims, revealing inherent discrimination against non-Muslims. In short, the mere application of Sharia penal law to both Muslims and non-Muslims implies an infringement on the right to practice religion freely.

### **Implication of Sharia on the Fundamental Rights of Muslims and Non-Muslims**

#### ***Protection of the Right to Life***

The Sharia penal code permits the death penalty in cases of rape or adultery in which the individual is married. This form of punishment violates Article 6 of the ICCPR, which protects the right to life. In a controversial case, Safiya Huseini was sentenced to death by stoning for allegedly committing adultery. She was finally acquitted on procedural grounds. A woman from Katsina was sentenced in March 2002 to death by stoning after she gave birth outside of marriage.

The UN Human Rights Committee has interpreted the ICCPR to allow the death penalty only for intentional offenses that cause lethal or extremely grave consequences, stating that "when the death penalty is applied by a State party for the most serious crimes . . . it must be carried out in such a way as to cause the least possible physical and mental suffering." States are permitted to resort to the death penalty only

**The federal government of Nigeria has the ultimate responsibility to ensure that human rights are respected in the territory. As a result, state-declared Sharia law may not be invoked as a reason for non-implementation of Nigeria's international human rights obligations.**

in “exceptional circumstances,” and are obliged to abolish the death penalty for all crimes that do not meet these standards. Under international human rights law, the right to life is a universally protected right. Accordingly, the punishment of death by stoning for rape and adultery raises two problems: stoning is an excessive penalty for offenses that do not constitute the “most serious crimes,” such as murder, pursuant to ICCPR interpretation, and it is not a method of carrying out the death penalty that causes the least possible physical and mental suffering.

### ***The Right to Be Free from Torture or Cruel, Inhuman or Degrading Punishment***

Judicial corporal punishment in the forms of flogging and amputation for the offenses of theft, alcohol consumption, robbery, adultery, and rape in the Sharia penal code constitute torture or cruel, inhuman or degrading punishment under Article 7 of the ICCPR. Furthermore, the Sharia provision of death by stoning constitutes cruel and unusual punishment because it prolongs the physical and mental suffering of the individual. Despite the protections in the international human rights treaties to which Nigeria is a party, there are a number of documented cases by Amnesty International where Sharia courts have ordered amputations for theft and robbery, and have ordered public floggings for smoking marijuana, gambling, and carrying women on the back of moto-taxis. In one case, Ahmed Tijjani, who was found guilty of partially blinding a friend during an argument, was sentenced by a Sharia court in Katsina to have his left eye removed. Such severe penalties have forced some individuals subject to Sharia law to renounce Islam, reflecting the internal dissent among Muslims that has resulted from the adoption of Sharia penal law.

The UN Special Rapporteur on Torture has stated that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment prohibited in the CAT, to which Nigeria has been a party since June 2001. The UN Human Rights Committee has also found that corporal punishment is considered excessive under Article 7 of the ICCPR, which prohibits cruel, inhuman or degrading treatment. According to the language in the international human rights treaties to which Nigeria is bound, corporal punishment provided in the Sharia penal code does not adequately protect the rights of Nigerians to be free from cruel, inhuman or degrading treatment.

### ***The Right to Freedom of Religion***

Sharia law enables Muslims to exercise the freedom of religion guaranteed in the ICCPR and the Minorities Declaration. Freedom of religion, as protected by Article 18 of the ICCPR, includes one’s right to adopt a religion of choice and the freedom to practice one’s religion individually or with others. The only limits placed on this right are those prescribed by law and those that are necessary to protect public safety, order, health, morals, or the fundamental freedoms of others. This provision broadly protects individuals professing a faith as well as the right not to practice a religion, and extends protection to religious minorities that may be subject to hostility by a predominant religious group, according to General Comment 22 of the UN Human Rights Committee, which articulates the scope of Article 18 of the ICCPR. Furthermore, limitations on this right must be “pro-

portionate to the specific need on which they are predicated” and may not be applied discriminatorily or with discriminatory intentions. Lastly, an established state religion is prohibited from impairing the other rights protected by the ICCPR and must not discriminate against members of other religions.

### ***Conflict of Rights under International Law***

In determining how Sharia law can be enacted in compliance with international human rights standards, it is important to note the conflict among internationally protected human rights. Although the adoption of Sharia penal law by Nigerian states is protected by the ICCPR under the right to freedom of religion, the act infringes on the rights of religious minorities to practice their own faith, protected in Article 27 of the ICCPR. In short, the conflict emerges between the guarantee of freedom of religion and the guarantee of minority rights. In the case of Nigeria, the application of Sharia penal law to individuals residing within a state infringes on the right of non-Muslims to practice their own religions. According to General Comment 22, freedom of religion is wholly protected to the extent that it does not infringe on other fundamental rights protected by the ICCPR. In light of such inconsistencies, Sharia criminal law may or may not conflict with Nigeria’s international human rights obligations. A state is not prohibited from adopting an official religion, but it must not infringe on the rights of others to practice their own religions or profess no faith at all. This provision in the ICCPR is particularly relevant because non-Muslims and some Muslims prefer to be judged by a Nigerian criminal court rather than a Sharia court. Consequently, these individuals should have the right not to be subjected to a Sharia criminal court and the enforcement of religious behavior.

### ***Conditions under which Sharia Law May Be Applied in Nigeria in Accordance with International Human Rights Instruments***

An analysis of the texts has shown that the Sharia penal code and its application are inconsistent with Nigeria’s international human rights obligations. The enactment of Sharia penal law impairs the right of minorities to profess their own faith and violates the rights of religious minorities and women to be treated equally within society. The Presidential Committee on the Review of the 1999 Constitution emphasized the constitutional provision establishing the Federal Republic of Nigeria as a secular state and recommended preserving the prohibition against adopting an official religion and maintaining the right to freedom of religion. This recommendation considered the recent religious crisis in the country, which the Committee attributed to manipulation of religion for political ends rather than religion alone, and suggested that “a clear separation can, in a multi-cultural and multi-religious nation, be maintained between the affairs of a State and individual religious beliefs and practices, subject to such limits of conduct that may make State intervention necessary.” The Committee specifically concluded that legislation seeking to blur this separation should be approached cautiously so as not to restrict the individual’s right to freedom of religion or result in a religious dictatorship threatening fundamental freedoms.

### ***Conclusion***

In cases in which Islamic law conflicts with international human rights law, the Sharia penal code should undergo

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modifications of its penalties in order to comply with the ICCPR's protection of minorities, the right to life, and the right to be free from torture or cruel, inhuman or degrading treatment. Even with safeguards, it is not clear that fundamental rights will be protected with the introduction of Sharia criminal law because its provisions affect both public and private conduct of individuals. A commonly raised question regards how to regulate the consumption of alcohol, where such consumption is criminalized under Sharia but legal for non-Muslims. Furthermore, in multi-religious states where Sharia mandates the separation of the sexes in public education and public transportation, rights of women in minority religious groups that do not require the separation of the sexes will inevitably be impaired.

In light of the above analysis, it is clear that the recommendations by the Presidential Committee on the Review of the 1999 Constitution promote freedom of religion to all members of society and promote fundamental rights under the ICCPR, in conformity with Nigeria's international human rights obligations. At the same time, the Committee's conclusions address the conflict of rights dilemma by calling for the protection of the rights of minorities to practice their religion. Moreover, preserving a secular state in which a diversity of religions is practiced promotes peaceful co-existence.

Once modified, a limited application of Sharia law may be permissible under Nigeria's international human rights obligations, but a new framework for Sharia law that guarantees these rights has yet to be developed and implemented in Nigeria. 🌐

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### Remedy

The Commission concluded its opinion by making an appeal to the Nigerian government to ensure the protection of the environment, health, and livelihood of the people of Ogoniland through stipulated measures. These measures include stopping all attacks on the Ogoni people, conducting investigations into rights violations, and ensuring adequate compensation to victims and appropriate environmental and social impact assessments for any future oil development. The Commission also recommended that Nigeria provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by the exploitation. Finally, the Commission urged the Nigerian government to keep it informed of progress made by the institutions mandated to respond to environmental and human rights issues in Ogoniland.

### Conclusion

This case established strong precedent for the judicial enforcement of economic, social, and cultural rights within the international community. It is the first claim before an international human rights monitoring body that deals directly with alleged violations of economic, social, and cultural rights. By basing so much of its ruling within the social and economic rights guaranteed under the African Charter, the Commission effectively undermined arguments against the full recognition of these rights.

For Africa, the case marks a renewed commitment by the Commission to the implementation of economic, social, and cultural rights. Indeed, the African Commission indicated at its latest session held in July 2002 that it would host seminars and conferences on these rights as part of the fulfillment of its promotional mandate. These developments are encouraging, because most of the African constitutions adopted since the end of the Cold War have entrenched economic, social, and cultural rights in their bills of rights (for example, in Burkina Faso, Cape Verde, Ghana, Malawi, Sao Tome and Principe, and South Africa). This decision and other norm-setting activities of the Commission will be instructive to domestic courts in Africa on the enforcement of these rights.

Perhaps more importantly, the *SERAC Case* demonstrates that economic, social, and cultural rights are justiciable. This calls for the speedy ratification of the Protocol to the Charter establishing the African Court on Human and Peoples' Rights to ensure that such important decisions are enforced. 🌐

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# NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

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by Chanté Lasco\*

## The International Criminal Court

On July 1, 2002 the International Criminal Court (ICC) came into force. Crimes committed after July 1 falling within the Court's other jurisdictional requirements now can be referred to the Court. The date was set in accordance with Article 126 of the Rome Statute (Statute). It stipulates the date of entry into force as "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

Throughout the four years that passed before obtaining the 60 ratifications necessary under the Statute, the Preparatory Commission (Commission) drafted several key documents. These include the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Basic Principles Governing a Headquarters Agreement to Be Negotiated between the Court and the Host Country, the Financial Regulations and Rules, the Agreement on the Privileges and Immunities of the Court, the Budget for the First Financial Year, and the Rules of Procedure for the Assembly of States Parties (ASP). The Commission completed its work during its Tenth Session, which was held in New York City from July 1-12.

The first meeting of the ASP was held September 3-10. Article 112 of the Statute establishes the ASP, which consists of one representative from each state party and functions as the administrative body of the ICC. Prince Zeid Ra'ad Zeid Al-Husseini of Jordan was elected president of the ASP at the first meeting. Philippe Kirsch, chairman of the Commission, presented the Commission's report to the ASP and congratulated Prince Al-Husseini on "accepting the mantle of leadership." Applause marked the meaningful moment when the ASP took over from the Commission and the ICC became an institution independent of the United Nations.

After electing the president and two vice-presidents of the ASP, the body accepted the ASP Rules of Procedure promulgated by the Commission and its agenda. By consensus, the ASP adopted each of the remaining documents prepared by the Commission and finalized those documents that the Commission was unable to complete (including a procedure for the nomination and election of judges).

The ASP accepted most of the Commission's work by consensus, without further discussion or objection. Adopting a process for the nomination and election of judges was one of the most substantive tasks confronted by the ASP. At issue was Article 36(8) of the Statute, which stipulates that

The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

The Statute does not provide any guidance on how to meet these representation requirements. The ASP negotiated a process whereby states must vote for a minimum number of candidates from each geographical region and from each gender. For example, states must vote for three candidates from Africa, two from Asia, two from Eastern Europe, three from Western Europe, and three from Latin America. States

must vote for six male and six female judges, provided that at least nine women are nominated from which to choose. The Women's Caucus for Gender Justice (an umbrella organization representing non-governmental organizations (NGOs) from around the world) fought hard in Rome to have women's issues represented in the Statute and is now urging states parties to nominate qualified women, in addition to legal experts on violence against women, to help ensure the proper investigation and prosecution of crimes of gender and sexual violence.

The ASP opened the nomination period for the prosecutor and for judges on September 9th and it will close on November 30, 2002. The elections will be held from February 3-7, 2003. To date, nine countries have announced their candidates. Only one candidate was a woman.

## "Article 98" Agreements

A major topic of discussion among the delegates and NGOs was Article 98 of the Statute, which states that

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States government is currently using this provision to seek immunity from ICC prosecution for its personnel by entering into bilateral agreements with States Parties that prohibit surrendering U.S. citizens to the ICC. Many NGOs and States Parties oppose such agreements and believe the agreements undermine the purpose of the Statute. Nine countries have signed such agreements, including Uzbekistan, Mauritania, the Dominican Republic, East Timor, Israel, the Marshall Islands, Palau, Romania and Tajikistan. Because some of these states will require parliamentary approval of the agreements, there is still a possibility that the agreements will not be binding.

## Next Steps

The ASP will meet again in February to elect judges and a prosecutor. Meanwhile, an advance team arrived in The Hague on July 1, 2002 to begin making practical arrangements for the Court. A building has been provided by the Netherlands and the advance team is dealing with operational issues such as information technology, office space, and vacancy postings for personnel. At the time of writing, 81 countries have ratified the Statute.

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### The Special Court in Sierra Leone

The newly established Special Court for Sierra Leone (Special Court) has begun its work. Investigators from the Office of the Prosecutor are visiting massacre sites for evidence that can be used to prosecute those responsible for atrocities committed during Sierra Leone's civil war.

As the result of a request by President Ahmad Tejan Kabbah of Sierra Leone, the Special Court was created by treaty between Sierra Leone and the UN. President Kabbah wrote to UN Secretary-General Kofi Annan in June of 2000 to ask for UN assistance. A Security Council resolution passed in August 2000 authorized the establishment of a Special Court and called for the formation of an agreement between the UN and Sierra Leone to that effect.

The Special Court has jurisdiction over those individuals accused of committing crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law. The temporal jurisdiction of the Special Court began on November 30, 1996 and continues indefinitely. The Lomé Peace Accords were signed in 1999 in Lomé, Togo, between the government of Sierra Leone, the Revolutionary United Front, and the special representative of the UN Secretary-General to end the civil war. Although amnesty provisions are included in the Lomé Peace Accords for crimes committed during the course of the conflict, the UN representative stated upon signing the accords that these provisions are not applicable in instances involving genocide, crimes against humanity, war crimes, or other serious violations of international humanitarian law. Therefore, the amnesty provisions of Lomé will not preclude the Special Court from prosecuting those responsible for such grave crimes.

### Unique Features of the Special Court

The Special Court differs from the ad hoc tribunals for the former Yugoslavia and Rwanda. The ad hoc tribunals were created entirely under the auspices of the UN Security Council, employ all international judges and prosecutors, and apply only international law. The Special Court represents a "hybrid" court, containing aspects of both an international tribunal and a domestic court. Consequently, in addition to the international crimes listed above, the Special Court can prosecute individuals for domestic crimes delineated in its statute. These crimes include offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act of 1926 and offenses relating to the wanton destruction of property and arson under the Malicious Damage Act of 1861. The amnesty provisions contained in the Lomé Agreement are applicable to crimes that originate from Sierra Leonean law, and not only to those crimes originating in international humanitarian law.

Other crimes covered by the Statute that respond to the unique characteristics of the Sierra Leonean conflict are enumerated in Article 4. These crimes include:

- (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (c) Conscription or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 4(c) addresses one of the most shocking aspects of the events that took place in Sierra Leone—the widespread involvement of children in the hostilities. Children as young as ten were abducted, made to commit atrocities against their will, and given drugs such as cocaine and alcohol to fuel the violence. The Special Court sets 18 as the age of adult criminal responsibility and will not prosecute any child who was under the age of 15 at the time of the alleged commission of a crime. Article 7 of the Statute provides that any child who was between 15 and 18 years of age at the time of the commission of his or her crimes should not be imprisoned. Rather, such a child should

be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. . . . In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Because the Special Court has been created to prosecute those who bear the greatest responsibility for crimes, 15 to 18-year-olds are unlikely to be targeted for prosecution.

The hybrid character of the Special Court is also reflected in its personnel. The Special Court's Trial Chambers consists of three judges, two who are appointed by the UN Secretary-General and one who is appointed by the Sierra Leonean government. The Appeals Chamber is made up of five judges. The UN Secretary-General appoints three judges and the Sierra Leonean government appoints two judges. These eight positions, plus two alternate judge positions, were filled on July 26, 2002.

Another unique aspect of this tribunal is its location in Freetown, Sierra Leone. Many people have criticized the tribunals for the former Yugoslavia and Rwanda because they operate a great distance from the communities where the crimes occurred, and prevent victims from seeing and understanding the justice processes at work. Policymakers, activists, and academics see the Special Court as a possible model for future "hybrid" tribunals and are evaluating the Special Court's progress for encouraging signs. In drafting the Statute for the Special Court, UN personnel attempted to incorporate lessons learned from the ad hoc tribunals and to improve upon those models.

U.S. attorney David Crane was selected as chief prosecutor of the Special Court and began his appointment in August 2002. He recently traveled to the interior of Sierra Leone for the first time to examine massacre sites for evidence that could be used in his cases. Talking to a crowd of Sierra Leoneans, he said, "No one in the world deserves to suffer in the way that the people of your district have suffered. Justice cannot be reserved only for the rich. It is the right of every person in the world, no matter how poor."

The coming months and years will reveal whether this new tribunal will be able to afford victims of widespread atrocities a true measure of justice. ☺

*\*Chanté Lasco is a J.D. candidate at the Washington College of Law and a staff writer for the Human Rights Brief. For more information on the ICC, visit [www.un.org/icc](http://www.un.org/icc) or [www.iccnw.org](http://www.iccnw.org).*

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# NEWS FROM THE INTER-AMERICAN SYSTEM

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by Megan Hagler\*

## Inter-American Commission on Human Rights

### *Precautionary Measures Adopted for Detainees Held in Guantánamo Bay, Cuba (United States)*

**Facts:** The petitioners, the Center for Constitutional Rights, the Center for Justice and International Law, Judith Chomsky, Columbia University's Human Rights Clinic, and Professor Richard Wilson of the Washington College of Law, requested that the Inter-American Commission on Human Rights (Commission) adopt precautionary measures to protect the detainees held by the United States at its military base in Guantánamo Bay from imminent harm. The petitioners argued that according to the Geneva Conventions, to which the United States is bound, the United States must treat the prisoners as prisoners of war until an independent court determines their status. Despite the fact that an independent tribunal had not determined each individual's status, the United States declared that all Guantánamo prisoners are not prisoners of war, and therefore do not deserve the protections given to prisoners of war. Further, the petitioners asserted that because the detainees were allegedly held incommunicado, subjected to inhumane treatment, and held indefinitely, precautionary measures were necessary to protect the detainees' liberty and security.

**Decision:** The Commission adopted precautionary measures on March 12, 2002 pursuant to Article 25 of the Commission's Rules of Procedure. In reaching its decision, the Commission maintained that the fundamental rights of individuals under the control of a state during armed conflict may be determined pursuant to international human rights law as well as international humanitarian law. In instances of armed conflict in which international humanitarian law does not apply, individuals are still entitled to protection of their non-derogable rights under international human rights law. The Commission underscored that no individual under the authority and control of a state, regardless of his or her circumstances, should be denied legal protection of his or her fundamental and non-derogable human rights.

The Commission further stated that according to international norms applicable in peacetime and war, such as the right to a fair trial codified in Article V of the Third Geneva Convention and Article XVIII of the American Declaration of the Rights and Duties of Man, a competent court must be charged with honoring the legal status and rights of persons who fall under the authority and control of a state. With respect to the petitioners' claim, the Commission concluded that the detainees were at the "unfettered discretion of the United States government" as a result of the government's failure to require its courts to clarify the detainees' legal status and determine which protections apply to the detainees under domestic or international law. Accordingly, the Commission adopted precautionary measures to ensure that: (1) the government require that domestic courts clarify the legal status of each of the detainees; and (2) that the government provide the legal protections according to the courts' determinations regarding each detainee's status.

**Response of the United States:** On April 15, 2002, the U.S. government replied that the Commission's decision regarding precautionary measures was inappropriate because the Commission lacks jurisdiction to apply international human-

itarian law. The government maintained that even if the Commission had jurisdiction to apply international humanitarian law, the precautionary measures were unnecessary because the legal status of the detainees was clear pursuant to statements of the U.S. government. The government did not respond to the Commission's contention that the detainees were entitled to a determination of their status by an independent court. Finally, in arguing that the detainees were not at risk of irreparable and immediate harm, the United States alleged that the officials' treatment of the detainees complied with the principles of the Geneva Convention.

### *Precautionary Measures Adopted for September 11th Detainees Ordered Deported or Granted Voluntary Departure (United States)*

**Facts:** The petitioners, the Center for Constitutional Rights, the Center for Justice and International Law, and the International Human Rights Law Group, requested that the Commission order precautionary measures to protect an undisclosed number of foreign nationals detained after September 11th. The petitioners alleged that precautionary measures were necessary to prevent continued unlawful treatment allegedly threatening the detainees' right to be free from arbitrary detention, as well as their rights to due process, protection of personal integrity and family life, and equal treatment. Specifically, the petitioners alleged that the Immigration and Naturalization Service (INS) continued to hold dozens of detained Muslim men of Arab and South Asian descent because the United States required that the detainees be "cleared" of their possible connection to terrorism before their release and departure, even though the INS did not have probable cause to suspect that the detainees were involved in criminal activity. Petitioners argued that even though these detainees were initially held for minor immigration violations and had never been charged with terrorism, the INS had routinely denied the detainees bail and had detained some for up to four months beyond the expiration of their deportation orders at the time of the petition's filing. Petitioners further substantiated their claim for precautionary measures with testimony of detainees who, after returning to their countries, claimed to have been subjected to severe physical and verbal abuse while in detention. Petitioners alleged that there is no basis under domestic or international law for the detainees' continued detentions, and that the detainees had been held without being granted the possibility of challenging the legality of their detentions before domestic courts. Additionally, the petitioners alleged that no information regarding the detainees' conditions of detention or the supervision of those conditions had been released.

**Decision:** On September 26, 2002, the Commission adopted precautionary measures to avoid potential irreparable harm to the detainees. Citing to its decision on the request for precautionary measures for the Guantánamo Bay detainees, the Commission reasoned that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or

continued on next page



her fundamental and non-derogable human rights.” Specifically, the Commission requested that the U.S. government take necessary steps to protect the detainees’ right to personal liberty and security, their right to humane treatment, and their right to resort to the courts for an independent determination whether their detention is lawful and whether the detainees are in need of protection. The Commission requested that the government provide information regarding its compliance with the precautionary measures within 30 days of receipt of the Commission’s communication and periodically thereafter.

### Inter-American Court of Human Rights

#### *Hilaire, Constantine and Benjamin et al. Case (Trinidad and Tobago)*

**Facts:** This case results from the joinder of 32 cases the Commission sent to the Inter-American Court of Human Rights (Court) regarding the use of the death penalty, issues of due process, and treatment of detainees. This is the first case in which the Court has ruled on death penalty issues.

The domestic courts sentenced each victim to death by hanging pursuant to a statute that mandates the strict application of the death penalty for murder convictions. Instead of considering mitigating factors when issuing their death sentences, the courts issued a mandatory death sentence in each victim’s case, and none of victims had the opportunity to apply for pardons. Several of the victims alleged that the courts did not provide them with effective legal representation, delayed their criminal proceedings, and committed due process violations during the pre-trial, trial, and appeal phases. Further, the petitioners alleged that several of the victims were subjected to inhumane treatment and were confined in unsuitable conditions. Experts testified that in Trinidad and Tobago prisons, there is a severe shortage of psychiatric assistance; overcrowding is common, with up to 14 prisoners occupying a single cell; there are no proper toilet facilities; the lighting and ventilation is poor; many prisoners do not have the opportunity to leave their cells for exercise; and those on death row often wait for prolonged periods before being executed.

**Decision on the Merits:** The Court ruled that issuing mandatory sentences without considering the individual circumstances of each crime arbitrarily deprived the victims of their right to life in violation of Article 4(1) of the American Convention on Human Rights (Convention), and that ordering the death penalty without considering the seriousness of each crime also violated Article 4(2) of the Convention, in relation to Article 1(1), which requires that states respect the rights of the provisions of the Convention. Additionally, the Court held that the state’s continued application of the statute requiring mandatory death penalty sentencing in murder cases violates Article 2 of the Convention, which requires that its domestic legislation does not contradict the protections set forth in the Convention. Because the state did not guarantee an effective procedure for granting amnesty, pardon, or commutation of sentence, the Court found a violation of Article 4(6), which provides that those condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence. The Court considered that not allowing an effective pardon procedure also violated the victims’ due process rights under Article 8 in conjunction with Article 1(1) of the Convention. The Court deemed that Trinidad and Tobago had violated the right to

life of the only victim who was executed, as the state executed the victim after the Court had issued provisional measures to protect the victim’s life.

The Court concluded that the state violated the victims’ rights to personal liberty, due process, and judicial protection under Articles 7, 8, and 25 of the Convention, respectively, in relation to Article 1(1). Specifically, the Court considered that the delay in the processing of the victims’ domestic cases violated Articles 7(5) and 8(1). The Court also considered that the state violated Articles 8 and 25 in relation to Article 1(1) by not providing legal assistance to certain victims, thereby rendering their appeals illusory.

Furthermore, although the Commission alleged that only certain victims were subject to inhumane treatment as a result of the inadequate prison conditions, the Court found that the evidence provided by expert witnesses was indicative of the general conditions of prisons in Trinidad and Tobago. The Commission therefore considered that all individuals in this case suffered violations of their rights to personal integrity and to be free from cruel, inhuman or degrading treatment under Articles 5(1) and 5(2) in relation to Article 1(1) of the Convention.

The Court ordered the state to provide several forms of reparations pursuant to Article 63(1) of the Convention. Specifically, the Court demanded that the state refrain from applying the mandatory death penalty statute in the future and brings its domestic law into compliance with Article 2 of the Convention. The Court recommended that the state adopt legislative reforms to introduce different categories of murder, allowing courts to consider the severity of an act and apply a penalty commensurate with the gravity of that act. The Court requested that the state order a retrial for the criminal charges brought against all victims and apply the reformed laws in their trials. On the grounds of equity, the Court urged the state not to execute any of the individuals, regardless of the outcomes of their trials. The Court additionally requested that the state indemnify the family members of the executed victim, and that the state pay for a portion of the victims’ legal expenses in the proceedings before the Court. *(For information regarding the preliminary objections in the Hilaire Case, see “News from the Inter-American System” in the Human Rights Brief, Volume 9, Issue 3. 🌐*

*\*Megan Hagler is a J.D. candidate at the Washington College of Law and co-editor-in-chief of the Human Rights Brief. Ariel Dulitzky, principal human rights specialist of the Inter-American Commission on Human Rights, provided research support.*



## LEGISLATIVE WATCH

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

**Senate Foreign Relations Committee Approves Ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**  
*Chairman of the Senate Foreign Relations Committee:* Senator Joseph R. Biden, Jr. (D-DE)

On July 30, 2002, the Senate Foreign Relations Committee, under the current chairman, Senator Joseph R. Biden, voted 12-7 to approve U.S. ratification of the United Nations' CEDAW, drafted in 1979 and entered into force on September 3, 1981. Although the United States signed CEDAW in 1980, and the Senate Foreign Relations Committee approved it in 1994 by a vote of 13-5, efforts to ratify the treaty have been repeatedly stalled. With the Committee's approval, the full Senate will debate ratification of CEDAW, and will possibly vote on ratification in the fall. According to Senator Biden, "The treaty is a means to an end—a tool which strengthens the ability of the United States as well as women's advocates around the world to press nations to expand rights for women. This vote is a good first step toward improving women's rights worldwide and a victory for women everywhere."

**Afghanistan Freedom Support Act of 2002, H.R. 3994**

*Major Sponsor:* Rep. Henry J. Hyde (R-IL)

*Status:* Referred to Senate Committee on Foreign Relations on May 21, 2002.

*Substance:* This bill addresses economic, democratic, and military assistance for Afghanistan, as well as other foreign countries and international organizations providing support for Afghanistan. Principles governing the provision of economic and democratic development assistance include: reduction of terrorism, narcotics control, women's rights, self-sufficiency, and coordination of international donors. To achieve these goals, the bill authorizes the president to provide assistance in various areas, including humanitarian needs; repatriation and resettlement issues; counter-narcotics efforts, focusing specifically on opium; food and health conditions, emphasizing the rehabilitation of the agricultural sector; and infrastructure reconstruction. The bill urges the president to designate a coordinator within the Department of

State to facilitate these programs. With regard to military assistance, the bill calls for the requisite assistance, support, and training to develop a civilian-controlled and centrally governed army and a civilian police force, each operating with respect for human rights. Additionally, the bill calls for a multinational security force and makes similar assistance and training available to foreign countries or international organizations participating in military, peacekeeping, or policing operations in Afghanistan. The multinational security force's authority would terminate on December 31, 2004.

**Proposal of an Amendment to the Constitution of the United States Relating to Marriage, H. J. Res. 93**  
*Major Sponsor:* Rep. Ronnie Shows (R-MS)

*Status:* Referred to House Committee on the Judiciary, Subcommittee on the Constitution on July 18, 2002.

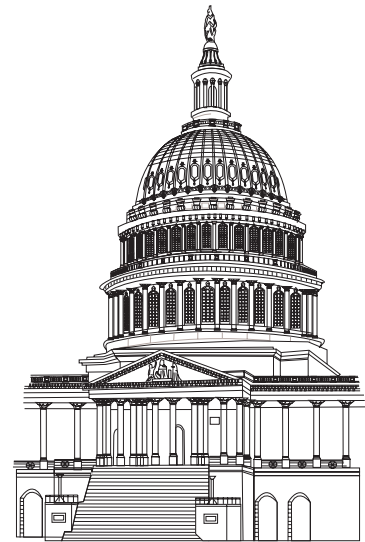
*Substance:* This legislation, also known as the Federal Marriage Amendment, proposes to narrow the definition of marriage, recognizing only those marriages between a man and a woman. Additionally, this legislation seeks to prohibit the conferral of legal marital status on unmarried couples or groups pursuant to state constitutions, state law, or federal law. The resolution was initially drafted by the Alliance for Marriage, which is composed of religious and political activists. If passed, the amendment would negate existing domestic partnership laws in eight states, including Vermont, the only state that legalizes civil unions.

**Hunger to Harvest: Decade of Support for Sub-Saharan Africa Resolution, H. Con. Res. 102**

*Major Sponsor:* Rep. James A. Leach (R-IA)

*Status:* Agreed to in the Senate by unanimous consent.

*Substance:* In calling on the United States to declare a decade of support for Sub-Saharan Africa, this legislation appeals to President Bush to produce five- and ten-year strategies to address hunger and poverty in Sub-Saharan Africa. The bill also encourages the president to provide funding for bilateral and multilateral poverty-focused resources to address issues such as education, agriculture, economic develop-



ment, democracy building, micro-finance development, debt relief, and health, including HIV-AIDS prevention and treatment. To implement these strategies, the legislation encourages the president to work with other donor countries, NGOs, aid organizations, and Sub-Saharan African countries. The resolution makes an additional appeal to Congress for obtaining resources to implement such strategies, and requests that the Administrator of the United States Agency for International Development report on the implementation of these strategies. 🌐



knew that subordinates were committing human rights abuses like those suffered by the plaintiffs.

The plaintiffs in *Romagoza* drew from the *Delalić* case, in which the ICTY ruled that a showing of *de jure* command gives rise to a legal presumption that the defendant commander exercised effective control. Specifically, the plaintiffs argued that the jury should be instructed on the existence and operation of this presumption. Judge Hurley nonetheless made an initial determination that the defendants had presented sufficient evidence to rebut the presumption and thus declined to instruct the jury on the presumption.

### The Defense and the Plaintiffs' Rebuttal

Given the centrality of the concept of "effective control" to the application of the doctrine of command responsibility, the defendants not surprisingly argued in both cases that the civil war in their country had created a state of chaos that rendered it impossible for them to know what their subordinates were doing, or to be able to intervene to prevent abuses or punish perpetrators. This defense proved successful in the *Ford* case, as statements by jurors to the press indicate that they determined that the plaintiffs had not met their burden of proving that the generals had "effective control" over the subordinates who committed the churchwomen's murders.

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

The plaintiffs also demonstrated that the top military echelons were able to control their troops when they wanted to implement the banking reform or fight the civil war. In this regard, Terry Karl, professor of Latin American studies at Stanford University, gave expert testimony describing the violence in El Salvador during the relevant period as a spigot, which could be turned on and off by the military as needed. A retired Argentine colonel—Colonel José Luis García, whose extensive knowledge of El Salvador stemmed from expert testimony he provided in the trial of the murderers of the six Jesuits who were killed in El Salvador in 1989—discussed the structure and operation of a military chain of command in general and of Latin American militaries in particular. He also presented expert testimony that the Salvadoran military's communications and transportation infrastructure were sufficiently developed to enable the defendants to exercise control over their troops. Finally, the plaintiffs presented significant evidence of the generals' failure to denounce abuses, let alone investigate or prosecute perpe-

trators, despite their ability to do so. The plaintiffs' military expert provided examples of what the defendants could have done to curb abuses by their subordinates had they had the will to do so.

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

The defendants have indicated their intention to appeal. In the meantime, Kurt Klaus, the defense counsel, has recently indicated that he will defend Juan López Grijalba, a former Honduran military chief accused of the murder and torture of Honduran civilians in the 1980s. This case is also being brought by The Center for Justice & Accountability, which filed and served the complaint on July 15, 2002.

### Case Impact

The verdict against Generals García and Vides has energized human rights activists in El Salvador and has provided hope to the Salvadoran refugee community and others. The verdict was headline news in El Salvador, and was widely reported in the United States. Over 150 lawyers, students, and others encouraged by the verdict attended a recent conference about the case at the Human Rights Institute of the University of Central America in San Salvador. Activists gave their overwhelming support to efforts in the United States to fight against the impunity of military and death squad leaders for abuses during that country's civil war. While many expressed a desire for such cases to be brought in El Salvador, commentators noted that this is currently impossible due to the existence of the the amnesty law, which forgave military leaders of crimes and human rights abuses they or their subordinates committed. At the same time, some human rights lawyers stated that the case provided new impetus to seek to limit or rescind the broad amnesty law adopted by the Salvadoran Congress in 1993 in the wake of publication of the United Nation's Truth Commission Report.

At the same time, editorials in some Salvadoran papers criticized the case as "reopening old wounds" and as a threat to stability achieved following the Peace Accords in El Salvador. Many commentators nonetheless dismissed these arguments as disproved by the measured debate accompanying the verdicts, and pointed to the importance of the public dialogue about the issues of justice and accountability brought about by the case. In the United States, throngs of supporters have greeted the plaintiffs at events in their communities to celebrate the victory, and the plaintiffs have received messages from well-wishers around the world praising their courage and thanking them for providing hope that some measure of justice could be achieved. 🌐

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





**H**adar Harris is the new executive director of the Center for Human Rights and Humanitarian Law. She brings a wealth of experience to the position and possesses an exciting vision for the Center. Regarding her wide-ranging background in human rights law, Ms. Harris states, "Human rights activism is multi-pronged. You can change

the law, but unless you get laws implemented, and unless you ensure that people know what their rights are, you've only done a small part of the work." She has worked in all facets of human rights activism, including legal reform, implementation, and citizen education. "I believe strongly that all of these things should be linked together."

### Work in the Field of Human Rights Law

In the area of legal reform, Ms. Harris consulted on proposed reforms to the Moroccan Criminal Procedure Code. "There were good aspects to the proposed changes, but also other provisions which undercut the positive aspects. For example, one provision codified the presumption of innocence, yet another stated that defendants could not rebut police reports. We worked very hard to amend this provision, and in the end, we were successful in changing the law. Now training is needed for judges, prosecutors, and police to implement the changes. Reform alone is not enough. There must be a link between theory and practice, law and implementation."

Regarding her work in implementing legal reform, Ms. Harris spent five and a half months in Armenia piloting an assessment tool developed by the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) to review national compliance with the provisions of the Convention on the Elimination of All Forms of Discrimination against Women. "I was able to take the intellectual framework created by the ABA and implement it in the field, evaluating and rethinking the tool in order to better assess compliance given the realities of implementation. The pilot program served as a bridge between academic theory and activism in the field."

While working in Armenia, Ms. Harris also consulted on implementation of the assessment tool in Serbia and Kazakhstan, and developed methodology, an implementation guide, and a training manual for use of the tool around the world. The final report from the Armenia pilot program was submitted for review to the United Nations and the Armenian government.

To help citizens exercise their human and civil rights, Ms. Harris has worked in private practice in the area of labor and employment law. Recently, she was involved in *Mehinovic v. Vukovica*, a lawsuit initiated on behalf of four Bosnian Muslims against their Serbian torturer. The case, brought in U.S. Federal Court in Atlanta, Georgia under the Alien Tort Claims Act and the Torture Victim Protection Act, resulted in an award of nearly \$140 million.

Additionally, Ms. Harris spent six years living in Jerusalem, working for the Association for Civil Rights in Israel (ACRI), Israel's premier human and civil rights organization. ACRI focuses on various issues regarding rights and liberties including

freedom of and from religion, due process, rights of the Arab minority in Israel, and gender equality. At ACRI, Ms. Harris was in charge of program and resource development. Currently in Israel, religious courts govern all personal status, making it impossible for Israelis of different religions to marry. While there, Ms. Harris helped develop projects to streamline the implementation of due process mechanisms in the Ministry of the Interior and to create options for civil marriage in response to the current law. She pursued these goals using advocacy in the Israeli court system, legislation in the parliament, and public education and media outreach in civil society.

Ms. Harris has also worked to defend civil and human rights by helping write shadow reports to the UN for the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, and the International Covenant on Civil and Political Rights. Ms. Harris also worked as an international election observer with the UN/OSCE joint mission in Azerbaijan. Ms. Harris points out, however, that citizens cannot exercise their rights if they are not aware of their rights. With the aim of educating citizens in this regard, Ms. Harris has taught law

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## Eighth Annual Inter-American Human Rights Moot Court Competition May 18–23, 2003

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### For more information, contact:

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Website: [www.wcl.american.edu/pub/humright/mcourt](http://www.wcl.american.edu/pub/humright/mcourt)

at Khazar University in Baku, Azerbaijan. She has also piloted innovative distance learning programs, and has conducted training and educational workshops on a wide variety of subjects including human rights, pluralism, and democracy education around the world.

This wide range of practical experience that Ms. Harris brings to the Center for Human Rights and Humanitarian Law enhances her vision of how the Center can serve the WCL community and beyond. "As I see it, there are three key roles for the Center. First, working with students, being a resource for them, providing hands-on research and advocacy experiences and being an incubator of student-driven initiatives and ideas. Second, working with faculty engaged in scholarship and research on international human rights and humanitarian law and facilitating their work. And finally, working with the international community to engage in substantive research and project development to help expand the role of international human rights and humanitarian law in the international community."

#### **Vision for the Future of the Center**

Ms. Harris believes the Center should play both practical and academic roles. "The Center can serve as a resource for students to do academic research, but in order for them to have good opportunities in international human rights, they should not just sit in the library and do research. The Center can help students see how human rights are violated and how they are protected, and what it really means to be an advocate and a lawyer. We are doing this by creating projects with practical elements for students, such as internships and field placement opportunities, and by constantly thinking through projects to take into account the realistic side of what we're trying to do. Human rights advocacy is strategic. I see the work of the Center as being able to think through how we can push the envelope strategically and address cutting-edge issues."

Many students at WCL who are interested in international human rights and humanitarian law stand to gain from such opportunities and also to benefit from Ms. Harris's advice on seeking a fulfilling career. "There are very few full-time, paying jobs for international human rights attorneys, so it is hard to make a living at it. But there are many other worthwhile ways to be involved in human rights. You can serve on the board of directors of an organization, donate your time or your money, or even just read about what is happening. Every person must find what his or her point of entry is, and what he or she is willing and able to do, given practical realities. If you think that human rights and humanitarian law is your life's work, take advantage of the unique opportunities in law school to meet people, do substantive work, and gain an understanding of the field. This will give you an advantage." As a first step toward getting students involved in human rights and humanitarian law, the Center has launched a program this semester called "Munching on Human Rights" that will help students get involved in human rights issues even before they take international law classes.

Ms. Harris envisions the Center as an incubator of ideas and projects that will serve the international community and the cause of international human rights and humanitarian law. She looks forward to partnering with international organizations to providing students with substantive opportunities. Projects currently in development deal with a wide range of novel issues, including reparations for people affected by development projects, developing assessment tools to evaluate international treaty compliance, training indigenous peoples on legal rights and advocacy, freedom of expression in the Americas, and more. 🌐



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## FACULTY/STAFF

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**John Cerone**, executive director of the War Crimes Research Office at American University's Washington College of Law (WCL), was appointed to American University's School of International Service as an adjunct faculty member in May 2002, and taught a course on international human rights law and politics. During the summer of 2002, he was interviewed by the Canadian Broadcasting Corporation, NPR's "All Things Considered," and Voice of America Radio on legal and political issues relating to U.S. opposition to the new International Criminal Court. In July 2002, he traveled to East Timor, and undertook an assessment of the UN-created international/national hybrid system created to prosecute perpetrators of grave violations of international law committed in East Timor. In September 2002, he delivered a lecture, "Reasonable Measures in Unreasonable Situations: The Application of Human Rights and Humanitarian Law in Territories under UN Administration Where the Bulk of Human Rights Violative Activity is Perpetrated by Non-State Actors," at a conference entitled "The United Nations and Human Rights Protection in Post-Conflict Situations," sponsored by the Human Rights Law Centre of the University of Nottingham, UK. Mr. Cerone's recent publications include "The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice" in *ILSA Journal of International and Comparative Law*, and "The Human Rights Framework Applicable to Trafficking in Persons and Its Incorporation into UNMIK Regulation 2001/4" in *2001 Yearbook of International Peacekeeping*.

**Robert K. Goldman**, professor of law and co-director of the Center for Human Rights and Humanitarian Law, traveled to Colombia and Argentina in May and August 2002, respectively, as the Inter-American Commission on Human Rights (IACHR) member responsible for cases and friendly settlements in those countries. In July 2002, Professor Goldman testified on a panel before the Commission on Truth and Reconciliation in Lima, Peru regarding unjustly convicted persons under Peru's anti-terrorist laws. In September 2002, he attended the annual meeting of the board of the Inter-American Institute of Human Rights in San José, Costa Rica. In October 2002, Professor Goldman attended the three-week ordinary session of the IACHR in Washington, D.C.

**Claudio Grossman**, dean, co-director of the Center, and former President of the

IACHR, was a guest speaker at the September 2002 Inter-American Defense College seminar on "Global Threats and Hemispheric Security," regarding corruption in the public and private sector in Latin America. Additionally, Dean Grossman was interviewed by the National Radio of Spain regarding the consequences of September 11, 2001. In August 2002, he was interviewed by the Guatemalan Press regarding the Myrna Mack case, and interviewed by BBC Spanish regarding changes in society, the economy, and security since September 11, 2001. In July 2002, Dean Grossman was interviewed by Hispanic National Radio regarding U.S.-European relations, interviewed by Dutch World Radio regarding Latin American human rights issues, and interviewed by the *Chicago Tribune* regarding his observation of the Argentinean Jewish Community Center bombing trial. In addition, he was interviewed by *CNN en Español* regarding the unveiling of President Bush's Middle East Policy in June 2002, and appeared as a guest on the program "Dominio Público" on *Venevisión* discussing freedom of expression in Guatemala in May. Dean Grossman presented lectures at the Institute for International Political Studies on the inter-American system for the protection of human rights in May 2002, and participated in a meeting sponsored by the Inter-American Dialogue entitled "Advancing Democracy through Press Freedom in the Americas" in April 2002. In April, he also participated as a representative of the IACHR in a dialogue involving the Nicaraguan government and the Awas Tingni concerning the demarcation of lands of the Awas Tingni in Nicaragua. He also organized a conference in April entitled "Indigenous Peoples: Challenges for the 21st Century," where he moderated a panel on indigenous women's rights. Since July 2002, Dean Grossman has served as a board member of the Social Science Foundation, Graduate School of International Studies, University of Denver, and in August he was elected executive board member of the Inter-American Institute on Human Rights.

**Claudia Martin**, visiting associate professor and co-director of the Academy on Human Rights and Humanitarian Law, coordinated the fourth summer program of the Academy on Human Rights and Humanitarian Law in May and June 2002. In addition, during the program she co-taught Inter-American Human Rights Law, coordinated activities of Human Rights Month, and participated as a moderator in the panel "Amnesty Laws and the

Struggle against Impunity in Argentina: Current Status of Cases that Continue to be Prosecuted in the National Jurisdiction." In August 2002, Professor Martin lectured on the role of the Inter-American Court of Human Rights to students during the XI Edition of the African Human Rights Moot Court Competition in Cairo, Egypt. In addition, she participated in the honor panel that judged the final round of the African competition. In September 2002, Professor Martin coordinated an event in cooperation with the Human Rights Program of *Universidad Iberoamericana* and the Mexican Bar Association on current developments in human rights law for human rights law professors and members of the legal profession. During that event, Professor Martin lectured on current developments in the case law of the Inter-American Court of Human Rights.

**Diane Orentlicher**, professor of law and co-director of the Center, provided commentary in various media sources on issues relating to the U.S. opposition to the International Criminal Court and other war crimes issues during the summer of 2002. Additionally, in May 2002, she was invited to serve on the board of directors of the International Legal Institute of the Open Society Institute. Also in May 2002, Professor Orentlicher served as a panelist in a program on military tribunals at the United States Courthouse hosted by the Edward Bennett Williams Inn of Court. In June 2002, she participated in a meeting of the International Humanitarian Law Working Group at the United States Institute of Peace entitled, "New Players in the Implementation and Enforcement of International Humanitarian Law: The Evolving Role of the Military." In August 2002, Professor Orentlicher participated in a panel on "International Criminal Justice Today: Theories and Practices in a Changing World," sponsored by the American Bar Association Central and East European Law Initiative, as part of the ABA's annual meeting.

**Diego Rodríguez-Pinzón**, 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, co-hosted the Academy on Human Rights and Humanitarian Law in May and June 2002. In addition to teaching during the Academy session and coordinating all logistical and academic aspects as co-director, he served as a moderator in the panel presentation

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entitled, "The Current Status of Economic, Social, and Cultural Rights," featuring Philip Alston, Victor Abramovich, and Stephen Hansen. In June and July 2002, Professor Rodríguez-Pinzón advised the Presidential Program on Human Rights of the Government of Colombia on further legal steps to confront the human rights situation in that country, particularly regarding the issue of impunity. In August 2002, he lectured at The American University in Cairo, Egypt, during the African Human Rights Moot Court Competition, presenting a comparative approach to the inter-American, European, African, and UN systems. In September 2002, Professor Rodríguez-Pinzón lectured on "Current Developments in the Inter-American Commission on Human Rights" in a training seminar organized by the Mexican Bar Association and the *Universidad Iberoamericana* in Mexico City. The event was part of an ongoing project of the Academy with several Mexican universities focusing on human rights legal education in that country. Also in September 2002, he lectured on the limitations of international human rights law when restructuring the government, at a conference hosted by the *Procuraduría General de la Nación* of Colombia, the Swedish Government, and UN Human Rights

High Commissioner's Office in Bogotá, Colombia.

**Herman Schwartz**, professor of law and co-director of the Center, served as a Fulbright senior specialist lecturer on American law, comparative constitutional law, and human rights at South African law schools in Cape Town, Western Cape, Stellenbosch, and Witwatersrand from April 15-30, 2002. Additionally, he was commencement speaker at the University of Buffalo Law School, SUNY, in May 2002. Also in May 2002, he served on the executive committee of the board of directors, of the International Legal Institute of the Open Society Institute. In June 2002, he provided an analysis of proposed amendments to the constitution of Georgia for USAID. In September 2002, he provided an analysis of proposed amendments to the constitution of the Republic of Kyrgyzstan for the National Democratic Institute.

**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, taught in the Academy on Human Rights and Humanitarian Law in June 2002, and at the Oxford University and George Washington University Summer Joint Program in International Human Rights Law in July 2002. During the sum-

mer of 2002, Professor Wilson published the following articles: "The United States' Position on the Death Penalty in the Inter-American Human Rights System," in *Santa Clara Law Review*, "Issues in the Assignment of Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach," in the *International Criminal Law Review*, and "Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South," in *Clinical Law Review*. He also wrote a book review of Geert-Jan G.J. Knoops' *Defenses in Contemporary International Criminal Law* in the *American Journal of International Law*. Professor Wilson filed the brief of the European Union in *Atkins v. Virginia* (barring execution of mentally retarded persons), decided by the U.S. Supreme Court in June. The EU brief was cited in both the majority and dissenting opinions. In September, Professor Wilson conducted an evaluation for the Open Society Foundation of Lithuania of three law school legal aid clinical programs in that country. 🌐



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