



# HUMAN RIGHTS

Center for Human Rights and Humanitarian Law

# BRIEF

A LEGAL RESOURCE FOR THE INTERNATIONAL HUMAN RIGHTS COMMUNITY

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# Defending Humanity

by Peter Cicchino

*The Human Rights Brief is proud to publish the following speech given by Professor Peter Cicchino at the 1998 Robert Cover Conference for Public Interest Law. As Professor Cicchino described: "People come to the conference from all over the country, united by two common attributes: (1) all those attending are interested in or currently practicing law in the public interest, which usually means free legal services to poor people, prisoners, victims of discrimination, and other politically unpopular groups of people; and (2) all those attending share a willingness to spend a weekend bunking with several other people in a wooden cabin in snowy, rural New Hampshire for the sake of fellowship with people who share their ideals."*

*Shortly after delivering this speech, Professor Cicchino was diagnosed with advanced colon cancer. After battling valiantly for two years, all the while contributing enormously to the Washington College of Law community and beyond, Professor Cicchino died in July 2000. We celebrate his powerful vision of human rights and his commitment to the idea that by helping others, we help ourselves. He is sorely missed, but not forgotten.*

*The Editors.*

Since we are in New Hampshire, it seems especially appropriate that I begin with my favorite story of one of New Hampshire's most loved sons: Theodore Geisel, otherwise known as Dr. Seuss. The story is called *Horton Hears A Who*. The story is about an elephant named Horton who, because of his extraordinarily large ears, becomes aware that a community of microscopic people called *Whos* live on a dust speck that sits atop the blossom of a single flower.

Horton's enhanced auditory ability is, of course, a metaphor for a heightened moral sensitivity. Once Horton is aware that people live on the dust speck, he acts accordingly, doing everything within his power to protect them.

The other animals in the jungle are not able to hear the voices of the *Whos* and consequently do not recognize that persons live on the dust speck on the flower. They find Horton's way of relating to the dust speck—and insistence that others act similarly—offensive and bizarre. They mock Horton. They abuse him. They think him insane. They take the blossom on which the dust speck sits and hurl it into a valley of billions of identical blossoms, endangering the lives of the *Whos* and forcing Horton, the *Whos* advocate and protector, to endure countless hours of difficult and tedious work in finding them.

Finally, in the story's climax, the other animals assault and imprison Horton, intent on boiling the dust speck on which the *Whos* live. But this is a story by Dr. Seuss, and at the last crucial moment the *Whos*—whom Horton has been exhorting with the slogan "If you only make yourselves heard you don't have to die!"—manage to organize themselves to speak one unmistakably audible "We are here! We are here!"

The other animals hear the voice, recognize that Horton was right all along, and now aware of the personhood of the *Whos* change their behavior accordingly.

I start with that children's story, not to be funny or sentimental, but because I think it powerfully conveys, in a simple and beautiful way, the central idea on which I will reflect: the idea of human rights. That is to say, the unique, the profound, the unavoidable moral and political consequences that flow from the recognition that the other whose presence we share is a person, a human being.

The legal document I take for my textual inspiration is the Universal Declaration of Human Rights (Universal Declaration) of 1948. Ratified when memories of the Holocaust and Nuremberg were still freshly seared into the world's memory, the Universal Declaration celebrates its 50th anniversary this year. The topic I have chosen in keeping with the theme of this Cover Conference is *Defending Humanity: The Practice of Public Interest Law and the Idea of Human Rights*.

What I have to say will not be an academic discourse in which a thesis is argued or idea analyzed. There exists a significant body of progressive literature on international human rights covenants. I commend that literature to you. That literature makes cogent arguments for the justiciability of those rights and their application to some of the issues we care most about: the right to housing, the right to an adequate education, and the abolition of the death penalty.

Instead, the rhetorical form I have chosen is one I encountered as a Jesuit novice. That form my master of novices called the "ferverino."

As I understand it, the ferverino is a deliberate preaching to the choir. In English, the metaphor of preaching to the choir is invariably pejorative, but I do not see why that is necessarily so. Even the choir—the true believers, the already converted—sometimes grows tired and discouraged, is sometimes tempted to despair. The point of the ferverino is to act as a moral call to arms, to inspire and console, to put into words and thereby make present the ideals we cherish and in which we believe. And in that act of making present, the hope is that we will remember how much those ideals mean to us and be strengthened in our commitment to them.

I augment my reading of the Universal Declaration with two other international agreements: the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights, both proposed in 1966 but entered into force in 1976.

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The guiding premise of the Universal Declaration is found in the first paragraph of its preamble: “the recognition of the inherent dignity and of the equal and inalienable rights of the human family is the foundation of freedom, justice, and peace in the world.”

The articles of the Universal Declaration then go on to enumerate those rights, including the freedoms with which we are familiar from the first ten amendments to the U.S. Constitution, but also including rights to health care, education, a just living wage, and social security, the sorts of economic and social rights regrettably not secured by the Constitution of the United States.

The Universal Declaration is a beautiful document, even if—as with so many of law’s best promises—its strength has been more in preserving aspirations than providing enforceable legal rights. I want, however, to dwell on three fundamental implications of the idea of human rights and their relevance to the work of public interest lawyers.

First, human rights imply a shared human nature.

Second, people are not things and should not be treated as things.

And third, defending the human rights of others is itself a constituent part of leading a good and happy human life.

The Universal Declaration takes as its empirical premise that all human beings share certain critical attributes and needs. Without that empirical premise, the Declaration, indeed the concept of human rights itself, is meaningless. That set of common attributes and needs I will call shared human nature.

In using the term “human nature,” I realize I am courting controversy. On the political right, “human nature” is a term fraught with specific teleologies of what constitutes the proper end of human life. Defenders of market economics, various social Darwinist schemes, capital punishment, and all sorts of harsh and punitive forms of social organization will invoke this thing called “human nature” to justify the oppression and subordination of other human beings.

On the left, sensitivity to cultural diversity, opposition to anything that smacks of essentialism, and an at times excessive form of social constructionism make the idea of a shared human nature singularly unwelcome.

Nevertheless, I will insist on using the term in the following sense: by “human nature” I mean the shared attributes and needs that all human beings possess regardless of gender, race, creed, national origin, sexual orientation, disability, or any other accident of time or place. The Universal Declaration and subsequent covenants identify some of those common human physical needs: food, shelter, medical care; but also psychological needs for education, relationships, self-determination, and that quality in human beings that our own legal tradition calls “liberty.”

From the empirical reality of human nature derive two hopeful corollaries.

First, oppression always requires work because it meets the resistance of human nature. That seems so obvious, but sometimes when we are struggling against oppression it may seem that iniquity is effortless, while justice requires impossible exertions of energy to bring about and sustain.

Don’t believe it.

Wherever human beings are denied the things they need for flourishing—food, shelter, work, education, liberty, or dignity—they *will* act out. That is why oppressive regimes must invest so much time, energy, money, and resources in the instruments of collective deception and social coercion: propaganda, the military, and the police. In the United States, it is why our continued neglect of the basic human needs of tens of millions of people goes hand-in-hand with a massively expanded and still expand-

ing prison system, and an ever more punitive system of criminal justice.

The recognition of a shared human nature should also give us hope that we who so frequently define ourselves by and organize around so called issues of identity—gender, race, sexual orientation—can transcend those differences and both find genuine connection and build lasting alliances with others who struggle for justice. The reason for that hope is grounded in the recognition that we can move beyond the things that divide us because we are united in something more fundamental than and prior to those status attributes: a common humanity.

That brings me to my second point: people are not things and should not be treated as things.

When we recognize someone as a human being, we acknowledge that we must relate to him or her in a certain way. That is the whole point of the Dr. Seuss story with which I began. It is a

point grasped immediately by every child to whom I have ever read the story. That recognition is the basis of the empathic ability that underlies the so called “Golden Rule.” It is, or so I am led to believe by contemporary neurological science, a capacity that is effectively hard wired into the human brain by the time an infant is a few months old.

An ocean of ink has been spilled, much of it by legal academics, on

the relative usefulness of thinking about our special relationship to other human beings in terms of rights or obligations. That distinction is irrelevant here. What is relevant is that we hold fast to and act upon the conviction that simply because an other is a person, a human being, he or she has legitimate claims to make on us as individuals and as a society.

Almost everything we do as public interest lawyers can ultimately be expressed in these terms: demanding that our clients be treated as the human beings they are, and that our political community honor the claims our clients’ humanity makes on that community.

People are not things. It seems so absurdly obvious as to be unworthy of articulation. But remember this: the single most powerful organizing force in the United States and the world today—Capitalism—asserts precisely the opposite, namely, people are things and are to be treated as things.

I do not say that as some kind of inflammatory ideological remark. I am simply making a statement of fact. Capitalism is premised on the notion that human labor is a commodity; a thing to be bought and sold like any other commodity on the open market. In its most abstract and rarefied mathematical expression—the equations and formulae of theoretical economics—labor is one more variable in the cost of production, indistinguishable from any other variable. If a firm can double its profits by cutting energy costs in half, then that is what the logic of the market says a firm must do. If a firm can double its profits by firing half its workforce and thereby destroying a community, the market’s imperative is no different.

In actual practice, in the day-to-day operations of markets, the treatment of people as things is just as evident. Whether in downsizing workers, destroying unions, or making decisions about product safety, the qualitative difference between human beings and things is either ignored or effaced by a relentless process of monetarization and commodification. As Robert Kuttner put it in his 1997 book, *Everything [is] For Sale*. That is to say, everything is a commodity.

The dogma of the reigning market religion—which you have surely encountered in the speeches of many politicians and that school of thought called “Law & Economics”—preaches that this endless process of commodification and profit maximization will ultimately redound to the common good of humanity. The metaphor most often employed is a great rising tide that lifts all

Sometimes when we are struggling against oppression it may seem that iniquity is effortless, while justice requires impossible exertions of energy to bring about and sustain.

boats. But the sorts of people public interest lawyers serve are drowning in that tide.

While macroeconomic realities may seem remote from our work, we must acknowledge that late twentieth century Capitalism is the context for all we do. It must be reckoned with. To the extent that we see ourselves as defending human rights, we have no choice but to resist Capitalism's drive to commodify everything. That drive is aimed at nothing else than eradicating the qualitative moral differences between our treatment of people and things.

I now arrive at my third and last point. In our work to protect the human rights of our clients, we are making a good and happy human life for ourselves.

As I grow ever closer to my fortieth birthday, I become ever more convinced that there is really only one important question from which all others flow: *In what does a good human life consist and how do we go about living such a life?* That question was much on the mind of Socrates. It was the question he so relentlessly and persistently and infuriatingly put to the businessmen, priests, politicians, generals, rhetoricians, and intellectuals of his day.

The Universal Declaration gives a partial answer to the first part of that question: freedom, food, family, education, safe and decent work at a living wage. What may not be so apparent is that in fighting to secure those things—those human rights—for other human beings, public interest lawyers are answering Socrates' question, for themselves.

Our lives are the only things that are completely ours. The kind of life we make is the most important work, the single most significant project we will ever undertake. One of the things that makes me saddest when I talk to law students and lawyers is the recurring impression I get that they have lost a sense of their own agency, i.e., the sense that their lives are theirs to make of what they will. Because of that loss, people who are among the most gifted and privileged in the world instead live with a sense of drastically constricted possibilities of what they can do with their lives.

I understand how frightening it can be. How crushing the burden of debt can seem. Still, I want to cry at the failure of imagination and loss of promise represented by all those law students—and there are thousands of them—who enter law school dreaming of doing great things in the pursuit of justice, only to find themselves defending corporations.

I suppose what I am trying to say is that in my own life as I have struggled with the question of what makes a good and happy human life, I have become ever more convinced that struggling to secure the conditions for a decent human life for others is a large part of the answer.

I know it is not easy. Just as the Universal Declaration of Human Rights marks its 50th anniversary, this year I mark the 10th anniversary of my departure from the Society of Jesus, a Roman Catholic religious order probably better known as "the Jesuits."

I had known much happiness as a Jesuit. By most reports, I was very good at being a Jesuit. But while teaching high school seniors, I became involved in a controversy surrounding one of my students. The student had been subjected to an official inquiry, a temporary suspension, and threats of not being graduated with his class for painting and displaying a picture for which he had received approval from the chairperson of the school's art department. Unfortunately, for my student, the picture caused a controversy in the school community and greatly upset the school's president.

The details of the story are too complex and too many to relate here. Suffice it to say that the student came to me to protest the way he had been treated and to ask for my help. I was warned by fellow Jesuits that the consequences of my advocacy might be dire.

They were right.

I took up my student's cause, protesting to both faculty and administration about the unfairness of the process to which my student was subjected. The student emerged without further harm. The investigative process was ended, no further disciplinary action was taken, and he graduated with his classmates. But my advocacy on my student's behalf had so angered and alienated my religious superior that my life as a Jesuit came to an end.

I cannot tell you what it was like for me on the June day in 1988 when I left the Jesuits. For six years it had been my whole life. Being a Jesuit had become integral to my identity. Losing that was not unlike getting a nasty divorce, losing your job, and being evicted all on the same day. In one fell swoop I lost my home, my job, my community, and a large part of my identity.

I had very little money and very little idea of what I would do. And for what? So that a 17-year-old kid could paint the pictures he wanted to paint and have his human rights of due process and free expression respected. For that, I jeopardized and lost everything that gave me security.

But I have *never* regretted it! The universe was kind to me. I landed on my feet—in law school of all places—and became a public interest lawyer.

I tell this story to impress upon you this point: courage is often the better part of freedom. If you want to make a happy and good human life for yourself and help secure such a life for others, you must be brave. Immersing yourself in the suffering of others can be heart-breaking. But just the endeavor to relieve human suffering will bring you great, great joy.

Let me end with a truly great orator's words, words that I think are applicable to the struggle for human rights and the practice of being a public interest lawyer.

The words come from the second century C.E. Roman Marcus Tullius Cicero, and they are drawn from his essay on friendship. Cicero is responding to an argument he associates with the Epicureans, the argument that we should not befriend others, much less the poor and suffering, because they will only add their troubles to our own. This is what Cicero has to say in response:

What a magnificent philosophy! Why, they take the very sun from the sky, I should say, when they take friendship from life, for of all the gifts the gods have given us, this is our best source of goodness and happiness. What, after all, is this "freedom from care" they talk about? In appearance it is seductive indeed, but in actual fact it is something that in many circumstances deserves only contempt. For it is not in accord with sound principle to refuse to undertake any honorable proposal or course of action or, having once undertaken any such thing, to refuse to go through with it, for fear that one may lose one's peace of mind. If we run away from trouble, we shall have to run away from virtue too, for it is impossible for virtue to avoid trouble in some degree when she shows her contempt and enmity toward things incompatible with herself. When kindness stands out against malice, when self-control stands against wantonness, bravery against cowardice . . . And so, if pain does touch the heart of the wise person—and certainly it does, unless we are of the opinion that every vestige of human feeling has been rooted out of him or her—what earthly reason could be offered for excising friendship, root and branch, from life, for fear that it may become the cause of some slight hardship on our part? For if we remove all feeling from the heart, what difference is there not, I hasten to say, between a human being and an animal, but between a human being and a rock or a stump or anything else of that kind?

Be human beings. Go out and befriend the poor and the oppressed wherever you may find them. Identify those who impoverish and oppress them. And then make some trouble! 🌍

**Our lives are the only things that are completely ours. The kind of life we make is the most important work, the single most significant project we will ever undertake.**

# East Timor: Will There Be Justice?

by Barbara Cochrane Alexander\*

On August 30, 1999, in a United Nations-sponsored referendum, the people of East Timor affirmatively voted for independence from Indonesia. The pre- and post-balancing period, however, was marred by violence. Militia forces favoring integration with Indonesia, supported by members of the Indonesian military, committed grave breaches of international human rights law. Based on the evidence gathered, which included reports of widespread intimidation and terror, killings and massacres, displacement of people, forced expulsion of approximately one-fourth of the entire population, rape and sexual harassment of women, disappearances, and destruction of property, the International Commission of Inquiry on East Timor (Commission of Inquiry) concluded that the East Timorese were victims of a premeditated and systematic campaign of crimes against humanity.

Currently, there are three potential prosecuting authorities: the Indonesian government; the United Nations Transitional Administration in East Timor (UNTAET), which has served as East Timor's transitional government since October 1999; and a United Nations-sponsored international human rights tribunal operating in Indonesia, East Timor, or any other relevant jurisdiction. As of November 2000, the Indonesian government was moving forward with its plans to prosecute under its criminal code, UNTAET was moving forward with its attempts to indict and prosecute, and a United Nations-sponsored international human rights tribunal has not been established. To date, the individuals responsible for these crimes have not been prosecuted, primarily because Indonesia has neither the legal capacity nor the political will to do so. Moreover, Indonesia has thus far refused to extradite suspects to East Timor at the request of UNTAET.

## Background

East Timor was a Portuguese colony until early 1975 when Portugal began the process of de-colonization. The people of East Timor held local elections to declare their independence. Concerned with this move toward independence, neighboring Indonesia began laying the groundwork for a coup d'état,

**The Indonesian government has demonstrated a lack of political will to prosecute the alleged perpetrators.**

which occurred in August 1975. Civil war subsequently broke out between those East Timorese favoring integration with Indonesia and those opposed to integration. Ultimately, in December 1975, the Indonesian military invaded East Timor to ensure its dominance in the region and made the territory Indonesia's 27th province. Effectively, Indonesia's invasion interrupted East Timor's decolonization, which remained incomplete until the 1999 referendum.

In June 1998, after decades of violence and civil unrest, Indonesia proposed limited self-rule for East Timor and the UN subsequently incorporated this proposal into a draft constitutional framework. In October 1998, the UN presented the framework to Indonesia and Portugal. On January 27, 1999, then-president Habibie of Indonesia announced that if the people of East Timor voted to reject limited self-rule, the Indonesian government would rescind the integration law between East Timor and Indonesia. Thus, the East Timorese had two options:

accept limited self-rule and remain integrated with Indonesia, or reject limited self-rule in favor of total independence from Indonesia.

In May 1999, Indonesia, the international de facto sovereign of East Timor, and Portugal,

the UN-recognized administrator of the East Timorese non-self-governing territory, signed the "5 May Agreements," which proposed "popular consultation" for the East Timorese people. The parties understood "popular consultation" to mean a fair campaign and a popular ballot to determine East Timor's political status.

In order to facilitate this "popular consultation," the UN Security Council formally established the United Nations Mission in East Timor (UNAMET) to assist the Indonesian government in securing a peaceful and credible ballot process. Citing intimidation and violence, UN Secretary-General Kofi Annan postponed voter registration. When the vote finally occurred on August 30, 1999, more than 430,000 registered voters, out of a population of 700,000, cast their ballots.

In the months leading up to the referendum, Indonesia faced the potential loss of sovereignty over East Timor. Pro-integration militia, located in East Timor and supported by members of the Indonesian military, intimidated and terrorized the East Timorese population. According to the Commission of Inquiry, pro-integration militia committed systematic and mass murder, forcibly displaced East Timorese, sexually assaulted women, and destroyed 60-80 percent of the territory's public and private property. On September 3, 1999, UN Secretary-General Kofi Annan announced that 78.5 percent of the East Timorese population voted to reject Indonesia's special autonomy proposal in favor of a full transition to independence. The violence immediately escalated further. Some of the worst violence occurred in the month following the referendum.

Initially, the international community recognized the importance of Indonesia establishing its own commission to investigate alleged crimes against humanity committed by its citizens and military. Yet Indonesia has thus far failed to prosecute any suspects, provoking international dispute over how best to achieve accountability and justice. Additionally, UNTAET has established the Special Panel for Serious Criminal Offenses at the District Court of Dili (Special Panel). For different reasons than the Indonesian government, the Special Panel also has failed to prosecute any alleged suspects. These potential prosecuting authorities, as well as the proposed international tribunal, face legal and political obstacles.

## Indonesian Obstacles to Prosecuting Crimes Against Humanity

### Lack of Political Will

In early 2000, Indonesia's Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM) reported the names of 33 people—including militia leaders, police officers, and senior military officers—whom it believed to be directly or indirectly responsible for the pre- and post-referendum violence in



East Timorese show their support for the 1999 referendum.

East Timor International Support Centre

continued on next page

East Timor. Since that time, however, the Indonesian government has demonstrated a lack of political will to prosecute the alleged perpetrators. Following months of investigation during which the 33 suspects were questioned, Indonesian investigators indicated their intention to indict 19 individuals. By September 2000, the Indonesian government had released a provisional list of the 19 individuals to be indicted. This provisional list did not, however, include the names of those believed to be most responsible, such as General Wiranto, a senior Indonesian military official believed to have ordered the alleged crimes against humanity.

Shortly thereafter, Indonesian Attorney General Marzuki Darusman announced that he would prosecute 22 suspects, including senior military officials and militia members. Darusman noted, however, that trials would begin only after the Indonesian parliament enacted legislation establishing a special domestic human rights tribunal to hear the cases. Darusman expressed his expectation that such legislation would be enacted in December 2000, yet that appears to be a remote possibility. Further, even if such legislation were enacted, there is no indication that such a tribunal will apply anything but Indonesian law, which is inadequate to address these crimes. In addition to its unwillingness to prosecute domestically, the Indonesian government has made clear it would not cooperate with an international human rights tribunal should a tribunal be established. A primary reason for Indonesia's opposition is that an international tribunal would inevitably apply international humanitarian and human rights law instead of applying the Indonesian Criminal Code, which Indonesia would prefer.

**There are certain crimes, such as forced displacement of persons, which cannot be prosecuted at all under the Indonesian Criminal Code.**

### Legal Obstacles

In addition to the Indonesian government's lack of political will to initiate prosecutions, a number of legal obstacles preclude the effective prosecution of the perpetrators. Two obstacles in particular pose the greatest threat to effective prosecutions. First, the Indonesian People's Consultative Assembly (MPR) passed a constitutional amendment in August 2000 (Article 28(I) of the Indonesian Constitution) enshrining the principle of non-retroactivity in Indonesian law. Second, the Indonesian Criminal Code does not contain provisions for collective responsibility.

The principle of non-retroactivity prohibits a government from prosecuting its citizens for acts that were not crimes under domestic law when they were committed. Article 28(I) of the Indonesian Constitution reads, "the right not to be charged on the basis of retroactivity is a basic human right that may not be breached *under any circumstances*" (emphasis added). Thus, even if the Indonesian Parliament were to enact legislation recognizing crimes against humanity, such legislation could only apply prospectively. In other words, Indonesia would still be precluded from prosecuting those individuals who committed grave human rights abuses leading up to and immediately following the referendum in East Timor.

It is important to evaluate Indonesia's constitutional amendment on non-retroactivity in the context of customary international law. According to Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Article 15(2), however, provides that "[n]othing in [Article 15] shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was

committed, was criminal according to the general principles of law recognized by the community of nations." Article 15 of the ICCPR is considered customary international law. Further, Article 53 of the United Nations Convention on the Law of Treaties stipulates that norms of customary international law are non-derogable and "can be modified only by a subsequent norm of general international law having the same character." Under customary international law, crimes against humanity are "criminal according to the general principles of law recognized by the community of nations" and thus constitute an exception to the principle of non-retroactivity. By amending its constitution to include an unconditional principle of non-retroactivity, Indonesia therefore violated customary international law.

In addition to the constitutional amendment, the Indonesian Criminal Code also precludes such retroactive prosecutions. Article 1 of the Indonesian Criminal Code provides that an offense can only be prosecuted under a law that existed at the time the offense was committed. Yet when the pre- and post-referendum violence occurred in East Timor, there were not, and still are not, any provisions in the Code for crimes against humanity. Thus, it is likely that Indonesian-led prosecutions would be

limited to prosecuting alleged suspects for "ordinary crimes" as defined in Indonesia's Criminal Code. For instance, it is likely that systematic mass murder would be tried under Article 340 of the Indonesian Criminal Code, which deals with premeditated murder and is punishable by the death sentence or life imprisonment, and torture would

be tried under Article 355, which deals with premeditated attempts to cause serious injuries and is punishable by a maximum sentence of 12 years in prison. A more disturbing scenario is that there are certain crimes, such as forced displacement of persons, which cannot be prosecuted at all under the Indonesian Criminal Code.

Additionally, the Indonesian Criminal Code does not contain any provisions for collective responsibility which is an internationally-recognized legal principle underlying crimes against humanity. The Indonesian government has yet to revise its domestic law to include provisions that would facilitate the prosecution of senior police and military officials for the crimes against humanity committed by those under their command. Although Indonesia has indicted some senior military officials and militia leaders, it is unclear when and how they will be prosecuted. Failure to prosecute those in command contravenes the principle of collective responsibility, which the international community has recognized since the Nuremberg trials as a general principle of modern international law. More recently, the statutes of the ICTY and ICTR recognize the principle of collective responsibility. Article 7(3) of the ICTY Statute enumerates the following principle: because the act "was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Article 6(3) of the ICTR Statute, which applies to non-international conflicts, mirrors Article 7(3) of the ICTY Statute.

The principle of collective responsibility includes a number of elements: a duty to exercise authority over subordinates; equality of responsibility with the subordinate; actual knowledge that the subordinate planned or carried out the unlawful conduct, or in the absence of actual knowledge, sufficient information to enable the superior to conclude that the subordinate

planned or executed such conduct; and failure on the part of the superior to take the necessary steps to prevent the crime. Ultimately, the superior is responsible if he or she orders a subordinate to commit, or attempt to commit, a crime against humanity or war crime.

### East Timorese Prosecutions

East Timor has attempted to conduct prosecutorial investigations of its citizens and militias. These investigations, however, have been hampered by a lack of cooperation on the part of the Indonesian government. Indonesian resistance to East Timorese prosecutions contravenes the April 6, 2000, *Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters*, signed by Indonesian Attorney General Darusman and Chief of UNTAET, Sergio Vieira de Mello. For example, Indonesia has refused to comply with UNTAET's extradition requests to return East Timorese suspects that fled to Indonesia after the violence. To justify its refusal to extradite, the Indonesian government, as well as pro-integration groups, have asserted the following arguments: to do so would undermine Indonesian sovereignty; East Timor is not yet a sovereign nation; and there is no extradition agreement between Indonesia and East Timor.

Faced with an impatient international community, and the increasing likelihood of an international human rights tribunal, Indonesia agreed, in early November 2000, to allow East Timorese prosecutors to question 39 witnesses. This agreement followed the Indonesian government's offer to allow East

**One obstacle to the establishment of an international human rights tribunal is the anticipated opposition of China and perhaps other Security Council members.**

Timorese investigators to question Eurico Guterres, leader of the East Timorese Aitarak militia group. It remains unclear, however, when Indonesia will, in fact, permit East Timorese investigators to travel to Indonesia to carry out these questionings.

### International Human Rights Tribunal

UN Secretary-General Annan has met with Indonesian President Wahid and Vice-President Sukarnoputri to explain, among other things, the UN Security Council's intention to establish an international human rights tribunal if Indonesia fails to prosecute the perpetrators of the East Timorese violence. As early as February 2, 2000, the Commission of Inquiry issued a report recommending that the UN "should establish an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members of East Timor and Indonesia." The Commission of Inquiry explained that the tribunal "would sit in Indonesia, East Timor and any other relevant territory to receive complaints and to try and sentence those accused." Conceivably, the tribunal's temporal jurisdiction would cover events beginning in January 1999. Furthermore, the tribunal would be empowered to prosecute and sentence individuals "regardless of the nationality of the individual or where that person was when the violations were committed." As of November 2000, however, the Security Council has not exercised its Chapter VII powers to establish such a tribunal.

One obstacle to the establishment of an international human rights tribunal is the anticipated opposition of China and perhaps other Security Council members. International pressure could be applied to prevent China from vetoing an international human rights tribunal. Should a tribunal overcome such political obstacles and be established, it would have two distinct advantages for East Timorese seeking justice. First, an international human rights tribunal has the ability to prosecute under international law those directly and indirectly responsible for the commission of crimes against humanity. Second, an international human rights tribunal can provide capable and impartial judges. Consequently, an international human rights tribunal offers East Timor the most promising hope for accountability.

### Conclusion

All evidence thus far indicates that Indonesia has neither the legal capacity nor the political will to prosecute crimes against humanity and bring senior-level police and military officials to justice. After meeting with Secretary-General Annan in early November 2000, Indonesian Attorney General Darusman promised that trials would begin no later than February 2001. It remains to be seen whether prosecutions will begin. Further, for months the Indonesian government thwarted East Timor's investigations and prosecutions by refusing to cooperate, specifically by withholding evidence and access to witnesses located in Indonesia. Finally, should Indonesia refuse to cooperate with an international human rights tribunal, such a tribunal likely would experience the same frustrations and inefficacy as the East Timorese investigations and attempts to prosecute. The three prosecutorial options for justice in East Timor all face obstacles, and each leaves unanswered the question—will there be justice? 🌐

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## U.S. Military Support for Plan Colombia: Adding Fuel to the Fire

by Andrew Miller\*

### Introduction

Dating back to former U.S. president George Bush's administration, the United States has provided Colombia with hundreds of millions of dollars in counter-narcotics assistance, given primarily to elite counter-drug units of the Colombian National Police. In 2000, however, the United States precipitously increased its support for Colombia's armed forces by providing massive aid for the military—ostensibly to fight the decades-old "War on Drugs." The factors contributing to this rapid shift from police aid to military aid are numerous: an election year in the United States, the public relations efforts of a savvy Colombian president and his able advisors, fears of growing guerrilla military strength and resulting regional instability, exploding coca cultivation, and Colombia's continued strategic and economic importance to the United States.

Given, however, the Colombian military's current intransigence in improving its own human rights performance and that of allied paramilitary groups, U.S. military aid is the wrong signal at the wrong time. In addition to being wholly ineffectual in achieving its stated objective of reducing drug production in Colombia, this aid is likely to propel an already grave situation into a human rights and humanitarian catastrophe.

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### A Brief Overview of the Participants in Colombia's Armed Conflict

The Colombian armed conflict is characterized by a universal disregard for basic concepts of international humanitarian law pertaining to internal conflicts, as defined by Common Article 3 of the 1949 Geneva Conventions and its Additional Protocol II of 1977. For every armed combatant killed as a result of the conflict, at least two unarmed civilians also are killed. Amnesty International believes that roughly 3,500 politically-motivated murders took place in 1999 alone.

The country's armed opposition groups—the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)—are primarily responsible for these gross infractions of international humanitarian law. According to the internationally-respected Colombian Commission of Jurists (CCJ), these groups collectively were responsible for an estimated 19.6 percent of all political killings carried out in 1999. These groups also have used abductions, selective killings of unarmed civilians, and the forced recruitment of minors to achieve their ends.

In addition to the armed opposition groups, the Colombian armed forces—the army, in particular—have a long history of violating human rights and international humanitarian law in the context of social repression and counter-insurgency operations. Although these violations manifested themselves in the 1970s and into the early 80s in the forms of political detentions and torture, the late 80s and early 90s saw a marked shift

### The Controversy Over Plan Colombia

In 1999, Colombian President Andrés Pastrana launched his blueprint for foreign assistance: the U.S.\$7.5 billion "Plan Colombia." In response, U.S. Senator Paul Coverdell (R-GA) sponsored the Alliance with Colombia and the Andean Region (ALIANZA) Act of 1999 (S. 1758). Although time ran out in the 1999 legislative calendar, Congress was quick to return to the issue in early 2000. In the House of Representatives, support for Plan Colombia appeared in the emergency supplemental appropriations bill, H.R. 3908, which was passed in late March and included U.S.\$1.7 billion for Colombia. Senate funds were approved in June as part of the regular appropriations process and appeared in S. 2522. On July 13, 2000, President Bill Clinton signed Public Law 106-246, which included U.S.\$1.319 billion in aid to Colombia and other Andean countries for Fiscal Years (FYs) 2000 and 2001.

toward selective killings, disappearances, and massacres. Over this same period, right-wing irregular forces, the self-styled "peasant self-defense forces" or paramilitary groups, began their rise toward infamy. Following a string of massacres, then-president Virgilio Barco outlawed paramilitary groups in July of 1989 with Decree 1149. These groups, however, continued to operate in the 1990s and have expanded rapidly in recent years.

In order to carry out their "dirty war" counter-insurgency campaigns while trying to improve their international human rights image, the Colombian military forces have effectively acted through their paramilitary allies. One symptom of this phenomenon has been the drop in political killings by the armed forces and the commensurate rise in paramilitary massacres. Though emphatically denied by the Colombian State, Amnesty International, Human Rights Watch, the United Nations, and scores of Colombian human rights non-governmental organizations have overwhelmingly documented the strong links between the armed forces and paramilitary groups. Public pronouncements aside, there have been few concrete demonstrations of the political will to dismantle paramilitary groups. The Colombian government offers statistics about incarcerated paramilitary members to prove its efforts at controlling these groups, but have little in the way of specific evidence. Many known paramilitary leaders—the intellectual authors of hundreds of killings—such as Carlos Castaño, Ramón Isaza, and Julian Duque, operate openly and without effective prosecution.

The on-going links between the paramilitary and the government armed forces appear evident in dozens, if not hundreds, of cases each year. One notorious example is the case of *El Salado*, located near the Caribbean coast in the department of Bolívar. From February 18-20, 2000, approximately 300 paramilitary members massacred at least 46 unarmed townspeople. Those persons killed include a six-year-old girl and an elderly woman, as reported in the Data Bank of Human Rights and Political Violence, a joint project of two respected Colombian human rights NGOs. Over the course of the three days, the regional military ignored pleas by the

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### Plan Colombia and Human Rights

by Ambassador Luis Alberto Moreno\*

**P**lan Colombia is a national program to address Colombia's major problems in a highly-coordinated, comprehensive manner. Plan Colombia contains four central components: first, economic recovery, trade, and fiscal issues; second, strengthening of state institutions; third, national security and counter-narcotics; and fourth, the Colombian peace process. Plan Colombia is based upon the realistic assumption that the only way to finally put an end to the difficult human rights situation is to negotiate a final peace agreement with the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Army (ELN) guerrilla movements and to strengthen the Colombian State. The Colombian State includes the judicial and legislative branches, as well as the Attorney General's and the Prosecutor General's Offices. In order to accomplish this agenda, Colombia must confront the drug trade head-on by destroying the drug-traffickers' infrastructure, thereby disrupting the enormous amounts of money fueling armed illegal group activity in Colombia. This is why Plan Colombia has a military component.

In order to adequately discuss Plan Colombia and the U.S. aid package, one first must understand the situation in Colombia. I have learned that it is very easy to reach the wrong conclusions about Colombia when you lack crucial information.

The first thing I must say is that Colombia is not experiencing a civil war where half the population is fighting the other half. Rather, the situation in Colombia is an internal conflict generated by approximately 30,000 individuals (less than 0.06 percent of the country's population of 39.6 million), consisting of both guerrilla organizations and illegal self-defense groups. These groups are totally alienated from mainstream Colombian society. In all public opinion polls done by private, independent pollsters in Colombia, including several polls done by international institutions, it is very clear that the population of Colombia does not support the guerrillas, or consider them legitimate. Although numbers vary, close to 88 percent of Colombians have a negative opinion of the guerrillas (only 4 percent have a positive opinion). Colombians do not support the illegal self-defense groups either. Furthermore, these groups are well armed, well trained, and most importantly, well financed. The resources for these groups stem from

the fact that they "tax" the illegal drug trafficking industry in remote areas of the country in exchange for protection from government law enforcement.

The country has such a difficult human rights situation precisely because these guerrillas and illegal self-defense groups have demonstrated a flagrant disregard for human rights and international humanitarian law. Neither my government nor the United States government, nor human rights non-governmental organizations (NGOs) dispute that the vast majority of all incidents of human rights violations, as well as violations of international humanitarian law, are attributable to these groups.

Since coming to office in August 1998, President Andrés Pastrana has placed the issue of human rights at the very forefront of his agenda. He has continually stated, in the clearest possible

terms, that he will not tolerate human rights abuses. At a Colombian Mayor's Conference in February 2000, President Pastrana stated, "my government and I are fully committed to the defense of human rights. Human rights abuses will not be tolerated, because peace in Colombia is impossible without the full application of international humanitarian law." He has welcomed domestic and international scrutiny of Colombia's human rights policies. For instance, the Office of the United Nations High Commissioner for Human Rights operates

under President Pastrana's permission in Colombia, and her staff works closely with the government of Colombia. Its members, as well as all NGOs that visit the country, have government permission to operate and move freely through any area, and to verify accusations or incidents of human rights abuses. Additionally, the Colombian government regularly cooperates and provides information to human rights organizations. Colombian Vice President Gustavo Bell, who is in charge of human rights issues in the government, meets regularly with representatives of all human rights NGOs that work in Colombia. Representatives of human rights NGOs sit side-by-side with Colombian government officials as members of the Committee for Human Rights Protection, which is part of the Ministry of the Interior.

As one of his first actions in office, President Pastrana appointed General Fernando Tapias, a reform-minded leader

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townspeople to intervene and instead, set up a roadblock and prevented humanitarian workers from entering the area, effectively assisting the paramilitary activity. Yet Admiral William Porra, second-in-command of the Colombian Navy, continues to claim that the deaths were a result of combat.

### United States Support for Plan Colombia

In the last ten years, the United States has been funding the Colombian security forces as part of the U.S. "War on Drugs." Levels of official funding, however, have varied greatly. In the early 1990s, security assistance began to significantly diminish. This decrease was due to the Congressional "de-certification" of then-president Ernesto Samper's administration for non-cooperation in the anti-drug effort. Congressional concern for the Colombian military's abysmal human rights record also played a role in the decline of aid. Starting in 1996, however, figures for aid to the Colombian security forces began to rise. The United States sidestepped the issue of the military's human rights record by giving the counter-narcotics aid to the Colombian National Police instead, which was lead by General Rosso José Serrano. Both Colombia and the United States viewed General Serrano as a hero for his successes in firing thousands of corrupt police officers and for dismantling the Cali Cartel, the infamous cocaine cartel in Colombia, which, according to CNN, was once the world's largest cocaine supplier, generating U.S.\$8 billion per year in cocaine sales.

In 1999, Colombian President Andrés Pastrana launched a new blueprint for attracting massive foreign assistance: the U.S.\$7.5 billion "Plan Colombia." The Plan is said to address five different areas of need: support for Colombia's peace process, fighting drugs, economic relief, strengthening the judicial structure and human rights, and social development of the country. Pastrana's plan called for U.S. assistance in counter-narcotics and, consequently, military hardware and training.

On July 13, 2000, President Bill Clinton signed Public Law 106-246, which included U.S.\$1.319 billion in aid to Colombia and other Andean countries for FYs 2000 and 2001. Of the total U.S.\$1.319 billion in emergency counter-narcotics aid, \$860 million is destined for Colombia. This sum is divided into a number of categories: military assistance (\$519.2 million), police assistance (\$123.1 million), alternative development (\$68.5 million), human rights (\$51 million), law enforcement and rule of law (\$45 million), aid to the internally displaced

**The Colombian government should carry out all human rights investigations and trials under civilian jurisdiction, with the full cooperation of the security forces.**

(\$37.5 million), judicial reform (\$13 million), and peace (\$3 million).

Public Law 106-246 states, however, that the United States will not begin to distribute this aid until the U.S. State Department certifies that the Colombian government has complied with the following human rights conditions: the Colombian president must direct in writing that Colombian armed forces personnel credibly alleged to have committed gross violations of human rights or to have aided or abetted paramilitary groups will be brought to justice in civilian courts (Section 3201(1)(A)(i)); the Commander General of the armed forces must promptly suspend from duty any personnel credibly alleged to have committed gross violations of human rights or to have aided or



Andrew Miller

A U.S. journalist interviews Colonel Díaz, head of the Colombian Army's 24th Brigade.

abetted paramilitary groups (Section 3201(a)(1)(A)(ii)); the Colombian armed forces must comply fully with (A)(i) and (ii) (Section 3201(a)(1)(A)(iii)); the Colombian armed forces must cooperate fully with civilian authorities in any such investigations, prosecutions, and punishments (Section 3201(a)(1)(B)); the Government of Colombia must vigorously prosecute, in civilian courts, paramilitary group members as well as any Colombian armed forces personnel who aid or abet paramilitary groups (Section 3201(a)(1)(C)); and the Colombian Armed Forces must develop and deploy a Judge Advocate General Corps to investigate armed forces personnel for misconduct (Section 3201(a)(1)(E)).

Although Public Law 106-246 conditioned U.S. aid to Colombia on Colombia's obligation to meet key human rights conditions, the law also included a presidential waiver that the U.S. President could invoke on the vague grounds of national security, such as preserving democracy in Colombia, promoting US interests in economic reform, and protecting US citizens and hemispheric stability. From August 17-18, the U.S. State Department hosted an NGO consultation in Bogotá and in Washington, D.C. to solicit outside input on Colombia's human rights performance. In a joint document, Amnesty International, Human Rights Watch, and the Washington Office on Latin America presented a detailed analysis of the conditions and concluded that the United states should not certify these conditions because they have not been met.

On August 22, 2000, President Clinton certified that Colombia had complied with one condition (Section 3201(1)(A)(i)). Human rights organizations, like Human Rights Watch and Amnesty International, however, reject the President's certification of this provision. Furthermore, also at the protest of human rights organizations, President Clinton waived the remaining conditions set forth in the legislation, claiming that the Colombians did not have sufficient time to make the requisite progress. On August 23, 2000, President Clinton justified this waiver by stating that "[the United States] has protected [its] fundamental interest in human rights and enabled the Plan Colombia to have a chance to succeed, which I think is very, very important for the long-term stability of democracy and human rights in Colombia and for protecting the American people and the Colombian people from drug traffic." This certification process covered funds allocated in FY2000 and will be repeated later this year before FY2001 funds can be sent. It is likely that President Clinton will again waive most of the conditions, as they will not have been met.

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By waiving the human rights conditions of Public Law 106-246, and allowing for the flow of military assistance into Colombia, the United States sends the message that human rights considerations are not a priority and that the Colombian government need only make a superficial effort to address these issues in order to secure future aid. The Colombian authorities, both civilian and military, have mastered the art of such superficial efforts. They have established what is perhaps the most extensive human rights bureaucracy in the world. They have passed extensive human rights legislation, including recent approval of the long-awaited Forced Disappearance Law of 2000 (*Ley 589 de 2000, Ley de Desaparición Forzada*). They have even fired several generals implicated in working with paramilitary groups to commit human rights violations. These efforts, however, have not amounted to much because the Colombian authorities have demonstrated an aversion to implementing concrete measures necessary to end impunity, despite regular recommendations to do so by such bodies as the United Nations and the Inter-American Commission for Human Rights.

### Recommendations for Improving Human Rights in Colombia

How the Colombian State should go about improving human rights is an unambiguous and well-understood process. The following are some specific examples of what Colombia could do to demonstrate it has the political will to improve its human rights situation. First, the Colombian government should hold high-ranking (Colonel and General levels) Colombian military officers, paramilitaries, and armed opposition leaders accountable by immediately suspending them after credible allegations of their involvement in human rights violations or collaboration with paramilitary organizations, subjecting them to a full and impartial investigation by civilian authorities, promptly and transparently trying them in civilian courts, and sentencing them commensurate with the severity of their crimes. Second, the Colombian government should dismantle known paramilitary bases, such as Finca “Villa Sandra,” located three kilome-

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ters outside of Puerto Asís, Putumayo. Third, the Colombian government should carry out all human rights investigations and trials under civilian jurisdiction, with the full cooperation of the security forces. Fourth, the Colombian government could protect human rights defenders and others at risk by ending impunity for human rights violations.

U.S. aid to the Colombian military will only contribute to the drug trafficking in Colombia because this aid will trickle down to the paramilitaries, who are heavily involved in the drug trade. The paramilitaries have continued to target coca growing regions, such as the Serranía de San Lucas in the southern part of the Bolívar department, the La Gabarra region of North Santander department, and the Putumayo department—the



Andrew Miller

September 2000 protest against Plan Colombia.

epicenter of the U.S. military aid’s effort—in their territorial expansion over the last several years. These offensives have served the dual role of weakening the guerrillas both militarily and politically, while shifting control of coca profits from the guerrillas to the paramilitaries. It is easy to imagine a Plan Colombia-facilitated diminution of guerrilla control of these coca regions, with the simple result of a strengthened paramilitary control of the coca, therefore not solving the drug problem. Essentially, this would represent the worst of both worlds: maintaining the drug production while strengthening the paramilitaries, who will continue to carry out widespread human rights violations with the impunity that they have always enjoyed.

### Conclusion

The Colombian and United States governments have publicly recognized the fundamental role that respect for human rights must play in solving the Colombian crisis. For too long, however, they have disregarded human rights in practice for the exigencies of fighting the civil conflict and narrow political and economic interests. It is time to move beyond those words and turn their expressed commitments into concrete actions. Until real indicators of the political will to make difficult decisions appear, human rights advocates will continue to strongly oppose support to the Colombian armed forces. 🌐

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dedicated to improving the Colombian military's record on human rights, to head the armed forces. Over the last year and a half, the Colombian armed forces, which includes the Colom-

**In poll after poll across the country, the armed forces are continually cited as the most admired government institution.**

bian National Police, have made notable, indeed dramatic improvements. In poll after poll across the country, the armed forces are continually cited as the most admired government institution. Complaints against state security forces have decreased by about 80 percent from 1996 to 1998. The state security forces are comprised of the Administrative Department for Security and the armed forces. Today, only three percent of all reported human rights violations in the country are attributed to the armed forces. President Pastrana is determined to do everything he can to eliminate such incidents entirely.

In order to reform and professionalize the armed forces, President Pastrana has taken several steps: he has reformed the Military Penal Code to include provisions that require an independent judge advocate, rather than unit commanders, to judge subordinates; President Pastrana has prohibited the drafting of minors under 18 years old; and he has provided the commander general, who commands the Colombian military, with discretionary power to dismiss servicemen at any time. President Pastrana has also instituted a substantial increase in the instruction, education, and training activities for both commissioned and non-commissioned officers on human rights and international humanitarian law; he has established a National Coordination Center, consisting of the Colombian armed forces and the offices of the Prosecutor General and the Attorney General, to combat self-defense organizations; he signed into law, on July 24, 2000, a new Civil Penal Code in conformity with international humanitarian law; and he signed the Forced Disappearance Law of 2000 (*Ley de Desaparición Forzada*), a measure that criminalized forced displacements, forced disappearances, genocide, and torture. The Forced Disappearance Law also created a Special Commission, composed of several state institutions and human rights NGOs, to locate all victims of forced disappearance in Colombia.

The Colombian State is committed to fighting all criminal activities in Colombia, including the activity of illegal self-defense groups. In fact, in 1999, the number of arrest warrants, detentions, preventative arrests, and accusatory resolutions against illegal self-defense group members equaled 1,135 out of approximately 5,500 members nationwide (20.3 percent of their total ranks).

The armed forces have also contributed to the effort against illegal self-defense groups. Since August 1998, when President Pastrana came to power, 341 members of illegal self-defense groups have been killed in action by Colombian armed forces. By contrast, there were 281 legal measures (arrest warrants, detentions, preventative arrests, and accusatory resolutions) against guerrilla members, out of a total population of 25,795 (less than 1 percent of their total ranks). This statistic shows that, unlike what many NGOs often imply, the Colombian State is not biased against left-leaning criminal organizations when it comes to applying the law. The Colombian State has done its best to bring to justice guerrilla and self-illegal defense groups. The

reality is that Colombia's justice system is often overwhelmed by the volume of criminal activity, and it does its best under the circumstances to punish both the guerrilla and illegal defense groups that have committed crimes against citizens and the government.

The challenges ahead remain enormous. Drug-traffickers are destroying vast tropical forests in the southeastern part of the country, mainly in the departments of Putumayo, Caqueta, and Guaviare. Armed guerrillas and illegal self-defense groups control this territory and tax the huge coca plantations there. There is little or no government presence in such regions because, until recently, the region was a dense, unpopulated jungle. Poor peasants, however, have begun inhabiting this jungle region in an attempt to make a living by cultivating coca. When these communities emerged, the guerrillas and illegal self-defense groups quickly assumed control of the region and started taxing the drug industry in exchange for "protection" from counter-narcotics operations. Furthermore, these regions have no roads, no communications, no health centers, and no schools. Such factors, combined with the general lawlessness of these regions and the fighting between guerrillas and illegal self-defense groups, bring about terrible human rights violations where innocent civilians are the principal victims. As can be seen, Colombia's problems are all interconnected; one problem cannot be resolved without addressing the others.

President Pastrana's response to this situation has been to create Plan Colombia. Plan Colombia is a U.S.\$7.5 billion dollar initiative, 75 percent of which is comprised of institutional strengthening, alternative development, and social safety-net programs, and 25 percent of which is the military, anti-drug component. Of the total cost, Colombian taxpayers will pay for U.S.\$4 billion, and international financial institutions will provide loans for another U.S.\$900 million. The Colombian government is seeking foreign assistance for the remaining U.S.\$2.6 billion. The U.S. Congress recently approved a U.S.\$1.3 billion assistance package for Plan Colombia.

#### **The United States Aid Package**

Most of the proposed U.S. assistance to the Colombian military will be given to two new counter-narcotics battalions. These battalions will consist of individuals who the Colombian government and the U.S. State Department, through extensive background checks and polygraph tests, have carefully vetted for past human rights abuses. Members of these units will also receive extensive human rights education and training. Under safeguards already put in place, no U.S. assistance will be given to military units suspected of human rights abuses. Some argue

**Under safeguards already put in place, no U.S. assistance will be given to military units suspected of human rights abuses.**

that U.S. assistance to Colombia's military will worsen the human rights situation in the country. This assertion is not true. By strengthening the institutions of the Colombian government, U.S. and all other international aid will enhance the protection of human rights in Colombia. This is the most important point I want to emphasize.

Some human rights NGOs and other commentators argue that because there are problems in Colombia, the international community should refrain from helping, or that because three

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percent of all reported human rights violations still are attributed to the armed forces, the U.S. aid package, which provides assistance to the Colombian military, is a bad idea. I believe quite the contrary; it is precisely because there are problems that we need help. Colombia alone cannot defeat a U.S.\$500 billion international drug industry or prevent its terrible effects on Colombia and the whole Andean Region.

Luckily, I am not the only one who thinks so. The Independent Task Force on Colombia (Task Force), a group of experts formed by the Council on Foreign Relations, and the Inter-American Dialogue, co-chaired by Senator Bob Graham of Florida and General Brent Scowcroft, President of the Forum for International Policy and former national security adviser to former president George Bush, released a report on October 12, 2000, entitled "Toward Greater Peace and Security in Colombia: Forging a Constructive U.S. Policy." This report provided recommendations on U.S. policy towards Colombia. After a year of analyzing the situation in Colombia, the Task Force recommended greater U.S. commitment toward Colombia, including expanding U.S. aid to six years (the recently approved U.S. aid package is a two-year initiative). The Task Force also recommended "providing the Colombian [government with the] capability to protect its citizens . . . by professionalizing its military, and expanding aid to all branches of the armed forces." They summarized their conclusions by saying "there are risks to deeper engagement, but these can be held in check. The risks of not engaging are even greater."

Of course, U.S. and all foreign aid to Colombia must and will be supervised by the international community to make sure that the Colombian State is expanded and strengthened, while also making it more transparent and responsible. The U.S. Embassy in Colombia will supervise the implementation and use of all military and non-military aid. Most of the institutional strengthening, alternative development, and judicial reform projects will be implemented by Colombian and foreign NGOs, not the government of Colombia. Each donor country under Plan Colombia can choose the type of projects that it wishes to fund. In this sense, the U.S. aid package is generous—of approximately

**Colombia alone cannot defeat a U.S.\$500 billion international drug industry or prevent its terrible effects on Colombia and the whole Andean Region.**

U.S.\$232 million of institution building and alternative development resources, the aid package allocates \$122 million for support of human rights and judicial reform. This includes \$4 million to protect human rights workers with basic measures such as bodyguards, bullet-proof vests, and armed vehicles. It also includes \$7 million for technical assistance and support for civil society organizations working in human rights, including training on how to document human rights violations and monitor individual cases. The aid package also includes \$25 million to establish and train new Colombian law enforcement task forces at the attorney general's office that will specialize in the investigation and prosecution of alleged human rights violations. It is very important that Colombian citizens, the armed forces, and the international community fully trust our judicial system so that all accusations against military servicemen are thoroughly and justly investigated. To this end, \$3.5 million of the

U.S. aid package is specially earmarked for training judges, and another \$2 million for training public defenders.

Regardless of all the negative media attention focused on the U.S. aid package—aimed mostly toward its military component—recent polls show that a vast majority of Colombians support both the U.S. aid package and Plan Colombia. A Gallup Poll published on September 2, 2000, by *El Tiempo*, the largest newspaper in Colombia, shows that 62 percent of Colombians are in favor of the U.S. aid package and only 34 percent are against it. The people of my country know this is our big chance to solve our many inter-related problems. They understand that the Colombian armed forces face many challenges, among them to become a modern and professional fighting force that respects and upholds international humanitarian law and basic human rights. Colombians also understand, however, that this will never happen if we decide not to help them change and simply walk away. As Ambassador of Colombia, I hope the rest of the world understands that too. 🌐

*\* Ambassador Luis Alberto Moreno is the Colombian Ambassador to the United States, appointed by President Pastrana in 1998.*



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## ALUMNI PROFILE

by Teresa Young Reeves\*



On November 2, 1998, the Inter-American Commission on Human Rights (Commission) appointed Santiago Alejandro Canton, LL.M. 1989, to the office of the Special Rapporteur for Freedom of Expression (Rapporteur). Prior to Canton's appointment, there were only two other rapporteurs for freedom of expression worldwide: one under

the United Nations, and one under the Organization for Security and Cooperation in Europe.

In the late 1990s, many members of the Organization of American States (OAS) voiced overwhelming concerns regarding freedom of expression violations in their countries. In October 1997, the Commission, an organ of the OAS, responded with the creation of the permanent office of the Rapporteur. At the April 1998 "Second Summit of the Americas" in Santiago, Chile, the heads of state of the OAS members adopted a Plan of Action calling on their governments to "[s]trengthen the exercise of and respect for all human rights and the consolidation of democracy, including the fundamental right to freedom of expression and thought, through support for the activities of the Inter-American Commission of Human Rights in this field, in particular the recently created Special Rapporteur for Freedom of Expression." After evaluating many candidates, the Commission unanimously appointed Canton to the office of the Rapporteur at its 100th Regular Session on October 6, 1998.

One of Canton's primary goals as the Rapporteur is to promote freedom of the press by protecting journalists in the OAS member states. Canton monitors cases in which journalists have been censored, imprisoned, tortured, or even murdered because of their work. The Annual Report of the Inter-American Commission on Human Rights (Report) details these and other freedom of expression violations. Canton submits the Report to the OAS General Assembly, comprised of the Foreign Ministers of the OAS member states. The 1999 Report documented 17 cases involving journalists who had been murdered in the Americas in 1998 alone. According to the Report, the Americas are "the most dangerous region of the world in which to practice the profession of journalism. In the past decade, there have been approximately 150 cases of murdered journalists, and many cases of physical attacks and threats." In light of these facts, Canton's 1999 Report recommends the OAS General Assembly institute "effective, serious and impartial judicial investigation[s]" into all cases involving the abuse or murder of journalists so perpetrators may be prosecuted. Although the Report is not legally binding, the Plan of Action adopted by the OAS at the "Second Summit of the Americas" evidences its commitment to support and integrate the recommendations made by the Rapporteur.

Canton also strives to ensure freedom of expression by drafting legal standards to serve as guidelines for lawyers and judges in the OAS member states. Since his appointment, Canton drafted the Declaration of Principles of Freedom of Expression (Declaration), which the Commission approved and adopted on October 19, 2000. The Declaration encourages the formation of laws establishing the right to seek public and private information, prohibiting censure, and inhibiting violent or intimidating acts against people disseminating information through any mode of communication.

The Declaration addresses another major part of Canton's work: the elimination of *desacato* laws (contempt laws) that penalize citizens for offensive expressions directed at public officials. Accord-

ing to the 1999 Report, *desacato* laws persist in 16 countries in the Western Hemisphere, including Brazil, Chile, Ecuador, Mexico, and Venezuela. Canton believes *desacato* laws are repugnant to the most fundamental democratic principle of enabling citizens to criticize their governments. In the 1964 case *New York Times Co. v. Sullivan*, the U.S. Supreme Court deemed it unconstitutional for a public official to recover damages against an individual who makes a "defamatory falsehood relating to [the public official's] conduct unless . . . the statement was made with 'actual malice'—that is, with the knowledge it was false or with reckless disregard of whether it was false or not." Canton's Report recommends the OAS member states enact laws similar to the U.S. doctrine of "actual malice."

As the Rapporteur, Canton also works to secure the right of citizens to access and to request information held both publicly by the government, such as national agency rules and opinions, and privately by governmental and non-governmental banks (*habeas data*), such as credit reports. For example, Canton advised Guatemalan President Alfonso Cabrera to enact an Access to Information Law granting Guatemalans rights similar to those provided to U.S. citizens under the 1966 Freedom of Information Act, as amended. As of October 2000, the Access to Information Law has not yet been presented in the Guatemalan legislature. In Argentina, however, Canton's efforts successfully led to the passage of legislation establishing the right to access *habeas data*. Ensuring access to government-held information is an integral part of Canton's work because, according to the 1999 Report, it "is one way [for citizens] to monitor state governance and [is] one of the most effective means of combating corruption." In this way, Canton's role as the Rapporteur strengthens the development of democracy in the Americas.

Canton's work to promote freedom of expression, however, is not limited to the Western Hemisphere. On November 22, 2000, Canton attended the "Freedom of Expression in the African Charter" conference in Johannesburg, South Africa. The conference was sponsored by the African Commission on Human and People's Rights (African Commission), a branch of the Organization of African Unity. Canton was invited to discuss his function as the Rapporteur with the African Commission, which is considering appointing its own rapporteur to promote and protect freedom of expression.

Canton, a native of Argentina, received his law degree in 1985 from the *Universidad de Buenos Aires*. As an LL.M. student at the Washington College of Law (WCL), Canton studied international human rights and criminal law. During his first semester, Canton began working at the National Democratic Institute for International Affairs (NDI). After graduation, Canton continued working for NDI and soon became the director for Latin America and the Caribbean. His primary responsibilities included observing national elections, enhancing civilian control of the military through legislative enactments, and encouraging Latin American leaders to learn democratic norms by participating in U.S. political party conventions. Canton also served as a political advisor to former president Jimmy Carter during the 1989 elections in Nicaragua, and 1994 elections in the Dominican Republic and in Panama. Canton attributes his interest in the subject of freedom of expression to his legal studies at WCL and to his political work at NDI. Canton's goal as Rapporteur—to strengthen democracy through the institution of legal rights to freedom of expression—is thus a natural extension of his prior academic and work experience. 🌐

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# A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification

by Teresa Young Reeves\*

On July 17, 1998, 120 nations voted to adopt the Rome Statute of the International Criminal Court (Rome Statute), establishing the world's first permanent tribunal for the crime of genocide, crimes against humanity, and war crimes. The adoption of the Rome Statute marked the end of a four-year, multinational negotiating marathon. It also signaled the end of the contentious, five-week "United Nations Diplomatic Conference of Plenipotentiaries" (Rome Conference) at which 21 nations abstained from voting, and seven nations, including the United States, Israel, and China, opposed adoption of the Rome Statute. The United States opposed the Rome Statute because of its concern that it might one day have to surrender a citizen, particularly a member of its government or armed forces, to the jurisdiction of the International Criminal Court (ICC). The United States also feared, and continues to fear, that the ICC will deny U.S. citizens the procedural due process rights guaranteed to them in the U.S. Constitution. Under the Rome Statute, it is possible that the ICC could subject a U.S. citizen to its jurisdiction. In reality, however, the narrow definition of the crimes, coupled with the Court's fundamental principle of deferring to national judicial systems, virtually negate that possibility. If, however, the remote possibility of a U.S. citizen being indicted by the Court were to arise, it is important for the United States to note the congruency of the Rome Statute with the U.S. Constitution.

## The International Criminal Court

Pursuant to the Rome Statute, the ICC will be an independent and permanent criminal tribunal, headquartered in The Hague, The Netherlands (Article 3(1)). The Court will officially come into existence once 60 nations have ratified the treaty (Article 126). The nations that ratify the treaty constitute the Assembly of States Parties (Assembly) (Article 112). After the Court is created, the Assembly will elect, by a two-thirds majority vote, 18 judges to nine-year nonrenewable terms (Articles 36(6), (9)). The Assembly also will elect, by an absolute majority vote, one prosecutor and one or more deputy prosecutors to nine-year non-renewable terms (Article 42(4)). As of November 2000, 115 states have signed the Rome Statute and 22 nations have ratified it. Observers of the ICC expect the Court will come into existence as early as 2002.

Once established, the Court will have jurisdiction over the crime of genocide, crimes against humanity, and war crimes (Article 5). While ad hoc tribunals are formed only after the commission of such crimes, the ICC aims to prevent these crimes from occurring in the first place. Unlike the United Nations International Court of Justice, which deals only with disputes among states, the ICC will have jurisdiction over individuals, including heads of state and other government representatives. The ICC thus embodies the principle of individual accountability that the justices at Nuremberg defined more than half a century ago: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The ICC's strength thus lies in its capacity to hold individuals responsible for committing the most serious crimes of international concern. Yet it is the ram-

ifications of this principle of individual accountability that have fueled the United States' opposition to the Rome Statute.

## Genocide, Crimes Against Humanity and War Crimes

The Rome Statute provides the Court with jurisdiction over genocide, which occurs when a perpetrator intends "to destroy, in whole or in part, a national, ethnical, racial or religious group" (Article 6). The U.S. delegation to the Rome Conference, led by David Scheffer, former U.S. ambassador-at-large for war crimes, was not concerned that one of its citizens acting in an official capacity as a soldier or government representative would commit the crime of genocide. Rather, the team was concerned that, under the language of the Rome Statute, the ICC could misconstrue a peacekeeping, pre-emptive defense, or other military action by a U.S. citizen as a commission by that citizen of either a crime against humanity or a war crime.

Under the Rome Statute, a crime against humanity includes, *inter alia*, murder, enslavement, torture, apartheid, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of

comparable gravity (Article 7). Further, the individual must commit the act as "part of a widespread or systematic attack directed against any civilian population . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack" (Articles 7(1), (2)(a)). A war crime is defined under the Rome Statute as a crime committed during an international or internal conflict "as part of a plan or policy or as part of a large-scale commission of such crimes" (Articles 8(1), (2)(b), (2)(c)). Thus, in order for the ICC to charge an individual with a crime against humanity or a war crime, the individual also must be found guilty of having a policy or plan to intentionally kill civilians. Therefore, under the language of the Rome Statute, unintentional civilian casualties would not constitute either the commission of a crime against humanity or a war crime. Assuming, however, that the ICC considers indicting a U.S. citizen for a crime against humanity or a war crime, the ICC's principle of complementarity to national judicial systems further safeguards any such U.S. citizen from coming under a direct investigation or prosecution by the Court.

## The Principle of Complementarity

One of the founding principles of the ICC is its creation as a court that will act to complement, rather than to substitute, national judicial systems (Preamble). The ICC's function is not to displace the criminal jurisdiction of any state, but rather to serve as an alternative judicial forum for states that are either "unwilling or unable genuinely" to prosecute a suspect on its own accord (Article 17). A determination by a panel of ICC judges that a state is "unable" to carry out an investigation or prosecution requires either a literal inability by the state to prosecute the perpetrator, or "a total or substantial collapse or unavailability of [the state's] national judicial system" (Article 17(3)). It is unlikely the United States would not be able to conduct a sufficient judicial proceeding to satisfy the requirements of the Rome Statute. Moreover, the likelihood of the U.S. judicial

**The United States opposed the Rome Statute because of its concern that it might one day have to surrender a citizen, particularly a member of its government or armed forces, to the jurisdiction of the International Criminal Court.**

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system suffering a total collapse at any time in the foreseeable future is remote. Thus, the U.S. concern for its citizens appears to turn on the definition of “unwillingness.”

Under the Rome Statute, a panel of ICC judges is empowered to determine that a state is unwilling to investigate or prosecute a perpetrator only in three circumstances: when it appears the proceedings are designed to shield the perpetrator from criminal responsibility; when the proceedings have been unjustifiably delayed so as not to bring the perpetrator to justice; or when the proceedings lack independence and impartiality or are being conducted in a manner inconsistent with the state’s intent to bring the perpetrator to justice (Article 17(2)). Therefore, the ICC would directly prosecute a U.S. citizen only if it ruled that the U.S. judicial process was so biased that it was unwilling to carry out a valid investigation and prosecution of an individual suspected of committing a crime of genocide, a crime against humanity, or a war crime.

### Congressional Opposition to the Rome Statute

During the Rome Conference, Senator Jesse Helms (R-NC), chair of the Senate Foreign Relations Committee, declared that the Rome Statute would be “dead on arrival” in Congress unless the ICC incorporated a provision exempting all U.S. citizens from its jurisdiction. Further, on June 14, 2000, the senator introduced a bill that would threaten the effect of the ICC. Senate bill S. 2726, the American Servicemembers’ Protection Act of 2000 (Protection Act), grants U.S. military personnel, and many categories of elected and appointed officials of the U.S. government, protection from investigation or prosecution by the ICC. Also on June 14, Representative Tom DeLay (R-TX) introduced a similar bill, H.R. 4654, in the House.

The Protection Act prohibits all U.S. federal and state government entities, agencies, and courts from cooperating with the ICC. Under the Protection Act, cooperation includes any type of assistance relating to the investigation, arrest, extradition, or transit of suspects. In addition, the Protection Act prohibits the U.S. president from sending U.S. troops to participate in select UN peacekeeping operations occurring on territories of states that have ratified the Rome Statute. The Protection Act

**One of the founding principles of the ICC is its creation as a court that will act to complement, rather than to substitute, national judicial systems.**

prohibits such U.S. military assistance because of the danger that a U.S. servicemember could be found by the ICC to have engaged in an activity that might render him or her accountable before the ICC. Further, the Protection Act explicitly states that, under the Rome Statute, U.S. citizens will “be denied many of the procedural protections to which all U.S. citizens are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution.” This statement, however, is not wholly accurate. Contrary to the Protection Act’s assertion, the Rome Statute is consistent with the U.S. Constitution.

### Constitutionality of the Rome Statute

The Rome Statute does not deny U.S. citizens their rights under the U.S. Constitution. According to Yale Law School

Professor Ruth Wedgwood’s extensive study, there “is no forbidding constitutional obstacle to U.S. participation in the treaty.” Wedgwood cites five reasons for this conclusion, three of which will be addressed here. First, historically the United States has signed treaties allowing U.S. participation in international tribunals that could affect the lives and property of U.S. citizens. For example, the North American Free Trade Agreement and the World Trade Organization subject U.S. businesses to judicial processes that do not mirror those found in an American courtroom, i.e., fact-finding by a panel of judges rather than by a jury.

**Even before the U.S. delegation team headed to Rome during the summer of 1998, the U.S. State Department issued a statement signaling an impending U.S. opposition to the ICC.**

Second, the ICC does not offend U.S. constitutional notions of due process because the Rome Statute, as carefully negotiated by Scheffer and his team at the Rome Conference, comports with the procedural protections and safeguards provided to U.S. citizens under the U.S. Constitution. Wedgwood and Monroe Leigh, a member of the American Bar Association, have compiled lists citing articles of the Rome Statute that both address and guarantee due process rights. Their lists include, *inter alia*, the right of the suspect: to have timely notice of charges filed against him (Article 60(1)); to a presumption of innocence (Articles 66(1), (2)); to the privilege against self-incrimination (Articles 55(1)(a), (1)(b), 67(1)(g)); to the assistance of counsel (Articles 55(2)(c), 67(1)(b), (1)(d)); to a speedy trial (Article 67(1)(c)); to cross-examine adverse witnesses (Article 67(1)(e)); to innocence unless the prosecutor has proved guilt “beyond reasonable doubt” (Article 66(3)); and to be present at the trial (Article 63).

Third, the crimes within the ICC’s jurisdiction under which a U.S. citizen could be indicted are generally those that would ordinarily be administered through the U.S. military court-martial system or through extradition of the U.S. suspect to the foreign nation where the criminal violation occurred. Specifically in response to H.R. 4654, on July 25, 2000, Leigh submitted a statement to the House Committee on International Relations in which he asserted the constitutionality of any potential criminal proceedings by the ICC against a U.S. citizen. Leigh’s statement emphasizes that members of the U.S. armed forces are precluded the right to jury trials under the Fifth Amendment of the Constitution, which states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” Moreover, the language of the Sixth Amendment, which concerns criminal trials, extends the guarantee of a jury trial only to the state and district where the crime was committed: “In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .” Therefore, a person who commits a crime in a foreign country risks extradition to that foreign country and, accordingly, has no constitutional guarantee of a jury trial.

In arguing that the Rome Statute does not offend U.S. constitutional notions of due process, Wedgwood cites three

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# NEWS FROM THE INTER-AMERICAN SYSTEM

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by Terri J. Harris \*

## Inter-American Commission Cases

### *Case Gary T. Graham, now known as Shaka Sankofa (United States)*

**Facts:** In October 1981, Shaka Sankofa was convicted of capital murder and sentenced to death in the State of Texas. Sankofa was 17 years old at the time of the offense. The International Human Rights Law Clinic at the Washington College of Law filed a petition on behalf of Sankofa with the Inter-American Commission on Human Rights (Commission) on April 26, 1993. The petition asserted a violation of the right to life, liberty and personal security (Article 1), the right to equality before the law (Article 2), the right to a fair trial (Article 18), and the right to due process of law (Article 26) under the American Declaration of the Rights and Duties of Man. As a precaution, the Commission requested Texas to ensure a stay of execution and grant Sankofa a full and fair hearing before the Texas Board of Pardons and Paroles.

**Decision:** On June 15, 2000, the Commission declared the petition admissible. The findings on admissibility stated that Sankofa had exhausted all available domestic remedies or else had been prohibited from petitioning by domestic legislation. The Commission further held that the 19-year delay in the execution and his age at the time of the offense eliminated any reasonable prospect of success in a domestic court.

### *Case Caloto Massacre (Colombia)*

**Facts:** On December 16, 1992, a petition was filed on behalf of members of the Paez indigenous community of the northern Cauca region of Colombia against the Colombian State for the Caloto Massacre. The massacre resulted from a dispute over the El Nilo *hacienda* between the Paez community and the *Sociedad Agropecuaria Piedra Blanca* company, which purchased the land knowing it was inhabited by the Paez. The petitioners claimed Colombia violated the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), and the right to judicial protection (Article 25) read in conjunction with Article 1(1) of the American Convention on Human Rights (Convention). Prior to the massacre, members of the indigenous community were harassed by company representatives and armed men for refusing to abandon the land in exchange for payment for their houses and improvements made to the land. The State conceded that on the night of December 16, 1991, members of the National Police, along with heavily armed civilians, went to the El Nilo *hacienda*, executed the leaders of the community, and shot others trying to flee. Before leaving, the armed men also burned the houses and property of the Paez.

**Decision:** While the parties originally agreed to a friendly settlement procedure according to Article 48(f) of the Convention, by October 1998 the petitioners asked the Commission to issue a ruling on the merits. The petition was considered admissible in light of the explicit acknowledgement by the State of its responsibility for the massacre. The Commission interpreted the rights in the Convention in the context of the specific rights of indigenous communities found in the International Labor Organization's 1989 Convention 169 on Indigenous and Tribal Peoples, the Inter-American Charter of Social Guarantees (1948), and the Commission's 1996 resolution on Special Protection for Indigenous Peoples. The Commission ruled the State violated the right to life (Article 4), the right to physical integrity (Article 5(1)), the right to personal liberty (Article 7), and the right to a fair trial and to judicial protection as provided for in Articles 8 and 25 of

the Convention, respectively. The State also failed to respect and ensure all rights in the Convention under Article 1(1) by not taking measures to prevent the massacre, even after members of the Paez community reported threats made against them. The

**The 19-year delay in the execution and his age at the time of the offense eliminated any reasonable prospect of success in a domestic court.**

Commission recommended Colombia investigate and punish those responsible for the massacre, make both monetary and social reparations benefiting the entire Paez community, and adopt measures to prevent future massacres.

### *Case Carmelo Soria Espinoza (Chile)*

**Facts:** On February 15, 1997, the daughter of Carmelo Soria Espinoza filed a complaint with the Commission against the State of Chile alleging a violation of the right of access to justice. In July 1976, while working for a UN agency, Soria was kidnapped by agents of Chile's National Intelligence Agency (DINA), arbitrarily detained, tortured, and later executed. In 1995, the Chilean Supreme Court of Justice confirmed Soria was murdered and identified the state agents responsible. The Supreme Court, however, later terminated the criminal proceedings and declared the 1978 Amnesty Law (Decree Law Number 2.191) prevented the prosecution and punishment of those responsible. The petition requested the Commission declare the Amnesty Law incompatible with Chile's international obligations under the Convention.

**Decision:** On November 19, 1999, the Commission declared the Amnesty Law in Chile violated the State's obligations under Article 1(1) and 2 of the Convention. In applying the Amnesty Law to the disappearance and murder of Soria, the State violated the rights of judicial protection and access to justice under Articles 1(1), 2, 8, and 25 of the Convention. Pursuant to Article 29 of the Convention, the Commission also determined the State had violated Article 2(1) of the Prevention and Punishment of Crimes against Internationally Protected Persons. The Commission recommended the State prosecute and punish those responsible for the murder of Soria and repeal the self-Amnesty Law. The Commission placed special emphasis on the principles of individual criminal responsibility and universal jurisdiction for grave human rights violations. The Commission concluded that if Chile could not fulfill its international obligation to prosecute those responsible, the State would automatically be subject to universal jurisdiction.

### *Case Desmond McKenzie, et. al (Jamaica)*

**Facts:** Six death row inmates at the St. Catherine District Prison in Jamaica individually petitioned the Commission between June 1998 and May 1999, claiming the mandatory imposition of the death sentence in each of their cases violated the state's obligation to respect rights (Article 1), the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to equal protection (Article 24), and the right to judicial protection (Article 25) under the Convention. The Commission later consolidated the cases into one report based on the similarity of facts and the issues presented. The petitioners asserted that the process of requesting a pardon or

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commutation from the Jamaican Privy Council violated their right to apply for amnesty, pardon, or commutation of their sentence under Article 4(6) of the American Convention. The Jamaican Privy Council may pardon or commute a death sentence under Articles 90 and 91 of the Constitution of Jamaica, but prisoners have no procedural guarantees.

**Decision:** On April 13, 2000, the Commission ruled Jamaica had violated Articles 4(1), 5(1), 5(2), 8(1), and 4(6) of the Con-

**The Commission criticized the Peruvian Intelligence Service’s (SIN) use of wiretapping, espionage, and physical surveillance to harass and intimidate opposition presidential candidates.**

vention by disallowing the petitioners to present mitigating evidence at an individualized sentencing hearing before imposing the death penalty. The Commission found the Jamaican Privy Council’s power to grant a pardon or commute a death sentence does not serve as a form of judicial review because under Jamaican law the petitioners have no effective right to apply for this form of discretionary relief. The Commission recommended the State commute the death sentences and offer the petitioners compensation. Additionally, the Commission recommended Jamaica adopt domestic legislation requiring the death penalty be imposed only in accordance with the American Convention and pass legislation allowing criminal defendants to apply for amnesty, pardon, or commutation of the death penalty.

**The “Second Report on the Situation of Human Rights in Peru”**

On June 2, 2000, the Commission issued the “Second Report on the Situation of Human Rights in Peru” (Report), following

an on-site visit in November 1998. The Report described measures implemented by the executive, legislative and judicial branches of government, restricting the right of political participation of its citizens, as guaranteed by Article 23 of the Convention. The Commission criticized the Peruvian Intelligence Service’s (SIN) use of wiretapping, espionage and physical surveillance to harass and intimidate opposition presidential candidates. In documenting the State’s interference in citizens’ participation in the political process, the Commission referred to contentious cases from Peru currently under review, previously decided, or already submitted to the Inter-American Court of Human Rights. These included the *Case of Mariela Barreto Riofano*, the *Case of Susana Higuchi Miyagawa*, and the *Case of Baruch Iocher Bronstein*.

The Commission also reviewed reports by the Organization of American States Electoral Observation Mission, the Commission’s Rapporteur for Freedom of Expression, the Peruvian Human Rights Ombudsman, and non-governmental organizations within Peru that observed the April 9, 2000, presidential and legislative elections. These reports documented serious abnormalities and persistent inequities in the voting process, including the tallying of the votes. Consequently, the Electoral Observation Mission and other election monitoring organizations decided against observing the second round of elections on May 28, 2000, which ultimately declared Fujimori the winner of the presidency. The Commission concluded the 2000 elections were not free and fair in light of international standards enshrining the right of political participation. The Commission further held that Peru should hold another election, guaranteed to be free and fair, within a reasonable time period, to uphold the rule of law and guarantee the right of political participation. As of November 27, 2000, Fujimori has resigned the presidency and been replaced by former congressman Valentin Paniagua. 🌐

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procedural provisions of the Rome Statute that distinguish the ICC from U.S. common law procedures. First, the Rome Statute provides for the use of a fact-finding panel of judges rather than a jury (Articles 34, 39(2) (b) (ii), 74). As discussed above, historic U.S. treaty participation already subjects U.S. citizens to this procedure. Second, verdicts rendered by the ICC are by a vote of at least two judges (Article 74(3)). Finally, the ICC prosecutor may file an appeal based on errors of fact, law, and procedure (Article 81(1)(a)). Because U.S. citizens who commit crimes abroad are generally subject to the rules either of foreign courts or of the U.S. military courts-martial system, it is safe to assume that a U.S. citizen could encounter these same rules of procedure in a foreign country. In addition, U.S. courts-martial rules similarly stipulate that verdicts, in cases of acts resulting in unintentional civilian casualties or other unintentional harms, need not be rendered by a unanimous vote: “a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty” (R.C.M.921(c) (2) (B)).

Further, the United States has the capacity to ensure the constitutionality of the ICC’s Rules of Procedure and Evidence (Rules) before committing itself to the provisions of the Rome Statute. At the signing of the Rome Statute, the Rome Conference adopted Resolution F, mandating the establishment of a Preparatory Commission (PrepCom) to complete draft texts

<b>Ratifications of the ICC Statute as of November 2000.</b>	
<b>COUNTRY</b>	<b>DATE OF RATIFICATION</b>
Senegal	February 2, 1999
Trinidad and Tobago	April 6, 1999
San Marino	May 13, 1999
Italy	July 26, 1999
Fiji	November 29, 1999
Ghana	December 20, 1999
Norway	February 16, 2000
Belize	April 5, 2000
Tajikistan	May 5, 2000
Iceland	May 25, 2000
Venezuela	June 7, 2000
France	June 9, 2000
Belgium	June 28, 2000
Canada	July 7, 2000
Mali	August 16, 2000
Lesotho	September 6, 2000
New Zealand	September 7, 2000
Botswana	September 8, 2000
Luxembourg	September 8, 2000
Sierra Leone	September 15, 2000
Gabon	September 21, 2000
Spain	October 25, 2000

# Human Rights Violations Against Muslims in the Xinjiang Uighur Autonomous Region of Western China

by Natasha Parassram Concepcion\*

The disintegration of the Soviet Union resulted in the formation of several new and unstable Central Asian states, located around the Chinese border. This instability is a major source of concern for the Chinese government, which fears the unrest could lead to destabilization of some of its provinces. Today, there are five autonomous regions in China where national minority citizens are allowed some form of limited representation in regional government institutions. The Xinjiang Uighur Autonomous Region (XUAR), where approximately eight million Uighurs—the predominantly Muslim inhabitants—currently reside, is one of these five regions.

The XUAR is a strategically important region within China, reportedly rich in oil and gas, and used by the Chinese government for nuclear bomb testing. In order to maintain its hold over the region, the Chinese government has responded to the threat of destabilization by tolerating, to some degree, the Muslim religious practices in the XUAR. At the end of the 1980s, however, local unrest in the XUAR led the government to initiate a crackdown on what they believed to be local nationalism and separatist sentiments.

In 1997 and 1998, violence in the region escalated. According to Amnesty International, fighting between small groups of Uighurs and ethnic Chinese (Han) security forces, as well as attacks by Uighur opposition groups against Chinese government officials, are intensifying in response to the Uighurs' growing discontent over government discrimination, interference with their religious and cultural rights, official corruption, and denial of equal economic opportunity.

The Chinese government's response continues to be harsh and repressive. As a result of these violent outbreaks in the XUAR, the Chinese government launched a campaign against suspected separatists, subjecting many Uighurs to arbitrary arrest, detention,

**[T]he Chinese government launched a campaign against suspected separatists, subjecting many Uighurs to arbitrary arrest, detention, imprisonment, torture, unfair trials, and summary executions.**

imprisonment, torture, unfair trials, and summary executions. On August 11, 1999, for example, government officials arrested Rebiya Kadeer, an important businesswoman and one of the most prominent women among the Uighur ethnic minority population, in Urumqi, the capital of the XUAR. According to both Amnesty International and Human Rights Watch, Kadeer, charged with "providing secret information to foreigners," received eight



years imprisonment. The Chinese government's actions against Kadeer are meant to punish both her and her husband, a former political prisoner, for publicly speaking out against the government's treatment of the Uighurs.

Despite the fact that the Chinese government signed the International Covenant on Civil and Political Rights (ICCPR) and ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (CAT), it continues to perpetrate massive human rights abuses against the Uighur population, directly in violation of its international human rights obligations under these two treaties.

## Background

### Political and Religious History

The Uighurs have resided in the Tarim basin in Western China since the sixth century. At times Uighurs experienced self-rule, independent of their powerful neighbors, China and Russia. Beginning around 1750, however, the Chinese political sphere gradually incorporated the Uighurs. Xinjiang officially became a province of China in 1884, but retained some strong Russian influences and ties.

The Manchu Qing dynasty, which controlled the region until its fall in 1910, referred to the region as the "new dominion" (*xinjiang*). After the collapse of the Manchu Qing dynasty, competition among the three major players in the region—China, Russia and Great Britain—resulted in the Xinjiang region being extremely unstable and divided. During this time, the Uighurs unsuccessfully attempted to regain their independence on two separate occasions.

By 1949, internal strife in China culminated in the People's Liberation Army's ascension to power and the establishment of the People's Republic of China under communist rule. The communist authorities moved to consolidate their power in Xinjiang by trying to erase Russian influence in the region. In 1950, for example, the new Chinese government initiated a program to promote Han immigration into Xinjiang. With the influx of Han into the region, the Uighurs began to feel marginalized in their own land, and viewed the increasing integration with China as a threat to their cultural survival. In 1955, the government established the Xinjiang Uighur Autonomous Region (XUAR), a region within China's borders but with self-autonomy. This autonomy, however, is limited because the Chinese Communist Party continues to make almost all policy decisions. In addition, Han, who are relatively recent arrivals in the XUAR, receive many of the official government posts in the XUAR. Such governmental policies contribute to the tension and sporadic eruptions of violence between the Han and Uighur populations.

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Religion also has been a source of contention between the Uighurs and the Chinese government. Although the Uighurs adopted Islam sometime between the fifteenth and seventeenth centuries, the term Uighur was not associated with Islam until 1935, when the Chinese Nationalists officially defined the Uighurs as an ethnic group of oasis-dwelling Muslims in the Tarim basin. As part of their Muslim religious practice, the Uighurs generally pray five times a day and celebrate two major Islamic festivals each year—Lesser Bairam (the Festival of Fastbreaking) and Cobran (the Sacrifice Festival). During the month immediately preceding Lesser Bairam, the Uighurs fast until sunset, and break fast on Lesser Bairam. Seventy days later, they celebrate Cobran, a three-day festival during which Uighurs wear national costumes, celebrate Muslim services, eat mutton, sing songs, pray, and dance.

### Human Rights Violations in the XUAR

The Uighurs face severe economic, racial, social, and cultural discrimination by the Chinese government. In addition, Amnesty International indicates that religion and political organization are the two primary motivations behind the governmental repression of the Uighurs and the significant increase of human rights violations in the XUAR region. Fearing Islam might feed ethnic nationalism and a separatist movement, the Chinese government began to severely curtail the political and religious practices of the Muslim Uighurs in the 1980s and 1990s.

The mounting tension between the Chinese government and the Uighur population culminated in an eruption of violence over the past five years. Three major events were responsible for sparking violent confrontations between Chinese police forces and the Uighurs. The first occurred in 1995 with the revival of the *meshrep*, an old system that dealt with social issues. The *meshrep* is analogous to a traditional social party in which large groups of people congregate to speak, play music, sing, or recite poetry. For the Chinese government, these *meshreps* represented a threat because they attempted to revive cultural and Islamic traditions. Consequently, this attempt at social organization—perceived by the government as a form of political organization—was met with heavy government repression. The second event to fuel the violence was the 1995 disappearance of Abdul Kayum, an Islamic preacher (*imam*), at a mosque in Khotan (Hetian). The third incident resulted from a series of protests in 1997 in the city of Gulja (Yining). Clashes between demonstrators calling for the equal treatment of Uighurs and police forces resulted in hundreds arrested, injured, or killed.

Since that time, and according to the most recent U.S. State Department Country Report on Human Rights Practices in China, the Chinese authorities have been ferociously targeting suspected Uighur nationalists, separatists, and independent Muslim religious leaders.

### Denial of Judicial Guarantees

The Chinese government continues to routinely jail Uighurs for their suspected separatist views and for exercising their religious freedom and fundamental human rights. In many cases, prisoners are not charged or tried, and are held incommunicado. In other cases, prisoners are sentenced to lengthy prison terms for essentially non-violent activities, such as demonstrating.

According to a 1999 Amnesty International Report on human rights violations in the XUAR, even if prisoners receive a trial, the process is a mere formality because political authorities typically



XUAR storefront in Arabic and Chinese.

have already determined the prisoner's fate. Furthermore, prisoners have very limited access to lawyers, and in many cases they are merely informed of their sentences after a court has adjudicated the case in a private session. Prisoners also are sometimes taken to public sentencing rallies where their sentences are read in front of hundreds or thousands of people.

The inordinate imposition of the death penalty in the XUAR is particularly disturbing. Many political prisoners are sentenced to death and executed; the XUAR continues to have the highest ratio of death sentences relative to its population size. According to Amnesty International, it is the only region within China where, in recent years, political prisoners are routinely executed for their political beliefs.

### Torture

Uighur prisoners often are tortured while in prison to extract confessions. Amnesty International reports that such torture includes: sleep and food deprivation; severe beatings with either fists or other instruments, sometimes while suspended by the arms or feet; electric shocks; handcuffing or tying prisoners in ways causing severe pain and suffering; exposure to extreme cold or heat;

using trained dogs to attack prisoners; inserting sticks or needles under finger nails or having fingernails pulled out entirely; and administering injections causing the prisoner to "become mentally unbalanced or to lose the ability to speak coherently." Other methods of torture not used elsewhere in China include putting pepper, chili-powder or other substances in the mouth, nose, or genital organs;

and inserting horse hairs or wires into the male prisoners' penises.

### China's International Human Rights Obligations

China is legally bound to respect the human rights treaties it has ratified. Under traditional principles of international law, without ratification by a state, a treaty may not be enforced against that state unless the treaty codifies customary international law. Currently, China has signed, but not ratified, the International Covenant on Civil and Political Rights (ICCPR), and has ratified to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

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**Many political prisoners are sentenced to death and executed; the XUAR continues to have the highest ratio of death sentences relative to its population size.**

By adopting the CAT, China is legally bound by its provisions. The CAT requires China to take measures to prevent torture in territories under its jurisdiction (Article 2), to make torture a criminal offense and establish jurisdiction over it (Articles 4 and 5), to prosecute or extradite persons charged with torture (Article 7), and to provide a remedy for persons tortured (Article 14). Further, the CAT's definition of "torture" forbids the state from intentionally inflicting any severe pain or suffering, whether physical or mental, to elicit information or a confession, or to punish someone for acts he has committed or is suspected of having committed. In addition, authorities have a responsibility not to inflict pain and suffering to intimidate or coerce a person for any reason based on discrimination of any kind (Article 1). Finally, the CAT explicitly stipulates that consent or acquiescence of a state official or governmental actor in inflicting torture is requisite to holding a state responsible for its actions (Article 16); the CAT does not protect individuals from torture by private actors.

Despite having ratified the CAT in 1988, China continues to practice torture against the Uighurs. Many of the detained Uighurs are political prisoners, often arrested for merely discussing politics openly. The reports of former prisoners gathered by Amnesty International, as well as other sources, indicate torture is systematic in the XUAR—a practice in direct violation of China's obligations under the CAT. Certain detention facilities, such as the Liu Daowan jail in Urumqi and some of the jails in Ili Prefecture, are reputed to be worse than others; approximately 90 percent of detained prisoners allowed to appear in court allege they have been tortured while in police custody.

Many of the Uighur victims of torture report being severely beaten while in detention. Victims also claim to have been kept in crowded jail cells, and to have often lacked sufficient room to lie down at night. Some victims claim they were taken to special rooms to be tortured, where they describe being handcuffed with their hands behind their backs.

China's obligations under the ICCPR are less coherent because the state has signed but not yet ratified the convention. Under international law, China may only be legally bound by the ICCPR if the rights contained in the treaty codify international customary law. The act of signing the treaty is nonetheless significant in terms of state obligations. According to the general principles of international law, the act of signature means China must refrain from any actions that would run counter to the object and purpose of the treaty until it has made clear its final intentions with regard to the treaty. Thus, by signing the treaty, China has an obligation to respect the rights guaranteed to its citizens under the ICCPR.

Under Article 2 of the ICCPR, each state party is obligated to recognize the rights of all individuals within its territory and subject to its jurisdiction, regardless of race, color, sex, language, religion, political or other opinion, and national or social origin. The ICCPR guarantees each person the right to life (Article 6); the right to be free from torture or cruel, inhuman or degrading treatment or punishment (Article 7); the right not to be subjected to arbitrary arrest or detention, and the right to be "informed, at the time of arrest, of the reasons for his arrest" (Article 9); the right to be taken before a judge or magistrate (Article 9); the right to a fair trial (Article 14); the right to freedom of expression

(Article 18); and the right to enjoy his own culture and practice his own religion (Article 27).

China's behavior toward the Uighurs violates many of the ICCPR's fundamental principles. Arresting and detaining the Uighurs for peaceful demonstrations and religious, cultural, and political expression, clearly violates the ICCPR. Because the fear of a separatist movement is so great, the government regularly imprisons anyone remotely suspected of political activity. Religious activism, which Chinese authorities consider to be a political activity, is also a target of government repression. The Chinese government believes that such religious activities might fuel the movement for political independence. As such, no Uighurs in the XUAR seem to be free from the government's accusations.

The February 25, 2000, State Department Report on Human Rights Practices in China confirms the Chinese government's increasing repression of Uighur religious activity. Many of the mosques in the XUAR have been shut down, and the government

has issued new regulations severely restricting religious activities, the building of mosques, and religious teaching in the region. Furthermore, the government's harsh treatment of religious activists—also viewed as political agents advocating separatism—often manifests in arrests, illegal detention, and torture. Some religious adherents are sentenced to death or are arbitrarily executed, less so for punishment than as a message to the rest of the community that

separatist tendencies will not be tolerated.

In addition to China's obligations under international human rights law, China's practices and policies in the XUAR do not conform with its domestic legal obligations. The 1997 amendments to China's Criminal Procedure Law were designed to provide greater access to legal counsel, to abolish a regulation permitting summary trials in certain cases involving the death penalty, and to provide for notifying the detainee's family within 24 hours of arrest and detention. The Chinese police forces, however, continue to detain individuals without providing access to lawyers, and many trials continue to be conducted in secrecy. Many of the prisoners are not even charged with a specific crime. In direct violation of international and domestic law, the Uighurs continue to be held as political prisoners, denied judicial guarantees, tortured, and arbitrarily executed.

### Conclusion

To date, the plight of the Uighur population in western China has not been sufficiently publicized. Accordingly, it is important the international community draw attention to the suffering of the Uighurs in order to pressure the Chinese government to end its abusive practices in the XUAR. Specifically, the international community must closely monitor the situation in the XUAR and urge China to ratify human rights treaties—namely, the ICCPR—and to fulfill its obligations under those treaties it has ratified. 🌐

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**Uighur prisoners often are tortured while in prison to extract confessions . . . such torture includes: sleep and food deprivation; severe beatings . . . and administering injections causing the prisoner to "become mentally unbalanced or to lose the ability to speak coherently."**



## 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.

### **Trafficking Victims Protection Act of 2000, H.R. 3244/S. 2449**

**Major Sponsor:** Rep. Christopher H. Smith (R-NJ)/Sen. Sam Brownback (R-KS)

**Status:** Referred to Senate Committee on Foreign Relations on April 13, 2000. Passed Senate with an amendment by unanimous consent on July 27, 2000. House conference to reconsider the Senate amendment held on September 28, 2000.

**Substance:** This bill targets the trafficking of women and children into the United States for purposes of enslavement, forced or bonded labor, prostitution, and other violent or sexual uses, by establishing effective modes of punishment for traffickers and by providing protection and support to their victims. The bill directs the president to create an interagency task force, chaired by the Secretary of State, to monitor and assess the progress made by the United States and other countries in their efforts to combat trafficking and to coordinate the implementation of the Act. In the case of those victims trafficked into the United States, the bill amends the Immigration and Naturalization Act by allowing the Attorney General to grant a new, non-immigrant "T" visa to those victims who would face hardships if deported. In addition, the bill requires the president to withhold non-humanitarian assistance to countries that do not meet the Act's minimum trafficking standards. The Act also amends the Federal Criminal Code to double the maximum penalties for traffickers; to add the possibility of life imprisonment for trafficking violations that result in death, kidnapping or other aggravated forms of abuse; and to require convicted traffickers to provide restitution to their victims.

### **United Nations Rapid Deployment Police and Security Force Act of 2000, H.R. 4453**

**Major Sponsor:** Rep. James P. McGovern (D-MA)

**Status:** Referred to the House Committee on International Relations on May 15, 2000, and to the House Subcommittee on International Operations and Human Rights on June 12, 2000.

**Substance:** This bill encourages the UN to form a Rapid Deployment Police and Security Force that will act under the authority of the UN Security Council. The combination police and military force will consist of no more than 6,000 volunteers

chosen from UN member nations. The Security Council may rapidly deploy the force for up to six months when it deems intervention by the international community is necessary to prevent gross human rights violations or breaches of the peace. In addition, the UN Rapid Deployment Police and Security Force personnel will promote participation in international peace operations by training the military and civilian police of UN member nations.

### **Human Rights Investment Act of 2000, H.R. 5196**

**Major Sponsor:** Rep. Benjamin A. Gilman (R-NY)

**Status:** Referred to the House Committee on International Relations on September 18, 2000.

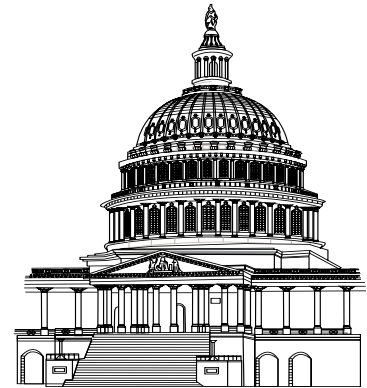
**Substance:** This bill promotes, defends, and advances democracy and human rights in United States foreign policy. The bill provides financial support to the Bureau of Democracy, Human Rights, and Labor, including funding for salaries, expenses, and the creation of new positions, and to U.S. human rights development missions abroad. By providing U.S.\$32 million for fiscal years 2001 and 2002, the bill establishes a Human Rights and Democracy Fund whose primary objective is to support human rights defenders and victims of human rights violations. In addition, the bill creates a weapons monitoring program to ensure that no U.S. military assistance or weapons manufactured in or sold from the United States aid in the perpetration of gross human rights violations. U.S. military assistance includes education, training, antiterrorism support, narcotics control, and other counter-drug measures provided under the Foreign Assistance Act of 1961. The bill also authorizes U.S.\$50 million in appropriations for the National Endowment for Democracy during each of the fiscal years 2001 and 2002.

### **Corporate Code of Conduct Act, H.R. 4596**

**Major Sponsor:** Rep. Cynthia Ann McKinney (D-GA)

**Status:** Referred to the House Subcommittees on International Economic Policy and Trade, and on International Operations and Human Rights on July 17, 2000.

**Substance:** This bill was introduced following protests against the World Trade Organization in Seattle, Washington, and



the World Bank and International Monetary Fund in Washington, D.C., regarding the "unregulated expansion of globalization." Recognizing the reputation that numerous U.S. foreign business operations have for disregarding employees, the bill demands U.S. nationals who employ more than 20 persons abroad, either directly or through subsidiary companies, subcontractors, affiliates, joint ventures, partners, or licensees (including any security forces), to implement and maintain a specific Corporate Code of Conduct (Code) toward employees. The Code is designed to promote good faith, compliance with internationally recognized labor and environmental laws and conformity with minimum international human rights standards. In particular, the Code prohibits the use of child and forced labor; employment discrimination based on race, gender, ethnicity, or religious beliefs; and the practice of firing pregnant employees or forcing employees to use birth control. The bill works to ensure the fulfillment of the Code in three ways: the bill provides preferred financial assistance and other trade benefits to entities that comply with the standard; the bill requires the Secretary of Commerce, the Secretary of Labor, the Secretary of State or the Administrator of the Environmental Protection Agency to terminate all contracts entered into with entities that violate the standard; and lastly, the bill establishes a private right of action for employees to petition for an investigation by the appropriate federal official of any alleged violations of the Code. ☉

## LEGISLATIVE FOCUS

### Repealing the Use of Secret Evidence

By Gobind Singh Sethi\*

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which authorized the Immigration and Naturalization Service (INS) to use secret evidence against aliens in various immigration proceedings. H.R. 2121, the Secret Evidence Repeal Act (SERA 1999), was introduced in 1999 and reintroduced to Congress in 2000 (SERA 2000). SERA 2000, if enacted, would help restore to aliens some of the constitutionally mandated procedural safeguards guaranteed to U.S. citizens that IIRAIRA removed. In particular, SERA 2000 prohibits the use of secret evidence in removal and asylum proceedings, as well as bond and immigration benefit hearings, with the exception of cases where aliens are removable for terrorist activities.

Presently, the INS uses secret evidence by presenting the evidence before a judge, without the alien or her attorney present. In order for the INS to use secret evidence, two criteria must be satisfied: a government agency, such as the Federal Bureau of Investigation, must deem the evidence classified; and the INS must find the evidence to be relevant to the case.

Many critics have challenged the constitutionality of secret evidence, arguing it is contrary to Fifth Amendment procedural due process guarantees. In secret evidence cases, the accused is unable to adequately refute the secret evidence used against her because of restrictions denying access or knowledge of the evidence. IIRAIRA also prohibits the accused from confronting and cross-examining the witness that informed the authorities of the relevant evidence. Thus, there is no way for the accused to question the credibility of the witness. Moreover, the use of secret evidence diminishes the prospects of a successful appeal because the accused cannot challenge rulings on evidentiary grounds. Due to the gross procedural abuses resulting from secret evidence, all federal courts, including the Supreme Court, have consistently banned its use.

Recent cases involving the use of secret evidence have questioned its constitutionality, and have signaled to lawmakers the need to repeal its use. In *Kiareldeen v. Reno*, the INS detained Hany Kiareldeen, a Palestinian, for 19 months pending his removal based on secret evidence. The INS arrested Kiareldeen on March 27, 1998. The only formal charge the INS raised against Kiareldeen was that he failed to maintain his student visa status and was thus deportable. Based on secret evidence, however, the immigration judge initially handling his case denied his bond request on the grounds that Kiareldeen posed a threat to national security.

Kiareldeen appealed the immigration judge decision to the Board of Immigration Appeals (BIA) and filed a *habeas corpus* petition with a federal district court in New Jersey. Both courts permitted Kiareldeen to receive summaries of the secret evidence used by the INS in the initial bond hearing. According to the BIA, Kiareldeen's rebuttal clearly demonstrated he was not a threat to national security, and therefore ordered his release. In fact, the evidence was discovered to be uncorroborated hearsay alleged by his ex-wife. The district court concluded the use of secret evidence violated Kiareldeen's due process rights and ordered his release on that basis. Both judicial bodies criticized the INS for its inappropriate use of secret evidence to detain Kiareldeen for 19 months.

#### Legislative History and Substance of H.R. 2121

The *Kiareldeen* decision, along with others, spurred members of the House of Representatives to enact legislation reforming

the use of secret evidence against aliens. On June 10, 1999, Congressman David Bonior (D-MI) introduced the Secret Evidence Repeal Act of 1999. Originally SERA 1999 would have repealed all use of secret evidence in immigration cases. After a September 26, 2000, House Judiciary Committee mark-up, however, SERA 2000 as amended still permits the use of secret evidence, but restricts it to removal proceedings where the alien is alleged to be deportable under section 237(a)(4)(B) of the Immigration and Naturalization Act. This section applies to any alien "who has engaged in, is engaged, or at admission engages in any terrorist activity."

SERA 2000 requires the Attorney General to inform the accused and the presiding immigration judge of the INS's intention to use secret evidence. The INS must provide the accused with a summary of the evidence and also refer the evidence to a federal district court. The federal judge must examine the summary to determine whether the summary would permit the defendant substantially the same defense as the secret evidence, in its entirety, would have provided. If the summary is deemed sufficient, the immigration judge hearing the case would receive only the same summarized information as the accused.

SERA 2000 would restore due process rights to a fair hearing for most aliens in immigration proceedings concerning secret evidence. Only known terrorists would be deprived from their liberty based on the use of secret evidence. Aliens would then be able to adequately defend themselves in court, while still allowing the government to keep classified information secret. On October 17, 2000, SERA 2000 was placed on the Union Calendar in the House of Representatives. ☺

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# NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

## Part I\*

by Cecile E.M. Meijer and Amardeep Singh\*\*

### General

In the year 2000, the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down, as of late October 2000, seven judgements. The Trial Chamber rendered two judgements after trials on the merits (Blaškić and Kupreškić), and one judgement on allegations of contempt (Simić *et al.*), in addition to numerous interlocutory decisions and orders. Additionally, the Appeals Chamber rendered two judgements on the merits in the Aleksovski case and the Furundžija case, as well as a sentencing judgement and a judgement on allegations of contempt in the Tadić case.

Two new judges assumed their duties at the ICTY this year: Judge Fausto Pocar of Italy replaced Judge Antonio Cassese and was sworn in on February 8, 2000, and Judge Liu Daqun of China was sworn in on April 3, 2000, replacing Judge Wang Tiejia. They will serve the remainder of their predecessors' terms of office, both of which end on November 16, 2001.

In February, France signed an agreement with the ICTY regarding the enforcement of ICTY sentences on French territory. In March, Spain became the seventh state to sign such an agreement with the ICTY. Under this agreement, however, Spain will consider only those cases where the sentence is no longer than the maximum possible sentence for any crime under Spanish criminal law, which currently is 30 years. Each agreement will enter into force after France and Spain, respectively, have notified the ICTY that it has satisfied the necessary domestic implementing legislation. The other states that have signed such agreements are Italy, Finland, Norway, Sweden, and Austria. In September 2000, Finland for the first time received two convicted persons from the ICTY—Aleksovski and Furundžija—who will serve their sentences in Finland. Most recently, Duško Tadić was moved from the UN Detention Unit in The Hague to a German prison, following *exequatur* proceedings (necessary to execute an ICTY judgement in Germany) and an ad hoc agreement for this particular case between the ICTY and the government of Germany.

### The Appeals Chamber

#### Aleksovski Judgement

On March 24, 2000, the Appeals Chamber rendered its written decision in *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, following an appeal by Zlatko Aleksovski and by the prosecution against the Trial Chamber's judgement and imposed sentence. Among the main issues decided was the question of precedent, i.e., the weight to be accorded to the Tribunal's past judgements. Additionally, for the first time the Appeals Chamber lengthened a sentence imposed by the Trial Chamber.

Aleksovski, a Bosnian-Croat, was accused of mistreating Bosnian-Muslim prisoners at the Kaonik prison in Bosnia-Herzegovina while he was a warden of the prison. His indictment included allegations, *inter alia*, of beatings, forced labor, and allowing prisoners to be used as human shields. On May 7, 1999, in its oral pronouncement of the judgement, the Trial Chamber had found Aleksovski guilty of violations of the laws or customs of war, specifically "outrages against personal dignity," as recognized by Article 3 of the Tribunal's Statute (violations of the laws or customs of war). The Trial Chamber did not, however, find him guilty of "inhuman treatment" and "willfully causing great suffering or serious injury to body or health" as

recognized by Article 2(b) and Article 2(c) of the ICTY Statute (grave breaches of the Geneva Conventions), respectively. Aleksovski's acquittal on these two counts was based on the fact that the Trial Chamber's majority did not consider the

**The Appeals Chamber held that "in the interests of certainty and predictability, the Appeals Chambers should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."**

Bosnian-Muslim victims as protected persons, because the conflict at the relevant time and place was not deemed to be of an international character. The Trial Chamber sentenced Aleksovski to two and one half years imprisonment. He was immediately set free, however, because the sentence was less than time already served. The written judgement had been rendered on June 25, 1999.

Aleksovski raised four grounds of appeal, all of which were rejected. One of the Appellant's grounds of appeal concerned the question whether the prosecution must demonstrate that the perpetrator of a crime as defined under Article 3 of the Tribunal's Statute was "motivated by a contempt toward [an] other person's dignity in racial, religious, social, sexual or other discriminatory sense." The Appeals Chamber referred, *inter alia*, to the 1995 *Tadić Appeal on Jurisdiction* decision, in which the Tribunal identified the general requirements for prosecuting under Article 3 of the ICTY Statute and stated that proving discriminatory intent or motivation is not among these requirements. The Appeals Chamber furthermore examined in this respect the text and purpose of relevant provisions in the Geneva Conventions and Additional Protocols, the commentaries by the International Criminal Tribunal for Rwanda (ICTR), customary international law relating to this issue, as well as pertinent ICTY jurisprudence. As a result, the Appeals Chamber rejected this ground of appeal, finding that "it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive."

The prosecution's cross-appeals were more successful. The first ground of cross-appeal contested the non-applicability of Article 2 of the ICTY Statute, and asserted that the Trial Chamber applied the incorrect test in determining the nature of the armed conflict. The prosecution argued the Trial Chamber should have applied the "overall control" test. The prosecution also contended that the Trial Chamber used the wrong test in determining the victims' status as protected persons.

Before discussing these contentions, however, the Appeals Chamber considered the issue of what weight must be given to its decisions and those of the Trial Chambers in subsequent cases. The Appeals Chamber held that "in the interests of certainty and predictability, the Appeals Chambers should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice." In reaching this decision, the Appeals Chamber discussed the jurisprudence of various common law and civil law countries and concluded that domestic courts gen-

continued on next page

erally follow past decisions unless a clear injustice would occur in doing so. Furthermore, the Appeals Chamber recognized that the Tribunal's Statute is silent on the question of the binding force of previous decisions. The Appeals Chamber nonetheless stated that the right of appeal constitutes part of the right to a fair trial and that "an aspect of the fair trial requirement is the right of an accused to have like cases treated alike."

The Appeals Chamber continued that "the legal principle," or *ratio decidendi*, should be followed, and that "the obligation to follow that principle only applies in similar cases, or substantially similar cases," i.e., "the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision." The Appeals Chamber further held that the "*ratio decidendi* of its decisions is binding on Trial Chambers;" decisions of Trial Chambers, however, "have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive."

Having pronounced on this issue, the Appeals Chamber returned to the prosecution's first ground of cross-appeal, applying the aforementioned conclusions. First, the Appeals Chamber addressed the issue of what test to apply when determining whether a war is international in character. The Appeals Chamber noted that it had developed in the *Tadić* case the less stringent "overall control" test, under which it suffices that a "group is under the 'overall control' of a State." The Appeals Chamber found that there was no "cogent reason to depart" from the principle set forth in the *Tadić* decision. The Appeals Chamber thus held that the "overall control" test was applicable in the *Aleksovski* case and that the Trial Chamber should have used this test.

Second, the Appeals Chamber concluded that because the conflict at the relevant place and time was international in nature, the victims were protected persons within the meaning of Article 4 of the Fourth Geneva Convention. This article defines protected persons as those persons who are "in the hands of a Party to the Conflict or Occupying Power of which they are not nationals." Moreover, the *Aleksovski* Appeals Chamber confirmed the *Tadić* finding and stated that "in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors." In contrast to the Trial Chamber's majority holding that the Bosnian Muslim victims were not protected persons, the Appeals Chamber quoted the less stringent criterion of *Tadić*, i.e., "allegiance to a Party to the conflict." In following *Tadić*, the Appeals Chamber further stated it "considers that this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts." The Appeals Chamber declined, however, to reverse the acquittal on the two counts of grave breaches.

Another significant decision by the Appeal Chambers dealt with its capacity to lengthen a sentence imposed by the Trial Chamber. The prosecution appealed *Aleksovski's* sentence on several grounds, including that the sentence imposed by the Trial Chamber was too short. Specifically, the prosecution argued that the Trial Chamber failed to give due weight to the gravity of *Aleksovski's* offenses, and failed to impose a sentence long enough to deter others from future violations.

The Appeals Chamber agreed that the Trial Chamber erred in its sentencing determination of two and one half years and found support for its authority to review the sentence in the *Tadić* sentencing judgement (see below). Citing *Tadić*, the *Aleksovski* Appeals Chamber held that an Appeals Chamber "should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a 'discernible

error'" in its length. In this case the Appeals Chamber found that the Trial Chamber erred by "giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature." The Appeals Chamber stated that *Aleksovski's* offenses were especially grave because as the prison's highest official, he not only failed to prevent or punish abuses against prisoners, but participated in them, and aided and abetted in their commission. Consequently, the Appeals Chamber lengthened *Aleksovski's* term of imprisonment from two and one half years, to seven years. As

**[F]or the first time the Appeals Chamber lengthened a sentence imposed by the Trial Chamber.**

a result of the Appeals Chamber's decision, *Aleksovski* was re-imprisoned after being set free by the Trial Chamber.

The Appeals Chamber rejected the prosecution's argument that the short length of the Trial Chamber's sentence was faulty on grounds of deterrence. In so doing, the Appeals Chamber quoted a portion of the *Tadić* sentencing judgement, stating, "this factor [deterrence] must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal." The Appeals Chamber maintained, "[a]n equally important factor is retribution" as a means of expressing "the outrage of the international community at these crimes."

***Tadić* Sentencing Judgement**

In a decision on two sentencing judgement appeals by Duško *Tadić*, the Appeals Chamber addressed many pressing issues regarding sentencing of those found guilty by the Tribunal. The issues before the Chamber included whether a punitive distinction exists between a war crime and a crime against humanity. The Appeals Chamber's *Judgement in Sentencing Appeals* of January 26, 2000, is the result of a joinder of two appeals against sentencing judgements by the Trial Chamber: the first of July 14, 1997, and the second of November 11, 1999, on additional counts.

*Tadić* appealed the sentencing judgments on a total of nine grounds. Of these, four are of particular significance. First, *Tadić* alleged that the Trial Chamber erred in holding that, all things being equal, crimes against humanity should attract a higher sentence than war crimes. The majority of the Appeals Chamber, in a contested holding, disagreed with the Trial Chamber's holding on this point. The Appeals Chamber determined there exists "in law no distinction between the seriousness of a crime against humanity and that of a war crime." The Appeals Chamber reasoned that neither the Statute of the Tribunal, nor its Rules of Procedure and Evidence contained such distinction between the two crimes. The Appeals Chamber also referred to Article 8(1) of the Statute of the International Criminal Court to assert that, in its view, that article does not articulate a difference in penalty for the two types of crimes.

In a strong dissent, Judge Cassese argued that where an act may be considered both a crime against humanity and a war crime, a greater criminal penalty should attach to the crime against humanity. Judge Cassese pointed out that a crime against humanity, unlike a war crime, requires the additional element of knowledge by the perpetrator that his or her actions are part of a "widespread or systematic practice." This additional element, according to Judge Cassese, requires that, all things being equal, a greater criminal penalty attached to a crime against humanity than to a war crime (this issue was revisited in the *Furundžija* appeal, as noted below).

Second, Tadić argued he deserved credit for the whole time he served in Germany awaiting trial on the same charges, and not just for the time he served in that country after the Tribunal requested Germany to defer the proceedings. According to Rule 101(D) of the Tribunal’s Rules of Procedure and Evidence, credit must be given for time a person “was detained in custody pending surrender to the Tribunal or pending trial or appeal.” Yet the Appeals Chamber held that despite the wording of this article, “fairness requires” that Tadić be given credit for the entire time served in Germany because he was held there for proceedings involving “substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal.”

Third, Tadić maintained that the calculation of his minimum sentence should begin on the date the Trial Chamber pronounced its sentence and not when his appeal is being determined. The Appeals Chamber agreed, holding that the starting point of any minimum sentence should commence on the date of sentencing by the Trial Chamber. The Appeals Chamber reasoned that starting the calculation of a minimum sentence after an appeal is completed could discourage convicted persons from using the right to appeal, because such a rule would fail to recognize the considerable time they spend imprisoned while awaiting a decision on appeal. Such a result would also deprive the Appeals Chamber of “the opportunity to hear appeals on substantial questions of law.” The Appeals Chamber held, however, that when calculating the minimum term, no credit was due pursuant to Rule 101(D) of the Rules of Procedure and Evidence.

Fourth, Tadić contended that the Trial Chamber, in accordance with Article 24(1) of the ICTY Statute, should have given greater weight to the general sentencing practices in the former Yugoslavia. In arguing that his sentence on particular counts ranging from 6 to 25 years was too long, Tadić pointed out that in the former Yugoslavia the most severe term of imprisonment that a court could impose was 20 years. The Appeals Chamber held that while Yugoslav practice should be taken into account by the Tribunal, it is not controlling in sentencing determinations. In support of this proposition, the Appeals Chamber relied, *inter alia*, on Rule 101(A) of the Tribunal’s Rules of Procedure and Evidence, which allows the Tribunal to sentence a convicted person to imprisonment for the remainder of his life.

Finally, the Appeals Chamber reduced the higher end of Duško Tadić’s prison sentence from 25 to 20 years, considering the higher sentence “excessive.” Looking at the ICTY and ICTR jurisprudence, the Appeals Chamber opined that sentences generally need to reflect the “relative significance of the role of the Appellant” and that Tadić ranked low in comparison to others in the command structure. As a result of this Appeals Chamber decision, Tadić’s minimum term of ten years imprisonment must be calculated from July 14, 1997, the date of the first sentencing judgement by the Trial Chamber, and time previously served will not apply to this minimum term. Taking into account the time Tadić served prior to this appeals judgement, his imprisonment will end no earlier than July 14, 2007. On October 31, 2000, Tadić was transferred to Germany to complete the remainder of his sentence.

### Furundžija Judgement

On July 21, 2000, the Appeals Chamber, in *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, rendered a decision on an

appeal by Furundžija against the Trial Chamber’s judgement and sentence of December 10, 1998. The Trial Chamber had found Furundžija guilty of two counts of violations of the laws or customs of war (Article 3 of the ICTY Statute). Specifically, Furundžija was convicted and sentenced to ten years imprisonment for torture as a co-perpetrator, and to eight years concurrently for outrages upon personal dignity, including rape, as an aider and abetter. The Appellant raised five grounds of appeal, including allegations of judicial bias. In addition, the Appeals Chamber briefly considered the issue of whether crimes against humanity should be punished more harshly than war crimes. All grounds of appeal failed and the Appeals Chamber affirmed the imposed sentences.

Of particular importance is the fourth ground of appeal which, reminiscent of the *Pinochet* case, stated that Judge Mumba, Presiding Judge in the case before the Trial Chamber, should have recused herself in accordance with Rule 15(A) of the Rules of Procedure and Evidence, because of her previous membership on the UN Commission on the Status of Women (UNCSW). Without actually claiming that Judge Mumba had been biased, Appellant alleged that she “should have been disqualified as an appearance was created that she had sat in judgement in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.”

Addressing this issue for the first time, the Appeals Chamber articulated principles for the interpretation and application of the impartiality requirement of Rule 15(A) of the Rules of Procedure and Evidence. In so doing, the Appeals Chamber determined that a judge “is not impartial if it is shown that actual bias exists.” The Appeals Chamber further decided that an unacceptable appearance of bias includes a situation where “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.” Quoting the Supreme Court of Canada, the Tribunal understood this to mean that a “reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”

Applying this principle, the Appeals Chamber found no substance to this ground of appeal. The Tribunal reasoned that Judge Mumba served on the UNCSW as her country’s representative, and not in a personal capacity. Moreover, the Appeals Chamber asserted that the UNCSW promotes UN goals and objectives, regardless of whether these coincided with the judge’s personal convictions. Furthermore, the Appeals Chamber pointed to Article 13(1) of the ICTY Statute, requiring that judges be experienced in international law, including human rights law. The Appeals Chamber held that “the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.”

In the fifth ground of appeal, Furundžija claimed that the sentence imposed by the Trial Chamber constituted “cruel and unusual punishment,” and should be lowered to a maximum of six years. The Appeals Chamber disagreed with the Appellant and found that there does not yet exist a certain “penal regime” that should be followed in sentence determinations. It further found nothing in the ICTY’s jurisprudence to support the argument that crimes resulting in a victim’s death must be

**The Appeals Chamber . . . stated that the right of appeal constitutes part of the right to a fair trial and that “an aspect of the fair trial requirement is the right of an accused to have like cases treated alike.”**

punished more harshly than other crimes. The Tribunal also followed the *ratio decidendi* in the *Tadić* Sentencing Judgement and confirmed that war crimes and crimes against humanity are equally grave offences and should be punished accordingly. In a Declaration appended to the judgement, Judge Vohrah disagreed, arguing, similar to Judge Cassese in the *Tadić* Sentencing Judgement, that “when all things are equal,” a crime against humanity is a more serious crime than a war crime, and that “ordinarily this additional gravity requires that the person convicted of a crime against humanity should receive a longer sentence than a person convicted of the same act as a war crime.”

### Contempt cases

In 2000, the ICTY issued two important judgements in contempt of court proceedings. The Appeals Chamber issued an unanimous

**The Aleksovski Appeals Chamber confirmed the *Tadić* finding and stated that “in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.”**

judgement against Milan Vujin, former counsel for Duško Tadić. In addition, Trial Chamber III rendered judgement on contempt of court allegations against Milan Simić and his counsel.

### Tadić

The Appeals Chamber dealt with the issue of contempt proceedings against Mr. Milan Vujin, counsel in the *Tadić* case, as well as the source of the Tribunal’s authority to deal with such proceedings and punish those found guilty of contempt. The allegations of contempt date back to conduct during the time of preparations for the appeal in the *Tadić* case, in particular the preparations for an (ultimately unsuccessful) application in accordance with Rule 115 of the Tribunal’s Rules of Procedure and Evidence (the presentation of additional evidence to the Appeals Chamber). After receiving information from Mr. Vujin’s co-counsel that Vujin had possibly engaged in misrepresentations to the Tribunal, the Appeals Chamber issued a Scheduling Order on February 10, 1999, requiring Vujin to respond to allegations of contempt. Tadić and the prosecution appeared in the contempt proceedings as interested parties.

The Tribunal stated it was exercising its power to initiate contempt proceedings in accordance with Rule 77(E) of the Tribunal’s Rules of Procedure and Evidence, which states that the Tribunal may hold in contempt those “who knowingly and willfully interfere with its administration of justice.” Though there is no customary international law on this matter, the Appeals Chamber noted the concept of contempt is common to the major legal systems around the world. It concluded that it possessed “an inherent jurisdiction” to ensure that its basic judicial functions are “not frustrated” by conduct that obstructs the administration of justice.

Regarding the nature of the contempt allegations, on January 31, 2000, the Appeals Chamber held Milan Vujin in contempt of the Tribunal on different grounds. First, the Appeals Chamber found that Mr. Vujin had, in a submission to the Tribunal, knowingly misrepresented the date of a particular statement and



UN Photo Library

View of the International Tribunal on War Crimes in Former Yugoslavia in session.

misrepresented that he had personally taken the statement. Second, Mr. Vujin falsely represented to the Tribunal that a suspect had committed a murder when the witness to whom he attributed this assertion had specifically told him that another person had committed the murder. Finally, the Appeals Chamber found that Mr. Vujin had manipulated witnesses by instructing them not to mention any names in statements, thus withholding evidence that may have exonerated Tadić. In making these findings, the Appeals Chamber applied the “beyond a reasonable doubt” standard.

The Appeals Chamber regarded the contempt as serious, especially where the lawyer’s conduct had been against his client’s interest, noting that it struck “at the very heart of the criminal justice system.” The Tribunal ordered Mr. Vujin to pay a fine of Dfl 15,000 to the Tribunal’s Registrar, and directed the Registrar to consider striking his name from the list of assigned counsel and report his conduct to his professional organization. The Appeals Chamber further ordered the publication of certain specified documents.

### Simić et al.

On June 30, 2000, Trial Chamber III issued its written *Judgement in the Matter of Contempt Allegations against an Accused and his Counsel*. The Trial Chamber found Milan Simić, and his attorney Branislav Avramović, not guilty of threatening, bribing, and requesting a potential witness to commit perjury. The Trial Chamber determined these allegations had not been proved beyond a reasonable doubt. In a case that hinged on findings of fact rather than findings of law, the Trial Chamber found that the testimony of “Witness Agnes,” upon whom the charges of contempt solely relied, could not support a finding of contempt. 🌐

*\* Volume 8, Issues 2 and 3 of the Human Rights Brief will cover the remaining ICTY judgements of 2000 and the jurisprudence of the International Criminal Tribunal for Rwanda over that same period.*

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## BOOK REVIEW

### *Crimes of War: What the Public Should Know* Edited by Roy Gutman and David Rieff Legal Editor Kenneth Anderson

by Anne Theodore Briggs and Matthew R. Briggs\*

*"The chemical attack began a day later at 6:20 p.m. . . . Wave after wave of bombers . . . dropped a cocktail of poison gases: mustard gas, the nerve agents sarin, tabun and . . . VX, the most lethal of all. . . . The [Kurdish] townspeople had no protection and the chemicals soaked into their clothes, skin, eyes, and lungs. At least five thousand, and probably many more, died within hours. Many were poisoned in the cellars where they sought refuge - trapped by gases that were heavier than air."* - "Poisonous Weapons," Gwynne Roberts

*"Bosnian Serb soldiers wearing stolen UN uniforms and driving stolen UN vehicles announced over megaphones that they were UN peacekeepers and that they were prepared to oversee the Bosnian Muslim's surrender and guarantee they would not be harmed. Disoriented and exhausted, many Bosnian Muslims fell for the lie. . . . Those whom the Serbs got their hands on were killed by firing squad."* - "Perfidy and Treachery," David Rhode

*"Other Iraqi soldiers in that area of open ground made clear they were surrendering [to the Kurdish Pehsmerga guerillas] by laying down their weapons, kneeling on the ground and locking their hands behind their heads. Many were crying 'Allahu Akbar' (God is Great), pleading for mercy. . . . An Iraqi soldier with no weapon, and with his hands in the air, was shot and killed a few steps from me. Seven unarmed prisoners kneeling on the ground nearby were shot to death moments later. Individually and in small groups, every Iraqi soldier I saw outside the main building was executed. None had weapons, nor were they resisting or trying to escape."* - "Hors de Combat," Kurt Schork

These quotations from *Crimes of War: What the Public Should Know* are a few examples of the extremes of human behavior in combat. They illustrate the difficulty in distinguishing legitimate acts of combatants from war crimes during periods of conflict. *Crimes of War* examines this tension in detail, through photographs and 140 alphabetically organized essays detailing the first-hand experiences of journalists, and provides commentary from experts on international humanitarian law, i.e., the laws of war. Pulitzer Prize-winning journalist Roy Gutman and freelance author David Rieff served as co-editors for the book, and Washington College of Law (WCL) Associate Professor Kenneth Anderson served as legal editor.

The book interweaves journalists' accounts with principles of humanitarian law. Each essay is categorized as a "Case Study," "Crime," or description of "The Law." The "Case Study" and "Crime" sections are the more gripping and gruesome parts of the book, sparing no detail in the descriptions of torture, murder, and other cruelties, often told from the perspective of the maligned victims. This perspective focuses on the violent acts themselves and the victims thereof, without examining the circumstances or motivations of the perpetrators. Although a more balanced perspective may have helped the reader to gain a fuller understanding of the issues, it is difficult to imagine mitigating aspects of the gross violations of international humanitarian law described.

International humanitarian law standards form the contextual basis of the legal analysis, focusing largely on the four

Geneva Conventions of August 12, 1949, and the two Additional Protocols of June 8, 1977. The Geneva Conventions address: "Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," "Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea," "Treatment of Prisoners of War," and "Protection of Civilian Persons in Time of War," respectively. The two Additional Protocols extend these protections to wars of national liberation and civil wars. Although most states are parties to these and other agreements, states can claim individual exceptions or reservations to the Conventions, resulting in divergent application and enforcement of the provisions therein.

Lack of uniform application is a significant weakness of the Geneva Conventions and in many respects *Crimes of War* strongly criticizes the failings of humanitarian law. Most "Case Study" and "Crime" entries typically conclude with both a brief overview of the provisions of the Geneva Conventions applicable to the situation, and the author's view as to the prospect of preventing war crimes through the particular rule of law. Acclaimed journalist Sydney Shanberg expresses his frustration with legal technicalities in "Cambodia," an essay discussing three decades of continual atrocity: "[O]ver the years, the law has proved so poor a guide to the reality of human slaughter. For, whether you call the mass killing in Cambodia a genocide or simply a crime against humanity, it was the same by either name. It was a visitation of evil." Meanwhile, others, such as journalist Mark Huband in his essay "Rwanda—The Genocide," criticize the lack of enforcement of war crimes and reliance on tribunals as a healing salve. "[T]rials are a poor substitute for prevention... The Rwandan genocide could have been prevented had the outside world had the will to do so. . . . The legal basis for intervention was there. It was courage that was lacking."

The essays in *Crimes of War* consistently highlight the inability of legal obligations to restrain the brutal instincts of the human psyche in situations involving extreme threats or frustration. From his conversations with military professionals and scholars, Professor Anderson argues the "compulsion to follow the rules [of war] is not about law but has fundamentally to do with soldiers' professional identity as soldiers. . . . [Military historian] John Keegan said it best: 'There is no substitute for honor on the battlefield. There never has been and there never will be.' The compulsion to obey is not about justice, but about honor." Indeed, the variety of atrocities mentioned in *Crimes of War*, from mutilation, rape, and starvation, to less publicized war crimes of pillage and destruction of historical monuments, pose the broader question of whether international legal standards will be ultimately effective in shaping human behavior, or whether combatants, by virtue of situational extremes, will succumb to a tunnel vision of self-preservation impervious to conceptions of morality and decency.

Notwithstanding its shortcomings, the laws of war can have a discernable impact. In their respective essays, "Gulf War" and "Compelling Military Service," journalists Patrick J. Sloyan and Frank Smyth describe how General Norman Schwarzkopf "ordered perhaps the most ambitious effort to prevent war crimes ever conducted on a battlefield" during the 1991 Gulf War. Schwarzkopf trained every officer and enlisted soldier in the laws of war, and frequently requested interpretive decisions from the International Committee of the Red Cross to ensure that U.S. military operations would not be characterized as war crimes. Sloyan and Smyth's complementary discussions demonstrate one of the more optimistic perspectives offered by the book concerning the effects of international humanitarian law.

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### The Quality of Courage: A Dialogue with Human Rights Defenders

by Sarah C. Aird\*

On September 18, 2000, the Washington College of Law (WCL) and the Robert F. Kennedy Center for Human Rights (RFK Center) co-sponsored a conference entitled “The Quality of Courage: A Dialogue with Human Rights Defenders.” The conference was the first in a series of events commemorating the courage and inspiration of 51 human rights defenders from 40 different countries. Their stories are documented in *Speak Truth to Power: Human Rights Defenders Who Are Changing Our World*, a book written by Kerry Kennedy Cuomo, founder of the RFK Center and long-time human rights activist.

The 14 human rights defenders who participated in the WCL event included: Gabor Gombos from Hungary, a former patient in the Hungarian mental health-care system who became an activist on behalf of persons with mental disabilities, and a co-founder of two non-profit organizations—the National Family Association of the Mentally Ill and Voice of Soul; Bruce Harris, a former postman from the United Kingdom, and now, as executive director of *Casa Alianza*, one of the leading advocates for street children in Guatemala; Rana Husseini of Jordan, a journalist who, through a series of articles in the *Jordan Times*, brought to the public’s attention the practice of honor killings; Wei Jingsheng, currently based at Columbia University, who symbolizes the struggle for human rights and democracy in China because of his unrelenting commitment to political reform; Guillaume Ngefa Atondoko from the Democratic Republic of Congo, founder and president of the African Association for the Defense of Human Rights, Congo’s premier human rights organization, which is known for its even-handed monitoring of human rights violations; Digna Ochoa from Mexico, one of the leading human rights defense attorneys in her country, who has taken on some of Mexico’s most politically-charged cases as a member of the Miguel Agustín Pro Juárez Human Rights Center; Marina Pisklakova, Russia’s leading advocate on behalf of victims of domestic violence, who founded a domestic violence hotline called Anna, Association No to Violence, and established the first women’s crisis center in Russia; Kailash Setyarthi of India, head of the South Asian Coalition on Child Servitude, and the foremost advocate for the abolition of child servitude in Asia, having emancipated over 40,000 people from slave-like conditions; Francisco Soberón of Peru, founder of the Association for Human Rights, one of the leading human rights organizations in Latin America; Raji Sourani, founder and director of the Palestinian Center for Human Rights and outspoken critic of human rights violations committed by both Palestinians and Israelis in Gaza; Sezgin Tanrikulu, co-founder of the Diyarbakir Human Rights Association and a leading human rights attorney in Turkish Kurdistan, specializing in the defense of political prisoners; Maria Teresa Tula, one of the leaders of the Mothers of the Disappeared, an organization formed in Latin America in the early 1980s that advocates on behalf of disappeared persons and their families; Harry Wu, China’s foremost critic of the Chinese *Laogai* labor camp system and founder and director of the Laogai Research Foundation; and Mohammad Yunus from Bangladesh, founder of the Grameen Bank, the largest and most successful microcredit lending institution in the world.

Professors Rick Wilson and Claudia Martin of WCL’s Center for Human Rights and Humanitarian Law, and WCL Professors Ann Shalleck, Brenda Smith, and Michael Tigar, facilitated the discussion. Professor Wilson asked the panelists how they manage to continue their work in the face of extreme violence against them, their families, and their co-workers. Raji Sourani, a torture survivor, expressed the position of many of his colleagues when he stated that he feels obligated to act when aware that others continue to suffer trauma that he or a loved one once endured. Others, like Marina Pisklakova, are driven by a sense of responsibility toward the individual stranger who may call their organization in need of help.

Professor Shalleck then asked the defenders to describe what, in their clients’ lives, they find so compelling that they are able to transcend their own personal ordeals to help them. Wei Jingsheng explained that whenever he feels he cannot continue his work, he remembers a young girl he saw naked and begging at a train station when he was sixteen years old. He was shocked by her poverty, for he had believed his privileged status was the norm, and to this day, he remembers her image. Gabor Gombos stated that despite suffering from a mental illness, he is fortunate to be economically and educationally privileged, leaving him with a sense of responsibility toward others facing the same illness. Furthermore, only by fighting against the discrimination and stigma that all people with mental disabilities in Hungary face can he improve his own situation. Mohammad Yunus, an economics professor, was disturbed by the extreme poverty in Bangladesh and the inability of traditional economic policies to resolve this problem. So he decided to challenge the common perception that the poor are not creditworthy by loaning out his own money, initially only U.S.\$27 split among 40 people. From this humble start, his program, known around the world today as the Grameen Bank, has proven that the poor are creditworthy and that “banks are not people-worthy.”

Professor Smith raised a new topic, asking the defenders to what extent their work involves ensuring access to economic, social, and cultural rights for the disenfranchised. Francisco Soberón noted that in politically repressive situations, it is necessary to focus greater attention on civil and political rights. He added, however, that human rights are indivisible and that ultimately, it is not possible to resolve civil and political rights without addressing economic, social, and cultural rights as well. Mohammad Yunus responded with an example of the interrelationship of human rights. He described how, as a result of the personal and financial empowerment experienced by many Grameen recipients, an overwhelming number of them now participate in elections, both as voters and as candidates. Bruce Harris views economic and political rights as inseparable, insofar as he considers economic marginalization not to be an unfortunate global accident, but rather the known consequence of calculated political decisions. He noted, for example, that it would take U.S.\$8 billion to feed and clothe all the children in the Americas and yet U.S.\$40 billion is spent annually on golf around the world. He underscored the responsibility of each individual for this injustice and countered arguments that one

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person alone cannot make a difference, stating, “if you feel that you’re too small to do anything, then you’ve never been in bed with a mosquito.”

In response to a directed question from Professor Tigar, Guillaume Ngefa Atondoko described the role of international actors in exacerbating African wars. He derided the United States for claiming to support the rule of law in Africa while ignoring the suffering of more than 400 million people throughout the continent and warned that U.S. taxpayer dollars are used to support murderous policies abroad. As a response to this type of insidious foreign involvement, Mr. Ngefa’s organization is exploring how to link traditional war crimes and crimes against humanity with the nascent concept of economic war crimes.

Professor Martin next asked a question eliciting the advocates’ opinions regarding the international community’s efforts to address human rights issues. Harry Wu expressed his concern that the Western world, and in particular the United States, seems willing to dismiss human rights violations in China as cultural traditions. He noted the mutability of traditions, describing how France, a country once best known for the invention of the guillotine, now bans the death penalty. Mr. Wu expressed his hope that in the future, Western policy makers will not use the concept of tradition as an excuse to refrain from holding China accountable for its human rights violations. Digna Ochoa focused on the positive impact of international solidarity, explaining that it helps protect human rights defenders from governmental retribution for their work. Moreover, she noted that publicizing Mexican human rights violations abroad discourages the government from committing such abuses because of its fears of losing international economic investment as a result.

In closing, Ariel Dorfman, Walter Hines Page Research Professor of Literature and Latin American Studies at Duke University, playwright, and author of a theatrical presentation based on the defenders’ lives, reiterated how the defenders use the power of truth to challenge the status quo. Unwilling to turn away from the ugly and the horrific, these activists threaten not only state perpetrators of human rights violations, but also the complacency shared by many of the privileged around the world. As Ms. Kennedy-Cuomo states in the introduction to her book, “[t]heir determination, valor, and commitment in the face of overwhelming danger challenge each of us to take up the torch for a more decent society. Today we are blessed by the presence of these people. They are teachers, who show us not how to be saints, but how to be fully human.”

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#### Book Review, continued from page 28

*Crimes of War* provides an informative overview of war crimes and the laws designed to limit them. Consistent with the book’s educational mission, the reader obtains a useful foundation for evaluating current and future events. Although the book’s alphabetical organization, numerous contributors, and wide range of subject matter make for a somewhat uneven read, on the whole, it is an invaluable reference.

In addition to Professor Anderson’s contribution as legal editor, WCL Professor Diane Orentlicher provided the essay, “Genocide,” and WCL Professor Robert Goldman, assisted by

defining the Rules and the Elements of the Crimes (Elements) on or before June 30, 2000. Although the United States is not a signatory to the Rome Statute, it has nonetheless taken an active role in drafting both the Rules and the Elements to be used by the Court once it officially comes into existence. In addition, the PrepCom agreed in June 2000 to extend considerations to exempt U.S. citizens from the jurisdiction of the Court until the PrepCom’s next meeting in November and December of this year. Because the Rome Statute is open for signature at the United Nations Headquarters in New York until December 31, 2000, the United States still has the opportunity to adopt the Rome Statute (Article 125). Therefore, should the United States choose to endorse the creation of the ICC, it will have a chance to review the final texts of the Rules prior to signing the treaty.

#### Conclusion

Although prior to the Rome Conference the Clinton administration advocated a world criminal court, the efforts of the U.S. delegation team at the Rome Conference do not reflect such a desire. Rather, their efforts reveal an American attempt to shape a court that would not pose a threat to U.S. citizens. Even before the U.S. delegation team headed to Rome during the summer of 1998, the U.S. State Department issued a statement signaling an impending U.S. opposition to the ICC: “The American armed forces have a unique peacekeeping role, posted to hot spots around the world. Representing the world’s sole remaining superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts. And [the United States] simply cannot be expected to expose [its] people to those sorts of risks.” Accordingly, some might argue the United States sought the creation of a global court only insofar as the term “global” would exclude the United States.

Aside from U.S. opposition to the Rome Statute, the accomplishments of the Rome Conference mark an historic and important step toward ending the traditional impunity of those who commit the most offensive crimes. Perhaps the most remarkable aspect of the Rome Conference is the overwhelming international support for the creation of a permanent world criminal court. The consensus achieved in the ICC’s creation is testament to the international community’s unified position of intolerance toward crimes against humanity and other egregious crimes.

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then-WCL L.L.M. candidate Ewen Allison, provided seven entries, including “Belligerent Status,” “Civil Patrols,” and “Illegal or Prohibited Acts.” Royalties from the book support the Crimes of War Project, a non-profit organization based at American University that seeks to raise awareness about international humanitarian law.

\* Anne Theodore Briggs is a joint-degree J.D./M.B.A. candidate at the Washington College of Law. Matthew R. Briggs holds a Masters degree in Military and Diplomatic History from The George Washington University.

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## CENTER FACULTY/STAFF NEWS

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**Robert K. Goldman**, Professor of Law, Co-Director of the Center for Human Rights and Humanitarian Law (Center), and member of the Inter-American Commission on Human Rights (IACHR), traveled to Vienna, Austria, in September to attend the International Colloquy on the Guiding Principles on Internal Displacement, organized by the Austrian Foreign Ministry, at which he spoke on the IACHR's use of the Principles. Thereafter, he participated in the Inter-American Commission's 108th regular session. He joined the United States Institute of Peace's (USIP) International Humanitarian Law Working Group and attended its first meeting, during which members examined the role of new actors in the implementation and enforcement of international humanitarian law. In November, he traveled to Costa Rica to argue a case before the Inter-American Court of Human Rights (Court) and participated in a seminar in Bogotá, Colombia, on the Inter-American Human Rights System, organized by the Human Rights Unit of the Prosecutor General's office.

**Claudio Grossman**, Dean, Co-Director of the Center, and member of the IACHR, participated as a panelist at the World Bank Conference, "The Gender Dimension of Human Rights: A Development Perspective," on June 1, speaking on the legal and institutional framework for protecting and promoting women's human rights in the Inter-American System. From June 4-6, he served as a representative of the IACHR to the Organization of American States' (OAS) General Assembly in Windsor, Canada. On June 12 and June 16, Dean Grossman spoke in a series of conferences on "The Inter-American System for the Protection and Promotion of Human Rights in Brazil," which took place in Brasilia and Sao Paulo, respectively. On June 22, Dean Grossman participated in the "Global Young Leaders Conference," held in Washington, D.C., on a panel entitled "International Law and Human Rights." On July 17, Dean Grossman participated in the "Challenges for Human Rights" panel at the American Bar Association (ABA) Annual Meeting in London and had the article "Moving Toward Improved Human Rights Enforcement in the Americas" published by the ABA in conjunction with the conference. On August 7, Dean Grossman participated in the 18th Costa Rican Interdisciplinary Course on Human Rights, entitled "Administration of Justice in Light of the Resolutions of its Organs." From August 11-12, Dean Grossman represented the victims in the case *Paniagua Morales y otros* before the Court in San Jose,

Costa Rica. At the Annual Meeting of B'nai B'rith International held in Washington, D.C., on August 27, Dean Grossman gave the keynote address regarding improvements in the prevention of human rights abuses. On September 26, Dean Grossman participated in a panel on human rights at the Inter-American Defense College Seminar on Human Rights, hosted at WCL. On October 26, he presented introductory remarks at the American Association of Law Schools' "Workshop on Human Rights: Teaching and Scholarship, New Issues, New Approaches," held in Alexandria, Virginia and also moderated a panel discussion entitled "Consent and Compliance."

**Beth Lyon**, Practitioner-in-Residence at the WCL International Human Rights Law Clinic (IHRLC), wrote a paper entitled "Organization of American States," which appeared in the Manual of Human Rights Complaint Mechanisms Available to Refugees and Internally Displaced Persons. Professor Lyon presented the paper on July 22, at Queen Elizabeth House, Oxford, United Kingdom. From July to August, Professor Lyon acted as consultant to the Centre on Housing Rights and Evictions (COHRE), in Geneva, Switzerland. She also drafted a manual entitled "Making Your Case to the UN Committee on Economic, Social and Cultural Rights," which was published by COHRE in November.

**Claudia Martin**, Adjunct Professor and Co-Director of the Center's Inter-American Human Rights Digest Project, lectured during the seminar "Training of Human Rights Law Professors on International Human Rights Standards," in Bogotá, Colombia, which took place from April 23-27. During the summer, in collaboration with Professor Diego Rodríguez, Professor Martin helped organize and coordinate a series of three human rights training sessions for approximately 1,000 Colombian public defenders, which constitutes nearly two-thirds of all Colombian public defenders. The sessions were held in the Colombian cities of Bogotá, Cartagena, and Cali. On September 18, Professor Martin participated as a facilitator at the conference "The Quality of Courage: A Dialogue with Human Rights Defenders," a discussion with the world's leading human rights activists, an event sponsored by WCL and the Robert F. Kennedy Center for Human Rights. Other facilitators included Professors Shalleck and Smith.

**Diane F. Orentlicher**, Professor of Law and Co-Director of the Center, testified on the human rights situation of the Romani minority in Europe at a hearing held on

June 8 before the Commission on Security and Cooperation in Europe in Washington. She delivered the keynote address at a conference on the Roma held in Bratislava, Slovakia, from June 14-15, sponsored by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe. Professor Orentlicher spoke on the legal framework of crimes against humanity and genocide at an IHRLC conference co-sponsored with the Center for Human Rights Legal Action. The conference, entitled "Contemporary Perspectives in International Criminal Law: War Crimes, Genocide and Crimes Against Humanity," took place from July 26-28 in Antigua, Guatemala. On September 25, Professor Orentlicher participated in the first meeting of the USIP's Working Group on International Humanitarian Law. On October 2, she participated in a roundtable discussion sponsored by USIP on the Sierra Leone Special Court and the Truth and Reconciliation Commission.

**Jan Perlin**, Practitioner-in-Residence at the IHRLC, was one of the organizers of an IHRLC conference co-sponsored with the Center for Human Rights Legal Action. The conference, entitled "Contemporary Perspectives in International Criminal Law: War Crimes, Genocide and Crimes Against Humanity," took place from July 26-28 in Antigua, Guatemala. As a panelist at this conference, Professor Perlin compared the objectives and functioning of truth commissions with those of criminal trials.

**Diego Rodríguez-Pinzón**, Adjunct Professor and Co-Director of the Center's Inter-American Human Rights Digest Project, participated in a joint lecture held on July 12 in Washington, D.C. with Clara Elena Reales, coordinator of the partnership between the Center and the Law School of the *Universidad de Los Andes* in Colombia, on the progress of human rights legal education. During the summer, he helped organize and coordinate, along with Professor Martin, the above-mentioned series of three human rights training sessions for approximately 1,000 Colombian public defenders.

**Herman Schwartz**, Professor of Law and Co-Director of the Center, provided *pro bono* assistance to the Oregon Legal Service Fund and the Farm Workers Justice Fund on migrant worker cases in May. As part of this work, Professor Schwartz prepared an *amicus curiae* brief in support of Mexico's appeal challenging the dismissal of a lawsuit alleging discrimination against Mexi-

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Faculty News, continued from previous page

can farmworkers. In June, the University of Chicago Press published Professor Schwartz's book *The Struggle for Constitutional Justice in Post-Communist Europe*. On July 26, Professor Schwartz advised a Turkish human rights group on the legality under Turkish law and the European Convention of Human Rights of the detention of its members for conspiracy. From August 23–25, he gave an address and participated in a workshop held in Tbilisi, Georgia, in celebration of the 5th anniversary of the Georgian Constitution. On September 14, Professor Schwartz gave an address at the Woodrow Wilson Memorial Center in Washington, D.C., on the topic of constitutional courts in post-communist Europe since 1989.

**Ann Shalleck**, Professor of Law, Director of WCL's Women and the Law Program, and Practitioner-in-Residence at the Women and the Law Clinic, co-wrote an article with Dean Grossman entitled "Women and International Law Program" for the textbook *Genero y Derecho*, the first textbook in Latin America on women and the law, co-published in 2000 by WCL's Women and International Law Program. From April 28–30, Professor Shalleck co-chaired the Working Group on Transnational Justice at a con-

ference entitled "Women, Justice and Authority," co-sponsored by Yale Law School, the Arthur Liman Public Interest Program, and the Schell Center for International Human Rights. On June 1, as a panelist at the World Bank conference "The Gender Dimension of Human Rights: A Development Perspective," Professor Shalleck delivered an address entitled "Integrating Gender into Legal Education—A Strategy for Promoting Gender Equity in Latin America."

**Brenda V. Smith**, Associate Professor of Law at the Community and Economic Development Law Clinic, is currently serving as consultant to the Ford Foundation, assisting the Program Officer for the Women's Right Portfolio in assessing grantmaking strategies with a view toward enhancing the visibility and effectiveness of women of color and women from the global south in the international human rights agenda. In her capacity as manager of the National Institute of Corrections' nationwide efforts on training correctional decision-makers about sexual misconduct, she conducted trainings in Washington, D.C., from September 24–29. In November, Professor Smith authored the second edition of the practice manual "End to Silence, Prisoners' Handbook on Identifying and Addressing Sexual Misconduct," which includes a chapter entitled

"Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Prisoners." WCL published this manual.

**Richard J. Wilson**, Professor of Law, Co-Director of the Center, Director of the IHRLC, and Director of the WCL Clinical Program, gave a talk entitled "Legal Education and Human Rights" as part of a seminar on the training of professors in human rights and the Inter-American system, which was held in Colombia on April 24. On May 9–13, he participated in a seminar on human rights strategies for lawyering in Africa, conducted by the International Human Rights Law Group and the Legal Resource Center, in Johannesburg, South Africa. Also in May, he authored an article entitled "Defending a Criminal Case with International Human Rights Law," published in *The Champion*, a magazine of the National Association of Criminal Defense Lawyers. On May 25–27, Professor Wilson participated in a conference entitled "Legal Services and Human Rights in Central America and Mexico," sponsored by the International Human Rights Law Group and the Myrna Mack Foundation, in Guatemala City, Guatemala. On September 18, Professor Wilson hosted the panel discussion "The Quality of Courage: A Dialogue with Human Rights Defenders," held at WCL. 🌐



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