



# HUMAN RIGHTS

Center for Human Rights and Humanitarian Law

# BRIEF

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# Bámaca Velásquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations

by Megan Hagler and Francisco Rivera\*

On November 28 and 29, 2001, the Inter-American Court of Human Rights (Court) held hearings for the reparations phase of *Bámaca Velásquez v. Guatemala*, a landmark case that expanded the scope of reparations for cases of forced disappearance in the inter-American system. At the reparations hearing, the Inter-American Commission on Human Rights (Commission) requested that the Court order the exhumation and return of the disappeared body as a specific remedy. In its judgment on reparations, released on February 22, 2002, the Court granted the Commission's request and ordered the Guatemalan government to exhume the body and return it to the victim's family. Because the Court has never before ordered the exhumation of a body in a case of forced disappearance, the Court's ruling on reparations in the *Bámaca* case is a significant development in forced disappearance jurisprudence in the inter-American system.

## History of the Case

On March 12, 1992, the Guatemalan army captured Efraín Bámaca Velásquez, a Mayan *comandante* of the Guatemalan National Revolutionary Unity (URNG), during Guatemala's civil war. The army secretly detained and tortured Bámaca for over a year before killing him in September 1993. According to an eyewitness, Bámaca was last seen "lying half-naked on a bed, with his eyes bandaged and an arm and leg bandaged" and with his face swollen. His body has never been found. For the last ten years, Jennifer Harbury, Bámaca's wife, has been searching for truth, justice, and her husband's body.

Hoping to find her husband alive, Harbury filed petitions for habeas corpus, pursued several criminal lawsuits, and carried out a series of hunger strikes in front of Guatemalan military headquarters and in front of the United States White House. At that time Harbury did not know that Bámaca was already dead. In 1995, three years after Bámaca's disappearance, U.S. Senator Robert Torricelli disclosed that Bámaca was assassinated in 1993 upon orders of Guatemalan Colonel Julio Roberto Alpírez, a former paid CIA informant and a graduate of the School of Americas, a U.S. Army training center based in Fort Benning, Georgia.

Since 1995, Harbury has focused her efforts on obtaining her husband's remains. To this end, Harbury participated in various exhumations in attempting to identify her husband's remains. These exhumations were unsuccessful due to a number of obstructions by Guatemalan agents. Although it was fully aware that the bodies exhumed belonged to people other than Bámaca, the government of Guatemala carried out the exhumations under the pretext that the exhumed bodies at least matched Bámaca's characteristics. None of the bodies exhumed so far resembles the physical characteristics of Bámaca or appears to have died of the same causes.

In 1995, CIA documents provided information indicating that Bámaca's remains were buried in a Guatemalan mil-

itary base called Las Cabañas. To this day, no exhumation has been conducted at Las Cabañas base, and Guatemalan authorities have stated that they would "continue to obstruct any exhumation procedure in Las Cabañas until they receive[d] an amnesty."

Despite official stonewalling, Harbury has continued with her quest for justice simultaneously on three fronts. First, the Guatemalan government has denied Harbury justice despite her continuous demands for a full investigation and the return of her husband's body. Second, in the United States, Harbury filed a Freedom of Information Act suit against the CIA, which is allegedly withholding vital information regarding her husband's case. Harbury also filed a *Bivens* action, a case for damages against a federal agent who violates the U.S. Constitution while acting under color of law. In this case, which Harbury argued before the U.S. Supreme Court, she claimed that CIA officials participated in torturing and murdering her husband, and that while he was being tortured, and for more than a year and a half after his death, U.S. State Department and National Security Council officials systematically concealed information from her and misled her about her husband's fate. Finally, Harbury has sought justice through the inter-American human rights system.

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### The Case on the Merits before the Inter-American Court of Human Rights

After exhausting domestic remedies in Guatemala, and with no success toward recovery of Bámaca's remains, Harbury filed a complaint with the Commission. In 1996, after a hearing on the case, the Commission recommended in its annual report that Guatemala accept responsibility for the disappearance, torture, and extrajudicial execution of Bámaca; investigate the matter fully; bring to justice those responsible; adopt reforms to bring their military programs into conformity with international humanitarian law norms; and provide reparations to Harbury and the other members of Bámaca's family.

When Guatemala failed to comply with these recommendations, the Commission brought the case before the Inter-American Court of Human Rights. On November 25, 2000 the Court reached a decision on the merits of the case, holding unanimously that Guatemala should repair the damages it caused to Bámaca, Harbury, and Bámaca's relatives. The Court determined that Guatemala violated the following articles of the American Convention on Human Rights (American Convention): Article 1(1) (Obligation to Respect Rights); Article 4 (Right to Life); Articles 5(1) and 5(2) (Right to Humane Treatment); Article 7 (Right to Personal Liberty); Article 8 (Right to a Fair Trial); and Article 25 (Right to Judicial Protection). The Court considered that Guatemala violated Articles 1, 4, 5, 7, 8, and 25 with respect to Bámaca, and Articles 1, 5, 8, and 25 with respect to Harbury and Bámaca's family. In the same manner, the Court declared unanimously that the Guatemalan State did not violate Article 3 of the Convention (Right to Juridical Personality). Further, the Court failed to find a violation of Article 13 of the Convention (Freedom of Thought and Expression), reasoning that Bámaca's and his family's right to the truth was subsumed by the right to a fair trial and judicial protection.

Additionally, the Court declared that Guatemala failed to comply with its obligation to prevent Bámaca's torture and sanction those involved as required under the following articles of the Inter-American Convention to Prevent and Punish Torture: Article 1 (duty to abide by this Convention); Article 2 (duty not to commit torture); Article 6 (duty to take effective measures to prevent and punish torture); and Article 8 (duty to make impartial judicial examinations of torture claims). Finally, the Court ordered an investigation to determine which persons were responsible for the human rights violations mentioned in the ruling, impose sanctions, and publicly announce the results of this investigation.



Panel of judges at the reparations hearing before the Inter-American Court of Human Rights.

Credit: Francisco Rivera

### The Reparations Hearing before the Inter-American Court

The Court held a separate hearing in November 2001 to determine appropriate reparations for the violations found in the merits decision of November 2000. The Commission petitioned the Court for several forms of reparation pursuant to Article 63(1) of the American Convention. According to Article 63(1), the Court must rule that a state remedy the breach of its obligation to respect victims' human rights, and that the state compensate the injured party in cases in which the Court determines the state has violated human rights. In the *Bámaca* case, the Commission petitioned the Court primarily for compensation, as well as satisfaction and guarantees of non-repetition.

#### Compensation

Although the damage in human rights cases is often irreparable, international and national courts have required states to compensate victims with money to acknowledge the violation and to sanction the state. The Court has required states to pay victims damages to compensate them

for both material and moral damages.

#### Material Damages

In the *Bámaca* case, the Commission asked the Court to order the Guatemalan government to compensate the family for *lucro cesante*, or wages that Bámaca would have earned during the rest of his life had he survived. The

Court has awarded victims and their families damages according to this theory to attempt to place the victim or the victim's family where they would have been had the violation not occurred. Even though Bámaca was not earning a salary as a guerrilla leader, the Commission argued he would have earned a salary if he had the chance to continue working as a leader in Guatemalan civil society after the end of the civil war. In devising a formula to present to the Court, the Commission requested that the Court average the salaries earned by three other guerrilla leaders and one Mayan community leader in their positions since the end of the Guatemalan civil war. Based on the Commission's arguments, the Court awarded damages to the Bámaca family pursuant to the *lucro cesante* theory.

Additionally, the Commission requested that Guatemala compensate Harbury for *daño emergente*, or her economic loss. This request included compensation for the income Harbury forfeited while she interrupted her career to search for her husband, payment for the damage to her physical health as a result of the hunger strikes, and compensation for the expenses she incurred while searching for her husband. The Court granted the Commission's request and awarded damages to compensate for Harbury's *daño emergente*.

#### Moral Damages

The Commission requested that the Court order

Guatemala to pay the family for suffering inflicted on Bámaca while the government illegally detained and tortured him. The Commission sought compensation for the loss to Harbury and the immediate family, as well as for their own suffering as victims of violations of the rights to humane treatment, a fair trial, and judicial protection. The Commission also demanded that the Court require the Guatemalan government to pay moral damages to acknowledge Harbury's emotional anguish resulting from the government's lies, its bad faith efforts to comply with the petitions for habeas corpus that required Harbury to participate in the exhumations of three bodies, and the government's ongoing campaign to ruin Harbury's reputation. The Court also ordered that Guatemala pay damages for the moral suffering of Bámaca's family and Harbury.

#### Proyecto de Vida

In addition to seeking material and moral damages, the Commission requested that the Court award compensation based on Bámaca's loss of his *proyecto de vida*, or life plan. The *proyecto de vida* concept serves to award victims for lost opportunities and the lost enjoyment of achieving goals, taking into consideration the vocation, potential, circumstances, and skills of the individual victim. Unlike the concept of *lucro cesante*, the *proyecto de vida* is designed to compensate the victim for the personal fulfillment and liberty interest in planning his or her life.

The Commission argued that compensatory awards based on moral damages and the *lucro cesante* and *daño emergente* theories were not enough in the Bámaca case. The Commission reasoned that when the government killed Bámaca, it did much more than violate his physical and psychological integrity and take away his capacity to earn money. The Commission therefore sought compensation for the government's denial of Bámaca's right to live his life as he planned it. While he was a guerrilla, Bámaca learned to read and write, developed leadership skills, and became a high-ranking *comandante* in the URNG. Bámaca planned to continue working as a leader after the signing of the Guatemalan Peace Accords, reintegrating himself into civil society. Requiring compensation on this basis would require the Guatemalan government to acknowledge that it denied him the possibility to continue working to effect social change in Guatemala and destroyed his future with his wife.

The Center for Justice and International Law (CEJIL), the victims' representative, also asked the Court to award

*proyecto de vida* damages. CEJIL, however, requested *proyecto de vida* damages for Harbury rather than for Bámaca. CEJIL's theory was that Harbury's loss was not limited to moral damage or *daño emergente*. CEJIL urged the Court to require the Guatemalan government to compensate Harbury for interfering with her plans to raise a family and spend the rest of her life with her husband.

The Court first considered the idea of *proyecto de vida* in its recent decision *Loayza Tamayo v. Peru*. The *Loayza Tamayo* case involved the illegal detention and torture of a surviving victim. The Commission argued for monetary compensation due to the severe psychological and physical effects of the violations, which prevented the victim from resuming her studies and developing her professional and personal goals.

Although the Court ruled in the *Loayza Tamayo* case that the *proyecto de vida* concept is valid, the Court did not compensate the victim on this basis, asserting that it is impossible to put a monetary value on a victim's *proyecto de vida*.

To the contrary, in *Cantoral Benavides v. Peru*, pursuant to the *proyecto de vida* theory, the Court required the Peruvian government to provide a scholarship for a university student who was illegally detained and tortured.

The Court reasoned that the Peruvian government should be required to pay for the victim's tuition when the victim is ready to return to his studies in order to allow the victim to continue to develop his *proyecto de vida*.

The Commission's request for awards on this basis in the Bámaca case is significant because the Commission attempted to persuade the Court to order states to pay damages according to a model that more accurately reflects the scope of the violations. Despite the Commission's efforts, the Court did not award damages to compensate for the destruction of Bámaca's *proyecto de vida* or the alteration of Harbury's *proyecto de vida*. To this date, in cases of forced disappearance, the Court has not ordered compensation for the destruction of the disappeared's *proyecto de vida*, or the effect of the disappearance on the *proyectos de vida* of family members.

#### Satisfaction and Guarantees of Non-Repetition

In seeking to redress non-pecuniary wrongs, the Commission requests satisfaction and guarantees of non-repetition. Such measures may be appropriate for requiring an acknowledgement of wrongdoing, the prosecution and punishment of perpetrators, the state's promise to take measures to prevent the recurrence, or symbolic acts of reparation.



Jennifer Harbury during her 32-day hunger strike in Guatemala City in 1994.

Credit: Guatemala Human Rights Commission

The Commission requested that Guatemala adopt the measures necessary to recover Bámaca's body and allow the family to access legal procedures making it possible to locate and rebury his body. The Commission demanded that the government locate the body and acknowledge that the nature of the continuing violation perpetuates emotional suffering of the family members while the fate of their loved one remains uncertain. In making its request, the Commission also sought to allow the family to provide Bámaca with a proper burial in accordance with the traditions of the Mam ethnicity of the Mayan culture, thereby requiring the government to acknowledge the anguish they caused the family by disposing of Bámaca's body after they tortured and killed him. Finally, the Commission urged that the Court order the return of the body as a remedy in order to require the government to reveal evidence of the crime and thus end the impunity of the perpetrators.

In previous cases of forced disappearance, and in the merits phase of the *Bámaca* case, the Court recognized that the disappearance of an individual is a continuing violation. Accordingly, the Court required that a state cease its violation by investigating circumstances surrounding a disappearance. Because Guatemala did not comply with the Court's orders to investigate the matters fully, the Commission argued that the government must exhume the body to end its impunity and allow the family to bury the body in accordance with their



Credit: Guatemala Human Rights Commission

Visitors demonstrating support for Jennifer Harbury during her 32-day hunger strike.

**The *Bámaca* case is significant because the Court ordered not only that Guatemala investigate Bámaca's disappearance, but also demanded that Guatemala provide reparation by returning Bámaca's body to his family within six months of the release of the judgment.**

traditions. The *Bámaca* case is significant because the Court ordered not only that Guatemala investigate Bámaca's disappearance, but also demanded that Guatemala provide reparation by returning Bámaca's body to his family within six months of the release of the judgment.

Further, at the request of the Commission, the Court demanded that Guatemala prosecute and punish the per-

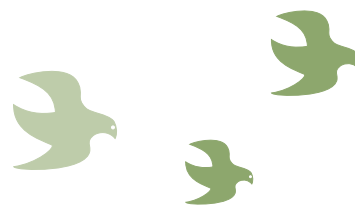
petrators of the violations against Bámaca, Harbury, and the family. The Commission also urged the Court to require the Guatemalan government to publish Harbury's account of the case through the national media, in efforts to restore partially Bámaca's, Harbury's and the family's dignity. The Court ordered the Guatemalan government to publish the facts of the *Bámaca* case in two national newspapers. Finally, as requested by the Commission, the Court ordered the Guatemalan government to adopt the necessary measures to adapt its internal system to conform with its obligation to respect the right to life under the Convention.

### Conclusion

*Bámaca Velásquez v. Guatemala* is a landmark case not only because the Commission sought to expand the system's jurisprudence on reparations, but also because the case advanced the struggle for justice in Guatemala. Victims had the opportunity to denounce Guatemala's human rights violations publicly before the international community and demand that the Guatemalan government take specific measures to end the cycle of impunity. The Court's judgment is particularly important because after Harbury's ten-year search for the truth, the *Bámaca* case

has resulted in the only binding court order requiring the investigation, prosecution, and punishment of the perpetrators who violated Bámaca's right to life. 🌍

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# Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations under the Geneva Conventions

by Erin Chlopak\*

Controversy has surrounded the United States' detention and treatment of nearly two hundred alleged members of the Taliban and *al-Qaeda* at the U.S. naval base in Guantanamo Bay, Cuba. At issue is the scope of applicability of the Geneva Conventions, a series of treaties that provide international humanitarian legal standards for states parties during armed conflicts. In particular, the Third Geneva Convention relative to the Treatment of Prisoners of War and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War extend a variety of procedural and substantive legal rights to prisoners of war and other victims of armed conflicts. As states parties to the Conventions, both the United States and Afghanistan are legally bound to afford the protections guaranteed in the treaties to prisoners detained as a result of the present conflict between the two countries.

In January 2002, shortly after their detention, U.S. Secretary of Defense Donald Rumsfeld labeled the Guantanamo Bay prisoners "unlawful combatants" who "do not have any rights under the Geneva Convention[s]," indicating that the prisoners would be treated "for the most part . . . in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate." In response to this and similar statements, as well as footage of the detainees incarcerated in metal cages and wearing shackles, blacked-out goggles, surgical face masks, and sound-blocking earmuffs, other governments and human rights groups have condemned the U.S. for failing to respect human rights and humanitarian law. Perhaps in acquiescence to this international pressure, the U.S. has modified its position on the application of the Geneva Conventions, announcing in early February that prisoners who fought for the Taliban in Afghanistan would be covered by the Conventions. In spite of U.S. efforts to allay international criticism, human rights groups and international legal scholars continue to charge that this latest decision fails to conform fully to the duties of the U.S. under the Geneva Conventions. Specifically, while the U.S. accurately acknowledged the general applicability of the Conventions to Taliban detainees, the government's unilateral decision to deny all detainees prisoner of war (POW) status, and its decision categorically to except *al-Qaeda*

detainees from any coverage by the Conventions, suggest the U.S. government has improperly interpreted its legal obligations under the Conventions.

## The Geneva Conventions and the Scope of Their Protection

There are four Geneva Conventions, signed in 1949 and supplemented by two additional Protocols, signed in 1977. Convention I, For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and Convention II, For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, enumerate protections guaranteed to members of the armed forces who fall ill or are injured during an armed conflict. Convention III, Relative to the Treatment of Prisoners of War, and Convention IV, Relative to the Protection of Civilian Persons in Time of War, describe protections guaranteed to persons who are taken into enemy custody during an armed conflict. Protocol I, relating to the Protection of Victims of International Armed Conflicts, and Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts, extend protections of the Geneva Conventions to persons combating foreign occupation or internally racist regimes, as well as to victims of internal conflicts.

Most relevant to the Guantanamo Bay detainees are the Third and Fourth Conventions. The Third Convention defines categories of persons entitled to POW classification, articulates the procedure for classifying a prisoner whose status is unclear, and enumerates the rights of detainees classified as POWs. Article 4 of the Third Convention defines several categories of persons entitled to classification as prisoners of war, including persons "who have fallen into the power of the enemy" and who are (1) members of armed forces of a party to the conflict; or (2) members of other militias or volunteer corps, which are commanded by a person responsible for subordinates; have a fixed and distinctive symbol, recognizable at a distance; carry arms openly; and conduct operations in accordance with the laws of war. Article 5 explains that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as



Credit: AP Photo/Shane T. McCoy, U.S. Navy

Taliban and *al-Qaeda* detainees sit in a holding area under the watchful eyes of military police at Camp X-Ray at Naval Base Guantanamo Bay, Cuba, during in-processing to the temporary detention facility on January 11, 2002.

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their status has been determined by a competent tribunal.” The U.S. government is therefore obliged to recognize the POW status of detainees who clearly fit into an Article 4 category, and must allow a competent tribunal to determine the status of those whose status is ambiguous.

#### *Defining the Status of the Detainees*

The U.S. government’s classification of the Guantanamo Bay detainees as “unlawful combatants” has generated confusion and controversy. Secretary Rumsfeld’s early statement that all of the detainees were “unlawful combatants” who lacked any rights under the Geneva Conventions seemed to imply that “unlawful combatants” inherently are not protected by the Geneva Conventions. “Unlawful combatants,” often referred to as “unprivileged combatants” are those fighters who are not entitled to the privileges of POW status. Unlawful combatants, however, are not persons lacking all rights under the Conventions. Indeed, rather than suggest that certain categories of aggressors may be excepted from the protection of the Conventions, Article 4 of the Fourth Convention professes a broad protection of persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The only caveat to this encompassing protection is that the prisoners must be nationals of a state bound by the Convention.

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The International Committee of the Red Cross (ICRC) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have interpreted the Third and Fourth Conventions jointly to embrace all persons who fall into enemy custody during an armed conflict, and neither has recognized an exception for so-called unlawful combatants. Quoting both sources, Human Rights Watch (HRW) explained that “nobody in enemy hands can fall outside the law,” and prisoners detained by an enemy in an armed conflict either are protected by the Third Convention as prisoners of war, or by the Fourth Convention as civilians.

#### **The United States’ Application of the Geneva Conventions**

After initially refusing to guarantee full application of the Geneva Conventions to any of the detainees, the U.S. has recently compromised, and conceded that the Conventions apply to Taliban detainees. Nevertheless, the U.S. continues to deny the application of the Geneva Conventions to *al-Qaeda* prisoners, has refused to grant any of the detainees POW status, and has denied the prisoners the right to a determination of such status by a competent tribunal. The U.S. government’s basis for distinguishing between Taliban and *al-Qaeda* detainees was its recognition of Afghanistan’s status as a signatory to the Conventions in contrast to *al-Qaeda*, which, as a non-state actor, has not and could not have signed the treaties. Such a categorical exception of *al-Qaeda* detainees results from a flawed interpretation of the express language of Article 4 of the Fourth Convention, and con-

tradicts customary interpretations of the broad scope of the Conventions. Similarly, the executive decision categorically to deny all detainees POW status directly violates Article 5 of the Third Convention, which provides for the determination of such status by competent tribunals.

#### *Refusal of the U.S. Government to Apply the Geneva Conventions to al-Qaeda Detainees*

In early February, White House Press Secretary Ari Fleischer commented that *al-Qaeda* fighters “do not qualify [for protection under the Geneva Conventions] because they do not represent any country that is party to the treaty.” Article 4 of the Fourth Convention does not except combatants on the basis of their representation of a state not party to the Conventions, but rather it excludes persons who are nationals of a state not bound by the Conventions. Thus, the language of the Conventions seems to indicate that persons who fought on behalf of *al-Qaeda*, and who are nationals of a state party to the Conventions, would be within the scope of their protections.

According to HRW, the detainees encompass a variety of nationalities, including Afghans, Pakistanis, and, in lesser numbers, Saudis, Yemenis, Uzbeks, Chechens from Russia, Chinese, and others. Each of these nations has both signed and ratified the Conventions, or joined the Conventions by accession. The United States ratified the Conventions in 1955. Although China, Pakistan, the Russian Federation, Yemen, and the U.S. entered reservations and/or declarations upon signing the Conventions, none of the reservations or declarations provides a basis for excluding their nationals from the general protections afforded by the Conventions, or from the benefits of POW status in particular. In addition, these reservations and declarations do not provide a basis for denying such protections. Thus, the U.S. government’s current policy of categorically refusing to apply the Geneva Conventions to non-Taliban detainees contradicts customary legal interpretations of the scope of the Conventions, as well as the explicit language of the Fourth Convention. Members of either the Taliban or *al-Qaeda*, who are nationals of a country that has signed the Geneva Conventions, expressly are within the scope of the treaties. Current U.S. policy at best misinterprets, and at worst ignores, this legal reality and potentially renders the U.S. in breach of its treaty obligations for any actions against detainees which contradict the Conventions’ guarantees.

#### *Denying All Detainees Prisoner of War Status*

Although the U.S. has correctly recognized that the Geneva Conventions apply to Taliban fighters captured during the present conflict in Afghanistan, its unilateral decision to deny such detainees POW status violates the procedures established by the Conventions for determining the status of prisoners captured by an enemy in an armed conflict. Moreover, the refusal of the U.S. even to recognize the Geneva Conventions with respect to *al-Qaeda* detainees precludes a proper determination of their legal status.

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Article 4 of the Third Convention confers POW status on persons who fall into enemy power and who are members of armed forces of a party to the conflict. Alternatively, Article 4 characterizes as POWs members of irregular forces, such as militias or volunteer corps who: (1) adhere to an established chain of command; (2) wear a uniform or otherwise have some fixed and distinctive symbol, which is recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws of war.

The Crimes of War Project, a collaborative organization of journalists, lawyers, and scholars formed in 1999 and headquartered at American University in Washington, D.C., seeks to educate the public about international humanitarian legal issues. The Project recently surveyed international legal and humanitarian experts on their opinions about the applicability of the Geneva Conventions to the Guantanamo Bay detainees. Most of the survey's respondents believed Taliban detainees, and possibly *al-Qaeda* detainees, should be accorded POW status. Most of the experts characterized the Taliban detainees as members of Afghanistan's armed forces, entitling them to POW status under Article 4(1) of the Third Convention. Among such experts, Washington College of Law Professor Robert Goldman criticized the Bush Administration's classification of the Taliban as irregular forces under Article 4(2), which requires them to meet the four criteria enumerated under that category. Similarly, during a recent interview on National Public Radio, David Scheffer, Senior Fellow at the U.S. Institute of Peace, emphasized the importance of recognizing that captured Taliban fighters are part of the organized, armed force of Afghanistan, and thus entitled to POW status. Nevertheless, even under the four criteria enumerated for irregular forces, most of the experts surveyed by the Crimes of War Project believed that the Taliban detainees would be entitled to POW status. Curtis Doebbler, Professor of Human Rights Law at the American University in Cairo, asserted that the Taliban do meet the four criteria mandated for irregular forces, although he, like many others, was less confident about the ability of *al-Qaeda* detainees to satisfy the criteria.

Indeed, there is less support for classifying *al-Qaeda* fighters as POWs under the Geneva Conventions. Even HRW has suggested that "ultimately the *al-Qaeda* fighters would likely not be accorded POW status." However, as HRW, the Crimes of War Project, and other experts have highlighted, the principal criticism of the U.S. position is not the government's improper categorization of the detainees under Article 4 of the Third Convention. Rather, critics emphasize the government's failure to make individualized determinations about the status of each prisoner, and its outright neglect of Article 5, which requires that a competent tribunal resolve such controversial determinations. Article 5 further provides that detainees whose legal status is in doubt "shall enjoy the protection of the present Convention" until a tribunal makes the final determination. Thus, even if, as the U.S.

presently claims, none of the detainees ultimately would be entitled to POW status, Article 5 requires that each detainee whose status is in doubt be treated as a POW until a competent tribunal makes a final determination.

Under U.S. military regulations, a "competent tribunal" pursuant to Article 5 of the Third Convention consists of three commissioned officers. As HRW explained, the regulations require that persons whose status is to be determined be advised of their rights; be permitted to attend all open sessions, call witnesses, question witnesses called by the tribunal; be permitted, but not compelled, to testify or otherwise address the tribunal; and be provided with an interpreter, if necessary. The regulations provide for the tribunal's determination of the detainee's status in closed session by a majority vote and require a preponderance of evidence to support the tribunal's finding.

The clear purpose of Article 5, and the corresponding procedures set forth in U.S. military law, is to ensure that the assessment of a prisoner's status is a fair and objective determination. Beyond violating its explicit, legal obligations under Article 5, the executive branch's unilateral determination of the prisoners' collective status, absent a finding by an objective tribunal, renders

the U.S. susceptible to charges of unfairness, corruption, and dishonesty.

**[T]orture and ill-treatment of prisoners are prohibited by customary law and international human rights treaties. Article 7 of the International Covenant on Civil and Political Rights, ratified by the United States in 1992, sets forth the non-derogable principle that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."**

### The Significance of Recognizing the Geneva Conventions

The Geneva Conventions confer a variety of protections to prisoners detained during an international conflict. Among them are protections relating to humane treatment (Convention III, Article 3; Convention IV, Article 3), interrogation (Convention III, Article 17; Convention IV, Article 31), and prosecution (Convention III, Articles 87, 99-108; Convention IV, Articles 146-47). The legal status of individual prisoners dictates the scope of their protections under the Conventions. Nevertheless, all persons detained in an armed conflict may be prosecuted for war crimes, crimes against humanity, and other crimes unrelated to armed conflict. Similarly, all detainees must be treated humanely, in accordance with international human rights norms, and as recommended by the ICRC.

### *Humane Treatment in the Context of International Human Rights Law*

To provide a context for the Conventions' requirement of "humane treatment," HRW explained that torture and ill-treatment of prisoners are prohibited by customary law and international human rights treaties. Article 7 of the International Covenant on Civil and Political Rights, ratified by the United States in 1992, sets forth the non-derogable principle that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Similarly, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the U.S. became a party in 1994, prohibits, under all circumstances, the

use of torture and other excessive forms of punishment.

#### *The Ramifications of POW Status: Humane Treatment and Interrogation*

Although all of the Guantanamo Bay detainees are entitled to humane treatment under the broad provisions of the Geneva Conventions and the more specific provisions of international human rights treaties, those entitled to POW status are guaranteed further protections. Regarding interrogation and prosecution, for example, the Third Convention extends additional protections to POWs. Under Article 17, POWs are required only to disclose their last names, first names, rank, birth dates, and military serial numbers. Although both POWs and unprivileged combatants are protected by the Conventions' general prohibitions against torture, Article 17 provides that POWs who refuse to answer interrogations "may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Article 21 prohibits holding POWs in close confinement except as necessary to safeguard their health, and in such circumstances, the nature and duration of confinement also must be limited to what is necessary. Similarly, Article 25 requires that POWs be accommodated in conditions as favorable as those provided for the forces of the detaining power stationed in the same area. Such conditions must allow for the habits and customs of the prisoners, and may not be prejudicial to their health. Article 34 guarantees POWs "complete latitude" in the enjoyment and exercise of their religious duties. Prisoners who are properly determined not to be POWs are not entitled to these and other guarantees enumerated in the Third Convention.

In the absence of a proper determination of the status of each detainee at Guantanamo Bay, and in light of the ICRC's inability to disclose its findings publicly, it is difficult to analyze whether any of the detainees are entitled to these specific POW privileges, let alone whether their rights have been violated. Foreign governments and media, and international human rights groups, have articulated a general concern regarding the apparent nature of the prisoners' detention. Their critiques have suggested that depriving the detainees of their senses of sight and hearing by requiring them to wear blacked-out goggles and sound-blocking earmuffs constitutes inhumane treatment, in violation of the general human rights principles embodied in the Geneva Conventions.

The U.S. government has defended its detention practices as necessary security measures. On January 18, 2002, delegates of the ICRC visited the Guantanamo Bay detainees, but ICRC standard procedures prohibit public comment on the treatment or conditions of prisoners. Rather, ICRC delegates submit recommendations to detaining authorities and encourage such authorities to take measures necessary to resolve any humanitarian problems.

#### *The Ramifications of POW Status: Prosecution and Punishment*

Perhaps the most significant rights accorded to prisoners of war are in the context of prosecution and punishment.

Generally speaking, POWs may not be prosecuted or punished for mere participation in the armed conflict, although they may be tried for war crimes, crimes against humanity, and crimes unrelated to the conflict. Article 83 of the Third Convention requires that a detaining power exercise "the greatest leniency" in determining whether an offense alleged to have been committed by a POW be adjudged by judicial or disciplinary proceedings and provides that "wherever possible, disciplinary rather than judicial measures" shall be taken. Article 84 enunciates that "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused

the rights and means of defence provided for in Article 105." Article 105 correspondingly guarantees POWs the assistance of a legal defense by a qualified advocate or counsel of his choice. It further requires that the detaining power deliver to the protecting power a list of persons qualified to present the POW's defense, and ultimately obliges the detaining

power to appoint a competent advocate or counsel if the POW does not choose his own. Article 86 guarantees POWs the right against double jeopardy. Article 87 limits the penalties to which POWs may be subjected to those that would be imposed upon members of the armed forces of the detaining power who have committed the same acts. Article 106 provides that every POW shall have the same rights of appeal or petition of a sentence as are guaranteed to the members of the armed forces of the detaining power. Moreover, POWs must be fully informed of such rights, as well as the time limit within which they may appeal.

In light of these and the numerous other rights guaranteed to prisoners of war, it is clear that the Guantanamo Bay detainees are not being treated in accordance with the Third Convention. Moreover, absent an objective determination of their legal status by a competent tribunal, the nature of their detention violates the requirement in Article 5 that detainees whose status is uncertain be treated in accordance with the Third Convention until such status is determined.

#### **The Consequences of Selectively Applying the Geneva Conventions**

Beyond noting the sheer illegality of selectively applying the Geneva Conventions, some experts question why the U.S. would violate its duties in the absence of any apparent gain. Most of the experts surveyed by the Crimes of War Project believe that the U.S. has little to gain from denying POW status to qualified prisoners. Such experts noted that POWs and unprivileged combatants are equally subject to prosecution for fundamental human rights violations. Perhaps the government's primary concern is the apparent conflict between its noted intention to try those detained in military tribunals, where procedural rights are limited and the rules of evidence are more indulgent, and the provisions in the Third Convention requiring that POWs be prose-

**In light of these and the numerous other rights guaranteed to prisoners of war, it is clear that the Guantanamo Bay detainees are not being treated in accordance with the Third Convention.**

# Virginity Testing in Turkey: A Violation of Women's Human Rights

by Chanté Lasco\*

In February 2002, Turkey issued a decree banning forced virginity testing. This followed an announcement in July 2001 by Turkey's Health Minister, Osman Durmus, that midwife and nursing students were required to be virgins, and that testing would be used to ensure compliance. Although human rights groups and the international community welcomed news of the recent ban on virginity testing, it remains to be seen whether the practice of virginity testing will in fact cease.

As Turkey attempts to improve its human rights record in a bid for European Union membership, its government faces a tension between enduring cultural norms and international human rights standards. The prominence of certain cultural norms can cause conflicting results when the government tries to demonstrate progress by promulgating legislation without instituting additional measures, such as educational campaigns and enforcement mechanisms, to ensure that human rights abuses are not tolerated.

Virginity testing is discriminatory, highly invasive, and often involuntary. These tests involve the physical examination of a woman's hymen for tears to determine whether the woman is still "a girl" (the term Turkish doctors use to refer to a virgin). Underlying the practice of virginity testing are cultural norms, which dictate that women who are not virgins may not be considered eligible for marriage and could bring dishonor to their families. This is especially true in rural areas of predominately Muslim Turkey. Virginity testing is thus used to prove a woman's chastity and make her eligible for marriage. This cultural context creates a presumption that female virginity is a legitimate interest of the family, community, and ultimately, the state. According to Human Rights Watch (HRW), an interview with a Turkish doctor revealed that if a woman does not bleed on her wedding night, she likely will be taken for "virginity control." Although gynecologists maintain the status of the hymen is not determinative of one's virginity, Turkish doctors nonetheless rely on such information when they perform virginity testing, and "passing" the virginity test is based on whether or not the hymen is torn.

Prior to the ban on virginity testing, women were entitled to refuse a virginity test. Doctors who performed virginity testing, however, reported they were unaware that a woman's consent was required. Such misinformation demonstrates that having a law in place is not enough to ensure the protection of women's rights. Rather, a comprehensive educational campaign is needed to ensure the law's requirements are met. Further, in practice women rarely exercise their right to refuse virginity testing because of pressure from family, or the police in cases in which prisoners are tested. Women who refuse virginity testing often are assumed to be non-virgins,



Credit: Shara Abraham

Turkish women in Istanbul. Women in Turkey have been arrested for dining with female friends, an activity that is considered by some to be "immodest behavior."

and it is likely that a Turkish woman would rather undergo virginity testing than risk her reputation.

The extent of the practice is difficult to estimate because most women are very reluctant to admit their virginity has been questioned and thus seldom report being subjected to testing. Despite the lack of statistics, interviews with doctors, lawyers, and local women's and human rights activists reveal that the threat of such exams follows women throughout their lives. Further, it is clear that the Turkish government plays a significant role in conducting, or acquiescing in, virginity testing, especially those exams performed on women in police custody, on students and job applicants, and on rape victims.

## Virginity Testing

Those subjected to virginity testing include women who apply for certain government jobs; girls applying to attend specialized schools, such as nursing school; or women who are arrested for political activism or "immodest behavior," such as dining with female friends. Further, Turkey's history of torture and gross human rights violations against prisoners puts women detainees at risk of serious abuse.

## Prisoners and Detainees

Virginity testing of prisoners and detainees is not carried out in response to complaints of sexual assault or at a prisoner's request; rather, the tests are routine and involuntary. Women in prison are often subjected to virginity testing immediately upon being incarcerated, and again prior to release, under the justification that virginity testing protects female prisoners. Police authorities argue that if a woman is raped in police custody, a virginity test constitutes evidence of the crime. They contend that if an exam reveals that a woman is not a virgin, that evidence demonstrates a woman is sexually active and that the loss of virginity was not due to custodial rape. Therefore, only women who can prove they were virgins prior to being raped can successfully bring a custodial rape charge. Forced virginity exams are thus used to defend against claims of rape while in custody. This situation insinuates that non-virgins who are raped are not violated. Further, because the state fails to recognize that the tests are physically invasive and involuntary, virginity testing constitutes cruel treatment.

Women detained for political offenses also are targeted for virginity testing. In southeastern Turkey, where the Kurdish conflict is particularly volatile, Turkey has instituted a state of emergency, authorizing police to detain anyone suspected of terrorist activity for thirty days without being charged. Anti-terrorism laws restrict a variety of rights, including the right

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to demonstrate, to publish, and to broadcast. In accordance with these anti-terrorism laws, female journalists working for left-wing publications have been detained in southeastern Turkey and subjected to forced virginity testing.

Additionally, police force women to submit to virginity testing under the guise of investigating prostitution. Police often detain and examine women they deem immoral, accusing them of prostitution for acts the police consider immodest. For example, women have been detained as suspected prostitutes and subjected to testing for dining alone or with female friends, staying with female friends in a hotel, staying with a boyfriend in a hotel, walking or driving alone on a street, sitting on a park bench after dark with male friends, or living alone and having male visitors.

Compounding the humiliation and pain associated with the virginity tests, police harass women with the results. If an exam “determines” that a woman is not a virgin, she often faces taunting and verbal abuse by the police. In more egregious cases, if an examiner feels that the test shows a woman is a virgin, police sometimes threaten to rape the woman and destroy her “honor.”

#### *Students, Job Applicants, and Hospital Patients*

Prior to the ban, directors of state-run dormitories for female university students often required virginity exams of women when they first entered the dormitories, and subsequent to any nights they spent elsewhere. Nursing and midwife students also have been subjected to virginity testing. Additionally, applicants for civil service jobs at the State Cartography Department, a division of the Department of Defense, have complained about being tested for virginity. In addition, some hospitals’ rules dictate that female patients are to be examined for virginity before being admitted.

#### *Virginity Testing of Rape Victims*

Although gynecological exams are a legitimate way to gather evidence of sexual assault, in practice these exams often are performed without the victim’s consent or under the guise of conducting a rape investigation. One highly reported incident occurred in May 1991 at Bakirkoy Mental Hospital, a state hospital in Istanbul. The Istanbul provincial health director, along with his assistant and two male gynecologists, responded to reports of staff sexual misconduct with female patients by subjecting patients to forced gynecological exams. Doctors interrupted a group therapy session, and proceeded to separate the married patients from the unmarried ones. The unmarried patients were subjected to gynecological exams without their consent, and the exams were not limited to women who filed complaints of staff sexual misconduct. This procedure suggested that the married patients could not be victims of sexual misconduct. Further, the way in which the tests were performed degraded and abused the already vulnerable psychiatric patients. For instance, one patient who refused to submit to the exam was forcibly and roughly examined in view of other people.

The state’s interest in women’s virginity is evidenced by Turkish legal treatment of the offense of rape. Although other forms of battery are considered “Felonies Against Individuals,” rape is categorized as a “Felony Against Public Decency and Family Order.” This dichotomy suggests sex crimes are violations against a community rather than the

individual victim and emphasizes that loss of honor is the primary offense. Turkey’s criminal statutes explicitly refer to the virginity of the victim. For example, causing a woman or girl to lose her virginity after promising to marry her is a felony. This supports a perception that rapes committed against non-virgins are less serious. Turkish law thus puts a victim’s modesty on trial, rather than the perpetrator’s actions. As a result of this legal framework, gynecological exams of rape victims, which should be performed for the sole purpose of obtaining forensic evidence, often include virginity testing. Further, virginity exams can be used as a way to control women’s lives by forcing them to marry to protect family honor. If a woman’s family suspects she has had sexual intercourse, they may attempt to force a marriage between the woman and her sexual partner by filing criminal charges with the police and forcing the woman to undergo a virginity exam. A man charged with the offense of causing a woman to lose her virginity by promising to marry her, seduction, or statutory rape can escape criminal liability if he marries the woman bringing charges.

### **Violation of National and International Law**

#### *National Law*

Under the Turkish criminal code, vaginal exams may be performed at the state’s behest for the following reasons: (1) to collect evidence after criminal charges have been filed for rape, but only if the woman participates willingly; or (2) to conduct a health check for working prostitutes. The law also dictates that vaginal exams conducted as a result of criminal charges being brought must be requested by a judge or prosecutor. Despite these limitations on the authority to examine women, state officials continue to compel examinations without consent, and even in the absence of criminal charges.

#### *International Law*

The degradation, humiliation, and invasion of privacy that accompany virginity testing violate the following international instruments: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the Convention concerning Discrimination in respect of Employment and Occupation.

#### *Universal Declaration of Human Rights*

Article 2 of the UDHR states that everyone is entitled to the rights enumerated in the Declaration, without distinction of any kind, including sex. Pursuant to this provision, women have the same human rights as men, including those provided for under Article 5, which states that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” Being forced to submit to physically invasive virginity exams is cruel and degrading, especially when such exams are performed on women in police custody, and conducted in a manner designed to intimidate and punish. Further, Article 12 of the UDHR prohibits arbitrary interference with privacy and attacks on one’s honor and reputation. Virginity testing is a substantial intrusion upon women’s

privacy and is carried out in the context of questioning women's honor and reputation, clearly violating Article 12. Although the UDHR is not a binding legal instrument, widespread violation of the basic human rights it embodies contravenes the spirit of the document and the widely held values and expectations of the international community.

*International Covenant on Civil and Political Rights*

Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” General Comment 20, which further develops the meaning of Article 7, specifically states that the aim of Article 7 is “to protect both the dignity and the physical and mental integrity of the individual.” Article 7 relates not only to acts that cause physical pain, but also to acts that cause mental suffering to the victim. Forced virginity testing compromises the dignity of Turkish girls and women, and violates their physical and mental integrity. The incidence of suicides among young women threatened with virginity testing is evidence of the degree of mental anguish that virginity testing causes. General Comment 20 also imposes on state parties a “duty . . . to afford everyone protection through legislative or other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.” As a state party to the ICCPR, Turkey owes an affirmative duty not only to refrain from practicing virginity testing, but to take necessary action against private parties who perpetrate this abuse. The importance of this provision is reflected in the fact that no limitations, derogation, justifications, or excuses are permitted for violations of Article 7. Notably, General Comment 20 states that “it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.” Although laudable, Turkey's recent decree banning virginity testing is only the first step in upholding its duties under the ICCPR.

*Convention concerning Discrimination in respect of Employment and Occupation*

Because virginity testing has been used to enforce virginity requirements for certain vocational training programs, such as nursing and midwife school, it violates the Convention concerning Discrimination in respect of Employment and Occupation. This Convention proscribes discrimination on the basis of sex that impairs equality of opportunity or treatment in employment or occupation. Signatories of the Convention are not only expected to repeal discriminatory laws and enact appropriate legislation; they also must ensure that the Convention is followed through measures including seeking the cooperation of appropriate organizations. For Turkey, this means the state cannot rely solely on its recent decree outlawing mandatory virginity testing for school applicants. Turkey also must work with schools and employers to ensure female applicants are not discriminated against on the basis of virginity.

*European Convention for the Protection of Human Rights and Fundamental Freedoms*

Turkey also is bound by the ECHR. Article 3 states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Again, the degrading and involuntary nature of virginity testing, especially in prisons, subjects women to impermissible treatment under international law. Further, Article 14 prohibits discrimination on the basis of sex. Because only women are targeted for virginity testing, the practice is discriminatory.

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Article 16 of the CAT requires states to prevent cruel, inhuman, or degrading treatment or punishment that does not amount to torture when committed by, at the instigation of, or with the acquiescence of a public official or other person acting in an official capacity. Although virginity testing may not be construed as torture, it constitutes cruel and degrading treatment and is thus strictly prohibited by the CAT.

The CAT obligates states to take specific steps to prevent such treatment, such as ensuring that education and information regarding the prohibition against cruel, inhuman or degrading treatment or punishment be included fully in the training of law enforcement personnel, medical personnel, public officials, and other persons who may be involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention, or imprisonment. States parties also are obligated to ensure prompt and impartial investigation of violations, and to ensure protection to complainants. Such obligations extend well beyond official decrees banning virginity testing. Turkey must educate doctors, police, and other relevant personnel to ensure that virginity testing is no longer conducted.

*Convention on the Elimination of all Forms of Discrimination against Women*

CEDAW prohibits discrimination against women, which is defined in Article 1 as “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Because men are not subjected to virginity testing, the existence of the practice constitutes discrimination. Further, because virginity testing has been used in the context of job and school applicants, women are discriminated against in their pursuit of career and educational goals.

CEDAW calls on states parties to pursue by all appropriate means a policy of eliminating discrimination against women by taking affirmative actions. CEDAW enumerates a host of possible affirmative actions: refraining from engaging in any act or practice of discrimination against women and ensuring that public authorities and institutions shall act in conformity with this obligation; taking all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise; and taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against women. The Committee on the Elimination of Discrimination against Women specifically “noted

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with the gravest concern the practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault, including of women prisoners while in custody. The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women.” The Committee also expressed concern about the categorization of violence against women as a “crime against public decency and public order,” and stated that such categorization contradicted the spirit of CEDAW. Further, the Committee noted its deep concern that greater penalties were imposed for the rape of a woman who was a virgin.

Although Turkey has taken initial steps in meeting its obligations under CEDAW by abolishing certain discriminatory laws, Turkey remains obligated to eliminate all discriminatory customs and practices, and take all measures necessary to end discrimination against women. CEDAW requires parties not only to refrain from discriminating against women, but also to ensure compliance by authorities and institutions, and to take all necessary measures against any person, organization, or enterprise that engages in discriminatory practices. The recent decree banning virginity testing will be insufficient if sanctions are not levied against those who violate the decree.

### Conclusion

Turkey’s human rights record has been cited consistently as grounds for denying Turkey admission into the European Union. Repealing the virginity testing law is a step in the right direction, but more needs to be done to eradicate the practice. The government must initiate a nationwide campaign

to inform women that the practice has been banned and that they have the right to refuse to comply with virginity testing. Further, doctors must be notified regarding the new law. To fully comply with international human rights standards, Turkey should adhere to the following measures, as recommended by HRW: stop detaining women for illegal prostitution without objective evidence; prohibit police from forcing women suspected of prostitution to undergo gynecological exams without their consent; stop discriminating against women by holding them to subjective standards of modesty to which men are not held; publicly denounce the forced imposition of virginity exams under any circumstances as a grave and intolerable human rights abuse and a violation of domestic and international law; direct state-employed doctors not to perform virginity exams on girls and women; train law enforcement personnel, health care providers, public officials, and others involved in the custody, interrogation, and treatment of detainees that compulsory virginity exams are prohibited, and will result in punishment; and examine rape victims only with their informed consent, the authorization of a prosecutor or judge, and only for the purpose of gathering forensic evidence.

Turkey’s actions in the near future will indicate whether officially banning virginity testing constitutes a real commitment to eradicating this egregious practice or an empty promise designed to improve its reputation. To meet its obligations under international law and truly improve its standing in the international community, Turkey must demonstrate respect for women’s human rights not just on paper, but in practice. 🌍

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cuted and punished in a manner consistent with the treatment of members of the armed forces of the detaining country who violate similar laws.

Regardless of the government’s underlying objectives, setting a standard for selectively applying the provisions of an international treaty poses serious consequences to citizens of all states parties to the agreement. In particular, some have expressed concern over the future treatment of U.S. special forces, who usually do not wear uniforms and therefore could be denied POW status for failing to meet the conditions enumerated in Article (4) (2) of the Third Convention.

### Conclusion

The Geneva Conventions set forth legal standards and procedures for the treatment of all nationals of states parties who fall into enemy custody during an armed conflict. In particular, the Third Convention articulates a duty of a detaining power to convene a competent tribunal to determine the legal status of persons detained in such a conflict. Moreover, where the status of detainees is in doubt, a detaining power is required to accord them the rights and privileges enumerated in the Third Convention until such status is

determined by an objective tribunal. The circumstances of the detention and treatment by the United States of the prisoners currently detained at Guantanamo Bay fail to conform to the Geneva Conventions in several respects. The refusal to recognize the Conventions with respect to prisoners classified as members of *al-Qaeda* violates the text and customary interpretations of the Fourth Convention. The unilateral determination that no prisoner is entitled to POW status violates the Third Convention’s guarantee that such determinations are to be made by competent tribunals. Finally, in light of the likelihood that at least some of the prisoners should be entitled to POW status, the nature of their detention violates the various provisions of the Third Convention, which guarantee privileged treatment to POWs.

As one of the most powerful nations in the world, the U.S. is setting a dangerous precedent for the future application and interpretation of the Geneva Conventions. In the interest of its own credibility, as well as the future safety of its own armed forces, the U.S. government would be well advised to reconsider its position and comply with all of its obligations under the Conventions. 🌍

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# Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement through the Prohibition of Genocide and Ethnocide?

by Stefanie Ricarda Roos\*

A disproportionate number of people who are physically displaced in the context of development projects are from minority communities. Most of them are indigenous or tribal peoples. Development-induced displacement can give rise to severe risks for the resettled population. Forced relocation results in the disruption of the relationship between the relocated community and the natural, social, economic, and cultural environments upon which its means of livelihood are based. The loss of a people's base threatens the continuity of its traditions and practices as well as endangers its cultural survival. In addition, the conditions of the new locations often imperil the physical survival of relocated populations. The vice president of the World Council of Indigenous Peoples underscored the destructive consequences of the displacement of Indigenous Peoples from their land when he stated: "Next to shooting Indigenous Peoples, the surest way to kill us is to separate us from our part of the Earth."

Sociologists and historians have long argued that because of its devastating effects on both the physical and cultural existence of dislocated people, development-induced displacement may amount to "developmental genocide," "cultural genocide," or "ethnocide." Legal scholars, on the contrary, have traditionally focused on cases concerning conflict-induced displacement, such as forced dislocations of people that occur in conditions of armed conflict or civil strife. Only recently, some legal scholars have begun to evaluate forced relocations in the context of development projects through the perspectives of international law, in particular international human rights law. Referring to forced dislocations, Professor of Law and Development at MIT, Balakrishnan Rajagopal, has publicly raised concerns about the practice of "ethnically targeted development," and has called for the international indifference toward the "violence of development projects" to end. Rajagopal argued that the result of development-based resettlement is often "a soft form of genocide or crime against humanity involving systematic and deliberate destruction of ethnic, racial and religious minorities and indigenous peoples."

Given this recent concern about the implications of development-induced displacement and the realization that special legal protection must be made available, it seems timely to determine whether the international prohibition of genocide and ethnocide can curtail development-based resettlement. This question is not strictly academic. Rather, the question of whether forced relocation can amount to genocide can be crucial in deciding whether victims of development-induced displacement have cases for redress, in particular in courts outside their countries. For example, if the case can be made that development-induced displacement can under certain circumstances amount to genocide under international law, then the victims could, for example, seek redress in U.S. courts under the Alien Torts Claims Act (ATCA) which grants federal district



Representatives of indigenous groups at the UN World conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance hold signs reading "We are peoples and not populations" and "We are discriminated against."

courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," even when the case involves acts perpetrated in another country by a non-U.S. citizen.

Forced relocations in the name of development also jeopardize the survival of the host populations inhabiting the territories where the displaced resettle. The Qinghai Component of the China Western Poverty Reduction project (Qinghai Project), which in 1999 and 2000 was subject to an investigation by the World Bank's Inspection Panel, is exemplary. The Qinghai Project was challenged by a Request for Inspection, *inter alia*, because of its severe social effects. Under the original project design, approximately sixty thousand ethnic Chinese were to be transferred into the Tibet Autonomous Region (TAR) and the areas outside the TAR within historical Tibet. The settler infusion would have adversely impacted four thousand local people, including serious risk of escalation of ethnic tensions and conflicts over resources. Concerns have been voiced that the Qinghai Project would weaken the Tibetan and Mongolian character of the area, and threaten the lifestyles and the livelihoods of the Tibetan and Mongolian "host" communities.

## Protection against the Extermination of an Indigenous Group as a Result of Development-Induced Displacement through the Prohibition of Genocide under International Law

The definition of genocide that is most widely accepted and generally recognized as the authoritative definition of this crime, inclusive for purposes of customary law, is that adopted by the United Nations through the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention). According to

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Article 2 of the Convention, genocide means:

- any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

The forcible transfer or dislocation of a group or its adult members is not explicitly included in the exhaustive list of acts forbidden under the Genocide Convention. The Genocide Convention does not, however, restrict the manner in which the acts listed in Article 2 can be committed.

Rather, any means of carrying out a prohibited action with the requisite intent to destroy the group constitutes genocide. Therefore, the forced relocation of ethnic and racial minorities and indigenous groups may, for example, meet the elements of the international crime of genocide, if the dislocation is meant to inflict on the group conditions of life which can extinguish the displaced community.

Numerous cases of development-induced displacement of indigenous and tribal peoples, such as the forced resettlement in 1981 of the Waimiri-Atroari, a native tribe living in the state of Amazonas (Brazil), to make way for hydroelectric projects, and the forced relocation of ten thousand indigenous Kenyah and Kayan people from their ancestral homes on the island of Borneo to make way for the Bakun Dam, demonstrate the effects of forced relocation. Such effects, including the deprivation of livelihood, resettlement on unproductive land, and the introduction of diseases, often subject the displaced populations to life-threatening conditions. Genocidal acts do not necessarily entail the immediate destruction of a group, but can be part of an overall plan which aims at the destruction of the essential foundations of the life of a national, ethnic, racial, or religious group. Hence, forced relocation into an environment in which the security, health, dignity, and traditional way of living of a minority group is not secured, may constitute genocide within the meaning of Article 2 of the Genocide Convention.

#### *The “Intent to Destroy” Requirement of Genocide (Mens Rea)*

The essence of genocide is, however, not the actual destruction of the group, but the intent to destroy it as such, *i.e.*, the *mens rea* of the offense. Although forced relocation may have the effect of causing the extinction of a group, it may not qualify as genocide under the definition

set forth in Article 2. The critical determination as to whether forced relocation amounts to genocide is whether the affected community has been forcibly dislocated from its land with the requisite “intent” to extinguish the group. The government responsible for forcibly relocating a vulnerable minority group will, however, rarely openly announce that it intended resettlement to contribute to the destruction of the people dislocated. Rather, states assert that the displacement and the threats it poses to the resettled group are unintentional by-products of a development project with a legitimate public purpose, such as economic or social development. The argument about genocide may, therefore, collapse at this juncture.

The argument would not collapse, however, if the Genocide Convention’s “intent to destroy” requirement were to be interpreted broadly, *i.e.*, that either knowledge or a general awareness of the likely consequences of the enumerated acts with respect to the immediate victims of forced relocations would meet this requirement. Can one, however, convincingly argue that knowledge or foreseeability is the correct standard of genocidal intent? In other words, could the forced displacement of a minority community amount to genocide

absent purpose to exterminate the peoples relocated on the grounds of their ethnic difference or “otherness”? If the answer is in the affirmative, given that the effects of forced resettlement, unless mitigated, are not only devastating but easily foreseeable, almost any case of development-induced forced dislocation of people belonging to ethnic and racial minorities and indigenous groups would constitute genocide, and would therefore be curtailed by the international prohibition of this crime.

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#### *The Interpretation of Genocide as a Specific Intent Offense by International Criminal Tribunals and United States Courts*

Some commentators contend that genocide embraces those acts whose foreseeable or probable consequences are the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act. The stricter interpretation, according to which genocide is a specific intent offense, has prevailed, however. In this context, the case law on genocide of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), both of which have been crucial in defining the crime of genocide, is relevant. In *The Prosecutor v. Radislav Krstic*, the ICTY dealt in depth with the question of how to interpret the intent requirement. In *Krstic*, the Trial Chamber invoked the preparatory work of the Genocide Convention, the 1996 Report on the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC), the International Court of Justice’s advisory opinion, the *Legality of the Threat or Use of Nuclear Weapons*, as well as relevant case law of the ICTR. The Trial Chamber found that the definition of the crime of genocide required a “specific intent,” *i.e.*, that

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genocide encompasses only acts committed with the *goal* of destroying all or part of the group.

In its 1997 decision *Beanal v. Freeport-McMoRan, Inc.*, the United States District Court for the Eastern District of Louisiana adopted the same interpretation. This case addressed the claim of genocide by an Indonesian citizen and leader of the Amungme tribe against Freeport, an American corporation that owned a subsidiary which operated open-pit copper, gold, and silver mines in Indonesia. The plaintiff alleged that Freeport's conduct resulted in the displacement, relocation, and "purposeful, deliberate, contrived and planned demise of a culture of indigenous people." In interpreting genocide as a specific intent offense, the court in *Beanal* relied on the 1995 decision of the United States Court of Appeals, *Kadic v. Karadzic*, which upheld that specific intent was an element of genocide. The *Beanal* court found that a claim of genocide was not sufficiently clear and that the plaintiff should therefore be given the opportunity to make a more definite statement clarifying whether he meant that Freeport was destroying the Amungme culture, or whether Freeport was committing acts with the intent to destroy the Amungme group.

The question remains whether the prevailing interpretation of genocide as a specific intent crime must necessarily be followed. In considering the object and purpose of the Genocide Convention, an argument could be made both for the specific intent interpretation, and for the broad interpretation of the intent requirement of Article 2. The International Court of Justice observed in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*, that the Genocide Convention's object and purpose is "to safeguard the very existence of certain human groups." If the Convention seeks to protect human groups' right to existence, however, in the interest of the most effective protection of minority groups from a rights-based approach, one might make a case for a broad interpretation of genocidal intent.

#### *Proving Specific Intent*

Even if specific intent were the correct standard of genocidal intent, however, governments cannot escape charges for "development genocide" simply by invoking the absence of intent to destroy the relocated group as a separate and distinct entity. In cases in which ethnic and racial minorities and indigenous groups are forcibly resettled in order to free their traditional land for economic development, the purpose of the displacement might be to further economic development. A project may, however, have more than one purpose, as demonstrated by the actions taken against Paraguay's Northern Aché population between 1962 and 1972. In this case, fifty percent of the Aché population was killed to make way for development projects. Scholars have

characterized the factual situation as genocidal, despite the fact that the Paraguayan Defense Minister denied the requisite genocidal intent existed.

Indeed, governments often use development-induced displacement as a means of undermining disfavored minority cultures. Indigenous Peoples living in remote areas of a country are particularly vulnerable to practices of "ethnically targeted development" because they are often perceived as "primitive." In practice, the real challenge will be to find an "intent" to extinguish the resettled group *qua* group. How can intent, for example, be proved if a development-induced relocation lacks an openly declared objective to destroy the group in its collective sense?

Commentators have drawn a parallel to race discrimination claims, and have argued that plaintiffs probably must prove intent indirectly, by inferences from the actions of the government. Both the ICTY and the ICTR have followed similar approaches, and have asserted that the intent to destroy a protected group can be derived from certain facts, such as political speeches or plans, or other methods or actions which are not part of the genocide itself, but constitute part of the attack on the group, or the objective cir-

cumstances or consequences of an act. One would, therefore, have to study the facts closely to discover an implicit genocidal intent. In cases in which a long-term state policy of annihilating a particular minority group exists, and in which forced relocations support the country's general policy of repression toward a minority community, or in which a country's developmental agenda is specifically and knowingly tailored toward the destruction, development-induced forced resettlement could merit the characterization of genocide.

Proving intent, even if indirectly, will be difficult unless a pattern of rights violations with the foreseeable result of group destruction exists. In sum, according to the prevailing interpretation of genocidal intent, the incident of forcible dislocation alone will not suffice to establish that genocide has been committed, even if the displacement can be reasonably expected to result in the extinction of the relocated group. Rather, further evidence would be necessary to prove that a state, in forcefully relocating a particular group, did not only want to take the land of the people, but destroy the people as such.

#### **The Prohibition under International Law of Cultural Genocide (Ethnocide)**

Forced resettlement might fall short of interfering with a group's physical survival, but may still undermine its cultural survival. Although physical destruction is the most obvious method to extinguish a group, one may, as has been conceded by the Trial Chamber of the ICTY in the *Krstic* case "also conceive of destroying a group through purposeful

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eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.” Development-induced forced relocations often cause foreseeable, irreparable harm to the cultures of peoples whose religious, economic, or social practices, traditions, and norms are based on the land from which they are dislocated. Displacement often results in the disintegration of local cultures, the weakening of community institutions and social networks, and the dispersion of kin groups, resulting in the cultural destruction of the affected group. The question therefore arises, whether in such cases the displaced people can make out a claim for genocide provided that the cultural destruction was intended.

Some legal scholars argue that, although the framers of the Genocide Convention considered and then expressly rejected cultural genocide, the notion of genocide today covers not only the physical or material eradication of a group, but also the cultural destruction of a group. In this context, one might argue that the prohibition of cultural genocide has at least ascended to the level of customary international law. A narrow definition of genocide excluding the cultural destruction of a group still prevails, however. In the *Krstic* case, the Trial Chamber concluded that “an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.” Similarly, in *Beanal*, the court held that genocide included deliberate acts which inflict on the group conditions of life “calculated to bring about its physical destruction,” but did not purport to include acts which cause “displacement” and “relocation” absent any physical destruction.

Regardless of the difficulty of proving the *mens rea* requirement of the international crime of genocide, a rights-based approach to the protection against threats to the cultural survival of minority groups appears to be more suitable than a criminal law approach. The framers of the Genocide Convention argued in a rights-based direction, and decided to leave the explicit prohibition of cultural genocide to future human rights and minority rights protections. In past decades, significant advances had been made in the development of the law on Indigenous Peoples’ rights, most noteworthy through the standard-setting activities of the UN and the Organization of American States (OAS). For example, Article 7 of the 1993 UN Draft Declaration on the Rights of Indigenous Peoples contains the explicit language, “collective and individual right not to be subjected to ethnocide and cultural genocide.” The Proposed American Declaration on the Right of Indigenous Peoples contains an explicit prohibition of forced assimilation, the right to cultural integrity, and a prohibition of arbitrary transfer or relocation of Indigenous Peoples without their free and informed consent. Both drafts reflect growing awareness for the special needs of protection of indigenous and tribal peoples against activities that may result in the destruction of the culture or the possibility of the extermination of

an indigenous group.

To date, no single human or minority rights treaty exists which explicitly prohibits cultural genocide or ethnocide. The lack of a specific treaty does not mean that international human rights law currently fails to protect against the cultural destruction of minority groups. The prohibition of cultural genocide is encompassed in the right of members of a minority group to culture as protected, in particular, in Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Logically, the destruction of a culture is a violation of the right to culture.

Controversy remains, however, as to whether the right to enjoy one’s own culture implies that a minority community’s traditional way of life must be preserved at all costs. Even among the members of the Human Rights Committee,

opinions diverge on this question. This disparity is illustrated by the individual opinion of Committee member Nisuke Ando in *B. Ominayak and Members of the Lubicon Lake Band v. Canada*. In their communication, members of the Lubicon Lake Band argued that the province of Alberta had allowed private oil and gas exploration activities to threaten their way of life. The violation was manifested

by the threat of destruction of the band’s economic base and the continuity of its indigenous traditions and practices, thus endangering the group’s survival as a people. Whereas the Committee found a violation of Article 27, Committee member Ando argued in his individual opinion that “the right to enjoy one’s own culture should not be understood to imply that the band’s traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole.” A decade later, the Committee in its considerations regarding the communication *Länsmän et al. v. Finland* argued that although a state may understandably wish to encourage development, measures whose impact amount to a denial of the right of a member of a minority to enjoy his or her culture would not be compatible with the obligations under Article 27. The Committee contended, however, that measures having a limited impact on the way of life of persons belonging to a minority would not necessarily amount to a denial of the right to culture under Article 27. Applying this argument to cases of development-induced displacement, one would have to conclude that the right to cultural integrity as protected under Article 27 of the ICCPR curtails forced relocations which prevent the relocated from sustaining their cultural life.

To date, the Human Rights Committee has not yet decided a case of forced relocation as such. The Committee’s concluding observations with regard to Chile’s State Report of 1999, indicate, however, which standard the Committee is likely to use in such cases. In the observations,

**Regardless of the difficulty of proving the *mens rea* requirement of the international crime of genocide, a rights-based approach to the protection against threats to the cultural survival of minority groups appears to be more suitable than a criminal law approach.**

# Sierra Leone's Search for Justice and Accountability of Child Soldiers

by Ismene Zarifis\*

The Lome Peace Accords were signed in July 1999, ending nine years of internal armed conflict between the government forces of Sierra Leone and the Revolutionary United Front (RUF), an armed rebel group known for committing gross human rights violations. The conflict in Sierra Leone was one of the most brutal in Africa because of the nature and extent of war crimes committed by both sides and the forced recruitment of approximately five thousand child combatants. The United Nations and international human rights organizations reported that RUF combatants adopted a systematic practice of raiding villages, abducting children from their homes, and using them as combatants against their will. According to Amnesty International (AI), personal accounts by former child soldiers reveal that the RUF threatened children's lives as well as their families' lives if the children refused to join the RUF. After the children were forcibly recruited, they were drugged and indoctrinated into the systematic practice of killing, raping, and maiming their victims.

The internal armed conflict in Sierra Leone began in March 1991, when the RUF launched an attack to overthrow the government and gain political control of the country. Fighting between the RUF and government forces persisted, despite several UN-brokered attempts at peace in February 1995, November 1996, and October 1997. The parties ultimately reached an agreement to end hostilities in July 1999. Now that the internal armed conflict has officially ended, Sierra Leone is obligated under international law to prosecute and punish perpetrators of war crimes. The fact that both government forces and the RUF recruited children under the age of fifteen to participate in the armed conflict is a violation of international humanitarian law, while the acts committed primarily by RUF combatants during the hostilities are punishable crimes under international law. The combination of these elements poses a unique problem of establishing the accountability of child combatants who were both victims and victimizers in the hostilities.

## Obligations to Prosecute

### *Obligations under the Lome Peace Accords*

The Lome Peace Accords marked an official cease-fire between warring parties, provided for demobilization and disarmament of all combatants, and called on the parties to form a government of national unity, thereby transforming the RUF into a political party. Since 1999, demobilization of the thirty percent of minors under the age of eighteen who make up the RUF forces has been slow. In January 2000, only about 1,700 of an estimated 5,000 child combatants were disarmed and returned to their homes or rehabilitation centers to undergo special psychological and reintegration treatment. RUF commanders in particular lack the political will to implement the demobilization duty established in the Lome Peace Accords. In fact, they continue to employ child combatants to secure their control of politically contested diamond fields in the eastern region of the country, and have



Credit: International Human Rights Law Group

Panelists at a seminar on Sierra Leone's Truth and Reconciliation Commission.

been recapturing demobilized child combatants from rehabilitation centers.

The Lome Peace Accords also called for the establishment of a truth and reconciliation commission as an essential element of a post-conflict program. Additionally, a national amnesty law was passed providing a "[f]ree pardon to all combatants for any of their actions committed in pursuit of their objectives since March 1991." This contentious amnesty law was included in the Lome Peace Accords, according to some, to promote lasting peace in Sierra Leone. The amnesty law, however, shields combatants from prosecution of crimes under domestic law since the war's inception, causing public concern that human rights abusers will enjoy immunity for their criminal acts.

### *Obligations under International Law*

The amnesty law conflicts with Sierra Leone's obligations under humanitarian law. Under the Geneva Conventions, Sierra Leone is obligated to punish the perpetrators of international crimes. The Special Court of Sierra Leone (Special Court) was established in August 2000, pursuant to UN Security Council Resolution 1315, and represented an agreement between the Sierra Leonean government and the UN to prosecute perpetrators for violating international human rights and humanitarian law after 1996. The Special Court statute is a bilateral agreement binding on both parties.

Both the Additional Protocol II to the Geneva Conventions of 1949 (Additional Protocol II), to which Sierra Leone became a party on June 8, 1977, and UN Resolution 1315 impose international obligations on Sierra Leone, which supercede the domestic amnesty law. Article 10 of the statute of the Special Court bars amnesty protection of combatants for international crimes defined in the statute: crimes against humanity (Article 2); violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II (Article 3); and other serious violations of international humanitarian law (Article 4). Article 10 is grounded in international

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human rights law jurisprudence, which holds that national amnesty laws are contrary to a state's duty to respect and ensure human rights. The duty to respect and ensure human rights includes the state's obligation to investigate, prosecute, and punish human rights violators. Significantly, under the Special Court statute, children between ages fifteen and eighteen are neither excluded from nor protected against criminal responsibility for violations of the international crimes in the statute.

Sierra Leone is now in a transitional justice phase in which the prosecution of war criminals is essential to end impunity and strengthen the rule of law. Establishing the accountability of child combatants for violations of international law where their very participation in the hostilities is a product of illegal recruitment poses a unique challenge.

### Children in the Conflict

#### *Forced Recruitment*

Both the Sierra Leonean government and the RUF engaged in recruitment of child soldiers as young as ten years old, which is a violation of domestic law and international humanitarian law. Under domestic law, the minimum age for voluntary recruitment is eighteen years. International humanitarian law, through the Additional Protocol II, establishes fifteen as the minimum age requirement for recruitment or participation in hostilities. Recruitment under international law includes conscription (compulsory recruitment), voluntary enlistment, and forced recruitment. Participation in hostilities includes direct participation in combat and active participation linked to combat such as spying, acting as couriers, and sabotage. Finally, Article 22(2) of the African Charter on the Rights and Welfare of the Child, which entered into force in November 1999, and to which Sierra Leone is a signatory, requires "state parties . . . [to] take all necessary measures to ensure that no child [below age eighteen] shall take direct part in hostilities and [to] refrain in particular from recruiting any child."

Many international human rights groups have documented the RUF's systematic practice of forcibly abducting children, and issuing death threats to recruit child soldiers in Sierra Leone. For example, after an RUF attack and temporary occupation of the capital city of Freetown in January 1999, 4,800 children were reported missing and 7,335 people were reported dead. The abducted children were forced to become soldiers, sex slaves, or work in the diamond fields, and were routinely exploited as human shields for the rebels. AI has reported that the RUF killed children who refused to join them or forced them to use drugs to induce their compliance. Personal accounts from demobilized child combatants now undergoing rehabilitation recount tales of sexual violence and physical abuse. Others claim that they were threatened into aiding and abetting in the rape of girls.

#### *Crimes Committed by Child Soldiers*

Under physical and psychological duress, child combatants committed widespread and systematic atrocities condemned under Common Article 3 of the Geneva Conventions (Common Article 3), Additional Protocol II, and the Special



Credit: International Human Rights Law Group

Information session on Sierra Leone's Truth and Reconciliation Commission for ex-combatants at a disarmament camp.

Court statute. Children were drugged, threatened with death, sexually and physically abused by their abductors, and terrorized into adopting the RUF's practice of committing war crimes. "When I go to battle fields, I smoke enough. That's why I become unafraid of everything," a child combatant interviewed by AI stated. "When you refuse to take drugs, it's called technical sabotage and you are killed." Widespread and indiscriminate murder, rape, and amputation of limbs were signature crimes of the RUF and are well documented by international human rights groups such as AI and Human Rights Watch (HRW). The widespread and systematic nature of the abuses committed by RUF forces, including child combatants, fits the definition of crimes against humanity.

Crimes against humanity established in international customary law primarily consist of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, or religious grounds and other inhumane acts committed as part of a widespread or systematic attack against a civilian population. In particular, international customary law automatically binds all states to prevent and punish these abuses. The statute of the Special Court adopts the international definition of crimes against humanity, and Article 2 of the statute of the Special Court gives the Court the power to prosecute persons who committed such crimes. According to this definition, RUF combatants, including children, may be held individually criminally responsible for committing crimes against humanity.

Article 3 of the Special Court statute also incorporates violations of Common Article 3, the Additional Protocol II, and other international humanitarian law violations into the list of punishable crimes. These include: violence to life, health, and physical or mental well-being of persons; acts of terrorism; outrages upon personal dignity; rape, pillage, threats to commit these acts; and intentionally directing attacks against civilian populations or against individual civilians not participating in the hostilities. Under these definitions, child combatants who committed such crimes may face criminal accountability.

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### **Mechanisms of Accountability: Establishing the Criminal Responsibility of Children**

#### *The Special Court of Sierra Leone*

The Special Court of Sierra Leone was created to prosecute individual perpetrators for violating international law during the armed conflict. The temporal jurisdiction of the Special Court, however, dates only from 1996, leaving perpetrators of war crimes committed prior to 1996 unaccountable under the Special Court jurisdiction or domestic law jurisdiction. According to Article 1 of the Special Court statute, the goal is “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone.” According to a report by the UN Secretary-General Kofi Annan on the establishment of the Special Court, the “authority position of the accused” and the “gravity or massive scale of the crime” are indicators of “greatest responsibility” for purposes of prosecution under the statute.

These factors imply that children between ages fifteen and eighteen are not likely to be targets of prosecution by the Special Court because of their junior status in the RUF command structure. The UN Secretary-General, however, reported that children who held positions of authority, such as brigadier, and who committed gross violations under the statute are not necessarily excluded from prosecution. At the same time, the UN Secretary-General recognized the violent circumstances under which children are recruited into battle, stating, “[t]hough feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.” Thus, the potential prosecution of children for war crimes presents a moral problem.

International human rights organizations have stated their objections to judicial accountability of children younger than eighteen on the grounds that prosecution would place their rehabilitation at risk. HRW recommended that the Special Court focus on adult offenders rather than prosecution of children younger than eighteen in light of the children’s inherent immaturity and forced abduction into the armed conflict.

In the event that juvenile offenders are prosecuted, the statute calls for special protection mechanisms for juveniles. Article 7 of the statute states that children between the ages of fifteen and eighteen shall be treated in accordance with international human rights standards specific to the rights of the child, and “[s]hall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.” Instead of ordering imprisonment as a penalty, the Special Court is limited to ordering any of the following rehabilitative measures: care, guidance, and supervision orders; community service orders; counseling; foster care; correctional, educational, and vocational training programs; approved schools; and, as appropriate, any disarmament, demobilization, and reintegration programs of child protection agencies. Other protective measures include: ordering the

release of the accused, whenever possible; establishing a juvenile chamber; providing a separate trial for a juvenile from an adult; and providing all legal and other assistance to ensure the juvenile’s privacy. In order to ensure that these rights are afforded to the child-defendant, the judges and the staff of the prosecutor’s office are expected to have prior experience in juvenile justice.

Determining whether a child may be prosecuted for crimes in the statute depends on the prosecutor’s consideration of several factors, such as whether the child’s status of authority and the nature of the crimes committed fulfills the “greatest responsibility” requirement in the statute. Another factor the prosecutor must consider is codified in Article 15 of the statute, which states that “[i]n the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation program is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.” In a series of communications, the UN Secretary-General and the president of the Security Council, Sergey Lavrov, expressed the importance of limited prosecution of juvenile offenders, pointing to the Truth and Reconciliation Commission (TRC) as an alternative to prosecution of juveniles in order to promote the child’s rehabilitation and social reintegration.

#### *Truth and Reconciliation Commission*

Pursuant to the Lome Peace Accords, the TRC was established in February 2000 by an agreement between the Sierra Leonean government and the UN. The TRC’s underlying objective is to foster national reconciliation by allowing victims and perpetrators to tell their personal stories of their roles in the hostilities. “Truth is a prerequisite to genuine reconciliation . . . revealing the truth leads to the addressing of impunity,” stated Ambassador Oluyemi Adeniji of the UN Mission in Sierra Leone, the human rights observer mission tasked with reporting human rights developments in the country. Unlike the Special Court, the TRC does not have a punitive, prosecutorial role, but rather allows perpetrators and victims of human rights violations to come forward and account for their actions in the spirit of promoting national peace and reconciliation. All those who were involved in the hostilities will be eligible to participate in the TRC.

The primary objective of the TRC will be to create an impartial historical record of human rights violations committed during the armed conflict in Sierra Leone. The TRC will investigate and report on the causes, nature, and extent of the violations, and work to restore the human dignity of victims and promote reconciliation through truth telling. The TRC envisions special procedures to address child victims and perpetrators. Accordingly, the TRC may serve as an effective alternative to the prosecution of juvenile offenders whose criminal responsibility is minimal or difficult to assess. Finally, the TRC will issue a final report based on its findings and present its recommendations to the government of Sierra Leone, suggesting reforms needed to achieve the non-repetition of the violations, addressing impunity, and promoting healing and reconciliation.

Human rights groups support recording child perpetrators’ accounts through the TRC as opposed to criminal pros-

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education because the TRC fosters the children's total rehabilitation and social reintegration in accordance with Sierra Leone's obligation to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflict," according to Article 39 of the Convention on the Rights of the Child (CRC). The child combatant's unique position of first victim and then victimizer requires a special accountability mechanism such as the TRC. Such an approach also is consistent with Article 40.3 of the CRC, which emphasizes the importance of using alternatives to judicial proceedings when dealing with children who have violated the law, provided that human rights and legal safeguards are respected.

In pursuing the difficult task of determining the accountability of a child combatant, many experts argue that accountability would best be established through a non-punitive truth telling process, a form of catharsis allowing the victim and perpetrator to heal emotionally and psychologically. Experts argue also that it would be unfair to hold children to the same standards of criminal liability as adults who orchestrated armed attacks and forced abductions of children. As such, truth telling before the TRC complies with international human rights standards in the CRC, and appears to be the most effective accountability mechanism for children.

#### Displacement, continued from page 17

the Committee raised concerns about hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities, and concluded that "relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant," and that "when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them."

#### Conclusion

It is questionable whether an overemphasis on the drafting history of the Genocide Convention serves the Convention's purpose to protect the right to existence of minority groups. When interpreting genocide, should one be guided by the realization that international law is not static, but an evolving body of standards and directives that must be interpreted and applied in a contemporaneous fashion? Despite the encouragement engendered by the emerging genocide approach toward development-induced displacement, however, one must certainly be careful not to stretch the law to make it fit one's vision. Hence, the crucial question to be answered is whether the concept of genocide is adequate to deal with forced relocations in the context of development projects that result in both the physical and cultural extinction of an ethnic and racial minority and indigenous group. The concept of genocide is not quite adequate to deal with the destructive consequences of development-induced displacement of minority communities. In most cases, it will be difficult, if not impossible, to prove that forced dislocations in the context of a development project, including those leading to the physical or cultural destruc-

#### Conclusion

The moral dilemma of holding juvenile offenders accountable for war crimes is addressed collaboratively by the Special Court and the TRC. The Special Court focuses on prosecuting war criminals with the greatest responsibility, while the TRC focuses on fostering national peace and reconciliation. There is strong support from Sierra Leone for the prosecution of juvenile offenders in order to comply with the international obligation to punish perpetrators of human rights and humanitarian law violations. The lack of prosecution, some argue, could perpetuate impunity and pose a risk of similar abuses recurring in the future. In light of the special circumstances of the forcibly recruited child soldier, however, it appears that the RUF adult leaders primarily qualify as "individuals with the greatest responsibility," and should therefore be targeted for prosecution. The unique position of the child combatant, first victim then perpetrator, would best be served by truth telling before the TRC to facilitate effective social rehabilitation and reintegration. At the same time, the TRC promotes national reconciliation, which is essential for the population to heal after nine years of armed conflict. ☹

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tion of a minority group, constitute genocide within the meaning of the Genocide Convention.

The case law of the international criminal tribunals does not support the application of the concept of genocide to development-induced displacement either. The factual situations the tribunals have dealt with were fundamentally different from most cases of forced relocations in the context of development projects. In the cases before the tribunals, states and individuals accused of having committed the crime of genocide set out to exterminate the members of the particular victim groups simply on the grounds of their ethnic difference. Yet to prove that a government intentionally uses development-induced displacement as a means to extinguish a minority group *qua* group will be a difficult, if not impossible, endeavor. Whether forced relocations in the context of development projects are referred to as a "soft form" or "special category" of genocide, the apparently insurmountable hurdle of establishing the elements of genocide remains. One may argue that in cases in which an individual is held liable for the tort of genocide and not the crime, that in these cases the intent requirement might be less stringent. With regard to protection against cultural genocide or ethnocide, it remains to be seen whether the proposed declarations by the UN and the OAS on Indigenous Peoples' Rights, once adopted, will be used as standards against which the practice of ethnically targeted development in general, and of development-induced displacement of minority communities in particular, are measured. ☹

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# The “Pacific Solution”: Refugees Unwelcome in Australia

by Alexander J. Wood\*

*“For those who’ve come across the seas  
We’ve boundless plains to share  
With courage let us all combine  
To advance Australia fair.”*

The Australian national anthem, *Advance Australia Fair*.

In recent years Australia has instituted a series of laws and policies requiring the mandatory detention of certain refugees and asylum seekers and, in some instances, their forcible relocation to other countries. These measures place Australia in probable violation of its obligations under international law including, inter alia, the Convention relating to the Status of Refugees, and in the case of child asylum seekers, the Convention on the Rights of the Child. Conditions of detention in Australia, which have sparked protests by refugees, also place Australia in violation of these same international instruments.

Australia acceded to the Convention relating to the Status of Refugees (Refugee Convention) on January 22, 1954, and to the 1967 Protocol relating to the Status of Refugees on December 13, 1973. The 1967 Protocol applies the Refugee Convention to refugees since 1951. Article 1 of the Refugee Convention defines refugees as people with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in their countries of origin. The UN High Commissioner for Refugees (UNHCR), in Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, notes as a general principle that there should not be mandatory or excessively lengthy detention of asylum seekers. These UNHCR guidelines, although not binding on Australia as a matter of law, provide that alternatives to detention should be implemented unless detention is found to be necessary.

Australia ratified the Convention on the Rights of the Child (CRC) on December 17, 1990. Ratified by 191 countries, the CRC’s guiding principles mandate that determination of the child’s best interests (Article 3) and the survival and development of the child (Article 6(2)) should constitute the standards for evaluating all actions concerning children. Each right set forth in the CRC is applicable to children seeking refugee or asylum status (Article 22(1)).

## The “Pacific Solution”

On August 26, 2001, near Christmas Island off the northern Australian coast, 434 primarily Afghan refugees were rescued from their sinking boat by a Norwegian freighter, the Tampa. The Australian Navy intercepted the Tampa, and

after a standoff lasting several days, relocated the refugees to New Zealand, Papua New Guinea (PNG), and the Pacific island nation of Nauru. In October 2001, another Australian patrol ship picked up 216 refugees, mainly Iraqis, from Ashmore Reef, an Australian island, and deposited them on Manus, an island belonging to PNG. These two incidents represent the “Pacific Solution,” an initiative of the recently re-elected conservative government of Prime Minister John Howard, whereby refugees, including those who are asylum seekers, are either removed from Australian territory or prevented from reaching Australia. In return for agreeing to take the refugees for processing, Australia has committed to paying PNG and Nauru millions of Australian dollars. Since the Tampa incident, Australia has relocated more than 1,500 refugees in this manner.



Hunger strikers sheltering under bedding around the internal perimeter fence of the Main Compound.

Credit: Australian Human Rights and Equal Opportunity Commission

## Australian Legislative Amendments

On September 26, 2001, Australia passed several amendments to its Migration Act 1958, which further curtail

refugee rights and seek to deter continued refugee migration to Australia. The Migration Amendment (Excision from Migration Zone) Act 2001 provides that some of Australia’s outlying islands do not constitute part of Australia for the purposes of migration. The result is that refugees who land on these islands are not allowed to submit visa applications, including requests for asylum. Refugees’ only chance for remaining on Australian territory relies upon the discretionary power of the immigration minister, whose decision is not reviewable.

Although the amendment includes several provisions designed to protect refugees, including a requirement that the relocation destinations have “effective” asylum procedures in place, there are no requirements for what those procedures should be, nor any means to evaluate whether the procedures are met. Moreover, Nauru is not a signatory to the Refugee Convention, and Papua New Guinea has made numerous significant reservations to the Convention. It is unclear where the refugees will go once their claims have been processed, as Australia has committed to taking no more than its “fair share” of those determined to be refugees, and neither Nauru nor PNG has indicated that it will continue to host them. Because there are no guarantees that people relocated to Nauru and PNG will be settled, even if they are legitimately found to be refugees, the “Pacific Solution” places them in jeopardy of being returned or sent to countries where they may face persecution. Thus, by creating a territorial fiction that exempts parts of Australia from

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Australian migration laws, Australia is in danger of violating the preemptory norm of *nonrefoulement*—or non-return—of refugees to countries where they may be subject to persecution. This prohibition of return is enshrined in Article 33 of the Refugee Convention.

A related amendment is the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, which requires that asylum seekers have not resided “for a continuous period of at least 7 days, in a country of which the applicant could have sought and obtained effective protection....” Many refugees come to Australia by boat, and they are often transferred from one boat to another, particularly in Indonesia, where they may stay several days. The effect of this amendment is to prevent those refugees who stop for more than seven days from continuing on to Australia. UNHCR guidelines, however, specify that Article 31(1) of the Refugee Convention, which stipulates that governments shall not punish refugees on the basis of illegal entry into the country, should be understood to include persons who have transited through an intermediate country without applying for asylum there. The guidelines also note that no “strict time limit” should be applied to any part of the migration. These guidelines, although not binding on Australia, make it clear that this amendment is in violation of the intended meaning of Article 31(1) of the Refugee Convention.

#### *Definition of Refugees and Judicial Review*

In addition to the two amendments above, the government simultaneously passed several other amendments of importance to refugees. The Migration Legislation Amendment Act (No. 6) 2001 (MLA No. 6) to the Migration Act 1958, adds three requirements that must be met in order for an individual to be recognized by the Australian government as a refugee. The amendment may violate the intent of the Refugee Convention in several ways, including by narrowing the definition of what constitutes persecution. For example, in addition to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” the legislation requires that the reason for persecution must also be “the essential and significant reason . . . for the persecution.” The Australian government has not made clear what criteria would satisfy the additional “essential and significant” elements, nor has it indicated why they are necessary. The second requirement of the amendment is that “the persecution involves serious harm to the person.” The third requirement is that “the persecution involves systematic and discriminatory conduct.” These three requirements will add to the evidentiary burden refugee and asylum applicants face in Australia. Human rights organizations such as Human Rights Watch and the U.S. Committee for Refugees argue that this narrow definition of “refugee” brings Australia out of compliance with its treaty obligations.

The Australian government also passed legislation limiting the availability of judicial review in several areas. The Border Protection Legislation Amendment Act 1999 eliminates legal challenges to forced removal from excised offshore places. The Migration Legislation Amendment (Judicial Review) Act 2001 eliminates judicial review of asylum determinations made by government agencies that process asylum applications. Decisions of the Department of Immigration and Multicultural Affairs (DIMA), the government agency responsible for reviewing applications for asylum, can be appealed to the Refugee Review Tribunal or the Administrative Appeals Tribunal, depending on the status of the asylum applicant. The immigration minister may intervene on a discretionary basis if either of these bodies denies the appeal. Before the passage of this amendment, administrative decisions were reviewable by Australian courts. The increasing number of refugees making these appeals created a significant burden on the courts. Article 16(2) of the

Refugee Convention provides that refugees should have the same access to courts as the state party provides to nationals. Substituting judicial review of questions of law with ministerial discretion represents a deviation from Australia’s obligation under Article 16(2) of the Refugee Convention.

Other amendments affecting judicial review include the Migration Legislation Amendment Act

(No. 1) 2001, which prevents class actions, raises requirements for standing, and reduces time limits for filing appeals. Viewed together, the judicial amendments, although arguably designed to make the process more efficient, may make determination proceedings much more difficult for refugees.

#### **Mandatory Detention**

Since 1994, Australia has enforced mandatory detention of refugees arriving illegally in Australia, including children, whether accompanied by parents, or not. Australia allows a total of twelve thousand refugees per year and has a bifurcated policy for refugees applying for asylum depending on where the application is filed. “Offshore” applicants are people who apply for refugee status while they are overseas. Once granted asylum, these people are eligible for Australian citizenship and other benefits. “Onshore” applicants are those who apply for asylum only once they arrive in Australia. Those “onshore” applicants arriving with invalid travel documents, or no documents at all, are deemed “unlawful non-citizens” under Australia’s Migration Act 1958. As such, “onshore” applicants face indefinite detention while their applications are reviewed and, if necessary, appealed. Even if granted asylum, these applicants receive only a temporary protection visa, which is valid for three years. Unlike “offshore” applicants, “onshore” applicants are generally ineligible for permanent residence or citizenship and are not provided with access to education or the right to leave and return to Australia. The effect of the

**Refugee protests against these conditions have included hunger strikes, setting fire to buildings, swallowing poisonous substances, and breaking windows. Refugees, including children, have sewed their lips shut in protest, cut themselves, and threatened to otherwise harm or even kill themselves.**

Migration Amendment (Excision from Migration Zone) Act 2001 is that for refugees to be detained and processed in Australia, they either must arrive by air or, if by boat, they must avoid Australian navy patrols and set foot on the continent, rather than any of the excised outlying islands.

Australia's mandatory detention policy and recent legal amendments violate Article 31(2) of the Refugee Convention. Article 31(2) provides that states parties may impose such restrictions on refugee movement only as "necessary." The UNHCR has stated that, in relation to the necessary restrictions in Article 31(2), detention should only be resorted to for the following reasons: (1) to verify identity; (2) to establish elements of a refugee status or asylum claim; (3) to deal with cases where asylum seekers have destroyed or falsified documents; or (4) to protect national security or public order. The UN Commission on Human Rights has determined that a "maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length."

Philip Ruddock, Australia's Minister for Immigration and Multicultural and Indigenous Affairs has invoked several of these bases in an attempt to justify Australia's policy. Ruddock claims, for example, that it may take several months to verify identity, especially in instances where documents have been falsified or destroyed. Although Australia may, in theory, detain asylum applicants on the basis of verifying identity, Ruddock admits that the average processing time is eighteen weeks. Reports indicate, however, that some refugees and asylum applicants have been held in detention for more than a year.

Perhaps in justification of why refugees should continue to be detained after their identity has been verified, Ruddock has also invoked the specter of national security by warning of a flood of illegal immigrants disappearing into the country if they are not detained. An Associated Press report indicated that Prime Minister Howard stated that conditions at detention facilities, such as Woomera, a former missile base in a remote area of the state of South Australia, are intentionally harsh to deter other refugees from coming to Australia. The UNHCR guidelines, however, warn that national security concerns should be invoked only "where there is evidence to show that the asylum seeker has criminal antecedents" and cautions against using detention "as part of a policy to deter future asylum-seekers." Criminal records have not been invoked by Australia in relation to national security concerns, and even if they had been, they would only justify continued detention of those individuals who had criminal records, and not of refugees as a whole.

Australia detains asylum seekers through the entire asylum application process, including any appeals. UNHCR guidelines on detention state that detention for the purpose of establishing the elements of an asylum claim should be limited to no more than a "preliminary interview to identify the basis of the asylum claim." Australia has therefore failed to successfully invoke any of the four UNHCR approved bases for detention.

The UNHCR recommends several alternatives to detention, including instituting reporting or residency require-



Credit: Australian Human Rights and Equal Opportunity Commission

Interior of accommodation available in the Main Compound to sleep up to four family members.

ments and release on bail. Ruddock rejects these alternatives with hyperbole, warning of "130,000 failed asylum seekers [not subject to detention who] have vanished into the British community. Unofficial estimates put the figure at twice that level." Yet the government's own calculations show that approximately eighty percent of illegal immigrants arriving in Australia by boat receive refugee status. Finally, in cases of mandatory detention, the UNHCR recommends that the detention be subject to automatic review by an independent judicial or administrative body. Detention is not subject to review in Australia.

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

Several provisions of the CRC are applicable to Australia's detention of child refugees and asylum seekers. Two important standards enshrined by the CRC are that decisions impacting children be made in the child's best interest and that these decisions should further the development of the child. Detention of children (particularly those without parents) is not in their best interests, as articulated in Article 3. Additionally, it is difficult to see how detention furthers the development of a child, as called for by Article 6(2). Moreover, the UNHCR notes that child asylum seekers should not as a general principle be detained. The Australian government has not attempted to justify its policy in reference to these two principles.

Article 37(b) provides that children must not be arbitrarily deprived of their freedom, and detention "shall be used only as a measure of last resort and for the shortest appropriate period of time." Although it is not clear what the "shortest appropriate period of time" is, nine children have been detained at the Woomera detention facility for more than a year. Furthermore, Australia's policy of mandatory detention may be arbitrary within the meaning of Article 37. The UN Human Rights Committee has indicated that factors to be considered when defining arbitrary include whether the detention is reasonable under the circumstances and the length of the detention. Given alternatives to detention recommended by the UN and the failure of

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Australia to cite any compelling reason for the lengthy detention of children, especially unaccompanied children, its mandatory detention should be considered arbitrary.

Article 2 requires states parties to “respect and ensure” rights set forth in the CRC without discrimination based on the child’s status. The Human Rights and Equal Opportunity Commission (HREOC) is an Australian government body that oversees Australia’s compliance with, *inter alia*, the CRC. The HREOC has determined that Article 2 is meant to protect against discrimination based on the child’s immigration status. Australia may be in violation of Article 2 in two ways: first, “offshore” asylum applicants are not detained although “onshore” applicants are; second, “onshore” applicants are only eligible for temporary protection visas, although “offshore” applicants may apply for citizenship. The HREOC has stated that the different immigration status of these two categories may translate into discriminatory treatment within the meaning of Article 2.

### Detention Conditions

There are six detention facilities around Australia, which hold approximately three to four thousand detainees at any given time. Conditions at these facilities have been widely criticized, particularly as they apply to children. Refugees have protested detention conditions in several facilities, perhaps nowhere more strikingly than in Woomera. Accommodating up to 1,700 people, Woomera has only 40 showers and 40 toilets. In summer, temperatures routinely exceed 100 degrees, and have been known to reach over 120 degrees. Detainees have reported waiting in line outside for two to three hours for food. Visits by relatives, the media, NGOs, attorneys, and others, are generally prohibited.

Refugee protests against these conditions have included hunger strikes, setting fire to buildings, swallowing poisonous substances, and breaking windows. Refugees, including children, have sewed their lips shut in protest, cut themselves, and threatened to otherwise harm or even kill themselves.

As of February 2002, there were approximately 750 refugees at the Woomera facility. In November 2001, there were 582 children in detention around Australia. An estimated 331 of the Woomera refugees are children. Of those 331, 58 are without either parent. Human Rights Watch has called for the immediate release of these children to foster care. The government has placed some unaccompanied children in foster care, but on an ad hoc, discretionary basis.

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

Detention conditions of child asylum applicants violate several provisions of the CRC. As part of a yearlong National Inquiry into Children in Immigration Detention, the HREOC has also questioned whether detention conditions at Woomera meet the requirements of several CRC articles.

Article 19 stipulates that states parties should “take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment.” Incidents of lip sewing, slashing, attempted suicide, and threats of self-inflicted injury at Woomera are evidence of both mental and physical violence and neglect.

Eyewitness statements and reports document an incident of a refugee hunger striker and his three-year-old son being locked up for twenty-three hours a day. The HREOC has found that Australia is in violation of its obligations under Article 19. Amnesty International and other NGOs have expressed concern that the detention conditions are particularly harmful to the mental state of children.

Article 28 calls for states parties to provide educational opportunities to all children within their jurisdiction, including compulsory and free primary education (Article 28(1)(a)) and optional secondary education (Article 28(1)(b)). The HREOC noted that only children under twelve at Woomera were given any schooling, and then only for a two hours a day, four days a week.

UNHCR guidelines stipulate that detained asylum seekers should have the opportunity “to make regular contact and receive visits from friends, relatives, religious, social and legal counsel,” as well as access to education or vocational training. Australia has failed to meet these guidelines by isolating refugees in facilities such as Woomera.

Finally, news reports indicate that detention conditions at the camps outside Australia where refugees are being relocated may be just as poor or even worse than the conditions at Australian camps. As many as fifteen refugees held on PNG, for example, reportedly suffer from malaria; other refugees may have typhoid and tuberculosis. These refugees have also engaged in protests and hunger strikes, but remain largely out of the public eye.

### Conclusion

The legality of Australia’s various amendments to its migration laws will be tested in Australian courts under existing domestic law. Regardless of the outcome of these challenges, however, these amendments contravene Australia’s duties under international law.

International bodies such as the UN Human Rights Committee, as well as numerous governments and nongovernmental organizations, have criticized Australia for both its detention facilities and detention policy. In addition, Australians have staged an increasing number of rallies to protest the government’s refugee policies. Australia’s opposition political party, after months of agreeing with the Howard government’s position on refugees, has argued that unaccompanied children and mothers and their children should be released from detention centers. The Howard government has responded by agreeing to let a Special Representative of the UN High Commissioner for Human Rights visit the Woomera center in May 2002. The government has also indicated that it plans to close Woomera eventually. The government has refused to relent on refugee policy generally, however, insisting that Australia has a “sovereign right to determine who is allowed entry.” Yet Australia’s sovereignty does not inherently conflict with its moral and legal obligation to protect refugees and asylum seekers. Only when Australia reforms its “Pacific Solution,” amends its policy of mandatory detention, and improves detention conditions will it be in compliance with international law. ☹

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# Minority Rights: The Failure of International Law to Protect the Roma

By Mary Ellen Tsekos\*

The Roma, also known as Gypsies, are a misunderstood population. Though few know much about the nomadic Roma minority, the history of the Roma minority is fraught with discrimination. The international community has only recently acknowledged the problem of state sanctioned discrimination against the Roma. Although there are international mechanisms established to protect minority groups, these mechanisms are often inadequate to address the problems faced by minority groups such as the Roma, which are excluded from current definitions of “minority.” This failure to protect minorities’ rights stems in large part from the international community’s inability to define the concept of “minority,” or make it more malleable to include such groups as the Roma.

The lack of a definition, however, reflects more than just a disagreement about semantics. The issue also is perceived as one of state sovereignty. States are often reluctant to grant rights to minority groups because they view such an act as a relinquishment of sovereignty. Thus, states often struggle to define minorities in ways that do not undermine their sovereignty. Some argue that minority group rights are unnecessary in a system that affords international protection to individuals. Individual rights, however, are not sufficient to protect a minority group’s culture, language, and religious beliefs. As such, discrimination against the Roma is unlikely to be eliminated without reconsidering the role minority groups play in the international system, and redefining the ways in which they can be protected.

## Background

Historians disagree about the origins of the Roma. Most believe, however, that the ancestors of the Roma migrated from northwest India at around 1000 AD. Contrary to the common misconception, the name Roma did not originate in the country of Romania. Rather, the name comes from the Sanskrit-related language spoken by the Roma in which the word “Rom” is the masculine singular noun meaning “man.” “Roma” is the plural for “Rom.”

The Roma first appeared in Western Europe in the 1400s. Early tolerance soon turned to suspicion, partly due to the Roma’s unique cultural practices. Romani culture, for example, is infused with both mistrust and fear of outsiders. This distrust stems in part from their semi-religious beliefs, which divide the world into the clean and the unclean. To the Roma, the perception of the rest of the world as unclean justifies treating outsiders differently. As such, the Roma consider those who are not Roma to be irredeemably unclean because they do not follow the Roma system. Thus, while stealing would never be accepted within the Roma group, stealing from outsiders is considered acceptable so long as what is stolen is needed for subsistence. These cultural dif-

ferences have placed the Roma at great odds with citizens of the countries to which they emigrate.

Centuries of abuse and discrimination have fostered among the Roma a need to protect themselves from the rest of the world. Thus, difficulties arise when outsiders try to bridge the cultural gap. The Roma use various forms of deception and pretense to protect themselves. For one, Romanes, the Roma language, has been effectively kept a non-literary language, in part because knowing a secret language affords the Roma a degree of protection. Further, local authorities often try to control the Roma by arresting their “King.” The “King of the Gypsies,” however, is an individual, usually of low standing, who places himself in the position of an ad hoc liaison between the Roma and the *gaje* (non-Roma). Thus, the arrest of the “King” harms the Roma very little. These deceptions have increased hostile feelings toward the Roma and make it nearly impossible for outsiders to understand their culture.

The Roma’s beliefs and practices have fostered great discrimination and prejudice against them. For centuries, the Roma have endured banishment, deportation, cultural destruction, enslavement, mutilation, and murder. The Roma were considered pariahs in virtually every

country in which they arrived, and many European states enacted discriminatory laws against them. In England, for example, during the reign of Elizabeth I, a law was passed that made it illegal to be a Roma. Under this law, one could be put to death for having been born to Roma parents. In Switzerland, the Roma were legally hunted as game.

In the 20th century, acceptance of the Roma has not changed significantly. During World War II, the Roma were among the first targets of Nazi policies; at least half a million to a million Roma were killed under the Nazi regime. From 1920 to 1972, the Swiss government enacted a policy of taking Romani children from their parents to be raised by non-Roma families. Until 1954, Sweden prohibited the Roma from entering the country, and banished the Roma population already there.

Roma populations in every country have lower life expectancies, lower literacy rates, and a lower standard of living than the general population, and often their living conditions are appalling. Although international mechanisms do exist for the protection of minority rights, the problems of the Roma are often not addressed by these mechanisms.

## The Definition of Minorities in International Law

Existing international mechanisms are inadequate to protect the rights of the Roma as a minority group. The issue is partly one of definition. Currently, there are no universally accepted definitions within international law for the

**The Roma’s beliefs and practices have fostered great discrimination and prejudice against them. For centuries, the Roma have endured banishment, deportation, cultural destruction, enslavement, mutilation, and murder.**

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terms “people,” “nation,” or “minority,” though numerous attempts have been made to define these terms. The current vagueness of the definitions means that the Roma are denied minority status, and as such, states often can ignore the problems of the Roma.

A variety of international documents have attempted to define the concept of a minority. In 1966, the International Covenant on Civil and Political Rights (ICCPR) included Article 27, which relates to “persons belonging to [ethnic, religious or linguistic] minorities,” but did not define the term. Special Rapporteur Francesco Capotorti was assigned the task of preparing a study pursuant to Article 27 of the ICCPR. In this study, Capotorti defined a “minority” as “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”

Other recent international human rights declarations have used the term “national minorities,” but have failed to define it. The term “national minority,” however, generally has been used to identify minority groups who fall into one of two groups: (1) minority groups who are nationals of one state but have ethnic ties to another; or (2) minority groups who reside on the territory of a state, are citizens of that state, and maintain long standing and lasting ties to the state.

The Framework Convention for the Protection of National Minorities (Framework Convention), which was adopted by thirty-nine European states in 1994, is the first legally binding multilateral instrument devoted exclusively to the protection of minorities. Despite the fact that the Framework Convention is legally binding, it fails to provide a conclusive definition of minority. The authors of the Framework Convention, like those of other international documents, used the term “national minority,” but left it undefined due to an inability to reach a consensus on the definition.

Other terms, such as “people” or “nation,” also are vaguely defined in international agreements. The ICCPR declares that “all people have the right of self-determination,” but leaves both “people” and “self-determination” undefined. In general, “people” are understood to include colonies of foreign powers. Documents that refer to a “nation” generally link the term to the concept of “nationalism,” which tends to be associated with ties to land.

While the lack of definition of the terms “minority,” “people,” and “nation” pose problems to numerous minority groups, these definitions are particularly problematic for the Roma. Current definitions remain limited in scope and apply only to minorities who are either nationals of a particular state, or those who are colonized peoples. Neither of these definitions extends minority status to the Roma. The Roma were not a colonized people, they do not have a homeland, and they do not bear ties to any currently existing state. The Roma also are not citizens of any given state, in part because of their nomadic way of life, which developed



Credit: Greek Helsinki Monitor

A Roma family in Greece.

in response to centuries of fleeing persecution. Instead, the Roma have ethnic and linguistic ties to other groups of Roma that reside in other countries.

Groups of Roma that do remain in a state for an extended period still may be refused minority status. For one, international definitions of the term “minority” are so loose that states can choose to interpret them in a variety of ways. For example, while it is clear that the authors of the Framework Convention intended the protections afforded “national minorities” to include the Roma, the German government has refused to include them. According to the German government, “national minorities” are defined as those “ethnic groups whose members are German nationals living in well-defined areas of settlement for a long period of time.” The Roma, however, do not live in a discrete area within Germany, but instead are spread across the country. Germany’s refusal to recognize the Roma as an ethnic group, then, is based on its interpretation of the definition of minorities as requiring that minority groups live in settlement areas.

### Minorities as Actors in the International System

The international community’s inability to define minority status is more than merely a problem of semantics. International law, which was founded on a notion that states are the primary players in the international system, is structured around the concept of the sovereign state as the most effective organizing framework for law and order. Granting international rights to entities other than sovereign states is a modern concept. Modern history has, however, been marked by abhorrent abuses committed by states against their own citizens, and thus it has become necessary to allow individuals to have some personal redress at an international level. The modern international human rights framework has begun to afford individuals a small degree of recognition as independent actors within the international system. For example, states are bound by numerous international conventions guaranteeing individuals certain rights, and pursuant to these conventions, individuals may now

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bring claims independently to the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights when states violate the rights guaranteed within these conventions.

This minimal recognition of the individual as an international actor has not expanded sufficiently to effectively include minority groups as actors. The human rights system in Europe serves as a key example of the problem. Europe's primary human rights instrument is the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). This document obliges states to guarantee the protection of human rights to all persons within their jurisdiction. The rights outlined in the European Convention are similar to those included in the Universal Declaration of Human Rights and other human rights instruments. Significantly, however, the document guarantees all those rights to individuals. No rights are granted to groups. Furthermore, while an individual's right to take part in cultural life is guaranteed, there is no obligation that a state party must offer protection to a group in preserving its culture.

The European Convention also established the European Court of Human Rights (ECHR) and granted it the authority to hear cases from individuals. Notably, the Convention continues to require that all domestic remedies be exhausted before redress is sought at the ECHR. This is particularly problematic for minority groups such as the Roma, who often are not recognized as a minority group by the states in which they reside. If such unrecognized minority groups are not granted minority status, they will lack the requisite standing to bring a claim against the state based on discrimination, and thus will be unable to satisfy the exhaustion of domestic remedies requirement set by the European Convention.

Recognizing the inherent problems of the European Convention in protecting minority rights, the Council of Europe adopted the Framework Convention in 1994. Although the Framework Convention focuses considerable attention on the rights of minority groups, it fails to provide minority groups with effective international redress for their grievances, and perpetuates some of the obstacles currently facing unrecognized minority groups. Among its problems, the only mechanism for the implementation of the goals set out in the Framework Convention is the establishment of a committee to review reports sent in by states on their progress. There are no mechanisms in the Framework Convention to adjudicate individual or group complaints.

Thus, in order for discrimination against a minority group to be addressed under the Framework Convention, the discriminating state must first confer minority group status on the group seeking redress for discrimination, and then must recognize that the existing domestic laws are in fact discriminatory. The Framework Convention's current implementation mechanism is ineffective because it ignores

the fact that states can easily refuse to acknowledge or confer minority status on certain groups, such as the Roma, as has been demonstrated in the case of the Roma in Germany. Furthermore, the implementation mechanism fails to provide redress if the reporting state has refused to acknowledge that discrimination in fact exists.

While monitoring a state's progress in implementing the goals of the Framework Convention is important, it is not the most effective way for a minority group to improve their conditions. It is important for minority groups to have the ability to seek redress at an international level, not only to deal with discrimination against their individual members, but also to deal with discrimination that affects the group as a whole.

### Collective Rights of Minorities in International Law

Some might argue that the international human rights regime, which is increasingly granting individuals standing as actors within the international system, is sufficient to protect members of a minority group against discrimination and abuse. This approach, however, ignores the necessity of protecting group identity, and disregards the fact that the rights to develop a group's culture, religion, language, traditions, and cultural heritage are fundamental in protecting their human rights.

The 1935 advisory opinion of the Permanent Court of International Justice (Court) concerning minority schools in Albania

highlights the importance of fundamental group rights, and conveys the Court's opinion that protection of individual rights alone is not sufficient to protect minorities. In this case, the Albanian Constitution was amended to abolish all private schools in 1933. The Albanian government asserted that this amendment was non-discriminatory since it applied equally to all private schools. In effect, however, the amendment disproportionately discriminated against the minority Greeks since the group relied heavily on its private school system to protect its identity, faith, and culture. The Court found that the abolition of the private school system denied the Greeks equal treatment as a culture, and that without the ability to teach their children, the Greek minority's culture would slowly be eradicated.

The *Minority Schools in Albania* case is analogous to the problems faced by the Roma population today in protecting their group culture. The current system continues to emphasize protection of individual rights, which includes the right to practice one's own cultural beliefs, but fails to include state protection of group practices. Thus, under the current individual rights-based system, the Roma are not allowed to have a separate legal system, nor are they guaranteed that their children would learn Romanes in school. The Roma culture, language, and traditions exist within groups, and a failure to protect their group rights essentially undermines the rights of the Romani individual to practice his or her beliefs.

**Although the Framework Convention focuses considerable attention on the rights of minority groups, it fails to provide minority groups with effective international redress for their grievances, and perpetuates some of the obstacles currently facing unrecognized minority groups.**

Despite the *Minority Schools in Albania* decision, a number of international conventions, including the ICCPR and, more recently, the European Framework Convention, fail to afford special protection to minority groups. Instead, these international instruments continue to recognize only the rights of individuals within minority groups the ability to maintain and develop their culture.

### Disentangling Sovereignty

In order for the Roma to be able to flourish as a group, they must be granted certain group rights. Granting them these rights, however, will mean that states will have to give up some measure of sovereignty over the Roma. Thus, solving the problems faced by the Roma requires rethinking the notion of sovereignty. One proposed alternative is to disentangle the notion of sovereignty, or group autonomy, from the concept of land.

The notion of disentangling sovereignty and land is not new. Gidon Gottlieb, author of *Nation Against State*, has referred to this concept “national autonomy,” and Allen Ross, author of *Internal Self-Determination*, has called it “internal self-determination.” Their ideas are based on the belief that dividing sovereignty into power over people and power over land could solve many ethnic conflicts. In this way, minority groups could be granted status as a “nation” without destroying the physical jurisdiction of the state. Although the concept may sound radical, it is not novel. In the United States, for example, Native American tribes retain their own legal traditions and their own schools, while the U.S. government retains ultimate jurisdiction. Diplomatic and consular immunities show the same type of division, and allow the state to retain territorial control.

Fred Bertram, in his 1997 article “The Particular Problems of the Roma,” published in the *UC Davis Journal of International Law and Policy*, discusses this proposed solution in depth, and examines the probable effects on the Roma. Granting some form of national autonomy to the Roma, Bertram argues, would allow them the right to live according to their own legal, social, and cultural system without threatening the state’s sovereignty over land. Bertram’s analysis, however, continues to focus on the authority of the individual states to grant minority groups this autonomy, acknowledging the unlikelihood that states would relinquish their sovereign control over people within their territory.

One argument is that the international community as a whole should attempt to change structurally in order to recognize a level of self-determination for minority groups. Although the international system has already acknowledged the rights of minority groups to promote their way of life, minority groups still require an effective outlet for dealing with their problems. If international law could disentangle the notion of sovereignty from control over land, minority groups could acquire the autonomy necessary to protect their rights within the international system.

### Conclusion

It is clear that the international system, with the sovereign state as its main actor, is not going to change quickly. The

international system, however, increasingly has begun to operate outside the realm of state control, and the panoply of players in the international system has expanded significantly. The development of international legal frameworks that allow individuals to have a personal voice in the international system, as well as the creation of supra-national associations that are composed of entities that are not sovereign states, suggest an increasing role for non-state actors in the international system.

Fred Bertram argues that the problems of the Roma are particularly unique because they have no homeland, face barriers to recognition and implementation of their rights, and because modern human rights instruments are tangential to their needs and problems. While it is true that the Roma are severely restricted in asserting their rights, their problems are not entirely unique. In today’s increasingly global world, certain groups are beginning to act as subjects in the international system. The internationalization of corporate organizations, finance and trade, environmental and security problems, and social movements are slowly eroding the notion of the sovereign state. Nonetheless, the international system continues to operate within a framework in which states are the only legitimate international actors. The problems of the Roma, among other groups, demonstrate the need for a new conception of what constitutes a legitimate international actor, and the need to redefine this notion to include minority groups as actors. 🌐

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

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## Part III: International Criminal Tribunal for the former Yugoslavia (ICTY)

by Cecile E.M. Meijer\*

### **Kvočka et al.**

On November 2, 2001, the ICTY Trial Chamber delivered its Judgment in the *Kvočka et al.* case (*Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlaco Radić, Zoran Žigić, and Dragoljub Prcać*, Case No. IT-98-30/1-T). The amended indictment had charged the accused with seventeen counts of crimes against humanity and violations of the laws or customs of war. Amongst others, the charges included persecutions on political, racial or religious grounds by way of murder; torture and beating; sexual assault and rape; harassment, humiliation and psychological abuse; and confinement in inhumane conditions. Žigić was the only accused in this case to be charged with crimes in locations other than the Omarska camp (*i.e.*, Keraterm and Trnopolje camps). The indictment charged Žigić with individual responsibility under Article 7(1) of the ICTY Statute. The others accused were charged with individual and superior responsibility under Articles 7(1) and 7(3). The Trial Chamber concluded that the evidence showed beyond a reasonable doubt that the Omarska camp functioned as a joint criminal enterprise, and found the accused guilty of persecution as a crime against humanity, and murder, torture and cruel treatment (Žigić only) as violations of the laws or customs of war under Article 7(1). It sentenced the accused to prison terms ranging between five and twenty-five years. All received credit for time served.

The *Kvočka et al.* case concentrated largely on atrocities committed in the Omarska camp during the summer of 1992, and the role of the accused in the camp's operations. The Omarska camp was a so-called "collection centre" in the north-east of Bosnia-Herzegovina, where thousands of detainees (mostly Muslims and Croats) were interrogated purportedly in an attempt to identify who was a suspect of and/or collaborator with the non-Serb opposition. The court heard evidence about the deplorable conditions in the camp, where food and water were poor in quality and quantity, and where hygienic and living conditions were grossly inadequate. The court found that the interrogations were conducted in a cruel and inhumane fashion, the detainees were frequently subjected to mental and physical violence throughout the camp, and the few female detainees were subjected to various forms of sexual assault, including rape. Both the abusive camp conditions and the acts of extreme physical mistreatment often resulted in the death of detainees. The Trial Chamber found that "the non-Serbs detained . . . were subjected to a series of atrocities and that the inhuman conditions were imposed as a means of degrading and subjugating them. Extreme brutality was systematic in the camp and utilized as a tool to terrorize the Muslims, Croats, and the other non-Serbs imprisoned therein."

After finding all of the accused guilty of persecution, the court applied the cumulative convictions test using the two-prong test set forth in the *Čelebići* Appeals Chamber

judgement, and subsequently dismissed the murder and other charges covered by the persecution conviction when based on the same underlying conduct.

The Trial Chamber elaborated extensively on the theories of criminal responsibility under Article 7(1) of the ICTY Statute, examining in particular the "joint criminal enterprise" theory, which previous jurisprudence had found to be included implicitly in Article 7(1). The Chamber restated the three elements identified in the *Tadić* Appeals Chamber judgement that require proof in order for joint criminal enterprise liability to arise: (1) a plurality of persons; (2) the existence of a common plan which amounts to or involves the commission of a crime provided for in the Statute; and (3) participation of the accused in the execution of the common plan. Given the facts of the case, the court limited the scope of its analysis primarily to one particular situation of joint criminal enterprise liability, namely where the accused have personal knowledge of a system of ill-treatment and demonstrate an intent to further or otherwise participate in the system of abuse. The court examined in depth the post World War II "concentration camp" cases.

In assessing the necessary *mens rea* (intent) for different modes of participation in a joint criminal enterprise (co-perpetration and aiding or abetting), the Trial Chamber, having examined relevant post World War II jurisprudence, opined that "a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise; an aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise."

The Trial Chamber examined what level of participation is required for lower level persons to be criminally liable under the joint criminal enterprise theory, especially those who did not order or organize the camps, nor orchestrate their operations. Again, the court analyzed relevant post World War II jurisprudence and concluded that it shows that "when a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation." The person's acts or omissions must significantly assist or facilitate the commission of the crimes, which means that the act or omission "makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or

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without disruption.” This level of participation must be determined on a case by case basis and depends on various factors. Furthermore, crimes that are committed to further the joint criminal enterprise and that are natural and foreseeable consequences of the enterprise can also be attributed to a person (aider, abettor, and co-perpetrator) who knowingly participates in the enterprise in a significant way.

Next, the Trial Chamber carefully analyzed the criminal responsibility of each of the accused in the joint criminal enterprise. Using the above legal framework, the Chamber addressed for each accused his personal background; arrival and duration in Omarska camp; duties and position in the camp; knowledge of camp conditions and abusive treatment during his time in the camp; whether he physically perpetrated abuses; and whether his participation was significant enough to incur criminal responsibility. In addition, the court examined issues that were more specific to a particular accused.

With respect to Kvočka, a Serb police officer, the court found that he served in the Omarska camp in a position which the court found to be the functional equivalent of a deputy commander with some degree of authority over the guards. According to the evidence, he had extensive knowledge of the camp’s abusive practices and conditions, but did little to prevent or ease them. He was also aware of serious crimes being committed in the camp and sometimes witnessed them. Nonetheless, Kvočka performed his duties in the camp for at least seventeen days in a skillful and efficient manner, without complaint. As deputy of the camp commander, he made a significant contribution to the camp’s administration and functioning. Finally, the court found beyond a reasonable doubt that Kvočka “was aware of the context of persecution and ethnic violence prevalent in the camp and he knew that his work in the camp facilitated the commission of crimes.” Based on the above findings, the Trial Chamber concluded that Kvočka was a co-perpetrator of the joint criminal enterprise that was the Omarska camp. The Trial Chamber convicted Kvočka under Article 7(1) of the Statute for persecution as a crime against humanity and for murder and torture as violations of the laws or customs of war. He was sentenced to seven years’ imprisonment.

The court followed largely similar reasoning with regard to Prać, a pensioner who was mobilized in April 1992 and worked for about twenty-two days as an administrative aid of the Omarska camp commander, and Kos, a guard shift leader who was involved in beatings and extortion of detainees. Like Kvočka, both were found guilty under Article 7(1) of co-perpetration in a joint criminal enterprise and convicted of persecution as a crime against humanity, as well as murder and torture as violations of the laws or customs of war. Prać received a prison sentence of five years, while Kos received six years.

Radić was also a guard shift leader and worked during the entire three months that the Omarska camp was in operation. He exerted substantial authority over certain guards and his shift was notorious for the camp’s most brutal cases of physical and mental abuse or mistreatment. Radić knew of these crimes and their discriminatory purpose, and frequently was exposed directly to them. The Trial Chamber found that he never used his authority to stop the crimes committed by the guards in his shift, and that his failure to do so in fact encouraged the guards to continue,

as Radić seemed to condone their actions. In addition, Radić personally committed or threatened to commit the crime of rape and other forms of sexual violence against non-Serb women. The court qualified his contribution to the camp’s maintenance and functioning as substantial, concluding that he “willingly and intentionally contributed to the furtherance of the joint criminal enterprise.” Radić was found guilty, under Article 7(1), as a co-perpetrator of persecution, murder and torture including rape and other forms of sexual violence, all of which were committed as part of the joint criminal enterprise operative in the Omarska camp. He was sentenced to twenty years in prison.

Lastly, the court considered the alleged crimes perpetrated by Žigić, a taxi driver who frequently went to the Omarska camp to abuse detainees. The Trial Chamber found that Žigić personally and directly committed crimes on discriminatory grounds, that his participation in the joint criminal enterprise was significant, and that he knew of the persecutory character of the crimes. This made him a co-perpetrator in the joint criminal enterprise at Omarska. In relation to the Omarska atrocities, Žigić was found guilty of persecution, murder, and torture. Žigić was also charged with and convicted of crimes committed in the Keraterm and Trnopolje camps, namely persecution as a crime against humanity, as well as murder, torture, and cruel treatment as violations of the laws or customs of war. The court sentenced Žigić to twenty-five years’ imprisonment.

## Part IV — International Criminal Tribunal for Rwanda (ICTR)

### General

During 2001, several institutional changes took place at the ICTR. On March 1, 2001, Mr. Adama Dieng of Senegal was sworn in as the new Registrar of the ICTR. Pursuant to UN Security Council Resolution 1329 of November 30, 2000, Judge Winston Churchill Matanzima Maqutu of Lesotho and Judge Arlette Ramaroson of Madagascar were appointed as the two additional judges to the Arusha-based ICTR. Furthermore, two ICTR judges assumed their responsibilities in the Hague as new members of the Appeals Chamber that is common to both the ICTR and ICTY: Judge Mehmet Güney from Turkey and Judge Asoka de Zoysa Gunawardana of Sri Lanka. Judge Andréia Vaz of Senegal replaced the late Judge Laity Kama (also of Senegal) who died in May 2001. In the summer of 2001, ICTR President Pillay requested the UN to appoint *ad litem* judges, “to enable the timely completion of the mandate of the Tribunal.”

During 2001, the ICTR issued several judgements on the merits. The Appeals Chamber rendered judgements in the *Akayesu*, *Kayishema and Ruzindana*, and *Musema* cases. Of these three cases, only the *Akayesu* appeals judgement is reviewed here. The ICTR Trial Chamber delivered one judgement on the merits: the *Bagilishema* case, the first ICTR acquittal on genocide charges.

### Appeals Chamber

#### *Akayesu*

On June 1, 2001, the Appeals Chamber rendered its Judgement in *The Prosecutor v. Jean-Paul Akayesu*, Case No.

ICTR-96-4-A. Akayesu was the “bourgmestre” (mayor) of Taba during the 1994 Rwandan genocide. The Trial Chamber had found Akayesu guilty of genocide, direct and public incitement to commit genocide and crimes against humanity, but not guilty of complicity in genocide, and of violations of Common Article 3 of the Geneva Conventions and Article 4(2) (e) of Additional Protocol II (judgment of September 2, 1998). The Trial Chamber had sentenced him to life imprisonment. Both Akayesu and the Prosecution appealed. The Appeals Chamber dismissed all of Akayesu’s challenges, thus affirming his convictions and sentence. On December 9, 2001, Akayesu was transferred to Mali to serve his prison term.

Akayesu’s grounds of appeal were largely of a procedural and evidentiary nature. For example, Akayesu claimed that he had been denied the right to be defended by counsel of his choice, and the right to competent counsel. Other appeals grounds addressed, *inter alia*, allegations that the tribunal was biased and partisan; improper amendment of the original indictment during trial; improper treatment of prior witness statements; out of court evidence; improper hearsay evidence; irregularities in the examination and cross-examination of witnesses; and sentencing. All of Akayesu’s grounds of appeal failed.

The grounds of appeal raised by the Prosecution addressed alleged errors of law by the Trial Chamber, which all fell outside the scope of Article 24 of the ICTR Statute. Article 24 requires that an appeal must pertain to an error of law which invalidates the decision or an error of fact which has occasioned a miscarriage of justice. The Prosecution acknowledged that its appeals grounds would have no bearing on the Trial Chamber’s judgement, but argued that they were nonetheless “important matters of general significance to the Tribunal’s jurisprudence.” The Appeals Chamber agreed and ruled that it has jurisdiction to determine such issues even if they are the only ones put forward by a party on appeal, provided the issues are “of interest to legal practice of the Tribunal and . . . have a nexus with the case at hand.” The Chamber found that the Prosecution’s grounds of appeal met both requirements. In his Dissenting Opinion, Judge Nieto-Navia disagreed with the Chamber’s majority on this point and expressed the view that Article 24 of the Statute should be given a strict interpretation.

In considering the Prosecution’s grounds of appeal, the Appeals Chamber made important pronouncements on three issues: (1) whether a “public agent or government representative test” applies to determine a person’s culpability for violations of Common Article 3 of the Geneva Conventions; (2) the scope of discriminatory intent in relation to crimes against humanity; and (3) whether instigation as articulated under Article 6(1) of the ICTR Statute must be direct and public. In its disposition, the Appeals Chamber sets out the relevant legal findings regarding these points of law raised by the Prosecution.

In order to answer the question whether the perpetrator of a Common Article 3 violation must be a public agent or government representative in order to incur individual criminal responsibility, the Appeals Chamber examined the ICTR Statute, and the text, object, and purpose of Common Article 3. The Chamber found that neither the ICTR Statute nor the text of Common Article 3 explicitly limits such responsibility to a particular group of individuals.

Seen in conjunction with the duty under Common Article 3 to afford minimum protection to victims, the Chamber opined that “it does not follow that the perpetrator of a violation of Article 3 must of necessity have a specific link” with a particular category of persons. Furthermore, although in most cases there may exist a nexus between the perpetrator of the violation of Common Article 3 and one particular party to the conflict, “such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute.”

The second issue concerned a contradiction in the Trial Chamber judgement where it had found that in case of murder and rape under Article 3 of the Statute, the perpetrator must have the discriminatory intent *vis-a-vis* the victim, while in case of extermination and torture “the *attack* must be on discriminatory grounds.” The Appeals Chamber opined that the discriminatory grounds in the chapeau of Article 3 are a “restriction of jurisdiction,” and that crimes against humanity “continue to be governed in the usual manner by customary international law, namely that discrimination is not a requirement for the various crimes against humanity, except where persecution is concerned.” The requirement remains, however, that the attack be against the civilian population on national, political, ethnic, racial, or religious grounds.

Finally, the court addressed whether instigation under Article 6(1) of the ICTR Statute must be direct and public. The Appeals Chamber rejected this proposition as being inconsistent with the plain and ordinary meaning of the provision. Although incitement to genocide contains an additional element requiring that the incitement be direct and public, such additional element does not exist for instigation under Article 6(1), according to the Chamber.

### Trial Chamber

#### *Bagilishema*

On June 7, 2001, the ICTR Trial Chamber delivered its Judgement in *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T. The amended indictment charged Bagilishema with seven counts of genocide, complicity in genocide, crimes against humanity and serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. He was charged with individual and superior responsibility under Articles 6(1) and 6(3) of the ICTR Statute. In a landmark decision, the Trial Chamber unanimously acquitted Bagilishema of three counts, including genocide. The Chamber’s majority found him also not guilty of the remaining four charges which included complicity in genocide, with Judge Mehmet Güney dissenting (Separate and Dissenting Opinion). Thus, Bagilishema was acquitted of all charges.

During the Rwanda genocide, Bagilishema was the “bourgmestre” (mayor) of Mabanza *commune*, which belonged to the Kibuye Prefecture headed by Prefect Clément Kayishema (Kayishema lost his appeal before the ICTR on June 1, 2001, and is currently serving a prison sentence for the remainder of his life for genocide). Following the downing of the plane of the Rwandan president on April 6, 1994, and the start of hostilities, people began to seek refuge at the *bureau communal* (communal office) in Mabanza. Due to security problems in Mabanza, on April 13, 1994, the refugees moved to two sites in Kibuye: the Stadium

and the Home St. Jean Complex (Complex). Thousands of refugees were detained in harsh conditions at the Kibuye Stadium, without food, water, or sanitation. A few days after their arrival, many of those held at the Stadium and the Complex were massacred.

The Trial Chamber did not hold Bagilishema directly responsible for the mistreatment of the refugees in the Stadium or for the massacres because the Prosecution had failed to prove beyond a reasonable doubt that he incurred responsibility. The Chamber also found unproven the Prosecution's allegation that in instructing the refugees to move to Kibuye, the accused "knew or had reason to know that attacks at these locations [were] imminent." Moreover, it found that the Prosecution had failed to show that Bagilishema "was notified or should have known about the inhumane conditions at the Stadium, or about the attack on the Complex, or about the imminent attack on the Stadium." Finally, the court found that the Prosecution had not demonstrated that the accused's failure to take sufficient follow-up actions (e.g., punishment) as "*bourgmestre*" amounted to acquiescence in the killings, constituting aiding and abetting. Judge Güney disagreed with these findings.

In the period April 13 to July 1994, killings continued to take place in Mabanza and the Prosecution charged Bagilishema with several individual instances. In each case, however, the Chamber found the accused not criminally responsible because the allegations had not been proven beyond a reasonable doubt.

Lastly, the amended indictment charged Bagilishema with crimes in relation to the establishment and operation of several roadblocks at which some people, in particular Bigirimana and Judith, had been killed. In addition to examining the individual and superior criminal liability of the accused in these cases under Article 6(1) and Article 6(3) (which both failed), the Trial Chamber analyzed whether Bagilishema was responsible because of gross negligence. The court described this form of liability as "a species of liability by omission" that would be available "if the Prosecution were to show that the Accused had been grossly negligent in his administration of one or more roadblocks under his control, such negligence causing the murder of Tutsi civilians (by roadblock staff)."

The Trial Chamber held that for liability on the basis of criminal negligence to arise in this case, the Prosecution not only had to prove Bagilishema's public duty in security matters, but also the following four cumulative elements: (1) "that one or more crimes were committed in connection with identified roadblocks;" (2) "that [Bagilishema] was responsible for the administration of those roadblocks because he was involved in their establishment, acquiesced to their continuing existence, or more generally because they came under his control as *bourgmestre*;" (3) "that measures, if any, taken by [Bagilishema] to detect and prevent crimes in connection with the stated roadblocks were clearly inadequate in the circumstances;" and (4) "that the crimes in question would have been detected or prevented had [Bagilishema] administered the roadblocks with reasonable diligence." The Chamber found that not all of these elements had been proven beyond a reasonable doubt; in particular, the Prosecution had failed to prove "the Accused's wanton disregard for high-risk activities at

roadblocks" and that "having established the Trafipro roadblock, the Accused neglected to regulate the conduct of those staffing it, thus causing the deaths of Bigirimana and Judith." Consequently, the court also declined to hold Bagilishema responsible on the basis of criminal negligence. The Prosecution has appealed this acquittal.

Judge Güney disagreed in his Separate and Dissenting Opinion on two points. In his view, there was sufficient evidence to hold Bagilishema responsible as an accomplice for the killings of thousands at Kibuye, and for the crimes committed against civilians at the Trafipro roadblock. 🌐

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## International Criminal Court Officially Established

On April 11, 2002, the International Criminal Court (ICC) officially was launched. The Rome Statute creating the ICC received more than the sixty ratifications required for its creation. At a UN ceremony on April 11, ten countries—Bosnia, Bulgaria, Cambodia, Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia—deposited their instruments of ratification, bringing to sixty-six the number of states that have ratified the Rome Statute. The United States boycotted the April 11 ceremony. Further, the Bush Administration has maintained that it will refuse to seek Senate ratification of the Rome Statute and has threatened to nullify the U.S. signature. The ICC will be the first permanent court to try individuals accused of war crimes, genocide, and crimes against humanity. Its historic creation is the culmination of four years of negotiations and ratification proceedings worldwide. The Court will be based at The Hague, and the Rome Statute will officially enter into force on July 1, 2002. For more information about the ICC, visit the Coalition for the ICC website at [www.iccnw.org](http://www.iccnw.org). 🌐

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# NEWS FROM THE INTER-AMERICAN SYSTEM

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by *Ismene Zarifis\**

## Inter-American Commission on Human Rights

### **Case 12.342: *Balkissoon Roodal* (Trinidad and Tobago)**

**Facts:** On November 8, 2000, the Inter-American Commission on Human Rights (Commission) received a petition against Trinidad and Tobago on behalf of Balkissoon Roodal, a death row inmate. The petition alleged violations of Article I (Right to life, liberty and personal security), Article II (Right to equality before the law), Article XVII (Right to recognition of juridical personality and civil rights), Article XVIII (Right to a fair trial), Article XXV (Right of protection from arbitrary arrest), and Article XXVI (Right to due process of law) of the American Declaration of the Rights and Duties of Man (Declaration). Roodal was arrested and charged with murder in August 1995. Roodal was convicted of murder in July 1999 and received the death sentence, which he unsuccessfully appealed before the Court of Appeal of Trinidad and Tobago. In November 2000, Roodal presented a Special Leave to Appeal as a Poor Person to the Judicial Committee of the Privy Council, which was dismissed. Roodal did not pursue a constitutional motion, because he lacks adequate financial means and access to legal aid. Roodal alleged his human rights were violated due to the mandatory nature of the death sentence; the government's depriving him of a fair trial due to the fact that the prosecution failed to disclose pertinent information to the defense regarding prior convictions of the prosecution's witnesses; the undue delay in his trial; cruel and unusual punishment; inhumane treatment in prison; and his lack of access to the courts.

Trinidad and Tobago denounced the American Convention on Human Rights (Convention) on May 26, 1998 in accordance with Article 78 of the Convention, which took effect on May 26, 1999. Petitioners claimed that although the government denounced the Convention, it remains obligated to respect the rights in the Declaration. The petitioners relied on Advisory Opinion OC-10/89 of the Inter-American Court of Human Rights (Court), which declared the rights in the Declaration as those enumerated in the OAS Charter, to which member state Trinidad and Tobago is bound.

The Commission requested precautionary measures to stay Roodal's execution until the Commission can investigate and decide the case, preserving the opportunity to provide remedies to Roodal in the event of a confirmed violation of the Convention or Declaration.

**Decision on Admissibility:** On October 10, 2001, the Commission declared the case admissible with respect to Articles I, II, XVII, XVIII, XXV, XXVI of the Declaration. The Commission also admitted the petition based on Article 1 (Obligation to Respect Rights), Article 2 (Domestic Legal Effects), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the Convention.

The denunciation of the Convention by Trinidad and

Tobago posed a new challenge for the Commission, because the Commission had not yet interpreted the Convention's application and legal effect on a denouncing state. In considering the admissibility of the case, the Commission acknowledged a member state's power to denounce the Convention, but considered that a denunciation does not relieve a state from its obligations under the Convention for violations committed before the effective date of denunciation. The Commission therefore stated it will maintain jurisdiction over violations of the Convention committed by Trinidad and Tobago before May 26, 1999. As a result, when the Commission considers the merits of the case, it may hold Trinidad and Tobago accountable under the Convention.

While some violations alleged in Roodal's petition occurred before May 26, 1999, others continued beyond this date. Under such circumstances, the Commission could potentially find violations under both the Convention and the Declaration in deciding the merits of the case. Pursuant to general principles of law, the Commission is permitted to apply the Convention even in cases in which parties do not cite violations of provisions of the Convention in their petitions. The Commission will proceed to investigate the facts and decide the case on the merits.

### **Terrorism and Human Rights**

On December 12, 2001, the Commission issued a resolution on terrorism and human rights, announcing its intention to publish a special report on the subject. The report will provide guidance to states regarding the implementation of anti-terrorist legislation and their duties to respect their international human rights obligations. The resolution reiterated the Commission's condemnation of unjustified attacks against civilians and recognized such attacks as crimes under international law. In particular, the Commission interpreted the September 11 attacks on the World Trade Center and the Pentagon as acts committed against all nations in the Americas. Although states have the right and duty to defend themselves from becoming targets of these international crimes, the Commission considers that states are obliged to respect their international human rights obligations and adopt domestic legislation in accordance with these obligations.

In its resolution, the Commission addressed the use of military courts for trying terrorists. According to the Convention, military courts may not try civilians, except in cases in which no civilian court exists or when trial by a civilian court is materially impossible. In the rare instances in which civilians may be tried by military courts, the Commission emphasized that minimum human rights standards apply, such as the requirement of non-discrimination between citizens and non-citizens, the presence of an impartial judge, the defendant's right to be assisted by counsel of his or her own choosing, and the defendant's right to access evidence offered against him or her with the opportunity to challenge it.

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### Executive Secretary Creates Human Rights Defenders Functional Unit

On December 7, 2001, the executive secretary of the Commission resolved to create the Human Rights Defenders Functional Unit, which will receive information on the situation of human rights defenders in the Americas, maintain contact with governmental and non-governmental organizations, and coordinate the activities of the Executive Secretariat of the Commission. The Unit is created pursuant to General Assembly Resolution AG/RES. 1818 (XXXI-0/01), which urges the Commission to pay special attention to the situation of human rights defenders in the Americas and requests that the Commission prepare a study on this subject. This initiative marks a significant development for the protection of individuals who risk their safety and lives to defend human rights.

### Inter-American Court of Human Rights

#### *Hilaire v. Trinidad and Tobago* (Preliminary Objections)

**Facts:** Haniff Hilaire was convicted on May 29, 1995, with two co-defendants, for the murder of Alexander Jordan. Hilaire and one of the co-defendants responded to a plea for help from Jordan's wife, who was mistreated by her husband. Hilaire and Baptiste intended only to injure Jordan, but Jordan died from the severe wounds inflicted by the defendants. Hilaire received the death sentence, which he appealed before the Court of Appeal of Trinidad and Tobago and before the Judicial Committee of the Privy Council in London. The appeals were dismissed. The Commission found violations of Article 2 (Domestic Legal Effects); Article 4 (Right to Life); Article 5.1, 5.2, and 5.6 (Right to Humane Treatment); Article 7.5 (Right to Personal Liberty), and Article 25 (Judicial Protection) of the Convention.

On May 25, 1999, the Commission submitted the *Hilaire* case to the Court. Trinidad and Tobago submitted a preliminary objection contesting the Court's compulsory jurisdiction in the case. The government of Trinidad and Tobago cited its reservation, stating that "Trinidad and Tobago recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights . . . only to such extent that recognition is consistent with the relevant sections of the Constitution of Trinidad and Tobago and provided that judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen."

**Decision:** The Inter-American Court dismissed the preliminary objection by Trinidad and Tobago as to the Court's lack of jurisdiction and resolved to continue to process the case. The Court made several legal arguments with respect to its decision regarding Trinidad and Tobago's purported reservation. Specifically, the Court held that when a state party accepts the contentious jurisdiction of the Court pursuant to Article 62(1) of the Convention, the state accepts the Court's right to settle any controversy relating to its jurisdiction. The Court maintained that if it were to give the state the discretionary power to determine which matters the Court could decide, the Court would not be able to fulfill its jurisdictional role. Further, citing Article 31(1) of the Vienna Convention on the Law of Treaties, the Court emphasized that a treaty must be interpreted in good faith according to its object and purpose. The Court considered that the vague scope of

Trinidad and Tobago's reservation made its instrument of acceptance incompatible with the object and purpose of the Convention. The Court additionally asserted that in light of Article 29(a) of the Convention, which provides that no provision shall be interpreted as permitting any state party, group, or person to interfere with or restrict the exercise of the rights recognized by the Convention, a state's acceptance of the Court's jurisdiction leads to the presumption that the state will subject itself to the compulsory jurisdiction of the Court. Finally, the Court stressed that because human rights treaties are "inspired by a set of higher common values," they are different from other treaties that establish reciprocal obligations between states. Because the object and purpose of the Convention as a human rights treaty is to protect the basic rights of individuals, the Court concluded that the purported reservation would hinder the effect of the Convention. In a separate opinion, Judge A. A. Cançado Trindade distinguished the Court as a human rights judicial body, which has a special duty to uphold fundamental human rights in the region and may construe reservations narrowly so as not to render null and void a state's acceptance of the Court's jurisdiction. ☉

*\* Ismene Zarifis is a J.D. candidate at the Washington College of Law and a staff writer for the Human Rights Brief.*



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#### **For more information, contact:**

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# 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.

## **Mental Health Juvenile Justice Act, S. 2198**

**Major Sponsor:** Sen. Paul D. Wellstone (D-MN)

**Status:** Read twice and referred to the Committee on the Judiciary on February 26, 2002.

**Substance:** This bill amends the Juvenile Justice and Delinquency Prevention Act of 1974 to direct the Administrator of the Office of Juvenile Justice and Delinquency Prevention to issue grants to train state juvenile justice system officers and employees regarding appropriate access to mental health and substance abuse treatment services for juveniles. The bill specifically directs the attorney general and the secretary of Health and Human Services to provide grants to partnerships between state and local or county juvenile justice agencies, and state and local mental health authorities, for programs that provide for appropriate diversion of juveniles from incarceration and for mental health screening and treatment. The bill also charges the secretary with issuing grants to monitor mental health and special education services to, and advocacy on behalf of, juveniles. To be eligible for funds under this bill, states must have in place, by January 1, 2003, a program of mental health screening and treatment for appropriate categories of offenders during periods of incarceration and supervision that is consistent with guidelines issued by the attorney general. The bill also amends the Public Health Service Act to direct the attorney general and the secretary of Health and Human Services to award competitive grants to eligible entities for programs that address the service needs of juveniles in general, and of juveniles with serious mental illnesses through diversion and treatment services. This would include the provision of services to juveniles on probation, on parole, or to those who have been discharged. Finally, the bill establishes a Federal Coordinating Council on Criminalization of Juveniles with Mental Disorders to study and coordinate the criminal and juvenile justice and mental health and substance abuse activities of the federal government, and to report to Congress on pro-

posed legislation to improve the treatment of mentally ill juveniles who come in contact with the juvenile justice system.

## **International Child Safety Improvement Act of 2002, S. 1920**

**Major Sponsor:** Sen. Bill Nelson (D-FL)

**Status:** Read twice and referred to the Committee on the Judiciary on February 7, 2002.

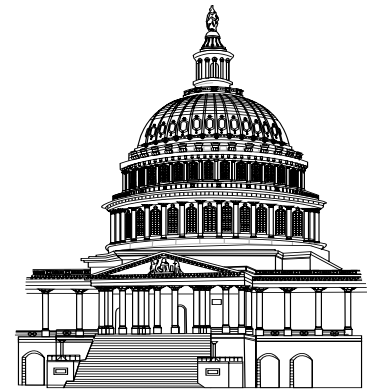
**Substance:** This bill requires the attorney general, in consultation with the secretary of state, to conduct a study regarding the ability of the Federal Bureau of Investigation (FBI) to prevent and combat international crimes involving children. The study would examine the way in which the FBI works with other federal, state, and local law enforcement agencies in conducting international criminal investigations involving children. Further, the bill proposes a review of the current resources allocated to those investigations, and an assessment of what resources may be needed to improve the ability of the FBI to investigate and prevent those crimes. The bill stipulates that when investigating international crimes involving children, the FBI also shall coordinate and share information regarding an investigation with the International Criminal Police Organization.

## **Restoration of Fairness in Immigration Act of 2002, H.R. 3894**

**Major Sponsor:** Rep. John Conyers, Jr. (D-MI)

**Status:** Referred to the House Committee on the Judiciary on March 7, 2002.

**Substance:** This bill amends the Immigration and Nationality Act (INA) to improve access to due process in immigration proceedings, including due process in expedited removal proceedings, and judicial review in immigration and detention proceedings. The bill charges the attorney general with making periodic reports with respect to persons detained after September 11, 2001, and directs the secretary of state to establish a Board of Visa Appeals. The bill revises INA provisions relating to: (1) removal proceedings; (2) five-year bars to admission and other grounds for exclusion;



(3) family reunification-related visas and grounds of admissibility; (4) voluntary departure; (5) public charge determinations and affidavits of support; (6) asylum and refugee proceedings; (7) asset forfeiture; (8) parole authority; and (9) state personnel performing immigration functions. Finally, the bill instructs the Commissioner of the Immigration and Naturalization Service to establish an Office of Border Patrol Recruitment and Retention.

## **Battered Immigrant Family Relief Act of 2001, H.R. 3828**

**Major Sponsor:** Rep. Janice D. Schakowsky (D-IL)

**Status:** Referred to the Committee on the Judiciary, as well as the Committees on Education, Workforce, Ways and Means, Energy and Commerce, and Agriculture on February 28, 2002.

**Substance:** This bill amends the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to make qualifying battered alien spouses and children eligible for specified public benefits. To that end, the bill modifies procedures and provides special rules for battered aliens with respect to the following issues: (1) public charge inadmissibility; (2) immigrant petitions, including self-petitioning petitions; (3) implementation of immigration provisions in the Violence Against Women Act (VAWA); (4) fiancée conditional residency requirement; (5) removal and inadmissibility; (6) adjustment of status; and (7) access to VAWA for visa waivers. 🌐

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## LEGISLATIVE FOCUS

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### GAINS Act

by Ossai Miazad \*

On October 24, 2000, Congresswoman Constance Morella (R-MD) introduced The Global Action and Investments for Success for Women and Girls (GAINS) Act to address the fact that “[e]conomic globalization is leaving the world’s poorest women, girls and communities behind.” The GAINS Act, which is aimed at increasing U.S. assistance to women and girls in developing countries, is currently being revised and expanded for tentative reintroduction in the House of Representatives in April 2002. Senator Olympia Snowe (R-ME) will introduce a version of the bill in the Senate.

The Act’s central rationale is that investment in women’s education, economic opportunities, political participation, and healthcare yields high returns for women, their families, and their communities. This rationale is coupled with the belief that gender equality is a core development issue that enhances U.S. global interests. Relying on the premise that investment must occur in multiple sectors to ensure that women and girls thrive economically and socially, the GAINS Act of 2000 focuses on five interrelated areas: (1) integrating women into the national economies of developing countries; (2) addressing the impact of trade agreements on women; (3) ensuring opportunities for women in developing countries; (4) promoting the health of women and girls in developing countries; and (5) protecting the human rights of women. According to Women’s Edge, a Washington, D.C.-based non-governmental organization that has launched an advocacy campaign entitled “GAINS for Women and Girls,” the revised 2002 Act will include new sections on violence against women; women’s leadership and political participation; women, agriculture and food security; women and the environment; women and conflict situations/refugee women; and a section on creating economic opportunities for women. In accordance with the original version of the Act, the revised version will call on the Senate to hold hearings on and ratify the Convention on the Elimination of All Forms of Discrimination against Women.

The GAINS Act identifies and provides solutions to deficiencies in current U.S. foreign policy and international assistance programs. Although Congress passed the Percy Amendment to the U.S. Foreign Assistance Act in 1973, which requires U.S. bilateral assistance to integrate women into the economies of developing countries, implementation of the Percy Amendment has been slow. The Percy Amendment led the way in 1974 for the creation of the Women in Development (WID) office within the U.S. Agency for International Development (USAID). In a 1993 evaluation of USAID’s progress in meeting Percy Amendment standards, however, the Government Accounting Office concluded that USAID has only recently begun to contemplate the role of women in its international development strategies, despite the fact that twenty years have passed since Congress directed that USAID assistance programs focus on the roles of women and their needs in development projects. In March of 1996, shortly after the United Nations’ Fourth World Conference on Women, held in Beijing, USAID announced a Gender Plan of Action (GPA) designed to

ensure that gender considerations were institutionalized throughout its agencies’ development programs and projects. In 2000, the Advisory Committee on Voluntary Foreign Assistance, a presidential commission created to link between non-governmental organizations and USAID, conducted an in-depth survey of the GPA, finding that over 90% of those interviewed within USAID and the Private Voluntary Organizations/Non-Governmental Organizations community said the GPA has not had any measurable impact on USAID operations.

The GAINS Act calls for full implementation of USAID’s Gender Plan of Action. Recognizing the gap between policy and implementation of gender integration into U.S. development programs, the Act proposes concrete and pragmatic changes. For example, the Act calls for up to thirty million dollars in funding for the WID office and proposes that the director of the WID office should become a deputy director administrator or the equivalent of USAID. The Act further recommends the establishment of a WID Management Group within USAID that would meet on a routine basis to monitor and assist with the ongoing implementation and compliance with USAID gender integration policies and programs.

The proposals set forth in the GAINS Act move the United States closer to implementation of the Percy Amendment mandate, and to its pledged commitment in Beijing to integrate gender concerns and perspectives in its foreign policy and international assistance programs. ☉

\* Ossai Miazad is a J.D. candidate at the Washington College of Law and a staff writer for the Human Rights Brief.

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## CENTER FACULTY/STAFF NEWS

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**John Cerone**, Executive Director of the War Crimes Research Office at American University's Washington College of Law (WCL), authored "The Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings," which was published in the January 2002 issue of ASIL Insight. In February, Canadian Broadcasting interviewed Mr. Cerone regarding the status of detainees in Guantanamo Bay, Cuba, and the Bush Administration's agreement to abide by the Geneva Conventions. Mr. Cerone participated in the Cornell International Law Journal Symposium 2002, where he gave a presentation on "Killing Enemies, Killing Innocents: Changes in Humanitarian Law and the Rules of War in Response to September 11, 2001." Also in February, Mr. Cerone presented "From Nuremberg to Kandahar: Shifting Paradigms in International Criminal Adjudication" at a conference on "International Criminal Justice and White Collar Crime," sponsored by the Center for International Legal Studies in cooperation with the American Bar Association.

**Robert K. Goldman**, Professor of Law and Co-Director of the Center for Human Rights and Humanitarian Law (Center), currently serves as a member of the Inter-American Commission on Human Rights (IACHR), and as a member of the Board of the Inter-American Institute of Human Rights in San Jose, Costa Rica. In February, Australian Broadcasting and the *Kansas City Star* interviewed Professor Goldman regarding the Geneva Conventions and the detainees in Guantanamo Bay, Cuba. In March, *Voice of America* interviewed Professor Goldman regarding the appeal of a woman in Nigeria, found guilty of adultery, who was sentenced to death by stoning.

**Claudio Grossman**, Dean, Co-Director of the Center, and former President of the IACHR, was interviewed in February by *BBC-Spanish* about President Bush's domestic agenda. In February, *O'Globo*, a Spanish-language newspaper, interviewed Dean Grossman about prospects for *The New Chile*. Dean Grossman authored "Building the World Community: Challenge for Legal Education," which was published in February in the *Dickinson Journal of International Law*. Dean Grossman also authored "Freedom of Expression in the Inter-American System for the Protection of Human Rights," which was published in the *Nova Law Review*. Also in February, Dean Grossman addressed the Conference of Conservative Jewish Rabbis of America on the topic of the 1994 terrorist bombing at the Jewish Community Center in Buenos Aires, Argentina. Dean Grossman analyzed the *Pinochet* case as part of a Potomac Institute for Policy Studies conference entitled, "International Seminars on Counter Terrorism Strategies for the 21st Century: European, Latin American, and U.S. Perspectives." Dean Grossman presented the keynote lecture at a conference entitled, "*Reforma Judicial y Libertad de Expersión*" (Judicial Reform and Freedom of Expression) at the *Colegio de Abogados de Honduras*, which was held in February. Additionally, Dean Grossman co-authored with Professors Robert K. Goldman, Claudia Martin, and

Diego Rodriguez-Pinzon a book entitled, "The International Dimension of Human Rights." The Inter-American Development Bank and American University published the book. In March 2002, *Voice of America* interviewed Dean Grossman regarding the release of the U.S. State Department's annual Human Rights report.

**Diane Orentlicher**, Professor of Law and Co-Director of the Center, was interviewed in February by *CNN* and quoted in an article in *The Chicago Tribune* about President Bush's February 7 decision regarding the application of the Third Geneva Convention to members of the Taliban. In February, *The Philadelphia Inquirer* quoted Professor Orentlicher about the trial of Slobodan Milosević in The Hague, and *The Christian Science Monitor* quoted Professor Orentlicher regarding war crimes tribunals. In an interview with Serbian *Voice of America*, Professor Orentlicher discussed the Milosevic trial. Also in February, Professor Orentlicher was interviewed on *NPR's* "All Things Considered" about Slobodan Milosevic's strategy of representing himself *pro se* at his trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY). On February 4, Professor Orentlicher was the featured speaker at a Council on Foreign Relations roundtable on whether to try terrorists in civilian or military courts. On February 6, Professor Orentlicher gave a speech entitled, "Problems and Prospects for Judging Slobodan Milosević, Augusto Pinochet, and Osama bin Laden," at a conference hosted by Steptoe & Johnson and the Columbia Law School Association of Washington D.C. In late February, Professor Orentlicher moderated two panels on "Domestic Courts in an Interconnected World" at the Federal Judicial Center's National Workshop for District Judges in New Orleans. In March, Professor Orentlicher was quoted in a *New York Times* article about the law regarding prisoners of war. Also in March, Professor Orentlicher was a guest on *WAMU's Public Interest* with Kojo Nnamdi. The program discussed the Milosević trial at the ICTY. Professor Orentlicher co-authored an article with Professor Robert K. Goldman entitled, "When Justice Goes to War," which was published by the *Harvard Journal of Law & Public Policy* in a symposium issue on "Law and the War on Terrorism."

**Diego Rodríguez-Pinzón**, Visiting Associate Professor, Director of the Human Rights Legal Education-Partnership Projects in Ecuador and Colombia, Co-Director of the Inter-American Human Rights Digest Project, and Co-Director of the Academy on Human Rights and Humanitarian Law, has contributed to the development of a human rights academic network in Ecuador and a diagnostic report on the current status of legal education in Ecuador. As part of the ongoing Human Rights Legal Education-Partnership Projects in Ecuador and Colombia, Professor Rodríguez-Pinzón lectured on the Inter-American system and the Inter-American Commission on Human Rights at Pontificia Universidad Católica de Ecuador (PUCE).

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**Herman Schwartz**, Professor of Law and Co-Director of the Center, was interviewed by *NBC Nightly News* regarding John Walker Lindh's motion to suppress his confession. In February, *CBS Marketwatch* interviewed Professor Schwartz regarding the decision by certain Enron executives to plead the Fifth Amendment. Also in February, *Chicago Public Radio* interviewed Professor Schwartz about countries transitioning to democracy. On March 23–24, Professor Schwartz lectured to judicial candidates in Belgrade, Serbia, on comparative judicial review, human rights, and humanitarian law. From April 15–May 2, Pro-

essor Schwartz will teach constitutional law and human rights in South Africa as a Fulbright Senior Specialist.

**Richard Wilson**, Professor of Law, Co-Director of the Center, Director of the International Human Rights Law Clinic (IHRLC), and Director of the WCL Clinical Program, was interviewed by *The Blade* regarding asylum sought by individuals persecuted for their sexual orientation. Professor Wilson also was quoted in *The Washington Post* in an article on the filing of a petition before the Inter-American Commission on Human Rights on behalf of detainees in Guantanamo Bay, Cuba. On March 9, Professor Wilson facilitated the Expert Meeting on International Law and Capital Pun-

ishment, which was held at WCL. From February through March, Professor Wilson served as a consultant in Tbilisi, Georgia, under the auspices of the Center for Institutional Reform and the Informal Sector (IRIS) of the University of Maryland. In Tbilisi, Georgia, Professor Wilson consulted on issues such as the rule of law, legal aid services, and impact litigation. On April 2, Professor Wilson gave a lecture at the Institute for Policy Studies in Washington, D.C., entitled, "Legal Issues in the 9/11 Aftermath—Guantanamo and International Law." Professor Wilson was named to the Editorial Board of the *International Criminal Law Review* and the *Litigation Advisory Board of IRIS-Georgia*. 🌐



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