

## Human Rights

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## I. The U.N. Human Rights Council

The new U.N. Human Rights Council<sup>1</sup> began work in 2007, resolving to establish procedures, mechanisms, and organizational arrangements to facilitate its work.<sup>2</sup> The speed with which many of these arrangements were implemented reveals the international significance of the Council and the responsibility it has placed upon itself to overcome the problems of its predecessor, the Commission on Human Rights. The Council reports directly to the U.N. General Assembly,<sup>3</sup> which indicates not merely the new prominence given to human rights within the overall U.N. system but also the Council's indispensable links with other mandates of the U.N., namely, security, development, and peace. The Council meets for at least three sessions each year for a total duration of no less than ten weeks.<sup>4</sup>

The Council is responsible for dealing with human rights violations, promoting effective coordination of the mandate within the U.N., and making recommendations on policy issues.<sup>5</sup> The key principles guiding the Council are: impartiality, objectivity, and non-selectivity.<sup>6</sup> In 2007, the Council gave itself the task of reviewing procedures and mechanisms, including those of mandates<sup>7</sup> and mandate-holders.

The Council established a new mechanism, the Universal Periodic Review, with which to regularly evaluate the human rights records of all States.<sup>8</sup> The review will be carried out by a working group consisting of nominees of the Council. The working group will meet three times a year and will be assisted by representatives of three member states of the Council, called "troikas." In reviewing each State,<sup>9</sup> the working group will consider recommendations from mandate holders and views from other groups, such as non-gov-

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U.N. Special Rapporteur on the use of mercenaries as a means of impeding human rights and the right of peoples to self-determination, and she is a member of the current U.N. working group on the same subject. Dr. Shameem has also worked as a human rights expert for the United Nations to review historical human rights violations in Timor L'este. Leslie J. Shields wrote the section on human trafficking. Ms. Shields is a law student at California Western School of Law where she is studying international law. She was active as an intern with the U.N. Anti-Human Trafficking Office in Vienna, Austria. Jaspreet Singh wrote the section on Pakistan. Mr. Singh is a staff attorney at United Sikhs, a U.N.-affiliated international not-for-profit, humanitarian relief, human development, and advocacy organization. Mr. Singh is co-founder of the Campaign to Restore Democracy in Pakistan. Nancy Kaymar Stafford wrote the section on sexual exploitation by U.N. personnel. Ms. Stafford works for the Feminism and Legal Theory Project at Emory University Law School where she teaches a class in International Women's Rights Law. Alice Anne Stephens contributed to the section on Myanmar. Ms. Stephens is a student at Stanford Law School. Anna Vidiaev wrote the section on Russian minority language in Ukraine. Ms. Vidiaev is licensed to practice in the State of New York and the State of New Jersey, and she recently completed an L.L.M. in International Human Rights Law at the University of Essex.

1. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

2. Press Release, Human Rights Council, New Human Rights Council Convenes First Session in Geneva, 19 June, U.N. Doc. HRC/2 (June 15, 2006).

3. U.N. Human Rights Council, *Institution-Building of the United Nations Human Rights Council*, U.N. Doc. A/C.3/62/L.32 (Nov. 5, 2007).

4. G.A. Res. 60/251, *supra* note 1.

5. *Institution-Building of the United Nations Human Rights Council*, *supra* note 3.

6. G.A. Res. 60/251, *supra* note 1, ¶ 4.

7. Mandates are themes or country situations that are allocated to human rights experts (mandate holders) who provide reports several times a year to the Human Rights Council and the U.N. General Assembly.

8. *Institution-Building of the United Nations Human Rights Council*, *supra* note 3.

9. States have already been informed of the session of the Council in which they will be reviewed.

ernmental organizations, national human rights commissions, and inter-governmental agencies.<sup>10</sup>

In each review, the working group will assess a State's compliance with the U.N. Charter, the Universal Declaration of Human Rights, ratified human rights instruments, voluntary pledges, and applicable international humanitarian law. Upon the completion of each review, the State will be provided with recommendations to be implemented. The degree to which these recommendations have been implemented will be assessed in periodic reviews every four years.<sup>11</sup>

At its twentieth meeting on September 27, 2007,<sup>12</sup> the Council established the following guidelines for the information to be assessed in the Universal Periodic Review:

- Background of the State under review, particularly its legal and institutional framework for the promotion and protection of human rights.
- Promotion and protection of human rights on the ground, evaluated through the implementation of international human rights obligations, voluntary commitments, national human rights institution activities, public awareness of human rights, and cooperation with human rights mechanisms.
- Identification of achievements, best practices, challenges, and constraints.
- Key national priorities, initiatives, and commitments that the State intends to undertake to overcome challenges to improve human rights.
- Expectations in terms of capacity building and requests, if any, for technical assistance.
- Presentation by the State as a follow up to the previous review.

States are already preparing their submissions under these guidelines. The first group of States will be reviewed in 2008.

The Council presented its first report to the U.N. General Assembly in November 2007, entitled "Institution-Building of the United Nations Human Rights Council."<sup>13</sup> The report outlined the Universal Periodic Review mechanism, including its principles and objectives, as well as special procedures and mechanisms, including selection and appointment of mandate holders and review of mandates. The report noted that a new committee, the Human Rights Council Advisory Committee consisting of eighteen experts serving in their personal capacity as a "think-tank," will be established for the Council.<sup>14</sup> A complaints procedure has been set up to address consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms occurring in any part of the world.<sup>15</sup>

The new Council appears to be a leaner and more efficiently organized organization than its predecessor. Mandate holders will now be appointed for only two terms of three years each. This eventually will have the effect of building a much broader range of inter-

10. *Institution-Building of the United Nations Human Rights Council*, *supra* note 3.

11. *Id.*

12. U.N. Human Rights Council, *Follow-up to Human Rights Council Resolution 5/1*, HRC Decision 6/102 (Sept. 27, 2007).

13. *Institution-Building of the United Nations Human Rights Council*, *supra* note 3.

14. *Id.*

15. *Id.*

national human rights experts.<sup>16</sup> The forty-seven seats on the Council are distributed according to equitable geographic representation (thirteen from the African Group; thirteen from the Asian Group; six from the Eastern European Group; eight from the Latin American and Caribbean Group; and seven from the Western European and Other States Group).<sup>17</sup> The first election of members to the Council in May 2006 indicated that the processes for selection were transparent, open, and fair. Small nations have a relatively weak position in the fierce lobbying for membership on the Council. Despite the fact that all States have equal standing in the U.N. system, the negligible bargaining position of small States tends to diminish their prospect of being elected to the Council.

The Council's predecessor, the Commission on Human Rights, was beset with internal problems arising mainly out of the defensive position maintained by many of the member States on their own human rights record. The Commission's review mechanism was cumbersome and defective because it allowed the human rights agenda to be subverted by regional and international politicization. The new Council might be able to rise above the political *quid pro quo* arrangements that undercut the legitimacy of the previous human rights framework.

## II. International Criminal Tribunals

### A. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

In November 2007, the Appellate Chamber of the Court of Bosnia and Herzegovina confirmed the guilty verdict of Gojko Jankovic and sentenced him to thirty-four years imprisonment for crimes against humanity for acts including rape and sexual slavery in Foca.<sup>18</sup> The *Jankovic* case was one of the first war crimes cases transferred in 2005 to Bosnian courts from the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In another war crimes case transferred from the ICTY to Bosnia, the Appellate Chamber of the Bosnian State Court increased the prison term of Radovan Stankovic from sixteen years to twenty years, stating that the original sentence had not met the "purpose of punishment."<sup>19</sup> Meanwhile, a former Bosnian Serb officer, Milorad Trbic, is on trial before the Court of Bosnia for his participation in the murders of over 7,000 Bosniak men in Srebrenica. Trbic's trial is the second case involving genocide in the U.N. designated "safe area of Srebrenica" to come before the Court of Bosnia.<sup>20</sup> He has admitted to per-

16. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Council*, U.N. Doc. A/HRC/5/21 (Aug. 7, 2007).

17. HRC Information Service, Media Information, <http://www2.ohchr.org/english/bodies/hrcouncil/> (last visited Mar. 28, 2008).

18. X-KR-05/161-*Jankovic Gojko*, Court of Bosnia and Herzegovina, Appellate Panel of Section I for War Crimes, decision rendered October 23, 2007. (Jankovic was charged with crimes against humanity pursuant to Article 172, paragraph 1 of the Criminal Code of BiH on the counts of murder, enslavement, deportation/transfer of population, and torture [including coercion for sexual acts, rape, and sexual violence]).

19. *Bosnia Serb Ex-Soldier Jailed to 20 Years on Appeal*, REUTERS, April 17, 2007, available at <http://www.reuters.com/article/latestCrisis/idUSL17668172> (Stankovic, among other acts, was accused of setting up a detention center and kept nine women enslaved including a twelve-year-old girl).

20. *Indicted General "Admitted Committing at Least 55 Murders"*, BOSNIA DAILY, Nov. 9, 2007, at 4.

sonally committing at least fifty-five murders.<sup>21</sup> The first witnesses were scheduled to testify in late November 2007.

The larger judicial problem may be the approximately 10,000 people living in Bosnia that are currently suspected of war crimes and the processing of this large number of cases.<sup>22</sup> Prosecutions of war crimes have been impeded by complaints of witness intimidation, dual nationality of many suspects, and lack of staff, including attorneys and equipment.<sup>23</sup> Poor work conditions and difficulty in finding witnesses for war crimes trials are obstacles facing Cantonal judicial authorities in places such as Zenica.<sup>24</sup> Many witnesses are afraid for their safety and change their statements between the time of the initial investigation and appearance in court.<sup>25</sup> Prosecutors have complained of a lack of cooperation with non-governmental organizations and war victims associations and their families.<sup>26</sup>

By the end of 2007, Bosnian national courts may also have 20,000 proceedings for compensation demands made by the Bosnian Association of Concentration Camp Survivors.<sup>27</sup> The concentration camp survivors have asked for 300 euros each, for every day spent at a camp.<sup>28</sup> Approximately 2,000 Bosnian Muslims and Croats detained in camps submitted compensation claims in May against the Serb Republic totaling almost \$50 million.<sup>29</sup> The Bosnian Association of Concentration Camp Survivors includes approximately 56,000 individuals and about 80 percent are expected to file complaints, i.e., about 40,000 people. Bosnian Serb wartime camp inmates plan to file 7,000 compensation claims in the Federation.<sup>30</sup> Courts in both regions have awarded compensation in the past for unlawful wartime detentions; however, members of the Association have stated the awards were too low, in some cases just \$6.20 per day.<sup>31</sup> Compensation claims in the Republika Srpska had been postponed for fifty years, but the Constitutional Court of Bosnia has ordered the period be shortened.<sup>32</sup>

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21. *Id.*

22. Merdijana Sadovic, *Thousands Suspected of Crimes in Bosnia*, IWPR, [http://www.iwpr.net/index.php?apc\\_state=hen&s=0&o=1=EN&p=tri&s=f&o=338553](http://www.iwpr.net/index.php?apc_state=hen&s=0&o=1=EN&p=tri&s=f&o=338553) (cited in BOSNIA DAILY, September 10, 2007, at 2).

23. Jelena Mrkic-Bjelovic, *Zenica: Fear Puts War Crimes Trials in Danger*, BALKAN INVESTIGATIVE REPORTING NETWORK, Nov. 14, 2007, <http://www.bim.ba/en/89/10/5808/> (also cited in BOSNIA DAILY, November 16, 2007, at 8).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Bosnian Courts to Handle 20,000 Requests for War Crimes Proceedings by the End of the Year*, BOSNIA NEWS, Nov. 1, 2007, available at <http://www.bosnianews.blogspot.com/2007/11/bosnian-courts-to-handle-20000-requests.html>.

28. *Id.*

29. Olja Stanic, *Bosnian Camp Inmates Submit Compensation Claims*, REUTERS, May 23, 2007, available at <http://www.reuters.com/article/latestCrisis/idUSL23300570>.

30. *Id.*

31. Stanic, *supra* note 29; See also G.A. Res. 60/147, ¶ 15, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (The concept of reparations in Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which state that “[r]eparation[s] should be proportional to the gravity of the violations and the harm suffered.”).

32. Stanic, *supra* note 29.

## B. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In 2004, the U.N. Security Council adopted Resolution 1534, which called on the prosecutors of both *ad hoc* international criminal tribunals (the ICTR and the ICTY) to review their respective caseloads “with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions.”<sup>33</sup> On November 22, 2007, the Trial Chamber at ICTR granted the request of the prosecutor to transfer the cases of Laurent Bucyibaruta and Wneceslas Munyeshyaka to France for trial under the Tribunal’s Rule 11*bis*.<sup>34</sup> Munyeshyaka, a Catholic priest in Kigali during the 1994 genocide, is charged with genocide, rape, extermination, and murder as crimes against humanity. Bucyibaruta, a prefect of the Gikongoro prefecture during the 1994 genocide, is charged with direct and public incitement to commit genocide and crimes against humanity. With these two transfers to France, the ICTR has now transferred a total of three cases to national jurisdictions since the Security Council’s adoption of its Completion Strategy in 2004.

One reason for the low number is illustrated by the saga of *Prosecutor v. Bagaragaza*, a case that was ultimately transferred to the Netherlands on April 13, 2007.<sup>35</sup> There, efforts to transfer the case began on February 15, 2006, when the prosecution filed a motion for transfer, originally seeking to have the case sent to Norway, under Rule 11*bis*. Both the Trial Chamber and Appeal Chamber, however, denied the motion to transfer on the ground that Norway, despite being a signatory to the Rome Statute, does not criminalize acts of genocide or other war crimes. The fact that its decision was likely to limit the effectiveness of the Completion Strategy was not lost on the Appellate Chamber, which noted: “[I]t may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate. However, the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law.”<sup>36</sup>

The *Bagaragaza* saga illustrates some of the key issues arising before the ICTR (and the ICTY by implication) when deciding whether to issue an order for referral to a national jurisdiction. First, does the domestic law of a proposed Referral State contain similar offences such that Rule 11*bis* will be satisfied? After *Bagaragaza*, the choice of the national jurisdiction to which a case may be transferred has been limited to those states with domestic laws punishing crimes against humanity and war crimes, similar to the statutory laws of the *ad hoc* tribunals. Out of more than 190 countries, only forty-one countries have enacted legislation punishing crimes against humanity and war crimes, and those nations are signatories to the Rome Statute as well.<sup>37</sup> Second, even if a national jurisdiction enacts domestic legislation criminalizing acts of genocide, crimes against humanity,

33. S.C. Res. 1534, ¶ 4, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

34. Press Release, Int’l Criminal Tribunal for Rwanda, Tribunal Transfers Two Accused to France for Trial (Nov. 22, 2007), available at <http://69.94.11.53/default.htm>.

35. *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-AR11*bis*, Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands (Apr. 13, 2007).

36. *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11*bis* Appeal, ¶ 18 (Aug. 30, 2006).

37. Argentina, Australia, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Cambodia, Canada, Colombia, Costa Rica, Croatia, Democratic Republic of Congo, Denmark, Ecuador, Estonia, Finland, France, Georgia, Germany, Ireland, Latvia, Lichtenstein, Luxembourg, Mali, Malta, Netherlands, New Zealand, Ni-

or other similar acts, will it take cognizance retrospectively of events that occurred in 1994? Third, Article 9(2) of the Rules of Procedure and Evidence of the ICTR reflects the Tribunal's principle of *non bis in idem*, empowering the Tribunal to try a person if the "case was not diligently prosecuted" or on other grounds. This has left open the possibility of trials returning to the *ad hoc* tribunals.

### C. SPECIAL COURT FOR SIERRA LEONE

The trial of former president of Liberia, Charles Taylor, for his alleged involvement in atrocities committed in Sierra Leone, began on June 4, 2007, in The Hague and, after an interruption in the proceedings, is scheduled to resume on January 7, 2008 (as of this writing). The Special Court for Sierra Leone (the "Special Court") agreed to conduct the trial in The Hague to avoid political unrest within Sierra Leone.<sup>38</sup> The U.N. and Sierra Leone established the Special Court to examine violations of international humanitarian and Sierra Leonean law committed in Sierra Leone after November 30, 1996.<sup>39</sup> The Special Court is a hybrid tribunal composed of Sierra Leonean and international officials and charged with prosecuting crimes under international and Sierra Leonean law.<sup>40</sup>

The Special Court indicted Taylor, president of Liberia from 1997 to 2003, on March 7, 2003.<sup>41</sup> Taylor fled to Nigeria and accepted an offer of asylum from the Nigerian government.<sup>42</sup> On March 16, 2006, the Special Court issued an amended eleven-count indictment that charged Taylor with five counts of crimes against humanity (murder; rape; sexual slavery and any other form of sexual violence;<sup>43</sup> other inhumane acts; and enslavement), five counts of violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (acts of terrorism; murder;; outrages upon personal dignity; cruel treatment; and pillage), and one count of other serious violations of international humanitarian law (conscripting or enlisting children under the age of fifteen years into armed forces or groups, or using them to participate actively in hostilities).<sup>44</sup>

Following a request from Ellen Johnson Sirleaf, the then newly elected president of Sierra Leone, and the Special Court's Chief Prosecutor, Desmond de Silva, to arrest Taylor and deliver him to the Special Court, Nigerian police arrested Taylor on March 27, 2006.<sup>45</sup> The Nigerian government transferred Taylor to the Special Court's headquarters

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geria, Norway, Peru, Poland, Portugal, Sierra-Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, United Kingdom, and Uruguay.

38. See Human Rights Watch, *Trying Charles Taylor in The Hague: Making Justice Accessible to Those Most Affected*, June 2006, available at <http://www.hrw.org/background/ij/ij0606/ij0606.pdf>.

39. See The Special Court for Sierra Leone, *About the Special Court for Sierra Leone*, <http://www.sc-sl.org/about.html> (last visited Mar. 28, 2008).

40. See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, Oct. 2000, <http://www.asil.org/insights/insigh53.htm> (last visited Mar. 28, 2008).

41. See The Special Court for Sierra Leone, *Summary of Charges against Charles Taylor*, <http://www.sc-sl.org/Taylorcasesummary.html> (last visited Mar. 28, 2008).

42. Human Rights Watch, *supra* note 38.

43. Prosecution v. Taylor, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, (May 29, 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01-PT-263.pdf> (removing the charge for "other sexual violence" because it is duplicative of the charge for "outrages upon personal dignity.").

44. See *Summary of Charges Against Charles Taylor*, *supra* note 41.

45. Prosecutor v. Taylor, SCSL-03-01-PT-217, Decision on Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, (Mar. 30, 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01->

on March 29, 2006, where he pled not guilty to all eleven charges on April 3, 2006.<sup>46</sup> The Special Court and the International Criminal Court (ICC) concluded a Memorandum of Understanding on April 13, 2006, to permit the use of ICC facilities for Taylor's trial based on concerns over stability in the region.<sup>47</sup> Following a U.N. Security Council resolution calling for Taylor's transfer to The Hague<sup>48</sup> and an order from the President of the Special Court for a change in venue, the Registrar of the Special Court authorized Taylor's detention at the ICC Detention Centre in The Hague.<sup>49</sup> Taylor was transferred to The Hague on June 20, 2006.<sup>50</sup>

Taylor's charges stem from his involvement in Sierra Leone's civil war, which resulted in over 50,000 deaths, a multitude of serious injuries, and the use of child soldiers in a "campaign of terror waged against civilians."<sup>51</sup> Taylor allegedly provided both financial and military support to the Revolutionary United Front (RUF), the main rebel group in Sierra Leone, and the Armed Forces Revolutionary Council (AFRC), who allied themselves with the RUF to gain control over the country and access its diamonds and other resources.<sup>52</sup> The amended indictment broadly alleges Taylor's criminal responsibility.<sup>53</sup> The prosecution might therefore argue during trial that Taylor: (1) aided and abetted the commission of the crimes, (2) was involved in a joint criminal enterprise, and/or (3) exercised command responsibility over those individuals who committed the crimes.<sup>54</sup>

Already in the trial, the Special Court has addressed threats to Taylor's fair trial rights, many of which stem from Taylor's own actions. Taylor did not to appear in court on the first day of trial; he fired his defense counsel and chose to represent himself.<sup>55</sup> Taylor claimed he could not receive a fair trial because he had inadequate time and facilities to prepare a defense.<sup>56</sup> He also questioned the equality of arms in the composition of the defense and prosecution teams.<sup>57</sup> Although the Special Court concluded that Taylor's absence and his desire to represent himself amounted to a "boycott" of the trial, on June 25, 2007, Presiding Judge Sebutinde ordered the Principal Defender, acting in concert

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PT-217.pdf.; See Leslie Thompson, *Extradition of Charles Taylor to the Special Court for Sierra Leone, in Updates from the International Criminal Courts*, 13 Hum. Rts. Br. 61, 68, 79 (2006).

46. See Thompson, *supra* note 45, at 79.

47. See Taylor, SCSL-03-01-PT-217.

48. See S.C. Res. 1688, U.N. Doc. S/RES/1688 (June 16, 2006) (stating that "the Special Court shall retain exclusive jurisdiction over former President Taylor during his transfer to and presence in the Netherlands in respect of matters within the Statute of the Special Court").

49. See Taylor, SCSL-03-01-PT-217.

50. See *id.*

51. *Dramatic Start to First Day of Taylor Trial*, The Trial of Charles Taylor, June 4, 2007, <http://charles-taylortrial.org/2007/06/04/dramatic-start-to-first-day-of-taylor-trial/> (last visited Mar. 28, 2008); See Mark A. Drumbl, *Charles Taylor and the Special Court for Sierra Leone*, ASIL Insight, Apr. 12, 2006, [http://www.asil.org/insights/2006/04/insights\\_060412.html](http://www.asil.org/insights/2006/04/insights_060412.html) (last visited Mar. 28, 2008).

52. See Human Rights Watch, *supra* note 38, at 14-15.

53. See Taylor, SCSL-03-01-PT-263.

54. See Michael A. Newton, Professor, Vanderbilt University Law School, *Understanding the Charles Taylor Case: An International Law Briefing* (May 30, 2007), available at <http://www.asil.org/webinars/asil20070530.pdf>.

55. See *Dramatic Start to first Day of Taylor Trial*, *supra* note 51.

56. *Id.*

57. *Id.*

with the Acting Registrar, to assemble a suitable defense team composed of one lead counsel, two co-counsel, and one senior investigator.<sup>58</sup>

On July 17, 2007, the Principal Defender assigned a new defense team consisting of Lead Counsel Courtenay Griffiths, Queen's Counsel of the Bar of England and Wales, and Co-Counsel Andrew Cayley and Terry Munyard.<sup>59</sup> The new defense team requested, and was granted, a trial delay until January 7, 2008, to adequately prepare a defense. The new defense team has raised a number of issues that will play out as the trial progresses. During a status conference on August 20, 2007, the defense team revealed that an investigator had discovered approximately 50,000 pages of materials from Taylor's personal archives.<sup>60</sup> A prosecution motion requested the Special Court to order the Registry to assign a "Special Master" to review and deliver relevant documents to the prosecution.<sup>61</sup> The Special Court concluded, however, that the prosecution did not adequately identify the information sought, merely restating the core elements of the charges and that the motion had the "hallmarks of a fishing expedition."<sup>62</sup> Although the contents of these archives are largely unknown,<sup>63</sup> the archives may contain documents relevant to Taylor's defense.

The new defense team has also argued against the prosecution's use of live testimony by stating that crime-based testimony is "emotional baggage."<sup>64</sup> Because the defense concedes that the alleged atrocities occurred, the defense argues that crime-based witnesses are unnecessary.<sup>65</sup> The prosecution argues, on the other hand, that live testimony provides context for the alleged crimes.<sup>66</sup> If the Special Court allows the prosecution's crime-based witnesses to provide live testimony, the focus of the trial may shift toward the severity of the crimes committed. The prosecution's burden will lay in proving Taylor's liability through evidence presented by linkage witnesses.

#### D. INTERNATIONAL CRIMINAL COURT

On April 27, 2007, the ICC issued arrest warrants for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") and Ahmad Muhammad Harun ("Ahmad Harun") based on allegations that they created and implemented strategies which resulted in the systematic per-

58. See *Trial Chamber Finds Taylor's No-Show Tantamount to Boycott of Trial and Nullifies Self-Representation*, The Trial of Charles Taylor, June 25, 2007, <http://charlestaylortrial.org/2007/06/25/trial-chamber-finds-taylors-no-show-tantamount-to-boycott-of-trial-and-nullifies-self-representation/> (last visited Mar. 28, 2008).

59. See *Principal Defender Assigns Taylor New Counsel*, The Trial of Charles Taylor, July 18, 2007, <http://charlestaylortrial.org/2007/07/18/principal-defender-assigns-taylor-new-counsel/> (last visited Mar. 28, 2008).

60. See *Trial Chamber Finds Taylor's No-Show Tantamount to Boycott of Trial and Nullifies Self-Representation*, *supra* note 58.

61. See *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Ex Parte and Confidential Prosecution Motion for an Order to Provide to the Prosecution Non-Privileged Documents Recently Obtained from the Accused's Personal Archive, (Nov. 5, 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01-T-355.pdf>.

62. *Id.* at 5.

63. See *Court Delays Taylor Trial until January 7, 2008*, The Trial of Charles Taylor, Aug. 20, 2007, <http://charlestaylortrial.org/2007/08/20/court-delays-taylor-trial-until-january-7-2008/> (last visited Mar. 28, 2008) (One document contained in the archives is a personal letter from Jimmy Carter to Taylor).

64. *Id.*

65. See *id.*

66. See *id.*

secution, murder, and rape of civilians in the Darfur region of Sudan as well as the pillaging of towns and the destruction of property.<sup>67</sup> Kushayb, a top commander for government-controlled militia forces, and Harun, the former Minister of the Interior for Sudan, are both charged with having committed crimes against humanity and war crimes.<sup>68</sup>

Although the armed conflict in Darfur began in 2003, tension and violent incidents over land and resources in the region date back to at least the 1980s.<sup>69</sup> Residents in Darfur, many of whom were farmers and cattle herders, grew tired of nomads and others trespassing upon their land in search of more fertile terrain and created rebel groups, such as the Sudanese Liberation Movement/Army and the Justice and Equality Movement, to stop such encroachments.<sup>70</sup> Because the government lacked the personnel, vehicles, and weapons to combat the rebel groups, it began recruiting and funding militias, otherwise known as the Janjaweed, to police the areas.<sup>71</sup> People from the Fur, Zaghawa, and Masalit ethnic groups heavily populate Darfur and, for the most part, have been targets in the ongoing violence.<sup>72</sup> As a result of the clashes, over two million people have been displaced, thousands of women and girls have been brutally raped, and the conflict has spread to neighboring countries like Chad and the Central African Republic.<sup>73</sup>

In 2005, the International Commission of Inquiry on Darfur issued a report in which it found that the heinous acts of Sudanese government officials, militias, and rebel groups constituted crimes against humanity and war crimes but that such actions did not rise to the level of genocide.<sup>74</sup> Most significantly, the Commission found that although the Fur, Zaghawa, and Masalit are protected groups, there was no intent on the Sudanese government's part to annihilate those populations.<sup>75</sup> The prosecutor of the ICC, in a June 7, 2007 statement to the U.N. Security Council, maintained that although the Sudanese government has investigated some of the crimes committed in Darfur, the government has failed to initiate any criminal proceedings against Harun or examine the specific incidents contained in the arrest warrant involving Kushayb.<sup>76</sup> Furthermore, government officials have still not arrested Kushayb and Harun, which is prolonging the case.

67. Prosecutor v. Harun & Al Abd-al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf); Prosecutor v. Harun & Al Abd-al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf).

68. *Harun & Al Abd-al-Rahman*, Case No. ICC-02/05-01/07.

69. Human Rights Watch, *Darfur 2007: Chaos by Design, Peacekeeping Challenges for AMIS and UNAMID* (Sept. 2007), at 28, available at <http://hrw.org/reports/2007/sudan0907/4.htm>.

70. Int'l Criminal Court, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, at 22-23, Jan. 25, 2005, available at [http://www.icc-cpi.int/library/cases/Report\\_to\\_UN\\_on\\_Darfur.pdf](http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf).

71. *Id.* at 24.

72. *Id.* at 3.

73. Int'l Criminal Court, Office of the Prosecutor, *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, June 7, 2007, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSCR5-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSCR5-Darfur_English.pdf); *Darfur 2007: Chaos by Design, Peacekeeping Challenges for AMIS and UNAMID*, *supra* note 69, at 27.

74. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, *supra* note 70, at 129-32.

75. *Id.* at 130-32.

76. *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, *supra* note 73.

In an effort to curb the ongoing violence, the U.N. Security Council unanimously voted on July 31, 2007, to deploy up to 26,000 peacekeepers to replace the meager 7,000 African Union troops.<sup>77</sup> Sudan initially opposed any U.N. military mission in Darfur but has now agreed to cooperate with the U.N. forces.<sup>78</sup> The Sudanese government also declared a ceasefire as part of peace talks held on October 27, 2007, but key rebel leaders boycotted the meetings, thus weakening any efforts to reach a resolution.<sup>79</sup> Nevertheless, organizations and individuals continue to advocate for a peaceful end to the conflict in Darfur and for increased protection for displaced civilians and humanitarian aid workers.

The ICC's prosecution of Kushayb and Harun is significant not only because it recognizes the seriousness of the crimes committed in the region but also because it offers hope that at least some perpetrators will be held accountable for their actions. The case, in and of itself, sends a message that the life of even the poorest and most powerless individual has value and is entitled to justice.

### III. The International Court of Justice Decision on Bosnian Genocide

The International Court of Justice's (ICJ) landmark judgment in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ("Bosnian Genocide")<sup>80</sup> marked the first time an international tribunal has ruled on whether a State has engaged in genocide. In February 2007, the ICJ held in *Bosnian Genocide* that Serbia had not committed genocide, although the Court affirmed the possibility that a State may be held accountable for genocidal conduct if it demonstrates specific intent.

The actus reus for genocide, as defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), was clearly met in Bosnia, leaving only the question of intent.<sup>81</sup> In the well-documented Srebrenica massacre,<sup>82</sup> 7,000 to 8,000 Muslim men had been killed in one day, fulfilling the "[k]illing members of the group" element of Article II.<sup>83</sup> The ICJ considered the evidentiary records from many ICTY cases and a number of U.N. Security Council Resolutions, indicating that systematic rape and sexual violence had been perpetrated against Bosnian Muslim women by Republika Srpska (VRS) forces.<sup>84</sup> The *Bosnian Genocide* opinion devoted a

77. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007), available at <http://daccessdds.un.org/doc/UN-DOC/GEN/N07/445/52/PDF/N0744552.pdf?OpenElement>.

78. Jeffrey Gettleman, *Sudan Declares Cease-Fire at Darfur Peace Talks*, N. Y. TIMES, Oct. 28, 2007, available at [http://www.nytimes.com/2007/10/28/world/africa/28darfur.htm?\\_r=1&oref=slogin](http://www.nytimes.com/2007/10/28/world/africa/28darfur.htm?_r=1&oref=slogin).

79. *Id.*

80. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 91 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

81. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

82. The Srebrenica Massacre was the July 1995 killing during the Bosnian War of an estimated 7,000 to 8,000 Bosniak males, ranging in age from young teens to the elderly, in the region of Srebrenica in Bosnia and Herzegovina by units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladic.

83. Bosnia and Herzegovina v. Serbia and Montenegro, *supra* note 80, at ¶ 272; Genocide Convention, *supra* note 81, art. 2.

84. Bosnia and Herzegovina v. Serbia and Montenegro, *supra* note 80, at ¶¶ 298 – 302.

significant amount of its holding to a discussion of the “camps” that VRS soldiers used for displaced Muslims.<sup>85</sup> The ghetto-like conditions in these camps, and the death and disease that occurred in them, would qualify as “[c]ausing serious bodily or mental harm to members of the group.”<sup>86</sup>

In searching for genocidal intent by the State of Serbia, the majority examined several key pieces of evidence, including the Srebrenica massacre, rape, and detentions camps. When considering the totality of the circumstances in Bosnia, alongside the Serbian aim of “[s]eparation as a state from the other two ethnic communities,”<sup>87</sup> genocidal intent might have been inferred but the Court chose not to do so. The ICJ examined the extent of “control Serbia had over those having [genocidal] intent and committing genocide or some of the other acts prohibited by the Genocide Convention.”<sup>88</sup> The idea that a State is responsible if the actors are under its “control” is well-established in international law and was central to the ICJ’s judgment. However, there is no clear standard for what “control” means, and there is substantial debate over how direct it must be. Two standards have emerged over time: the high threshold of “effective control” developed by the ICJ in *Nicaragua v. United States*<sup>89</sup> and the more flexible “overall control” test articulated by the ICTY Appeals Chamber in the *Tadic* case.<sup>90</sup>

The ICJ applied the “effective control” test for State responsibility, concluding that Serbia was not guilty of genocide because VRS forces did not receive direct instructions from Serbian officials.<sup>91</sup> Because Serbian officials had not given specific instructions on acts in Srebrenica genocide and did not have operational control in other areas, the Court would not hold Serbia responsible for the genocide.<sup>92</sup> The Court saw significant evidence that would implicate Serbia under an “overall control” test. The judgment noted a report that “Belgrade was aware of the intended attack on Srebrenica” and that operations were coordinated with Serbia.<sup>93</sup>

In his dissent, Vice President Al-Khasawneh touched on the distinctions between Bosnian Genocide and *Nicaragua v. United States*. Moreover, he discussed the problems with the Bosnian Genocide majority’s approach of applying the “effective control” test. He noted that “[i]n the present case, there was a unity of goals, unity of ethnicity and a common ideology, such that effective control over non-State actors would not be necessary.”<sup>94</sup> Vice President Al-Khasawneh noted in his dissent that the inherent danger of using the “effective control” test was “that it gives States the opportunity to carry out criminal poli-

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85. *Id.* at ¶ 243.

86. *Id.*; Genocide Convention, *supra* note 81, art. 2(b).

87. *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80 at ¶ 371.

88. Marko Milanovic, *State Responsibility for Genocide*, 17 EUR. J. INT’L. L. 553, 597 (2006).

89. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (The ICJ in *Nicaragua* required evidence that the United States was specifically directing the contras’ actions on the ground to establish state responsibility through the effective control test).

90. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 117 (July, 15, 1999) (overall control requires evidence of financing, equipping, and coordination of a non-state actor for there to be attribution to a state).

91. *Id.* at ¶ 413.

92. *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80 at ¶ 413.

93. *Id.* at ¶ 411.

94. *Id.* at ¶ 36 (dissenting opinion of Vice President Al-Khasawneh).

cies through non-state actors or surrogates without incurring direct responsibility therefore.”<sup>95</sup>

Procedurally speaking, the Bosnian Genocide decision began in March 1993, when the Government of Bosnia and Herzegovina filed an application with the ICJ for proceedings against the Federal Republic of Yugoslavia in respect to a dispute concerning alleged violations of the Genocide Convention.<sup>96</sup> The application invoked Article IX of the Genocide Convention as the basis of the Court’s jurisdiction.<sup>97</sup> At issue in the case was whether the state of Serbia had committed genocide against the Bosniaks at Srebrenica (the largest mass murder in Europe since World War II) and during subsequent war and peacetime atrocities. Specifically, Bosnia and Herzegovina contended that Serbia, through its agents and surrogates, had “killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina.”<sup>98</sup> Bosnia sought a declaration that Serbia had violated the Geneva Convention and requested provisional measures.<sup>99</sup> On April 8, 1993, the ICJ ordered Serbia to take all measures within its power to prevent genocide and ordered both Bosnia and Serbia not to take any action that might aggravate or extend the dispute.<sup>100</sup>

The 1951 Genocide Convention, which recognizes genocide as an international crime,<sup>101</sup> is foremost concerned with the prosecution of individuals who perpetrate genocide.<sup>102</sup> Article II of the Genocide Convention defines “genocide” as the inchoate commission of “any. . . acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>103</sup> Article IX does not expressly impose an obligation on States to prevent, or be held accountable for, genocide.<sup>104</sup> As previously described, the ICJ required proof that the killings were committed with the intent to destroy the group; i.e., the Bosniaks of Srebrenica.<sup>105</sup> By requiring “specific intent” in this manner, the ICJ limited the liability of States for genocide to situations where there is “smoking-gun” evidence of a State’s specific intent.<sup>106</sup> Unlike in World War II, there was no Wannsee Conference in Belgrade to decide on the implementation of a “final solution” for Bosnia’s

95. *Id.* at ¶ 39.

96. Genocide Convention, *supra* note 81. For an expanded discussion of this decision, see Scott Shackelford, Note, *Holding States Accountable for the Ultimate Human Rights Abuse: A Review of the International Court of Justice’s Bosnian Genocide Case*, 14 HUM. RTS. BR. 21, 30 (2007).

97. *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80.

98. *Id.* ¶ 64.

99. *Id.* ¶ 65.

100. *Id.* ¶ 4.

101. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 418 (2000).

102. Lawrence J. LeBlanc, *The ICJ, the Genocide Convention, and the United States*, 6 WIS. INT’L L.J. 43, 52 (1987).

103. Genocide Convention, *supra* note 81, art. 2. (Under Article 2, genocide includes the following acts: “(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”).

104. *Id.* art. 9.

105. H.E. Judge Rosalyn Higgins, President, Int’l Court of Justice, Statement to the Press (Feb. 26, 2007).

106. David Luban, *Timid Justice*, SLATE, Feb. 15, 2007, <http://www.slate.com/id/2160835>.

Muslims.<sup>107</sup> Without such a formal, well-documented meeting, the ICJ's decision makes it almost impossible to prove State-sponsored genocidal intent.

Nevertheless, for the first time in legal history, the ICJ unequivocally held in *Bosnian Genocide* that States—and not just individual perpetrators—can be held responsible, in theory, for genocide.<sup>108</sup> Thus, the ICJ has taken one step forward in holding States accountable. In the final analysis, though, the ICJ set the evidentiary bar impossibly high for proving State intent: “the [Genocide] Convention definition of genocide requires proof of specific intent. It is hard to conceive of a State with specific intent.”<sup>109</sup> Without evidence proving that a State's leaders had perpetrated the crime in violation of Article II of the Genocide Convention, it is therefore impossible to prove genocide.<sup>110</sup> This same requirement defeated Yugoslavia's assertions of NATO's purported genocidal intent in a bombing campaign that was the subject of the *Legality on the Use of Force* decision.<sup>111</sup>

In addition to ruling on the required showing of specific intent, the ICJ also concluded that Serbia had violated its obligations under the Genocide Convention by failing to transfer Radko Mladic, who had been indicted for genocide by the ICTY.<sup>112</sup> Moreover, the Court found jurisdiction over Serbia even though its predecessor State—rather than Serbia itself—had been party to the Genocide Convention. Serbia had contested the ICJ's jurisdiction to hear the case, arguing that, at the time Bosnia filed its application, Serbia was not the continuator of the Socialist Federal Republic of Yugoslavia (SFRY). The SFRY became a party to the Genocide Convention in 1948.<sup>113</sup> Serbia contended that jurisdiction was lacking because it was not a party to the Genocide Convention when the proceedings were instituted and because it had no access to the ICJ since Serbia and Montenegro were not members of the United Nations at that time.<sup>114</sup> The Court rejected Serbia's objection and found jurisdiction under Article IX of the Geneva Convention.<sup>115</sup>

107. The Wannsee Conference was a meeting of senior Nazi officials held in the Berlin suburb of Wannsee on January 20, 1942, to inform them of the “final solution of the Jewish question;” the killing of all eleven million European Jews.

108. *Trial Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo.)*, 2002 I.C.J. 610 (Order of Nov. 19); *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 916, 132 (Order of June 2, 1999); *Trial of Pakistani Prisoners of War (Pak. v. India)*, 1973 I.C.J. 347 (Order of Dec. 15).

109. SCHABAS, *supra* note 101, at 444.

110. Peter H. F. Bekker & Paul C. Szasz, Note, *International Decision: Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 91 AM. J. INT'L LAW 121 (1997).

111. *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 916.

112. *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80 at ¶471.

113. See United Nations Treaty Collection, <http://www.unhcr.ch/html/menu3/b/treaty1gen.htm> (last visited Mar. 28, 2007) (The SFRY signed on to the Convention with a reservation with regard to Article 9, noting that before any dispute to which the SFRY is a party may be submitted to the jurisdiction of the ICJ, the “specific and explicit consent” of the SFRY is required).

114. See United Nations Member States, <http://www.un.org/members/list.shtml#s> (last visited Mar. 28, 2008) (The SFRY was an original member of the United Nations in 1945. Serbia (then known as the Federal Republic of Yugoslavia) became a member of the United Nations on November 1, 2000. Following its independence, Montenegro became a member of the U.N. on June 28, 2006).

115. *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 80 at ¶140.

## IV. The Death Penalty

### A. THE UNITED STATES

In 2007, the U.S. Supreme Court and lower federal courts addressed several significant issues relating to the death penalty. Also, several state court decisions were notable. The primary focus of these decisions included: (1) jury selection and instructions, (2) procedural safeguards and sentencing criteria, and (3) constitutional methods of execution.

#### 1. *Jury Selection and Instructions*

In *Uttecht v. Brown*,<sup>116</sup> the Supreme Court, in a five-to-four decision, made it easier for prosecutors in death penalty cases to remove potential jurors who may be reluctant to impose the death penalty. The majority opinion held that appeals courts must defer to a trial judge's decision on whether a potential juror could overcome concerns about capital punishment and vote objectively to impose a death sentence.<sup>117</sup> The dissenters asserted that this set the juror disqualification bar too low and could imbalance juries towards imposing a death penalty.

The Supreme Court issued three (five-to-four) rulings in one day, which threw out death sentences for three Texas inmates because of jury instructions that did not allow jurors to give a reasoned moral response to mitigating evidence and sufficient weight to factors that might cause them to impose a life sentence instead of death. The instructions at issue had previously been held unconstitutional by the Court in 1991, and these opinions, *Abdul-Kabir v. Quarterman*,<sup>118</sup> *Brewer v. Quarterman*<sup>119</sup> and *Smith v. Texas*,<sup>120</sup> were widely viewed as being a stern message to Fifth Circuit and the Texas Court of Criminal Appeals to strictly follow Supreme Court precedent in capital cases.<sup>121</sup>

The Supreme Court heard oral argument on December 4, 2007, in the case of *Snyder v. Louisiana*,<sup>122</sup> in which an all-white jury, the result of the prosecution's preemptory strike of all five black prospective jurors, found a black man guilty of murder and sentenced him to death. The Supreme Court had ordered the Louisiana Supreme Court to reconsider its decision to uphold the jury verdict in light of *Miller-El v. Dretke*.<sup>123</sup> On remand, the Louisiana Supreme Court reaffirmed its earlier ruling that prosecution comments, in and out of court, including reference to the O. J. Simpson case, did not establish racial bias that tainted jury selection.

116. *Uttecht v. Brown*, 127 S.Ct. 2218 (2007).

117. See Adam Liptak, *Court Ruling Expected to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007, at A1.

118. *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007).

119. *Brewer v. Quarterman*, 127 S.Ct. 1706 (2007).

120. *Smith v. Texas*, 127 S.Ct. 1686 (2007).

121. See Stephanie Francis Ward, *High Court Messes With Texas . . . Again*, A.B.A. J. E-REPORT, April 27, 2007.

122. *Snyder v. Louisiana*, No. 06-10119, 2008 U.S. LEXIS 2708 (2008).

123. *Miller-El v. Dretke*, 545 U.S. 231, 269 (2005) (courts must address factors which may support a claim of intentional prosecutorial discrimination).

In *People v. Taylor*,<sup>124</sup> the New York Court of Appeals ruled (four-to-three) that, as a matter of stare decisis, the New York death sentence statute was unconstitutional on its face. The Court of Appeals had previously ruled in 2004<sup>125</sup> that a jury instruction could coerce deadlocked jurors into voting for death because it informed the jury that, in the event of a non-unanimous death sentence verdict, a sentence including parole would automatically be imposed.

The Ninth Circuit, in *Fields v. Brown*,<sup>126</sup> upheld the death sentence for a convicted murderer despite a claim of jury misconduct resulting from the foreman's outside research on the death penalty, including the Bible, which he brought to jury deliberations the next day and quoted, inter alia: "He that smiteth a man, so that he dies, shall surely be put to death."<sup>127</sup> One dissenting judge wrote that the majority had endorsed "a theocratic jury room."<sup>128</sup>

## 2. Procedural Safeguards and Sentencing Criteria

In *Schriro v. Landrigan*,<sup>129</sup> the Supreme Court reversed (five-to-four) the Ninth Circuit and held that the district court did not abuse its discretion in concluding that a death row inmate could not establish prejudice based on counsel's failure to present asserted mitigating evidence. Thus, the inmate's Sixth Amendment right to effective assistance of counsel claim was rejected. The ABA had filed an amicus curiae brief, which argued that the inmate's claim could not be judged fairly without a hearing on counsel's investigation of the asserted mitigation evidence.<sup>130</sup> On November 5, 2007, the Supreme Court accepted Idaho's appeal of the Ninth Circuit decision in *Arave v. Hoffman*,<sup>131</sup> which held that a lawyer, who advised his client to reject an offered guilty plea to murder with a life sentence, provided constitutionally ineffective assistance of counsel when the client was subsequently convicted and sentenced to death.<sup>132</sup> In *Stevens v. McBride*,<sup>133</sup> a divided panel of the Seventh Circuit held that legal counsel was constitutionally ineffective during the death penalty phase of the trial and issued a conditional writ of habeas corpus. At trial, the only evidence offered regarding the defendant's mental state at the time he killed a ten-year-old boy was testimony from a psychologist who believed that mental illness is a myth. In *Richey v. Bradshaw*,<sup>134</sup> the Sixth Circuit, for a second time, threw out a two-decades-old death sentence imposed on a British citizen convicted of killing a toddler in an apartment fire because he had received constitutionally ineffective assistance of counsel at trial.

124. *People v. Taylor*, 878 N. E. 2d 969 (2007); See Alan Feuer, *Murderer's Death Sentence Tossed Out*, N.Y. TIMES, Oct. 24, 2007, at B3.

125. *People v. LaValle*, 817 N.E. 2d 341 (N.Y. 2004).

126. *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) (en banc); See Adam Liptak, *Jury Consulted the Bible, But Death Sentence Stands*, N.Y. TIMES, Sept. 11, 2007, at A25.

127. *Fields*, 503 F.3d at 778 (quoting *Exodus* 21:12).

128. *Id.* at 788 (Gould, J., dissenting).

129. *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007).

130. See Mark Hansen, *High Court Tilts Against Death Row Inmate*, A.B.A. J. E-REPORT, May 18, 2007.

131. *Arave v. Hoffman*, 128 S.Ct. 532 (2007), cert. granted, 76 U.S. L.W. 3238 (U.S. Nov. 5, 2007) (No. 07-110).

132. See Linda Greenhouse, *'Bad' Legal Advice and the Death Penalty*, N.Y. TIMES, Nov. 6, 2007, at A22.

133. *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007).

134. *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007).

The Supreme Court, in *Panetti v. Quarterman*,<sup>135</sup> reversed (five-to-four) the Fifth Circuit and ruled that a mentally ill murderer who was delusional and lacked a “rational understanding” of why he had been sentenced to death could not be executed. The Court expanded the Eighth Amendment prohibition on executing the insane announced in *Ford v. Wainwright*<sup>136</sup> and held that an offender is entitled to a fair sentencing hearing with the opportunity to submit psychiatric evidence in opposition to the state’s competency examination and an evidence-based finding as to whether he has a rational understanding of why he is being sentenced to execution.<sup>137</sup> The ABA filed an amicus curiae brief in support of this position.

In *Roper v. Weaver*,<sup>138</sup> the Supreme Court dismissed certiorari as improvidently granted. Originally, the Court had agreed to decide whether the Eighth Circuit exceeded its narrow authority under 28 U.S.C. § 2254(d)(1), a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), by overturning a capital sentence because the prosecutor’s penalty phase closing argument was “unfairly inflammatory.”<sup>139</sup> Upon further review of the complex procedural history of the case, however, the Court concluded that a federal habeas petition which had been filed prior to the effective date of AEDPA, had not become unexhausted when Weaver filed for certiorari; thus, it remained for consideration by the district court, which had instead dismissed it without prejudice.

In *Medellin v. Texas*,<sup>140</sup> the Supreme Court granted certiorari to consider, for the second time in this capital case, complex issues under the Vienna Convention on Consular Relations and the ICJ *Avena* judgment and their interplay with principles of federalism and state law.<sup>141</sup>

### 3. *Constitutional Methods of Execution.*

In 2007, the Supreme Court accepted certiorari in the widely watched case of *Baze v. Rees*,<sup>142</sup> which challenges the most common lethal injection method in the United States—a three-drug “cocktail” that may place some inmates at risk of severe pain. The Kentucky Supreme Court ruled that the risk of severe pain was constitutionally insignificant. Following acceptance of *Baze*, the Supreme Court stayed three executions, and several lower federal and state courts also halted planned lethal injection proceedings.<sup>143</sup> The Eleventh

135. *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007).

136. *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986).

137. See Mark Hansen, *Mentally Ill Death Row Inmates Get Another Chance*, A.B.A. J. E-REPORT, July 6, 2007.

138. *Roper v. Weaver*, 127 S.Ct. 2022 (2007) (per curiam).

139. *Weaver v. Bowersox*, 438 F.3d 832, 841 (8th Cir. 2006).

140. *Medellin v. Texas*, 543 U.S. 1032 (2007).

141. See Lawrence G. Albrecht et al., *International Human Rights*, 40 INT’L LAW. 467, 468 (Summer 2006) (the ABA filed an amicus curiae brief in support of the petitioner).

142. *Baze v. Rees*, 128 S.Ct. 34 (2007).

143. *Berry v. Epps*, 128 S.Ct. 531 (2007); *Emmett v. Johnson*, No. 07A304, 2007 WL 3018923 (Oct. 17, 2007); *Turner v. Texas*, 128 S.Ct. 37 (2007); see also Linda Greenhouse, *Justices Stay Execution, a Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1; Associated Press, *Supreme Court Grants Stay of Execution for Virginia Man*, N.Y. TIMES, Oct. 18, 2007, at A21; Robert Barnes, *Stay of Execution Is Granted for Mississippi Murderer*, WASH. POST, Oct. 31, 2007, at A3; Brenda Goodman, *Top Court in Georgia Again Delays an Execution*, N.Y. TIMES, Oct. 23, 2007, at A27; Ralph Blumenthal, *Texas Ruling Signals Halt to Executions Indefinitely*, N.Y. TIMES, Oct. 3, 2007, at A14; See Ralph Blumenthal, *Texas Judge Draws Outcry for Allowing an Execution*, N.Y. TIMES, Oct. 25, 2007, at A18 (On the same day the Supreme Court accepted *Baze*, the presiding judge of the Texas Court of Criminal Appeals rejected the expedited appeal of a death row inmate because the

Circuit, in *Siebert v. Allen*,<sup>144</sup> sua sponte, stayed an execution pending further en banc consideration of the constitutional challenge to Alabama's lethal injection protocol. In *Lightbourne v. McCollum*,<sup>145</sup> however, the Supreme Court of Florida thereafter ruled that Florida's lethal injection practice, as actually administered, did not violate the Eighth Amendment. A similar conclusion had been reached by the Eighth Circuit in *Taylor v. Crawford*<sup>146</sup> with respect to Missouri's lethal injection protocol, and the Seventh Circuit had also refused to issue a stay of execution in two earlier cases, *Lambert v. Buss*<sup>147</sup> and *Woods v. Buss*,<sup>148</sup> challenging Indiana's method of lethal injection. On November 15, 2007, the Supreme Court blocked the execution of a Florida child-killer pending review of a petition for a writ of certiorari after the Eleventh Circuit refused to stay the planned lethal injection.<sup>149</sup>

#### 4. *Nongovernmental Organizations (NGOs)*

On October 28, 2007, the American Bar Association Death Penalty Moratorium Implementation Project released its final report, following compilation of data from eight separate state reviews conducted over a three-year period.<sup>150</sup> Key findings included, *inter alia*, failure of states to collect and preserve DNA evidence (which has been used to exonerate over 200 inmates), eyewitness misidentifications and false confessions resulting in wrongful convictions, persistent race-based disparities in death sentences when victims are white, state court appeal and post-conviction procedural flaws, poorly written and legally deficient jury instructions, and inadequate criminal defense legal services and resources. The ABA concluded that a nationwide freeze on executions was required. Many prosecutors and death penalty supporters assert, however, that the eight state studies were flawed because of alleged bias against the death penalty by ABA investigative teams, although the ABA has not taken an official position against the death penalty.<sup>151</sup> The Death Penalty Information Center reported that fifty-three persons were executed in the United States during 2006,<sup>152</sup> and, as of August 16, 2007, thirty-three persons were executed in 2007.

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rushed filing was delayed, due to a computer problem, past the 5 p.m. court closing. Michael Richard was then executed by lethal injection).

144. *Siebert v. Allen*, 504 F.3d 1341 (11th Cir. 2007).

145. *Lightbourne v. McCollum*, 969 So. 2d 326, (Fla. 2007) (en banc).

146. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).

147. *Lambert v. Buss*, 498 F.3d 446 (7th Cir. 2007) (per curiam).

148. *Woods v. Buss*, 496 F.3d 620 (7th Cir. 2007) (per curiam) .

149. *Schwab v. Florida*, 128 S. Ct. 644 (2007).

150. American Bar Association, *Death Penalty Moratorium Implementation Project*, available at <http://www.abanet.org/moratorium> (the final report and all eight state reports).

151. See American Bar Association, *The Death Penalty*, 34 AM. B. ASS'N HUMAN RIGHTS 2 (2007) (the official publication of the ABA Section of Individual Rights and Responsibilities, which was dedicated to a comprehensive thirty-year retrospective consideration of death penalty issues).

152. Death Penalty Information Center (2008), [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org). (last visited Mar. 28, 2008) (death penalty data).

### 5. State Legislative and Policy Developments

Several state legislatures passed or introduced bills in 2007 to abolish the death penalty.<sup>153</sup> Many states struggled with the expense of death penalty proceedings in 2007, and public policy and economic cost-benefit analysis became a major national focus in considering whether to pursue the death penalty.<sup>154</sup> Ninth Circuit Judge Alex Kozinski, in a nationally noted lecture, assessed the full range of pragmatic concerns regarding administration of the death penalty and concluded that, given current national reality, the asserted purposes of the death penalty are not being advanced.<sup>155</sup> Recent studies, however, have revived the debate over whether the death penalty deters murders.<sup>156</sup>

### B. INTERNATIONAL DEVELOPMENTS

In its 2007 report, Amnesty International found that, in 2006, at least 1,544 people were executed in twenty-five countries and at least 3,861 people were sentenced to death in fifty-five countries.<sup>157</sup> The true number of executions is believed to be far larger due to non-reporting, particularly in China. Ninety percent of all executions were carried out in just five countries: China, Iran, Iraq, Pakistan and the United States. Iran and Pakistan executed persons convicted of crimes committed while they were under age eighteen.<sup>158</sup> Rome-based Hands Off Cain,<sup>159</sup> reported that 5,628 people were executed in 2006 and that Iran and Pakistan also executed minors, in violation of the U.N. Convention on the Rights of the Child.<sup>160</sup> Many countries are undertaking the same pragmatic cost/benefit analysis of the death penalty as in the United States.<sup>161</sup> In November 2007, a draft resolution was introduced in the United Nations by eighty-five countries, including all twenty-seven E.U. nations, to seek a global moratorium on executions; however, the United States and China opposed the measure.<sup>162</sup>

153. See *id.*; Eddie Hicks, *Will New Jersey Ban Capital Punishment?*, 34 AM. B. ASS'N HUMAN RIGHTS 2, 6 (Spring 2007); Jeremy W. Peters, *New Jersey Moves to End Death Penalty*, N.Y. TIMES, Nov. 19, 2007, at B1 (New Jersey's last execution was in 1963, but eight men remained confined on death row).

154. See Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. TIMES, Nov. 4, 2007, at A1 (survey of issues in several states); Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, at A16.

155. See Frederic Block, *A Slow Death*, N.Y. TIMES, Mar. 15, 2007, at A27.

156. See Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, at A11.

157. Amnesty International, *Amnesty International Report 2007: The State of the World's Human Rights 314*, available at <http://thereport.amnesty.org/document/16>.

158. *Id.*

159. See Hands off Cain, *Executions in 2006*, <http://www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=10000531> (last visited Nov. 23, 2007).

160. See Human Rights Watch, *Iran: Revoke Death Sentence in Juvenile Case*, Nov. 3, 2007, available at <http://hrw.org/english/docs/2007/11/03/iran17242.htm>.

161. See Sandra Babcock, *The Global Debate on the Death Penalty*, 34 AM. B. ASS'N HUMAN RIGHTS 2, 17 (2007).

162. See Anne Penketh, *America and the World's Executioners Join Efforts to Block UN Moves to End Death Penalty*, INDEP., Nov. 15, 2007, <http://news.independent.co.uk/news/world/america-and-the-worlds-executioners-join-efforts-to-block-un-moves-to-end-death-penalty-400415.html>.

1. *Asia*

China continues to execute far more people than the rest of the world combined, with reports that as many as 8,000 people were executed in 2006.<sup>163</sup> China asserts, however, that fewer people are being executed since the Supreme People's Court reinstated a requirement that it must review and approve every death case.<sup>164</sup> Legal scholars in China predict that future executions may fall by 20 to 30 percent and that the number of crimes eligible for the death penalty may decrease.<sup>165</sup> The Constitutional Court of Indonesia upheld, six-to-three, the death penalty for three Australians convicted of heroin smuggling charges and decided that an amendment to the Indonesia Constitution upholding the right to life did not apply to drug trafficking capital cases because the rights of victims must be considered.<sup>166</sup> During 2007, over 130 people, including thirty-four foreigners, were on death row in Indonesia, primarily for drug-related crimes.<sup>167</sup> Kryrgyzstan signed into law a new Constitution that does not authorize the death penalty.<sup>168</sup>

2. *Africa*

Rwanda abolished the death penalty, which removed a major obstacle to U.N. ICTR transfer of suspects in the 1994 genocide and extradition of genocide suspects from other countries.<sup>169</sup> Mali announced that it was abolishing the death penalty, three decades after its last hangings in 1980.<sup>170</sup> In Uganda, Parliament unanimously passed a Penal Code Amendment Bill that authorized expansion of the death penalty to anyone who, aware of being HIV-positive, has sex with a child under age fourteen.<sup>171</sup> Also, in Swaziland, a rising incidence of rape, coupled with the world's highest level of HIV-infection, has fueled proposed legislative efforts to impose the death sentence on HIV-infected rapists.<sup>172</sup> Morocco announced that it would become the first Arab state to abolish the death penalty, which has not been applied since 1993.<sup>173</sup>

3. *Iraq*

Human Rights Watch criticized Iraq's "haste and vengeance" in hanging Saddam Hussein and asserted that further planned executions "highlight the Iraqi government's dis-

163. See *A Long Death Row*, ECONOMIST.COM, May 30, 2007, [http://www.economist.com/world/asia/displaystory.cfm?story\\_id=9250206](http://www.economist.com/world/asia/displaystory.cfm?story_id=9250206) (Mar. 28, 2008).

164. See Jim Yardley, *With New Law, China Reports a Decline in Executions*, N.Y. TIMES, June 9, 2007, at A3.

165. *Id.*

166. See Peter Gelling, *Indonesia Upholds Death In Drug Cases*, N.Y. TIMES, Oct. 31, 2007, at A12.

167. *Id.*

168. See Amnesty International Report 2007, *supra* note 157.

169. See Felly Kimenyi, *Rwanda: Parliament Scraps Death Penalty*, RWANDA NEW TIMES, June 10, 2007, <http://www.afrika.no/Detailed/14337.html>.

170. See *Mali Plans to Abolish Death Penalty*, IOL, Oct. 18, 2007, [http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=3045&art\\_id=nw20071018141836926C537790](http://www.int.iol.co.za/index.php?set_id=1&click_id=3045&art_id=nw20071018141836926C537790).

171. See *Uganda: Death Penalty for HIV-Positive Child Sex Offenders*, IRIN, Apr. 29, 2007, <http://www.plus-news.org/report.aspx?ReportId=71713> (last visited Mar. 28, 2008).

172. See *Aids Activists Call for Death Penalty for HIV Infection by Rape*, IRIN, April 23, 2007, <http://www.alertnet.org/thenews/newsdesk/IRIN/7693c989fb0d0ccb233ad668b339368f.htm> (last visited Mar. 28, 2008).

173. See *Morocco to Abolish Capital Punishment*, HANDS OFF CAIN, Feb. 1, 2007, <http://www.hands-off-cain.info/news/index.php?id=documento=9306985> (last visited Mar. 28, 2008).

turbing disregard for human rights and the rule of law.”<sup>174</sup> The D.C. Circuit Court of Appeals held that U.S. courts do not have habeas corpus jurisdiction to intervene in the case of a U.S. citizen convicted by an Iraqi criminal court of kidnapping and sentenced to death.<sup>175</sup> Throughout 2007, ongoing legal and political debates ensued in Iraq regarding the propriety of death sentences for former regime members.<sup>176</sup>

## V. Human Trafficking

“Trafficking in persons is a modern-day form of slavery, a new type of global slave trade.”<sup>177</sup> —U.S. Secretary of State, Condoleezza Rice

Slavery, in its modern-day form of human trafficking, was a major human rights concern in 2007. The internationally recognized crime targets the vulnerable, exploiting women, children, and men for sex, labor, domestic work, and other services. Although much has been done to combat this crime, human trafficking remains a major problem throughout the world.

### A. INTERNATIONAL DEVELOPMENTS

The primary international document regulating trafficking in persons is the *United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the “Protocol”). The Protocol entered into force in 2003 and requires State Parties to criminalize trafficking in humans, to establish comprehensive policies and programs to prevent and combat trafficking, and to protect victims of trafficking.<sup>178</sup> In 2007, six additional countries, including Suriname, Trinidad and Tobago, Saudi Arabia, Guinea-Bissau, and Cambodia, ratified the Protocol.<sup>179</sup> To date, the Protocol now has 117 signatories and 116 parties.<sup>180</sup>

While trafficking occurs throughout the world, the European Community, through the Council of Europe, has developed a new instrument to combat trafficking. Considering it necessary to draft another instrument going beyond the Protocol, the Committee of Ministers adopted the *Council of Europe Convention on Action Against Trafficking in Human Beings* in May 2005 (the “Convention”).<sup>181</sup> As the first European treaty in the field of anti-trafficking, the Convention focuses mainly on the protection of victims of trafficking and

174. Human Rights Watch, *Iraq: Halt Dujail Trial Executions*, Jan. 8, 2007, <http://hrw.org/english/docs/2007/01/08/Iraq14978.htm> (last visited Mar. 28, 2008).

175. *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007); see Josh White, *U.S. Citizen Sentenced to Death in Iraq Loses Appeal*, WASH. POST, Apr. 7, 2007, at A3.

176. See Richard A. Opper, Jr. & Alissa J. Rubin, *Execution Case Tests Iraq’s Bid to Ease Divide*, N.Y. TIMES, Oct. 27, 2007, at A1.

177. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 3 (2007), available at <http://www.state.gov/tip/rls/tiprpt/2007/>.

178. See generally, G.A. Res. 55/25, U.N. Doc. A/RES/55/24/Annex II (Nov. 15, 2000) (Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime).

179. *Id.*

180. *Id.*

181. Council of Europe, Directorate General of Human Rights and Legal Affairs, *Council of Europe Convention on Action against Trafficking in Human Beings*, Oct. 2007, [http://www.coe.int/t/dg2/trafficking/campaign/Source/FactSheet1\\_Oct07\\_EN.pdf](http://www.coe.int/t/dg2/trafficking/campaign/Source/FactSheet1_Oct07_EN.pdf).

safeguarding their rights. A unique aspect of this treaty includes the setting up of an independent monitoring mechanism capable of controlling the implementation of the obligations contained in the Convention. The treaty also aims to prevent and prosecute trafficking.<sup>182</sup> On October 24, 2007, the Council of Europe's Convention received the necessary tenth ratification in order for the treaty to enter into force in 2008. At the moment, Albania, Austria, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Moldova, Romania, and Slovakia have ratified the Convention.<sup>183</sup>

## B. UNITED STATES DEVELOPMENTS

The U.S. Department of State published its annual Trafficking in Persons Report (TIP Report) in June 2007, allocating "tier" rankings to distinguish each nation's efforts to combat trafficking.<sup>184</sup> Countries which do not comply with U.S. minimum trafficking regulations are placed in Tier 3 and may be denied non-humanitarian aid and assistance.

This year, a total of sixteen states—four more than in 2006—were given a Tier 3 status. Those countries placed in Tier 3 this year included: Algeria, Bahrain, Burma, Cuba, Equatorial Guinea, Iran, Kuwait, Malaysia, North Korea, Oman, Qatar, Saudi Arabia, Sudan, Syria, Uzbekistan, and Venezuela.<sup>185</sup>

## C. PROMINENT U.S. TRAFFICKING CASES IN 2007

### 1. *United States v. Paris*

A federal jury in Connecticut found Dennis Paris guilty for operating a sex trafficking ring in June 2007.<sup>186</sup> The jury convicted Paris of knowingly using minors in his prostitution business and using force, fraud, or other coercive means to compel adult victims to engage in sexual acts. Evidence at trial showed that Paris preyed upon his victims' vulnerabilities, including drug addictions, socioeconomic status, age, and living situations. Paris faces a sentence from 360 months to life in prison, and a fine up to \$1.5 million.<sup>187</sup> Nine co-defendants in this case previously pleaded guilty to federal charges including sex<sup>188</sup>

### 2. *United States v. Maksimenko and Aronov*

A Michigan court sentenced Michail Aronov to ninety months in prison and over \$1 million in restitution on August 16, 2007. Aronov was sentenced for being part of an involuntary servitude conspiracy to force Eastern European women to work as exotic dancers in Detroit strip clubs.<sup>189</sup> Aronov and his partners smuggled women into the United States and then threatened them and coerced them to work as dancers in strip

182. *Id.*

183. *Trafficking News*, ANTI-SLAVERY, Nov. 2007, <http://www.antislavery.org/homepage/traffic%20news/index.htm> (last visited Mar. 28, 2008).

184. TRAFFICKING IN PERSONS REPORT 2007, *supra* note 177.

185. *Id.* at 42.

186. Civil Rights Div., U.S. Dep't. of Justice, Anti-Trafficking News Bulletin (2007), [http://www.usdoj.gov/crt/crim/trafficking\\_newsletter/antitraffnews\\_aug07.pdf](http://www.usdoj.gov/crt/crim/trafficking_newsletter/antitraffnews_aug07.pdf).

187. *Id.*

188. *Id.*

189. *Id.*

clubs. He was the last of nine convicted defendants to be sentenced for crimes associated with this trafficking conspiracy.<sup>190</sup>

### 3. *United States v. Calimlim*

A Milwaukee federal jury convicted Dr. Jefferson Calimlim, Sr., and his wife, Elnora Calimlin, in May 2006 of forced labor of a Philippina woman. In February 2007, the court ordered the defendants to pay the victim over \$900,000 in restitution.<sup>191</sup> The Calimlins recruited the nineteen-year-old woman from the Philippines to the United States to be their domestic servant in 1985. For the next nineteen years, the woman worked in the house for as little as \$100 a month. The defendants used intimidation and psychological abuse to keep the woman from leaving the house. She was not allowed to leave the house without supervision.<sup>192</sup>

#### D. RECENT PUBLICATIONS ON TRAFFICKING IN HUMANS

A number of human trafficking publications were developed in 2007 focusing on victim assistance, trafficking recruitment tools, and analysis of current programming. The International Organization for Migration published a handbook entitled “The IOM Handbook on Direct Assistance for Victims of Trafficking.” This handbook provides guidance and advice necessary to effectively deliver assistance to trafficking victims.<sup>193</sup> Astra, a Serbian organization, published “Human (Child) Trafficking: A Look Through the Internet Window.” This report examines the recruitment of trafficking victims through the internet.<sup>194</sup>

In May 2007, the Department of Justice released the Attorney General’s Fiscal Year 2006 Report to Congress on U.S. Government Activities to Combat Trafficking in Persons.<sup>195</sup> This report tracks U.S. trafficking cases, victim assistance, and international and domestic funding, training, and outreach by the Department of Justice.

## VI. European Court of Human Rights

The year began with accusations by Russian President Vladimir Putin that the European Court of Human Rights (ECHR) was handing down “political” rulings after Russian

190. *Id.*

191. *Id.*

192. *Id.*; See also *Djoumessi v. Wolfenbarger*, No. 05-CV-70455-DT, 2007 WL 2021837 (E.D. Mich. July 12, 2007) (Cameroonian naturalized U.S. citizens sentenced for holding a young girl from Cameroon in involuntary servitude.); *United States v. Jones*, No. 1:05-cr-617-WSD, 2007 WL 2301420 (N.D. Ga. July 18, 2007) (Jones of Georgia pleaded guilty to conspiracy to engage in sex trafficking and to transport women across state lines for prostitution).

193. INT’L ORG. FOR MIGRATION (IOM), THE IOM HANDBOOK ON DIRECT ASSISTANCE FOR VICTIMS OF TRAFFICKING (2007), [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/main/site/published\\_docs/books/CT%20handbook.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/main/site/published_docs/books/CT%20handbook.pdf).

194. ASTRA, HUMAN (CHILD) TRAFFICKING: A LOOK THROUGH THE INTERNET WINDOW (2006), <http://www.astra.org.yu/en/pdf/InternetENG.pdf>.

195. DEP’T OF JUSTICE, ATT’Y GEN. ANN. REP. TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2006 (May 2007), <http://www.usdoj.gov/ag/annualreports/tr2006/agreporthumantrafficking2006.pdf>.

forces were found responsible for civilian deaths in several cases.<sup>196</sup> The ECHR continued to hand down judgments against Russia in cases of alleged human rights abuses filed by Chechens.<sup>197</sup> On June 21, 2007, the ECHR ruled that Russia was responsible for the killings of four Chechens, including Zura Bitiyeva, a well-known political activist and anti-war protester,<sup>198</sup> in *Bitiyeva v. Russia*.<sup>199</sup> Although the perpetrators of the crime have not been identified, Russia was found guilty on the basis of eyewitness descriptions of the attackers, the vehicles driven by them, and their ability to travel during restricted hours.<sup>200</sup> The ECHR determined that Russia had violated Articles 2 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").<sup>201</sup> Article 2 protects the right to life and provides that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."<sup>202</sup> The right to an effective remedy is guaranteed by Article 13 which states: "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>203</sup>

Regarding the detention of Bitiyeva at the Chernokozovo detention facility three years prior to her death, the ECHR agreed with the applicant that Russia had violated Article 3, the Convention's prohibition of torture, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>204</sup> In addition, due to the lack of clarification surrounding the legal status of the facility, the applicant argued that Bitiyeva's detention violated Article 5 of the Convention, which states in part that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."<sup>205</sup> The ECHR agreed and further admonished Russia by stating that "[t]his situa-

196. See Reuters, *Putin Calls European Rights Court Rulings "Political,"* RADIO FREE EUROPE/RADIO LIBERTY, Jan. 11, 2007, available at <http://www.rferl.org/featuresarticle/2007/01/9d15a5cc-496d-489c-a68a-2883ffb58fb8.html>.

197. The European Court of Human Rights held Russia responsible for violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights) with regard to its actions against Chechens in the following cases: *Chitayev v. Russia*, [2007] Eur. Ct. H.R. 60; *Baysayeva v. Russia*, [2007] Eur. Ct. H.R. 256; *Akhmadova v. Russia*, [2007] Eur. Ct. H.R. 385; *Dunayev v. Russia*, [2007] Eur. Ct. H.R. 404; *Bitiyeva v. Russia*, [2007] Eur. Ct. H.R. 510; *Alikhadzhiyeva v. Russia*, [2007] Eur. Ct. H.R. 555; *Baygayev v. Russia*, [2007] Eur. Ct. H.R. 568; *Magomadov v. Russia*, [2007] Eur. Ct. H.R. 581; *Musayev v. Russia*, [2007] Eur. Ct. H.R. 671; *Musayeva v. Russia*, [2007] Eur. Ct. H.R. 643; *Goncharuk v. Russia*, [2007] Eur. Ct. H.R. 759; *Goygova v. Russia*, [2007] Eur. Ct. H.R. 761; *Makhauri v. Russia*, [2007] Eur. Ct. H.R. 760; *Medov v. Russia*, [2007] Eur. Ct. H.R. 903; *Khamidov v. Russia*, [2007] Eur. Ct. H.R. 928; *Isayeva v. Russia*, [2007] Eur. Ct. H.R. 924; *Kukayev v. Russia*, [2007] Eur. Ct. H.R. 929; *Tangiyeva v. Russia*, [2007] Eur. Ct. H.R. 1001; 2007 Eur. Ct. H.R. 1023.

198. See Amnesty International, Russian Federation: European Court of Human Rights Rulings on Bitiyeva and X v. Russia (June 21, 2007), available at <http://web.amnesty.org/library/Index/ENGEUR460272007>.

199. See *Bitiyeva*, [2007] Eur. Ct. H. R. 510.

200. *Id.*

201. *Id.*

202. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

203. *Id.* at art. 13.

204. See *Bitiyeva*, [2007] Eur. Ct. H.R. 510, ¶¶ 93, 103-107.

205. *Id.* ¶¶ 110, 113-119.

tion fosters impunity for all kinds of abuses and is absolutely incompatible with the responsibility of the authorities to account for individuals under their control.”<sup>206</sup>

*Associated Society of Locomotive Engineers and Firemen v. United Kingdom* was a landmark case before ECHR and upheld the right of ASLEF, a British trade union, to choose its members.<sup>207</sup> The ECHR found the U.K. had violated the Union’s freedom of association (Article 11 of the Convention) when it prevented the Union from expelling a member due to his membership in the British National Party (BNP), stating that Article 11 could not be interpreted as imposing obligations for associations to admit anyone who applied for membership.<sup>208</sup> Further, the ECHR explained that where associations are set up by people who share common values, ideals, and goals, “it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.”<sup>209</sup>

On April 10, 2007, the Grand Chamber of the ECHR ended a four-year legal battle in *Evans v. United Kingdom* that could have had a major impact on fertility law throughout the U.K. and the E.U.<sup>210</sup> The ECHR ruled against Evans’s argument that a U.K. law mandating the destruction of embryos after the consent of one of the parties is withdrawn is, without exception, neither necessary, nor proportionate, in its effects. She argued the U.K. law violated Articles 2, 8, and 14 of the Convention.<sup>211</sup> Focusing on the fact that the “issues raised by the present case are undoubtedly of a morally and ethically delicate nature” and taking into account “the lack of European consensus” on the matter,<sup>212</sup> the ECHR deferred to established English law and unanimously decided there had been no violation of Evans’s (or the embryos’) right to life (Article 2). In addition, the ECHR decided, by thirteen votes to four, that the English regulations violated neither Evans’s right to respect for private and family life (Article 8) nor the Convention’s prohibition of discrimination (Article 14).<sup>213</sup>

The ECHR issued a unanimous decision in favor of the Church of Scientology of Moscow upholding religious freedoms on April 5, 2007.<sup>214</sup> The Court determined that Russia had violated the rights of the Scientologists under Article 11 of the Convention (the right to freedom of association) “read in the light of Article 9” (the right to freedom of relig-

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206. *Id.* ¶ 118.

207. See *Associated Soc’y of Locomotive Eng’rs & Firemen (ASLEF) v. United Kingdom*, [2007] Eur. Ct. H.R. 184; See also *Union Wins BNP Expulsion Ruling*, BBC NEWS, Feb. 27, 2007, available at [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/6402533.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/6402533.stm).

208. See *ASLEF*, [2007] Eur. Ct. H.R. 184, ¶ 39; see also *ASLEF, About Us*, [http://www.aslef.org.uk/information/100011/about\\_us/](http://www.aslef.org.uk/information/100011/about_us/); see also *British National Party, Mission Statement*, <http://www.bnp.org.uk/mission-statement/> (Both the ASLEF and the BNP recognize that their views on trade unionism are in opposition to one another. The ASLEF is Britain’s trade union open to U.K. train drivers, regardless of their sex, ethnicity, religion, etc. The BNP is a nationalist organization that “exists to secure a future for the indigenous peoples of these islands in the North Atlantic which have been our homeland for millennia.”

209. *ASLEF*, [2007] Eur. Ct. H.R. 184, ¶ 39.

210. See *Evans v. United Kingdom*, [2007] Eur. Ct. H.R. 264-65.

211. See *id.* ¶¶ 61, 66; Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

212. *Evans*, 2007 Eur. Ct. H.R. 264-65, ¶¶ 78, 92.

213. *Id.* ¶¶ 54, 58-60, 84-92, 95-96; (Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele dissenting).

214. See *Church of Scientology Moscow v. Russia*, [2007] Eur. Ct. H.R. 259.

ion), when it refused to consider the application of Church of Scientology Moscow for re-registration as a religious organization.<sup>215</sup>

In *Baczkowski v. Poland*, the ECHR ruled unanimously that the banning of a 2005 Lesbian, Gay, Bisexual, and Transgender (LGBT) pride parade in Warsaw violated Articles 11, 13, and 14 of the Convention.<sup>216</sup> Delivered on May 3, 2007, the ruling affirmed that banning LGBT pride parades goes against freedom of assembly and association. Additionally, the ECHR emphasized the “positive obligations” of a State to secure genuine and effective respect for the freedoms guaranteed in Article 11, stating that the freedom of association and assembly “is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.”<sup>217</sup>

## VII. Myanmar

In August and September 2007, peaceful demonstrators in Myanmar (formerly Burma) filled the streets of Yangon (formerly Rangoon), Mandalay, and other cities. What began as protests against rising prices of rice, petrol, and ground nut oil, quickly expanded into demands for a return to democracy and the release of pro-democracy leader Daw Aung San Suu Kyi, who has been under house arrest for twelve years.<sup>218</sup> Monks, highly revered in Myanmar, took to the streets to protest the military government and called for the entire country to join them in their effort to overthrow the government.<sup>219</sup> Turnout estimates ranged from 50,000 to 100,000 as Myanmar witnessed the largest street protests in two decades against the nation’s military rulers.<sup>220</sup>

The protests were ultimately crushed by soldiers and riot police who opened fire on the protesters and reportedly arrested 3,000 civilians.<sup>221</sup> To prevent information about the crackdown from reaching the outside world, the junta shut down access to the internet, suspended text messaging, and eventually seized satellite phones.<sup>222</sup>

The outside world did respond to the protests, however, and the ensuing crackdown. On September 25, 2007, President Bush, in a speech before the U.N. General Assembly,

215. *Id.* ¶¶ 81-85, 88-98; see also *Church of Scientology of Moscow Wins Landmark Decision in European Court of Human Rights—Confirmation of Scientology’s Religious Bona Fides by the Highest Court in Europe*, SCIENTOLOGY TODAY, Apr. 5, 2007, available at [http://www.scientologytoday.org/press/704042347361\\_scn-int.html](http://www.scientologytoday.org/press/704042347361_scn-int.html).

216. See *Baczkowski v. Poland*, [2007] Eur. Ct. H.R. 370; see also *Gay Marchers Ignore Ban in Warsaw*, BBC NEWS, June 11, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4084324.stm>.

217. *Baczkowski*, [2007] Eur. Ct. H.R. 370, ¶ 64; see also *European Court of Human Rights States that Poland Violated Article 11*, LEGISLATIONLINE, May 14, 2007, <http://www.legislationline.org/news.php?tid=1&jid=39> (last visited Mar. 28, 2008).

218. *Monks Lead Largest Burma Protest*, BBC NEWS, Sept. 24, 2007, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/7009825.stm>.

219. *Id.*

220. Seth Mydans, *Monks’ Protest Is Challenging Burmese Junta*, N.Y. TIMES, Sept. 24, 2007, available at <http://www.nytimes.com/2007/09/24/world/asia/24myanmar.html>. (In 1988, the military crushed a peaceful nationwide uprising, and killed an estimated 3,000 civilians).

221. Andrew Marshall, *Anatomy of a Failed Revolution*, TIME, Oct. 11, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1670515,00.html>.

222. *Id.*

announced specific steps that the U.S. Government would adopt “to help bring peaceful change to Burma.”<sup>223</sup> The President promised that the U.S. Government would:

[T]ighten economic sanctions on the leaders of the regime and their financial backers, [i]mpose an expanded visa ban on those responsible for the most egregious violations of human rights, [i.e. three dozen military and government leaders], as well as their family members, [and c]ontinue supporting the efforts of humanitarian groups working to alleviate suffering in [Myanmar].<sup>224</sup>

U.S. sanctions were issued by President Bush via executive order on October 19, 2007.<sup>225</sup> Characterizing the sanctions as a response to an “extraordinary threat to the national security and foreign policy of the United States”<sup>226</sup>—so as to bring the sanctions within the national state of emergency declared in President Clinton’s first executive order against Myanmar in 1997<sup>227</sup>—President Bush ordered that

all property and interests in property of the following persons that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.<sup>228</sup>

An annex of individuals and companies who, either form part of the military junta in Myanmar, or who funnel money to their activities and whose assets in the United States are blocked, is attached to the executive order and has already been supplemented by the addition of names.<sup>229</sup>

Following the U.S. lead, the E.U.,<sup>230</sup> Japan,<sup>231</sup> and Australia<sup>232</sup> also imposed sanctions on Myanmar. While China and Russia opposed sanctions, the U.N. Security Council, with their approval, strongly deplored the violence against peaceful demonstrators. In a

223. U.S. DEP’T OF STATE, BURMA: DEMOCRATIC ASPIRATIONS (2007), <http://www.state.gov/r/pa/scp/93709.htm>.

224. *Id.*

225. David S. Cloud, *Bush Imposes New Sanctions on Myanmar*, N.Y. TIMES, Oct. 20, 2007, available at [http://www.nytimes.com/2007/10/20/washington/20prexy.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/10/20/washington/20prexy.html?_r=1&oref=slogin).

226. Exec. Order No. 13,448, 72 Fed. Reg. 60,223 (Oct. 18, 2007).

227. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997); Burmese Freedom and Democracy Act, Pub. L. No. 108-61, 117 Stat. 864, §§ 3-4, 6 (2003) (Because the government of Myanmar had previously “committed large-scale repression of the democratic opposition in Burma,” President Clinton instituted the first sanctions against Myanmar through executive order on May 20, 1997, which was then expanded and codified in July 2003 by the Congress in the Burmese Freedom and Democracy Act. In order to “sanction the ruling Burmese military junta, [and] to strengthen Burma’s democratic forces,” the law froze Burmese assets in the United States, expanded a visa ban, and set broad import restrictions for Burmese products attempting to enter the United States. Those sanctions remain in effect).

228. Exec. Order No. 13,448, 72 Fed. Reg. 60,223-24.

229. *Id.*

230. Ingrid Melander, *EU Implements Sanctions on Myanmar Junta*, REUTERS, Nov. 19, 2007, available at <http://www.reuters.com/article/mapNews/idUSL19999620071119>.

231. James Blitz & Amy Kazmin, *EU and Japan Set New Burma Sanctions*, FIN. TIMES, Oct. 15, 2007, available at [http://search.ft.com/ftArticle?queryText=EU+and+Japan+set+new+Burma+sanctions&y=0&aje=true&x=0&id=071015000437&ct=0&ncklick\\_check=1](http://search.ft.com/ftArticle?queryText=EU+and+Japan+set+new+Burma+sanctions&y=0&aje=true&x=0&id=071015000437&ct=0&ncklick_check=1).

232. *Australia Fleshes Out Burma Sanctions*, SYDNEY MORNING HERALD, Oct. 24, 2007, available at <http://www.smh.com.au/news/National/Australia-fleshes-out-Burma-sanctions/2007/10/24/1192941140707.html>.

Presidential Statement released on October 11, 2007,<sup>233</sup> the Security Council called upon the government to work toward a peaceful solution and to start a genuine national dialogue with the direct support of the United Nations.

In addition, the U.N. Human Rights Council held an urgent full-day meeting on the situation in Myanmar on October 2, 2007.<sup>234</sup> On the same day, the Human Rights Council adopted a resolution by consensus (including China) deploring the continued violent repression of peaceful demonstrations in Myanmar, urging the government to ensure full respect for human rights and fundamental freedoms, to investigate and bring to justice perpetrators of human rights violations, to release without delay those arrested and detained, including all political detainees, including Daw Aung San Suu Kyi, and to lift all restraints on peaceful political activity of all persons.<sup>235</sup> The resolution urged the government to urgently engage in a national dialogue so as to achieve reconciliation, democratization, and the rule of law.<sup>236</sup> Unfortunately, however, Myanmar was not one of the first forty-eight countries slated for human rights review under the terms of the Universal Periodic Review mandate, described above, of the Human Rights Council.<sup>237</sup> In fact, Myanmar is only set down for review in the last year of the first cycle of review: 2011.

On November 10, 2007, Paulo Sergio Pinheiro, the U.N. Special Rapporteur on the situation of human rights in Myanmar, arrived in the nation to verify allegations of abuses by the Myanmar government against demonstrators.<sup>238</sup> During his trip, Pinheiro met with government officials, the U.N. Country Team, monks, detainees, and representatives of ethnic groups.<sup>239</sup> Pinheiro stated that he was unable to confirm neither the number of casualties nor the number of detainees released.<sup>240</sup> Myanmar officials claimed only fifteen casualties and assert that the government has released around 3,000 detainees.<sup>241</sup>

Nevertheless, on November 22, 2006, the U.N. General Assembly's Third Committee on Social, Humanitarian and Cultural Affairs approved a draft resolution critical of Myanmar.<sup>242</sup> The resolution was adopted by seventy-nine votes to twenty-eight<sup>243</sup> with sixty-three abstentions and condemned Myanmar for widespread human rights violations, in-

233. U.N. Sec. Council, *Security Council Deplores Violence Used Against Myanmar Demonstrators, Stresses Importance of Early Release For All Political Prisoners*, U.N. Doc. SC/9139 (Oct. 11, 2007).

234. Press Release, United Nations, UN Human Rights Council Calls on Myanmar to Release Detainees, Political Prisoners (Oct. 2, 2007), <http://www.un.org/apps/news/story.asp?NewsID=24124&Cr=myanmar&Cr1>.

235. Situation of Human Rights in Myanmar, H.R.C. Res. S-5/1 (Oct. 2, 2007); *See also* Press Release, United Nations, Human Rights Council Strongly Deplores Continued Violent Repression of Peaceful Demonstrations in Myanmar, (Oct. 2, 2007), *available at* <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/6F686D230293EC91C12573680072F75A>.

236. Human Rights Council Strongly Deplores Continued Violent Repression of Peaceful Demonstrations in Myanmar, *supra* note 235.

237. *Report to the General Assembly on the Fifth Session of the Council*, *supra* note 16.

238. Press Release, United Nations, World Must Keep Spotlight on Myanmar, Urges UN Rights Expert (Nov. 16, 2007), *available at* <http://www.un.org/apps/news/story.asp?NewsID=24695&Cr=myanmar&Cr1=>

239. *Id.*

240. *Id.*

241. *Id.*

242. U.N. GAOR, 61st Sess., 52d mtg., U.N. Doc. A/C.3/61/L.38/Rev.1 (Nov. 20, 2006).

243. *Id.* (The against votes came from Algeria, Azerbaijan, Bangladesh, Belarus, Brunei Darussalam, Cambodia, China, Congo, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Egypt, Guinea, India, Indonesia, Iran, Lao People's Democratic Republic, Libya, Malaysia, Myanmar, Pakistan, Russian Federation, Sudan, Syria, Uzbekistan, Venezuela, Viet Nam, and Zimbabwe).

cluding: torture, summary executions, forced labor, sexual violence, and the recruitment of child soldiers.<sup>244</sup> A subsequent resolution to take no action on the resolution was just defeated with seventy-seven votes against, sixty-four in favor, and thirty abstentions.<sup>245</sup> The fact that sixty-four countries wanted no action taken against Myanmar does not augur well for the resolution of the problems in Myanmar.

Although the ten-member Association of South East Asian Nations (ASEAN) has consistently insisted upon “constructive dialogue” with Myanmar as the only effective means to bring about a change, it did condemn the crackdown.<sup>246</sup> However, at a recent meeting at which it signed a new charter to transform the bloc into an E.U.-style single market by 2015 and to guarantee democracy and human rights for the region’s 570 million people, discussed below, ASEAN rejected the U.S. Senate’s call to suspend Myanmar,<sup>247</sup> thereby reaffirming its principle of non-interference in internal affairs of a Member State. That said, following signature of the new ASEAN charter, Gloria Macapagal Arroyo, the Philippines president, said that her country’s congress would have “extreme difficulties in ratifying the ASEAN charter as long as Aung San Suu Kyi . . . remained under arrest.”<sup>248</sup>

### VIII. Southeast Asian Charter for Human Rights

On November 20, 2007, ASEAN, composed of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam adopted a binding charter for the organization.<sup>249</sup> One of the important provisions in the Charter is that ASEAN will establish a human rights body to promote human rights and democracy in this part of the world.<sup>250</sup>

While Asian countries have for many years discussed ways of redressing the absence of a regional human rights instrument and institution,<sup>251</sup> this is the first concrete step taken to put a treaty in place and develop a human rights structure that will govern such issues. Problematically, however, the ASEAN Charter has to be ratified by all members before it comes into force.<sup>252</sup> Furthermore, it contains no provisions which would allow for punitive measures against states that are non-compliant with the human rights and democracy

244. *Id.*

245. *Id.*

246. George Yeo, Sing. Minister for Foreign Affairs, Statement by ASEAN Chair, (Sept. 27, 2007), <http://www.aseansec.org/20974.htm> (last visited Mar. 28, 2008).

247. Assoc. Press, ASEAN Rejects US Senate Call to Suspend Myanmar Until Junta Improves Human Rights, *INT’L HERALD TRIB.*, Nov. 18, 2007, available at <http://www.ihf.com/articles/ap/2007/11/18/asia/AS-GEN-ASEAN-US-Myanmar.php>.

248. Amy Kazmin, *New Charter Falls Foul of Burma Divisions*, *FIN. TIMES*, Nov. 21, 2007, at 7, available at <http://search.ft.com/ftArticle?queryText=Region%27s+new+charter+falls+foul&y=0&aje=true&x=0&id=071121000264&ct=0>.

249. ASEAN, *THE ASEAN CHARTER* (Nov. 20, 2007), available at <http://www.aseansec.org/ASEAN-Charter.pdf>.

250. *Id.* art. 14.

251. Rodolfo C. Severino, *Framing the ASEAN charter: An ISEAS Perspective*, *Institute of Southeast Asian Studies* (2005), [http://www.iseas.edu.sg/Framing\\_ASEAN\\_Charter.pdf](http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf).

252. ASEAN CHARTER, *supra* note 249, at art. 47.

provisions of the Charter.<sup>253</sup> The drafting process of the Charter itself has been criticized, with Amnesty International arguing that it was “largely opaque and non-participatory.”<sup>254</sup>

While the Charter aims “[t]o strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms,”<sup>255</sup> it also contains the principle that there shall be no interference in the domestic affairs of states.<sup>256</sup> This principle, as it has in the past, will severely hamper the ability of ASEAN to deal with issues in Member States. This principle has already severely limited what ASEAN has been willing to do in relation to Myanmar.

These are important issues in the context of Myanmar and other human rights issues in the region, as ASEAN has failed to deal with these problems adequately. The fact that ASEAN now has a charter with human rights provisions will be seen as a further test of ASEAN’s resolve and ability to deal with the ongoing crisis in Myanmar. ASEAN has indicated, however, that it is unwilling to impose measures such as sanctions.<sup>257</sup> While the charter makes a provision for a human rights body to be established that will seek the “promotion and protection of human rights and fundamental freedoms”<sup>258</sup> in the region, what the structure will be is unknown and the fact that it will be established by the foreign ministers of the various states implies that it will be given little teeth to deal with the various problems it will have to contend with.

## IX. Sexual Exploitation by U.N. Personnel

Instances of sexual exploitation and abuse (SEA) against women and children in armed conflict have been documented since time immemorial. More recently, this disturbing trend has extended to acts perpetrated by U.N. Peacekeepers. There has been evidence of U.N. personnel committing sex crimes against women and young girls in Bosnia, Burundi, Cambodia, Congo, Guinea, Haiti, Ivory Coast, Kosovo, Liberia, Sierra Leone, and Sudan.<sup>259</sup> These crimes have ranged from rape to forced prostitution.

On December 6, 2006, the Department of Peacekeeping Operations (DPKO) co-hosted, with the Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Programme (UNDP) and the United Nations Children’s

253. *See id.* at arts. 24-27 (The Charter does contain dispute resolution mechanisms for disputes concerning the application of the Charter).

254. Public Statement, Amnesty International, ASEAN: Human Rights in the Charter and Beyond, (Nov. 21, 2007), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGASA010092007010092007>.

255. ASEAN Charter, *supra* note 249, art. 1(7).

256. *See id.* art. 2(2)(f).

257. Assoc. Press, *ASEAN Adopts Landmark Charter, with Watered-Down Human Rights Body to Appease Myanmar*, BURMA DIGEST, Nov. 20, 2007, available at <http://burmadigest.info/2007/11/20/asean-adopts-landmark-charter-with-watered-down-human-rights-body-to-appease-myanmar/>.

258. Jeremy Sarkin, *Toothless Charter Will Hurt ASEAN Credibility*, Embassy of Indonesia Ottawa, Nov. 29, 2007, [http://www.indonesia-ottawa.org/information/details.php?type=news\\_copy&id=5057](http://www.indonesia-ottawa.org/information/details.php?type=news_copy&id=5057) (last visited Mar. 28, 2008).

259. Brett D. Schaefer, *Time for a New United Nations Peacekeeping Organization*, BACKGROUNDER, Feb. 13, 2007. *See also* Colum Lynch, *U.N. Faces More Accusations of Sexual Misconduct*, WASH. POST, Mar. 13, 2005, at A22; *UN Troops Face Child Abuse Claims*, BBC NEWS, Nov. 30, 2006, available at <http://news.bbc.co.uk/2/hi/americas/6195830.stm>; Kate Holt & Sarah Hughes, *UN Staff Accused of Raping Children in Sudan*, TELEGRAPH (U.K.), Jan. 4, 2007.

Fund (UNICEF), the “High-level Conference on Eliminating Sexual Exploitation and Abuse by UN and NGO Personnel.”<sup>260</sup> A primary goal of the conference was to “agree on a common framework to further advance the standards of conduct outlined in the U.N. Secretary-General’s Bulletin on sexual exploitation and abuse.”<sup>261</sup> This resulted in the conference issuing the “Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and Non-UN Personnel,” which lays out ten strategic actions for all stakeholders:<sup>262</sup>

1. Develop organization-specific strategies to prevent and respond to sexual exploitation and abuse.
2. Incorporate [U.N.] standards on sexual exploitation and abuse in induction materials and training courses for our personnel.
3. Prevent perpetrators of sexual exploitation and abuse from being (re-)hired or (re-)deployed.
4. Ensure that complaint mechanisms for reporting sexual exploitation and abuse are accessible and that focal points for receiving complaints understand how to discharge their duties.
5. Take appropriate action to the best of the [U.N.’s] abilities to protect persons from retaliation where allegations of sexual exploitation and abuse are reported involving [U.N.] personnel.
6. Investigate allegations of sexual exploitation and abuse in a timely and professional manner.
7. Take swift and appropriate action against [U.N.] personnel who commit sexual exploitation and abuse.
8. Provide basic emergency assistance to complainants of sexual exploitation and abuse.
9. Regularly inform [U.N.] personnel and communities on measures taken to prevent and respond to sexual exploitation and abuse.
10. Engage the support of communities and governments to prevent and respond to sexual exploitation and abuse by [U.N.] personnel.<sup>263</sup>

Although it is encouraging that the United Nations is addressing issues of SEA seriously and setting a positive standard of conduct, this statement, and indeed the conference itself, should have been unnecessary in principle, given that the Secretary General set a zero tolerance policy in 2003. At that time, the Secretary General noted that “[s]exual exploitation and sexual abuse violate universally recognized international legal norms and standards. Such conduct is prohibited by the United Nations Staff Regulations and Rules.”<sup>264</sup>

Since the High-level Conference, the General Assembly has published several documents relating to SEA by peacekeepers with no clear advancement toward its elimina-

260. U.N. Dep’t of Peacekeeping Operations, Conduct and Discipline Team, *High-level Conference on Eliminating Sexual Exploitation and Abuse by UN and NGO Personnel, Conference Report*, at 3 (Dec. 4, 2006).

261. *Id.*

262. *Id.* at 4.

263. U.N. Dep’t of Peacekeeping Operations, *Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and Non-UN Personnel* (Dec. 4, 2006).

264. Secretary-General, United Nations, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ¶ 3.1, S/T/SGB/2003/13 (Oct. 9, 2003).

tion.<sup>265</sup> In the end, holding a U.N. Peacekeeper criminally liable for acts committed on a mission continues to be difficult. In 2007, the U.N. was unable to gain consensus for a model Memorandum of Understanding (MOU) outlining the conditions under which a member State will provide troops for peacekeeping operations.<sup>266</sup> If a crime is committed by a peacekeeper and the host State is unable to prosecute, which generally occurs, prosecution falls to the troop-sending State. There, however, can be a jurisdictional gap if the criminal laws of the prosecuting State do not cover crimes (e.g., prostitution) that violate U.N. Regulations or the host State's criminal laws. The Group of Legal Experts on ensuring the accountability of U.N. officials and experts on missions has recommended "a new international convention to address jurisdiction and related issues."<sup>267</sup> But adoption of a convention is a long-term objective. Meanwhile, SEA continues to be a serious problem. In 2006, there were 371 new allegations reported,<sup>268</sup> and "none appears to have been prosecuted."<sup>269</sup>

On October 31, 2007, Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations, noted "that the Department continued to receive allegations of sexual exploitation and abuse, which he regretted. The United Nations counted on Member States to help ensure that contingent commanders understood, and took seriously, their responsibilities and that they were accountable."<sup>270</sup> It appears the Statement of Commitment had minimal effect in addressing SEA by peacekeepers in 2007.

## X. Disability Rights

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)<sup>271</sup> and its Optional Protocol<sup>272</sup> were adopted by the General Assembly on December 13, 2006,<sup>273</sup> and opened for signature on March 30, 2007.<sup>274</sup> On the day it was opened for

265. See, e.g., U.N. GAOR, 61st Sess., ¶ 66-82, U.N. Doc. A/61/19 (Part II) (June 5, 2007); U.N. GAOR, 61st Sess., U.N. Doc. A/61/19 (Part III) (June 12, 2007); Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. A/61/957 (June 15, 2007); G.A. Res. 291, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/291 (Aug. 24, 2007).

266. U.N. GAOR, 61st Sess., ¶ 14, U.N. Doc. A/61/19 (Part II) (June 5, 2007).

267. U.N. GAOR, 62nd Sess., U.N. Doc. A/62/329 (Sept. 11, 2007).

268. *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, supra note 265.

269. Francis Elliott & Ruth Elkins, *UN Shame Over Sex Scandal*, INDEPENDENT, Jan. 7, 2007, available at <http://www.independent.co.uk/news/world/politics/un-shame-over-sex-scandal-431121.html?service=Print>.

270. Press Release, Dep't of Public Info., Momentous Year for United Nations Peacekeeping as it Mounts Two Unique Operations in Africa, Sustains 18 More, Restructures Department, Fourth Committee Told, GA/SPD/382 (Oct. 31, 2007).

271. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006), available at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm> [hereinafter CRPD].

272. Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006), available at <http://www.un.org/esa/socdev/enable/documents/tccoptprote.pdf> [hereinafter Optional Protocol].

273. Press Release, U.N. General Assembly, General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Persons with Disabilities, GA/10554 (Dec. 13, 2006), available at <http://www.un.org/News/Press/docs/2006/ga10554.doc.htm>

274. Press Release, United Nations, Convention on Rights of Persons with Disabilities to be Opened for Signature on 30 March, HR/4914, L/T/4402 (March 29, 2007), available at <http://www.un.org/News/Press/docs/2007/hr4914.doc.htm>

signature, a record eighty-two countries signed the Convention and forty-four signed the Optional Protocol.<sup>275</sup> One country, Jamaica, also ratified the Convention on that date. The Convention and its Optional Protocol have entered into force as of May 3, 2008, with twenty-five ratifications of the Convention and fifteen of the Optional Protocol.<sup>276</sup>

The development of the CRPD began in 2001, when the General Assembly passed a resolution, initiated by the government of Mexico, to establish an Ad Hoc Committee to consider proposals for a “comprehensive and integral convention to promote and protect the rights and dignity of persons with disabilities.”<sup>277</sup> Earlier efforts to create such a convention had resulted in the 1993 adoption of the U.N. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, a non-binding declaration.<sup>278</sup> The Standard Rules signaled a paradigm shift on the issue of disability, from a medical and charity-based approach to non-discrimination and human rights. The CRPD continues to develop this paradigm shift, addressing a broader spectrum of rights and enshrining the obligation to respect the rights of persons with disabilities without discrimination as a matter of international law.

The Ad Hoc Committee met in eight sessions, from July 2002 through August 2006, with a resumed meeting in December 2006 to formalize the adoption of the text.<sup>279</sup> Notable features of the drafting and negotiation process were the influential presence of civil society in an International Disability Caucus led by organizations of people with disabilities, and the strong role played by the global South, beginning with Mexico’s initiative in the General Assembly. Numerous text proposals were received from governments and civil society, and a working group was convened in January 2004 to synthesize these proposals into a single text. The working group comprised twenty-seven governments, twelve organizations of people with disabilities and one national human rights institution. It was a dramatic success, bringing together the relevant stakeholders in a process where all participants learned from each other, and set the tone for the remainder of the negotiations.

Key features of the Convention include:

- Comprehensive scope: purpose is to guarantee equal enjoyment of all human rights and fundamental freedoms to all persons with disabilities.<sup>280</sup>
- Guiding principles set out, including respect for inherent dignity, individual autonomy including freedom to make one’s own choices, acceptance of persons with disabilities as part of human diversity and humanity, non-discrimination, equality of opportunities, full participation and inclusion, accessibility, equality between men and women, and respect for evolving capacities of children with disabilities.<sup>281</sup>

275. A list of signatories to the Convention, as well as a list of countries that have ratified it, is available at <http://www.un.org/disabilities/countries.asp?id=166>

276. United Nations Enable, *Ratifications*, <http://www.un.org/disabilities/default.asp?navid=18&pid=257> (last visited May 12, 2008).

277. General Assembly Resolution 56/198 (Dec. 19, 2001), available at <http://www.un.org/esa/socdev/enable/disA56168e1.htm>.

278. General Assembly Resolution 48/96 (Dec. 20, 1993).

279. A timeline of events in the drafting of the CRPD and the Optional Protocol is available at <http://www.un.org/disabilities/default.asp?navid=21&pid=153>

280. CRPD art. 1.

281. *Id.* art. 3.

- Legal capacity of persons with disabilities recognized on an equal basis with others, with corresponding obligation on governments to provide access to support that persons with disabilities may need to exercise their legal capacity.<sup>282</sup>
- Education of all persons with disabilities is to be provided through the general education system, on an equal basis with others.<sup>283</sup>
- Sign language, Braille and other forms of communication used by persons with disabilities are recognized and accepted.<sup>284</sup>
- Accessibility of physical environment, information and communication, transportation, other facilities and services must be ensured by appropriate measures.<sup>285</sup>
- Right to an adequate standard of living without discrimination.<sup>286</sup>
- Other articles address general obligations; equality and non-discrimination; women with disabilities; children with disabilities; awareness raising; right to life; situations of risk and humanitarian emergencies; access to justice; liberty and security of the person; freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from exploitation, violence and abuse; protecting the integrity of the person; liberty of movement and nationality; living independently and being included in the community; personal mobility; respect for privacy; respect for home and family; health; habilitation and rehabilitation; work and employment; participation in political and public life; participation in cultural life, recreation, leisure and sport; statistics and data collection.
- International cooperation must be undertaken to realize the purpose of the Convention,<sup>287</sup> and mechanisms are to be established at the national level to implement the convention and monitor implementation.<sup>288</sup> The national monitoring mechanism is to be established taking account of the principles relating to national human rights institutions.
- International monitoring: the CRPD will have its own monitoring committee with powers similar to those of other human rights treaties; competence to receive individual communications and investigate serious human rights violations are addressed in the Optional Protocol.
- Expanded role for Conference of States Parties: in addition to its usual duties, the Conference of States Parties will consider matters related to the implementation of the Convention.<sup>289</sup>

The CRPD is already having an impact as people with disabilities learn about their rights and the advocacy potential represented by the Convention, and governments begin the ratification and implementation process by examining their laws and policies with a view to reform. U.N. agencies have also made the commitment to base their programs relating to people with disabilities on the letter and spirit of the new convention.

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282. *Id.* art. 12.

283. *Id.* art. 24.

284. *Id.* art. 21. *See also* art. 2 (Definitions).

285. *Id.* art. 9.

286. *Id.* art. 28.

287. *Id.* art. 32.

288. *Id.* art. 33.

289. *Id.* art. 40.

The United States government has indicated it will not sign the CRPD,<sup>290</sup> but organizations of people with disabilities and allies in the U.S. are campaigning for eventual signature and ratification.<sup>291</sup> In addition to this, municipal governments have begun to pass resolutions of support for the new convention.<sup>292</sup> The United States has contributed a great deal to the rights of people with disabilities with the passage of the 1990 Americans with Disabilities Act (ADA), pioneering a non-discrimination approach. The rights of people with disabilities in the United States can only be strengthened by ratification of the comprehensive treaty that clarifies obligations in contexts not reached by the ADA, and makes these human rights issues a matter for international concern and cooperation.

## XI. U.S. Private Military Contractors

2007 witnessed two small steps forward in the battle to hold private security companies accountable for human rights abuses: new legislation proposed by Congress to provide for federal prosecution of U.S. government contractors that commit crimes abroad, and a civil court ruling denying summary judgment to a contractor implicated in human rights abuses.

### A. PROPOSED LEGISLATION

On September 16, 2007, employees of Blackwater, USA, opened fire on a crowd of Iraqi civilians in Nisour Square in Baghdad, killing seventeen and wounding nearly thirty others.<sup>293</sup> Despite evidence of Blackwater's criminal culpability in the shooting, the employees involved were protected from any criminal or civil accountability by Coalition Provisional Authority (CPA) Order 17, which immunized contractors from criminal prosecution.<sup>294</sup> The timing of the shooting during the presidential campaign, dramatic press coverage of the incident, and the unsuccessful attempts of the Iraqi government to remove Blackwater from Iraqi territory, drew renewed interest to the politically sensitive issue of privatized warfare.<sup>295</sup> The use of private military firms<sup>296</sup> has existed from as early as the

290. See Press Release, U.S. Department of State, Explanation of Position on the Convention on the Rights of Persons with Disabilities, Agenda Item 67(b), in the General Assembly (Dec. 13, 2006) (suggesting that a domestic rather than international focus is most appropriate for change and improvement), available at <http://www.state.gov/p/io/rls/rm/81455.htm>

291. See, e.g., Andrew Imparato, American Association of People with Disabilities, *U.S. Must Come Back to the Table on Disability Treaty* (Apr. 12, 2007), available at <http://communities.justicetalking.org/blogs/day13/archive/2007/04/12/u-s-must-come-back-to-the-table-on-disability-treaty.aspx>

292. See, e.g., Portland, Oregon City Council Res. 36543 (Oct. 24, 2007), available at <http://www.aapd.com/UN/071124pc.htm>; Press Release, City of Chicago, Mayor's Office for People with Disabilities (Nov. 15, 2007), available at [http://g3ict.com/press/press\\_releases/press\\_release/p/id\\_40](http://g3ict.com/press/press_releases/press_release/p/id_40).

293. James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, available at <http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?scp=1&sq=From+Errand+To+Fatal+Shot&st=nyt>.

294. Coalition Provisional Authority, Order 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, § 4(3), available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) ("Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.")

295. Glanz & Rubin, *supra* note 293.

cold war, but there has been such a recent proliferation<sup>297</sup> of these firms that they seem to typify most contemporary war situations.<sup>298</sup>

Two bills introduced in Congress in 2007, the Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007 (H.R. 2740), and the Security Contractor Accountability Act of 2007 (S. 2147) demonstrate a new willingness to confront contractors that violate international law.<sup>299</sup> These bills would expand U.S. jurisdiction from Department of Defense contractors to contractors of all U.S. agencies operating near a conflict area, establish FBI Theater Investigative Units to probe incidents of use of force by contractors, and require the Department of Justice to report on action taken in response to cases of contractor crime.<sup>300</sup>

Although the two bills make considerable progress in shoring up the loopholes that have prevented criminal prosecution of contractors in the past, the narrow scope of some provisions leaves much territory still to be addressed. For example, S. 2147 limits the scope of FBI Theater Investigative Units to areas where the Armed Forces are conducting a contingency operation and would not, therefore, provide for the prosecution of U.S. citizens employed as contractors by foreign governments or the United Nations. As of this writing, neither bill had become law.

## B. CIVIL LITIGATION

In *Ibrahim v. Titan Corporation*, plaintiffs brought suit under the Federal Tort Claims Act (FTCA) against two private security companies, CACI International and Titan Corporation (now L-3 Communications Titan), on behalf of more than 200 Iraqis who suffered human rights abuses at Abu Ghraib prison in 2003.<sup>301</sup> On November 6, 2007, the district court issued summary judgment in favor of Titan, but allowed the claims against CACI to proceed.

The basis for both Titan's and CACI's motion was the FTCA's "combatant activities" exception, which protects soldiers in wartime from civil liability.<sup>302</sup> In its ruling, the court found, on the record, that Titan's linguists "were acting under the direct command and

296. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004), available at [http://www.brookings.edu/~media/Files/rc/articles/2004/spring\\_defenseindustry\\_singer/singer20040122.pdf](http://www.brookings.edu/~media/Files/rc/articles/2004/spring_defenseindustry_singer/singer20040122.pdf) (noting that "'privatized military firms'" (PMFs), sell everything from small teams of commandos to massive military supply operations").

297. See Office of the United Nations High Commissioner for Human Rights, Statement by Mr. José Luis Gómez del Prado, Chairperson-Rapporteur of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-determination, Mar. 21, 2007, available at [http://www2.ohchr.org/english/issues/mercenaries/docs/statwgm\\_en.pdf](http://www2.ohchr.org/english/issues/mercenaries/docs/statwgm_en.pdf) (stating that "[t]he new modalities involve an emerging and very flourishing industry of private military and security companies, which operates under a commercial logic of obtaining the greatest profit.").

298. See Kristen Fricchione, Comment, *Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 WIS. INT'L L.J. 731 (2005); see also Henry Sanchez, *Why Do States Hire Private Military Companies?*, <http://newarkwww.rutgers.edu/global/sanchez.htm> (last visited Mar. 28, 2008) (one of the first companies to provide private military services was Executive Outcomes).

299. Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007); Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007).

300. Security Contractor Accountability Act, *supra* note 299.

301. See *Ibrahim v. Titan Corp.*, No. 04-1248 (JR), 2007 U.S. Dist. LEXIS 81794 (D.D.C. Nov. 6, 2007).

302. See Federal Tort Claims Act, 28 U.S.C.S. § 2680(j) (2000).

exclusive operational control of the military chain of command,” and so “functioned as soldiers in all but name.”<sup>303</sup> Summary judgment was therefore appropriate. As to the claims against CACI, however, the court determined that there was sufficient evidence that CACI retained “operational control” over its interrogators to leave a reasonable question of fact that should be left to a jury.<sup>304</sup> While CACI may yet demonstrate at trial that the “combatant activities” defense applies, the case could set an important precedent as to the liability of private security companies for human rights abuses.<sup>305</sup>

## XII. Russian Minority Language in Ukraine

By becoming a member state of the Council of Europe (CoE)<sup>306</sup> and ratifying the Framework Convention for the Protection of National Minorities (FCNM) as well as the European Charter for Regional or Minority Languages (Charter), Ukraine has become obliged to protect and promote the language of the Russian minority in the region. In 2002, the Advisory Committee of the FCNM noted that Ukraine’s legislation includes general provisions for protection of national minorities, while in practice language disputes arise.<sup>307</sup>

Early in 2007, the Cabinet of Ministers of Ukraine<sup>308</sup> approved regulations of the State Committee of Ukraine for Nationalities and Religions (SCUNR), effective March 1, 2007.<sup>309</sup> The regulations include provisions for the implementation of legislation concerning matters within the Committee’s competence, such as the unhindered development of minority languages as one of the main tasks of SCUNR.<sup>310</sup>

SCUNR has begun working on implementation measures. An August 2007 First Periodic Report of Ukraine on Implementation of the Charter (Report)<sup>311</sup> to the Secretary General of the CoE notes that SCUNR is working to develop draft laws in Ukraine dealing with ethnic and national policy in Ukraine,<sup>312</sup> as well as developing a bill on amending the “Law ‘On National Minorities in Ukraine.’”<sup>313</sup> The Report also notes that the

303. *Ibrahim*, 2007 U.S. Dist. LEXIS 81794, at 9, 15.

304. *Id.* at 15.

305. *Id.* at 30-31.

306. The CoE has been facilitating Ukraine’s integration into the European Community.

307. See Council of Europe, Advisory Comm. on the Framework Convention for the Protection of Nat’l Minorities, Opinion on Ukraine, Mar. 1, 2002, [http://www.coe.int/t/e/human\\_rights/minorities/2.\\_framework\\_convention\\_%28monitoring%29/2.\\_monitoring\\_mechanism/4.\\_opinions\\_of\\_the\\_advisory\\_committee/1.\\_country\\_specific\\_opinions/1.\\_first\\_cycle/PDF\\_1st\\_OP/\\_Ukraine.pdf](http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_%28monitoring%29/2._monitoring_mechanism/4._opinions_of_the_advisory_committee/1._country_specific_opinions/1._first_cycle/PDF_1st_OP/_Ukraine.pdf).

308. CIA World Factbook, Ukraine, <https://www.cia.gov/library/publications/the-world-factbook/geos/up.html>. The Cabinet of Ministers of Ukraine is the highest body of state executive power of Ukraine. The Prime Minister is Viktor Yanukovich, former Presidential candidate.

309. See Cabinet of Ministers of Ukraine, Enactment, Approval of the Regulations of the State Committee of Ukraine for Nationalities and Religions, No. 201 (Feb. 14, 2007) (Ukr.).

310. *Id.*

311. See Council of Europe, First Periodic Report of Ukraine on Implementation of the European Charter for Regional or Minority Languages, MIN-LANG/PR 6, 2 (Aug. 2, 2007) (The Report was gathered this past year by a working meeting with the experts of the Secretariat in January, a public discussion in April, and a roundtable meeting in May).

312. *Id.* at 11 (experience of development of interethnic processes, activity of national NGOs, and European standards of human rights will be taken into account).

313. *Id.* at 4 (pursuant to paragraph 82 of the 2007 Tentative Plan of Lawmaking Activity approved by the 26 April 2007 Decree of the Cabinet of Ukraine #239-p).

SCUNR has submitted a draft Program of Implementation of the National Policy in the Field of Interethnic Relations and Development of National Minority Cultures Until 2010.<sup>314</sup>

### XIII. Water as a Human Right

Is water a human right? 2007 saw the intensification of debate over whether there exists a human right to water,<sup>315</sup> as more than a billion people lacked access to safe drinking water and an estimated two and a half billion did not have adequate sanitation.<sup>316</sup> In November 2006, the Human Rights Council asked the Office of the U.N. High Commissioner for Human Rights (OHCHR) to perform a study “on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.”<sup>317</sup> In May 2007, the OHCHR held a consultation on “Human Rights and Access to Safe-Drinking Water and Sanitation” to explore the sources and parameters of water as a human right.<sup>318</sup> In September 2007, the OHCHR submitted its final report. Among the more salient conclusions reached by the OHCHR are that: (1) it remains debatable whether access to safe drinking water and sanitation is a human right; and if it is, whether it is a self-standing or derivative right; and (2) the normative content of human rights obligations to provide access to sanitation is yet to be determined.<sup>319</sup> Underscoring the growing prominence of the debate

314. See *id.* at 11.

315. See John Scanlon, Angela Cassar, & Noemi Nemes, *Water as a Human Right?*, IUCN ENVIRONMENTAL POLICY AND LAW PAPER, No. 51 (2004), available at <http://www.iucn.org/themes/law/pdffdocuments/EPLP51EN.pdf> (analyzing conventions and declarations, customary international law, and judicial decisions regarding the debate).

316. See World Health Org. [WHO], *10 Facts About Water Scarcity* (Mar. 20, 2007), <http://www.who.int/features/factfiles/water/en/index.html> (last visited Mar. 28, 2008).; WHO, *The International Decade For Action, Water for Life – 2005-2015: Coping With Water Scarcity, World Water Day 2007*, [http://www.who.int/water\\_sanitation\\_health/wwd7\\_water\\_scarcity\\_final\\_rev\\_1.pdf](http://www.who.int/water_sanitation_health/wwd7_water_scarcity_final_rev_1.pdf); U.N. Dev. Program, *Millennium Development Goals— MDGs*, <http://www.undp.org/mdg> (last visited Mar. 28, 2008).

317. U.N. Human Rights Council, *Human Rights and Access to Water*, HRC Decision 2/104 (Nov. 27, 2006), available at [http://www2.ohchr.org/english/issues/water/docs/HRC\\_decision2-104.pdf](http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf).

318. Office of the United Nations High Comm’r for Human Rights, *Consultation on Human Rights and Access to Safe-Drinking Water and Sanitation* (May 11, 2007), available at <http://www2.ohchr.org/english/issues/water/docs/consultationReportmay07.pdf>; See *Projet de Loi, Sur L’eau et les Milieux Aquatiques*, No. 133 Sénat (Sept. 11, 2006), available at [http://ameli.senat.fr/publication\\_pl/2005-2006/370.html](http://ameli.senat.fr/publication_pl/2005-2006/370.html); see Scanlon et al., *supra* note 315, at 13, 56. Recent developments expressly recognizing a human right to water are limited, but include amendment of the French water bill: “Each person has the right of access to drinking water for his or her own supply and hygiene at economically acceptable conditions.” *Loi, Sur L’eau et les Milieux Aquatiques*, *supra* note 320. South Africa is the only country to provide a constitutional right to water; and the only two human rights treaties that provide for an explicit right to water are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. See Scanlon et al., *supra* note 315.

319. U.N. Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, ¶ 46, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement>; See G.A. Res. AG/RES. 2349 (XXXVII O/07), at 48, OAS Doc. AG/RES. 2349 (June 5, 2007) available at <http://www.oas.org/dsd/generalassembly/resolutionsGASDfinal.pdf>. It should also be noted that, on June 5, 2007, the thirty-seventh regular session of the General Assembly of the Organization of American States (OAS) adopted specific declarations and resolutions regarding water, health, and human

over whether water is a human right are the nearly universal issues of water scarcity and water management. At the core of the debate is the increasing attention being given to privatization efforts, which in 2007 witnessed a steady rise in related litigation. As the velocity of globalization and trade liberalization increases, so too are tensions mounting over the propriety of appropriating water and sanitation for profit. While certain views, such as those of the World Health Organization (WHO), challenge the prudence of water commoditization from a health perspective,<sup>320</sup> others go further, arguing that privatization has resulted in poor service and significant rate hikes, without resolving the lack of access.<sup>321</sup> Still, others maintain that private companies are often better suited than States to provide water and sanitation services, particularly in the developing nations.<sup>322</sup> One of the more consequential legal issues emerging in current litigation concerns the tension between investment treaty obligations and the duty of States to regulate the delivery of water and sanitation services by private companies. The friction that can arise between treaty obligations on the one hand, and State responsibilities to observe and protect human rights on the other, is being tested in a variety of cases that earned it a priority ranking among the concerns highlighted in the OHCHR's September 2007 Report.<sup>323</sup>

#### XIV. Pakistan

During the course of the past few years, reports of large numbers of missing and "disappeared" persons in Pakistan have become increasingly well documented. In particular, persons have reportedly been kidnapped, held for interrogation, and tortured in detention centers in major cities in Pakistan, as well as other countries, including the U.S. detention

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rights. While it recognized certain principles of nondiscrimination, equality, justice, and sustainability regarding access to safe drinking water and basic sanitation as indispensable for life and human dignity, the OAS did barely more than to give a nod to the obligations of state parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child, with regard to human rights and water, falling noticeably short of declaring water as a human right. *Id.*

320. See Rainer Fehr et al., *Towards Health Impact Assessment of Drinking-Water Privatization—The Example of Waterborne Carcinogens in North Rhine-Westphalia (Germany)*, Bulletin of the World Health Organization [WHO], at 413-414 (2003) available at <http://www.who.int/bulletin/volumes/81/6/fehr.pdf>.

321. See Sara Grusky, *The Corporate Takeover of Water in Ecuador*, ALTERNET, Nov. 9, 2007, <http://www.alternet.org/environment/67451> (last visited Mar. 28, 2008); Bill Rankin, *Selling Out Services, Commodities or Souls?*, EDMONTON J., Nov. 1, 2007, available at <http://www.canada.com/edmontonjournal/news/culture/story.html?id=75bdfecf-7984-4835-bc91-3c9bfcdfb13d>.

322. See Marc Gunther, *Is Water a Human Right?*, HUFFINGTON POST, June 11, 2007, available at [http://www.huffingtonpost.com/marc-gunther/is-water-a-human-right\\_b\\_51645.html](http://www.huffingtonpost.com/marc-gunther/is-water-a-human-right_b_51645.html); Elsa Chanduvi, *Water Management is Conflict Management*, LATINAMERICA PRESS, Nov. 3, 2007, available at <http://www.latinamericapress.org/Article.asp?lanCode=1&artCode=5365>.

323. *Annual Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, *supra* note 319, ¶ 63. For example, when Biwater-Tanzania allegedly failed to meet its contractual obligation to provide clean drinking water, the Tanzanian government sued Biwater demanding compensation pursuant to the UK-Tanzania Bilateral Investment Treaty. The Report notes the more active role given to civil society organizations in controversies such as this one before the International Centre for the Settlement of Investment Disputes (ICSID) between British investor Biwater and the Tanzanian government, where the Lawyers' Environmental Action Team (LEAT) along with The Center for International Environmental Law (CIEL) filed an Amicus Brief as part of a broader coalition of NGOs.

facility at Guantanamo Bay.<sup>324</sup> Methods of torture have included beatings, electric shock, and acid burning of face and genitalia.<sup>325</sup> Monitoring groups have also verified reports of detainees being rearrested after their initial release, purportedly for their attempts to publicize the details of their illegal detention and interrogation on part of intelligence agencies, which include Intelligence Bureau (IB), Federal Investigation Agency (FIA), Inter Service Intelligence (ISI), and Military Intelligence (MI).<sup>326</sup>

The Pakistani government made extra-judicial arrests under the Anti-Terrorism Act (ATA) of 1997, which allows for extra-judicial confessions obtained under torture and presumption of the guilt of the accused.<sup>327</sup> Members of the Human Rights Commission of Pakistan and other advocacy groups criticized the government's use of the ATA. Of approximately 240 cases of disappearances received by the Pakistan Supreme Court, 105 of the detainees were released, as reported by the government.<sup>328</sup> Insofar as these releases were verified, they primarily came about due to increased pressure in 2007 by key individuals in the Pakistani judiciary emphasizing the rule of law and from international human rights groups, such as Amnesty International and Human Rights Watch. There were 485 cases of enforced disappearances scheduled to be heard by the Pakistan Supreme Court on November 13, 2007.<sup>329</sup> Given President Musharraf's suspension of the Constitution and dismissal of Supreme and High Court judges on November 3, 2007,<sup>330</sup> however, it became extremely unlikely that these cases would be heard in 2007. Human rights reporting in Pakistan was also severely curtailed by the arrest on November 4, 2007, of fifty-five members of the Pakistan Human Rights Commission.<sup>331</sup> During the weeks following the imposition of a state of emergency, thousands of lawyers, journalists, activists, and members of the regime's political opposition were rounded up, beaten, and jailed by Pakistani police and military personnel for demonstrating against the imposition of martial law.<sup>332</sup>

## XV. Iraqi Refugees In Jordan

UNICEF estimates that of the total number of displaced Iraqis, 50 percent are children and the majority (up to 700,000) have fled to Jordan.<sup>333</sup> Some 22,000 Iraqi asylum seekers

324. See Human Rights Comm. of Pak., *Enforced Disappearances*, Aug. 2007, [http://pakistan.ahrchk.net/pdf/Disapp\\_PHRC.pdf](http://pakistan.ahrchk.net/pdf/Disapp_PHRC.pdf).

325. *Id.*

326. *See Id.*

327. See Antiterrorism Act (ATA) (1997) (Pak.), *available at* <http://www.interpol.int/Public/BioTerrorism/NationalLaws/Pakistan.pdf>.

328. See Statement, Asian Human Rights Comm., PAKISTAN: Military Regime of General Musharraf Unleashed a Phenomenon of Disappearances, Aug. 30, 2007, *available at* <http://www.ahrchk.net/statements/mainfile.php/2007statements/1172/>.

329. See Amnesty USA, *Least 485 Victims of Enforced Disappearance*, Nov. 13, 2007, *available at* <http://www.amnestyusa.org/actioncenter/actions/uaa30407.pdf>.

330. See *Musharraf Promulgates PEMRA Amended Ordinance 2007*, THE NEWS, Nov. 26, 2007, *available at* <http://www.thenews.com.pk/updates.asp?id=23760>.

331. See *Stop Attacks on Civil Society in Pakistan*, HUMAN RIGHTS FIRST, Nov. 16, 2007, *available at* [http://action.humanrightsfirst.org/campaign/Asma?qp\\_source=ga%5fadv](http://action.humanrightsfirst.org/campaign/Asma?qp_source=ga%5fadv).

332. See ACHR Weekly Review: *A fit case for special session: SCBA members arrested; judges held in house arrest*, 2007, *available at* <http://www.achrweb.org/Review/2007/192-07.html>.

333. See United Nations Children's Fund [UNICEF], *Immediate Needs for Iraqi Children in Iraq and Neighboring Countries* (2007), [http://reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EK0I-73MBJ6-full\\_report.pdf/\\$File/full\\_report.pdf](http://reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EK0I-73MBJ6-full_report.pdf/$File/full_report.pdf).

are already registered with the United Nations High Commissioner for Refugees (UNHCR) in Jordan, out of whom only 600 have been given refugee status by the Jordanian authorities.<sup>334</sup>

Overwhelmed and unprepared for this influx of refugees, Jordan is struggling to support its increasing Iraqi population. Unsurprisingly, child refugees are facing some of the worst consequences of its host's failures. Accompanied by family or not, children displaced by the Iraq war face overcrowded living conditions, inadequate medical services, and deficient or nonexistent educational opportunities.<sup>335</sup>

In January 2007, UNHCR issued a "Supplementary Appeal Iraq Situation Response" (the "Supplementary Appeal") and then a joint appeal with UNICEF in July 2007, entitled, "Providing Education Opportunities to Iraqi Children in Host Countries" (the "Joint Appeal"), which focused on replenishing depleted funds that provide refugees with essential medical care, educational facilities, and healthy living conditions.<sup>336</sup> The main objectives of the Supplementary Appeal are to provide emergency services by targeting the needs of the most vulnerable displaced persons. It aims to provide durable protection for refugee communities, update the UNHCR's regional contingency planning and emergency operational plan for the Iraq situation, and promote greater international attention and advocacy. The Joint Appeal also focuses on providing displaced Iraqi children with consistent education opportunities. In combination, UNHCR and UNICEF are requesting approximately \$186 million to meet target objectives.

Advocacy efforts from UNHCR and UNICEF have achieved some success for child education. Following international pressure, on November 2, 2007, Jordan's King Abdullah overturned a Ministry of Education restriction on education to anyone lacking a residency permit, opening the door for children to extend their stay and continue their education.<sup>337</sup>

334. See U.N. Office for the Coordination of Humanitarian Affairs, *IRAQ-JORDAN: Iraqi Asylum Seekers in Jordan to Increase Threefold*, IRIN (Nov. 26, 2007), <http://www.irinnews.org/report.aspx?ReportId=70053>.

335. See UNICEF, *supra* note 332, at 2.

336. See U.N. High Comm. for Refugees, *Supplementary Appeal Iraq Situation Response* (Jan. 2007), <http://www.unhcr.org/partners/PARTNERS/45a296f24.pdf>; see also UNICEF, *Joint Appeal: Providing Education Opportunities to Iraqi Children in Host Countries* (July 2007), <http://www.unhcr.org/partners/PARTNERS/46a9b6c82.pdf>.

337. See *IRAQ-JORDAN: Iraqi Asylum Seekers in Jordan to Increase Threefold*, *supra* note 333.

