International Human Rights

LAWRENCE G. ALBRECHT, BENJAMIN L. APT, ROBERT B. FITZPATRICK, ALEX LITTLE, CHRISTOPHER SCOTT MARAVILLA, ANASTASIA TELESETSKY, JONATHAN TODRES*

I. The Death Penalty

A. THE UNITED STATES

In November 2005, the Justice Department's Bureau of Justice Statistics released its report on death sentences and executions imposed during 2004.[1] Twelve states executed a total of fifty-nine prisoners, and 125 people (including five women) who were convicted of murder in 2004 received a death sentence. As of December 31, 2004, there were 3,314 people on death row—the fourth consecutive decline in the number of death row prisoners. The report noted that thirty-seven of the thirty-eight states with death penalty laws allow juries to consider life without parole as an alternative. In the United States, there are also twenty federal terrorism-related crimes eligible for the death penalty. In October 2005, the House of Representatives, in considering amendments to and reauthorization of sections of the USA PATRIOT Act, voted to add an additional forty-one terrorism-related crimes to the list of those punishable by the death penalty and to allow a federal trial to have fewer than twelve jurors if the judge finds "good cause" to do so.[2]

In 2005, the U.S. Supreme Court continued its recent active review of Eighth Amendment death penalty jurisprudence. In at least two cases, *Roper v. Simmons*,[3] and *Medellin v.*

*Lawrence G. Albrecht is President of First, Albrecht & Blondis, s.c. and practices, lectures and writes regarding human/civil rights matters; Benjamin L. Apt is the Co-Chair of the Human Rights Committee and head of the European Human Rights Subcommittee, and works on ERISA enforcement at the U.S. Department of Labor; Robert B. Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick, PLLC, where he represents clients in employment law and employee benefits matters. Alex Little is a student at Georgetown University Law Center. He serves as the Student Liaison to the ABA Section of International Law; Christopher Scott Maravilla is an attorney in Washington, D.C. He received his JD from Georgetown University Law Center in 2000. Anastasia Telesetsky is an associate at Briscoe, Ivester & Bazel in San Francisco. She was a 2005 researcher at the Hague Academy of International Law Centre for Studies and Research where she wrote on cultural heritage issues. Jonathan Todres is an Acting Assistant Professor at New York University School of Law and is a Vice-Chair of the ABA-SIL International Human Rights Committee and Chair of its Subcommittee on the Rights of the Child.

1. Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment*, BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 211349 (Nov. 2005, rev'd Feb. 1, 2006), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf.

2. Editorial, *The House's Abuse of Patriotism*, N.Y. TIMES, Oct. 31, 2005, at A18.

3. Roper v. Simmons, 543 U.S. 551 (2005).

Dretke,[4] the European Union submitted amicus briefs in opposition to the death penalty.[5] In *Roper v. Simmons*, the Court revisited the issue and decided that the Eighth Amendment prohibits the death penalty for crimes committed at the age of sixteen or seventeen.[6] The Supreme Court considered a wide breadth of legal authority, in addition to the EU amicus, including myriad international death penalty developments.[7] The Court held that the imposition of the death penalty on a person who commits a capital offense under age eighteen is cruel and unusual punishment, barred by the Eighth and Fourteenth Amendments.

In *Medellin v. Dretke*,[8] another of several death penalty cases recently arising out of the Fifth Circuit,[9] the Supreme Court had agreed to decide whether international law may trump U.S. criminal procedure law.[10] Specifically, the Court was asked to address whether the Vienna Convention on Consular Relations (Vienna Convention), ratified by the United States in 1969, creates enforceable rights on behalf of individuals that U.S. courts must enforce. Three rulings by the International Court of Justice (ICJ) found the United States in violation of international law with respect to criminal proceedings resulting in the death penalty.[11] On February 28, 2005, President Bush sent a memorandum to Attorney General Alberto Gonzales directing state courts to abide by the ICJ decisions. However, on March 9, 2005, the State Department announced that the United States had withdrawn from the Vienna Convention protocol authorizing the ICJ jurisdiction to hear such disputes. On May 23, 2005, the Supreme Court dismissed the *Medellin* appeal in order to afford the Texas state court an opportunity to address these developments.[12]

In *Brown v. Payton*,[13] the Supreme Court had previously decided issues arising from California's catch-all mitigation jury instructions in a capital case under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[14] Payton was convicted by a jury for murder, rape and two counts of attempted murder. The jury sentenced Payton to death and the California Supreme Court affirmed. However, in a 6-5 *en banc* decision, the Ninth Circuit reversed and held that the California Supreme Court decision was objectively unreasonable. Revisiting the case, the U.S. Supreme Court held on March 22, 2005, that the Ninth Circuit decision was contrary to the limits in federal habeas review imposed by the AEDPA.

4. Medellin v. Dretke, 125 S. Ct. 2088 (2005).

5. Brief for the European Union and Members of the International Community as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief for the European Union and Members of the International Community as Amici Curiae Supporting Petitioner, Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928).

6. *See* Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding statutes under which the minimum age for capital punishment was 16).

7. *See* Sean D. Murphy, Editorial, *The Law of the Lands: Why U.S. Courts Look Overseas*, BOSTON GLOBE, June 5, 2005, at D12 ("The Supreme Court's willingness to look to foreign and international law when interpreting the U.S. Constitution is not unusual").

8. *See Medellin*, 125 S. Ct. at 2088.

9. *See* Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).

10. *See* Ronald J. Tabak (mod.) et al., Panel Discussion, *Human Rights and Human Wrongs: Is The United States Death Penalty System Inconsistent With International Human Rights Law?*, 67 FORDHAM L. REV. 2793 (1999).

11. *See* Marlise Simons, *World Court Tells U.S. to Delay Executing 3*, N.Y. TIMES, Feb. 6, 2003, at A13.

12. *Medellin*, 125 S. Ct. at 2092.

13. Brown v. Payton, 544 U.S. 133 (2005).

14. *See* Boyde v. California, 494 U.S. 370 (1990) (upholding the Constitutionality of California's "catch all" mitigation instruction which therein consisted of pre-crime evidence in mitigation); *see also* 28 U.S.C. § 2254(1) (2006).

On June 13, 2005, the Supreme Court, in *Miller-El v. Dretke*, overturned the conviction of an black death-row inmate who claimed Texas prosecutors intentionally excluded blacks from the jury.[15] The Court ordered a new trial, and the decision was the second rebuke of lower courts' failure to fully examine his claim.[16] On the same day, the Court issued *Johnson v. California*, which held that a criminal defendant is not required to show that "peremptory challenges . . . were more likely than not based on race"[17] in order to make a prima facie case under Batson v. Kentucky.[18]

On June 20, 2005, in *Rompilla v. Beard*, the Supreme Court overturned a death sentence and ordered a new trial following a seventeen-year-old's murder case, deciding that the court failed to review mitigating evidence of mental retardation and a traumatic upbringing.[19] On June 27, 2005, the Supreme Court issued *Bell v. Thompson*, and chastised the Sixth Circuit for failing to issue a mandate under Rule 41 of the Federal Rules of Appellate Procedure following denial of certiorari in a death penalty case.[20] The Court found that the Sixth Circuit did not accord respect to the state court's imposition of the death sentence, despite newly discovered evidence regarding the alleged mental disabilities of the defendant.

The Supreme Court heard oral arguments in *Brown v. Sanders* on October 11, 2005.[21] The Ninth Circuit had granted *habeas* relief and held that it was unconstitutional for the California Supreme Court to uphold Sanders' death sentence for murder without either reweighing two special circumstances related to his crimes, which supported the death penalty, or without expressly finding that the presence of two invalid special circumstances, relied upon at sentencing, were harmless error. On November 9, 2005, the Supreme Court heard oral argument in *Evans v. Chavis*, which will determine what a federal court must do when the state court is silent on whether the prisoner's state *habeas* petition was filed timely under state law.[22] Under the AEDPA, state prisoners have one year to file a federal court writ of *habeas corpus* after the state conviction becomes final.[23] This limit may be tolled for pending state *habeas* petitions. Complex issues of federalism, comity, and finality are also integral to the Court's review in *Evans*.

In 2005, forensic advances, including the increasing availability of DNA testing, continued to have an impact on death penalty cases. An Ohio death row inmate's execution, scheduled for November 15, 2005, was delayed sixty days, for the second time, by Governor Bob Taft to conduct DNA testing of circumstantial evidence that may establish innocence, despite a conviction based on, *inter alia*, the defendant's own comments to investigators.[24]

B. International/Africa

In April 2005, Amnesty International issued *The Death Penalty Worldwide: Developments in 2004*, which found that 3,797 persons were executed in twenty-five countries and that

15. Miller-El v. Dretke, 125 S.Ct. 2317 (2005).
16. Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004).
17. Johnson v. California, 125 S.Ct. 2410, 2412 (2005).
18. Batson v. Kentucky, 476 U.S. 79 (1986).
19. *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005); *see also* Wendy N. Davis, *Inching Away From Death?*, 91—SEP A.B.A. J. 14, (Sept. 2005) (analyzing ineffective assistance of counsel rulings).
20. Bell v. Thompson, 125 S. Ct. 2825 (2005).
21. Brown v. Sanders, 126 S. Ct. 884 (2006).
22. Evans v. Chavis, 126 S. Ct. 846 (2006).
23. 28 U.S.C. § 2254(d) (2006).
24. *See Ohio Governor Delays Killer's Execution*, A.P. Online Reg., Nov. 8, 2005, *available at* http://www.washingtonpost.com.

7395 persons were sentenced to death in sixty-four countries. Four countries—China, Iran, Vietnam and the United States—carried out ninety-seven percent of all executions in 2004. A total of eighty-four countries abolished the death penalty for all crimes. The Amnesty International survey of African countries highlighted the continuing trend towards outright elimination or express limitations on death sentences.[25]

During 2005, human rights groups and NGOs urged Rwanda to abolish the death penalty—including for the estimated 10,000 prisoners currently condemned to death for participating in the 1994 genocide.[26] Pragmatic political and logistical concerns may dictate the demise of the death penalty in Rwanda.[27] In a related development, the Supreme Court of Canada ruled that a genocide suspect can be deported to Rwanda despite the suspect's argument that deportation was impermissible because of Rwanda's death penalty.[28]

On June 10, 2005, the Constitutional Court of Uganda held the death penalty is not unconstitutional, but laws which mandate the death penalty as punishment are unconstitutional and interfere with the discretion of judges.[29] Both the death-row inmates and the government have appealed the case to the Supreme Court.[30]

II. The International Criminal Court

On July 8, 2005, the International Criminal Court (ICC) issued the first arrest warrants in its history.[31] The judges of Pre-Trial Chamber II[32] concluded that there were "reasonable grounds to believe" that five senior leaders of the Lord's Resistance Army (LRA), a rebel group operating in northern Uganda and southern Sudan, committed crimes within the jurisdiction of the Court.[33] The charged crimes occurred after July 2002, when the Court's jurisdiction began.[34] Together, the five warrants of arrest listed eighty-six individual counts of crimes against humanity and war crimes.[35] Due to security considerations, the Court issued the warrants under seal.[36] The Chief Prosecutor of the ICC, Luis Moreno-Ocampo, and the judges of Pre-Trial Chamber II took the secrecy measure to ensure the safety of

25. AMNESTY INT'L, THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 2004 (Apr. 5, 2005), *available at* http://web.amnesty.org/library/pdf/ACT500012005English/$file?Act5000105.pdf.

26. *See* Esther Nakhazi, *Kagame Urged to End Death Penalty*, EAST AFRICAN NEWS (KENYA), Jan. 3, 2005.

27. *See* Arthur Asiimwe, *One Million Set to Face Village Trials*, GLOBE & MAIL, Jan. 15, 2005, at A15.

28. *See* Kirk Makin, *Top Court Rules Voice of Genocide Can be Deported Back to Rwanda*, GLOBE & MAIL, June 29, 2005, at A1, *available at* http://www.theglobeandmail.com.

29. *See Ugandan Court Upholds Death Penalty*, MAIL & GUARDIAN ONLINE, June 10, 2005, *available at* http://www.mg.co.za.

30. *See* Solomon Mayita, *Death Penalty Challenge Extended to Supreme Court*, THE MONITOR (UGANDA), July 5, 2005.

31. *See* Press Release, International Criminal Court (ICC), Warrant of Arrest Unsealed Against Five LRA Commanders, Oct. 14, 2005, *available at* http://www.icc-cpi.int/press/pressreleases/114.html [hereinafter Press Release on Warrants].

32. *Id.* Pre-Trial Chamber II was the judicial body designated to supervise the proceedings of the Ugandan case after it was referred to the Court by the Government of Uganda in December 2003.

33. ICC, Officer of the Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, Oct. 14, 2005, *available at* http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf [hereinafter Prosecutor's Statement on Warrants].

34. *Id.*

35. *See* Press Release on Warrants, *supra* note 31.

36. *See* ICC, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, ICC-02/04-01/05, Oct. 13, 2005, *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-52_English.pdf.

victims, potential witnesses and their families and to prevent the disclosure of their identities or whereabouts.[37] Previously, during the course of the Prosecutor's investigation, community and civil society leaders in northern Uganda had expressed concern that the issuance of arrest warrants could lead to an increase in violence by the LRA.[38] To protect against this danger, the Prosecutor and the Court's Victims and Witnesses Unit crafted a security plan that they assured the Chamber would provide "the necessary and adequate protective measures for all concerned."[39] As a result, the Chamber unsealed the arrest warrants on October 13, 2005.[40]

The targets of the warrant included the leader of the LRA, Joseph Kony, his "second in command and most trusted advisor," Vincent Otti, and three other senior members of the group's "Control Altar": Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen.[41] According to the Prosecutor, Lukwiya "was responsible for some of the worst attacks committed by the LRA during the investigated period"; Odhiambo "commanded the most violent of the four brigades of the LRA"; and Ongwen led a Brigade of the LRA.[42] Shortly before the warrants were unsealed, press reports indicated that Ongwen was killed in combat.[43] The warrants allege that Kony and Otti led a paramilitary group that "has engaged in a cycle of violence and established a pattern of 'brutalization of civilians' by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements."[44] As part of this violent campaign, "abducted civilians, including children, [were] forcibly 'recruited' as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities."[45] Detailing these crimes, the Prosecutor described the "[c]ivilians in Northern Uganda [as] living in a nightmare of brutality and violence for more than nineteen years."[46]

The warrants followed almost a year of investigation by the Prosecutor in Uganda and drew on myriad sources of evidence, including victim statements, accounts from former members of the LRA, and intercepted radio communications.[47] The Government of Uganda had referred the situation concerning northern Uganda to the Chief Prosecutor on December 16, 2003.[48] The Ugandan referral marked the first referral of a case to the Court by a State Party to the ICC.[49]

37. *See* Press Release on Warrants, *supra* note 31; *see also* Prosecutor's Statement on Warrants, *supra* note 33, at 3.

38. *See, e.g.*, Daniel Wallis, *Court Probe Undermines Uganda Peace Moves—Mediators*, REUTERS GULU, Feb. 22, 2005; Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, Apr. 18, 2005, at A1.

39. *See* Press Release on Warrants, *supra* note 31.

40. *Id.*

41. Prosecutor's Statement on Warrants, *supra* note 33, at 4-6.

42. *Id.*

43. *See, e.g.*, Justin Moro et. al., *LRA Brigadier Killed in Teso*, NEW VISION (KAMPALA), Oct. 6, 2005, *available at* http://www.newvision.co.ug/D/8/12/459381.

44. ICC, Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-01/05-53, at 3, *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf [hereinafter Kony Warrant].

45. *Id.*

46. Prosecutor's Statement on Warrants, *supra* note 33, at 7.

47. *See, e.g.*, Kony Warrant, *supra* note 44, at 5.

48. *See* Press Release, ICC, Office of the Prosecutor, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, Jan. 29, 2004, *available at* http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.

49. *Id.*

III. Selected Decisions of the European Court of Human Rights

What follows is a summary of some of the salient decisions issued in 2005 by the European Court of Human Rights, the judicial authority for the European Convention of Human Rights (ECHR). To review a selection of the court's opinions is not to ignore the major human rights events that occurred in Europe this past year, such as the July 7 bombings in London, or the protracted riots throughout France attributed to youths from North African immigrant families. Indeed, while all the events covered in the court's decisions happened years before, the rulings have a prospective effect and serve to guide the continuing jurisprudence on human rights in Europe.

On January 25, 2005, the court found for the leaders of a Turkish union of health professionals who gathered to protest the treatment of students at a secondary school. The appellants in *Karademirci et. al. v. Turkey* argued that they were improperly fined by Turkish authorities for passing out printed statements for the press.[50] The Turkish Court of Cassation upheld the fines under the Turkish Associations Act. It held that, whereas the Act protected statements issued directly to the press, it did not provide the same protections to more general public broadsides and leaflets.[51] The European Court of Human Rights overturned the Turkish Court's ruling on the grounds that the appellants viewed their flyers as materials for the press and could not reasonably have foreseen that they would be more widely distributed.

The court reached a similar holding in *Steel v. U.K.*[52] The appellants in this case were members of an organization that had long protested against the McDonald's corporation. Their accusations against McDonald's, which they disseminated in a printed leaflet, ranged from unfair international production practices to the unhealthy quality of the company's food. McDonald's charged them with libel, and the appellants applied for public legal aid because their economic resources were meager. They were unsuccessful, however, because England does not make state-funded legal aid available for libel actions. Forced to rely on their own untrained efforts, the defendants made a number of legal errors, which were exacerbated by procedural delays, and were outmatched by the lawyers employed by McDonald's. The defendants lost in the lower English courts, and were further denied appeal to the House of Lords.[53]

The European Court of Human Rights held that the appellants were denied their right to a fair trial, guaranteed under article 6(1) of the ECHR, because they could not avail themselves of trained legal representation. It was thus foreseeable that they would be ill-equipped to defend themselves against the plaintiff's charges. The court also reviewed the case in light of article 10 of the ECHR (protecting free expression).[54] On the one hand, the justices disagreed with the English High Court that British legal protection for free expression extended primarily to the press, not to public expression of opinions. On the other hand, the European Court of Human Rights concurred with the High Court's conclusion

50. Karademirci et al. v. Turkey (Nos. 37096/97 & 37101/97) (2005), *available at* http://www.echr.coe.int/eng.

51. *Id.*

52. Steel v. U.K. (No. 68416/01) (2005), *available at* http://www.echr.coe.int/eng.

53. *Id.*

54. *Id.*

that private citizens must, however limited their sources and personnel, ensure that their public statements are accurate and verifiable. The two appellants had failed to achieve this standard. The court nevertheless ruled they had suffered a violation of article 10; the unavailability of state-provided legal representation in England "chilled" the free expression of people who lacked the means to defend themselves against possible libel suits. Moreover, the trial court in England unjustly ordered (although the order was never effected) the defendants to pay damages that were not only disproportionate to any harm they may have caused McDonald's, but were also well beyond the appellants' financial capacity. The court awarded the two applicants 20,000 and 15,000 Euros respectively in non-pecuniary damages and costs and expenses.

The European Court of Human Rights also found violations of articles 1, 2, and 3 of Protocol 1 (in part) of the ECHR in other cases from Turkey.[55] *Akkum et al. v. Turkey* concerned the Turkish government's ineffective investigation into the killings and mutilation of Kurdish civilians.[56] The court held for the appellants, concluding that the government failed to investigate thoroughly the deaths of three members of the same family who had purportedly been caught in a crossfire between soldiers and militants from the Kurdish Workers' Party (PKK). The court reached similar rulings in *Simsek et al. v. Turkey*[57] and *Tanis et al. v. Turkey.*[58] In these instances, too, the court heard evidence that police had used unnecessary deadly force to suppress demonstrations by Kurdish civilians. In its ruling, the court found violations of article 2 (the obligation to protect life): first, when the police attacked demonstrators with small arms, and again in the half-hearted, secretive official investigation into the police conduct.[59]

A number of the court's prominent decisions in 2005 involved Russia. Separate decisions released by the court on February 24, 2005—*Khashiyev v. Russia*, *Akayeva v. Russia*, *Isayeva v. Russia*, *Usupova v. Russia*, and *Bazayeva v. Russia*—addressed human rights violations stemming from the Russian war in Chechnya and the war's consequences for civil human rights.[60] Chechen citizens had become victims of human rights violations during the Russian/Chechen conflict. Civilians who tried to flee scenes of combat fell victim to aerial bombardments or to indiscriminate shooting by Russian troops. According to the court, Russian forces violated article 2's obligations to protect life and to conduct open investigations of purported rights violations when they attacked areas extensively occupied by civilians.[61] The Russian military failed to take reasonable and practicable measures to protect the population from harm and, on the contrary, subjected civilians to the full brunt of their attacks.

The court also determined, in several decisions, that some domestic Russian penal facilities severely violated aspects of the ECHR. The appellant in *Novoselov v. Russia* argued that he had been incarcerated in a miniscule, overcrowded cell, in a prison overflowing with

55. Council of Europe, European Convention on Human Rights and its Five Protocols, Nov. 4, 1950, U.N. Doc A/RES 2200A/XII, arts. 1, 2, & 3, *available at* http://www.echr.coe.int/eng [hereinafter ECHR].

56. Akkum v. Turkey (No. 21894/93) (2005), *available at* http://www.echr.coe.int/eng.

57. Simsek et al. v. Turkey (Nos. 35072/97 & 37194/97) (2005), *available at* http://www.echr.coe.int/eng.

58. Tanis et al. v. Turkey (Nos. 35072/97 & 37194/97) (2005), *available at* http://www.echr.coe.int/eng.

59. Akkum v. Turkey, *supra* note 56.

60. Khashiyev & Akayeva v. Russia (Nos. 57942/00 & 57945/00) (2005); Isayeva, Yusopova, & Bazayeva v. Russia (Nos. 57947/00, 57948/00, & 57949/00) (2005), *available at* http://www.echr.coe.int/eng.

61. Khashiyev & Akayeva v. Russia (Nos. 57942/00 & 57945/00) (2005); Isayeva, Yusopova, & Bazayeva v. Russia (Nos. 57947/00, 57948/00, & 57949/00) (2005), *available at* http://www.echr.coe.int/eng.

inmates and badly understaffed by prison guards.[62] The unhealthy conditions the appellant endured during his detention resulted in malnutrition, scabies, fever, and dermatitis. The response of the Russian authorities was not to deny the prison's inadequacies, but rather to justify them as the unavoidable consequence of a concurrent rise in crime and a decline in state funding. The authorities insisted that amelioration was simply beyond their capacity. The court ruled that "objective" conditions clearly deleterious to prisoners were not defensible under article 3 of the ECHR and it found for the appellant in the sum of 3,000 Euros for non-pecuniary damages, as well as additional coverage for costs.[63]

Another challenge to the oversight of Russian prisons arose from even more disturbing facts in *Trubnikov v. Russia*.[64] In his appeal to the Court, the father of a young prisoner found hanged in his cell claimed authorities did not respond to his request for a criminal investigation. The evidence revealed that the prison governor had, in fact, arranged for an internal inquest, which found that the young subject had committed suicide. The European Court of Human Rights did not question this conclusion, but rather faulted prison officials for neglecting to inform the family of its investigation despite the father's inquiry. In withholding information about the internal investigation from the family, the prison's authorities violated the requirements of article 2 of the ECHR for lacking governmental diligence and transparency.[65]

The court's decision in *Fadeyeva v. Russia* addressed punishing environmental conditions that endangered a family's well-being.[66] In 1982, the appellant moved with her family to a neighborhood located near a steel plant. Ten years later, the Russian government declared an area in the proximity of the state-owned factory dangerously polluted. The government committed itself to relocating everyone who lived within the demarcated zone. Despite their independent findings, however, the responsible authorities failed to move families with the promised alacrity. Fadeyeva sued the authorities in the municipal court in 1996 and won. Although her family was consequently written onto a "priority waiting list," the local court's ruling remained unenforced.[67] Nevertheless, when Fadeyeva filed a second complaint in 1999, the court responded that its earlier decision remained valid and thus a further ruling would be moot.

The court accepted the national judicial findings below that the appellant and her family had indeed suffered physiological deterioration from the pollution. It further noted that government officials had neither corrected the ecological damage, nor relocated exposed families. Article 8 of the ECHR requires countries to maintain environmental standards that, at minimum, preserve residents from toxic harm.[68] The court awarded the appellants 6,000 Euros in non-pecuniary damages, together with costs and expenses.

In *Okyay et al. v. Turkey*, a case involving a community's ongoing request that three government-controlled energy plants be closed pending study of harmful environmental effects, resulted in a similar holding by the court.[69] The complaint was originally heard at

62. Novoselov v. Russia (No. 66460/01) (2005), *available at* http://www.echr.coe.int/eng.
63. *Id.*
64. Trubnikov v. Russia (No. 49790/99) (2005), *available at* http://www.echr.coe.int/eng.
65. *Id.*
66. Fadeyeva v. Russia (No. 55723/00) (2005), *available at* http://www.echr.coe.int/eng.
67. *Id.* at 5.
68. ECHR, *supra* note 55, art. 8.
69. Okyay v. Turkey (No. 36220/97) (2005), *available at* http://www.echr.coe.int/eng.

various national judicial levels, with each court agreeing that the plants emitted toxic gases, were not fitted with stipulated filters, and lacked the necessary licenses. Nonetheless, in the face of legal injunctions, the Council of Ministers continued to keep the plants functioning. The European Court of Human Rights determined that the Council's actions not only defied Turkish laws on environmental safety, but also transgressed the right, under article 6(1) of the ECHR, to a fair and effective trial. While the plaintiffs were able to appeal their complaints up through higher national courts, the Council's dismissiveness of the rulings deprived the plaintiffs of meaningful legal redress.

In *Moldovan et al v. Romania*, Romania was the defendant in a decision involving discrimination against Roma citizens.[70] During a 1993 dispute between three Roma men and a non-Roma man, the son of the latter intervened and was stabbed to death. The Roma men then ran to a house, where they were quickly surrounded by villagers and police. The villagers set the house afire; one of the fugitives died in the house, and villagers caught the other two escaping and beat them to death. The appellants before the European Court of Human Rights were Roma residents of the town. They charged that riots over the next few days, instigated in part by local police, led to the destruction of thirteen Roma homes and beatings of Roma citizens. A number of Roma villagers pursued criminal charges against local police and civilians for destruction of property and murder. The lower court in Romania dismissed the charges against the police, although it did ultimately convict some of the villagers.

Shortly after the incident, the Romanian government embarked on rebuilding the houses of Roma families that had been razed. However, the appellants argued before the European Court of Human Rights that they had been forced to live in such substandard shelter as hen houses throughout the course of the reconstruction. In the end, their houses proved to be only partially repaired. Although the government eventually declared the residences finished, the returning families found the walls riddled with large gaps and roofs left unfinished.

The court concluded from the proffered evidence that the Romanian Public Prosecutor's Office had been unreasonably lax in its prosecution of the defendant police officers, ignoring evidence of police collusion in attacks against the Roma residents' houses. Moreover, the response by the Romanian courts and government agencies had been inadequate: the hearings revealed incidents of unchecked discriminatory comments about the victims; court-ordered awards were meager compared to the documented damage; and the government was ineffective in providing new houses for the Roma victims. The families had been forced to reside in inhumane conditions that hurt their physical and mental health. In its decision, the court held that the Romanian government had violated articles 3 (protection against torture) and 8 (right to protection of families) of the ECHR.[71]

IV. Rights of the Child

In 2005, millions of children around the globe continued to face the prospect of a broad range of human rights violations, including trafficking, forced labor, commercial sexual

70. Moldoran et al. v. Romania (Nos. 41138/98 & 64320/01) (2005), *available at* http://www.echr.coe.int/eng.

71. *Id.*

exploitation, use in armed conflict, arbitrary detentions, as well as deprivation of their economic, social, and cultural rights. The news of 2005 was not all bad, however, as several key developments in support of children's rights occurred.[72]

A. Application of the Death Penalty to Juveniles

In recent years, a near global consensus has emerged prohibiting the use of the death penalty in cases involving juvenile offenders. Since 1990, only eight countries have executed individuals for crimes committed when they were under eighteen years old: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[73] Moreover since 2001, only the United States, China, Pakistan, and Iran have executed juvenile offenders.[74] Over half of the executions since 1990 were carried out in the United States, making it the runaway leader in executing juvenile offenders.

In March 2005, however, the U.S. Supreme Court revisited the issue of capital punishment for juvenile offenders in *Roper v. Simmons*, discussed earlier. In finding capital punishment for juveniles unconstitutional, the Supreme Court stated that, "[w]hen a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[75] Justice Kennedy, writing for the majority, looked to international law and the practice of other nations, noting, "[I]n sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."[76] With U.S. law now in conformity with the view of the overwhelming majority of countries, the argument that the prohibition on the use of capital punishment in juvenile justice cases has achieved the status of customary international law, and possibly even *jus cogens*, gains greater support.

While human rights advocates welcomed the ruling, concerns still remain about the treatment of juveniles in other areas of the criminal justice system, especially those facing life sentences. In late 2005, Human Rights Watch released the first national report of children sentenced in the United States to life imprisonment without parole.[77] The situation of youths incarcerated for life without possibility of parole merit reconsideration, along with many other juvenile justice issues, as the United States and the international community seek to ensure the rights of all youths.

B. The Impact of HIV/AIDS on Children

HIV/AIDS continues to have a dramatic effect on the lives of children. In 2005, HIV/AIDS killed approximately 570,000 children before they reached their fifteenth birthday,

72. Space limitations for this section do not permit the discussion of many of the important developments related to children's rights. The omission of a particular development should not be construed as suggesting that such issue is not important.

73. Death Penalty Information Center, The Execution of Juveniles in the U.S. and Other Countries (2005), *available at* http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#execsworld.

74. *Id.*

75. Simmons, 543 U.S. at 554.

76. *Id.* at 577.

77. Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States (2005), *available at* http://hrw.org/reports/2005/us1005/ (reporting that at least 2,225 children are serving life sentences without the possibility of parole).

and an estimated 2.3 million additional children under age fifteen were living with HIV, including 700,000 youths newly infected in 2005.[78] Children who do not contract HIV or die from AIDS-related illnesses may nonetheless feel the devastating impact of AIDS when the disease hits their families or communities. More than 15 million children have lost one or both parents as a result of AIDS.[79] Concerned that only five percent of HIV-positive children receive treatment and that millions of children have been orphaned as a result of AIDS, UNICEF and UNAIDS launched the "Unite for Children, Unite Against AIDS" campaign in October 2005, aimed at preventing maternal-child transmission of the disease, ensuring pediatric treatment programs, strengthening prevention measures, and protecting vulnerable children.[80]

In November 2005, the United States also adopted the Assistance for Orphans and Other Vulnerable Children in Developing Countries Act of 2005,[81] which aims to provide additional assistance to children orphaned as a result of AIDS and other orphans and vulnerable children in developing countries.[82] The Act calls for comprehensive, multi-sector assistance programs to ensure the well-being of orphans and other vulnerable children in developing countries. It also establishes a new government post, the Special Advisor for Assistance to Vulnerable Populations, who is to help ensure that the needs of vulnerable, marginalized children are properly addressed in foreign assistance and development programs.

C. U.N. Study on Violence Against Children

In 2005, Regional Consultations were held throughout the world as part of the U.N. Study on Violence Against Children.[83] In October, Professor Paulo Sérgio Pinheiro, the independent expert leading the study, presented his progress report to the U.N. General Assembly. The landmark study is aimed at better understanding all forms of violence against children, so that all sectors of society can be mobilized to eliminate such abuses. The final report of the study is expected to be presented to the U.N. General Assembly in October 2006.[84]

The year 2005 also witnessed other progress to help protect the rights of the child. Twelve more countries ratified or acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[85] and eleven countries ratified or acceded to the Optional Protocol to the Convention on the

78. UNAIDS & World Health Organization (WHO), AIDS Epidemic Update (Dec. 2005).

79. Press Release, UNICEF, Children: The Missing Face of AIDS (Oct. 25, 2005), *available at* http://www.unicef.org/uniteforchildren/press/press_29373.htm.

80. *Id.*

81. Assistance for Orphans and Other Vulnerable Children in Developing Countries Act of 2005, H.R. 1409, 109th Cong. (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h1409enr.txt.pdf.

82. *Id.*

83. See The United Nations Secretary General's Study on Violence Against Children, Regional Consultations (2005) http://www.violencestudy.org/r27.

84. Additional information on the U.N. Study on Violence Against Children is *available at* http://www.violencestudy.org/r25.

85. *See* Office of the U.N. High Comm'r for Hum. Rights, 11.c. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, U.N. Doc. A/RES/54/263, C.N. 1032.2000 (2006), *available at* http://www.ochr.org/english/countries/ratification/11_c.htm (ratification as of Oct. 7, 2005) [hereinafter 11c Protocol].

Rights of the Child on the Involvement of Children in Armed Conflict,[86] bringing the total number of states parties to each optional protocol to 101 and 102, respectively.[87] This growing recognition of and support for the rights of children represents a positive step. Much more work remains to bring all countries into the fold and to ensure greater compliance with international human rights law relevant to children.

V. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions

On October 20, 2005, 148 countries championed cultural rights by approving the Convention on the Protection and Promotion of the Diversity of Cultural Expressions at the General Conference of the United Nations Educational Social and Cultural Organization (UNESCO) in Paris. The United States and Israel voted against adoption of the Convention.[88] The United States Ambassador to UNESCO officially cited two major reasons for opposition to the Convention: (1) a fear that ambiguities in the Convention would lead to exploitation of minority cultures; and (2) a concern about the possibility of national governments asserting undue influence over freedom of expression, information and communication.[89] American negotiators to the conference suggested there were other factors behind their country's decision, including the fear that a trade treaty was being negotiated by a non-WTO body.[90]

In November 2001, in reaction to the tragedy of September 11, UNESCO's 185 Member States expressed concerns that "diversity" was becoming equated with "differentiation" and that some groups were citing "cultural diversity" as the basis for practices of "segregation and fundamentalism" rather than as a basis for "the common heritage of humanity."[91] The Member States unanimously adopted a Universal Declaration on Cultural Diversity.[92] Inspired by unprecedented historical events, the Declaration was in part designed to reaffirm the UNESCO Member States' commitments to protect cultural diversity as an essential aspect of both humankind and the "democratic framework."[93] Without creating a new right to be diverse, the Declaration stressed that all persons, within the limits of existing "human rights and fundamental freedoms," have the right to express themselves in the language of their choice, the right to experience education that is culturally-sensitive, the right to participate in cultural life, and the right to conduct their own cultural practices.[94]

86. Office of the U.N. High Comm'r for Hum. Rights, 11.b. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. A/RES/54/263, C.N. 1031.2000 (2006), *available at* http://www.ohchr.og/english/countries/ratification/11_b.htm (ratification as of Oct. 7, 2005) [hereinafter 11b Protocol].

87. *See* 11c Protocol, *supra* note 85; 11b Protocol, *supra* note 86.

88. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expansions (2005), *available at* http://unesco.org/culture/culturaldiversity/convention_en.pdf (advanced, unofficial test) [hereinafter Convention].

89. U.S. State Dep't, *U.S. Opposes Draft U.N. Cultural Diversity Convention*, U.S. STATE DEP'T MISSION DAILY BULLETIN, Oct. 20, 2005, *available at* http://usinfo.state.gov/is/Archive/2005/Oct/20-504183.html.

90. Robert Martin, Final Statement of the United States Delegation, June 3, 2005, *available at* http://www.amb-usa.fr/usunesco/texts/Cultural_Diversity_Final.pdf.

91. Koichiro Matsuura, UNESCO Director-General, Introduction, UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY (Nov. 2, 2001), *available at* http://unesdoc.unesco.org/images/0012/001271/127/60n.pdf.

92. *Id.*

93. *Id.* arts. 1 & 2.

94. *Id.* art. 5.

The language in the Declaration centered on principles of cultural diversity as they relate to identity, pluralism, human rights, creativity, and international solidarity. As such, the Declaration lacked any clear, practicable application. Wanting the Declaration to be an effective document, the UNESCO Member States in 2001 devised an action plan for the prompt implementation of the Declaration. One component of this plan was to explore the "advisability of an international legal instrument on cultural diversity."[95]

In 2003, the idea of exploring a binding international legal instrument on cultural diversity took root, and between December 2003 and July 2005, UNESCO's Director-General convened three meetings of independent experts, one meeting of a Drafting Committee, and three intergovernmental meetings.[96] At the first meeting of experts, the Director-General of UNESCO expressed concern that globalization was jeopardizing many local cultures.[97] Four years after the passage of the Declaration, the majority of the General Conference of UNESCO agreed on language for a Convention. Major proponents of the Convention included Canada, France, India, Brazil, and Mexico.

The final version of the Convention is a combination of objectives, principles, rights, and obligations for states to protect and promote the concept of cultural diversity. The Convention defines cultural diversity as a dynamic concept embodied in the "manifold ways in which the cultures of groups and societies find expression" including "artistic creation, production, dissemination, distribution, and enjoyment."[98] Nowhere is the term "culture" defined in the Convention, although the adjective "cultural" appears in several definitions, including "cultural content," "cultural expressions," "cultural activities," "cultural goods," "cultural services," cultural industries," and "cultural policies."[99]

One section of the Convention is dedicated to the rights and obligations of the signatory nations. Concerned about safeguarding their sovereignty, some Member States pushed to include language reaffirming "their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions."[100] The first part of this section detailed national level rights and the opportunities for parties to the Convention to adopt "regulatory measures" and "measures aimed at providing public financial assistance" designed to "[protect] and promot[e] diversity of cultural expressions."[101] In article 6(2)(a) and (d) of the Convention, "regulatory measures" refers to state subsidies for film and art subsidies and quotas for air and broadcast time. Subsidies for cultural industries have become an issue of international legal dispute.[102]

Article 7 was written into the Convention to avoid the perils of protectionism. Parties to the Convention are expected to "endeavor to create in their territory an environment that encourages individuals and social groups . . . to have access to diverse cultural expressions from within their territory as well as from other countries of the world."[103] Article 8 grants

95. *Id.* Action Plan ¶ 1.

96. UNESCO, First Meeting of Independent Experts, Dec. 17-20, 2003, *available at* http://www/unesco.org.

97. *Id.*

98. Convention, *supra* note 88, art. 7(1)(b).

99. *Id.*

100. *Id.* art. 5(1).

101. *Id.* arts. 6(2)(a) & (6)(2)(d).

102. *See, e.g.*, Contractual Obligations Pods. v. Gov't of Canada, Statement of Claims under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, Jan. 31, 2005, *available at* http://www/mediatrademonitor.org/filestore2/download/200.

103. Convention, *supra* note 88, art. 7(1)(b).

each signatory the right to "determine those special situations where cultural expressions on its territory are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding" and to take appropriate protective measures.[104] Along with this right, each state has the obligation to report to the Intergovernmental Committee on all measures it takes to meet the "special situation."

Articles 12-19 detail a series of international level rights and obligations. Some of the obligations are specific, such as voluntary contributions to an "International Fund for Cultural Diversity."[105] Other obligations are more nebulous, such as the duty to integrate culture into development policies to create conditions "conducive to sustainable development."[106]

Some international obligations seem contradictory with national rights. For example, article 16 calls for developed countries to "facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries."[107] Perhaps this provision is included simply to ensure that artists from developing countries receive assistance in acquiring travel visas. Yet the Convention does not reconcile its express goal of an international preferential system with the sovereign rights of countries "to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expression *on their territory.*"[108]

Heated discussions between Member States centered primarily on the relationship, raised in article 20, between the Convention and other international instruments. The majority of UNESCO's members opposed subordinating the Convention to any other treaty, but they also added language stating that nothing in the Convention "shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."[109] Thus a party to the Convention will be expected to adjust its existing rights and duties under existent treaties with any new Convention rights and obligation. Difficulties and discrepancies abound. For example, what would happen if one nation were to ban the importation of cheese from another on the grounds that its cheese production was a "cultural expression . . . in need of urgent safeguarding"?[110]

The Convention will likely be debated further at the December 2005 WTO Doha Round, where deregulation of audiovisual and media services is on the agenda. One of the main proponents of the Convention is the province of Québec, whose minister of culture and communications, Line Beauchamp, has called the effort behind the Convention "a fight crucial for our survival."[111] He believes that the "cultural exceptions" approved by the World Trade Organization, which will shortly lapse, may leave government-sponsored cultural support vulnerable to international dispute.[112] Québec was the first National Parliament to

104. *Id.* art. 8(1) & 8(2).
105. *Id.* art. 18.
106. *Id.* art 13.
107. *Id.* art. 16.
108. *Id.* art. 1(h) (emphasis added).
109. Convention, *supra* note 88, art. 20(2).
110. *Id.* art. 8.
111. Guy Duplait, *Faut-il avoir des Etats-Unis?*, ENJEUX INTERNATIONAUX, No. 9 (Oct. 2005), *available at* http://www.enjeux-internationaux.org/articles/num9/culturesement.pdf(trans. by author).
112. *Id.*

ratify the Convention.[113] Canada became the first State to ratify the Convention on November 23, 2005, as part of its commitment to "maintain policies that promote their culture, while respecting the rules governing the international trading system and securing markets for cultural exports."[114]

A real example of such a potential conflict can be found in a current French policy. Under the WTO "cultural exceptions" doctrine, it may give financial assistance to the domestic audiovisual sector, while remaining in compliance with its other international obligations. However, if this "cultural exceptions" doctrine expires in 2006, as slated, could France claim a cultural exception to protect this economic sector from international market forces without violating the Convention? Would the country's interest in "protection and promotion of cultural expressions" ultimately have to be subordinated to its obligations to treat locally-produced goods the same as imported goods under the trade principle of "national treatment"?[115] Would such a measure be subject to a WTO dispute resolution? How would the dispute resolution set out in article 25 of the Convention interact with the WTO dispute settlement mechanism?

Opponents have issued their own set of press releases expressing disappointment. The Motion Picture Association of America underscored its own commitment to cultural diversity, but then expressed its frustration that the end result of the Convention perpetuated anti-American sentiments by "excluding the single largest source of cultural diversity in the world" by possibly imposing additional limitations on U.S. cultural exports throughout the world.[116]

Although 148 countries approved the Convention with enthusiasm, it remains to be seen who will actually ratify the Convention. Without thirty ratifications, the Convention will languish in treaty limbo. With a US $380 billion international industry in cultural products possibly affected by the Convention language, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions will continue to receive far more than its fifteen minutes of fame.[117]

VI. The European Union's Age Directive as Implemented in the United Kingdom

In 2000, the European Union issued its employment directive on equal treatment. The directive requires all Member States to introduce age discrimination laws implementing the directive by December 2006. Until now, there has been no legislation dealing with age

113. *Id.*

114. International Affairs Branch, Canadian Heritage, A Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (February 7, 2006), http://www.pch.gc.ca/progs/ai-ia/unesco_e.cfm.

115. *See* General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194, art. 3; General Agreement on Trade in Services (GATS), Apr, 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 17; Trade Related Aspects of Intellectual Property (TRIPS), Apr, 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 3, *available at* http://www.wto.org.

116. Press Release, Motion Picture Ass'n of America, Glickman Expresses Disappointment at Outcome of Cultural Diversity Discussions (Oct. 21, 2005), *available at* http://www.mpaa.org/MPAAPress/2005/2005_10_21.pdf.

117. *See* UNESCO, STUDY ON INTERNATIONAL FLOWS OF CULTURAL GOODS, 1980-98 (2000).

discrimination in Great Britain.[118] On October 1, 2006, the Employment Equality (Age) regulations will come into force and effect in Great Britain.[119] The regulations will apply in Great Britain, Scotland, and Wales, but not in Northern Ireland.

Space does not permit a description of all the key provisions of these new regulations of age discrimination. Accordingly, only select provisions are addressed here. The regulations prohibit age discrimination against everyone, regardless of his or her age. Thus, unlike the United States' federal Age Discrimination in Employment Act, which is limited to discrimination against individuals over the age of forty and prohibits discriminatory preference of the young over the old,[120] the British age regulations prohibit discrimination against those both over and under forty. The regulations apply to employment at an establishment in Great Britain even if the employee works wholly outside British territory, so long as: the employer has a place of business in Great Britain; the work is for the purposes of the business carried on in Great Britain; and the employee is ordinarily a resident of Great Britain. In the United States, before the 1991 amendments to the 1964 Civil Rights Act, the Supreme Court had declined to apply the statute extraterritorially.[121] Title VII was amended to provide for limited extraterritorial application in 1991.[122] The EC regulations, like the United States' Congressional Accountability Act, specifically apply to the staff of both the House of Commons and the House of Lords.[123] In addition, the regulations apply to partnerships and prohibit age discrimination in entry into partnership or expulsion from partnership. In the United States, the issue of coverage in a partnership circumstance has been addressed by the Supreme Court in *Hishon v. King & Spaulding*[124] and in *Clackamas Gastroenterology Assoc. v. Wells.*[125]

Harassment on the basis of age is unlawful under the new regulations. Harassment includes unwanted conduct on account of age that violates the employee's dignity, or creates an intimidating, hostile, degrading, humiliating, or offensive environment.[126] The regulations prohibit victimization, which in the United States would be called "retaliation." Examples of victimization include adverse action because an employee brought a proceeding, gave evidence or information in connection with a proceeding, or alleged a violation of the

118. In contrast, such legislation has existed in Ireland since 1998, *see* Employment Equality Act, 1998 (Ir.); The Finnish and Portuguese Constitutions protected employees from age discrimination even prior to the 2000 directive. *See* CONST. (FIN.); (731/1999); CONST. (PORT.) art. 13. Luxemburg has drafted age discrimination laws, and Belgium, the Czech Republic, and Germany have some age discrimination laws in force. *See* EU FRAMEWORK ON EMPLOYMENT, OCCUPATION AND TRAINING SUMMARY OF PROGRESS TOWARDS TRANSPORTATION BY MEMBER STATES (Dec. 2003), *available at* http://www.ageplatform.org.

119. *See* Employment Equality (Age) Regulations 2006, 2006 No. 0000 (Gr. Brit.); *see also* Employment Equality (Religion or Belief) Regulations, S.I. 2003/1660 (2003) (Gr. Brit.); Employment Equality (Sexual Orientation) Regulations, S.I. 2003/1661 (2003) (Gr. Brit.), *available at* http://www.dti.gov.uk/er/equality/draftregulation_2006.pdf.

120. 29 U.S.C. § 630 (2000); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (holding that the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, does not protect against discrimination of the very young).

121. *See* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

122. *See* 42 U.S.C § 2000e-2(a) (2006).

123. 2 U.S.C. § 1301.

124. Hishon v. Spalding, 467 U.S. 69 (1984).

125. Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003).

126. *Cf.* Harris v. Forklift Sys., 510 U.S. 17 (1993); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

regulations.[127] There has been substantial litigation in the United States as to what constitutes an "adverse employment action," and whether an adverse employment action is an element of a retaliation claim.[128]

Plaintiffs may present complaints of age discrimination to an employment tribunal within three months after the discrimination occurs. Similarly, complaints of age discrimination may be filed in the courts within six months of the occurrence. The burden of proof is on the employee to establish facts upon which one could conclude that the employer engaged in age discrimination, and the burden then shifts to the employer to prove it did not commit age discrimination. In very limited circumstances, age may be regarded as a genuine occupational requirement (GOR) under the new regulations. The only circumstances that are generally agreed to satisfy the GOR exception would be an actor playing a young character in the theater.[129] Positive action (e.g., encouraging people of a particular age to take advantage of employment opportunities) will be lawful if it is reasonably expected to prevent or compensate for disadvantages people suffer because of their age. In the case of compulsory retirement of an employee, there will be a "duty to consider" procedure that will allow the affected employee to request working beyond the compulsory retirement date. If an employee makes such a request, the employer will have to consider it seriously. Henceforth, the upper age limit of sixty-five for unfair dismissals is to be removed, and thus older employees will get the same right to claim unfair dismissal as younger employees.

The regulations have gone through several consultations to elicit the views of the public and employers. Under the new laws, Great Britain will enter into a new era of the development of employment discrimination law.

VII. Bilateral Agreements to Deport Terror Suspects to Countries with Poor Human Rights Records

In the wake of the London bombings on July 11, 2005, the U.K. Government initiated a process of negotiating Memorandums of Understanding (MOU) that would provide for the deportation of terror suspects to countries with poor human rights records. The purpose of the MOU is to ensure diplomatically that the receiving country will not engage in any torture or cruel and inhumane treatment of the suspect contrary to both countries' obligations under international humanitarian law. The first such agreement was entered into with Jordan.[130] The British Government is rumored to be negotiating similar arrangements

127. The comparable anti-retaliation provision in the 1964 Civil Rights Act, as amended, is 42 U.S.C. § 2000e3 (2006). *See, e.g.*, Baker v. Am. Airlines, 430 F.3d 750 (5th Cir. 2005); Fogleman v. Greater Hazleton Health Alliance, 122 Fed. App'x 581 (3d Cir. 2004). There has also been considerable dispute in the United States regarding the coverage of internal corporate complaints. *See, e.g.*, Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999). For a collection of material on protected activity, *see* The U.S. Dep't of Labor, Office of Administrative Law Judges Nuclear and Environmental Whistleblower Digest, Division XII—Protected Activity, http://www.oalj.dol.gov/Public/WBLOWER/REFRNC/edig12.htm (last updated Feb. 15, 2005).

128. *Baker*, 430 F.3d at 755.

129. *Cf.* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1) (1998); Western Air Lines v. Criswell, 472 U.S. 400, 412 (1985) (holding that the bona fide occupational qualification defense was "meant to be an extremely narrow exception to the general prohibition").

130. The relevant portion of the Jordanian MOU states:

(1) "It is understood that the authorities of the United Kingdom and of Jordan will comply with their human rights obligations under international law regarding a person returned under this arrange-

with Egypt and Algeria. Because the United Kingdom has a policy of not deporting criminal suspects to countries with the death penalty, such memoranda must be written to ensure that the deported suspect will not face a possible sentence of execution in his or her home country.[131]

The United Kingdom also recently entered into an MOU with Libya.[132] The MOU requires Libya not to torture, execute, or subject returnees to cruel and inhumane treatment according to international law. The catalyst for the agreement was the arrest in England of a Libyan national among a group of terror suspects.[133] Libya recently agreed to end the death penalty in its country, which eliminates one of the most concerted criticisms in England against entering into a MOU with that nation.[134] The Libyan Government desires to bring to an end the controversy over five Bulgarian nurses who were sentenced to death along with a Palestinian doctor last year, after hundreds of children were infected with the AIDS virus.[135] Bulgaria, supported by the EU and much of the international community, contended that the infections were due to poor hygiene at the hospital. Libya's abandonment of the death penalty means that the nurses' sentences will be commuted. The Libyan High Court decided in mid-November to hear their appeal.[136]

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ment. . . . If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.

(2) A returned person who is arrested or detained will be brought promptly before a judge or other officer authorized by law to exercise judicial power in order that the lawfulness of his detention may be decided.

(3) A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.

(4) If the returned person is arrested, detained or imprisoned within three years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the U.K. and Jordanian authorities. . . .

(6) A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

(7) A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. . . .

(8) A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defense, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Memorandum of Understanding Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, U.K.—Jord., Aug. 10, 2005, 999 U.N.T.S. 171.

131. *U.K. Signs Libya Deportation Deal*, BBC NEWS, Oct. 18, 2005, *available at* http://news.bbc.co.uk/1/hi/uk_politics/4353632.stm.

132. Press Release, U.K. Home Office, Home Security Statement Libya Memorandum of Understanding, Oct. 18, 2005, *available at* http://www.ind.homeoffice.gov.uk/ind/enhome/news/press_releases/home_secretary_state.html.

133. Vikram Dodd & Ewen MacAskill, *UK in Deportation Talks with Libya After Arrests*, GUARDIAN (U.K.), Oct. 4, 2005, *available at* http://politics.guardian.co.uk/print/0,3858,5300376-116499,00.html.

134. *Libya to Scrap Death Penalty to End Nurses Row*, MIDDLE EAST ONLINE, Nov. 2, 2005, http://www/middle-eastonline.com/ENGLISH/libya/?id=14928=14928&format=0.

135. *Id.*

136. Tsvetelia Ilieva, *Libyan Court to Hear Bulgarian Nurses' Appeal*, REUTERS ALERT NET, Dec. 24, 2005, *available at* http://www.alertnet.org/thenews/newsdesk/L24341422.htm.

The MOUs are controversial. Manfred Nowak, the UN Commission on Human Rights Special Rapporteur, has argued that MOUs are really aimed at circumventing the international prohibition of deporting people to countries where there is a risk that they will be tortured.[137] "The fact that diplomatic assurances are requested from other countries," he said, "is already an indicator of the systematic practice of torture in the requested States."[138] The Lord Bishop of Oxford has also criticized the government openly in Parliament, charging that there is a "widespread agreement among international lawyers and human rights observers that diplomatic assurances provide no effective safeguard against the torture or degradation of those who are returned."[139] The MOUs are expected to receive legal challenges in U.K. courts.[140]

137. *Bilateral Deportation Agreements Undermine International Human Rights Law*, UN NEWS SERVICE, Oct. 26, 2005, *available at* http://www.un.org/apps/news/printnewsAr.asp?nid = 16372.

138. *Id.*

139. United Kingdom Parliament, 674 Parl. Deb., H.L. (5th Ser.) (2005) 364.

140. The relevant treaties are the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture. *See* ECHR, *supra* note 55; International Covenant on Civil and Political Rights, GA res. 2200A/XXI (Mar. 23, 1976); Convention Against Torture, GA res. 39/46, U.N. Doc A/RES/39/46 (June 26, 1987).