International Human Rights

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I. The U.N. Human Rights Council

This year, the United Nations made profound and long-awaited strides in reforming the international human rights system, as member states voted to replace the much-maligned Commission on Human Rights with the new Human Rights Council. The Commission on Human Rights was a functional commission created by the Economic and Social Council (ECOSOC) in 1946.[1] The Commission was endowed with primary responsibility within the U.N. Organization for monitoring, protecting, and enforcing human rights, yet it grew to be a source of frustration and contention. The Human Rights Council was established in response to the manifold criticisms of the Commission.[2]

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1. U.N. Charter art. 68; Economic & Social Council Res. 5 (Feb. 16, 1946).

2. *See* The Secretary General, *In Larger Freedom: Towards Security, Development and Human Rights for All*, U.N. Doc. A/59/2005 ¶¶ 45-46, delivered to the General Assembly, (Mar. 21, 2005), *available at* http://www.un.org/largerfreedom/, at 45-46 [hereinafter U.N. Doc. A/59/2005].

The Commission was roundly condemned both within and outside the United Nations for rampant corruption, politicization, and partisanship.[3] Furthermore, many critics were dissatisfied with the Commission's dearth of meetings, as it only convened for six weeks per year.[4] And several states—most vocally the United States—criticized the hypocrisy of allowing states with poor human rights records, such as Sudan and Zimbabwe, to serve as members of the Commission.[5] Also, the international community generally agreed that with fifty-three state members, the Commission was simply too large to be effective.[6]

Secretary-General Kofi Annan's 2005 *In Larger Freedom* report, therefore, called for the replacement of the Commission with a smaller yet fortified standing body to address human rights.[7] The *In Larger Freedom* proposals were furthered by the U.N. World Summit of September 2005 and then the Wilton Park Conference of January 2006, both of which helped to formulate concrete U.N. resolutions.[8] The General Assembly formally established the Council in March 2006 by passage of Resolution 60/251.[9] The Council held elections for state membership in May 2006, and officially supplanted the Commission in June when it convened in Geneva for its first meeting.[10]

The Human Rights Council has several attributes making it potentially more effective than the Commission. First, the Council is a subsidiary body of the General Assembly and, thus, directly accountable to the full membership of the United Nations.[11] The Commission, by contrast, reported to the fifty-four member ECOSOC.[12] The Council's more authoritative status reflects an increased commitment to human rights by the United Nations, which plans to consider elevating the Council to a Principal Organ in five years.[13]

Second, the Council is in the process of developing a universal peer review mechanism in which states will review the human rights policies and practices of other states.[14] This system reportedly will be up and running within a year, and Council members will be the first states to be reviewed.[15]

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3. *See, e.g., id. See also* Human Rights Watch, *Human Rights Council: New Approaches to Addressing Human Rights Situations*, Sept. 15, 2006, *available at* http://hrw.org/english/docs/2006/09/15/global14209.htm.

4. *See* U.N. Doc. A/59/2005, *supra* note 2, ¶ 45; Office of the High Commissioner on Human Rights, Commission on Human Rights, http://www.unhchr.ch/html/menu2/2/chr.htm.

5. *See, e.g.*, Warren Hoge, *U.S. Won't Seek a Seat on the U.N. Rights Council*, N.Y. TIMES, Apr. 7, 2006, at A6.

6. *See, e.g.*, U.N. Doc. A/59/2005, *supra* note 2, ¶ 45.

7. *Id.* ¶¶ 45-46.

8. *See* Rep. on Wilton Park Conf.: How to Advance the Human Rights Agenda, Jan. 20-22, 2006, *available at* http://www.wittonpark.org.uk/documents/conferences/NP805/pdfs/WP805.pdf.

9. G.A. Res. A/RES/60/251 (Apr. 3, 2006), at pmbl.

10. *See id.* ¶ 15; Human Rights Council, *First Sess. of the Human Rights Council, 19-30 June 2006: Human Rights Council Concludes First Sess.*, June 30, 2006, *available at* http://www.ohchr.org/english/bodies/hrcouncil/1session.

11. *See* G.A. Res. A/RES/60/251, ¶ 1.

12. U.N. Charter arts. 61, 68.

13. Press Release, U.N. News Serv., Annan Inaugurates U.N.'s Strengthened Human Rights Council with Appeal for "New Era," June 19, 2006, *available at* http://www.un.org/apps/news/printnewsAr.asp?nid=18909.

14. *See* G.A. Res. A/RES/60/251, ¶ 5(e).

15. Human Rights Watch, *U.N.: Rights Council Disappoints Again*, Oct. 6, 2006, http://hrw.org/english/docs/2006/10/06/global14354_txt.htm.

Third, the General Assembly is required to scrutinize more closely the human rights records of state candidates for membership.[16] And with an eye to improving efficiency, the Council has forty-seven members versus the Commission's fifty-three.[17] Moreover, elections for membership in the Human Rights Council are decided by a simple majority of the General Assembly instead of ECOSOC, which decided the membership of the Commission. The Council itself votes on the President, which is currently Ambassador Luis Alfonso de Alba of Mexico.[18]

Finally, the Council will hold no fewer than three meetings per year, with each meeting lasting longer than Commission meetings, although the Council still falls short of the permanent body envisaged by *In Larger Freedom*.[19] The Council also has the ability to call emergency meetings for pressing human rights matters.[20]

Since its inception last spring, the Council has experienced a flurry of activity. It has heard from experts on a variety of human rights issues, from racial discrimination, to the right to health, to the social responsibility of transnational corporations.[21] The Council has also examined reports from Special Rapporteurs on the human rights situations in dozens of countries, including Somalia and Cuba.[22] The Council has made modest progress towards bettering the international human rights protection system in its first two sessions, but these successes have received little attention in comparison to the deluge of criticisms it has confronted.

The United States has relentlessly opposed the Council. Not only was the U.S. delegation one of only four delegations to vote against the Council's passage, but also, once the Council was established, the United States refused to offer a candidate for membership. Ambassador Bolton asserted that the United States was not running for election in order to pressure the Council to adopt more stringent membership criteria to exclude states with egregious human rights records.[23] Commentators, however, have speculated that the actual reason the United States did not provide a candidate was because the Bush Administration was concerned that it would not be successful in light of the United States' own human rights record: Highly publicized detainee abuses in Iraq and clandestine government-sponsored prisons may have made it impossible to secure the requisite General Assembly votes for membership.[24]

In spite of U.S. opposition, the Council did elect several states with dubious human rights records, such as Cuba and China.[25] And independent human rights groups have

16. *See* G.A. Res. A/RES/60/251, ¶ 8.

17. *Id.* ¶ 7.

18. *See* Press Release, Human Rights Council, U.N. Human Rights Council Commences First Session in Geneva (June19, 2006), *available at* http://www.unhchr.ch/huricane/huricane.nsf/0/75B6FFDB21036E8AC1257192005F3EBB?opendocument.

19. G.A. Res. A/RES/60/251, ¶ 10.

20. *Id.*

21. Press Release, Human Rights Council, U.N. Doc. HR/HRC/06/61, Human Rights Council Suspends Second Session Until 27 November (Oct. 6, 2006), *available at* http://www.ohchr.org/english/press/hrc/index.htm.

22. *Id.*

23. *See* Hoge, *supra* note 5. *See also*, Jeffrey Laurenti, *Avoiding Defeat on Human Rights*, Apr. 7, 2006, *available at* http://www.tcf.org/print.asp?type=NC&pubid=1261.

24. Laurenti, *supra* note 23.

25. *See* Office of the United Nations High Commissioner for Human Rights, Membership of the Human Rights Council, *available at* http://www.ohchr.org/english/bodies/hrcouncil/membership.htm.

objected to the intimidating presence of states with poor human rights records during the Council's first few meetings.[26] Human Rights Watch, for one, observed that "[s]tates with stronger records on human rights, including many that have emerged recently from periods of substantial abuses, were on the defensive. These states were frequently outflanked by the spoilers, who seemed able to act both more cohesively and more strategically."[27]

Human Rights Watch has also taken the Council to task for its failure to impose punitive measures against notorious human rights abuses in, for example, Darfur, Uzbekistan, and Burma.[28] Meanwhile, the Council has reportedly devoted inordinate time and resources to denouncing human rights violations by select states such as Israel, while barely mentioning human rights abuses by armed Palestinian groups and Hezbollah. This tendency, which has been carried over from the days of the Human Rights Commission, is, according to some observers, attributable to the high representation of states from the Organization of the Islamic Conference.[29]

The Human Rights Council's shortcomings should be understood in the light of its inchoate status. The Council is a preliminary attempt at reform, and it is accordingly dynamic, experimental, and largely a work in progress. The United Nations will review the Council in five years for a second bite at the apple.[30]

II. International Criminal Tribunals and Their Consequences for National Jurisdictions

A. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

The International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) were the first to follow the historic tribunals of Nuremberg and Tokyo. The U.N. Security Council created these second-generation tribunals in response to two distinctly different regional events. The ICTY was formed in 1993 to address atrocities that swept through former Yugoslavia. The ICTR was created the following year to address crimes of genocide in Rwanda. Both tribunals have a completion strategy that calls for operations to wind down by 2008 and cease entirely by 2010.

1. *ICTY Developments*

At the time of the ICTY's formation, Bosnia and Croatia were submerged in the ongoing violence that raged between 1991 and 1995. Since the ICTY was established, prosecutors have charged over 160 people with complicity in the systematic ethnic cleansing estimated to have resulted in over 100,000 deaths and 1.8 million displaced. In light of its

26. Human Rights Watch, *U.N.: Rights Council Disappoints Again*, *supra* note 15.

27. *Id.*

28. Peggy Hicks, *How to Put U.N. Rights Council Back on Track*, THE JEWISH DAILY FORWARD, Nov. 3, 2006, *available at* http://www.forward.com/articles/how-to-put-un-rights-council-back-on-track/; Human Rights Watch, *U.N.: Rights Council Misses Opportunity on Uzbekistan*, Oct. 3, 2006, http://hrw.org/english/docs/2006/10/03/uzbeki14309_txt.htm.

29. Hicks, *supra* note 28; Human Rights Watch, *U.N.: Rights Council Misses Opportunity on Uzbekistan*, *supra* note 28.

30. G.A. Res. A/RES/60/251, ¶ 16.

2008 mandate for concluding operations, further war crimes indictments are unlikely. As part of the completion strategy, any remaining suspected war criminals will likely be referred back to the national courts of the former Yugoslavia pursuant to Rule 11 *bis*.

On March 11, 2006, Slobodan Miloševic was found dead in his cell at the Hague Detention Unit. His trial before the ICTY for sixty-six counts of genocide, crimes against humanity, and war crimes had just entered its fifth year, consuming the testimony of 295 witnesses and thousands of exhibits. Only forty hours were left of the Defense case and trial had been expected to end in the spring.[31]

This year also marked the first time in its history the ICTY has conducted six trials simultaneously, involving an unprecedented twenty-five accused. The largest trial held previously at the tribunal had been the matter of *Kvocka, et al.*, which involved five Bosnian Serbs prosecuted for crimes committed at the Omarska and Keraterm prison camps in 1992. Three of the six current trials include a combined total of twenty-one indictees. The three multi-accused trials required renovation of the courtrooms to accommodate the parties.

The first of the multi-accused trials to begin this year was *Prlic, et al.*, which commenced April 26, 2006. Six former high-ranking political and military officials of the so-called Croatian Community are accused of ethnic cleansing of Muslims and other non-Croats who lived in Bosnia and Hercegovina during the Muslim-Croat conflict of 1992 to 1994.

The second large trial began in July 2006 for the "Kosovo Six," former associates of Miloševic charged with ethnic cleansing and systematic terror and violence toward thousands of ethnic Albanians.[32] The trial against the six high-level political and military leaders of Serbia and the Federal Republic of Yugoslavia (FRY) focuses on an alleged joint criminal enterprise to use their political and military powers to achieve deportations, murders, forcible transfers, and persecution of the Kosovo Albanian population. According to the indictment, approximately 800,000 Kosovo Albanian civilians were deported.

The "Srebrenica Seven" trial, considered to be one of the most significant trials in ICTY history, also began in the summer of 2006 and is the largest of the three on-going trials.[33] Seven high-ranking Bosnian Serb military and police officers stand charged as most responsible for the 1995 Srebrenica massacre of more than 8000 Muslim men and boys by Serb forces. The notable absence of the alleged masterminds of the slaughter—Bosnian Serb political and military leaders, Radovan Karadzic and his military commander Ratko Mladic—is a major disappointment. Both Chief Prosecutor Carla del Ponte and Tribunal president Judge Fausto Pocar have deplored Serbia's failure to arrest Karadzic

31. Website of International Criminal Tribunal for the former Yugo (ICTY), http://www.un.org/icty/.

32. All of the charges against Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic, and Sreten Lukic are in relation to the crimes committed in the territory of Kosovo, beginning on or about January 1, 1999, and continuing until June 20, 1999.

33. Five of the accused—Popovic, Beara, Borovcanin, Pandurevic, and Nikolic—are facing genocide and war crimes charges, while the other two, Miletic and Gvero, are indicted for murder, persecutions, forcible transfer, and deportation.

and Mladic.[34] Judge Pocar, in his U.N. General Assembly address on October 9, 2006, urged that the Tribunal not close its doors before these accused are brought to justice.[35]

Particularly controversial was the ICTY's judgment against Momcilo Krajišnik, a former member of the Bosnian Serb leadership convicted on September 27, 2006 of persecutions, extermination, murder, deportation, and forced transfer of non-Serb civilians.[36] The controversy surrounds Krajišnik's acquittal on charges of genocide and complicity in genocide. The judgment noted the crimes alleged met "the requirements of the actus reus for genocide,"[37] but held that the evidence did not show that the crime of genocide formed part of a common objective of the joint criminal enterprise,[38] nor that "any of these acts were committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such."[39]

2. *ICTR Developments*

The ICTR was established by the U.N. Security Council following the one hundred days of Rwandan violence in 1994 which resulted in the deaths of an estimated 800,000 Tutsis and moderate Hutus.[40] Situated in Arusha, Tanzania, the ICTR focuses solely on the high-level figures alleged to have instigated the genocide. The tribunal began work in 1997. Since then judgments have been rendered or trials are on-going for a total of fifty-six accused. So far only defeated Hutus have faced trial.

The Rwandan government in May 2006 published a list of 171 people being sought in connection with the killings, many of whom have left the country.[41] By its nature, the process of the prosecutions is slow. Each question, objection, statement, and cross-examination must be translated between French, English, and the Rwandan language. The ICTR has attempted to transfer some cases to other nations. Thousands of other cases have also been tried in Rwanda,[42] either in regular national courts or in a special traditional system of justice known as "gacaca,"[43] hearings held outdoors with household heads

34. *See* Daria Sito-Sucic, *UN's Del Ponte Still Seeks Justice for Srebrenica*, REUTERS NEWS, July 11, 2006.

35. Judge Fausto Pocar, President of the ICTY, Address to the U.N. Gen. Assembly (Oct. 9, 2006), *available at* www.un.org/icty/pressreal/2006/p1122e-annex.htm. *See also*, ICTY, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, delivered to the Security Council and the General Assembly*, U.N. Doc. A/61/271–S/2006/666 (Aug. 21, 2006), *available at* http://www.un.org/icty/rappannu-e/2006/AR06.pdf.

36. Prosecutor v. Krajišnik, Case No. IT-00-39-T Judgment (Sept. 27, 2006), *available at* http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf.

37. *Id.* ¶ 867.

38. *Id.* ¶ 1091.

39. *Id.* ¶ 867.

40. Website of International Criminal Tribunal for Rwanda (ICTR), http://69.94.11.53/default.htm.

41. Press Release, Hirondelle Foundation, Rwanda/Genocide—Rwanda Hands Over 171 Indictments To Diplomats, May 13, 2006, *available at* http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/683D5D83700E09B543257l6D0026A028?OpenDocument.

42. *See* National Serv. of Gacaca Jurisdictions (Rwanda), *Gacaca Process: Achievement, Problems and Future Prospects*, *available at* http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm.

43. *See* Law No. 28/2006 of 27/06/2006, Organic Law Modifying and Complementing Organic Law No.16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between Oct. 1, 1990 and Dec. 31, 1994, *available at* http://www.inkiko-gacaca.gov.rw/pdf/Organic%20Law%2027062006.pdf.

serving as judges in the resolution of community disputes. The system is based on voluntary confessions, apologies, and pleas for forgiveness by wrongdoers.[44]

The ICTR continues to seek eighteen suspects purported to have participated in the genocide. Perhaps most wanted is Félicien Kabuga,[45] a wealthy Hutu businessman who is alleged to have financed the Rwandan radio station that in 1994 incited Hutus to kill their countrymen, and is also alleged to have imported weapons used during the genocide.[46] He has evaded capture for eight years despite a U.S.$5 million reward offered for his arrest.[47]

The Kenyan government has been criticized for failing to arrest Kabuga, who is rumored to have set up a semi-permanent base in Kenya. The Kenyan government denies this assertion, and in October 2006, launched a public appeal for information leading to Kabuga's arrest.[48] Even if he is arrested soon, it is doubtful his trial could be completed before the Tribunal's 2008 deadline expires, which would require the ICTR to transfer his case to another national jurisdiction.

To meet its completion deadline the ICTR began a number of trials in 2006, including:

- the trial of well-known singer and composer Simon Bikindi, which commenced September 18, 2006.[49] In his opening statement, the prosecutor stated that Bikindi, through the lyrical content and powerful messages of hate in his music, mobilized youth, including members of his ballet, to assist in executing the plan to exterminate Tutsis.[50]
- the trial of former Rwandan prosecutor and judge, Siméon Nchamihigo, which began September 26, 2006.[51] Nchamihigo is charged with four counts—genocide, extermination, murder, and other inhumane acts. The prosecution has alleged that Nchamihigo recruited, armed, and ordered the militia to massacre Tutsi civilians and moderates from the Hutu opposition including a priest who was killed in his presence at a 1994 roadblock.[52]
- The trial of Emmanuel Rukundo, former Military Chaplain in the Rwandan Armed Forces (FAR) began November 15, 2006.[53] Rukundo is charged with three counts of genocide, crimes against humanity for murder, and crimes against hu-

44. *See* Stephanie Nieuwoudt, Institute for War and Peace Reporting (IWPR) Africa Rep. No. 71, Slow Progress at Rwandan Tribunal (July 6, 2006), http://www.iwpr.net.

45. *See* Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council (Dec. 15, 2006), *available at* http://69.94.11.53/ENGLISH/speeches/jallow151206sce.htm.

46. *See* Trial Watch Profile, *available at* http://www.trial-ch.org/en/trial-watch/profile/db/facts/felicien_kabuga_96.html.

47. Marc Lacey, *Face of Rwanda Genocide Now on U.S.-Backed Wanted Posters*, N.Y. TIMES, June 13, 2002, at A7.

48. *Kenya Launches Public Appeal for Arrest of Rwandan Genocide Suspect*, PEOPLE'S DAILY ONLINE, Oct. 31, 2006, *available at* http://english.people.com.cn/200610/31/eng20061031_316774.html.

49. Docket ICTR-01-72. Information on the trial is available at http://69.94.11.53/ENGLISH/cases/Bikindi/index.htm.

50. *See* Press Release, ICTR, Trial of Singer Bikindi Begins, ICTR/INFO-9-2-495.EN (Sept.18, 2006).

51. Docket ICTR-01-63. Information on the trial is available at http://69.94.11.53/ENGLISH/cases/Nshamihigo/index.htm.

52. *See* Press Release, ICTR, Nchamihigo Trial Starts, ICTR/INFO-9-2-497.EN (Sept. 25, 2006), *available at* http://69.94.11.53/ENGLISH/PRESSREL/2006/497.htm.

53. Docket ICTR-2001-70-I. Information on the trial is available at http://69.94.11.53/ENGLISH/cases/Rukundo/index.htm.

manity for extermination. Senior Trial Attorney William Egbe said in his opening statement that the Prosecution would establish Rukundo's role in the 1994 events and spoke of incidents at St. Joseph's college in Kabgayi where the Tutsis would hide when they heard "the Priest was around," a phrase synonymous with the abduction and killing of the Tutsi.[54]

B. THE STATE COURT OF BOSNIA & HERZEGOVINA'S WAR CRIME CHAMBER

In reaction to mounting costs, the U.N. Security Council endorsed[55] the conclusion of ICTY trials by 2008 and an end to the *ad hoc* tribunal's work two years thereafter.[56] As part of this "completion strategy," competent national courts have begun to receive from the ICTY cases that involve intermediate and lower-level defendants.

As the ICTY winds down, the State Court of Bosnia & Herzegovina's War Crime Chamber has entered the slow, complicated sphere of war crimes adjudication. The War Crimes Chamber is the first permanent national court in Bosnia & Herzegovina (BiH) created to prosecute individuals responsible for egregious violations of international humanitarian law.[57] The Chamber has jurisdiction over several types of cases:[58] those transferred from the ICTY pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence (ICTY Rules);[59] those transferred from the ICTY for which indictments have not yet been issued; and so-called "Rules of the Road"[60] cases initiated by BiH cantonal and district court prosecutors where an indictment has not yet been confirmed. In the last

54. *See* Press Release, ICTR, Rukundo Trial Starts, ICTR/INFO-9-2-500.EN (Nov. 15, 2006), *available at* http://69.94.11.53/ENGLISH/PRESSREL/2006/500.htm.

55. S.C. Res. 1503 U.N. Doc. S/RES/1503 (Aug. 28, 2003) [hereinafter Res. 1503].

56. Jeremy Greenstock, U.N. Security Council President, Statement by the President of the Security Council, 4582nd meeting of the Security Council (July 23, 2002) (transcript available in U.N. Doc. S/PRST/2002/21, *available at* project.knowledgeforge.net/ukparse/svn/trunk/undata/pdf/S-PRST-2002-21.pdf); Res. 1503, *supra* note 55.

57. Judge Fausto Pocar, President of ICTY, Keynote Address at the Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems, Office for Democratic Institutions and Human Rights, OSCE (May 10-12, 2006), *available at* http://www.osce.org/documents/odihr/2006/05/18942_en.pdf.

58. *Id.*

59. Rule 11 *bis* (A) of the ICTY Rules provides:

> After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers [hereinafter the Referral Bench], which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
> (1) in whose territory the crime was committed; or
> (2) in which the accused was arrested; or
> (3) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

60. To guard against ethnically motivated arrests following the war, this procedure required the ICTY's Office of the Prosecutor (OTP) to assess each war crimes case that Bosnian authorities intended to prosecute; using international guidelines, the ICTY OTP evaluated whether sufficient evidence existed to support an arrest. In October 2004, the ICTY stopped reviewing these cases. Now, in cantonal and district level cases where an indictment has not yet been confirmed the Office of the Prosecutor within the Court of BiH War Crimes Chamber conducts the review. Human Rights Watch, *Looking for Justice: the War Crimes Chamber in*

instance, the War Crimes Chamber reviews the case to determine if it is "highly sensitive" and, thus, must be adjudicated before the War Crimes Chamber.[61]

Established in early 2005[62]—nearly ten years after the end of the four-year long conflict in BiH—the War Crimes Chamber, located in Sarajevo, epitomizes the larger transformation of BiH's national justice system.[63] The War Crimes Chamber began its work during a period of major adaptation of BiH law. In 2003, under the direction of the U.N. High Representative, a new Criminal Code (CC) and Criminal Procedure Code (CPC)[64] replaced the existing Socialist Federal Republic of Yugoslavia (SFRY) codes that governed BiH—at that time, one of the six republics within the former state of Yugoslavia.

In helping draft the new CPC, representatives of the European Union and U.S. Justice Department forged a hybrid of the Continental investigative system and Anglo-American adversarial system.[65] Thus, BiH moved from a criminal procedure code based on the Continental system to one that eliminated the investigative judge and granted the accused the right of confrontation and cross-examination. Additionally, under BiH's new CPC, the length of pretrial confinement is circumscribed, there are no juries, and trial panels cannot be composed of any pretrial judges.[66] For even the most seasoned advocates in BiH, these dramatic procedural changes, alongside the challenges of handling complicated war crimes cases, present a steep learning curve.

The War Crimes Chamber comprises the Trial Panel and Prosecutor, as well as a unique entity designed to support local defense attorneys representing the accused before

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Bosnia and Herzegovina, Feb. 2006, *available at* http://hrw.org/reports/2006/ij0206/index.htm [hereinafter Looking for Justice].

61. The 1996 Rome Agreement (Rules of the Road) provides that:

> [p]ersons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.

Rome Agreement, Office of the High Rep. and E.U. Spec. Rep., http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093 (Feb. 18, 1996).

62. On November 12, 2000, the U.N. Office of the High Representative, created by the Dayton Peace Agreement to implement the civilian portions of the peace agreement, promulgated the Law on the Court of BiH. Subsequently, the Parliament of BiH passed the law, and the State Court of BiH was established on July 3, 2002. State Court of BiH website, Public Docs. & Press Information, http://www.sudbih.gov.ba. In addition to the funds allocated to the Court by the government of BiH, international donors contributed approximately 10 million euros in 2006. The funds were targeted especially to the work of the War Crimes and Organized Crimes Chamber. The following entities are the principal donors: United States, United Kingdom, Germany, European Commission, Netherlands, Spain, Italy, Norway, Sweden, Austria, Ireland, Denmark, Belgium, Switzerland, Luxembourg, Greece, Cyprus, and benefits in kind from Japan, Portugal, Canada, and Finland.

63. *Looking for Justice*, *supra* note 60. As of May 2006, the ICTY Prosecutor had filed twelve referral motions covering twenty accused, and the ICTY has transferred six accused to the State Court of BiH.

64. On January 23, 2003, the U.N. High Representative, Paddy Ashdown enacted the current CPC. Press Release, Office of High Rep., U.N. High Rep. Paddy Ashdown Enacted the Current CPC, Jan. 23, 2003, *available at* http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094. For additional background on the CPC, *see OSCE Trial Monitoring Rep. on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia & Herzegovina* (Dec. 2004), *available at* http://www.oscebih.org/documents/1079-eng.pdf.

65. Bernard Boland, *In Search of a Trial: Exporting the Adversary System*, BENCH & BAR OF MINN. (Nov. 2003).

66. *Id.*

the Court: the Criminal Defense Section, known as OKO (Odsjek Krivicne Odbrane). With an aim to improve the quality of defense advocates before the War Crime Chamber, OKO provides indirect support to the accused and trains defense attorneys in criminal procedure, international humanitarian law, and courtroom advocacy within an adversarial system.[67] More broadly, OKO's work will establish a benchmark of professionalism for all Bosnian lawyers. This, in turn, will advance the progressive development of the rule of law in BiH's emerging democracy. In a nation whose political terrain remains dominated by polarizing nationalism and politically institutionalized ethnic divisions, the work of OKO, while little known, represents the hope of post-conflict reconciliation throughout BiH.

III. The International Court of Justice on Disputes in the Territory of the Congo

In 2005 and 2006, the International Court of Justice (ICJ) issued two important judgments concerning activities in the territory of the Democratic Republic of the Congo (DRC). In the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)* (*Congo v. Rwanda*), the DRC accused Rwanda of committing grave violations of international human rights and international humanitarian law. On February 3, 2006, by a vote of fifteen judges to two, the ICJ found that none of the treaties relied on by the DRC provided the court with jurisdiction to hear the case. By contrast, in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (*Congo v. Uganda*), decided on December 19, 2005, the ICJ resolved the dispute between the DRC and Uganda on the merits.

In the case of *Congo v. Uganda*, the ICJ ruled in favor of the DRC, finding that Uganda:

> . . . by engaging in military activities against the [DRC] on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of nonintervention.[68]

The judges concluded that Uganda, through the conduct of its armed forces, was an Occupying Power in the Ituri district. In this capacity, Uganda failed to fulfill its obligations under international human rights law and international humanitarian law and also failed to prevent acts of looting, plundering, and exploitation of Congolese natural resources.[69] Accordingly, the court placed the country under an obligation to make reparations to the DRC.[70]

In contrast, the ICJ also found the DRC's armed forces responsible for attacks on the Ugandan Embassy in Kinshasa and for the maltreatment of individuals on the Embassy

67. Odsjek Krivicne Odbrane (OKO) website, *available at* http://www.okobih.ba/?jezikE.

68. Congo v. Uganda, ¶ 345(1) (Dec. 19, 2005).

69. Id. ¶ 345(3-4).

70. Id. ¶ 345(5).

premises and Ugandan diplomats at several locations.[71] Accordingly, the court placed the DRC under an obligation to make reparations to Uganda for these injuries.[72]

Congo v. Uganda has several important implications for international human rights law. One addresses the obligations of an occupying power. The court ruled that Uganda established and exercised authority in Ituri as an occupying power through its armed forces, the Ugandan People's Defense Force.[73] Pursuant to, *inter alia*, Article Three of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907, as well as Article Ninety-One of Protocol I additional to the Geneva Conventions of 1949, the court stated that an Occupying Power has an obligation to uphold international human rights and humanitarian law in the area that it occupies.

The judges further recognized, however, that Uganda was not responsible for creating the Congolese rebel group, the Mouvement Pour là Liberation du Congo (MLC). While it had trained and given military support to the MLC, the court did not have probative evidence that Uganda controlled, or could control, this group.[74] Nevertheless, the court held that, even though the MLC's conduct could not be attributed to Uganda, the training and military provisioning provided by Uganda violated certain obligations of international law.[75]

IV. The Death Penalty

A. The United States

In 2006, the U.S. courts, both federal and state, addressed important issues relating to the death penalty. In particular, the courts gave guidance on issues relating to: (a) sentencing criteria for imposition of the death penalty; (b) acceptable methods of execution; and (c) constitutionally required procedural safeguards.

1. *Sentencing Criteria*

In *Brown v. Sanders*,[76] the Supreme Court (5-4) reinstated the death penalty of Ronald L. Sanders whose *habeas corpus* petition had been granted by the Court of Appeals for the Ninth Circuit after two of the four factors cited by the jury in support of the death penalty were found by the California Supreme Court to be invalid. Justice Scalia's majority opinion found no Constitutional error because the jury's consideration of the two remaining special circumstances satisfied the *Furman* criteria for imposition of the death penalty.[77]

In *Oregon v. Guzek*,[78] the Supreme Court (6-2) first resolved a complex jurisdictional issue regarding its authority to review an Oregon Supreme Court determination that introduction of live alibi testimony at resentencing was required under the Eighth Amend-

71. Id. ¶¶ 345(11)-(12).
72. Id. ¶ 345(13).
73. Id. ¶ 220.
74. Id. ¶ 161.
75. Id. ¶ 162.
76. Brown v. Sanders, 546 U.S. 212 (2006).
77. *See* Furman v. Georgia, 408 U.S. 238 (1972) for detailed analysis of death penalty eligibility factors that must be addressed at either the guilt or penalty phase.
78. Oregon v. Guzek, 546 U.S. 517 (2006).

ment. On the merits, the Supreme Court reversed the Oregon Supreme Court and held that the Eighth Amendment does not prohibit limiting innocence-related evidence that a capital defendant can introduce at the punishment phase to the evidence previously introduced at trial.

In *Kansas v. Marsh*,[79] the Supreme Court (5-4) upheld a death sentence and the constitutionality of a Kansas death penalty statute that required the death penalty even when aggravating circumstances and mitigating factors are equally balanced. The Court concluded that the statute met both the *Furman*[80] and *Gregg*[81] standards requiring a rationally drawn class of death-eligible defendants and jury authorization to make an individualized sentencing decision.

On November 13, 2006, the Supreme Court held (5-4) in *Ayers v. Belmontes*,[82] a twenty-five year old murder case, that California's catch-all jury instruction given in the penalty portion of capital cases, which directs jurors to consider any other circumstances that extenuate the gravity of the crime, does not violate the Eighth Amendment and does not mislead jurors to believe they must disregard forward-looking evidence that did not relate directly to actual culpability for the crime.

Late in 2006, the Supreme Court agreed to hear for a second time the death penalty case of LaRoyce L. Smith, whose sentence was overturned in 2004 because jurors did not consider his learning disability and other evidence but was reinstated by the Texas Court of Criminal Appeals, which concluded that defective jury instructions constituted harmless error.[83]

2. *Methods of Execution*

Constitutional issues involving lethal injections in capital cases came into focus before the Supreme Court and lower courts in 2006.[84] And while the American Society of Anesthesiologists issued a letter in June calling on its members not to attend executions of death sentences by lethal injection, even if ordered by a court,[85] death-row applicants seeking judicial intervention on the issue achieved little success. On January 31, the Supreme Court granted a stay of execution to Arthur D. Rutherford[86] pending resolution of his petition for certiorari, which argued that the chemicals used by the State of Florida for execution inflict unnecessary pain and violated the Eighth Amendment ban on cruel and

79. Kansas v. Marsh, ___ U.S. ___, 126 S. Ct. 2516 (2006).

80. *See* U.N. Doc. A/59/2005, *supra* note 2.

81. Gregg v. Georgia, 428 U.S. 153 (1976).

82. Ornaski v. Belmontes, ___ U.S. ___, 126 S. Ct 2881 (2006).

83. Smith v. Texas, ___ U.S. ___, 127 S. Ct. 855 (2007).

84. *See* Adam Liptak, *Judges Set Hurdles for Lethal Injection*, N.Y. TIMES, Apr. 12, 2006 (survey of judicial decisions in several states setting up legal roadblocks to the use of lethal injections to execute inmates); John Gilbeaut, *A Painful Way To Die?*, A.B.A.J., Apr. 2006, at 20 (also reviewing several cases and an April 2005 article in the British Medical Journal *The Lancet* which found that many executed convicts experience significant pain during the lethal injection process); Brenda Goodman, *Judge Allows Device for Monitoring Lethal Injection*, N.Y. TIMES, Apr. 18, 2006, at A14 (a federal judge in North Carolina, who had ordered that qualified medical personnel attend the execution of Willie Brown, Jr., authorized a brain wave monitor instead to ensure that he would be unconscious and unable to feel pain). Brown was executed days later.

85. Orin F. Guidry, Observations Regarding Lethal Injections (June 30, 2006), http://www.asahq.org/news/asanews063006.htm.

86. Rutherford v. Florida, ___ U.S.___, 126 S. Ct. 1190, 1191 (2006).

unusual punishment. The Court, however, ultimately denied Rutherford's petition and he was executed on October 18, 2006.

The Supreme Court agreed to decide procedural issues in an analogous case filed by another Florida death row inmate, Clarence E. Hill.[87] Hill argued that the use of pancuronium bromide causes suffocation, while potassium chloride causes burning in the veins and massive muscle cramping before resulting in cardiac arrest. The Court considered whether a federal civil rights challenge to lethal injection under 42 U.S.C. § 1983 can be brought by an inmate who has already exhausted all *habeas* appeals processes. In a unanimous decision, the Court reversed the Eleventh Circuit and held that the Section 1983 claim under the Eighth Amendment could proceed because the claim was not a challenge to the fact of the sentence itself.[88] Subsequently, Florida Governor Jeb Bush rescheduled Hill's execution for September 20, 2006. The district court and the Eleventh Circuit dismissed his civil rights claim as untimely, and after the Supreme Court voted 5-4 to deny another stay, he was executed by lethal injection.[89]

In other cases, the Supreme Court denied a challenge to Tennessee's method of lethal injection using pancuronium bromide, even though its use was forbidden under Tennessee law for euthanizing animals,[90] while California indefinitely postponed the execution of Michael A. Morales[91] after two anesthesiologists refused on ethical grounds to oversee a lethal three-drug cocktail; the federal court ruled that the state may only utilize an untested single lethal drug injection under strict medical supervision to eliminate the possibility of Morales suffering excruciating pain. Similarly, South Dakota delayed execution of its first person in fifty-nine years after Governor Michael Rounds requested legislative review of the state's lethal injection protocols.[92] In Missouri, a federal district judge rejected the state's latest protocol for execution by lethal injection and ordered that a doctor who had long mixed lethal drugs must not participate in any manner in the lethal injection process.[93] In Ohio, Joseph L. Clark's execution by lethal injection took nearly ninety painful minutes to complete, with Clark reportedly lifting his head from the gurney to tell his executioners: "It's not working."[94]

State courts continued to reject claims against specific methods of execution. In November 2006, the Kentucky Supreme Court ruled in the cases of Ralph Baze and Thomas C. Bowling that lethal injection did not constitute cruel and unusual punishment, joining thirty-seven states and the federal government which use this protocol.[95] The Supreme Court of Nebraska rejected an inmate's appeal that the electric chair amounts to cruel and

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87. Hill v. McDonough, ___ U.S. ___, 126 S. Ct. 2096 (2006).

88. *See* Linda Greenhouse, *Prisoners Gain in Suit Attacking Lethal Injection*, N.Y. TIMES, June 13, 2006. *See also* John Gilbeaut, *It's All In The Execution*, A.B.A.J., Aug. 2006, at 17 (analyzing future possible Section 1983 challenges).

89. *See* Abby Goodnough, *Inmate Awaits Final Ruling on Lethal Injection*, N.Y. TIMES, Sept. 19, 2006, at A14.

90. Abdur' Rahman v. Bredesen, ___ U.S. ___, 126 S. Ct. 2288 (2006).

91. *See* John M. Broder, *Questions Over Method Lead to Delay of Execution*, N.Y. TIMES, Feb. 22, 2006; *Lethal Injection Draws a New National Spotlight*, N.Y. TIMES, Feb. 23, 2006, at A22.

92. *See* Monica Davey, *S.D. Plans Its First Execution Since 1947*, N.Y. TIMES, Aug. 29, 2006, at A16.

93. Taylor v. Crawford, No. 05-4173 (W.D. Mo., June 26, 2006), *remanded by*, 457 F.3d 902 (8th Cir. 2006), *and on remand*, No. 05-4173 (W.D. Mo., Oct. 16, 2006).

94. *See* Linda Greenhouse, *Justices Back Police Intervention Without a Warrant*, N.Y. TIMES, May 23, 2006, at A22.

95. *See* Adam Liptak, *Court Rules for Kentucky on Execution*, N. Y. TIMES, Nov. 23, 2006.

unusual punishment.[96] According to the Death Penalty Information Center, nine states allow inmates to choose between lethal injection and another method—but Nebraska alone requires electrocution.[97]

3. *Procedural Safeguards*

In *Holmes v. South Carolina*,[98] the Supreme Court (in Justice Alito's first opinion) held unanimously that a capital murder defendant's Constitutional right to present a complete defense was violated by an evidence rule—deemed arbitrary—that precluded introduction of third-party guilt when the prosecution introduces forensic evidence strongly supporting a guilty verdict. The Supreme Court vacated the South Carolina Supreme Court's decision and remanded the case.[99]

In *House v. Bell*,[100] the Supreme Court (6-2) reversed the Sixth Circuit and ruled that House had met the stringent "manifest injustice" requirement to overcome the procedural default of his "actual innocence" claim, as well as principles of comity and finality. In direct contradiction to trial evidence, DNA testing twenty years later established that semen on the victim's clothing came from her husband, not House, and additional forensic evidence was discovered. While prisoners asserting innocence as a gateway to a defaulted ineffective assistance of counsel claim or other constitutional claims must show new reliable evidence not presented at trial, in a *habeas* proceeding, courts must assess the impact of all of the evidence on reasonable jurors.[101] The Court held that jurors could find reasonable doubt in light of this new evidence to meet the stringent showing necessary to authorize the re-argument of innocence in the context of his Constitutional claims.

In *Comer v. Schriro*,[102] the Ninth Circuit Court of Appeals held that although death row inmate Comer competently and voluntarily waived his filed *habeas* appeal, the court was required by the Eighth Amendment to hear the filed appeal. The court then granted the writ on the grounds that Comer's due process rights were violated when he was sentenced to death while nearly naked, bleeding, shackled, and exhausted. In *Alderman v. Terry*,[103] the Eleventh Circuit denied a death row inmate's *habeas* petition in which he argued that he had been denied effective assistance of counsel in the penalty phase of his trial because evidence of his background was not presented to the jury.

Finally, the death penalty case involving Zacarias Moussaoui[104]—the only person criminally convicted for the tragic events of September 11—raised fundamental issues regarding the scope of criminal conduct subject to the death penalty.[105] Does failure to disclose knowledge satisfy Supreme Court Eighth Amendment standards for remote participants

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96. State v. Moore, 718 N.W.2d 537 (Neb. 2006).

97. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org.

98. Holmes v. South Carolina, 547 U.S. 319 (2006).

99. *See* David L. Hudson Jr., *Alito's First Opinion Favors Murder Defendant*, A.B.A. J. eREPORT, May 5, 2006.

100. House v. Bell, ___ U.S. ___, 126 S. Ct. 2064 (2006).

101. *See* Schlup v. Delo, 513 U.S. 298 (1995) (establishing this test). *See also* Mark Hansen, *Doubt and DNA*, A.B.A.J., Sept. 2006, at 14.

102. Comer v. Schriro, 463 F.3d 934 (9th Cir. 2006).

103. Alderman v. Terry, 468 F.3d 775 (11th Cir. 2006).

104. In United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), the district court detailed legal standards applicable to imposition of the death penalty.

105. *See* G.M. Gilisko, *Moussaoui Sentence Debated*, A.B.A. J. eREPORT, Apr. 7, 2006.

in capital crimes?[106] In Moussaoui's case, however, the jury rejected the death penalty and imposed a life sentence.

4. *Nongovernmental Organizations (NGOs)*

In January 2006, the American Bar Association Death Penalty Moratorium Implementation Project issued *The Georgia Death Penalty Assessment Report*, which found numerous serious flaws in the criminal justice system in Georgia that compromise administration of the death penalty.[107] For example, the ABA found that Georgia is the only state that does not guarantee legal counsel to death row inmates at a critical stage of appeals and has the toughest standard in the United States for proof of mental retardation. Governor Sonny Perdue promptly rejected the ABA's call for a moratorium on executions.

In June 2006, the ABA issued *The Alabama Death Penalty Assessment Report*, which identified several problems, including the failure to assure DNA testing, made six specific recommendations, and concluded that a temporary moratorium on executions should be imposed. At the ABA 2006 Annual Meeting, a separate *Report* was submitted urging death penalty jurisdictions to implement a number of policies and procedures regarding people with mental illness. *The Arizona Death Penalty Assessment Report*, issued in July 2006, assessed twelve specific issues, highlighted several serious problems cumulative in nature, and made sweeping recommendations in every aspect of the death penalty system. A fourth report, *The Florida Death Penalty Assessment Report*, was issued in September 2006 and highlighted eleven problem areas and corresponding recommendations and ninety-three additional recommendations. One unique concern in Florida was the high number of death row exonerations—twenty-two since 1973.

In February 2006, Amnesty International issued *Summary Report*—UNITED STATES OF AMERICA—*The Execution of Mentally Ill Offenders*,[108] which reviewed the history of executing mentally ill offenders. Subsequent to *Atkins v. Virginia*,[109] which held that the death penalty is unconstitutional for persons with mental retardation, and *Roper v. Simmons*,[110] which held that the execution of juveniles is unconstitutional in light of evolving standards of decency and international opinion,[111] relevant legal analysis has focused on medical advances in understanding the severely mentally ill, treatment limitations, and

106. In Tison v. Arizona, 481 U.S. 137 (1987), the Court remanded a felony murder case to determine whether the mental state of two brothers established reckless indifference when they helped their father escape from prison and stood by while he murdered a family of four; in Enmund v. Florida, 458 U.S. 782 (1982), the Court focused on the remoteness of the defendant's conduct in sitting in a getaway car while a planned robbery resulted in a double murder and concluded that the death penalty violated the Eighth Amendment in those circumstances.

107. ABA State Death Penalty Reps., *available at* http://www.abanet.org/moratorium.

108. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA—THE EXECUTION OF MENTALLY ILL OFFENDERS, SUMMARY REPORT, *available at* http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf.

109. Atkins v. Virginia, 536 U.S. 304 (2002).

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

111. Human Rights Watch, World Rep. 2006, *available at* http://hrw.org (noting that post-*Roper* at least 2,225 child offenders remain sentenced to life terms, and 59% of these children were so sentenced for their first criminal conviction. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia (which lacks a central government), forbids both the death penalty and sentencing child offenders to life without parole).

moral issues regarding their cognitive responsibility for crimes.[112] Amnesty International argues for an extension of the *Atkins* ruling based in part on Justice Stevens' analysis therein of the diminished capacities of mentally retarded persons which in his view diminishes personal culpability.[113]

The Innocence Project at the Benjamin R. Cardozo School of Law at Yeshiva University submitted a Report in May 2006 prepared by a panel of private fire investigators retained by the newly created Texas Forensic Science Commission. The Report concluded that faulty forensics masquerading as science sent two men to death row for arson and led to the execution of one of them. Cameron T. Willingham was executed by lethal injection on February 17, 2004, after Governor Rick Perry rejected a plea for a last-minute stay after courts and the Texas State Board of Pardons and Paroles had declined to intervene. The Report details the botched arson investigation and trial evidence on which his conviction and death penalty were grounded. In the second case, Ernest R. Willis was exonerated and pardoned from death row and collected almost $430,000 for seventeen years of wrongful imprisonment.[114]

5. *State Legislative Developments*

Oklahoma became the fifth state to allow the death penalty for sex crimes against children, one day after South Carolina's similar enactment.[115] The Wisconsin Legislature placed an advisory referendum on the November 2006 ballot regarding reinstatement of the death penalty, which had been outlawed in 1853. The referendum passed with 54 percent voter support.

B. International Developments

In April 2006, Amnesty International issued *The Death Penalty Worldwide: Developments in 2005* report,[116] which found that 2,148 persons were executed in 2005 (down from 3,797 in 2004) and that 5,186 persons were sentenced to death in fifty-three countries. Over 20,000 people were awaiting execution in 2006. A total of eighty-six countries have abolished the death penalty, now also including Mexico and Liberia. China carried out 80 percent of all executions in 2005. Iran put ninety-four people to death, Saudi Arabia eighty-six, and the United States sixty.

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112. *See also* Ralph Blumenthal & Adam Liptak, *Judgment Whether a Killer is Sane Enough to Die*, N.Y. Times, June 2, 2006 (background on other challenges to execution of mentally ill prisoners); *A Growing Plea for Mercy for the Mentally Ill on Death Row*, N.Y. Times, Nov. 23, 2006, at 26.

113. *See* Adam Liptak, *Facing Death, His I.Q. Low, Man Wins Rare About-Face*, N.Y. Times, Mar. 15, 2006, at A21 (review of Fifth Circuit decision in the case of Marvin Lee Wilson applying *Roper* to reverse its own prior death penalty affirmance, although Wilson had missed a filing deadline). In re Wilson, 442 F.3d 872 (5th Cir. 2006).

114. *See* Ralph Blumenthal, *Faulty Testimony Sent Two to Death Row, Panel Finds*, N.Y. Times, May 3, 2006.

115. *See* Adam Liptak, *Death Penalty in Some Cases of Child Sex is Widening*, N.Y. Times, June 10, 2006, at A9.

116. Amnesty International Reports are available at http://web.amnesty.org.

1. *Asia*

In China, the National People's Congress adopted new legal rules, effective January 1, 2007, which restore power to the Supreme People's Court, stripped in 1983, and mandate review by the Court of all death sentences. Under China's Criminal Code, almost seventy offenses carry the death penalty, and 3,400 offenders were executed in 2005.[117]

In June 2006, the Philippines' legislature abolished the death penalty and the law was signed by President Gloria Macapagal Arroyo.[118] Over 1,200 death row inmates, including several Al-Qaeda-linked terrorists, were spared their death sentences. In Cambodia, the U.N.-supported international tribunal, created to try leaders of the Khmer Rouge who executed or starved to death about 1.7 million Cambodians, began pretrial preparation in 2006. There will be no death penalty imposed on those convicted of genocide.[119]

2. *Africa*

The Rwandan government has asserted that it will abolish the death penalty as of 2007 for genocide suspects from countries without a death penalty who may be transferred to its courts from the U.N. ICTR held in Arusha, Tanzania. To date, only Norway and Rwanda have expressed willingness to conduct the trials. About 650 other prisoners are on death row in Rwanda.[120] Botswana's Centre for Human Rights (Ditshwanelo) led a campaign in 2006 to abolish the death penalty, in part because of concerns over the availability of skilled defense attorneys.[121] Legal debates over restoration of the death penalty in both South Africa and Namibia heated up in 2006, largely in response to increases in crime. South Africa's Parliament ratified the second optional Protocol to the International Covenant on Civil and Political Rights in 2002 and would also need to amend its Constitution to adopt a death penalty.[122] Namibia abolished the death penalty at Independence in 1990 as part of the fundamental human rights and freedoms enshrined in Chapter Three of the Namibian Constitution.[123] Zambia's Supreme Court ruled that it was without power to abolish the death penalty on the grounds that it violated "Christian

117. *See* David Lague, *China Acts to Reduce High Rate of Executions*, N.Y. TIMES, Nov. 1, 2006.

118. Sarah Toms, *Philippines Stops Death Penalty*, BBC NEWS, June 24, 2006, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/5112696.stm.

119. *See* Ellen Nakashima, *Cambodia Steps Slowly Toward a Genocide Trial*, WASH. POST, Mar. 10, 2006, at A01.

120. *See* Isaac Mugabi, *Party Forum Endorses Death Penalty Abolition*, THE NEW TIMES (Kigali), Oct. 20, 2006, *available at* http://allafrica.com; Aimable Twahirwa, *Rwanda to Scrap Death Penalty in Hunt for Genocide Suspects*, THE EAST AFRICAN (Nairobi), Sept. 4, 2006, *available at* http://www.nationmedia.com/eastafrica/04 09200612.htm; Ignatius Ssuuna, *Parliament to Debate Death Penalty*, THE NEW TIMES, Aug. 20, 2006, *available at* http://www.newtimes.co.rw; *Country Working on Waiving Death Penalty for UN Court Suspects, Says Official*, HIRONDELLE NEWS AGENCY (Lausanne), Mar. 20, 2006, *available at* http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol01issue04.html.

121. *See Daggers Drawn Over Death Penalty*, IRIN NEWS, Oct. 30, 2006, *available at* http://allafrica.com.

122. *See* Wyndham Hartley, *No Death Penalty for SA, MPs Told*, BUSINESS DAY, Oct. 23, 2006, *available at* http://www.businessday.co.za/articles/article.aspx?ID=BD4A299942.

123. *See* Brigitte Weidlich, *Death Penalty Resurfaces*, THE NAMIBIAN (Windhoek), Oct. 20, 2006, *available at* http://allafrica.com.

values." President Levy Mwanawasa, however, has refused to sign warrants of execution for any of the more than 200 people on death row.[124]

3. *Europe*

The Council of Europe's Parliamentary Assembly and the European Commission rejected a proposal to restore the death penalty in Poland which had been abolished after the fall of the communist regime in 1989. Abolishment of the death penalty is a condition for membership in the European Union, which Poland joined in 2004.[125]

V. Human Trafficking 2006

A. International Developments

Each year, approximately 600,000 to 800,000 victims are trafficked across international borders to be exploited through forced labor or services, forced prostitution, removal of organs, or for other exploitive purposes.[126] The United Nations' Office on Drugs and Crime (UNODC) database on human trafficking trends documents the trafficking of human beings from 127 countries for exploitation in 137 countries.[127]

In 2006, fifteen additional countries ratified the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[128] The Protocol, which first came into force in 2003, supplements the United Nations Convention against Transnational Organized Crime.[129] The Protocol requires State Parties to criminalize trafficking in persons, to establish comprehensive policies and programs to prevent and combat trafficking, and to protect victims of trafficking.[130] To date, the Protocol has 110 States Parties and 117 Signatories.[131]

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124. *See Zambia Court Rejects Plea to Scrap Death Sentences*, Mail & Guardian Online, Nov. 14, 2006, *available at* http://www.mg.co.za.

125. *See Poland: Death Penalty Call is Condemned*, N.Y. Times, Aug. 4, 2006, at A7.

126. U.S. Dep't of State, Trafficking In Persons Rep., at 6 (2006) [hereinafter TIP Rep. 2006].

127. U.N. Office on Drugs and Crime, Trafficking in Persons: Global Patterns, at 17 (Apr. 2006).

128. Bolivia, Cameroon, Georgia, Germany, Italy, Mozambique, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United Republic of Tanzania ratified the Protocol this year. The Central African Republic, the European Community, Finland, Kuwait, Montenegro, Sao Tome, and Principe acceded, accepted, or succeeded to the Protocol this year, which has the same legal effect as ratification.

129. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 2, 2000) [hereinafter Protocol]. In particular, the Protocol stipulates:

> "[t]rafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Id. at art. 3, ¶ (a).

130. *Id.* at arts. 5 & 9.

131. U.N. Treaty Collection, *available at* http://untreaty.un.org/English/treaty.asp.

In the past year, the UNODC issued two publications including the *Toolkit to Combat Trafficking in Persons* and the *Trafficking in Persons: Global Patterns* report.[132] The *Global Patterns* report is one of the first reliable sources to trace trafficking trends in countries of origin, transit, and destination, and to make recommendations on how countries can do more to prevent trafficking, protect the victims, and punish the criminals.[133] The *Toolkit* should help governments, policy-makers, law enforcement agencies, and NGOs address the problem of human trafficking more effectively.[134] Many organizations are already working to raise awareness of the issue including the German Women's Council, Solwodi, Frauenrecht ist Menschenrecht, Diakoni, IOM, the Swedish International Development Cooperation Agency, and the World Childhood Foundation.[135]

B. The U.S. Trafficking Victims Protection Re-authorization Act of 2005[136]

On January 10, 2006, the United States enacted the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA), which amended current human trafficking laws, re-appropriated millions of dollars in funds for previously existing projects, and added greatly needed social service programs for human trafficking victims.[137] Human trafficking is the world's fastest growing criminal activity.[138] According to the U.S. Attorney General, an estimated 17,500 people are forced into prostitution, sweatshops, and domestic servitude each year in the United States.[139] Worldwide, human trafficking generates an estimated $9.5 billion in annual revenue,[140] ranking third only behind the arms and drug trading industry as the most profitable industry worldwide.[141]

The most significant amendment made by the TVPRA is the expansion of U.S. prosecutorial jurisdiction for human trafficking crimes to cover the overseas activities of U.S. peacekeepers and humanitarian aid workers.[142] The TVPRA amends the United

132. U.N. Trafficking Reps., *available at* www.unodc.org/unodc/en/publications/publications_trafficking.html.

133. Press Release, U.N. Office on Drugs and Crime, UNODC Rep. on Human Trafficking to be Unveiled at U.N. Crime Commission (Apr. 24, 2006), *available at* www.unodc.org/unodc/en/press_release_2006_04_20.html.

134. Press Release, U.N. Off. on Drugs and Crime, UNODC Unveils New Toolkit Aimed at Combating Human Trafficking (Oct. 5, 2006), *available at* www.unodc.org/unodc/press_release_2006_10_05_2.html.

135. G.A. Res. A/RES/60/251, *supra* note 14, at 14, 15.

136. Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon In The Fight Against Human Trafficking*, 16.1 Temp. Pol. & Civ. Rts. L. Rev. (forthcoming 2006).

137. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, tit. I, § 103(c), 119 Stat. 3558 (2006) [hereinafter TVPRA].

138. U.N. Doc. A/59/2005, *supra* note 2, at 17.

139. Jane Morse, U.S. Dep't of State, U.S. Intensifying Efforts to Combat Human Trafficking, Oct. 3, 2006, *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=October&x=20061003171442ajesrom0.3978235.

140. TIP Rep. 2006, *supra* note 126, at 13.

141. Ian Peck, *Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling*, 31 Vand. J. Transnat'l L. 1041, 1044 (1998).

142. *Trafficking Victims Protection Reauthorization Act of 2005, Comm. on the Judiciary Rep. 2 of 2*, 109th Cong. Rep. No. 317 (Dec. 8, 2005) (submitted by Rep. Sensenbrenner, Member, H. Comm. on the Judiciary) [hereinafter Trafficking Victims Protection Reauthorization Act of 2005 Report].

States Code to establish that any person[143] who engages in conduct outside of the United States while operating as an extraterritorial federal contractor[144] shall be punished as provided for that offense.[145] The formal offense under the TVPRA is punishable in the United States by imprisonment for more than one year. In short, the TVPRA addresses this issue by holding U.S. citizens accountable for acts of human trafficking while engaged in a peacekeeping mission or federally-funded contract abroad.

Notably, the TVPRA shifts the focus of concern from solely transnational victims of human trafficking to include the millions of American nationals who are victimized within the borders of the United States.[146] In so doing, TVPRA mandates two studies that aim to assess the prevalence of severe forms of trafficking and sex trafficking in the United States and to recommend effective approaches to law enforcement officials in combating human trafficking.[147]

The TVPRA additionally allocates grants to improve services for U.S. nationals who are victims of trafficking.[148] NGOs that work with trafficked children have indicated that lack of housing and other social assistance is an impediment to providing rehabilitative relief. In response, the TVPRA requires the Department of Health and Human Services (HHS) to carry out a pilot program making available residential treatment facilities for both adult and minor victims of domestic trafficking.[149]

Nevertheless, the TVPRA is not without its critics. Sanctions against those states which fail to comply with minimum standards to eliminate trafficking remain discretionary with the President. Critics of sanctions argue that such unilateral measures are ineffective and usually fail, creating a situation that generally works against U.S. foreign policy objectives.[150] Nevertheless, where sanctions are imposed under the TVPRA, those sanctions may take the form of withholding non-humanitarian aid and non-trade-related aid.[151] Sanctioned governments also face U.S. opposition to non-humanitarian and non-trade-related assistance from international financial institutions and multilateral development banks, such as the International Monetary Fund and the World Bank.[152]

143. The TVPRA amends the definition of "persons" subjected to the Act to read: "persons, including nationals of the country who are deployed abroad as part of a peacekeeping or other similar mission who engage in or facilitate severe forms of trafficking in persons or exploit victims of such trafficking." TVPRA, *supra* note 137, § 104(b)(1)(B).

144. The definition of "Federal Contractors" includes any person: (1) employed as a contractor, or as an employee of a contractor of any Federal agency; (2) present or residing outside the United States in connection with such employment; and (3) not a national of or ordinarily resident in the host nation. 18 U.S.C. § 3272.

145. *Id.* Sexual exploitation abroad also includes patronizing prostitutes. TIP Rep. 2006, *supra* note 126, at 4.

146. Rep. Christopher H. Smith, Member, H.R., *Introduction of the Trafficking Victims Protection Reauthorization Act of 2005*, E269 (Extended Remarks Feb. 17, 2005)

147. *See* Trafficking Victims Protection Reauthorization Act of 2005 Report, *supra* note 142.

148. TVPRA, *supra* note 137, at tit. II, § 202(a).

149. *Id.* § 203(g). The TVPRA authorizes $5 million over two years for this purpose.

150. Ctr. for Strategic and Int'l Studies, *Altering U.S. Sanctions Policy: Final Rep. of the CSIS Project on Unilateral Economic Sanctions*, 5-6 (1999).

151. TVPRA, *supra* note 137, § 7107(a). The State Department bases its country assessments on data compiled from U.S. embassies, foreign government officials, international human rights organizations, nongovernmental organizations, individuals, and published reports. TIP Rep. 2006 at 29.

152. TVPRA, *supra* note 137, § 7107(d)(1)(B).

The U.S. Department of Justice publishes an annual Trafficking in Persons Report (TIP Report), which classifies different nations according to a set of tiers. Governments that comply fully with the TVPRA's minimum standards for the elimination of trafficking are placed in Tier One.[153] Governments that do not comply but are making significant efforts to do so are placed in Tier Two. A country that fails to bring itself into compliance and is making no effort to do so, receives a negative Tier Three assessment and could be denied non-humanitarian and non-trade-related assistance from the United States.[154]

The 2006 TIP Report singled out Cuba and Venezuela, as it had in 2005, and also Belize, as being deficient in their human trafficking efforts. Moreover, it added Syria and Iran to the list of Tier Three countries.[155] This prompted the most vocal international criticism of the perceived politicization of the TIP Report to date.[156] Diplomats, NGOs, and foreign governments ranging from the Bahamas to Saudi Arabia have challenged the report on the ground that state classification is politically motivated. For instance, some attribute Venezuela's Tier Three ranking to the strained U.S.-Venezuela relations in the aftermath of an alleged U.S.-backed failed coup attempt against President Hugo Chavez,[157] while the Belize Prime Minister has asserted that its ranking is tied to its support of Cuba and Venezuela.[158] Meanwhile, NGOs and advocacy groups observe that, "strategically important nations—including India, Mexico, Russia, and China—escaped the roll call despite evidence in the report of growing problems."[159]

VI. European Developments

A. Selected Judgments by the European Court of Human Rights

1. *Violations of the European Court of Human Rights as a Result of State Efforts to Control Political Activities*

The European Court of Human Rights (ECHR or the Court) regularly hears a disproportionately large number of applications from Turkish citizens, primarily of Kurdish ethnicity, complaining of violations of their rights under the European Convention on Human Rights (ECHR) because of their active domestic political dissent. Court decisions

153. *Id.*

154. U.N. Doc. A/59/2005, *supra* note 2, at 35-36. Countries that do not receive either non-humanitarian or non-trade-related assistance might be withheld funding for participation in educational and cultural exchange programs.

155. *Trafficking in Persons Report 2006*, 83(23) Immigr. & Nat'lity L. Rev., Interpreter Release 1138, 1139 (June 12, 2006).

156. In total, the TIP Report 2006 designated twelve countries as Tier Three: Belize, Burma, Cuba, Iran, Laos, North Korea, Saudi Arabia, Sudan, Syria, Uzbekistan, Venezuela, and Zimbabwe. Jed Borod, *U.S. Releases Sixth Ann. Human Trafficking Rep., Targeted Countries Dispute Findings*, 22(8) Int'l Enforcement L. Rep. 321 (Aug. 2006).

157. Council on Hemispheric Affairs, *Washington's Human Trafficking Charges Drag Down U.S.-Venezuela Relations* (Oct. 8, 2004), *available at* http://www.venezuelanalysis.com/articles.php?artno=1290 (last visited Mar. 19, 2007) (quoting allegations of political bias from the directors of the Council of Hemispheric Affairs and the Center for Economic and Policy Research, and Global Rights).

158. 83(23) Immigr. & Nat'lity L. Rev. 1139 (citing Rickey Singh, *U.S. Rep. Upsets Belize PM*, The Nation (Barbados), June 16, 2006).

159. *Id.* (citing Cam Simpson, *U.S. Taxpayers Financed Human Trafficking, Rep. Says*, Chi. Tribune, June 5, 2006).

issued from late 2005 through 2006 again reflected this tendency. Applicants from Turkey are frequently members of civic organizations, such as trade unions (proscribed for civil servants in Turkey), political movements, or Islamist groups seeking greater religious freedom in a formally secular state. As the facts of the cases often made clear, some of the organizations with which applicants were affiliated advocated violence, such as some Kurdish nationalist independence movements like the Partiya Karkeren Kurdistan (PKK). Nevertheless, as it has in years past, the Court found numerous instances of violations of ECHR-protected rights by Turkish authorities.

In many of its 2006 decisions involving Turkey, the Court held that the applicants had unlawfully been held in detention for protracted periods without formal charges (ECHR Article 5), or sentenced to prolonged incarceration without an independent, impartial, and open trial (ECHR Article 6(1)), or deprived of their rights to freedom of expression (ECHR Article 10), or association (ECHR Article 11). Regardless of the political violence purportedly advocated by the original defendant, the Court ruled, Turkish authorities had repeatedly practiced or permitted methods of punishment that were either absolutely prohibited or that were excessive under the terms of the ECHR. Where, as occurred all too often, the victims of the rights violations were not alive or available to pursue their own applications before the Court, surviving relatives brought applications in their stead.[160]

160. The many 2006 Court decisions addressing applications by Turkish citizens concerning violations of fundamental freedoms protected under the ECHR included: Fikret Sahin v. Turkey, No. 42605/98 Dec. 6, 2005; Iletmis v. Turkey, No. 29871/96, Dec. 6, 2005; Bora v. Turkey, No. 39081/97, Jan. 10, 2006; Halis Dogan v. Turkey, No. 50693/99, Jan. 10, 2006; Imret v. Turkey, No. 42572/98, Jan. 10, 2006; Refik Karakoc v. Turkey, No. 53919/00, Jan. 10, 2006; Akbaba v. Turkey, No. 52656/99, Jan. 17, 2006; Duran Sekin v. Turkey, No. 41968/98, Feb. 2, 2006; Taciroglu v. Turkey, No. 25324/02 Feb. 2, 2006; Ozsoy v. Turkey, No. 58397/00 Feb. 2, 2006; Yurtsever v. Turkey, No. 47628/99 Feb. 2, 2006; Tum Haber Sen & Cinar v. Turkey, No. 28602/95, Feb. 21, 2006; Devrim Turan v. Turkey, No. 879/02, Mar. 2, 2006; Murat Demir v. Turkey, No. 42579/98, Mar. 2, 2006; Koc & Tambas v. Turkey, No. 50934/99 Mar. 21, 2006; Perk v. Turkey, No. 50739/99, Mar. 28, 2006; Bodur v. Turkey, No. 42911/98, Apr. 4, 2006; Karaaslan v. Turkey, No. 72970/01, Apr. 4, 2006; Dicle v. Turkey (2), No 46733/99, Apr. 11, 2006; Emin Yasar v. Turkey, No. 44754/98, Apr. 11, 2006; Karaks & Bayir v. Turkey, No. 74798/01, Apr. 11, 2006; Kekil Demirel v. Turkey, No. 48581/99, Apr. 11, 2006; Mehmet Emin Uildiz v. Turkey, No. 60608/00, Apr. 11, 2006; Sevgi Yilmaz v. Turkey, No. 62230/00, Apr. 11, 2006; Cagdas Sahin v. Turkey, No. 28137/02, Apr. 11, 2006; Ercikdi v. Turkey, No. 52782/99, Apr. 11, 2006; Fikri Demir v. Turkey, No. 55373/00, Apr. 11, 2006; Mut v. Turkey, No. 42434/98, Apr. 11, 2006; Katar v. Turkey, No. 40994/98, Apr. 18, 2006; Tanrikulu et al. v. Turkey, No. 60011/00, Apr. 18, 2006; Baslik et al. v. Turkey, No. 35073/97, Apr. 20, 2006; Berk v. Turkey, No. 41973/98, Apr. 20, 2006; Uzun v. Turkey, No. 48544/99, Apr. 20, 2006; Celik v. Turkey, No. 56835/00, Apr. 20, 2006; Ibrihim Yayan v. Turkey, No. 57965/00, Apr. 20, 2006; Ahmet Mete v. Turkey, No. 77649/01, Apr. 25, 2006; Soner v. Turkey, No. 40986/98, Apr. 27, 2006; Varli v. Turkey, No. 57299/00, Apr. 27, 2006; Alinak v. Turkey, No. 34520/97, May 4, 2006; Ergin v. Turkey, No.47533/99, May 4, 2006; Macin v. Turkey, No. 52083/99, May 4, 2006; Mehmet Ertugrul Yilmaz v. Turkey, No. 41676/98, May 4, 2006; Ruzgar v. Turkey, No. 59246/00, May 4, 2006; Akkurt v. Turkey, No. 47938/99, May 4, 2006; Saygili v. Turkey, No. 57906/00, May 4, 2006; Karakas v. Turkey, No. 76991/01, June 13, 2006; Basboga v. Turkey, No. 64277/01, June 13, 2006; Kutal & Ugras v. Turkey, No. 61648/00, June 13, 2006; Ors v. Turkey, No. 46213/99, June 20, 2006; Vayic v. Turkey, No. 18078/02, June 20, 2006; Eytisim Lt Sti. v. Turkey, No. 69763/01, June 22, 2006; Gokce & Demirel v. Turkey, No. 51839/99, June 22, 2006; Sertkaya v. Turkey, No. 77113/01, June 22, 2006; Tamer v. Turkey, No. 235/02, June 22, 2006; Konuk v. Turkey, No. 49523/99, June 22, 2006; Cagirici v. Turkey, No. 74325/01, June 27, 2006; Cetinkaya v. Turkey, No. 75569/01, June 27, 2006; Baltaci v. Turkey, No. 495/02, July 18, 2006; Ferhat Berk v. Turkey, No. 77366/01, July 27, 2006; Guzel v. Turkey (2), No. 65849/01, July 27, 2006; D.A. & B.Y. v. Turkey, No. 45736/99, Aug. 8, 2006; Mahmut Yilmaz v. Turkey, No. 47278/99, Aug. 8,. 2006; Cetin Agdas v. Turkey, No. 77331/01, Sept. 19, 2006; Sultan Karabulut v. Turkey, No. 45784/99, Sept. 19. 2006; Mehmet Gunes v. Turkey, No. 61908/00, Sept. 21, 2006; Eroglu v. Turkey, No. 59769/00, Sept. 21,

If the Turkish government was frequently found in violation of the ECHR in 2006, it certainly had no monopoly on any particular type of violation. The Court found in *Gerard Bernard v. France* that French authorities were liable under Article 5(3) for having failed to conduct a timely trial of a citizen who had been arrested on suspicion of affiliating with the underground Breton Revolutionary Army and of aiding members of the Basque separatist group, ETA.[161] The applicant was held in pre-trial detention for nearly three years. Whatever precautions the national French judges had concluded justified the extended detention, those reasons had long ago become superseded by the passage of time.

Other Court rulings addressed ethnic discrimination that had become incorporated into national policies. For example, the Court held in *Timishev v. Russia* that authorities in the Republic of Kabardino-Balkaria had improperly denied re-entry to the applicant because he was of Chechen ethnic background, in violation of Article 14 and Articles 2 of Protocol No. 4.[162] The Court, in addition, ruled that his child's education had been wrongly interrupted, in direct violation of the right to education codified in Article 2 of Protocol No. 1 (1952), when the national court deprived the father of his resident status in Kabardino-Balkaria.[163]

2. *Violations of the ECHR on the Basis of Individual Beliefs and Practices*

Several cases concerned people who claimed violations of their rights as a result of expressing their personal beliefs. In 2006, there were three particularly notable instances, each revolving around a different right in the ECHR. The applicant in *Giniewski v. France* published an article in a French newspaper criticizing the papal encyclical Veritatis Splendor (1993) for allegedly perpetuating historical Christian anti-Semitism that, the writer declared, had found its dénouement in the Nazi destruction of the Jews of Europe.[164] The organization *General Alliance against Racism and for Respect for the French and Christian Identity* (known as AGRIF) responded to publication of the article by bringing civil and criminal charges for defamation against the author and publisher. The French courts ultimately dismissed the criminal charges but found Giniewski liable civilly for defamation and assessed nominal damages of 1 Franc to AGRIF. The Court held that Giniewski's right to freedom of expression under Article 10 of the ECHR had been violated: The author's piece had not been directed against Christians as a group, and had served to provoke debate over a topic of public consequence.

2006; Baskaya v. Turkey, No. 68234/01, Oct. 3, 2006; Keklik v. Turkey, No. 77388/01, Oct. 3, 2006; Falakaoglu v. Turkey, No. 11840/02, Oct. 10, 2006; Tunceli Cultural & Mutual Assistance Assn. v. Turkey, No. 61353/00, Oct. 10, 2006; Tutar v. Turkey, No. 11798/03, Oct. 10, 2006; Comak v. Turkey, No. 225/02, Oct. 10, 2006; Abdullah Altun v. Turkey, No. 66354/01, Oct. 19, 2006; Hikmedin Yildiz v. Turkey, No. 69124/01, Oct. 19,. 2006; Macin v. Turkey (2), No. 38282/02, Oct. 24, 2006; Taner Kilic v. Turkey, No. 70845/01, Oct. 24, 2006; Yuksektepe v. Turkey, No. 62227/00, Oct. 24, 2006.

161. Gerard Bernard v. France, No. 27678/02, Sept. 26, 2006.

162. ECHR Article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Arts. 2 and 4 of Protocol No. 7 (1984) further guarantee a person convicted of a crime both the right of appeal to a higher court and protection against double jeopardy.

163. *Timishev*, No. 55762/00 & 55974/00, §§ 65-67, ¶ 1 at 16, Dec. 13, 2005.

164. Giniewski v. France, No. 64016/00, Apr. 31, 2006.

The applicant in *Ulke v. Turkey* had been an outspoken advocate of pacifism during his university studies in Turkey. He refused to perform his military service when called up in 1995.[165] The military court of the general staff sentenced him to a prison term for desertion. Upon his release, the applicant again declined to perform his military service and was reincarcerated. This pattern of refusal, trial, and imprisonment continued for an additional eight episodes. The Court ruled that the Turkish government had created an inescapable cycle of repeated penalty. The applicant was predictably compelled to commit the identical offense, which exposed him continually to the same punishment. He was thus unable to satisfy the legal consequence of his crime through a single, proportionate sentence, but rather was destined for a lifetime of perpetual release following completion of his sentence, and subsequent reincarceration. The Court held that the national law produced an excessive regime of inhuman punishment, in violation of Article 3 of the ECHR.

Segerstedt-Wiberg and others v. Sweden combined several similar complaints by applicants who had unsuccessfully attempted to acquire personal records assembled by the Swedish Secret Police. With the exception of one party, each applicant had a background of some political activism, primarily with organizations on the left. In two of the five instances, the applicants had worked to reveal the Nazi sympathies of certain public figures. The Swedish courts upheld the argument of the Secret Police that exposure of the records, even if released solely to the subjects of the records themselves, would jeopardize the integrity of the police files and the authorities' possible future reliance on the information. In four of the five applications, the Court reversed the Swedish court's rulings on the grounds that the policy overreached into the private affairs of the subjects, under ECHR Articles 8, 10, 11, and 13. The police records did not warrant such secretive protection because they were either well out of date after more than thirty years, or they had been improperly compiled out of an exaggerated precaution (none of the subjects of the police records was apparently suspected of advocating political violence).

The Court relied on a different analysis, however, in the case of the applicant Segerstedt-Wiberg. Here the Court concluded that the Swedish Secret Police had only assembled its file after Segerstedt-Wiberg had been threatened because of her Nazi-hunting efforts. The police could therefore keep the records sealed, even from their subject, out of a state interest in shielding her from harm. The Court nevertheless recognized that Segerstedt-Wiberg had, like her co-applicants, been deprived of a reasonable and explicit legal remedy, as required by ECHR Article 13. As a result, it directed the Swedish government to devise a rational and open process for disposing of outdated police records on individuals.

B. Case Law Concerning the Rights of the Roma

Europe's Roma, thought to number up to 8.5 million across Europe, have long suffered from hostility, discrimination, unemployment, and abject poverty.[166] International court and tribunal decisions in 2006 in cases involving Roma carried mixed messages. The European Court of Human Rights took both forward and backward steps in recognizing

165. Ulke v. Turkey, No. 39437/98, Jan. 24, 2006.
166. Jean-Pierre Liegeois, Roma, Gypsies, Travellers 34 (1994).

discrimination and abuse against Roma, while U.N. agencies made strides in acknowledging and attempting to remedy abuses.

The European Court of Human Rights recently defined discrimination as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations."[167] Notwithstanding this succinct definition, the Court has been reluctant to attribute underlying racial motivations to states that violate the human rights of particular minority groups, including the Roma. In *D.H. v. Czech Republic*, a group of Roma (Gypsy) schoolchildren filed an application with the Court alleging that they had been placed in "special schools" for the mentally handicapped as a result of their ethnicity, and not because of any mental disabilities, thus suffering discrimination in their right to receive an education.[168] They offered statistics to show that, although Roma children made up only 5 percent of the primary-age school children, over 50 percent of them were placed in "special schools," while only 1.8 percent of non-Roma children were so placed. In some "special schools," Roma children made up 80 percent to 90 percent of the student body. Thus, according to the applicants' documentation, a Roma child was twenty-seven times more likely to end up in a "special school" for the mentally handicapped than a non-Roma child.

The task facing the Court was to determine whether racism was a causal factor in the decision to place the Romani applicants in special schools. Amicus briefs filed by various human rights groups pointed out the anti-discrimination directives adopted by the European Union which provide for a shift in the burden of proof upon a prima facie showing of discriminatory impact.

The Court declined to examine the overall discriminatory impact of the school placements and instead ruled that the placement procedures pursued a "legitimate aim of adapting the education system to the needs and attitudes or disabilities of the children."[169] The applicants petitioned the Grand Chamber[170] and, on July 19, 2006, the petition was accepted. The acceptance of the application is significant—an acknowledgement that, for the second time in as many years, the criteria for finding discrimination raise a serious question of interpretation of the Convention.[171]

On a more positive note, the European Court of Human Rights strongly reaffirmed state obligations to investigate and remedy offenses involving violations of the two most fundamental articles of the European Convention, Articles 2 (right to life) and 3 (freedom from torture and inhuman or degrading treatment) in cases involving Roma brought against Bulgaria and Greece. In *Tzekov v. Bulgaria* the applicant was shot in the back after

167. Bekos & Koutropoulos v. Greece, No. 15250/02, § 63, Dec. 13, 2005.

168. D.H. v. Czech Republic, No. 57325/00, Feb. 7, 2006.

169. *Id.* § 49.

170. Under Article 43 of the ECHR, a party may, in exceptional cases, request that the case be referred to the seventeen-member Grand Chamber of the court. The request may be accepted if a panel considers that it "raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance." EHCR, *supra* note 162, at art. 43.

171. *See* Nachova v. Bulgaria [G.C.], Nos. 43577/98 & 43579/98, ¶¶ 1-5 at 42, July 6, 2005, (diluting the Court's earlier chamber decision in Nos. 43577/98, 43579/98, ¶¶ 1-6 at 38, Feb. 26, 2004). In its earlier decision, the Court had found, for the first time in its fifty-year history, a violation of the ECHR's prohibition against discrimination based on race. Nos. 43577/98 & 43579/98, ¶ 1 at 40, Feb. 26, 2004 (Bonello, J., concurring).

failing to respond to a police order to stop his horse-drawn cart.[172] Bulgarian authorities concluded the firearm had been used in accordance with Bulgarian law, which allowed use of a firearm to arrest an individual regardless of the seriousness of the offense. The Court held that the Bulgarian law allowing such use of a firearm was not "necessary and proportionate" and thus a violation of Bulgaria's positive obligations under Article 3.

Another case, *Ognyanova & Choban v. Bulgaria*, involved a Romani man arrested for theft who allegedly jumped to his death from a third-story window in the police station.[173] Because he died while in police custody, the police bore the burden of providing a plausible explanation of the death. Due to inconsistent descriptions of events by the authorities and no evidence to support a suicide theory, the Court found violations of Articles 2 and 3 (injuries on the body not caused by the fall suggested torture), as well as 5.1 (right to liberty) and 13 (right to an effective remedy).

The third case, *Bekos & Koutropoulos v. Greece*, involved police beating two young Romani men who were allegedly attempting to break into an ice cream kiosk.[174] In finding a violation of Article 3, the Court noted: "Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment."[175]

With respect to the applicants' claim in *Bekos* that the beating arose as a result of their Roma ethnicity in violation of Article 14 (freedom from discrimination), they urged that the burden of proof should shift to the government once the claimants established a prima facie case of discrimination. The Court declined to do so, but went on to find a procedural, but not substantive, violation of Article 14 based on the failure of authorities to carry out an effective investigation into potential racist motives.

Claims filed in domestic courts in Slovakia, the Czech Republic, and Hungary focused on the alleged forced sterilizations of Romani woman, and several such cases will most likely come before international human rights bodies within the next few years. On August 31, 2006, the U.N. Committee on the Elimination of Discrimination against Women issued a decision condemning Hungary for violating the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in connection with the sterilization of a Romani woman without her consent in January 2001.[176] In that case, the applicant underwent an emergency caesarean section to remove her dead fetus. In addition to a consent form for the caesarean section, the applicant signed a note the doctor had hand-written indicating she requested sterilization, but using the Latin rather than Hungarian word. She was bleeding heavily and in a state of shock at the time. The Committee urged Hungary to compensate the victim, review its legislation on informed consent, and monitor public and private health centers to avoid future violations.[177]

172. Tzekov v. Bulgaria, No. 45500/99, Feb. 23, 2006.

173. Ognyanova & Choban v. Bulgaria, No. 46317/99, Feb. 23, 2006.

174. *Bekos*, *supra* note 167, §§ 9-10.

175. *Id.* ¶45.

176. Szijjarto v. Hungary, Comm. No. 4/2004, CEDAW, A/61/38 (2006).

177. Other human rights bodies, such as the Council of Europe and the U.S. Helsinki Commission, have investigated allegations of sterilizations of Romani women without their consent in Hungary, the Czech Republic, and Slovakia. Domestic legal actions are currently pending in those countries. For further information, *see* http://www.reproductiverights.org/ww_europe.html.

The rights of Roma to freely access public places such as restaurants and bars also came before international tribunals. The U.N. Committee on the Elimination of Racial Discrimination issued a decision on March 8, 2006, finding Serbia and Montenegro in violation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) for failure to investigate a claim of racial discrimination in access to public places. Beginning in 2000, the Humanitarian Law Center, a Serbian NGO, carried out a series of "tests" across Serbia to determine whether members of the Roma minority were being discriminated against with respect to access to public places such as restaurants, clubs, discotheques, swimming pools, etc. In one such test, two Romani individuals, along with three non-Roma, tried to enter a discotheque in Belgrade. The Romani individuals were told a private party was being held and were denied entry, while the non-Roma (who were a part of the test and did not have any invitations to a party) were allowed in. The HLC filed a criminal complaint with the Pubic Prosecutor's office, but no investigation was undertaken. Rather than dismiss the complaint, which would have permitted the applicant to take over the investigation as a private prosecutor, the Public Prosecutor simply ignored it. A follow-up complaint to the Federal Constitutional Court likewise resulted in no response, so the applicant brought his case to the U.N. Committee, which agreed all domestic remedies had been exhausted and found a violation.

Finally, the European Committee of Social Rights, Europe's leading social rights body, considered the right to adequate housing for the Roma minority. In a decision issued April 24, 2006, the Committee found Italy to be in violation of the Revised European Social Charter[178] based on the insufficiency and inadequacy of squalid "camps," forcible evictions of families and individuals from Romani settlements, and the lack of permanent housing or access to social housing. The collective complaint,[179] filed by the European Roma Rights Center, accused the Italian government of attempting to create a network of ghettos aimed at preventing Roma from integrating into mainstream society. In addition to finding violations of their right to housing under the Charter, the Committee likewise found a violation of Article E, the prohibition against discrimination.

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178. The European Social Charter, adopted in 1961 and revised in 1996 under the auspices of the Council of Europe, guarantees social and economic human rights such as housing, health care and employment. European Social Charter (Rev.), May 3, 1996, C.E.T.S. No. 163, *available at* http://conventions.coe.int (select "treaties").

179. Eur. Roma Rights Ctr. v. Italy, No. 27/2004, collective complaint determined by Eur. Comm. of Social Rights (Dec. 21, 2005).