

# INTERNATIONAL HUMAN RIGHTS LAW UPDATE

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## I U.S. Court Cases:

(a) Breard v. Greene, 118 S.Ct. 1352 (1998). Breard, a citizen of Paraguay, was convicted and sentenced to death by a Virginia court for attempted rape and murder. The Republic of Paraguay instituted proceedings in the International Court of Justice (“ICJ”), alleging that the United States had violated the Vienna Convention on Consular Relations (“Vienna Convention”) when the arresting authorities failed to inform Breard of his right as a foreign national to contact the Paraguayan consulate. The ICJ requested the United States to “take all measures at its disposal to ensure” that Breard was not executed before a final decision by the ICJ. The U.S. Supreme Court in a per curiam decision (Justices Stevens and Breyer dissenting) rejected Breard’s petition for habeas corpus, holding that, absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of treaties in that state. The claim under the Vienna Convention thus was barred under the Antiterrorism and Effective Death Penalty Act (28 U.S.C.A. §2254(a)(e)(2)) as it had not been raised in the Virginia court. The Court also dismissed Paraguay’s suits against the Governor of Virginia on the ground that “neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions.” Breard was executed on April 14, 1998, hours after the Supreme Court decision.

(b) Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767(9th Cir. 1996). A class action was brought on behalf of almost 10,000 plaintiffs against the estate of Ferdinand Marcos, former President of the Philippines, alleging human rights abuses, including torture, summary execution and “disappearances” committed by forces under Marcos’ command. See 910 F. Supp. 1460, 1462-63 (D.Haw. 1995) (summary of evidence of abuses). The Court of Appeals affirmed liability and the jury award of \$1.2 billion exemplary damages and \$800 million in compensatory damages. The Court held that there was subject matter jurisdiction based on the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and that the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, was a proper ground as well for jurisdiction and damages. It also held that all requirements for a class action had been met and that plaintiffs’ claims were filed in a timely fashion. The Court affirmed the district court’s ruling admitting statements by Philippine military officials under an exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(D)). The lower court had admitted in evidence statements by the military, acting as President Marcos’ agents, on a matter within the

scope of the agency relationship, as well as allowing expert witnesses to testify to the Philippine military structure and to patterns of human rights violations during Marcos’ rule. Relying on both U.S. case law and international treaties, including Protocol II to the Geneva Convention of August 12, 1949 (reprinted in 16 I.L.M. 1391, 1429 (1977)), and the Statute of the International Criminal Tribunal for the Former Yugoslavia (reprinted in 32 I.L.M. 1159, 1192,94 (1993)), the Court upheld the district court’s instructions on “command responsibility”—the Marcos Estate could be found liable if the jury determined that Marcos directed, ordered, conspired with or aided the military in the abuses or, if he knew of such conduct and failed to prevent it. The Court of Appeals found no violation of due process in the district court’s method of calculating damages by randomly selecting 137 of the almost 10,000 plaintiffs, setting damages in their cases, and then fixing awards for the various types of abuses alleged by each plaintiff.

(c) Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996). The Court of Appeals, reversing the district court in part, held that two of the plaintiffs who sued Marcos directly should have had their claims determined by a jury, in one case for compensatory damages for torture and in the other for a state-law claim of destruction of business property for the seizure of a radio station during martial law. The Court of Appeals affirmed the lower court’s refusal to instruct the jury on plaintiffs’ claims for “cruel, inhuman, or degrading treatment,” declining to consider whether the international law proscription against such treatment is sufficiently specific to allow suit for its violation under Sec. 1350 of the ATCA.

(d) In the Matter of Surrender of Elizaphan Ntakirutimana, Civ. Action No. L-98-41597 (S.D. Tex. Aug. 5, 1998). The U.S. Government requested the surrender of a Rwandan citizen for proceedings before the International Criminal Tribunal for Rwanda pursuant to an executive agreement that the U.S. would surrender to the Tribunal persons found in its territory whom the Tribunal had charged with violations within its competence. The executive agreement was implemented by § 1342(a) (1) of Public Law No. 104-106 (110 Stat.486 (1996)). The court held that extradition may be effected either by treaty or by statute and it is within the power of the executive and congress to surrender fugitives pursuant to an executive agreement with congressional assent expressed through implementing legislation. The court granted the request and ruled that the Government had met its evidentiary burden, which in an extradition hearing is probable cause. The decision was stayed pending an appeal to the 5th Circuit. (As of May 10, 1999, there was no decision.)

## II Refugee Issues:

Lopez-Galarza v. Immigration and Naturalization Service, 99 F.3d 954 (9th Cir. 1996). The petitioner, whose father was a supporter of the Somoza regime, was a victim of persecution by the Sandinistas in Nicaragua. The Court of Appeals held that the Board of Immigration Appeals (BIA) had abused its discretion in denying petitioner's asylum claim when it failed to consider whether she had suffered "atrocious forms of past persecution," even if there is little likelihood of future persecution, as required in the leading case Matter of Chen, Interim Decision 3104 (BIA 1989). The Court compared rape to torture and affirmed that rape can be a form of persecution if inflicted for reasons of imputed political opinion. The Court also noted that the Immigration and Naturalization Service ("INS") recognized "gender persecution," including rape and sexual abuse in its 1995 Considerations for Asylum Officers Adjudicating Asylum Claims from Women.

## III United Nations:

(a) International Criminal Tribunal for the Former Yugoslavia (the "Tribunal"). Opinion and Judgment in Tadic Case, No. IT-94-1-T (May 7, 1997). [See International Human Right Law Update, Fall, 1995, p.2 and Spring, 1996, p.2] The Tribunal concluded its first trial by convicting Dusan Tadic, a Bosnian Serb, of eleven counts of persecution and beatings of Muslim civilians in 1992 at various camps in the Prijedor district of Bosnia and Herzegovina. Tadic was acquitted of 20 counts, including 9 counts of murder, because of insufficient evidence. A rape charge was withdrawn earlier when the victim refused to testify, fearing for her safety. The Court held that the Serb policy of "ethnic cleansing," was based on "religious and political discrimination" against non-Serbs; was methodically carried out; and that the accused knowingly participated, either by his presence or his participation in a "widespread and systematic attack" on Muslim civilians. The Court ruled two to one that eleven of the counts for grave breaches of the 1949 Geneva Conventions were not applicable. The majority determined that the fighting in Bosnia after May 1992, had not been proven to be an "international conflict" because there was insufficient evidence that Bosnian Serb troops were under the "effective control" of the Federal Republic of Yugoslavia: that they were "highly dependent allies" was not dispositive. The majority articulated a high standard for proving that military and government leaders are responsible for authorizing wrongdoing farther down the chain of command. Judge Gabrielle Kirk McDonald (a former U.S. District Court judge) dissented, arguing that the conflict in Prijedor was sufficiently international in character because the Bosnian Serbs were "agents" of the Yugoslav army and that the victims were "protected persons" under the Geneva Conventions.

(b) The International Criminal Court. ("ICC") The Rome Diplomatic conference, after five weeks of intense negotiations, ended on July 18, 1998 with the adoption of a treaty to create an international criminal court. [See International Human Rights Law Update, Fall 1996, p.3] 160 countries participated in the Rome Conference. The text was approved 120 to 7, with 21 abstentions. China, Iraq, Libya and the United States were among the states that voted against the treaty. The aim of the proposed court is to bring to justice those responsible for "the most serious crimes of international concern" – such as genocide, crimes against humanity and war crimes – when domestic criminal justice systems fail to do so. The ICC also will have jurisdiction over the crime of aggression once a definition of that

crime is agreed upon. The court will be complementary to national judicial systems and will assume jurisdiction only after it determines that a national system is unwilling or unable to do so. The criteria for establishing unwillingness and inability are provided for in the statute.

The treaty requires 60 ratifications before it comes into force. As of April 22, 1999, 82 countries have signed the treaty, including Canada, France, Germany, the Netherlands, Spain, Switzerland and the United Kingdom. There have been two ratifications thus far – Senegal, and Trinidad & Tobago.

The Rome treaty establishes for the first time a universal framework to end impunity for the most serious crimes under international law. The ICC prosecutor will be authorized to initiate proceedings on his or her own motion and will have automatic jurisdiction over the crimes listed in the Statute. The court will have jurisdiction over crimes committed in internal armed conflict, thereby foreclosing the claim that internal crimes are outside the reach of international law. It also codifies crimes against humanity in a multilateral treaty for the first time since Nuremberg.

Further information about the Court can be found on [www.un.org/icc/](http://www.un.org/icc/).

## IV European Human Rights Law:

Note: On November 1, 1998 (Protocol No.11) a new full-time single Court replaced the European Commission and the European Court of Human Rights. The new enforcement machinery was deemed necessary due to an increasing case load and to the dramatic increase in the number of parties to the European Convention on Human Rights with the addition of the states in eastern and central Europe.

(a) Chahal v. United Kingdom, European Court of Human Rights (the "Court") (Nov. 15, 1996), VIII Hum. Rts. Case Dig. 161 (No. 2) (1997). Chahal is an Indian citizen and an orthodox Sikh. The British government sought to deport him on grounds of national security and the international fight against terrorism, alleging that the petitioner was involved in terrorist attacks in India, the United Kingdom and elsewhere. Chahal was taken to prison where he has since been held. Chahal denied the allegations and fought deportation all the way to the House of Lords, which refused his leave to appeal. In a Grand Chamber decision the Court decided 12 to 7 that deporting the applicant would be a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") prohibiting torture and inhuman or degrading treatment or punishment. The Court declared that Article 3's prohibitions apply in expulsion cases, irrespective of the person in question. It examined evidence on the fate of Sikh militants in India and concluded that the applicant would be endangered by hard-line elements in the Indian security forces. In addition, the Court found (13 to 6) no violation of Article 5(1) (deprivation of liberty and due process) because it deemed that the deportation proceedings had been conducted with due diligence. It, however, unanimously found a violation of Article 5(4), which requires that any deprivation of liberty be subject to effective judicial control. The applicant's 6-year detention was not sufficiently in the control of the United Kingdom's courts and the government's claim that national security and terrorism were involved did not justify denial of procedural justice. The Court, also unanimously, found a violation of Article 13, requiring the availability of adequate remedies; there was no independent scrutiny

provided for Chahal's claim that he would be subjected to irreversible harm if returned to India. The Court declined to award damages concluding that its findings of violation of various provisions of the Convention constituted just satisfaction.

(b) Z. v. Finland, European Court of Human Rights (Feb. 25, 1997), VIII Hum. Rts. Case Dig. 341 (No. 5) (1997). The applicant brought a complaint against the Government of Finland for violating her right to privacy under Article 8 of the Convention by introducing her medical records and compelling testimony of her doctors in a criminal prosecution of her former husband. The evidence was introduced by court order when, prior to their divorce, the husband was tried and convicted for rape, other sexual offences, and manslaughter, and for knowingly exposing his victims to the risk of HIV infection. In the course of the criminal proceedings against the husband, the police seized the applicant's medical records and compelled testimony by her doctors and psychiatrists to the effect that she too was HIV positive. Details of the case were publicized, notwithstanding a later judicial order that they remain confidential until the year 2002. The Court ruled 8 to 1, that there was no violation of Article 8 of the Convention (the right to respect for one's private and family life, home and correspondence) in light of judicial orders compelling the testimony of applicant's medical advisers and seizure of her medical records for use in the criminal proceedings against her husband. The Court, however, found unanimously that an order to make the medical data publicly available as early as 2002 was a violation of Article 8, and that her rights were further violated by publication of her identity and medical condition. She was awarded 100,000 Finnish marks for non-pecuniary damages.

## **V Inter-American Human Rights Law:**

(a) Report No. 51/96, Decision of the Commission as to the Merits of Case 10.675 United States (March 13, 1997), OAS, Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, Doc. 7 rev, p. 550 (March 14, 1997). The Commission pursuant to its authority to hear petitions alleging violations of the American Declaration of the Rights and Duties of Man, considered claims that the United States had pursued a policy of interdicting and returning Haitian "boat people", despite the fact that many had a reasonable fear of persecution if returned to Haiti. These individuals were not provided a proper forum for resolution of their possible asylum claims and when, upon their return to Haiti, many were detained and some were tortured and killed. Throughout the proceedings over the ensuing seven years, the U.S. maintained that it had no legal duty to accept fleeing Haitians and that its policy of interdiction and return was designed to avoid a massive and dangerous exodus to the U.S. on unseaworthy vessels. Moreover, the U.S. now relies on the decision of the U.S. Supreme Court in Sale v. Haitian Centers Council Inc., 509 U.S. 155 (1993), vacated as moot, 509 U.S. 918 (1993), in which the Court held that neither domestic immigration law nor the Convention on the Status of Refugees limits the President's power to repatriate undocumented aliens intercepted on the high seas. The U.S. amended its policy in 1994 to permit interdicted Haitians to be housed at "safe havens" pending resolution of their asylum claims. The Commission, nonetheless, found that the U.S. breached several rights under the American Declaration, including the right to life, the right to liberty, the right to security of person (Article I); the right to equality before the law (Article II); the right to resort to the court (Article XVIII); and the right to seek and receive asylum (Article XXVII). The Commission rec-

ommended that the U.S. compensate the victims. The U.S. responded that it did not violate its obligations and refused to comply with the recommendation for compensation.

(b) Report No. 38/96, Case No. 10.506 Argentina (Oct. 15, 1996), OAS, Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, Doc. 7 rev, p. 50 (March 14, 1997). The Commission held that the Argentine Government's policy of routinely performing vaginal inspections on women visitors to its prisons violates various provisions of the American Convention on Human Rights, including Article 5 (the right to physical integrity), Article 11 (the right to privacy), Article 17 (rights of the family), and Article 19 (rights of the child, in the case of 13-year old petitioner, daughter of an inmate). The Commission held that a vaginal search or inspection was lawful only if the following requisites were met: it must be absolutely necessary to achieve a lawful objective in a particular case; there is not an alternative measure available; it should be preceded by a judicial order; and it must be carried out by an appropriate health professional. In response to the Argentine Government's presentation of a draft law that, if enacted, would allegedly cover such searches, the Commission noted that the draft provision failed to explicitly mention the problematic searches and that it did not conform to the Commission's recommendations in its failure to specifically require that such searches be done by health professionals. See Jurisprudence of the Inter-American System, CEJIL Gazette, No. 6, at 3 (1997)

(c) Case of Loayza Tamayo (September 17, 1997). The Inter-American Court of Human Rights ("the Court") unanimously held that Peru had violated Articles 1.1, 5, 7, 8, and 25 of the American Convention on Human Rights ("the Convention"), which guarantee the rights to humane treatment, personal liberty, a fair trial, and judicial protection. Loayza Tamayo was convicted of terrorism by a "faceless" civilian court after having been acquitted by a military court on the same charge. She was tortured and raped by police who attempted to coerce a confession. After her conviction, she was placed in solitary confinement. The Court held, 6-1, that the second trial violated the Convention's Article 8.4 prohibition on double jeopardy and ordered Peru to free Tamayo. One month after the decision the government allowed the law creating "faceless tribunals" to lapse and established a system of ordinary civilian tribunals to try cases of alleged terrorism.

## **VI Domestic and Foreign Legislation:**

(a) United States, Criminal Prohibition on Female Genital Mutilation, (FGM) 18 U.S.C.A. § 116 (Supp. 1997). In September 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress determined that whoever "knowingly circumcises, excises, or infibulates, the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years" shall be fined or imprisoned. The statute went into effect in April 1997. It exempts certain medical procedures "necessary" to the health of a person when performed by a medical practitioner, but specifically notes that no account may be taken of a cultural belief that the practice is necessary. This provision concerns "certain cultural and religious groups" living in the United States that may have brought the practice from their home country. The congressional findings note the "physical and psychological health effects that harm the women involved." Pub. L. 104-208, § 645(a), 110 Stat. 3009-546 (1996). The practice of FGM has been internationally recognized as a violation of women's and

girl children's rights. See, e.g., Report of the Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14, U.N. GAOR, 45th Sess., Supp. No. 38, at 80, ¶ 438, U.N. Doc. A/45/38 (1990); The Beijing Declaration and The Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, U.N. Doc. DPI/1766/Wom (1996) ¶¶ 112-113.

(b) Colombia, Law No. 288 (July 5, 1996). The Colombian legislature adopted a law obligating the government to implement the decisions of both the Inter-American Commission on Human Rights (the "Commission") and the UN Human Rights Committee (the "UN Committee"). The law requires the establishment of a committee comprised of the ministers of Interior, Foreign Relations, Justice and Defense to review decisions of the Commission and the UN Committee regarding indemnification of applicants. The committee has 45 days to render an opinion. If it believes either body has decided a case erroneously, the government is then required to take the matter to the second stage, by appealing to the Inter-American Court from a decision by the Commission, and challenging the decision of the UN Committee. Once these mechanisms are exhausted, the government must implement the relevant body's decision. The Colombian law is unique in the hemisphere in proclaiming the obligatory nature of the Commission's decisions as well as in instituting an implementation mechanism for payment of indemnity. Colombia has been the object of eleven adverse decisions by the Commission in nine years and three adverse decisions by the UN Committee, all of which required the government to provide the petitioners with a financial indemnity.

## **VII Foreign Court Cases:**

(a) Criminal prosecutions have been pursued in several countries, including France, Honduras, Italy, Spain, and Sweden, against military officials allegedly responsible for atrocities committed in the 1970s and early 1980s during Argentina's "Dirty War." Several civil damage suits have also been filed and damages awarded in United States courts. See *Seiderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); and *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Ca. 1988). In late 1996, the European Parliament stated its support of the extraterritorial enforcement of human rights. See European Parliament, Resolution on Human Rights Throughout the World in 1995-1996 and the Union's Human Rights Policy, A4-0400/96 (Dec. 12, 1996).

(b) Procedimiento, Diligencias Previas 108/96-L, Juzgado Central de Instrucción No. 5 de la Audiencia Nacional. In March 1996, Spanish Investigative Judge Baltazar Garzón filed criminal charges against 110 former military and police officers, including army commanders, intelligence chiefs and doctors allegedly responsible for kidnapping, torturing and killing 320 Spanish citizens in Argentina in the late 1970s. Spanish law applies criminal sanctions to international crimes such as genocide and torture, for acts occurring outside of Spain giving the courts jurisdiction over the defendants. See *Ley Orgánica del Poder Judicial* [Organic Law on Judicial Power], *Ley Orgánica 6/1985*, art. 23.4(a) & (b). In March 1997, the judge issued an international arrest warrant for a high-ranking general, former Argentine President Leopoldo Galtieri. In June 1997, following a request from the judge, Switzerland agreed to freeze the assets of four of the charged Argentine military officers. The Argentine government has refused to cooperate and Spanish law does not permit trials in absentia.

(c) Spanish Investigative Judges Manuel García Castellón and Baltazar Garzón for several years have been investigating alleged crimes against humanity committed by Chilean military leaders, security police officers and, most notoriously, former President and Senator for Life, General Augusto Pinochet, for conspiring in the murder, torture and kidnapping of Spanish nationals and others during the 1970s and early 1980s. In response to Spain's request that former president Pinochet (in London at the time), be extradited for trial in Spain, Britain arrested him on October 16, 1998. The case was heard by the Law Lords, Britain's highest court, who held on November 25, 1998, that while serving heads of state enjoy sovereign immunity from prosecution, the immunity of a former head of state "is not absolute" and that the extradition proceedings could go forward. However, due to a perceived conflict of interest on the part of one of the judges, a new panel was convened. In March 1999 the panel ruled that Pinochet could be extradited for crimes committed after December 8, 1998, the date when the UN Torture Convention took effect in Britain. The Convention, Article 8, states all acts of torture "shall be deemed to be included as extraditable offenses in any treaty existing between State Parties" and that Parties "undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between them." The Home Secretary declared that the case could proceed with the remaining charges, now reduced from the original 32 to three. Since the panel's ruling the Spanish judge has found additional evidence of conspiracies to commit crimes against humanity subsequent to December 8, 1998.

(d) *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa and others*, 1 Butterworths Human Rights Cases 52 (1996). The applicants challenged provisions of the Promotion of National Unity Reconciliation Act of 1995 (the "Act"), known as the amnesty law, extinguishing legal liability for political acts committed during the apartheid period and confessed to and disclosed to the satisfaction of the Truth and Reconciliation Commission. The Constitutional Court of South Africa on July 25, 1996, ruled unanimously that the Act, extinguishing all legal liability, whether civil or criminal, direct or vicarious, did not contravene the interim Constitution. The applicants argued that Article 22 provides that justiciable disputes must be settled by a court of law or other independent legal forum. The Court, referring to language under the heading "National Unity and Reconciliation" which speaks of the Constitution as "a historic bridge between the past characterized by injustice and strife and a future founded on democracy and human rights", held that it authorized and contemplated amnesty.

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