Chapter IX

International Human Rights

Overview

During 1999–2001, the United States played an active role in developing new treaties and instruments in the field of human rights. At the same time, the United States continued to recognize that promotion of human rights was just one component of overall U.S. foreign policy, which at times must compete with the advancement of U.S. national security and economic interests.

In implementing human rights norms, the United States adhered to certain U.S. laws restricting support for foreign states engaging in human rights abuses, and critcized such states in relevant international fora. The United States issued numerous reports on human rights in a wide variety of areas, ranging from the basic annual Department of State human rights reports to more specialized reports on religious freedom, torture, and trafficking in persons. Yet the United States itself proved unwilling to pursue certain matters, such as condemnation of Turkey for Armenian genocide of the early twentieth century, where doing so complicated U.S. security relationships, and proved unwilling to regard certain international human rights norms as having the force of law in U.S. law. Such actions exposed the United States to extensive criticism in the global community, including criticism by close allies and non-governmental organizations, which culminated in 2001 with the ousting of the United States from the seat it had held on the UN Human Rights Commission since the commission's inception. At the same time, U.S. resistance to some developments in the field of human rights—such as efforts at the September 2001 UN conference on racism to include language in a non-binding declaration that was severely critical of Israel and that called for compensation for past enslavement—ultimately had the effect of altering other states' views.[1]

One of the most interesting aspects of U.S. involvement in human rights law during 1999–2001 continued to be litigation in U.S. courts involving the Alien Tort Claims Act (ACTA) and the Torture Victim Protection Act (TVPA). Both statutes provided causes of actions to persons seeking to vindicate in U.S. court human rights violations that occurred abroad, including violations in which corporations were complicit. Certain high profile cases involving Bosnian Serb leader Radovan Karadzić and two Salvadorean generals implicated in the deaths of three U.S. nuns and a missionary were resolved.

This chapter also addresses various issues regarding immigration during 1999–2001. New U.S. laws, and federal court interpretation of those laws and existing laws, helped shaped the standards by which persons were to be granted asylum or refugee status and how they were to be treated if denied entry. The manner in which the United States interpreted its international and national commitments toward those seeking asylum was severely tested in the case of a small Cuban boy found floating off the coast of Florida, Elián González.

New Treaties and Instruments

International Convention to Eliminate the "Worst Forms of Child Labor"

On June 17, 1999, the International Labor Organization (ILO) unanimously adopted a

[1] *See* Rachel L. Swarns, *U.S. and Israelis Quit Racism Talks Over Denunciation*, N.Y. Times, Sept. 4, 2001, at A1; Rachel L. Swarns, *Race Talks Finally Reach Accord On Slavery and Palestinian Plight*, N.Y. Times, Sept. 9, 2001, at 1.

convention to eliminate the "worst forms of child labor."[1] The convention provides that each party "shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour," including through penal and other sanctions.[2] The convention defines a "child" as any person under the age of 18, and states that "the worst forms of child labour" comprise: (1) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (2) the use, procuring or offering of a child for prostitution, for the production of pornography, or for pornographic performances; (3) the use, procuring, or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in relevant international treaties; and (4) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.[3] The convention also obligates parties to provide for the rehabilitation and social integration of children removed from the worst forms of child labor, access to free basic education, and, wherever possible and appropriate, vocational training.[4]

The language in the treaty regarding the use of children in armed conflict permits the voluntary enlistment of children under age 18 to serve in a state's armed services. Since both the United Kingdom and the United States permit enlistment of volunteers under the age of 18, they insisted that the Convention permit such practice.[5]

In the first speech of a U.S. president before the ILO in Geneva, President Clinton addressed the conference on June 16, 1999. He stated that the United States endorsed the Convention and that he would seek advice and consent from the Senate for its ratification. Among other things, he said that the United States would not tolerate children being used in pornography, prostitution, slavery or bondage, being forcibly recruited to serve in armed conflicts, or risking their health in hazardous and dangerous working conditions. President Clinton noted, however, that adopting the Convention alone would not solve the problem. Rather, states must work aggressively both to enforce the Convention and to address the root causes of the problem ("the tangled pathology of poverty and hopelessness that leads to abusive child labor") by providing access to education for students and to jobs for their parents.[6]

In August 1999, President Clinton transmitted the treaty to the Senate for advice and consent,[7] which was granted in November. The president then deposited the U.S. instrument of ratification, such that the United States became a party when the Convention entered into force on December 2, 2000.

Separately, President Clinton signed an executive order on June 12, 1999, setting forth the policy of U.S. executive branch agencies to take appropriate actions to enforce U.S. laws prohibiting the manufacture or importation of goods produced by forced child labor. To that end, the Department of Labor will periodically publish a list of products, identified by their country of origin, which are believed to have been produced by forced child labor. Whenever U.S. executive branch agencies at home or abroad contract to procure products which appear on the list, they must obtain a certification from the supplying contractor that forced child labor was not used. The executive order contains further provisions for investigation of such certifications and sanctions if they are provided falsely.[8]

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[1] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, ILO No. C182, *reprinted in* 38 ILM 1215 (1999) [hereinafter Child Labour Convention]. Documents of the ILO may be found at <http://www.ilo.org/ public/english>. For further background on this issue, see Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AJIL 943 (1999); *see also* Elizabeth Olsen, *World Panel Adopts Treaty To Restrict Child Labor*, N.Y. TIMES, June 18, 1999, at A12.

[2] Child Labour Convention, *supra* note 1, Art. 1.

[3] *Id.*, Arts. 2–3.

[4] *Id.*, Art. 7.

[5] *See* Jane Perlez, *Clinton Pushes for Treaty to Ban The Worst Child Labor Practices*, N.Y. TIMES, June 17, 1999, at A17.

[6] Remarks to the International Labor Organization Conference in Geneva, Switzerland, 35 WEEKLY COMP. PRES. DOC. 1117, 1120–21 (June 21, 1999).

[7] *See* S. EXEC. REP. 106-12 (1999).

[8] Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (1999).

Signing of Protocols to Rights of the Child Convention

The United States signed in 1995, but has yet to ratify, the UN Convention on the Rights of the Child.[1] On May 25, 2000, the UN General Assembly adopted two optional protocols to the Convention, entitled Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.[2] Among other things, the first protocol bars compulsory recruitment of children under the age of eighteen for military service, requires that states that undertake voluntary recruitment under age eighteen describe the steps they will take to ensure the protection of such enlistees (for example, showing parental consent and reliable proof of age), and requires that states cooperate in prevention and rehabilitation efforts for children who have been victimized by war.[3] The second protocol defines as criminal acts the "sale of children," "child prostitution," and "child pornography;" establishes grounds for jurisdiction over, and extradition of, criminal offenders; and provides for international cooperation in pursuing offenders. A state may become a party to either protocol without being a party to the underlying Convention.

On July 5, President Clinton signed both protocols.[4] He stated:

> Every American citizen should support these protocols. It is true that words on paper are not enough, but these documents are a clear starting point for action, for punishing offenders, dismantling the networks of trafficking, [and] caring for the young victims. They represent an international coalition formed to fight a battle that one country, even a large country, cannot win alone.[5]

On July 25, President Clinton transmitted both protocols to the Senate for advice and consent.[6] On August 11, the United States joined other members of the Security Council in passing a resolution urging all members to sign and ratify the protocol on the involvement of children in armed conflict.[7]

Declaration on the Promotion of Democracy

On June 26–27, 2000, Poland, the United States, and several other states sponsored the first global conference dedicated to the promotion of democracy. The conference was held in Warsaw and attended by representatives of more than one hundred states. In her opening remarks to the conference, U.S. Secretary of State Madeleine K. Albright stated that its purpose was "to develop a framework for global cooperation that will help democracies of every description to deepen and sustain their liberty."[1]

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[1] *See* UN Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3.

[2] *See* UN Doc. A/RES/54/263 (May 25, 2000).

[3] On the U.S. decision to agree that children under the age of eighteen should not be sent into combat, see Steven Lee Myers, *After U.S. Reversal, Deal Is Struck to Bar Using Child Soldiers*, N.Y. TIMES, Jan 22, 2000, at A1.

[4] The United States enlists about 50,000 17-year-old children each year, but few of them, prior to turning 18, undergo sufficient training to qualify for combat duty. *See* Colum Lynch, *President Signs U.N. Pacts for Children*, WASH. POST, July 6, 2000, at A15.

[5] White House Press Release on Remarks by the President at UN on Protocols to be Signed (July 5, 2000), *available in* 2000 WL 890152, at *3.

[6] *See* White House Press Release on Message from the President to the Senate on Children's Rights (July 25, 2000), *available in* 2000 WL 1120135.

[7] SC Res. 1314, ¶4 (Aug. 11, 2000); *see also* Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AJIL 789 (2000).

[1] Secretary of State Madeleine K. Albright, Remarks at Opening Session Introducing Videotape Message from Burma's Aung San Suu Kyi at the "Towards a Community of Democracies" Conference (June 26, 2000), *at* <http://secretary.state.gov/www/statements/2000/000626b.html>.

After several plenary meetings and also panel discussions in working groups, the conference adopted on June 27 a nonbinding declaration in which the states agreed to "respect and uphold" a number of "core democratic principles and practices," including:

> The will of the people shall be the basis of the authority of government, as expressed by exercise of the right and civic duties of citizens to choose their representatives through regular, free and fair elections with universal and equal suffrage, open to multiple parties, conducted by secret ballot, monitored by independent electoral authorities, and free of fraud and intimidation.
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> The right of every person to equal access to public service and to take part in the conduct of public affairs, directly or through freely chosen representatives.
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> . . . .
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> The right of the press to collect, report and disseminate information, news and opinions, subject only to restrictions necessary in a democratic society and prescribed by law, while bearing in mind evolving international practices in this field.
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> . . . .
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> The right of every person to freedom of peaceful assembly and association, including to establish or join their own political parties, civic groups, trade unions or other organizations with the necessary legal guarantees to allow them to operate freely on a basis of equal treatment before the law.
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> . . . .
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> That the aforementioned rights, which are essential to full and effective participation in a democratic society, be enforced by a competent, independent and impartial judiciary open to the public, established and protected by law.
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> That elected leaders uphold the law and function strictly in accordance with the constitution of the country concerned and procedures established by law.
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> The right of those duly elected to form a government, assume office and fulfill the term of office as legally established.
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> The obligation of an elected government to refrain from extra-constitutional actions, to allow the holding of periodic elections and to respect their results, and to relinquish power when its legal mandate ends.
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> That government institutions be transparent, participatory and fully accountable to the citizenry of the country and take steps to combat corruption, which corrodes democracy.
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> That the legislature be duly elected and transparent and accountable to the people.
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> That civilian, democratic control over the military be established and preserved.
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> That all human rights—civil, cultural, economic, political and social—be promoted and

protected as set forth in the Universal Declaration of Human Rights and other relevant human rights instruments.

The Community of Democracies affirms our determination to work together to promote and strengthen democracy, recognizing that we are at differing stages in our democratic development. We will cooperate to consolidate and strengthen democratic institutions, with due respect for sovereignty and the principle of non-interference in internal affairs. Our goal is to support adherence to common democratic values and standards, as outlined above. To that end, our governments hereby agree to abide by these principles in practice, and to support one another in meeting these objectives which we set for ourselves today.[2]

Voluntary Human Rights Principles for Extractive and Energy Companies

Over the course of 2000, the governments of the United States and the United Kingdom, certain companies in the extractive and energy sectors, and certain nongovernmental organizations met to discuss means for companies in those sectors to protect and promote human rights.[1] In December 2000, the participants announced an initiative—the Voluntary Principles on Security and Human Rights—to guide such companies toward ensuring respect for human rights and fundamental freedoms while at the same time maintaining the safety and security of corporate operations.[2] The suggested principles are divided into three sections: risk assessment, companies' relations with public security, and their relations with private security.

The preamble to the Voluntary Principles states that they are guided by those set forth in the Universal Declaration of Human Rights and contained in international humanitarian law. The first section of the Voluntary Principles notes that assessing risk in the states where a company operates is critical not just for the security of company personnel and assets, but also for the promotion and protection of human rights. The principles call upon companies to assess a series of risk factors based on credible information from a broad range of perspectives, including civil society knowledgeable about local conditions. The Voluntary Principles' second section, which sets forth "principles to guide relationships between Companies and public security regarding security provided to Companies," notes in particular:

Companies should use their influence to promote the following principles with public security: (a) individuals credibly implicated in human rights abuses should not provide security services for Companies; (b) force should be used only when strictly necessary and to an extent proportional to the threat; and (c) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.[3]

The third section sets forth principles to guide private security providers, and addresses how

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[2] Final Warsaw Declaration: Toward a Community of Democracies, June 27, 2000, *at* <http://democracyconference.org/declaration.html>.

[1] Participants in the process included Chevron, Texaco, Freeport McMoran, Conoco, Shell, BP, Rio Tinto, Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Council on Economic Priorities, Business for Social Responsibility, the Prince of Wales Business Leaders Forum, and the International Federation of Chemical, Energy, Mine and General Workers' Unions. *See* U.S. Dep't of State Press Release on Voluntary Principles on Security and Human Rights: Statement by the Governments of the United States of America and the United Kingdom (Dec. 20, 2000), *at* <http://www.state.gov/www/global/human_rights/001220_stat_principles.html>.

[2] U.S. State Department Fact Sheet on Voluntary Principles on Security and Human Rights (Dec. 20, 2000), *at* <http://www.state.gov/www/global/human_rights/001220_fsdrl_principles.html>.

[3] *Id.*

companies should interact with those providers to avoid human rights violations.

Assistant Secretary of State for Democracy, Human Rights, and Labor Harold Hongju Koh described the principles and their purpose as follows:

> In recent years, partnerships among governments, businesses and civil society have expanded, and two excellent examples are the UN Global Compact[4] and the Sullivan Principles.[5] These private-public partnerships are key to changing the misperception that globalization benefits the few and necessarily leaves many out and many behind.
>
> Addressing the impact of globalization has taken on special importance as we seek to find common approaches to resolving the labor, environment and human rights issues that companies inevitably face as they operate around the world. The underpinnings of both a profitable business environment and a salutary human rights environment rest on the same corefoundations: rule of law and good governance. Creative partnerships that promote human rights, support civil society, and address genuine corporate needs create a win-win-win situation for governments, civil society and the private sector. Governments gain when corporations recognize that they are not merely visitors but responsible citizens of the communities in which they operate. Civil societies benefit when corporate actors promote the work of NGOs, the free media, labor unions and citizens groups. And companies gain when they can work closely with governments to create a safe and secure working environment for their employees.
>
> The Voluntary Principles we announce today are an extraordinary example of the kind of benefits that can emerge from building creative human rights partnerships among governments, corporations, labor unions and NGOs. The Principles are the outcome of a long and concerted effort, and they are significant for three reasons. First, they provide a basis for a global standard for the oil, mining and energy sector on security and human rights. The participants in this process have recognized that the goal of maintaining a secure operating environment is compatible with the goal of protecting human rights.
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> Second, the Principles offer an important foundation for further dialogue between industry and civil society. For almost a year, officials from eight companies, corporate responsibilities and human rights groups, the State Department and the British Foreign Office, sat side by side in a team effort to develop these Principles. That dialogue is only beginning and will continue into the coming new year.
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> Third, this process clearly demonstrates that the much discussed notion of corporate citizenship is ready to move from a principle into a practice; by supporting the rule of law, incorporating human rights into security arrangements, and working with NGOs, transnational companies can greatly strengthen and enrich the human rights environment in which they operate. At this stage, these Principles are a voluntary agreement between two governments and a number of leading companies and NGOs and a labor union. Nevertheless, we hope and expect they will be seen as the emerging global standard for strengthening human rights safeguards in the energy sector around the world.
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> Significantly, this innovation has occurred in the heart of the so-called old economy, the extractive sector. Similar innovations are occurring in other sectors of the new global economy, particularly among Internet companies that make up the heart of the new economy. We

[4] [Author's Note: UN Secretary-General Kofi Annan in 1999 initiated a UN-sponsored forum for encouraging and promoting good corporate practices in the area of human rights, labor, and the environment, known as the "Global Compact." The forum's Internet site is at <http://www.unglobalcompact.org>.]

[5] [Author's Note: Sullivan Principles for U.S. Corporations Operating in South Africa, 24 ILM 1464 (1985).]

encourage other industries to examine both the process that has resulted in these principles and the substance that has been developed to find similar creative approaches to other human rights issues emerging in other industries.[6]

Implementation of Human Rights

U.S. Government Internal Coordination of Human Rights Matters

On December 10, 1998, President Clinton signed an executive order intended to promote better coordination among U.S. executive agencies on human rights matters. The executive order stated that it shall be the policy and practice of the U.S. government "fully to respect and implement its obligations under international human rights treaties to which it is a party" and "to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including, among others, those of the United Nations, the International Labor Organization, and the Organization of American States."[1] The executive order established an interagency working group on human rights treaties, chaired by the White House which, among other things, is charged with coordinating the review of any significant interagency human rights issues, making recommendations in connection with pursuing the ratification of human rights treaties, coordinating the preparation of reports to be submitted by the United States in fulfillment of its treaty obligations, coordinating U.S. responses to human rights complaints against it before international organizations, developing mechanisms for ensuring that legislation proposed by the executive branch is in conformity with U.S. human rights obligations, and making recommendations for improving the monitoring of actions at all levels in the United States for conformity with human rights obligations.

Funding Restrictions Relating to Foreign Security Forces

Congress enacted a provision in the foreign assistance legislation for fiscal year 1998 prohibiting foreign assistance funds, including U.S. loan guarantees, from being used to aid units of foreign security forces that are committing human rights violations.[1] While the United States has no financial relationship with many states that have poor human rights records, the new provision (if repeated in future foreign assistance legislation) is expected to prompt extensive debate within the executive branch over U.S. support for other such states with which the United States seeks better relations, such as Algeria, China, Colombia, Indonesia, Mexico, and Rwanda. In December 1998, a request from a U.S. defense company for U.S. government financing for Turkey to purchase armored vehicles was denied under the new legislation, since the vehicles would be used by police in areas where state-sponsored torture occurs.[2]

U.S. Sanctions against States Tolerating Religious Persecution

In 1997, U.S. Senator Don Nickles proposed legislation entitled "The International Religious Freedom Act of 1998," which called for various executive actions and economic sanctions against

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[6] U.S. Dep't of State Press Release on Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor; E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs; and David G. Carpenter, Assistant Secretary for Diplomatic Security, Press Briefing on Voluntary Principles on Security and Human Rights (Dec. 20, 2000), *at* <http://www.state.gov/www/policy_remarks/2000/001220_koh_hr.html>.

[1] Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998), 38 ILM 493 (1999).

[1] Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, §570, 111 Stat. 2386, 2429 (1997).

[2] *See* Dana Priest, *New Human Rights Law Triggers Policy Debate*, Wash. Post, Dec. 31, 1998, at A34.

any foreign state identified as engaging in or tolerating religious persecution. The proposed law was strongly endorsed by the Christian Coalition and other conservative religious groups in the United States, but was viewed with skepticism by the Clinton administration.[1]

On May 12, 1998, John Shattuck, Assistant Secretary for Democracy, Human Rights and Labor, outlined the administration's concerns in a statement before the Senate Committee on Foreign Relations.[2] Insisting that the Clinton administration "is committed to confronting violations of religious freedom, including religious intolerance and discrimination, no matter where they may occur around the world," Shattuck expressed concern about the bill's sanctions and reporting mechanisms, its definition of religious persecution, its waiver provisions, its mandating of new reports without providing for additional resources, and its creation of new institutions. With respect to the imposition of sanctions, Shattuck stated:

> Our first major concern is the bill's requirement that the President impose one (or more) of sixteen executive actions and economic sanctions on any country identified as engaging in or tolerating religious persecution. We are concerned that the bill's sanctions-oriented approach fails to recognize the value of incentives and dialogue in promoting religious freedom and encouraging further improvements in some countries. . . . [M]any of our more notable works on behalf of religious freedom have come thanks to the pro-active approach of our diplomats in Laos, Turkey, Austria, and elsewhere.
>
> We also believe that the sanctions provisions will be counterproductive. In particular, while the imposition of sanctions is likely to have little direct impact on most governments engaged in abuses, it runs the risk of strengthening the hand of those governments and extremists who seek to incite religious intolerance. We fear that the sanctions could result in greater pressures—and even reprisals—against minority religious communities. This is a message we are receiving from both missionary groups and overseas religious figures, who point out that minority religious communities risk being accused of complicity in this American effort.
>
> We also believe that sanctions could have an adverse impact on our diplomacy in places like the Middle East and South Asia, undercutting Administration efforts to promote the very regional peace and reconciliation that can foster religious tolerance and respect for human rights.
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> We do understand that the legislation contains waiver provisions. However, those provisions would not eliminate the annual, automatic condemnations required by the legislation, which are our principal source of concern. To be sure, public condemnation—and even sanctions—may be appropriate in many instances, but not in all cases. As I have suggested, if the United States does not have the flexibility to determine when and how to condemn violators, we could endanger the well-being of those we are trying to help. This would limit U.S. efforts to work collectively with other nations to promote religious freedom, reconciliation, and peace, not to mention other critical national security objectives.[3]

In September 1998, Senator Nickles proposed modifications to the bill to address some of the administration's concerns, and the new version was passed by both Houses of Congress.[4] On October 27, 1998, President Clinton signed the bill into law. With respect to the imposition of sanctions, the president stated:

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[1] *See* Eric Schmitt, *Bill to Punish Nations Limiting Religious Beliefs Passes Senate*, N.Y. TIMES, Oct. 10, 1998, at A3.

[2] *S. 1868: The International Religious Freedom Act of 1998: Hearings Before the Senate Comm. on Foreign Relations*, 105th Cong. 87 (May 12 & June 17, 1998) (statement of John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor).

[3] *Id.* at 92.

[4] *See* Schmitt, *supra* note 1.

Section 401 of this Act calls for the President to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. This is consistent with my Administration's policy of protecting and promoting religious freedom vigorously throughout the world. We frequently raise religious freedom issues with other governments at the highest levels. I understand that such actions taken as a matter of policy are among the types of actions envisioned by section 401.

I commend the Congress for incorporating flexibility in the several provisions concerning the imposition of economic measures. Although I am concerned that such measures could result in even greater pressures—and possibly reprisals—against minority religious communities that the bill is intended to help, I note that section 402 mandates these measures only in the most extreme and egregious cases of religious persecution. The imposition of economic measures or commensurate actions is required only when a country has engaged in systematic, ongoing, egregious violations of religious freedom accompanied by flagrant denials of the right to life, liberty, or the security of persons—such as torture, enforced and arbitrary disappearances, or arbitrary prolonged detention. I also note that section 405 allows me to choose from a range of measures, including some actions of limited duration.

The Act provides additional flexibility by allowing the President to waive the imposition of economic measures if violations cease, if a waiver would further the purpose of the Act, or if required by important national interests. Section 402(c) allows me to take into account other substantial measures that we have taken against a country, and which are still in effect, in determining whether additional measures should be imposed. I note, however, that a technical correction to section 402(c)(4) should be made to clarify the conditions applicable to this determination. My Administration has provided this technical correction to the Congress.

I regret, however, that certain other provisions of the Act lack this flexibility and infringe on the authority vested by the Constitution solely with the President. For example, section 403(b) directs the President to undertake negotiations with foreign governments for specified foreign policy purposes. It also requires certain communications between the President and the Congress concerning these negotiations. I shall treat the language of this provision as precatory and construe the provision in light of my constitutional responsibilities to conduct foreign affairs, including, where appropriate, the protection of diplomatic communications.[5]

In its final form, the International Religious Freedom Act of 1998 called for the president to designate "countries of particular concern" for having engaged in or tolerated particularly severe violations of religious freedom. Absent a presidential waiver, such a designation authorizes the president to impose a range of economic and other sanctions on the country in question.[6] The statute also requires the U.S. Department of State to submit an annual report to Congress describing: the status of religious freedom in each foreign state; government policies in each state that violate religious beliefs and practices of groups, religious denominations, and individuals; and U.S. policies to promote religious freedom around the world.[7] Finally, the report establishes a ten-member U.S. Commission on International Religious Freedom of nongovernmental experts and authorities on religious freedom, charged with monitoring violations of religious freedom worldwide and making recommendations and reports to the U.S. government.[8]

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[5] Statement by the President on Religious Freedom Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2149 (Oct. 27, 1998).
[6] 22 U.S.C. §§6442(b), 6445–47 (1994 & Supp. IV 1998) (further amended by Pub. L. No. 106-55 (1999)).
[7] 22 U.S.C. §6412(b) (1994 & Supp. IV 1998).
[8] For the Commission's first and second reports released in 2000 and 2001 respectively, as well as other information on the work of the Commission, see <www.uscirf.gov>.

U.S. Criticism of PRC at the UN Commission on Human Rights

At the fifty-sixth session of the UN Commission on Human Rights in April 2000, the United States sponsored a resolution strongly criticizing the People's Republic of China (PRC)'s human rights record. In response, the PRC advanced a "no action motion," a procedural device that would prevent debate on the merits of the U.S.-sponsored motion. In advance of the vote on the PRC's motion, the U.S. representative to the Commission, Ambassador Nancy Rubin, stated:

> It is a fundamental principle of universal human rights that no nation's human rights record is above international scrutiny. Global participants must play by the rules of the global organizations to which they belong. But for years, one—and only one—country, China, has enjoyed immunity before this Commission, because other Commission members have allowed it to preserve that immunity. As a matter of principle, this practice must end. No country should have the right to judge all others at this Commission, yet never be judged itself.
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> By signing on to international human rights instruments, China has acknowledged that, like every other nation, its human rights record is a legitimate topic for discussion by the international community and the United Nations Commission on Human Rights. It is not interference in China's internal affairs to ask China to obey the same international standards that it has acknowledged, and that bind every other member of this Commission and the United Nations.[1]

To underscore the U.S. opposition to the PRC's motion, Secretary of State Madeleine K. Albright appeared before the Commission (the first time a U.S. secretary of state had ever done so), saying: "We owe it to the Chinese people and to the credibility of this Commission and its members not to shy away from the whole truth, or to hide behind procedural motions."[2] Nevertheless, the Commission voted 22 to 18 (with 12 abstentions) in favor of the PRC's motion, thus ending the U.S. initiative.

Defeat of House Resolution on Armenian Genocide

From 1915 to 1923, forces of the Ottoman Empire killed hundreds of thousands of Armenians. Today, claiming that some 1.5 million persons were killed as part of a campaign by the Ottoman Empire to force Armenians out of eastern Turkey, Armenians regard the killings as "genocide." The government of Turkey acknowledges that some three hundred thousand persons were killed but, maintaining that the deaths occurred during efforts to quell civil unrest, rejects the characterization of those deaths as genocide.[1]

In late 2000, Representative James E. Rogan, a Republican from southern California, was engaged in a close reelection campaign in a district that contains the largest concentration of Armenian Americans in the United States. Rogan sought to push through the House of Representatives a nonbinding resolution labeling the massacres of Armenians as "genocide."[2] Among other things, the proposed resolution stated that the

> Armenian Genocide was conceived and carried out by the Ottoman Empire from 1915 to 1923, resulting in the deportation of nearly 2,000,000 Armenians, of whom 1,500,000 men, women, and

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[1] U.S. Government Delegation to 56th Session of the UN Commission on Human Rights Statement on China's "No Action Motion" (Apr. 18, 2000), *obtainable from* <http://www.humanrights-usa.net/>.

[2] U.S. Dep't of State Press Release on Secretary of State Madeline K. Albright's Address to the UN Human Rights Commission (Mar. 23, 2000), *at* <http://secretary.state.gov/www/statements/2000/000323.html>.

[1] *See* Steven Mufson, *Local Politics Is Global as Hill Turns to Armenia*, WASH. POST, Oct. 9, 2000, at A1.

[2] H.R. Res. 596, 106th Cong. (2000).

> children were killed, 500,000 survivors were expelled from their homes, and which succeeded in the elimination of the over 2,500-year presence of Armenians in their historic homeland.[3]

The resolution would call upon the U.S. president, in his annual April message commemorating the massacres, to "characterize the systematic and deliberate annihilation of 1,500,000 Armenians as genocide."[4]

After the resolution was approved by the House International Relations Committee, the government of Turkey warned the United States that enactment would have repercussions. Turkey indicated that it might withdraw certain defense contracts with U.S. firms, reopen ties with the government of Iraq, and withdraw its consent to U.S. use of Turkey's Incirlik air base for air patrols over northern Iraq.[5] President Clinton urged the House to withdraw the resolution.

> I am deeply concerned that consideration of H. Res. 596 at this time could have far-reaching negative consequences for the United States. We have significant interests in this troubled region of the world: containing the threat posed by Saddam Hussein; working for peace and stability in the Middle East and Central Asia; stabilizing the Balkans; and developing new sources of energy. Consideration of the resolution at this sensitive time will not only negatively affect those interests, but could undermine efforts to encourage improved relations between Armenia and Turkey—the very goal the Resolution's sponsors seek to advance.
>
> We fully understand how strongly both Turkey and Armenia feel about his issue. Ultimately, this painful matter can only be resolved by both sides examining the past together.[6]

Minutes before the House was to vote on the resolution, Speaker J. Dennis Hastert withdrew the resolution, citing President Clinton's warning.[7] Thereafter, Representative Rogan lost his bid for reelection.

Inapplicability of ICCPR to Death Penalty Case

In 1994, a seventeen-year-old named Napoleon Beazley was arrested for murdering a man while stealing his Mercedes. In 1995, Beazley was convicted and sentenced to death by a Texas state court.[1] In the course of habeas corpus proceedings in federal court, Beazley argued that the provision of the Texas death penalty statute under which he was sentenced was void under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), which provides that "a sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."[2]

When ratifying the ICCPR in 1992, the United States made a reservation stating, in part:

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[3] *Id*. §2(1).

[4] *Id*. §3(2). For an example of the president's annual message, see Statement Commemorating the Deportation and Massacre of Armenians in the Ottoman Empire, 36 WEEKLY COMP. PRES. DOC. 916 (Apr. 24, 2000).

[5] *See* Molly Moore & John Ward Anderson,*Turkey Warns of Retaliation If U.S. Makes Genocide Charge*, WASH. POST, Oct. 6, 2000, at A22.

[6] Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 36 WEEKLY COMP. PRES. DOC. 2517 (Oct. 19, 2000).

[7] *See* J. Dennis Hastert, U.S. Speaker of the House, U.S. House of Representatives Press Release on Armenian Genocide Resolution (Oct. 19, 2000), *at* <http://speaker.house.gov/library/irdefense/001020armenia.asp>; Eric Schmitt,*House Backs Off on Turkish Condemnation*, N.Y. TIMES, Oct. 20, 2000, at A15. By contrast, in November 2000, the European Parliament adopted a resolution declaring the massacres of Armenians to be genocide. *See* Eur. Parl. Res. A5-0297/2000 (Nov. 15, 2000); *European Parliament Accuses Turkey of Genocide*, WASH. POST, Nov. 16, 2000, at A31. Further, as of March 2001, 15 state legislatures in the United States had adopted resolutions recognizing the Armenian killings as genocide. *See* Lori Montgomery, *Maryland Drawn into a Distant Dispute*, WASH. POST, Mar. 26, 2001, at B1.

[1] *See* Beazley v. Johnson, 242 F.3d 248, 253 (5th Cir. 2001). For similar cases during 1999–2001, see Ex Parte Pressley, 770 So.2d 143 (Ala. 2000); U.S. v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000).

[2] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, Art. 6(5), S. EXEC. DOC. NO. 36E, 95-2, at 23 (1978), 999 UNTS 171, 175 [hereinafter ICCPR].

> [T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
>
> . . . .
>
> The United States declares that the provisions of Articles 1 through 27 of the ICCPR are not self-executing.[3]

Beazley argued to the Fifth Circuit Court of Appeals that this reservation was invalid since, as maintained by the UN Human Rights Committee (HRC), a reservation to the ICCPR could be considered void if incompatible with the object and purpose of the treaty.[4] On February 9, 2001, the court found that Beazley's argument was procedurally barred because it was not, but should have been, raised in state court proceedings. Further, the court found that the HRC had not determined that the U.S. reservation was void. Nevertheless, the court proceeded to address whether the U.S. reservation was valid.

> Two state supreme courts have addressed whether the ICCPR supersedes state law allowing execution for a crime committed while under age 18. Most recently, the Alabama Supreme Court concluded that the Senate's reservation had not been demonstrated illegal. *See Ex parte Pressley*, 770 So.2d 143, 148, 2000 WL 356347, at *5-7 (Ala.) ("We are not persuaded that [petitioner] has established that the Senate's express reservation of this nation's right to impose a penalty of death on juvenile offenders, in ratifying the ICCPR, is illegal."), *cert. denied*, — U.S. —, 121 S.Ct. 313, 148 L.Ed.2d 251 (2000); *see also Ex parte Burgess*, No. 1980810, 2000 WL 1006958, at *11 (Ala. 21 July 2000) (reaffirming reasoning and holding of Pressley). And, in *Domingues v. Nevada*, the Supreme Court of Nevada concluded that "the Senate's express reservation of the United States' right to impose a penalty of death on juvenile offenders negate[d] Domingues' claim that he was illegally sentenced". 114 Nev. 783, 785, 961 P.2d 1279, 1280 (1998), *cert. denied*, 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999). We agree.
>
> Furthermore, our court has recognized the validity of Senate reservations to the ICCPR. *See White v. Johnson*, 79 F.3d 432, 440 & n. 2 (5th Cir.) ("[E]ven if we did consider the merits of this claim, we would do so under the Senate's reservation that the treaties [among them the ICCPR] only prohibit cruel and unusual punishment".), *cert. denied*, 519 U.S. 911, 117 S.Ct. 275, 136 L.Ed.2d 198 (1996); *cf. Austin v. Hopper*, 15 F.Supp.2d 1210, 1260 n. 222 (M.D.Ala.1998) ("[A]lthough international jurisprudence interpreting and applying the ICCPR would appear to assist this court, two sources preclude reliance on such precedent: the Supreme Court's directive in *Stanford v. Kentucky* [492 U.S. 361, 369 n. 1, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (American conceptions of decency are dispositive)]; and the reservations attached to the ICCPR.").

In claiming that the reservation is invalid, Beazley cites a declaration to the ICCPR:

> [T]he United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is *not* fulfilling its obligations under the Covenant[.]

138 Cong. Rec. S4784 (1992) (statement of presiding officer of resolution of ratification) (emphasis

[3] 138 CONG. REC. 8070 (Apr. 2, 1992).

[4] *See* General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).

added). But, this declaration, while acknowledging the HRC, does *not* bind the United States to its decisions.

Beazley asserts that other courts have found the HRC's interpretation of the ICCPR persuasive. *See, e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (looking to HRC's guidance as "most important [ ]" component in interpreting ICCPR claim (brackets omitted)); *United States v. Benitez*, 28 F.Supp.2d 1361, 1364 (S.D.Fla.1998) (finding HRC's interpretation of ICCPR article 14(7) helpful). However, these courts looked to the HRC only for guidance, *not* to void an action by the Senate. *See Duarte-Acero*, 208 F.3d at 1285 (finding appellant's contention contradicted by plain language and legislative history and HRC's interpretation, *all of which were in agreement*).

In the light of our analysis, the reservation is valid. Accordingly, we could dispense with, as moot, Beazley's contention that the ICCPR is self-executing; however, we consider it briefly. As quoted above, the Senate ratified the ICCPR with a declaration that articles 1 to 27 were *not* self-executing. Beazley claims this declaration is trumped by article 50 of the ICCPR, which states: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions". ICCPR, art. 50. He maintains also that various statutory provisions constitute enabling statutes to allow private rights of action.

The claim that the Senate, in ratifying the treaty, voided its own attached declaration is nonsensical, to say the very least. The Senate's intent was clear—the treaty is *not* self-executing. *See Duarte-Acero*, 208 F.3d at 1285 ("If the language of the treaty is clear and unambiguous, as with any exercise in statutory construction, our analysis ends there and we apply the words of the treaty as written."). "'Non-self-executing' means that absent any further actions by the Congress to incorporate them into domestic law, the courts may *not* enforce them." *Jama v. I.N.S.*, 22 F.Supp.2d 353, 365 (D.N.J.1998) (emphasis added).

Moreover, although Beazley cites *no* case law supporting the proposition that the treaty is self-executing, many courts have found it *is not*. *See, e.g., Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir.1994) ("Articles 1 through 27 of the Covenant were *not* self-executing, and could *not* therefore give rise to privately enforceable rights under United States law". (emphasis added; citation omitted)), *cert. denied*, 514 U.S. 1049, 115 S.Ct. 1426, 131 L.Ed.2d 308 (1995); *Ralk v. Lincoln County*, 81 F.Supp.2d 1372, 1380 (S.D.Ga.2000) (neither legislative nor executive branch intended ICCPR to be self-executing); *Jama*, 22 F.Supp.2d at 365 (ICCPR *not* self-executing); *White v. Paulsen*, 997 F.Supp. 1380, 1387 (E.D.Wash.1998) (ICCPR *not* self-executing treaty that gives rise to private cause of action). The reservation is an express exception to article 50; restated, article 50 does *not* void the Senate's express intent.[5]

Inapplicability of OAS Report to Death Penalty Case

Juan Raul Garza, a U.S. national, was convicted by a Texas federal court for violating federal drug-trafficking laws, including one for killing in furtherance of a criminal enterprise. A jury

[5] 242 F.3d at 266–68 (footnotes omitted). Although the U.S. court of appeals dismissed the petition, the Texas Court of Criminal Appeals on August 15, 2001 stayed Beazley's execution to consider arguments as to whether Beazley's initial appellate lawyer in the state court proceedings was incompetent and had failed to raise certain important issues, such as Beazley's age (he was seventeen at the time of the crime) and potential racial bias among the jurors. *See* Jim Yardley, *Texas Execution is Halted By State Court of Appeals*, N.Y. TIMES, Aug. 16, 2001, at A10. For other U.S. decisions during 1999–2001 finding that imposition of the death penalty did not violate U.S. obligations under the ICCPR or other international law, see Servin v. State, 32 P.3d 1277 (Nev. 2001); Booker v. State, 773 So.2d 1079 (Fla. 2000); State v. Bey, 709 N.E.2d 484 (Ohio 1999); State v. Ashworth, 706 N.E.2d 1231 (Ohio 1999), State v. Timmendequas, 737 A.2d 55 (N.J. 1999); State v. Martini, 734 A.2d 257 (N.J. 1999).

recommended and the court accepted that Garza be sentenced to death. In 1995, the conviction and sentence were affirmed on direct appeal.[1] Garza then moved to vacate the sentence on grounds that the introduction of evidence, at the time he was sentenced, of five uncharged murders he allegedly committed in Mexico violated his constitutional rights. That motion also failed.[2] Thereafter, on December 20, 1999, Garza filed a petition with the Inter-American Commission on Human Rights seeking a decision that the introduction of such evidence violated his rights to life, equal protection, and due process under the American Declaration of the Rights and Duties of Man (American Declaration).[3]

Both Garza and the U.S. government submitted pleadings to the commission and participated in a hearing convened on October 12, 2000. Among other things, the United States argued that Garza had failed to establish that international law precludes the use of the death penalty, and failed to establish a violation of either the right to a fair trial or the right to due process of law in relation to his criminal proceeding. In a report issued April 4, 2001, the commission found that the American Declaration does not proscribe capital punishment altogether—despite the "spirit and purpose of numerous international human rights instruments" that the United States has signed or ratified, and "the international trend toward more restrictive application of the death penalty."[4] Nevertheless, the commission found that the American Declaration does prohibit its application in a manner that would constitute an arbitrary deprivation of life.[5] The commission concluded that during the U.S. criminal proceeding, Garza was "not only convicted and sentenced to death for the three murders for which he was charged and tried in the guilt/innocence phase of his proceeding; he was also convicted and sentenced to death for the four murders alleged to have been committed in Mexico, but without having been properly and fairly charged and tried for these additional crimes."[6] The commission held that doing so was arbitrary, as well as a denial of Garza's rights to a fair trial and due process of law.[7] The commission asserted that the United States would "perpetrate a grave and irreparable violation of the fundamental right to life" under the American Declaration should it proceed with Garza's execution.[8]

Based on the commission's report, Garza sought to stay his execution. The Seventh Circuit Court of Appeals determined that a stay could not be granted unless Garza presented a substantial ground on which relief could be granted. In considering whether a substantial ground existed, the court found that the Inter-American Commission's report did not create an enforceable obligation that the United States was bound by treaty to honor. It stated:

> The only relevant treaty is the Charter of the Organization of American States (OAS), which the United States ratified in 1951, and ratified as amended in 1968. That treaty authorizes the creation of the Inter-American Commission on Human Rights, and contains the following relevant provision:
>
> > There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on

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[1] *See* United States v. Flores, 63 F.3d 1342 (5th Cir. 1995).

[2] United States v. Garza, 165 F.3d 312 (5th Cir. 1999).

[3] May 2, 1948, OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser. L/V/I.4 Rev. II (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 17, OAS Doc. OEA/Ser.L. V/II. 82, doc. 6 rev. 1 (1992), *and in* BURNS H. WESTON, 3 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS at III.B.23 (1994).

[4] Case 12.243, Inter-Am. C.H.R., paras. 92–95 (Apr. 4, 2001), *at* <http://www.cidh.org/annualrep/2000eng/chapterIII/merits/usa12.243.htm>.

[5] *Id.*, para. 92.

[6] *Id.*, para. 105

[7] *Id.*, paras. 110–11.

[8] *Id.*, para. 120.

human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

OAS Charter (Amended) Article 112, 21 U.S.T. 607. The American Declaration of the Rights and Duties of Man, on which the Commission relied in reaching its conclusions in Garza's case, is an aspirational document which, as Garza admitted in his petition in the district court, did not on its own create any enforceable obligations on the part of any of the OAS member nations. More recently, the OAS has developed an American Convention on Human Rights,[9] which creates an Inter-American Court of Human Rights. Under the American Convention, the Inter-American Court's decisions are potentially binding on member nations. The rub is this: although the United States has signed the American Convention, it has not ratified it, and so that document does not yet qualify as one of the "treaties" of the United States that creates binding obligations.[10]

The court of appeals denied the stay of execution.[11]

Fifth Amendment Inapplicability to Overseas Torture of Aliens

In 1999, a U.S. national named Jennifer Harbury filed suit in U.S. federal court alleging that Central Intelligence Agency (CIA) officials participated in the torture and murder in Guatemala of her husband, Efrain Bamaca-Velasquez, a Guatemalan national. Harbury further alleged that while her husband was being tortured and also after his death, the National Security Council (NSC) and the Department of State systematically concealed information from her about her husband's fate. Among other things, Harbury claimed that these actions violated her husband's Fifth Amendment right not to be deprived of life or liberty without due process of law.

On December 12, 2000, the Court of Appeals for the District of Columbia Circuit rejected Harbury's Fifth Amendment claim.

The difficult question, and the one presented by this case, is whether the Fifth Amendment prohibits torture of non-resident foreign nationals living abroad. Before reaching that question, however, we must consider Harbury's claim that because many of the CIA, NSC, and State Department officials who she says conspired to torture her husband did so within the United States, this case does not require extra-territorial application of the Fifth Amendment.

. . . .

Harbury fails to notice the relevance of *United States v. Verdugo-Urquidez*,[1] a case she cites later in her brief, where the Supreme Court held that a warrantless search and seizure of an alien's property in Mexico did not violate the Fourth Amendment. The search was conceived, planned, and ordered in the United States, carried out in part by agents of the United States Drug Enforcement Agency, and conducted for the express purpose of obtaining evidence for use in a United States trial. Still, the Court treated the alleged violation as having "occurred solely in Mexico." In reaching this conclusion, the Court never mentioned that the search was both planned and ordered from within the United States. Instead, it focused on the location of the primary constitutionally significant conduct at issue: the search and seizure itself.

We think *Verdugo-Urquidez* controls this case. Like the warrantless search there, the primary

[9] [Author's Note: American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 UNTS 123.]

[10] Garza v. Lappin, 253 F.3d 918, 924–25 (7th Cir. 2001).

[11] For another death penalty case in 1999 involving the Inter-American Commission on Human Rights, see the discussion of the case of Joseph Stanley Faulder, *supra*, Ch. II.

[1] [Author's Note: 494 U.S. 259 (1990).]

constitutionally relevant conduct at issue here—Bamaca's torture—occurred outside the United States. . . .

Acknowledging that aliens are entitled to fewer constitutional protections than citizens, and that constitutional protections (even for citizens) diminish outside the U.S., Harbury argues that the Constitution's most fundamental protections, like the Fifth Amendment prohibition of torture, apply even to foreign nationals located abroad. In support of this claim, she cites three lines of cases holding that non-citizens outside the United States enjoy constitutional rights. First, courts have held that inhabitants of nonstate territories controlled by the U.S.—such as unincorporated territories or occupation zones after war—are entitled to certain "fundamental" constitutional rights. Courts have also held that excludable aliens—aliens apprehended outside the U.S. while attempting to cross the border and held within the U.S. pending trial—likewise enjoy basic due process rights against gross physical abuse. Finally, courts have suggested that non-resident aliens abducted by the government for trial within the United States have basic due process rights.

Although these cases demonstrate that aliens abroad may be entitled to certain constitutional protections against mistreatment by the U.S. Government, we do not agree that they establish that Bamaca's torture ran afoul of the Fifth Amendment. To begin with, in adjudicating the application of constitutional rights to aliens, the Supreme Court has looked—among other factors—to whether the aliens have "come within the territory of the United States and developed substantial connections with this country." In all three sets of cases Harbury cites, the aliens had a substantially greater connection to the U.S. than Bamaca. The excludable alien cases involved persons physically present in the U.S. The occupation zone cases involved foreign nationals under de facto U.S. political control. And although the alien in *Toscanino*[2] had been tortured in a foreign country, he was abducted to and tried in the United States. In fact, the Second Circuit, treating the torture and abduction as part of the pre-trial process, focused on the fact that allowing the government to seize and torture defendants before bringing them to trial would threaten the integrity of the United States judicial process. In contrast to the aliens involved in these cases, Bamaca was not physically present in the United States, not tortured in a country in which the United States exercised de facto political control, and not abducted for trial in a United States court.[3]

The court of appeals further noted that in *Verdugo-Urquidez*, the Supreme Court referred to its earlier case, *Johnson v. Eisentrager*,[4] in which the Court rejected the claim that aliens are entitled to Fifth Amendment rights outside the United States.[5] That case involved enemy aliens arrested in China and imprisoned in Germany after World War II. On the ground that their convictions for war crimes violated, among other things, the Fifth Amendment, the imprisoned aliens had sought, but were denied, writs of habeas corpus in U.S. courts.

Release of U.S. Documents on Rwandan Genocide

In August 2001, the National Security Archive[1] released a series of documents obtained from the U.S. government pursuant to a Freedom of Information Act request relating to the 1994 genocide

[2] [Author's Note: United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).]
[3] Harbury v. Deutch, 233 F.3d 596, 602–04 (D.C. Cir. 2000) (citations omitted).
[4] 339 U.S. 763 (1950), *cited in* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[5] Harbury v. Deutch, 233 F.3d at 604.
[1] The National Security Archive is a research group at George Washington University that specializes in collecting government documents through Freedom of Information Act requests and lawsuits.

in Rwanda.[2] One of the documents consisted of a decision memorandum sent to then Secretary of State Warren Christopher from four of the department's bureaus, including the Office of the Legal Adviser. The memorandum—whose subject was "Has Genocide Occurred in Rwanda?"—was sent on May 20, 1994. After noting that "[e]vents in Rwanda have led to press and public inquiries about whether genocide has occurred there," the memorandum requested authorization from the secretary to announce the department's conclusion that "acts of genocide have occurred" in Rwanda. The secretary provided such authorization on May 21.[3]

In tab 1 to the memorandum, the department's Bureau of Intelligence and Research (INR) reached certain factual conclusions.

> There is substantial circumstantial evidence implicating senior Rwandan government and military officials in the widespread, systematic killing of ethnic Tutsis, and to a lesser extent, ethnic Hutus who supported power-sharing between the two groups. . . .
>
> . . . .
>
> *Killing and harm*. International organizations, foreign diplomats and indigenous eye witnesses have reported systematic executions of Tutsis in villages, schools, hospitals, and churches by Hutu militia, the Presidential Guard, and military forces. Many have been killed or gravely injured by machete-wielding militia members because they are ethnic Tutsi, have Tutsi physical characteristics, or support Tutsis. Government forces have also attacked sites where Tutsi civilians have sought refuge, such as the UN-protected Amahoro stadium in Kigali. They have prevented others from leaving a stadium in Cyangugu and have selected and killed some of those inside.
>
> Numerous credible reports claim that government officials, including national and local officials, have also exhorted civilians to participate in the massacres, often utilizing the militant Hutu radio station, Milles Collines. The new government named following [President] Habyarimana's death is comprised primarily of hard line Hutus opposed to compromise with Tutsis and includes individuals believed to have been involved in Tutsi killings. It has taken little, if any action to halt the killings, most of which have occurred behind government lines.
>
> *Unbearable living conditions*. Campaigns of ethnic cleansing against Tutsis appear well-planned and systematic. Homes are often destroyed and looted after the occupants have been killed. Hospital staffs have witnessed the execution of Tutsi patients. An estimated one million persons have been displaced and another 350,000 Tutsis and Hutus have fled the country. Inadequate nutrition and medical care are claiming additional lives and diseases such as cholera and hepatitis threaten thousands more. Sources of drinking water have become polluted by thousands of corpses thrown into rivers, lakes and wells. Government officials and soldiers have denied or limited access by international relief workers to threatened groups, thus preventing them from obtaining needed food and medical care. Government forces and militia have killed dozens of UN, Red Cross and other relief workers and attacked ambulances bearing the injured.
>
> *Measures to prevent births*. Tutsi children, along with their parents, are being mutilated and killed. In one town, pregnant women at a maternity clinic were massacred. International humanitarian agencies estimate from eight to 40 percent of the Tutsi population may have perished.[4]

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[2] The documents are available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/index.html>; *see* Neil A. Lewis,*Papers Show U.S. Knew of Genocide in Rwanda*, N.Y. TIMES, Aug. 22, 2001, at A5.

[3] Memorandum from George E. Moose, John Shattuck, Douglas J. Bennet, and Conrad K. Harper to the Secretary of State at 1 (May 20, 1994) [hereinafter Memorandum].

[4] *Id.*, tab 1, at 2–3.

Tab 2 to the memorandum presented a legal analysis, prepared by the Office of the Legal Adviser, assessing whether the facts set forth above met the requirements of the 1948 Genocide Convention.[5] The legal analysis read as follows:

The Definition of Genocide

As defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which the U.S. is a party, "genocide" has been committed when three criteria are met:

1. *specified acts are committed*:

    a) killing
    b) causing serious bodily or mental harm
    c) deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part
    d) imposing measures intended to prevent births, or
    e) forcibly transferring children to another group

2. *these acts are committed against members of a national, ethnic, racial or religious group, and*
3. *they are committed with the intent to destroy, in whole or in part, the group as such.*

In addition to "genocide," conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are also offenses under the Convention.

The Existence of Genocide in Rwanda

There can be little question that the specific listed acts have taken place in Rwanda. There have been numerous acts of killing and causing serious bodily or mental harm to persons. (As INR notes, international humanitarian organizations estimate that killings since April 6 have claimed from 200,000 to 500,000 lives. . . .)

The second requirement is also clearly satisfied. As INR notes, most of those killed in Rwanda have been Tutsi civilians, including women and children. The Tutsis are an ethnic group. (Moderate members of the Hutu ethnic group have also been killed. In addition, both Hutus and Tutsis have been killed in battles between Government forces and the Rwandan Patriotic Front (RPF). The RPF has also executed extremist Hutus).

It also appears that the third element has been satisfied. At least some of the prohibited acts have apparently been committed with the requisite intent to destroy, in whole or in part, the Tutsi group as such, as required by the Convention. . . .

The question of intent is necessarily somewhat difficult to prove without clear documentation (*e.g.*, written policies or orders) or express statements and is ultimately a question of the intent of particular individuals. Intention may, however, to some degree be inferred from the circumstances. Here, given the context of the overall factual situation described by INR, it seems

[5] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277, 280 (see especially Article II).

evident that killings and other listed acts have been undertaken with the intent of destroying the Tutsi group in whole or in part. In particular, INR states that "[n]umerous credible reports claim that government officials, including national and local officials, have also exhorted civilians to participate in the massacres, often utilizing the militant Hutu radio station, Miles Collines." INR also notes that the Interim Government, which took control after the April 6 crash of the Presidential plane, "has taken little, if any action to halt the killings, most of which have occurred behind government lines." (These acts would also constitute separate offenses under the Convention, which prohibits incitement of genocide and complicity in genocide).

In the absence of express statements of intent, the question of intent ultimately turns on inferences based on an overall assessment of the facts. The key concept of "intent to destroy a group . . . in part" is subject to some debate. The drafters clearly excluded mere "cultural genocide"—*i.e.*, destroying the identity of the group without destroying the members of the group—from the scope of the Convention. They did not more clearly define, however, the precise nature of the intent required, or the quantum of harm required. It is obviously not necessary to destroy an entire group to merit a charge of genocide. In ratifying the Convention, the United States expressed its understanding that the Convention requires a specific intent to destroy a group in whole or substantial part, at least within a given country. (The Senate has expressed the view that "substantial" means a sufficient number to "cause the destruction of the group as a viable entity.") The U.S. position probably represents a maximum requirement; the position has also been taken that the murder of a single member of a protected group, carried out with the idea that the group should be eliminated, constitutes genocide. The numbers of Tutsis subjected to killings and other listed acts involved in Rwanda can readily be considered substantial. International humanitarian agencies estimate that from eight to forty percent of the Tutsi population may have perished. (The figure depends on the estimate of total Tutsi population and the estimate of the number of victims).[6]

Reporting on Human Rights

U.S. Department of State Country Reports on Human Rights Practices

By U.S. law, the Department of State annually must submit to the Congress a "full and complete report regarding the status of internationally recognized human rights" for all UN member states and all states receiving U.S. foreign assistance.[1] At a press briefing on February 26, 1999, the day the country reports on human rights practices for 1998[2] were released, U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor Harold Hongju Koh stated:

The goal of these reports is simple: to tell the truth about human rights conditions around the world. They create a comprehensive, permanent and accurate record of human rights conditions worldwide in calendar year 1998. In a real sense, these reports form the heart of U.S. human rights policy, for they provide the official human rights information base upon which policy judgments are made. They're designed to provide all three branches of the federal government as well as you in the media, foreign governments, intergovernmental organizations and

[6] Memorandum, *supra* note 3, tab 2. Various international organizations, non-governmental organizations and some states criticized the United States for not reacting more quickly to the genocide in Rwanda. For an example of criticism of the United States during 1999–2001 on this issue, see *infra* this chapter.

[1] The reports are submitted to Congress by the Department of State in compliance with the Foreign Assistance Act of 1961, Pub. L. No. 87-195, §§116(d), 502B, 75 Stat. 424 (current version at 22 U.S.C.S. §2151n. (MB 2000)), and the Trade Act of 1974, Pub. L. No. 93-618, §504, 88 Stat. 1978, 2070–71 (current version at 19 U.S.C. §2464 (Supp. IV 1998)).

[2] U.S. Dep't of State, Country Reports on Human Rights Practices for 1998, 106th Cong., 1st Sess. (Joint Comm. Print 1999).

non-governmental organizations with an authoritative, factual basis for evaluating human rights conditions worldwide.

As an academic, I studied and used these reports long before I entered the government. And I've been struck by the development in their comprehensiveness and accuracy during the 22 years since the first report issued. The first report, which I looked at again just the other day, ran only 137 pages and it covered only 82 countries—those receiving U.S. foreign aid. The report we submitted this year represents the largest ever, covering 194 countries and totaling more than 5,000 pages in typed script. This year, thanks to the astonishing and expanding power of the Internet, we expect the report to be even more widely and quickly disseminated. As a point of reference, when last year's report was placed on the worldwide web, over 100,000 people read or downloaded parts of it on the first day of its publication.

These reports represent the yearly output of a massive official monitoring effort that involves literally hundreds of individuals. It's difficult and, at times, dangerous work. I should emphasize that people who acquire this information and pass it on to us—both from the private sector and from our embassies—take risks to gather this information. Having now seen this mammoth process at work from the inside, I can attest to the countless hours of hard work that go into making this report a reality.

. . . .

A report of this magnitude obviously is not easily summarized. In my testimony this afternoon before the House International Relations Committee . . . I elaborated on four themes that run through the reports: democracy, human rights, religious freedom and labor.

A word about each. First, democracy. What makes this year special is that 50 years have now passed since the Universal Declaration of Human Rights first proclaimed all human beings to be "free and equal in dignity and rights." As the Secretary recently noted, the intervening years have taught us that "democratic governance is not an experiment, it is a right accorded to all people under the Universal Declaration."

Since the fall of the Berlin Wall, the numbers of democracies worldwide has nearly doubled—by one measure, growing from 66 to 117 in less than ten years. But at the same time, some traditionally repressive governments, such as China and Cuba, have granted their citizens greater individual authority over economic decision-making, but without accompanying relaxation of controls over peaceful political activity.

What these cases show is that economic freedom cannot compensate for a lack of political freedom, and that a right to democracy necessarily includes a right to democratic dissent—namely the right to participate in political life and to advocate the change of government by peaceful means.

History shows that democracies are less likely to fight one another, [and] more likely to cooperate in security, economic and legal matters. Our own security as a nation depends on the expansion of democracy worldwide, without which, repression and instability can engulf countries or even regions.

As we saw in the year just past, the dangers of such instability are revealed in the disturbing trend toward widespread human rights abuse of civilians trapped in conflict in countries such as Serbia, Sierra Leone, Sudan and the Democratic Republic of the Congo. Our reports chronicle how, in the past year, tens of thousands of men, women and children died not just because of

conflict, but because of premeditated campaigns designed to inflict terror on civilian populations.

Let me just mention briefly two other themes that run through the reports. First, Article 18 of the Universal Declaration protects everyone's right of freedom of thought, conscience and religion. But as these reports demonstrate, too many countries have governments who refuse to respect this fundamental right, discriminating against, restricting, persecuting or even killing those whose faith differs from that of the majority population.

Second, Article 23 of the Universal Declaration says everyone has the right to work, and to free choice of employment, and just and favorable conditions of work. Free trade unions around the world, as we know, have played a critical role in promoting and defending democracy, and in working to eliminate exploitative forms of labor. But again, our reports demonstrate that numerous states continue to interfere with worker rights . . . and also continue to authorize or condone exploitative labor practices.

To address such practices, as Secretary Albright recently noted, we have been working through the International Labor Organization to raise core worker standards, and to conclude a treaty that would ban abusive child labor anywhere in the world.

. . . .

These are the themes of our 1998 reports: democracy, human rights, religious freedom and labor. The reports themselves, which we commend to you, contain our detailed assessment of country conditions with regard to each of these themes. But this afternoon in San Francisco, President Clinton said, "We have no greater purpose as a people, and no greater interest as a country, than to support the right of others to shape their destiny and choose their leaders. We need to keep standing by those who risk their own freedom to win it for others. Today," he said, "we are releasing our annual human rights reports. Their message is sometime resented, but always respected for its candor, its consistency, and for what it says about our country."[3]

The country-by-country report on human rights practices for 1999, released on February 25, 2000,[4] was especially critical of the People's Republic of China (PRC). The report stated, in part:

The People's Republic of China (PRC) is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount source of power. At the national and regional levels, Party members hold almost all top government, police, and military positions. Ultimate authority rests with members of the Politburo. Leaders stress the need to maintain stability and social order and are committed to perpetuating the rule of the CCP and its hierarchy. Citizens lack both the freedom peacefully to express opposition to the Party-led political system and the right to change their national leaders or form of government. Socialism continues to provide the theoretical underpinning of Chinese politics, but Marxist ideology has given way to economic pragmatism in recent years, and economic decentralization has increased the authority of regional officials. The Party's authority rests primarily on the Government's ability to maintain social stability, appeals to nationalism and patriotism, Party control of personnel and the security apparatus, and the continued improvement in the living standards of most of the country's 1.27 billion citizens. The Constitution provides for an independent judiciary; however, in practice, the Government and the CCP, at both the central and local levels, frequently interfere in the judicial

[3] Acting Secretary of State Frank E. Loy and Assistant Secretary for Democracy, Human Rights, and Labor Harold Hongju Koh, Remarks and Press Q&A on 1998 Country Reports on Human Rights at 2–4 (Feb. 26, 1999), *at* <http://www.state.gov/www/policy_remarks/1999/990226_loy_koh_hrr.html>.

[4] U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999, 106th Cong., 2d Sess. (Joint Comm. Print 2000), *at* <http://www.state.gov/www/global/human_rights/drl_reports.html>.

process, and decisions in a number of high profile political cases are directed by the Government and the CCP.

. . . .

The Government's poor human rights record deteriorated markedly throughout the year, as the Government intensified efforts to suppress dissent, particularly organized dissent. A crackdown against a fledgling opposition party, which began in the fall of 1998, broadened and intensified during the year. By year's end, almost all of the key leaders of the China Democracy Party (CDP) were serving long prison terms or were in custody without formal charges, and only a handful of dissidents nationwide dared to remain active publicly. Tens of thousands of members of the Falun Gong spiritual movement were detained after the movement was banned in July; several leaders of the movement were sentenced to long prison terms in late December and hundreds of others were sentenced administratively to reeducation through labor in the fall. Late in the year, according to some reports, the Government started confining some Falun Gong adherents to psychiatric hospitals. The Government continued to commit widespread and well-documented human rights abuses, in violation of internationally accepted norms. These abuses stemmed from the authorities' extremely limited tolerance of public dissent aimed at the Government, fear of unrest, and the limited scope or inadequate implementation of laws protecting basic freedoms. The Constitution and laws provide for fundamental human rights; however, these protections often are ignored in practice. Abuses included instances of extrajudicial killings, torture and mistreatment of prisoners, forced confessions, arbitrary arrest and detention, lengthy incommunicado detention, and denial of due process. Prison conditions at most facilities remained harsh. In many cases, particularly in sensitive political cases, the judicial system denies criminal defendants basic legal safeguards and due process because authorities attach higher priority to maintaining public order and suppressing political opposition than to enforcing legal norms. The Government infringed on citizens' privacy rights. The Government tightened restrictions on freedom of speech and of the press, and increased controls on the Internet; self-censorship by journalists also increased. The Government severely restricted freedom of assembly, and continued to restrict freedom of association. The Government continued to restrict freedom of religion, and intensified controls on some unregistered churches. The Government continued to restrict freedom of movement. The Government does not permit independent domestic nongovernmental organizations (NGOs) to monitor publicly human rights conditions. Violence against women, including coercive family planning practices [(]which sometimes include forced abortion and forced sterilization[)]; prostitution; discrimination against women; trafficking in women and children; abuse of children; and discrimination against the disabled and minorities are all problems. The Government continued to restrict tightly worker rights, and forced labor in prison facilities remains a serious problem. Child labor persists. Particularly serious human rights abuses persisted in some minority areas, especially in Tibet and Xinjiang, where restrictions on religion and other fundamental freedoms intensified.[5]

The country-by-country report on human rights practices for 2000, released on February 26, 2001,[6] was again critical of the PRC, noting that PRC authorities had "intensified their harsh measures against underground Christian groups and Tibetan Buddhists, destroyed many houses of worship, and stepped up their campaign against the Falun Gong movement." Further, the report highlighted the violence in the Middle East, faulting Israel for using "excessive force" and Palestinian forces for participating in (or at least failing to prevent) violent attacks.[7]

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[5] *Id.*

[6] U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2000, 107th Cong., 1st Sess. (Joint Comm. Print 2001), *at* <http://www.state.gov/g/drl/rls/hrrpt/2000/>.

[7] *Id.*, intro.

U.S. Designation and Report on International Religious Freedom

The first report by the U.S. government under the International Religious Freedom Act (discussed above) was released on September 9, 1999.[1] A thousand pages in length, the report cites Afghanistan, China, Iran, Iraq, Saudi Arabia, and Sudan as among the most repressive states. The executive summary notes that many states were deficient on one or more of the following grounds: totalitarian or authoritarian attempts to control religious belief or practice; state hostility toward minority or nonapproved religions; state neglect of discrimination against, or persecution of, minority or nonapproved religions; discriminatory legislation or policies disadvantaging certain religions; and stigmatization of religions by wrongfully associating them with dangerous "cults" or "sects." Subsequently, on November 3, the secretary of state, under authority delegated by the president, designated Burma, China, Iran, Iraq, and Sudan as "countries of particular concern."[2]

In presenting the report, the first U.S. ambassador-at-large for international religious freedom, Robert Seiple, stated:

> The goal of the report is simple: to create a comprehensive record of the state of religious freedom around the world, to highlight the most significant violations of the right to religious freedom, and to help the persecuted. As this report documents extensively, violations of religious freedom, including religious persecution, are not confined to any one country, religion, region, or nationality. . . . It is our hope that this report will do two things: first, provide all three branches of the federal government—as well as the press, foreign governments, religious groups, and NGOs—with a factual basis for evaluating religious freedom worldwide. Second, by so doing, that it will help alleviate suffering, recalling to persecutors and persecuted alike that they are not, and will not be, forgotten.
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> . . . .
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> A report of this magnitude is not easily summarized. Let me start by noting that at the heart of universal human rights lies a powerful idea. It is the notion of human dignity—that every human being possesses an inherent and inviolable worth that transcends the authority of the state. Indeed, this idea is the engine of democracy itself. It flows from the conviction that every person, of whatever social, economic or political status, of whatever race, creed or location, has a value which does not rise or fall with income or productivity, with status or position, with power or weakness. Every human being, declares the Universal Declaration of Human Rights,[3] is "endowed with reason and conscience;" reason and conscience direct us to the source of that endowment, an orientation typically expressed in religion. "Everyone," says the Declaration, "has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance." Religious freedom—the right to pursue one's faith—thus emerges as a cornerstone of human dignity and of all human rights.
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> . . . .
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> At the end of the day, there are no good reasons for any government to violate religious freedom, or to tolerate those within its warrant who do. There are, however, many good reasons to promote religious freedom. It bears repeating that the United States seeks to promote religious freedom, not simply to criticize. Such vital work usually is done out of the limelight, often without acknowledgment, [and] occasionally without knowing its results.

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[1] U.S. DEP'T OF STATE, ANNUAL REPORT ON RELIGIOUS FREEDOM (1999), *at* <http://www.state.gov/www/global/human_rights/irf/irf_rpt/index.html>.

[2] 64 Fed. Reg. 59,821 (1999).

[3] [Author's Note: Universal Declaration of Human Rights (Dec. 10, 1948), Aarts. 1, 18, GA Res. 217 (III 1948).]

> But the work must, and does, take place. It happens when a foreign service officer, sometimes at risk to her own life, presses local authorities to tell where the priest has been taken and why. It happens when an Ambassador, after discussing with a senior official his country's important strategic relationship with the United States, raises that "one more thing"—access to the imprisoned mufti, or information on the missionary who has disappeared. It happens when senior US officials, responsible for balancing and pursuing all of America's national interests, make it clear that a single persecuted individual, perhaps insignificant in the grand affairs of state, matters to the world's most powerful nation. All men and women, whether religious or not, have a stake in protecting the core truths expressed in the Universal Declaration of Human Rights. To preserve religious freedom is to reaffirm and defend the centrality of those truths—and to strengthen the very heart of human rights.[4]

U.S. First Report to the UN Committee on Racial Discrimination

In 1992, the United States signed the International Convention on the Elimination of All Forms of Racial Discrimination.[1] After receiving the advice and consent of the Senate, the United States ratified the Convention in October 1994, whereupon it entered into force for the United States on November 20. The Convention requires States Parties to report to the Convention's committee of experts regarding their efforts to comply with their obligations under the Convention.[2] In September 2000, the United States submitted its first report under the Convention, which was prepared by the U.S. Departments of State and Justice, in collaboration with the White House, the Equal Employment Opportunity Commission, and other executive branch departments and agencies, as well as non-governmental organizations and concerned individuals.[3] The report noted:

> Prior to ratifying the Convention on the Elimination of All Forms of Racial Discrimination, the United States Government undertook a careful study of the requirements of the Convention in light of existing domestic law and policy. That study concluded that U.S. laws, policies and government institutions are fully consistent with the provisions of the Convention accepted by the United States. Racial discrimination by public authorities is prohibited throughout the United States, and the principle of non-discrimination is central to governmental policy throughout the country. The legal system provides strong protections against and remedies for discrimination on the basis of race, color, ethnicity or national origin by both public and private actors. These laws and policies have the genuine support of the overwhelming majority of the people of the United States, who share a common commitment to the values of justice, equality, and respect for the individual.
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> The United States has struggled to overcome the legacies of racism, ethnic intolerance and destructive Native American policies, and has made much progress in the past half century. Nonetheless, issues relating to race, ethnicity and national origin continue to play a negative role in American society. Racial discrimination persists against various groups, despite the progress made through the enactment of major civil rights legislation beginning in the 1860s and 1960s. The path towards true racial equality has been uneven, and substantial barriers must still be overcome.

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[4] U.S. Dep't of State Briefing on Release of the 1999 Annual Report on International Religious Freedom (Sept. 9, 1999), *at* <http://www.state.gov/www/policy_remarks/1999/990909_seiple_koh_irf.html>.

[1] Mar. 7, 1966, 660 UNTS 195.

[2] *Id.*, Art. 9.

[3] *See* Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor, Remarks at a Public Release of the Initial Report of the United States of America to the United Nations Committee on the Elimination of All Forms of Racial Discrimination (Sept. 21, 2000), *obtainable from* <http://www.state.gov>.

Therefore, even though U.S. law is in conformity with the obligations assumed by the United States under the treaty, American society has not yet fully achieved the Convention's goals. Additional steps must be taken to promote the important principles embodied in its text.[4]

U.S. First Report to the UN Committee against Torture

On October 15, 1999, the United States submitted its first report to the UN Committee Against Torture.[1] The UN Committee Against Torture was established by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[2] which entered into force for the United States on November 20, 1994. The United States prepared the report pursuant to its obligation under Article 19.[3] In the Introduction, the report stated:

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. . . .
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> No government, however, can claim a perfect record in each of the areas and obligations covered by the Convention. Abuses occur despite the best precautions and the strictest prohibitions. Within the United States, as indicated in this Report, there continue to be areas of concern, contention and criticism. These include instances of police abuse, excessive use of force and even brutality, and death of prisoners in custody. Overcrowding in the prison system, physical and sexual abuse of inmates, and lack of adequate training and oversight for police and prison guards are also cause for concern.[4]

The report was divided into two main parts and five annexes. The first part explained the federal system of the U.S. government, and the second described how the United States has implemented the various articles of the Convention. The annexes address (1) U.S. reservations, understandings, and declarations in relation to the Convention; (2) relevant U.S. constitutional and legislative provisions; (3) U.S. views on capital punishment; (4) Immigration and Naturalization Service (INS) implementing regulations; and (5) Department of State implementing regulations.

With respect to the federal system of the U.S. government, the report notes that the United States had conditioned its ratification of the Convention on the understanding that the federal government would undertake to implement it to the extent authorized by the U.S. Constitution, the remainder being left to the state and local governments.[5] The report further explained:

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[4] U.S. Dep't of State, Initial Report of the United States of America to the UN Committee on the Elimination of Racial Discrimination at 2 (2000), *at* <http://www.state.gov/www/global/human_rights/cerd report/cerd_toc.html>. For reactions to the report by civil rights groups, see Elizabeth Olson, *U.S. Reports Progress in Fighting Bias; Rights Groups Are Critical*, N.Y. Times, Aug. 7, 2001, at A4.

[1] U.S. Dep't of State, Initial Report of the United States of America to the UN Committee Against Torture (1999), *at* <http://www.state.gov/www/global/human_rights/torture_index.html> [hereinafter Initial Report].

[2] Adopted Dec. 10, 1984, Senate Treaty Doc. No. 100-20 (1988), 1465 UNTS 85, *reprinted in* 23 ILM 1027 (1984), *as modified*, 24 ILM 535 (1985) [hereinafter Torture Convention].

[3] Torture Convention, Art. 19, para. 1.

[4] Initial Report, *supra* note 1, introduction.

[5] *Id.*, Annex I, para. II(5).

> This complicated federal structure both decentralizes police and other governmental authority and constrains the ability of the federal government to affect the law of the constituent jurisdictions directly. Although torture and cruel, unusual or inhuman treatment or punishment are prohibited in every jurisdiction, not every instance in which such acts might occur is directly subject to federal control or responsibility.[6]

The report stressed that federalism "does not detract from or limit the substantive obligations of the United States under the Convention. . . ."[7] The report also emphasized the decentralized structure of the criminal justice system, which included 15,000 separate city, county, and state law enforcement agencies, 1,375 state-operated penal institutions, 94 federal correctional facilities, 93 United States Attorneys, and public prosecutors at the state, county, and municipal levels.[8] The report stated that despite this decentralized structure:

> Every unit of government at every level within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity. Each must also ensure the prompt and thorough investigation of incidents when allegations of mistreatment and abuse are made, and the punishment of those who are found to have committed violations. Accomplishment of necessary reforms and improvements is a continued goal of government at all levels. The United States intends to use its commitments and obligations under the Convention to motivate and facilitate a continual review of the relevant policies, practices, and institutions in order to assure compliance with the treaty.[9]

Although "[a]ny act falling within the Convention's definition is clearly illegal and prosecutable everywhere in the country,"[10] the report noted that Congress by statute[11] implemented the Convention by authorizing federal criminal prosecution of U.S. citizens who commit torture abroad, as well as of any perpetrator, regardless of nationality, who is present in the United States.[12] The report listed civil remedies available to victims of torture throughout the U.S. system, including the Alien Tort Claims Act[13] (which allows noncitizens to sue individuals present in the United States who committed acts of torture against them) and the Torture Victim Protection Act of 1991[14] (which provides a comparable remedy available to U.S. nationals). In addition, the Civil Rights Division of the Department of Justice investigates and prosecutes incidents involving local, state, and federal law enforcement officials, and victims may seek damages against federal officials under the Federal Tort Claims Act, as well as against state officials under state tort law.[15]

Conceding that no government can claim a perfect record in each of the areas and obligations covered by the Convention, the report provided U.S. examples of police abuse and brutality, excessive uses of force, and death of prisoners in custody.[16] These examples included the well-known incidents of police abuse and brutality against Rodney King and Abner Louima, as well as consent decrees and settlements between the federal government and state, county, and city police forces

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[6] *Id.*, pt. I(A).
[7] *Id.*
[8] *Id.*, pt. I(B).
[9] *Id.*, introduction.
[10] *Id.*., pt. I(C).
[11] 18 U.S.C. §§2340, 2340A & 2340B (1994).
[12] INITIAL REPORT, *supra* note 1, pt. I(C).
[13] Alien Tort Claims Act, 28 U.S.C. §1350 (1994) (ACTA) (covering torts committed in violation of international law). For information on the ATCA, see *infra* this Chapter.
[14] Torture Victim Protection Act, 28 U.S.C. §1350 note (1994) (TVPA) (covering torture and summary execution). For information on the TVPA, see*infra* this chapter.
[15] 28 U.S.C. §§1346(b), 2401(b) & 2671–80 (1994).
[16] INITIAL REPORT,*supra* note 1, introduction.

regarding patterns or practices of excessive force.[17] The report identified the factors affecting the Convention's implementation, including racial bias and discrimination, lack of police accountability, crowded prisons, and underfunding of government agencies.[18] Recognizing the need for a comprehensive assessment of the problem of torture in the United States, Congress mandated that the Department of Justice's Bureau of Justice Statistics annually compile information on allegations of torture.[19]

The second part of the report detailed how the constitutional provisions, as well as federal and state laws, meet U.S. obligations to prohibit torture under Article 2 of the Convention.[20] Article 3(1) of the Convention obligates the Convention parties not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The report noted that the United States, through the INS and Department of State, had implemented its obligations through regulations detailed in annexes 4 and 5 of the report. The report indicated that, pursuant to regulations adopted in March 1999, the INS will determine whether "it is more likely than not" that aliens seeking asylum or suspension of removal will be tortured in the country of origin.[21] Similarly, pursuant to regulations issued in February 1999, the State Department will determine whether "it is more likely than not" that aliens will be subjected to torture in cases where they face extradition.[22]

The report highlighted other efforts by the United States to meet its obligations under the Convention. These efforts included the education of the public through the U.S. State Department's Internet home page,[23] as well as extensive training of federal law enforcement and corrections officers as contemplated in Article 10 of the Convention.[24] The United States also provides assistance to torture victims both in the United States, through the U.S. Department of Health and Human Services, and abroad, through the U.S. Agency for International Development.[25]

The report addressed the use of capital punishment in the United States, noting that critics consider this practice to be in violation of Article 16, which obligates states to prevent cruel, inhuman, and degrading treatment or punishment. The United States conditioned its adherence to the Convention on a reservation that Article 16's prohibition on cruel, inhuman, or degrading treatment or punishment refers to such treatment or punishment as prohibited by the Fifth, Eighth, and Fourteenth Amendments.[26] The report noted that "[t]his reservation has the intended effect of leaving the important question of capital punishment to the domestic political, legislative, and judicial processes."[27] In support of the argument that Article 16 was not meant to prohibit the death penalty, the report noted that the prohibition of the death penalty is not included in the text of, but only in an optional protocol to, the International Covenant on Civil and Political Rights.[28]

In an annex on U.S. reservations, understandings, and declarations, the report noted that the United States lodged an understanding at ratification concerning the definition of torture. Article 1 of the convention defines "torture" as any act by a public official "by which severe pain or

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[17] *Id.*, pt. I(C).
[18] *Id.*, pt. I(F).
[19] *Id.*, pt. I(G).
[20] *Id.*, pt. II (discussing Arts. 1 & 2).
[21] *Id.*, pt. II (discussing Art. 3). The INS regulations may be found at 64 Fed. Reg. 8,478 (1999), *as corrected by* 64 Fed. Reg. 13,881 (1999), 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253 & 507 (1999). For immigration cases relating to this issue, see *infra* this chapter.
[22] INITIAL REPORT, *supra* note 1, pt. II (discussing Art. 3). The Department of State regulations may be found at 22 C.F.R. pt. 95 (1999). For extradition cases relating to this issue, see *infra* Ch. X.
[23] *See* <http://www.state.gov/www/global/human_rights/index.html>.
[24] INITIAL REPORT, *supra* note 1, pt. II (discussing Art. 10).
[25] *Id.*, (discussing Art. 13).
[26] *Id.*, Annex I, para. I(1). The United States also filed an understanding that international law does not prohibit the death penalty and that the Convention does not restrict the United States from applying the death penalty consistent with U.S. constitutional guidelines. *Id.*, para. II(4).
[27] *Id.*, pt. II (discussing Art. 16).
[28] *Id.*

suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as" obtaining information or a confession, punishing the person, and intimidating or coercing the person, as well as for reasons based on discrimination. This definition is generally considered to include the infliction of mental pain and suffering through mock executions, sensory deprivation, use of drugs, and confinement to mental hospitals. The annex of the report reiterated, however, that the U.S. understanding seeks to provide a more precise legal definition:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[29]

The report emphasized that the United States understands "torture" as addressing "acts directed against persons in the offender's custody or physical control."[30] It also stated that in order to be held responsible for the use of torture by subordinates, a public official must have prior knowledge that such acts will take place, and also fail to take action to prevent those acts.[31]

Assistant Secretary of State for Democracy, Human Rights and Labor, Harold Hongju Koh, commented upon the report as follows.

> The right to be free from torture is an indelible element of the American experience. Our country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights. . . .
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> Within the United States, as we fully acknowledge in this report, there continue to be areas of concern, contention and criticism. But we note that torture does not occur in the United States, except in aberrational situations and never as a matter of policy. . . . We acknowledge areas where we must work harder because we believe the first step is to identify torture wherever it exists. We believe that this report is both comprehensive and candid. We have accurately and thoroughly exposed our strengths and failings and call upon other signatory states, as well as the entire international community, to do the same.[32]

Criticism of the United States

UN Reaction to U.S. Torture Convention Report

On May 15, 2000, the UN Committee Against Torture reacted to the first U.S. report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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[29] *Id.*, Annex I, para. II(1)(a).
[30] *Id.*, para. II(b).
[31] *Id.*, para. II(d).
[32] Harold Hongju Koh, U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, and James E. Castello, Associate Deputy Attorney General, U.S. Dep't of State Press Release on On-the-Record Briefing on the Initial Report of the United States of America to the UN Committee Against Torture (Oct. 15, 1999), *at* <http://secretary.state.gov/www/briefings/statements/1999/ps991015.html>.

discussed above. The committee welcomed the extensive U.S. legal protection against torture and the efforts pursued by U.S. authorities to achieve transparency of the nation's institutions and practices. The committee also acknowledged the broad legal recourse to compensation for victims of torture (whether or not such torture occurred in the United States), the introduction of federal regulations preventing "refoulement" of potential torture victims, and the U.S. contributions to the UN Voluntary Fund for the Victims of Torture.

The committee expressed its concern, however, about the failure of the United States to establish a federal crime of torture in terms consistent with Article 1 of the Convention, and called upon the United States to withdraw its reservations, interpretations, and understandings relating to the Convention. The committee also expressed concern about the number of cases of the mistreatment of civilians by police, and of mistreatment in prisons by police and prison guards—much of which seemed to be based upon discrimination, including alleged cases of sexual assault upon female detainees and prisoners. The committee noted that the electroshock devices and restraint chairs used in U.S. law enforcement may be methods of constraint that violate Article 16 of the Convention, which prohibits acts of cruel, inhuman, or degrading treatment by public officials. Finally, the committee expressed concern about the use of "chain gangs" (particularly in public), about restrictions on legal actions by prisoners seeking redress for harm incurred in prison, and about the holding of minors (juveniles) with adults in the regular prison population.[1]

Amnesty International Criticism of the United States for Human Rights Violations

In its first campaign directed against a Western nation,[1] Amnesty International published a report in October 1998 that harshly criticized the United States for "a persistent and widespread pattern of human rights violations." The report claimed that U.S. authorities have failed to prevent repeated violations of basic human rights: the right to freedom from torture and cruel, inhuman or degrading treatment, the right to life, and the right to freedom from arbitrary detention. According to the report, these violations were perpetrated by U.S. police officers, prison guards, immigration and other officials in violation of U.S. laws and guidelines, as well as international standards. The report described, for example, the following findings:

> Systematic brutality by police has been uncovered by inquiries into some of the country's largest urban police departments. . . . Across the USA, people have been beaten, kicked, punched, choked and shot by police officers even when they posed no threat. The majority of victims have been members of racial or ethnic minorities. . . .
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> Behind the walls of prisons and jails largely hidden from outside examination, there is more violence. Prisoners are particularly vulnerable to human rights abuses, and more than 1.7 million people are incarcerated in the USA. Some prisoners are abused by other inmates, and guards fail to protect them. Others are assaulted by the guards themselves. Women and men are subjected to sexual, as well as physical, abuse. . . .
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> US authorities persistently violate the fundamental human rights of people who have been forced by persecution to leave their countries and seek asylum. As if they were criminals, many asylum-seekers are placed behind bars when they arrive in the country. Some are held in shackles.

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[1] UN Press Release on Committee Against Torture, 24th Sess. (May 15, 2000), *obtainable from* <http://www.unhchr.ch/hurricane/huricane.nsf/newsroom> (document dated May 16, 2000); *see* Elizabeth Olson, *U.S. Prisoner Restraints Amount to Torture, Geneva Panel Says*, N.Y. TIMES, May 18, 2000, at A11.

[1] *See* Barbara Crossette, *Amnesty Finds "Widespread Pattern" of U.S. Rights Violations*, N.Y. TIMES, Oct. 5, 1998, at A11. At the 1999 annual meeting of the UN Human Rights Commission, Amnesty International for the first time placed the United States on its priority list of human rights violators, in the company of states such as Algeria, Cambodia, and Turkey. *See* Elizabeth Olson, *Good Friends Join Enemies To Criticize U.S. on Rights*, N.Y. TIMES, Mar. 28, 1999, at 11.

They are detained indefinitely in conditions that are sometimes inhuman and degrading. . . .

International human rights standards aim to restrict the death penalty; they forbid its use against juvenile offenders, see it as unacceptable punishment for the mentally impaired, and demand the strictest legal safeguards in capital trials. In the USA, the death penalty is applied in an arbitrary and unfair manner and is prone to bias on grounds of race or economic status. . . .

International human rights standards exist for the protection of all people throughout the world, and the USA has been centrally involved in their development. Some are legally binding treaties; others represent the consensus of the international community on the minimum standards which all states should adhere to. While successive US governments have used these international human rights standards as a yardstick by which to judge other countries, they have not consistently applied those same standards at home.[2]

U.S. Promotion of Human Rights Abuses in Guatemala During the Cold War

In 1994, the government of Guatemala and Guatemalan guerilla forces (the Guatemalan National Revolutionary Unity) agreed, as part of a UN-sponsored peace process, on the establishment of a Commission for Historical Clarification (CEH) to elucidate the human rights violations and acts of violence connected with Guatemala, which began in 1962 and concluded in 1996. The CEH conducted an extensive five-year investigation. The U.S. government provided financial support for the CEH's investigation (as did other governments), and declassified U.S. documents for its review.[1]

The CEH issued its report, entitled "Guatemala: Memory of Silence," on February 25, 1999.[2] Among other things, the report concluded that Guatemala's internal armed "confrontation" claimed some 42,275 victims, of which 23,671 suffered arbitrary execution and 6,159 forced disappearance. Further, 83 percent of fully identified victims were Mayan and 17 percent were Ladino. The CEH further estimated that the number of persons who were killed or had disappeared as a result of the confrontation exceeded 200,000. In puzzling out the cause of this tragedy, the CEH noted that the antidemocratic nature of the Guatemalan political tradition was rooted in an economic structure in which productive wealth was concentrated in the hands of a minority. That concentration meant that there were "multiple exclusions" of persons from the social system, which in turn led to protest and political instability, and from there to military coups and repression through use of violence and terror.

Notably, the CEH viewed this situation as not just the result of national history, but also of the Cold War. The CEH found that:

Whilst anti-communism, promoted by the United States within the framework of its foreign policy, received firm support from right-wing political parties and from various other powerful actors in Guatemala, the United States demonstrated that it was willing to provide support for strong military regimes in its strategic backyard. In the case of Guatemala, military assistance was directed towards reinforcing the national intelligence apparatus and for training the officer corps in counterinsurgency techniques, key factors which had significant bearing on human rights violations during the armed confrontation.[3]

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[2] AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA RIGHTS FOR ALL 2–3 (1998) (footnote omitted).

[1] *See* Mireya Navarro, *Guatemalan Army Waged "Genocide," New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1; Larry Rohter, *Searing Indictment: Commission's Report on Guatemala's Long, Brutal War Packs a Surprise*, N.Y. TIMES, Feb. 27, 1999, at A4. The Commission consisted of a Guatemalan jurist, a Guatemalan educator, and a German jurist, Christian Tomuschat, who headed the panel.

[2] COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE: CONCLUSIONS AND RECOMMENDATIONS (1999). The full nine-volume report was provided only to the government of Guatemala, representatives of the political party that succeeded the guerilla forces, and the United Nations. An 86-page summary of the conclusions and recommendations, quoted herein, was issued to the public.

[3] *Id.* at 19.

Acting in the name of anticommunism, and with the support of the United States, the report described how the government of Guatemala engaged in the kidnapping and assassination of political activists, students, trade unionists, and human rights advocates, all categorized as "subversives;" the forced disappearance of political and social leaders and poor peasants; and the systematic use of torture. The report found that these acts of the government of Guatemala constituted violations of Guatemalan law, human rights law, and international humanitarian law, and included acts of genocide against Mayan people. The report further stated that the violations committed by guerrilla forces were on a much lower scale. In accordance with its mandate, the CEH did not specify responsible individuals, but did recommend, among other things, the creation of a national reparations program, exhumations of bodies from clandestine cemeteries, and the implementation of measures to strengthen the democratic process, including judicial and military reform.[4] The report did not recommend that reparations be paid by the United States.

When commenting on the report, the head of the CEH stated that:

> The commission's investigations demonstrate that until the mid-1980's, the United States Government and U.S. private companies exercised pressure to maintain the country's archaic and unjust socio-economic structure. In addition, the United States Government, through its constituent structures, including the Central Intelligence Agency, lent direct and indirect support to some illegal state operations.[5]

On March 10, 1999, during a visit to Guatemala, President Clinton apologized for U.S. actions there, saying: "For the United States, it is important that I state clearly that support for military forces or intelligence units which engage in violent and widespread repression of the kind described in the report was wrong, and the United States must not repeat that mistake."[6]

OAU Report Regarding Rwandan Genocide

States that are party to the Genocide Convention have agreed that "genocide, whether committed in time of peace or in time of war is a crime under international law which they undertake to prevent and to punish."[1] In 1998, the Organization of African Unity (OAU) created an "International Panel of Eminent Personalities" with a mandate "to investigate the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region . . . as part of efforts aimed at averting and preventing further wide-scale conflicts in the . . . Region."[2] The OAU asked the panel

> to establish the facts about how such a grievous crime was conceived, planned, and executed, to look at the failure to enforce the [United Nations] Genocide Convention in Rwanda and in the Great Lakes Region, and to recommend measures aimed at redressing the consequences of the genocide and at preventing any possible recurrence of such a crime.[3]

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[4] *Id*. at 33–44, 49–52, 54, & 58–65.

[5] Excerpts from Tomuschat's statement appear at *The Atrocity Findings: "The Historic Facts Must Be Recognized,"* N.Y. TIMES, Feb. 26, 1999, at A8. Further information about the U.S. involvement in Guatemala, including information that the U.S. government was fully aware of the atrocities at the time they were being committed by the government of Guatemala, may be found in recently declassified U.S. government documents. *See* Douglas Farah,*"We've Not Been Honest,"* WASH. POST, Mar. 12, 1999, at A25; Douglas Farah,*Papers Show U.S. Role in Guatemalan Abuses*, WASH. POST, Mar. 11, 1999, at A26.

[6] Remarks in a Roundtable Discussion on Peace Efforts in Guatemala City,35 WEEKLY COMP. PRES. DOC. 395 (Mar. 15, 1999); *see* John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, Mar. 11, 1999, at A1.

[1] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. 1, S. EXEC. DOC. NO. B., 91-2, at 1 (1970), 78 UNTS 277, 280. The United States is a party to this convention.

[2] *Rwanda: The Preventable Genocide,* Annex A, ¶E.S.1, OAU Doc. IPEP/PANEL (May 29, 2000), *reprinted in* 40 ILM 141 (2001), *at* <http://www.oau-oua.org/Document/ipep/ipep.htm>.

[3] *Id.*

On May 29, 2000, the panel[4] presented its report, entitled *Rwanda: The Preventable Genocide*.[5] In it, the panel criticized various actions of the United Nations, France, and other states, but also focused on the inaction of the United States:

> 12.32. . . . As for the American role in the Rwandan genocide specifically, it was brief, powerful, and inglorious. There is very little controversy about this. Not only do authorities on the subject agree with this statement, so now does the American president who was responsible for the policies he belatedly finds so reprehensible. Unlike France, America has formally apologized for its failure to prevent the genocide, although President Clinton insists that his failure was a function of ignorance. It was, however, a function of domestic politics and geopolitical indifference. In the words of one American scholar, it was simply "the fear of domestic political backlash."
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> 12.33. The politics were simple enough. In October 1993, at the precise moment Rwanda appeared on the agenda of the Security Council, the US lost 18 soldiers in Somalia. That made it politically awkward for the US to immediately become involved again in another peacekeeping mission. The Republicans in Congress were hostile to almost any UN initiative regardless of the purpose, and the Somalia debacle simply reinforced their prejudices. But it is also true that the Clinton Administration, like every Western government, knew full well that a terrible calamity was looming in Rwanda. On this the evidence is not controvertible. The problem was not that the Americans were ignorant about Rwanda. The problem was that nothing was at stake for the United States in Rwanda. There were no interests to guard. There were no powerful lobbies on behalf of Rwandan Tutsi. But there were political interests at home to cater to.
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> . . . .
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> 12.36. Low expectations were thoroughly fulfilled, as was quickly seen in the establishment by the Security Council of UNAMIR, the UN Assistance Mission to Rwanda. Rwandan Tutsi, already victimized at home, now became the tragic victims of terrible timing and tawdry scapegoating abroad. The murder of the 18 American soldiers in Somalia indeed traumatized the United States government. The Rangers died on October 3. The resolution on UNAMIR came before the Security Council on October 5. The following day the American army left Somalia. This coincidence of timing proved disastrous for Rwanda. From then on, an unholy alliance of a Republican Congress and a Democratic President dictated most Security Council decisions on peacekeeping missions. The Clinton Administration immediately began to set out stringent conditions for any future UN peacekeeping operations. Presidential Decree Directive 25 (PDD25) effectively ruled out any serious peace enforcement whatever by the UN for the foreseeable future. This American initiative in turn deterred the UN Secretariat from advocating stronger measures to protect Rwandan citizens. . . .
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> . . . .
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> 12.41. Since we have already made clear our view that several nations, organizations, and institutions directly or otherwise contributed to the genocide, we can hardly blame the catastrophe solely on the US. On the other hand, it is indisputably true that no nation did more than the US to undermine the effectiveness of UNAMIR. Terrified Rwandans looked to UNAMIR

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[4] The panel members were Quett Ketumile Joni Masire (chairman, Botswana), P. N. Bhagwati (India), Hocine Djoudi (Algeria), Stephen Lewis (Canada), Lisbet Palme (Sweden), Ellen Johnson-Sirleaf (Liberia), and Amadou Toumani Touré (Mali).

[5] *Rwanda: The Preventable Genocide, supra* note 2.

for protection, yet "with the exception of Great Britain, the United States stood out as exceptionally insensitive" to such hopes.

. . . .

15.14. . . . On April 12, 10 days into the genocide, the Security Council passed a resolution stating that it was "appalled at the ensuing large-scale violence in Rwanda, which has resulted in the deaths of thousands of innocent civilians, including women and children." It then voted unanimously to reduce UNAMIR to a token force of about 270 personnel and to limit its mandate accordingly. . . .

15.15. The major powers may have been appalled, but they were intransigent about becoming involved. According to James Woods, who had been at the Pentagon for eight years as Deputy Assistant Secretary of [Defense] for African Affairs, the US government knew "within 10 to 14 days" of the plane crash that the slaughter was "premeditated, carefully planned, was being executed according to plan with the full connivance of the then-Rwandan government." . . .

15.16. There was no issue of insufficient information in the US. Human Rights Watch and the US Committee for Refugees, both of whom had first-hand knowledge from within Rwanda, persistently held public briefings and issued regular updates on the course of events. That it was a genocide was beyond question. Within two weeks, the International Committee of the Red Cross estimated that perhaps hundreds of thousands were already dead and that the human tragedy was on a scale the Red Cross had rarely witnessed. At the same time, the Security Council strategy, driven by the US, had been criticized for its irrationality.

15.17. James Woods, the former Pentagon African specialist, believes that "the principal problem at the time was a failure of leadership, and it was deliberate and calculated because whether in Europe or in New York or in Washington, the senior policy-making levels did not want to face up to this problem. . . . 'We're not going to intervene in this mess, let the Africans sort themselves out.'"[6]

In its concluding recommendations, the panel called for reparations to be paid to Rwanda and its victims by states that failed to act, and also for other steps. When asked about the report and the proposal for reparations, U.S. Department of State spokesman Richard Boucher stated:

I do think that we have been very active in supporting the aid effort that's under way. We've provided over $100 million of assistance to displaced and refugee populations in the first year of the crisis. In 1994, we did more. . . .

The other thing . . . to address is the President's statement that he said we need to learn the lessons, we need to do everything we can in our power to help build the future. We have taken several steps to address the threat of resurgent genocide in the region and, more generally, improve the ability of the international community to deal with the issue of genocide, should we again have to face that task.

During his trip to Africa, the President announced two initiatives for the Great Lakes region: the Justice Initiative and the International Coalition Against Genocide for the Great Lakes Region. Through this initiative, we're trying to counter the culture of impunity that's spawned so much of the violence and we're trying to rebuild the rule of law in the region. The International Coalition is still in the formation process but that's an attempt to bring together

[6] *Id.*, ¶¶12.32–33, 12.36, 12.41, 15.14–17 (footnotes omitted).

> the states of the region to work systematically to prevent counter-genocide. And we, as you know, have created a position here in this building . . . of Ambassador at Large for War Crimes Issues.
>
> Ambassador David Scheffer heads that office and he has focused much of his work on Rwanda. The work that he does, including the work of the Interagency Group on Atrocities, is to detect early signs of possible genocide, other serious violations of [humanitarian] law and to make recommendations to policymakers about how to prevent them. So we are trying to learn the lessons and we are trying to prevent this kind of thing from occurring in the future.[7]

Loss of U.S. Seat on the UN Human Rights Commission

The fifty-three members of the UN Human Rights Commission are elected to three-year terms, with about one-third of the commission coming up for re-election every year. By practice, the seats are divided geographically, and if a regional group agrees upon its slate of nominees then those nominees are elected by the UN Economic and Social Council (ECOSOC) without a vote. If a regional group cannot agree upon its slate, all its candidates are presented to ECOSOC for a secret vote.

From 1947 to 2001, the United States held a seat on the commission. In May 2001, however, when the United States came up for reelection, three slots were available in its geographic region (North America and Western Europe), and agreement could not be reached within the group on which three states should be put forward. Consequently, four states were put forward and, after secret ballot, Austria, France, and Sweden were elected over the United States. At the same time, Sudan—a country that independent human rights groups accuse of permitting slavery and of committing gross abuses against political and religious freedom—was elected to the Commission.[1] Several commentators viewed the vote as reflecting the international community's criticism of U.S. unilateralism in international law, including U.S. resistance to ratification of human rights treaties and other treaties, such as the statute for the international criminal court.[2] U.S. officials expressed dismay at the vote, but asserted that the United States would remain engaged in the work of the Commission.[3]

Alien Tort Claims Act and Torture Victim Protection Act Cases

Background

During 1999–2001, several human rights cases were considered in U.S. courts under the Alien Tort Claims Act (ATCA)[1] and the Torture Victim Protection Act of 1991 (TVPA).[2]

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[7] Richard Boucher, Spokesman, U.S. Dep't of State Daily Press Briefing at 6–7 (July 7, 2000), *at* <http://secretary.state.gov/www/briefings/0007/000707db.html>;*see Albright Disputes Report on Rwanda*, Wash. Post, July 10, 2000, at A4 (quoting Secretary Albright as stating, "The truth, though, that has to be kept in mind is that the whole thing exploded rapidly. There wasn't a U.N. force capable of taking this on."). For information on the U.S. decision to declare that "genocide" was occurring in Rwanda, see *supra* this chapter.

[1] *See* Barbara Crossette, *U.S. Is Voted Off Rights Panel of the U.N. for the First Time*, N.Y. Times, May 4, 2001, at A12. For the composition of the UN Human Rights Commission after the election, see Office of the High Commissioner for Human Rights, United Nations Commission on Human Rights Membership for the 58th Session (2002), *at* <http://www.unhchr.ch/html/menu2/2/chr.htm>.

[2] *See, e.g.*, Harold Hongju Koh, *A Wake-up Call on Human Rights*, Wash. Post, May 8, 2001, at A23.

[3] *See* U.S. Dep't of State Daily Press Briefing at 4 (May 4, 2001), *obtainable from* <www.state.gov>; *The U.N. Human Rights Commission: The Road Ahead*, S. Hrg. 107-55 (2001); Marc Lacey, *U.S. Attacks Rights Group for Ousting It as a Member*, N.Y. Times, May 5, 2001, at A4 (quoting a White House spokesman that "A Commission that purports to speak out on behalf of human rights, that now has Sudan and Libya as members and doesn't have the United States as a member, I think may not be perceived as the most powerful advocate of human rights in the world.").

[1] 28 U.S.C. §1350 (1994). For a discussion of prominent ATCA cases from 1980-98, see Donald J. Kochan, Note,*Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 Cornell Int'l L.J. 153, 162–68 (1998).

[2] 28 U.S.C. §1350 note (1994).

The ATCA provides for a civil action in U.S. court by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States." To succeed on an ACTA claim, three key elements must exist: the claim must be filed by an alien (i.e., not a citizen or national of the United States); the claim must be for a tort; and the action in controversy must have violated international law. With respect to the last element, ACTA claims generally have been limited to suits against individuals[3] acting under "color of state authority," since it generally is assumed that only states can violate international law,[4] but recent case law also supports claims when based on a handful of egregious offenses (namely, piracy, slave trading, and certain war crimes) that lead to individual liability under international law.

The TVPA provides for a civil action in U.S. court by U.S. nationals "against an individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to torture or extrajudicial killing. Unlike the ACTA, U.S. nationals may bring claims under the TVPA, but those claims are limited to torture and extrajudicial killing.

Some of the most interesting ATCA and TVPA cases in this period concerned procedural issues (such as forum non conveniens and statute of limitations), the ability to sue corporate persons for complicity in human rights abuses by foreign governments, the ability to sue persons acting on behalf of the U.S. government for human rights abuses, and the issuance of judgments against persons in high profile cases.[5] Each is discussed in turn.

Forum Non Conveniens

In *Wiwa v. Royal Dutch Petroleum Co.*, four Nigerian emigres in 1999 sued the Royal Dutch Petroleum Company (Royal Dutch) and Shell Transport and Trading Co (Shell Transport), two business corporations incorporated in The Netherlands and the United Kingdom respectively, that were doing business in the United States. The plaintiffs alleged that the defendants directly or indirectly engaged in human rights abuses, including summary execution, crimes against humanity, and torture, inflicted by the Nigerian government on the plaintiffs (or their deceased relatives) in reprisal for their political opposition to the defendants' oil exploration activities in Nigeria.

The district court found that it had jurisdiction over the defendants, but dismissed the case on grounds of forum non conveniens, finding that the United Kingdom was an adequate alternative forum and that a balancing of public interest and private interest factors made that forum

[3] Suits against governments present difficulties under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1441(d), 1602–11 (1994). *See generally* Justin Lu, Note, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997).

[4] *See* Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute—Trajano v. Marcos*, 27 CORNELL INT'L L.J. 387, 411 (1994).

[5] For other ACTA and TVPA cases during 1999–2001 not discussed below, see Wong-Opasi v. Tenn. State Univ., 2000 WL 1182827 (6th Cir. Aug. 16, 2000) (holding that appellant, a U.S. permanent resident who brought suit against Tennessee Board of Regents for employment discrimination, failed to state a violation of international law under the ATCA); Faulder v. Johnson, 178 F.3d 741 (5th Cir. 1999) (finding that a prisoner sentenced to death cannot seek stay of execution by alleging a violation of international human rights treaties and the Vienna Convention on Consular Relations under the ATCA because his exclusive appropriate remedy was a writ of habeas corpus); Jogi v. Piland, 131 F.Supp.2d 1024 (C.D. Il. 2001) (concluding that a police officer's failure to inform a dual citizen of his right to contact the Indian consulate was not a violation of international law sufficient to invoke jurisdiction under the ATCA); Kruman v. Christie's Int'l PLC, 129 F.Supp.2d 620 (S.D.N.Y. 2001) (finding that auction buyers who were overcharged as a result of admitted price fixing did not have a claim against the auction houses because price fixing is not an adequate violation of the law of nations required under the ATCA, especially for nonstate actors); Bano v. Union Carbide Corp., No. 99 Civ. 11329 (JFK), 2000 WL 1225789 (S.D.N.Y. Aug. 28, 2000) (holding that a previous settlement between a chemical plant and those injured in a chemical leak at the plant bars future claims brought against the plant under the ATCA).

preferable.[1] On December 14, 2000, the Second Circuit Court of Appeals reversed, and in doing so articulated a standard for cases brought under the ATCA, a statute passed in 1789, that drew upon the passage of the TVPA in 1991. The court stated:

> In passing the Torture Victim Prevention Act, 28 U.S.C. §1350 App., in 1991, Congress expressly ratified our holding in *Filartiga*[2] that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and carried it significantly further. While the 1789 Act expressed itself in terms of a grant of jurisdiction to the district courts, the 1991 Act (a) makes clear that it creates liability under U.S. law where under "color of law, of any foreign nation" an individual is subject to torture or "extra judicial killing," and (b) extends its remedy not only to aliens but to any "individual," thus covering citizens of the United States as well. 28 U.S.C. §1350 App. The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law. See H.R.Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 (noting that purposes of TVPA are to codify *Filartiga*, to alleviate separation of powers concerns, and to expand remedy to include U.S. citizens).
>
> Whatever may have been the case prior to passage of the TVPA, we believe plaintiffs make a strong argument in contending that the present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits. Two changes of statutory wording seem to indicate such an intention. First is the change from addressing the courts' "jurisdiction" to addressing substantive rights; second is the change from the ATCA's description of the claim as one for "tort . . . committed in violation of the law of nations . . . " to the new Act's assertion of the substantive right to damages under U.S. law. This evolution of statutory language seems to represent a more direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations.
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> . . . .
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> One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as "not our business."
>
> The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is "our business," as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. . . .

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[1] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 91, 94 (2d Cir. 2000), reprinted in 40 ILM 481 (noting that the district court conditioned the dismissal on the defendants' commitment to consent to service of process in the United Kingdom, comply with all U.K. discovery orders, pay any U.K. judgment, waive a security bond, and waive a statute of limitations defense if the action was begun in the United Kingdom within one year of the dismissal).

[2] [Author's Note: Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).]

> This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of forum non conveniens. The statute has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business. The TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the *Gilbert* factors[3] "tilt[ ] strongly in favor of trial in the foreign forum." R. Maganlal & Co., 942 F.2d at 167.[4]

The court then found that the district court erred by counting the fact that the plaintiffs were not residents of the Southern District of New York against the retention of jurisdiction, failing to count the U.S. interests in favor of retention, and giving no consideration to the "very substantial expense and inconvience that would be imposed on the impecunious plaintiffs by dismissal in favor of a British forum."[5]

In *Aguinda v. Texaco, Inc.*,[6] the U.S. District Court for the Southern District of New York noted the *Wiwa* decision when considering a motion to dismiss an ATCA case on grounds of forum non conveniens. In that case, the plaintiffs were citizens of Peru and Ecuador who brought a class action suit alleging that the defendant, in consortium with an Ecuadorean government enterprise, had polluted rain forests and rivers in their countries, causing environmental damage and personal injuries. The district court weighed the public and private interest factors, and decided to grant the motion to dismiss. The court noted that no act taken by the defendant in the United States bore materially on the alleged pollution-creating activities.[7] Further, the court noted that the ATCA claim—that the consortium's extraction activities violated evolving environmental norms of customary international law—"lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss."[8] For support, the court cited to *Beanal v. Freeport-McMoran, Inc.*,[9] in which an Indonesian resident, Tom Beanal, sued certain U.S. mining companies for their activities in Indonesia, which allegedly resulted in torts violating international environmental treaties and standards. The Fifth Circuit Court of Appeals in *Beanal* affirmed a dismissal of the case for lack of subject matter jurisdiction, stating:

> Beanal fails to show that these treaties and agreements enjoy universal acceptance in the international community. The sources of international law cited by Beanal and the amici merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts. Although the United States has articulated standards embodied in federal statutory law to address environmental violations domestically, nonetheless, federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments.[10]

Statute of Limitations

On October 6, 1942, Nazi troops abducted Elsa Iwanowa from her home in Rostov, Russia, and sold her and many other adolescents to Ford Werke, a subsidiary in Cologne, Germany of the U.S.

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[3] [Author's Note: Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).]
[4] 226 F.3d at 104–06.
[5] *Id.* at 106 (footnotes omitted).
[6] 142 F.Supp.2d 534 (S.D.N.Y. 2001).
[7] *Id.* at 553.
[8] *Id.* at 552.
[9] 197 F.3d 161 (5th Cir. 1999).
[10] *Id.* at 167 (citation omitted).

Ford Motor Company. Iwanowa performed heavy labor without compensation from 1942-1945, including drilling holes into the motor blocks of engines for military trucks. In 1945, Iwanowa was liberated by the allied forces and she became a citizen of Belgium where she resides.

In 1998, Iwanowa brought suit in U.S. federal court under the ATCA claiming that Ford Werke and Ford Motor Company's use of forced labor violated the laws of war. In a decision rendered October 28, 1999, the district court agreed that Iwanowa was an alien, that the defendants committed a tort by forcing her to perform unpaid labor in inhumane conditions, and that the "use of unpaid, forced labor during World War II violated clearly established norms of customary international law."[1] Further, the case could proceed against nonstate actors because the nature of the tort qualified as "slave-trading and war crimes."[2]

Yet the court then found that Iwanowa's claim failed because it was not brought within the statute of limitations. Although the ATCA does not contain a statute of limitations, the court found that "courts should apply the limitations period of the 'most closely analogous statute of limitations under state law.'"[3] In this case, the closest analogy under federal law was the TVPA, which has a ten-year statute of limitations period. Since the Second World War ended in 1945 and this action was brought in 1998, the court found the claim time-barred.[4]

By contrast, in *Bodner v. Banque Paribas*,[5] a class action was brought under the ACTA on behalf of all persons who themselves or whose family members were Jewish victims and survivors of the Nazi Holocaust in France and whose assets were deposited in, processed by, or converted by one or more defendant banks during or after the Holocaust and not returned.[6] The defendants moved to dismiss the case as time-barred. The court accepted the plaintiffs' theory that the alleged "continued denial and failure to return the looted assets to the plaintiffs, until this very day, means that the statute has not begun to run," and "since plaintiffs have been kept in ignorance of vital information necessary to pursue their claims without any fault or lack of due diligence," the doctrine of equitable tolling applies.[7] Similarly, in *Cabello v. Fernandez-Larios*, a Chilean prisoner's estate in 1999 sued a former Chilean soldier for extrajudicial killing, torture, and other claims under the ATCA and the TVPA. The defendant moved to dismiss the claims as time barred, noting that the death of the prisoner occurred in 1973. While the district court accepted that there was a ten-year statute of limitation under the TVPA, which should also be applied to the ATCA, the court found that equitable tolling was appropriate, because the Chilean military authorities for years had deliberately concealed the decedent's burial location from the plaintiffs. Since the plaintiffs could only view the body as of 1990, they had no means of knowing the exact nature of the decedent's death.[8]

Suits against Corporate Persons

In 1996, fifteen villagers from the Tenasserim region of Burma (Myanmar) filed a class action lawsuit in a U.S. federal court against various defendants involved in a joint venture to extract natural gas from oil fields off the coast of Burma and to transport the gas to the Thai border via a pipeline.[1] The defendants included Unocal Corporation (a U.S. corporation), Total S.A. (a French

[1] Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 439–40 (D.N.J. 1999).
[2] *Id.* at 443–44.
[3] *Id.* at 462 (citing to Forti v. Suarez-Mason, 672 F.Supp. 1531, 1547 (N.D.Cal. 1987)).
[4] *Id.* at 462–63.
[5] 114 F.Supp.2d 117 (E.D.N.Y. 2000).
[6] *Id.* at 121.
[7] *Id.* at 134–35.
[8] Cabello v. Fernandez-Larios, No. 99-0528, 2001 WL 964931 (S.D.Fla. Aug. 10, 2001).
[1] For a parallel case brought by different plaintiffs, see Nat'l Coalition Gov't of the Union of Burma v. Unocal, 176 F.R.D. 329 (C.D.Cal. 1997). For a general discussion of corporate complicity under the ATCA, see Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487 (2001).

corporation), the Myanmar Oil and Gas Enterprise (wholly owned by the government of Burma), and the government of Burma. The plaintiffs alleged that the defendants were responsible under the ACTA, as well as other federal and state laws, for international human rights violations, including forced labor, perpetrated by the Burmese military in furtherance of the pipeline portion of the project. The claims against Burma and its wholly owned corporation were dismissed in 1997 on grounds of sovereign immunity.[2] The claims against Total S.A. were dismissed in 1998 for lack of personal jurisdiction.[3]

The district court refused, however, to dismiss the claims against Unocal, finding that corporations are within the ambit of the ATCA when they engage in cooperative behavior with governments engaged in human rights violations.[4] This decision was heralded as a new step in promoting transnational corporate responsibility, but in August 2000 the court granted Unocal's motion for summary judgment because—as a factual matter—the corporation was not sufficiently connected to the construction and operation of the gas pipeline to sustain a claim that it engaged in a tort "in violation of the law of nations or a treaty of the United States."[5] The court found that in order to sustain such a claim, it must be shown that Unocal either acted under "color of state authority" or engaged in a handful of offenses (namely, piracy, slave trading, and certain war crimes) that lead to individual liability under international law. The court found that under the terms of various agreements entered into by Unocal, Total, and Burma, a separate limited-liability corporation had been responsible for the construction and operation of the gas pipeline. Moreover, since the plaintiffs presented no evidence that Unocal participated in, influenced, or controlled the military's decision to commit the alleged tortious acts, the court held that Unocal did not act under color of law for purposes of the ATCA. While the court agreed with plaintiffs that Unocal had invested in the project as a whole and, along with the other participants, shared the goal of making the project profitable, that shared goal alone did not establish joint action. Likewise, while the court agreed that "forced labor" falls within the handful of offenses that lead to individual liability under international law, it found that there was insufficient evidence suggesting that Unocal sought to have the joint venture employ such labor. In short, the court looked for, but did not find, a "substantial degree of cooperative action"[6] between the state and the private actor in effecting the deprivation of rights; absent that, there was no state action present. The court's decision is under appeal to the Ninth Circuit Court of Appeals.

In *Bigio v. Coca-Cola Co.*, the plaintiffs brought suit under the ATCA against the Coca-Cola Company and the Coca-Cola Export Corporation (Coca-Cola), alleging that Coca-Cola knowingly bought land from the Egyptian government that had been seized and confiscated from the Bigios in the early 1960s because the Bigios were Jewish.[7] The Second Circuit Court of Appeals found that, while the defendants may have purchased the land, the defendants had neither acted under "color of state authority" nor engaged in any of the handful of offenses (namely, piracy, slave trading, and certain war crimes) that lead to individual liability under international law.[8] Consequently, the complaint did not plead a violation of the "law of nations" by the defendants and there was no subject matter jurisdiction under the ATCA.

Likewise, in *Bao GE v. Li Ping*,[9] the Chinese plaintiffs had been imprisoned in China where they were forced to make soccer balls. In 1998, the plaintiffs sued Adidas America (among others) under the ATCA since there were Adidas logos on the soccer balls. On August 28, 2000, the court dismissed the case against the corporate defendants, finding that despite the presence of the logos,

[2] Doe v. Unocal Corp., 963 F.Supp. 880 (C.D.Cal. 1997).
[3] Doe v. Unocal Corp., 27 F.Supp.2d 1174 (C.D.Cal. 1998).
[4] Doe v. Unocal Corp., 963 F.Supp. at 889–92.
[5] Doe v. Unocal Corp., 110 F.Supp.2d 1294 (C.D.Cal. 2000).
[6] 963 F. Supp. at 891.
[7] Bigio v. Coca-Cola Co., 239 F.3d 440, 443 (2d Cir. 2001).
[8] *Id.* at 448.
[9] 2000 U.S. Dist. LEXIS 12711 (D.D.C. Aug. 28, 2000).

there was no evidence of any formal agreements showing Adidas involvement in the production, and therefore the plaintiffs had not alleged the "substantial degree of cooperative action" necessary under the *Unocal* precedent.[10] Moreover, the court found that "forced prison labor is not a state practice proscribed by international law."[11]

In both the *Bao GE* and *Beanal* (discussed above) cases, the plaintiffs had sued corporate defendants on the basis of both the ATCA and the TVPA. With respect to the TVPA, the *Bao GE* court found that the TVPA contains explicit language requiring state action, such that the plaintiff must establish that the defendant is either a state actor or de facto state actor.[12] The district court in the *Beanal* case found that the TVPA, by providing a cause of action against "individuals" does not provide a cause of action against corporations.[13] The court of appeals in that case found it unnecessary to pass upon this issue.[14]

Suits against Persons Acting on Behalf of the U.S. Government

In 1990, individuals, acting on behalf of the U.S. government, abducted Dr. Humberto Alvarez-Machain in Mexico, detained him for twenty-four hours, and brought him to the United States to face trial on various counts of conspiracy, kidnapping, and murder of a U.S. Drug Enforcement Agency (DEA) agent, Enrique Camarena-Salazar, in Mexico in 1985.[1] As a result of the abduction, Mexico lodged several diplomatic protests against the United States.

U.S. law does not impair the power of a court to try a person for a crime merely on the basis that that person was brought within the court's jurisdiction by reason of a "forcible abduction."[2] However, courts have denied such jurisdiction when the abduction was undertaken in violation of an extradition treaty.[3] Alvarez-Machain moved to dismiss his indictment, in part on grounds that his apprehension violated the U.S.-Mexico extradition treaty.[4] In 1992, the U.S. Supreme Court rejected the motion, finding that the extradition treaty, by its terms, did not preclude the United States from obtaining custody over persons in Mexico through resort to means other than as provided by the treaty.[5] The Court did not determine whether the abduction violated international law generally but stated that "it may be in violation of general international law principles."[6]

On remand, the case proceeded to trial, but the U.S. district court granted Alvarez-Machain's motion for an acquittal based on a lack of evidence.[7] On July 9, 1993, Alvarez-Machain brought a civil suit against the U.S. government and numerous individual defendants charging, among other things, kidnapping, torture, assault and battery, false imprisonment, negligent and intentional infliction of emotional distress, and cruel, inhuman, and degrading treatment. Although some claims were dismissed,[8] others went forward. On March 18, 1999, in the course of deciding several motions by the parties, the U.S. district court made certain important findings.

First, the court substituted the U.S. government as the defendant in place of Alvarez-Machain's claims against DEA agents involved in the abduction. Further, the court rejected most of Alvarez-

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[10] *Id*. at *16–17.
[11] *Id*. at *18.
[12] *Id.* at *19-20.
[13] Beanal v. Freeport-McMoran, Inc., No. Civ.A. 96-1474, 1998 WL 92246 (E.D.La. Mar. 3, 1998).
[14] 197 F.3d 161 at 169.
[1] *See* Jacques Semmelman, International Decisions, 86 AJIL 811 (1992); Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 167-70 (1991).
[2] Ker v. Illinois, 119 U.S. 436, 444 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1952).
[3] *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992).
[4] Extradition Treaty, May 4, 1978, U.S.-Mex., 31 UST 5059, TIAS No. 9656.
[5] United States v. Alvarez-Machain, 504 U.S. 655, 668–69 (1992).
[6] *Id*. at 669.
[7] *See* Alvarez-Machain v. United States, 107 F.3d 696, 699 (9th Cir. 1996).
[8] *Id*.

Machain's claims against the U.S. government under the Federal Tort Claims Act (FTCA)[9] for acts occurring in California and Texas. The Court found that the applicable state laws did not regard most of the alleged acts as torts or as otherwise actionable in a civil action.[10]

Second, the court considered the application of the ATCA . In this case, Alvarez-Machain used the ATCA to sue an individual, Jose Francisco Sosa, who the U.S. government had hired as an independent contractor, not an employee, to arrange the abduction. The court reasoned that, if the U.S. government had employed Sosa, in the sense that it directly controlled and supervised his performance or provided the tools or instrumentalities for the abduction, then Alvarez-Machain would not be able to sue Sosa in his personal capacity, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988.[11] However, for this abduction, the U.S. government only instructed Sosa on who should be abducted and how he should be treated once in custody, leaving to Sosa's discretion the time and manner for conducting the abduction. As such, the court found that Sosa was an independent contractor who could be sued in his individual capacity under the ATCA.[12]

Third, for an ATCA claim, with respect to whether there had been a violation of international law, the court affirmed certain positions taken by earlier courts, noting that the violated international norm must be "specific, universal, and obligatory," that it need not rise to the level of jus cogens, and that it be assessed as it exists today rather than as it existed in 1789, when the ATCA was enacted as part of the First Judiciary Act of 1789.[13] With respect to this case, the court held that state-sponsored transnational abductions violate international law,[14] a conclusion never before reached by a U.S. court, but one that accords with the practice of states, the courts of other countries, resolutions of international organizations, and the views of many commentators.[15] Likewise, the court found that arbitrary arrest and detention violated international law.[16] However, the court also found that while international law prohibited cruel, inhuman, and degrading treatment, as of 1990—when the events in this case took place—there was no "universal" consensus as to the content of such a tort.[17] Moreover, violation of any such norm related to whether the plaintiff had been deprived of his constitutional due process rights, which the Ninth Circuit, on a previous appeal, found had not occurred.

Thereafter, the district court entered a summary judgment in which it dismissed Alvarez-Machain's FTCA claims. The court reasoned that while the FTCA waives immunity for intentional torts, such as false arrest, it does not do so if the tort is committed by "an investigative or law enforcement officer," meaning any U.S. officer "who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[18] At the same time, the district court ruled against Sosa for kidnapping and arbitrary detention under the ATCA, but found that Alvarez-Machain could only recover damages relating to his detention prior to his arrival in the United States (since at that point, a lawful arrest warrant and indictment broke the chain of causation of Alvarez-Machain's injuries). The court awarded Alvarez-Machain US$ 25,000.[19]

Pointing to a number of global and regional human rights instruments on the rights of individuals

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[9] 28 U.S.C. §§1346(b), 2401(b), 2671–80 (1994). The Court also rejected certain constitutional claims against named U.S. government employees involved in arranging for the abduction.

[10] Alvarez-Machain v. United States, No. CV 93-4072, mem. op. at 18, 36–37 (C.D. Cal. Mar. 18, 1999).

[11] 28 U.S.C. §2679 (1994).

[12] Alvarez-Machain, *supra* note 8, at 11.

[13] *Id.* at 38–39, 44.

[14] *Id.* at 44.

[15] *See, e.g.,* Michael J. Glennon, *Agora: International Kidnapping: State Sponsored Abduction: A Comment On* United States v. Alvarez-Machain, 86 AJIL 746 (1992); Malvina Halberstam, *Agora: International Kidnapping: In Defense Of The Supreme Court Decision In* Alvarez-Machain, 86 AJIL 736 (1992).

[16] Alvarez-Machain, *supra* note 8, at 47–49.

[17] *Id.* at 46–47.

[18] 28 U.S.C. §2680(h).

[19] *See* Alvarez-Machain v. United States, 266 F.3d 1045, 1049 (9th Cir. 2001).

to liberty and security, the Ninth Circuit Court of Appeals agreed that state-sponsored transnational abduction violates customary norms of international human rights law (it declined to find that such abduction also violated a customary norm protecting sovereignty, since only Mexico—not Alvarez-Machain—had standing to advance such a claim). In doing so, the court rejected Sosa's argument that the ATCA required a violation of a jus cogens norm.[20] Likewise, the court found that Alvarez-Machain's seizure violated a customary international norm against arbitrary detention. In this regard, the court found that the arrest and detention of Alvarez-Machain was arbitrary because there was no Mexican warrant or any lawful authority for his arrest.[21] The court of appeals found no error in the district court's decision to substitute the U.S. government for the individual DEA defendants.[22] The court of appeals also found no error in the district court's use of federal common law (rather than Mexican law) to determine the amount of damages.[23]

However, the court of appeals reversed the district court's dismissal of the FTCA claims against the U.S. government. The court noted that the statute authorizing DEA enforcement did not expressly confer extraterritorial authority to the DEA, nor did California law (where DEA decisions about the abduction were made).[24] While the U.S. government argued that for federal law enforcement agencies to execute fully U.S. criminal statutes, they must have extraterritorial arrest authority, the court of appeals preferred an interpretation that Congress intended for federal law enforcement officers to obtain lawful authority, such as through a warrant, when conducting such arrests. Consequently, the court found that there was no lawful authority for the abduction and that the United States was liable for "false arrest" under the FTCA.[25]

In another case, *Jama v. INS*,[26] the plaintiffs had been detained by the Immigration and Naturalization Service (INS) at a New Jersey facility, where they alleged they were subject to human rights abuses, such as not being permitted to sleep, sleeping in filthy dormitories that smelled of human waste, being packed into rooms with no natural light or telephones, being beaten, being forced to eat meals only inches away from bathroom areas, being observed while using toilets and taking showers, and being abused mentally.[27] The facility was closed after a detainee revolt on June 18, 1995, at which time detainees were either moved to new facilities, granted political asylum or deported.[28]

On June 16, 1997, the plaintiffs brought suit under the ATCA against the INS, various INS officials, and a number of employees and officers of a private correctional services corporation that had contracted with the INS for services at the facility. The court found that the plaintiffs had a claim under international law, referring to various treaties and other international instruments on human rights and the rights of refugees.[29] The court dismissed claims against the INS on grounds of sovereign immunity, but allowed claims against the INS individuals and correctional services corporation employees to proceed, finding that they had acted under "color of law."[30]

Judgments against Radovan Karadzić

In 1993, Muslim and Croat victims of atrocities that were allegedly committed by Serb forces in Bosnia-Herzegovina filed two cases in U.S. federal court against Bosnian Serb leader Radovan

[20] *Id.* at 1049–53.
[21] *Id.* at 1052–54.
[22] *Id.* at 1053–54.
[23] *Id.* at 1060–62
[24] *Id.* at 1057–58
[25] *Id.* at 1057–60.
[26] 22 F.Supp.2d 353 (D.N.J. 1998).
[27] *Id.* at 358-359.
[28] *Id.* at 359.
[29] *Id.* at 361.
[30] *Id.* at 365.

Karadzić.[1] The lawsuits alleged various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution as part of a genocidal campaign conducted in the course of the conflict in the former Yugoslavia. Karadzić had been the president of the self-proclaimed Bosnian-Serb republic of "Srpska" during the conflict, and was subsequently indicted for his actions by the International Criminal Tribunal for the former Yugoslavia.[2]

The complaints in the two cases—*Doe v. Karadzić* and *Kadić v. Karadzić*, each with multiple plaintiffs—were brought principally under the ATCA and TVPA. The district court dismissed both cases on grounds that the statutes required "state action" and that Karadzić was the leader not of a recognized state, but of a nongovernmental warring faction within a state.[3] The court of appeals reversed and remanded. It held that Karadzić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity, and for other violations in his capacity as a state actor, and that he is not immune from service of process.[4] The defendant unsuccessfully sought Supreme Court review of the decision.[5]

Karadzić's lawyers participated in the proceedings until Supreme Court review was denied. Thereafter, Karadzić informed the district court through a telefaxed letter that he would no longer participate in what he deemed an intrinsically unfair trial, and instructed Ramsey Clark, his attorney and former U.S. attorney general, not to participate further in the proceedings.[6] The two cases nevertheless proceeded. The plaintiffs' effort in *Doe v. Karadzić* to have the case certified as a class action was rejected by the court.[7]

On June 13, 2000, the district court entered an order of default in *Kadić v. Karadzić*. The case then proceeded to a damages phase. During the eight-day trial that began July 31, the jury heard extensive testimony, including statements by women that Bosnian Serb soldiers raped them daily while their children were forced to watch.[8] On August 10, the jury returned a verdict of US$ 745 million (US$ 265 million in compensatory damages and US$ 480 million in punitive damages) for the group of fourteen plaintiffs, who were suing on behalf of themselves and their deceased family members. On August 16, that verdict was incorporated into a judgment of the court,[9] which also issued a permanent injunction stating that Karadzić and his forces were enjoined and restrained from committing or facilitating "any acts of 'ethnic cleansing' or genocide, including rape, enforced pregnancy, forced prostitution, torture, wrongful death, extrajudicial killing, or any other act committed in order to harm, destroy, or exterminate any person on the basis of ethnicity, religion and/or nationality."[10]

The other case, *Doe v. Karadzić*, also proceeded to trial, leading to entry of a judgment on October 5 in favor of twenty-one plaintiffs, suing on behalf of themselves and their deceased family members. The jury awarded the plaintiffs US$ 407 million in compensatory damages and US$ 3.8 billion in punitive damages.[11]

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[1] For background on these cases, see Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence*, 62 BROOK. L. REV. 753 (1996).

[2] *See* Prosecutor v. Karadzić, Rule 61 Indictment Review, Nos. IT-95-5-R61 & IT-95-18-R61 (July 11, 1996), *reprinted in* 108 ILR 85 (1998) (confirmation of the initial indictments by a three-judge panel).

[3] Doe v. Karadzić, 866 F.Supp. 734, 735 (S.D.N.Y. 1994).

[4] Kadi v. Karadzić, 70 F.3d 232, 238–46 (2d Cir. 1995).

[5] Kadi v. Karadzić, 518 U.S. 1005 (1996).

[6] *See* Bill Miller & Christine Haughney, *War Crimes Trials Find a U.S. Home*, WASH. POST, Aug. 9, 2000, at A1.

[7] Doe v. Karadzić, 192 F.R.D. 133 (S.D.N.Y. 2000). The district court decided that the standards set by the Supreme Court for certification were not satisfied on the record before the court.

[8] *See* Larry Neumeister, *Jury Finds Ex-Serbian Leader Owes $745 Million for Wartime Horrors,* ASSOC. PRESS NEWSWIRE, Aug. 10, 2000; Christine Haughney & Bill Miller, *Karadzic Told to Pay Victims $745 Million,* WASH. POST, Aug. 11, 2000, at A13.

[9] Kadi v.Karadzić, No. 93 Civ. 1163, judgment (S.D.N.Y. Aug. 16, 2000).

[10] Kadi v. Karadzić, No. 93 Civ. 1163, order & perm. inj. at 3 (S.D.N.Y. Aug, 16, 2000).

[11] Doe v. Karadzić, No. 93 Civ. 878, judgment (S.D.N.Y. Oct. 5, 2000).

Case against Salvadoran Generals in Nuns' Deaths

In the course of El Salvador's civil war, which lasted from 1980 to 1991, some seventy-five thousand civilians were killed, while thousands of others were tortured, lost their homes, or suffered other human rights abuses, mostly at the hands of Salvadoran military and security forces. U.S. churchwomen ministering in El Salvador were outspoken critics of the Salvadoran government's failure to prevent human rights abuses; Salvadoran authorities, in turn, regarded the churchwomen as "subversives." On December 2, 1980, three U.S. nuns—Maura Clarke, Ita Ford, and Dorothy Kazel—and a U.S. Catholic lay missionary—Jean Donovan—were abducted, detained, tortured, and murdered in El Salvador by members of the Salvadoran National Guard. In 1981, a national guardsman confessed to the murders and implicated several other guardsmen. In 1984, a Salvadoran criminal court convicted five guardsmen directly involved in the murders and sentenced them to thirty years' imprisonment. No charges were brought against any senior officer, however, for ordering or authorizing the murders.[1]

On February 25, 2000, the surviving family members of the four victims filed an amended complaint in a Florida federal court against José Guillermo García (the former defense minister of El Salvador) and Carlos Vides Casanova (the former director-general of the Salvadoran National Guard), both of whom were in office at the time of the murders.[2] Based on the statements of four of the convicted guardsmen that they were acting on orders of superior officers, the complaint alleged that the killings of the U.S. churchwomen satisfied the requirements of the TVPA. At the time the suit was filed, both defendants resided in Florida. The plaintiffs sought a total of US$ 100 million from the defendants—US$ 25 million for each victim.[3]

Over the course of a three-week trial in October 2000, the plaintiffs presented voluminous evidence seeking to link the two defendants to the killings, including declassified State Department memoranda and U.S. Embassy cables indicating that U.S. officials repeatedly told the generals that national guardsmen were involved in human rights abuses. By contrast, the generals testified that they had tried to prevent the killing of civilians, that these efforts were frustrated by their subordinates, and that their attention was, in any case, principally focused on confronting the insurgency and ending the civil war. A unique aspect of the case involved the court's instructions to the jury on the legal standard for establishing command responsibility, since no U.S. jury had ever before been instructed on foreign command responsibility. The relevant part of the jury instructions stated:

> A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it. The second legal theory applies when a commander fails to take appropriate action to control his troops. This is called the doctrine of command responsibility, and it is upon this doctrine that the plaintiffs seek to hold the defendants liable. The doctrine of command responsibility is founded on the principle that a military commander is obligated, under international law and United States law, to take appropriate measures within his power to control the troops under his command and prevent them from committing torture and extrajudicial killing. Plaintiffs contend that the defendants failed to exercise proper control over the troops under their command.

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[1] *See* Christopher Dickey, *4 U.S. Catholics Killed in El Salvador*, WASH. POST, Dec. 5, 1980, at A1; *6 Salvadoran Soldiers Are Arrested in Slaying of U.S. Church Workers*, N.Y. TIMES, May 10, 1981, at A1; A DECADE OF WAR: EL SALVADOR CONFRONTS THE FUTURE (Anjali Sundaram & George Gelber eds., 1991); AMERICA'S WATCH, EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO (1991).

[2] *See* Amended complaint, Ford v. Garcia (S.D. Fla. Nov. 3, 2000) (No. 99-8359). Documents relating to the trial may be found at <http://www.lchr.org/lac/nuns/courtdocs/index.htm>.

[3] *See* Rick Bragg, *Suit in Nuns' 1980 Deaths in El Salvador Goes to Florida Jury*, N.Y. TIMES, Nov. 2, 2000, at A4.

To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence.

(1) That persons under defendant's effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing, and

(2) The defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing; and

(3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing, or failed to investigate the events in an effort to punish the perpetrators.

"Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

A commander may be relieved of the duty to investigate or to punish wrongdoers if a higher military or civilian authority establishes a mechanism to identify and punish the wrongdoers. In such a situation, the commander must do nothing to impede nor frustrate the investigation.

A commander may fulfill his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate. A commander has a right to assume that assignments entrusted to a responsible subordinate will be properly executed. On the other hand, the duty to investigate and punish will not be fulfilled if the commander knows or reasonably should know that the subordinate will not carry out his assignment in good faith, or if the commander impedes or frustrates the investigation.

. . . .

The plaintiffs may only recover those damages arising from those omissions that can be attributed to the defendant. Each plaintiff must therefore prove that the compensation he/she seeks relates to damages that naturally flow from the injuries proved. In other words, there must be a sufficient causal connection between an omission of the defendant and any damage sustained by a plaintiff. This requirement is referred to as "proximate cause."

. . . .

If you find that one or more of the plaintiffs have established all of the elements of the doctrine of command responsibility, as defined in these instructions, then you must determine whether the plaintiffs have also established by a preponderance of the evidence that the churchwomen's injuries were a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility.

Keep in mind that a legal cause need not always be the nearest cause either in time or in space. In addition, in a case such as this, there may be more than one cause of an injury or damages. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.[4]

After just over a day of deliberations, the jury returned a unanimous verdict of not guilty.

[4] *See* Jury instructions at 6–7, 9–10, Ford v. Garcia (S.D. Fla. Nov. 3, 2000) (No. 99-8359).

Speaking afterwards, jury members stated that they did not believe, given both the chaos of the Salvadoran civil war and the limited resources available to the two generals for investigating and disciplining their troops, that the defendants had sufficient control over their forces to have done anything to prevent the four killings.[5]

IMMIGRATION

While immigration law is largely a matter of national law, in the United States the statutory provisions and related relief for aliens seeking entry as refugees, or seeking asylum, closely track the UN Convention Relating to the Status of Refugees[1] and the UN Protocol Relating to the Status of Refugees.[2] The following material seeks to capture some of the interplay between such instruments of international law and U.S. immigration law during 1999–2001.

Background

For fiscal year (FY) 1998 (from October 1997 to September 1998), 660,477 persons legally immigrated to the United States. All but a handful of these immigrants fell into one of five categories: immediate relatives of U.S. citizens (284,270), other family preferences (191,480), employment-based preferences (77,517), special diversity program (45,499), and refugees (54,709).[1] This level of legal immigration, the lowest in the 1990s (a 17 percent drop from FY 1997 and a 28 percent drop from FY 1996), was principally the result of slow application processing by the Immigration and Naturalization Service (INS).[2]

Independent of the drop in immigration in FY 1998, the relatively high level of immigration in recent years increased the proportion of foreign-born persons residing in the United States who are not yet naturalized citizens. In 1970, 64 percent of foreign-born U.S. residents had been naturalized; as of 1997, the percentage had dropped to 35 percent.[3] Moreover, as of late 2000, the U.S. government estimated that there were some 15.7 million foreign-born workers in the United States (12 percent of the total U.S. work force), of which nearly 5 million were estimated to be illegal aliens. The presence of these workers was credited with keeping down wages in unskilled jobs and providing many U.S. companies with employees needed to expand their operations.[4]

Aliens may apply for entry as "refugees" only from outside the United States. To qualify as a refugee, the alien must show "persecution or a well-founded fear of persecution" in another country "on account of race, religion, nationality, membership in a particular social group, or political opinion."[5] The number of refugees that can be admitted to the United States each year is determined by the president in consultation with Congress. On that basis, up to 78,000 refugees

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[5] *See* David Gonzalez, *2 Salvadorans Cleared by Jury in Nuns' Deaths*, N.Y. TIMES, Nov. 4, 2000, at A1.

[1] Convention Relating to the Status of Refugees, July 28, 1951, 19 UST 6259, 189 UNTS 150. The United States is not a party to this Convention but is derivatively bound to certain of its provisions through adherence to the Protocol.

[2] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

[1] INS Press Release on INS Announces Legal Immigration Figures for Fiscal Year 1999 (Aug. 11, 1998). INS press releases and other information may be found at <http://www.ins.usdoj.gov>. More recent data on U.S. immigration were not available when this volume went to press. Although the 1986 Immigration Reform and Control Act, Pub. L. 99-603, §401 (IRCA), required the submission triennially to Congress of a comprehensive report on immigration, the report issued in May 1999 only covered a three-year period ending in fiscal year 1994.

[2] *See* Michelle Mittelstadt, *Legal Immigration at 10-Year Low: Congressional Action Blamed*, WASH. POST, Aug. 12, 1999, at A6.

[3] Campbell Gibson & A. Dianne Schmidley, U.S. Census Bureau, Profile of the Foreign-Born Population in the United States: 1997, Current Population Reports, Series P23–195, at 3 (1999), *obtainable from* <http://www.census.gov/population/www/socdemo/foreign.html>;*see* Philip P. Pan, *U.S. Naturalization Rate Drops*, WASH. POST, Oct. 15, 1999, at A1.

[4] *See* Steven Greenhouse,*Foreign Workers At Highest Level in Seven Decades*, N.Y. TIMES, Sept. 4, 2000, at A11; *see also* U.S. Census Bureau, The Foreign-Born Population in the United States (2000), *obtainable from* <http://www.census.gov/population/www/socdemo/foreign.html>.

[5] 8 U.S.C. §§1101(a)(42)(A) (1994 & Supp. IV 1998).

could be admitted to the United States in FY 1999, with each of five geographical regions having a specified allocation: Africa (12,000), East Asia (9,000), Europe (48,000), Latin America/Caribbean (3,000), and Near East/South Asia (4,000), with 2,000 unallocated.[6] For FY 2000 up to 90,000 refugees could be admitted.[7]

Aliens who are already in the United States (such as on a temporary visa) or at a U.S. port of entry may apply to the INS for "asylum."[8] Such aliens must fit the criteria necessary for refugee status, but even then the decision on whether actually to grant an application for asylum rests with the attorney general.[9] The attorney general may not grant asylum when, among other things, "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States" or "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."[10]

Separate from, but closely related to, the issue of asylum is that of "withholding" deportation (which, unlike a grant of asylum, does not necessarily lead to permanent residency in the United States). If the attorney general determines that an "alien's life or freedom would be threatened" in another country "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion,"[11] the attorney general *must* withhold deportation (that is, there is no discretion). The standard of proof, however, is somewhat higher than the one used in cases of asylum. Whereas an alien requesting asylum need only prove a *well-founded fear* of persecution, an alien attempting to prevent deportation (or "removal") must prove that such persecution is *more likely than not.*[12] As in the case of asylum, however, the attorney general may not withhold deportation if the alien has been convicted of a serious crime or has committed a serious nonpolitical crime prior to arrival in the United States.[13]

Treatment of Aliens Who Commit Crimes in the United States

Before the effective dates of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)[1] and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[2] U.S. immigration law was interpreted as providing the attorney general with broad discretion to waive deportation of resident aliens. When the statutes became effective, however, the Immigration and Naturalization Service (INS) interpreted them as not only significantly increasing the list of prior criminal offenses that could serve as a basis for deportation, but also making it much more difficult to obtain relief from such deportation. As a consequence, immigration judges believed they were compelled to order the deportation of persons who might otherwise present sympathetic cases; for example, permanent resident aliens who were fully rehabilitated from their prior criminal acts.

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[6] INS Fact Sheet on U.S. Asylum and Refugee Policy (Oct. 29, 1998). On August 12, 1999, President Clinton increased the refugee allocation to Europe for FY 1999 by 13,000 to accommodate refugees fleeing from Kosovo. Presidential Determination No. 99–33, 64 Fed. Reg. 47,341 (1999).

[7] Presidential Determination No. 99–45, 64 Fed. Reg. 54,505 (1999).

[8] Immigration and Nationality Act, 8 U.S.C. §§1101–1537 (1994 & Supp. IV 1998), 8 U.S.C. §§1101–1537 (1994 & Supp. V 1999). The alien may apply affirmatively to the INS for asylum, in which case the application is heard by an INS asylum officer. If the application is denied, it may then be heard by an immigration judge. If the INS has brought proceedings against an alien, and the alien then requests asylum, the matter goes directly to an immigration judge.

[9] 8 U.S.C.A. §1158(b)(1) (West Supp. 1999). For the procedures followed upon an application for asylum, see 8 C.F.R. §208 (1999).

[10] 8 U.S.C. §1158 (b)(2)(A)(ii), (iii) (1994 & Supp. IV 1998). Denial of asylum on this basis was required initially by regulation and then by statute in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996). For a general discussion, see Evangeline G. Abriel, *The Effect of Criminal Conduct upon Refugee and Asylum Status*, 3 SW. J.L. & TRADE AM. 359 (1996).

[11] 8 U.S.C. §1231(b)(3)(A) (1994 & Supp. IV 1998).

[12] *See* INS v. Stevic, 467 U.S. 407, 429–30 (1984).

[13] 8 U.S.C. §1231(b)(3)(B)(ii), (iii) (1994 & Supp. IV 1998).

[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[2] Pub. L. No. 104-208, 110 Stat. 3009–546 (1996).

Further, the INS interpreted the statute as mandating that all aliens who had committed any of the listed crimes should be jailed, pending a final review, even if the aliens had completed their jail sentences, received suspended sentences, or not even been sentenced to jail for the crime.[3]

After challenges in U.S. courts relating to the retroactive application of the law, the INS implemented a new policy that would, among other things, allow the release of aliens who either had completed their sentences when the laws took effect or, because their home countries refused to allow them to return, faced indefinite detention after entry of a deportation order.[4] Interim procedures were announced in August 1999 for timely review of each case, with the principal focus on whether the alien's release would pose a "threat to the community" and, ultimately, whether the alien would comply with a deportation order.[5] Of the aliens deported in fiscal year 1999, 62,359 were the result of criminal records, including drug convictions (47 percent), criminal violations of immigration law (13 percent), and convictions for burglary (5 percent) and assault (6 percent).[6]

The INS interpretation of the 1996 laws was addressed by three Supreme Court decisions rendered in June 2001. The first two decisions concerned challenges to the ability of the INS—without any measure of judicial review—to deport aliens who had committed felonies within the United States. In *INS v. St. Cyr*[7] and *Calcano-Martinez v. INS*,[8] the Court held that the 1996 laws did not contain a clear intent to preclude the use of judicial review of such INS decisions, nor did they revoke the traditional court function of granting writs of habeas corpus. The *St. Cyr* opinion stated that "leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions."[9] Additionally, the *St. Cyr* opinion noted that nothing in the statute stated unambiguously that the law was to apply retroactively. Therefore, the plaintiff—who pled guilty to a deportable crime before enactment of the law thinking that he would be able to apply for a waiver of deportation—could not be deported on the basis of that plea.[10] In the third decision, *Zadvydas v. Davis*, the Court held that the INS may not indefinitely detain alien criminals after they have completed their jail sentences simply because they are somehow prevented from being deported to their country of origin. The Court found that detention for six months is constitutionally permissible, but thereafter the foreigner may not be detained if there is no significant likelihood of deportation in the reasonably foreseeable future.[11]

In light of this decision, U.S. Attorney General John Ashcroft on July 19, 2001 ordered the INS to commence a process that would result within three months in the release of some 3,400 aliens who had completed their sentences for U.S. criminal convictions, but whose home countries would not allow them to return. The process, however, envisaged strenuous efforts to secure agreement from the home country to accept return of the alien, continued detention of certain aliens posing special risks, and the pursuit of new criminal charges against certain aliens where appropriate.[12]

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[3] 8 U.S.C. §1226(c) (1994 & Supp. IV 1998).

[4] *See* Philip P. Pan, *INS Shifts Policy on Criminal Detainees*, WASH. POST, Aug. 9, 1999, at A1.

[5] INS Press Release on INS Implements New Procedures on Long-Term Detention (Aug. 6, 1999).

[6] INS Press Release on INS Sets New Removals Record; Fiscal Year 1999 Removals Reach 176,990 (Nov. 12, 1999).

[7] 121 S.Ct. 2271 (2001).

[8] 121 S.Ct. 2268 (2001).

[9] 2001 U.S. LEXIS 4670, at *7.

[10] *Id.* at *50–55.

[11] 121 S.Ct. 2491 (2001). The government had sought to remove the petitioner, Kestutis Zadvydas, on the basis of his criminal record. The petitioner, however, having been born in a displaced-persons camp in U.S.-occupied Germany in 1948, enjoyed legal citizenship in no country. Germany did not want him, nor did Lithuania where his parents were born, nor the Dominican Republic where his wife was a national. Consequently, the petitioner was detained for more than three years. In 2001, the INS was holding about 2,800 deportable aliens who had completed their jail sentences, many from countries with which the United States does not have repatriation agreements, such as Cambodia, Cuba, Laos, and Vietnam. *See* Eric Schmitt, *Constitutional Case of a Man Without a Country*, N.Y. TIMES, Mar. 13, 2001, at A16.

[12] *See* U.S. Attorney General John Ashcroft, Remarks on Long-term INS Detainees/Colorado Safe Neighborhoods Event (July 19, 2001), *obtainable from* <http://www.usdoj.gov/ag/speeches.html>; Cheryl W. Thompson, *INS to Free 3,400 Ex-Convicts*, WASH. POST, July 20, 2001, at A2.

Treatment of Illegal Aliens Who Have Committed Crimes Outside the United States

U.S. law also calls for refusal of asylum or for deportation when an alien has committed a "serious nonpolitical crime" outside the United States prior to the alien's arrival. In considering such deportation, a central issue is whether the prior crime was "political" or "nonpolitical." In the case of *INS v. Aguirre-Aguirre*, the alien defendant was a student leader who, among other activities, emptied and then burned buses in Guatemala to protest rising bus fares. The Board of Immigration Appeals (BIA) determined that the defendant's acts were more criminal than political and that the defendant was therefore deportable. On appeal, however, the Ninth Circuit found that even if the prior crime was nonpolitical in nature, a further supplemental balancing approach was appropriate. The Ninth Circuit relied upon a UN handbook[1] (developed to interpret the UN Protocol Relating to the Status of Refugees[2]) that called for balancing the prior crime against the threat of persecution in the home country if the alien was deported. Finding that such persecution was likely, the Ninth Circuit reversed the BIA and ordered that the alien not be deported.[3]

On May 3, 1999, the U.S. Supreme Court unanimously overturned the Ninth Circuit's decision by ruling that the attorney general may deport an alien if the attorney general determines that the alien committed a "serious nonpolitical crime" before arriving in the United States, regardless of whether deportation would present a threat to the alien's life or freedom because of his or her political beliefs.[4] In rejecting the Ninth Circuit's supplemental balancing approach, the Supreme Court stated that the UN handbook is not binding on the attorney general, the BIA, or U.S. courts, and that, in any event, the BIA's approach was more consistent with the language of the statute and the UN Convention.[5] The Court found sufficient the BIA's approach of balancing the political aspects of the acts committed against their common-law character. In so doing, the Court found that the Ninth Circuit did not give appropriate deference under *Chevron*[6] to the BIA (which is an administrative agency within the Department of Justice), noting that this deference was especially important in the immigration context because it involves foreign relations.[7]

Spousal Abuse as a Basis for Asylum

On June 11, 1999, the BIA, by a vote of ten to five, refused asylum to a woman who feared spousal abuse if returned to her country of nationality.[1] Although the BIA accepted that the woman, Rodi Alvarado Pena, was horribly abused by her spouse in Guatemala, it nevertheless found in *In re R-A-* that Alvarado had not proven that she suffered persecution or a well-founded fear of persecution "on account of" race, religion, nationality, political opinion, or membership in a particular social group.[2] The BIA noted that the INS's 1995 gender guidelines for asylum[3] set forth various considerations for addressing "social group" and "political opinion" questions, but did not resolve the issue of whether past spousal abuse satisfies the criteria necessary for refugee status for

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[1] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979).

[2] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

[3] Aguirre-Aguirre v. INS, 121 F.3d 521 (9th Cir. 1997).

[4] INS v. Aguirre-Aguirre, 526 U.S. 415 (1999),*reprinted in* 38 ILM 786 (1999). *See* Linda Greenhouse, *Court Restricts Refugee Status for Criminals*, N.Y. TIMES, May 4, 1999, at A22. In the *Aguirre* case, the Supreme Court was interpreting the "serious nonpolitical crime" provision associated with withholding of deportation as it appeared in its prior codification, at 8 U.S.C. §1253(h)(2)(C) (1994).

[5] 526 U.S. at 427–28.

[6] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[7] 526 U.S. at 424-25 (citing INS v. Abudu, 485 U.S. 94 (1998)).

[1] *See* Fredric N. Tulsky, *Abused Woman Is Denied Asylum*, WASH. POST, June 20, 1999, at A1.

[2] *In re* R-A-, Interim Decision 3403, 2001 BIA LEXIS 1 at *3 (June 11, 1999, decided by attorney general).

[3] Memorandum from Phyllis Coven, Office of International Affairs, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995), *reprinted in* Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 794–816 (1995).

purposes of U.S. asylum law.[4] On the facts before it, the BIA found that Alvarado's husband had not targeted other women in Guatemala for abuse and had not acted on account of a political opinion imputable to the victim. Further, the BIA found that Alvarado was not (at least for asylum purposes) part of a particular social group, to wit "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[5] The BIA stated:

> In our opinion, . . . the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group. The existence of shared attributes is certainly relevant, and indeed important, to a "social group" assessment. Our past case law points out the critical role that is played in "social group" analysis by common characteristics which potential persecutors identify as a basis for the infliction of harm. . . . But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.[6]

In a similar case one week after its *In re R-A-* decision, the BIA denied asylum to a Mexican girl who was fleeing her abusive father.[7]

Female Genital Mutilation as a Basis for Asylum

By contrast, in the landmark decision *Matter of Kasinga*, issued on June 13, 1996, the BIA granted asylum to a woman from Togo who feared female genital mutilation.[1] In that case, the BIA found that female genital mutilation was "persecution," that young women of the Tchamba-Kunsuntu tribe in Togo who have not undergone such mutilation and who oppose it are a "social group," and that the respondent possessed a well-founded fear of persecution on account of membership in that group.

The BIA initially reached a different result in a later case involving a woman who feared genital mutilation by her tribe if she was returned to Ghana. In its initial decision the BIA concluded that the respondent, Adelaide Abankwah, failed to demonstrate on the facts an objectively reasonable fear of female genital mutilation. In a decision rendered in 1999, the Second Circuit reversed the BIA's decision, on grounds that the BIA was being too stringent in the quality and quantity of evidence it required in order to establish such fear.[2] The court reiterated the doctrine of *Kasinga* (which the BIA below had not questioned) that female genital mutilation was not only internationally recognized as a violation of women's and of female children's rights, but also legally prohibited in the United States.[3] On remand, the BIA reviewed the evidence again, found that an objectively reasonable fear existed, and ordered that Abankwah's petition for asylum be granted.[4]

Tracking Aliens in the United States

When the Illegal Immigration Reform and Immigrant Responsibility Act was passed on

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[4] 2001 BIA LEXIS 1 at *16. For background, see Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims,* 13 GEO. IMMIGR. L.J. 25 (1998); Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum As a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804 (1997).

[5] 2001 BIA LEXIS 1 at *27.

[6] *Id*. at *30–31 (citations omitted).

[7] *See* Fredric N. Tulsky, *Asylum Denied for Abused Girl: Ruling of Appeals Panel Is Assailed*, WASH. POST, July 4, 1999, at A3.

[1] *In re* Fauziya Kasinga, Interim Decision 3278, 1996 BIA LEXIS 15 at *3 (BIA June 13, 1996), *reprinted in* 35 ILM 1145 (1996); *see* Linda A. Malone & Gillian Wood, International Decisions, 91 AJIL 140 (1997).

[2] Abankwah v. INS, 185 F.3d 18, 24 (2d Cir. 1999).

[3] *Id*. at 23.

[4] *See* Amy Waldman, *Asylum Won by Woman Who Feared Mutilation*, N.Y. TIMES, Aug. 18, 1999, at A21.

September 30, 1996, one provision (section 110) required that within two years the attorney general develop an "automated entry and exit control system" capable of (1) recording the departure of every alien from the United States and matching the record of departure with the record of the alien's arrival in the United States; and (2) enabling the attorney general to identify, through on-line searching procedures, lawfully admitted nonimmigrants who remain in the United States beyond the period authorized by the attorney general.[1]

On November 5, 1997, Senator Spencer Abraham, chairman of the Senate subcommittee on immigration, outlined various criticisms of this provision:

> I recently chaired a field hearing of the Immigration Subcommittee in Detroit, Michigan, at which elected officials and industry representatives testified on the traffic congestion, lost business and employment opportunities, and harm to America's international relations that could result from the full implementation of section 110.
>
> . . . .
>
> Traffic congestion is an all too common occurrence in this country, and at many of our busy border crossings it occurs as part of the daily routine. In Detroit, five to ten minute delays are the common result of current INS customs inspections. But imagine, if you will, the nightmare of a border-check system which could cause miles of back-up at facilities wholly unequipped to handle them.
>
> Under section 110, every foreign citizen could be required to present a yet undetermined form of identification to INS inspectors, whereupon these inspectors must properly record identity information for use in a "master database." In 1996 alone, over 116 million people entered the United States by land from Canada. Similarly, over 52 million Canadian residents and United States permanent residents entered Canada last year. Section 110 would require a stop on the U.S. side to record the exit of each person in every car. That is more than 140,000 each day; 6,000 each hour; 100 each and every minute. And that is only in one direction.
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> . . . .
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> And these are only the immediate, direct effects of section 110. Manufacturers across the nation will feel the detrimental effect of late shipments of goods. Just-in-time inventory systems will cease to exist. Trans-border trade will be hampered not by intent, but by incident. Of course, it is entirely possible for us to somewhat mitigate these troubles through investment in infrastructure. But the increased investment would likely be measured by tens of billions of dollars. . . .
>
> To the best of my knowledge, the cost of the technology required to undertake this automated data collection and analysis is unknown, as such technology does not yet exist. Even so, it is difficult to believe that the gains achieved by implementation of section 110 could approach, let alone outweigh, its costs.[2]

Senator Abraham then briefly described legislation he was introducing that "would exclude the land border from automated entry-exit control and otherwise maintain current practices regarding lawful permanent residents and a handful of our neighboring territories, including Canada, whose

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[1] Illegal Immigration Reform and Immigrant Responsibility Act, §110, 8 U.S.C.A. §1221 note (West Supp. 1998). Once the system was established, the law required an annual report to Congress containing information on the arrival and departure of aliens.

[2] *Impact of Entry-Exit System on U.S. Border: Hearings on S. 1360 Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 4, 5 (1997) (statement of Senator Spencer Abraham), *available in* 1997 WL 14152948.

nationals do not pose a particular immigration threat."[3] Instead of passing Senator Abraham's bill, however, Congress extended the deadline for implementation of the INS system with respect to land border and sea ports of entry to 2001.[4]

In the aftermath of the terrorist incidents of September 11, 2001, Congress focused on the tracking of aliens (including along land borders) as a means of combating terrorism. On October 26, 2001, President Bush signed into law the USA PATRIOT ACT.[5] Among other things, the law directed the attorney general to report on the feasibility of enhancing an "integrated automated fingerprint identification system" and other identification systems to better identify foreign individuals in connection with U.S. or foreign criminal investigations before issuance of a visa to, or permitting such person's entry or exit from, the United States.[6] Further, in December 2001, the United States and Canada concluded a joint statement outlining steps that both countries would pursue as part of an overall effort of creating anti-terrorist barriers around the United States and Canada.[7] Among other things, the two countries agreed to expand the use of "integrated border enforcement teams," which are established to share information and technology, as a means of securing the integrity of the border.

Effect of Torture Convention on U.S. Immigration Law

In late 1998, Congress directed U.S. agencies[1] to promulgate regulations within 120 days for implementing U.S. obligations under the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention").[2] Article 3(1) of the Convention provides that "[n]o State Party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." This obligation is similar to that contained in the Convention Relating to the Status of Refugees, but there are important differences. Certain persons excluded from the protections of the Convention Relating to the Status of Refugees would be protected under the Torture Convention; for example, persons who assisted in Nazi persecution or engaged in genocide, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious nonpolitical crimes before arriving in the United States, and persons who pose a danger to the security of the United States. Further, the Torture Convention protects persons who fear torture, whether or not that fear is on account of race, religion, nationality, political opinion, or membership in a particular social group.

In early 1999, and as directed by Congress, the Department of Justice amended its regulations on an interim basis in order to comply with its obligations under the Torture Convention.[3] The new regulations allowed aliens subject to deportation proceedings to seek and, if eligible, to be accorded protection under Article 3 of the Convention. Among other things the regulations provided:

In assessing whether it is more likely than not that an applicant would be tortured in the

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[3] S. 1360, 105th Cong. (1997), *available in* LEXIS, Legis Library, BL Text File.

[4] Section 116 of the Department of Justice Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[5] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[6] *Id.*, §405.

[7] *See* U.S.-Canada Joint Statement on Cooperation on Border Security and Regional Migration Issues (Dec. 3, 2001), *obtainable from* <http://www.usembassycanada.gov>; *see also* DeNeen L. Brown, *U.S., Canada Sign Border Accord*, WASH. POST, Dec. 4, 2001, at A16.

[1] Foreign Affairs Reform and Restructuring Act of 1998, §2242(b), as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[2] Adopted Dec. 10, 1984, SENATE TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85, *reprinted in* 23 ILM 1027 (1984), *as modified*, 24 ILM 535 (1985) [hereinafter Torture Convention]. The Convention entered into force for the United States on November 20, 1994.

[3] 64 Fed. Reg. 8478 (1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253 & 507).

proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.[4]

The regulations also created expedited deportation processes that enable asylum officers to identify potentially meritorious claims quickly and to screen out frivolous ones. One innovative aspect of the regulations was the ability of the secretary of state to forward to the attorney general any assurances received from a foreign state that an alien would not be tortured if the alien was removed to that state. If the assurances are deemed reliable by the attorney general, then the alien's claim for protection under the Convention is not to be considered further by an asylum officer, an immigration judge, or the BIA.[5]

U.S. adherence to the Torture Convention thereafter affected U.S. immigration law proceedings. For instance, in the case of *Mansour v. INS*,[6] an Iraqi national requested asylum within the United States, as well as withholding from deportation. His claim was denied by an immigration judge (IJ). Mansour then appealed the decision to the Board of Immigration Appeals (BIA), along with motion to remand and reopen the proceedings based upon U.S. adherence to the Torture Convention and its implementing legislation and regulations. The BIA affirmed the IJ's decision and denied the motion to remand. Mansour then appealed to the Seventh Circuit Court of Appeals.[7]

On October 16, 2000, the court of appeals agreed with Mansour that the original asylum claim and the motion under the Torture Convention constituted two separate forms of relief, and that a finding against relief on the asylum request does not preclude the Torture Convention claim from receiving its own due consideration in accordance with the regulatory standards promulgated for the INS.[8] The court stated:

> The BIA refused Mansour's motion to reopen his case on the ground that he failed to establish a prima facie case for protection under the Convention Against Torture. . . . An applicant has the burden of proof to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. §208.16(c)(2) (1999). The Convention Against Torture provides that if credible, an applicant's testimony may be sufficient to sustain the burden of proof without corroboration. *Id.* Because the BIA agreed with the IJ that Mansour's testimony was not credible, the BIA found that he had "not met his burden of proof to demonstrate that it is more likely than not he would be tortured if removed to Iraq." Accordingly, the BIA denied his motion to remand his case to the IJ.
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> . . . We cannot conclude that the BIA conducted a complete review of Mansour's claim as

[4] 8 C.F.R. §208.16(c)(3) (2000).
[5] *Id.* at §208.18(c).
[6] 230 F.3d 902 (7th Cir. 2000).
[7] *Id.* at 905–06.
[8] *Id.* at 907.

evidenced by: (1) its use of the phrase "Syrian Christians" in its opinion and not "Assyrian Christians," when Mansour labeled himself as an Assyrian Christian both in his appeal and motion to reopen; and (2) its silence with regard to the U.S. Department of State's Report (1998) that suggests that the Iraqi government has engaged in abuses against the Assyrian Christians, a minority, who are living in Iraq. The latter source of information may well be an indication of gross, flagrant, or mass violations of human rights in Iraq; however, the BIA never addressed this evidence.

. . . .

. . . Mansour is not a citizen of Syria, as the phrase "Syrian Christian" may suggest. He is an Iraqi national, an ethnic Assyrian, and a member of the Chaldean Catholic Church. The U.S. Department of State's Report (1998), which is not discussed by the BIA, states that "Assyrians are an ethnic group as well as a Christian community" and that the Iraqi government "has engaged in various abuses against the country's 350,000 Assyrian Christians." *See* U.S. Department of State, Country Reports on Human Rights Practices for 1998–Volume II, at 1682, 1686. The Report also indicates that there is "continued systemic discrimination" against Assyrians that involves forced movement from northern areas and repression of political rights in those areas of Iraq as well. *Id.* at 1686. The Report is specific on the meaning and consequence of being part of the ethnic/religious group of Assyrian Christians and had the BIA addressed the Report it might have viewed Mansour's torture claim differently.

Mansour's contentions regarding the BIA's review of his Convention Against Torture claim force us to conclude that we cannot accept the determination of the BIA on this issue. [9]

During 1999–2001, several other foreign nationals also sought to use the Torture Convention in U.S. courts to circumvent deportation. While in some instances the petitioner succeeded,[10] in most cases the decisions of the courts were brief and heavily deferential to the determinations of the responsible executive agencies.[11]

Selective Enforcement of Immigration Law Based on Political Views

On February 24, 1999, the U.S. Supreme Court held that the government does not violate the U.S. Constitution when the government selects particular aliens (who are otherwise deportable) for deportation based upon their political views and associations.[1] The case, *Reno v. American-Arab Anti-Discrimination Committee*,[2] involved eight aliens who belonged to the Popular Front for the Liberation of Palestine, a group that the U.S. government considers a terrorist and communist organization.[3] The Supreme Court, by a 6–3 vote, ruled generally that noncitizens do not have the right to assert as a defense against deportation that the U.S. government is engaging in selective

[9] *Id.* at 907–09 (footnotes omitted); *see* U.S. DEP'T OF STATE, IRAQ COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998, *at* <http://www.state.gov/www/global/human_rights/1998_hrp_report/iraq.html>.

[10] *See, e.g.*, Al-Saher v. INS, 268 F.3d 1143 (9th Cir. 2001) (finding that foreign national had met burden of showing that he had been previously tortured in Iraq and therefore was entitled to withholding of removal under the Convention).

[11] *See, e.g.*, Zainab v. Reno, 237 F.3d 591 (6th Cir. 2001); Issa v. INS, 2000 WL 1585538 (9th Cir. Oct. 6, 2000); Despaigne Barrero v. INS, 2000 WL 1278042 (8th Cir. Sept. 7, 2000); Nguyen v. INS, 2001 WL 180780 (9th Cir. July 14, 2000); Hernandez v. INS, 2000 WL 831811 (9th Cir. June 27, 2000); Shirkhani v. INS, 2000 WL 216590 (10th Cir. Feb.23, 2000); Ademola v. INS, 2000 WL 227860 (8th Cir. Feb. 14, 2000); El-Sayegh v. INS, 1999 WL 1006394 (D.C. Cir. Oct. 6, 1999); Kamalthas v. INS, 1999 WL 809820 (9th Cir. Oct. 4, 1999); Krishnapillai v. INS, 1999 WL 809823 (9th Cir. Oct. 4, 1999).

[1] Foreign Affairs Reform and Restructuring Act of 1998, §2242(b), as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[2] 525 U.S. 471 (1999).

[3] For a discussion on the "Los Angeles Eight", see Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens,* 28 ST. MARY'S L.J. 833, 865–69 (1997).

enforcement of immigration law.[4] The Court, however, left open the possibility that such a defense would be allowed if the discrimination was outrageous. "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[5] The Court also ruled by a vote of 8–1 that aliens are generally not allowed recourse to federal courts until their administrative proceedings have been exhausted.

Return of Elián González to Cuba

On November 25, 1999, a five-year-old boy named Elián González was found by two U.S. fishermen clinging to an inner tube several miles off the Florida coast.[1] He was one of thirteen Cuban nationals who had fled Cuba by boat on November 22 in an attempt to reach the United States. When the boat capsized, ten persons drowned, including Elián's mother and stepfather, but Elián and two others survived. The fishermen were met by the U.S. Coast Guard, which transported the boy to a Miami hospital to be treated for dehydration and exposure. The U.S. Immigration and Naturalization Service (INS) temporarily paroled him to the custody of his paternal great-uncle, Lázaro González, who resided in Miami.[2]

After recovering in the hospital, Elián was taken to the home of Lázaro González. On November 27, Elián's father, Juan Miguel González—who had divorced Elián's mother and remarried, but who shared custody of Elián with his former wife—sent a letter to the Cuban government requesting that his son be returned to him in Cuba. The request was forwarded to the U.S. interests section in Havana[3] and then to the INS. At the same time, the Cuban government took up the cause, organizing daily demonstrations and demanding the boy's return.[4]

On December 10, an asylum application on behalf of Elián and signed by Lázaro González, was submitted to the INS by an attorney retained by Lázaro González. The application requested asylum for Elián on grounds of a well-founded fear of persecution on account of political opinion or membership in a particular social group.[5] Shortly after the initial application for asylum, an identical application was submitted with Elián's own printed signature. INS officials interviewed Juan Miguel González in Cuba on December 13 and 31. In addition to reiterating that he wished Elián to be returned to his custody, he requested that any application for asylum filed on behalf of Elián be withdrawn. The INS also interviewed Lázaro González regarding Elián's relationship with his father.

On January 3, 2000, INS General Counsel Bo Cooper issued a memorandum—which was thereafter approved by the INS commissioner—on whether Elián could apply for asylum in direct opposition to his father's wishes. The memorandum stated, in part:

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[4] 525 U.S. at 486–87.

[5] *Id.* at 491–92.

[1] There are various sources describing the events of Elián's arrival in the United States. Readers may wish to consult Gonzalez *ex. rel*. Gonzalez v. Reno, 86 F.Supp.2d 1167 (S.D. Fla. 2000). Elián, who was born on December 6, 1993, turned six during the course of the events herein described.

[2] Temporary parole of an alien, such as a minor, may occur for "urgent humanitarian reasons or significant public benefit" under the Immigration and Nationality Act (INA), Pub. L. No. 82-414, §212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. §1182(d)(5) (Supp. IV 1998)); *see* 8 C.F.R. §235.2 (2000). For a historical overview of the law and policy of INS detention of unaccompanied minors, see Lisa Rodriguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589 (1998). Individuals from Cuba who arrive in the United States are treated differently from other aliens. They may (1) apply for asylum, (2) remain in the United States and, after one year, apply for adjustment of status to that of lawful permanent resident, or (3) return to Cuba. Cuban Refugees: Adjustment of Status, Pub. L. No. 89-732, 80 Stat. 1161 (1966), *amended by* Pub. L. No. 94-571, 90 Stat. 2706 (1976) & Pub. L. No. 96-212, §203(i), 94 Stat. 108 (1980),*reprinted in* 8 U.S.C. §1255 note (1994).

[3] The United States and Cuba do not have diplomatic relations. U.S. and Cuban representation is undertaken through interests sections organized under the auspices of the Swiss Embassies in Havana and Washington, D.C.

[4] *See* Karen DeYoung, *Cuba Longs for a Little Boy*, WASH. POST, Dec. 10, 1999, at A1.

[5] *See* 8 U.S.C. §§1101(a)(42)(A) & 1158(b)(1) (Supp. IV 1998).

Three attorneys have submitted Form G–28, Notice of Entry and Appearance as Attorney or Representative, with Elian's signature. . . . While there is no absolute prohibition against a minor signing a Form G–28, the ability to do so must be evaluated against general questions of capacity. In the state of Florida, for instance, a minor under the age of 18 is not considered competent to enter into contracts. *See* Section 743.07, Florida Statutes (1973). Under INS regulations, the parent or legal guardian may sign the application or petition of someone under the age of fourteen. 8 CFR 103.2(a)(2). Thus, while it appears that Elian may sign the Form G–28, the INS generally assumes that someone under the age of 14 will not make representation or other immigration decisions without the assistance of a parent or legal guardian. Here, the father has expressly stated that he does not authorize the attorneys to represent Elian, and that he does not want Elian to seek asylum. Unless the INS has direct evidence of Elian's capacity, Elian's signature on the Forms G-28 does not bear much weight.

. . . .

In this case, the alleged inability of the father to adequately represent the interests of the child rests not on any estrangement between father and child or the father's inability to adequately assess the best interests of his child. To the contrary, evidence in the record, including the interview of the father and the numerous affidavits he provided, establish that the father and child share a close relationship, and that the father has exercised parental responsibility and control, for example, in the education and health care of the child. Instead, the alleged inability of the father to adequately represent the interests of the child is based on the possibility that the father has been coerced. If coerced, the father's representation of the immigration interests of the child may conflict with the father's interest in his own personal safety, rendering him unable to adequately represent the child in immigration matters. Following [*Johns v. DOJ*, 624 F.2d 522 (5th Cir. 1980)], this inability would require the appointment of a *guardian ad litem* to represent Elian's immigration interests. . . .

On December 13, 1999, the Officer in Charge [or "OIC"] for the INS Havana suboffice (accompanied by the First Secretary and Chief of the Political/Economic Section of the US Interests Section) interviewed Juan Miguel Gonzalez-Quintana at his home. Mr. Gonzalez-Quintana described in great detail his close relationship with his son. He submitted affidavits from several neighbors, family friends, physicians, and Elian's teacher attesting to the affection between the father and son as well as the responsibility the father has taken in his son's life. He expressed his wishes that Elian be returned to him, that Elian not be allowed to apply for asylum, and that Elian not be represented by the attorneys purporting to represent him in the United States. . . .

. . . .

In order to ensure that we have examined fully the question of coercion, the INS sought a second interview with Juan Miguel Gonzalez-Quintana. At the request of both the US and Cuban governments, a neutral site was selected, the home of the representative of the United Nations International Children's Emergency Fund (UNICEF). . . .

. . . .

After weighing the information we have gathered, we believe the father is able to represent adequately the child's immigration interests. Accordingly, we believe the INS should give effect to the father's request for the return of his child by treating it as a request for a withdrawal of Elian's application for admission. . . .

. . . .

A child's right to asylum independent of his parents is well established. Section 208(a)(1) of the INA permits any individual physically present in the United States or who arrives in the United States—including any alien who has been brought to the United States after having been interdicted in international or United States waters—to apply for asylum. While Section 208(a)(2) of the INA describes certain exceptions to this right, those exceptions are not applicable to this case. There are no age-based restrictions on applying for asylum. Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances even a very young child may be considered for a grant of asylum. The INS need not, however, process such applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes. Further, the United Nations Convention on the Rights of the Child requires state parties to

> take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.

United Nations Convention on the Rights of the Child, Article 22, 28 I.L.M. 1448, 1464 (1989).[6]

> Neither Section 208 of the INA, nor the Convention on the Rights of the Child, however, addresses whether a child may assert a claim for asylum contrary to the express wishes of a parent. We believe, in keeping with the United States' obligation of *nonrefoulement* under the 1967 Protocol Relating to the Status of Refugees,[7] certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents.
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> . . . .
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> While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved. The *Polovchak* case[8] recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year old was probably at the low-end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents. Elian's tender age is clearly one of the factors that must be considered in assessing whether he can assert an asylum claim. At age six, well below the lower end of necessary maturity described by the Seventh Circuit in*Polovchak*, we have serious doubts as to Elian's capacity to possess or articulate a subjective fear of persecution on account of a protected ground. . . .
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[6] [Author's Note: The UN Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3, contains provisions invoked by both sides in the matter of Elián. Article 3(2) calls upon states to ensure the protection and care for a child that is necessary for his well-being, "taking into account" the rights and duties of his parents. Article 5 calls upon states to respect the responsibilities, rights, and duties of parents or, where applicable, extended family to provide appropriate direction and guidance to the child in the exercise of his rights under the Convention. Article 9 calls upon states to ensure that a child not be separated from his parents against his will, except when competent authorities determine that such separation is necessary for the best interests of the child (for example, in cases of abuse or neglect). Articles 10(1) and 22 appear to favor reunification of a child with his parents or other members of his family. Cuba is a party to this Convention, but the United States is not.]

[7] [Author's Note: Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267. The United States is a party to this Protocol, but Cuba is not.]

[8] [Author's Note: Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).]

Capacity is only one of the issues that must be assessed, however. In cases involving unaccompanied minors who may be eligible for asylum, the *INS Children's Guidelines*,[9] following the recommendations of the UNHCR,[10] advise adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the degree of an adult. In recommending a course of action for evaluating a child's fear, the *Children's Guidelines* note that the adjudicator must take the child's statements into account, but it is far more likely that the adjudicator will have to evaluate the claim based on all objective evidence available. The UNHCR notes that the need for objective evidence is particularly compelling where there appears to be a conflict of interest between the child and the parent. UNHCR Guidelines, para. 219.

. . . .

Elian's application for asylum bases his claim on two grounds. First, the application describes past persecution to members of Elian's family, including detention of Elian's stepfather, imprisonment of his great-uncle, and harassment of his mother by the communist party. Second, the application describes the potential for political exploitation of Elian, based on a political opinion imputed to him by the Castro regime, resulting in severe mental anguish and suffering tantamount to torture. The application includes a request for protection under the Convention Against Torture.[11] . . .

None of the information provides an objective basis to conclude that any of the experiences of Elian's relatives in Cuba bear upon the possibility that Elian would be persecuted on account of a protected ground. Further, while we are troubled about the possibility of political exploitation and resulting mental anguish, it does not appear to form the basis of a valid claim for asylum. There is no objective basis to conclude that the Castro regime would impute to this six-year-old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution. See *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812 (1992) (holding that an applicant for asylum based on political opinion must show that the alleged persecutors are motivated by the applicant's political opinion).

Finally, the allegation that any political exploitation of Elian requires protection under the Convention Against Torture is without objective basis. The assertion that the mental anguish Elian might face would be sufficiently severe to constitute torture under the Convention is purely speculative. Additionally, to merit protection under the Convention, the applicant must demonstrate that the torture would be inflicted intentionally. Even if the Castro regime seeks to exploit Elian for political gain, there is no reason to believe that it has any intention of inflicting severe mental anguish or any other form of harm recognized by the United States as torture upon Elian. Further, under U.S. law, the definition of mental suffering that can constitute torture is very narrow: it must be prolonged mental harm caused by the intentional infliction of severe physical pain or suffering, the administration or threatened administration of mind altering substances, or the threat of imminent death to the victim or another person. 8 CFR 208.18(a). Again, there is no indication that any political exploitation of Elian by the Castro regime would involve such tactics.[12]

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[9] [Author's Note: Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, to INS Asylum Officers, Immigration Officers & Headquarters Coordinators (Asylum and Refugees) (Dec. 10, 1998) (guidelines for children's asylum claims) (on file with author).]

[10] [Author's Note: OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (2d ed. 1992).]

[11] [Author's Note: Adopted Dec. 10, 1984, SENATE TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85, *reprinted in* 23 ILM 1027 (1984), *as modified*, 24 ILM 535 (1985) [hereinafter Torture Convention]. The Convention entered into force for the United States on November 20, 1994.]

[12] Memorandum from Bo Cooper, INS General Counsel, to Doris Meissner, INS Commissioner 2–8, 10–11 (Jan. 3, 2000) (footnote omitted) (on file with author).

On January 5, the INS announced that the father had the sole legal right to speak for the boy in immigration matters and that, pursuant to the father's true wishes, the boy should be returned to Cuba.[13] The INS letter to Lázaro González stated, in part:

> After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. [Juan Miguel González] and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters. Further, we took steps to ensure that Mr. [Juan Miguel González] could express his true wishes at our interviews with him, and after carefully reviewing the results of the interviews, we are convinced that he did so.
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> . . . Although the INS has placed Elian in your physical care, such placement does not confer upon you the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian, who recently turned six years old, has the legal capacity on his own to authorize representation. Finally, Mr. [Juan Miguel González] has expressly declined to authorize [your lawyers] to represent Elian. Therefore, the INS cannot recognize them as Elian's representatives.
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> . . . [N]either the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. [Juan Miguel González's] decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf.[14]

U.S. Attorney General Janet Reno supported the decision of the INS.[15] Juan Miguel González also requested that Elián, pending his return to Cuba, be transferred to the home of a different relative, one who favored Elián's return to Cuba. The INS, however, denied that request on grounds that transferring the child to a new and unfamiliar environment would not be advisable in view of the trauma he had already experienced.[16]

The federal government's intention to return Elián to Cuba—a country that has a record of gross violations of human rights—outraged the Cuban-American community of southern Florida and led to widespread protests.[17] Some Republican members of Congress introduced legislation that would grant Elián U.S. citizenship or permanent resident status,[18] but the effort was dropped

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[13] Doris Meissner, INS Commissioner, Press Release on INS Decision in the Elian Gonzalez Case (Jan. 5, 2000), *at* <http://www.ins.usdoj.gov/graphics/publicaffairs/statements/Elian.htm>; *see* Neil A. Lewis, *U.S. Says It Agrees to Return Boy, 6, to Father in Cuba,* N.Y. TIMES, Jan. 6, 2000, at A1; Karen DeYoung & Sue Anne Pressley, *U.S. Orders Return of Cuban Boy*, WASH. POST, Jan. 6, 2000, at A1.

[14] Letter from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Lázaro González (Jan. 5, 2000) (on file with author).

[15] Janet Reno, U.S. Attorney General, Weekly Media Briefing (Jan. 6, 2000), *at* <http://www.usdoj.gov/archive/ag/speeches/2000/1600avail.htm>; *see* Sue Anne Pressley & Karen DeYoung, *Reno Won't Reverse INS Decision to Return Boy to Cuba*, WASH. POST, Jan. 7, 2000, at A2.

[16] *See* Karen DeYoung, *INS Rejects Request to Relocate Elian*, WASH. POST, Feb. 19, 2000, at A23.

[17] *See* Rick Bragg, *Stand over Elián Highlights a Virtual Secession of Miami*, N.Y. TIMES, Apr. 1, 2000, at A1; Lizette Alvarez, *Irate Cuban-Americans Paralyze Miami*, N.Y. TIMES, Jan. 7, 2000, at A13.

[18] H.R. 3531, 106th Cong. (2000); H.R. 3532, 106th Cong. (2000); S. 1999, 106th Cong. (2000); S. 2314, 106th Cong. (2000); *see* Karen DeYoung, *Rare Act of Congress Is Planned for Elian*, WASH. POST, Jan. 16, 2000, at A3; Karen DeYoung, *Battle over Cuban Boy Moves to Hill*, WASH. POST, Jan. 28, 2000, at A3. Both of the leading candidates for election to the U.S. presidency in November 2000—Vice President Albert Gore Jr. and Texas Governor George W. Bush—endorsed the legislation. *See* Sue Anne Pressley & John F. Harris, *Gore Backs Bill on Elian Status*, WASH. POST, Mar. 31, 2000, at A1.

when it became clear that other Republicans and most U.S. nationals favored reuniting Elián with his father.[19] There were also doubts that it was constitutional to confer U.S. citizenship on a child against the wishes of his parent.[20] Those supporting Elián's return to his father noted, moreover, that custody disputes concerning children who had fled other nondemocratic countries were typically sent by U.S. courts to the family courts of those countries for disposition,[21] and that failure to do so could have an adverse effect on the many cases of U.S. parents seeking the return of their children from other countries.[22]

Lázaro González filed a case in Florida state court on January 7 asserting that the matter was an issue of family law. On January 10, the Florida court agreed and issued a temporary protective order granting Lázaro González temporary custody of Elián, pending both service of process upon Juan Miguel González and a full hearing.[23] In a letter to the attorneys representing Lázaro González and other relatives, however, Attorney General Reno stated that the matter was a federal one and that the state court decision had no bearing on the matter. She noted:

> [T]he question of who may speak for a six-year-old child in applying for admission or asylum is a matter of federal immigration law. Nothing in the temporary protective order changes the government's determination that Juan Gonzalez can withdraw applications for admission and asylum relating to Elian and that he has done so. In the Department's judgment, the Florida court's order has no force or effect insofar as INS's administration of the immigration laws is concerned.
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> . . . As the case evolved, it became clear that Elian's father, who was still in Cuba, was asserting a parental relationship with Elian and had adequately expressed his wish, under the immigration laws, for Elian's petition for admission to this country to be withdrawn. In these circumstances, INS was obliged to determine whether the father was the appropriate person to speak for Elian on immigration issues. That question, as I have said, remains one of federal, not state, law. The Commissioner's resolution of that question—as well as of other immigration matters—may be challenged, if at all, only in federal court. We are prepared to litigate in that forum.[24]

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[19] *See* Lizette Alvarez, *Republicans Back Away from Their Indignation over Seizure of Cuban Boy*, N.Y. TIMES, May 3, 2000, at A21.

[20] Arguably, granting such citizenship against the express wishes of Elián's father would be a violation both of the constitutionally protected privacy interests at stake in the parent-child relationship, and of a person's constitutional right to determine his or her citizenship. On a state's limits under international law to confer its nationality, see Local Law and International Law Aspects, 8 Whiteman DIGEST §5.

[21] *See, e.g.*, Rick Bragg, *Custody Case like Elián's Gets a Much Faster Ruling*, N.Y. TIMES, Mar. 6, 2000, at A13 (describing a Feb. 29, 2000 order by a Florida state court sitting in Miami that a two-year-old child be returned to his father in Jordan, even though his mother had fled with him so that he could grow up in the United States, and that any custody issue should be decided in the courts of Jordan, where the boy was born and spent most of his life). For a comparably controversial Cold War case involving a U.S. court ordering that the custody of four children (one of whom was a U.S. national) be restored to their Soviet parents in the Soviet Union, *see* Repatriation, 8 Whiteman DIGEST §21, at 640.

[22] Most cases concerning the return of children from one country to another involve competing claims by two estranged parents. International obligations regarding abducted children may be found in the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, TIAS No. 11,670, for states party to that Convention. The Convention provides that, in most circumstances, children under the age of 16 should be returned to the country where they had "habitually resided" before being abducted, and that any necessary custody hearings take place in that country. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 88–113 (1999). The United States is a party to the Convention, but Cuba is not.

U.S. concern about noncompliance with the Convention recently has focused on Germany. *See* Letter from Mike DeWine, U.S. Senator, to William J. Clinton, U.S. President (May 17, 2000) (on file with author) (noting that "from 1990 to 1998, only 22% of American children for whom Hague applications were filed were returned to the United States from Germany—and that percentage includes those who were voluntarily returned by the abducting parent"); Cindy Loose, *Abduction Cases Draw Ire on Hill*, WASH. POST, Mar. 24, 2000, at A4.

[23] Gonzalez *ex rel*. Gonzalez v. Gonzalez-Quintana, No. 00–00479–FC–28, 2000 WL 419688 (Fla. Cir. Ct. Jan. 10, 2000).

[24] Letter from Janet Reno, U.S. Attorney General, to Linda Oserg-Braun, Roger Bernstein, and Spencer Eig (Jan. 12, 2000) (on file with author), *reprinted in part in Excerpts from Attorney General's Letter on Cuban Boy*, N.Y. TIMES, Jan. 13, 2000, at A21; *see* Neil A. Lewis, *Boy's Fate Called a Federal Matter*, N.Y. TIMES, Jan. 13, 2000, at A1.

On January 19, 2000, Lázaro González, on behalf of Elián, challenged the INS decision of January 5 in federal court.[25] On March 21, the district court found that the granting of asylum is a matter within the discretion of the attorney general, that she had decided who may speak on behalf of Elián, and that her decision was controlling as a matter of law. Since there appeared to be no abuse of that discretion, the district court dismissed the case.[26] Lázaro González appealed the decision to the Eleventh Circuit Court of Appeals and also requested an injunction barring Elián's deportation from the United States. On April 13, a judge of the Eleventh Circuit issued such an injunction (which was confirmed by a three-judge panel of that circuit on April 19), but expressly did not decide where or in whose custody Elián should remain pending the appeal.[27]

On April 6, just prior to the issuance of the above injunction, Juan Miguel González, along with his second wife and their child, arrived in the Washington, D.C. area, declaring that "I have now lived 137 days unjustly and cruelly separated from my son."[28] Although he stayed at the residence of the head of the Cuban interests section in Washington, D.C., González was unaccompanied by the Cuban officials when he met the next day with Attorney General Reno. At that meeting, he reiterated his request that he be reunited with his son and that they be allowed to return to Cuba.[29]

On April 13, coincidentally the same day that the Eleventh Circuit judge issued its injunction, the Florida court terminated its temporary protective order and dismissed the case on grounds of the lack of subject matter jurisdiction due to federal preemption, and the lack of standing of Lázaro González under the relevant Florida statute on temporary custody of minor children by extended family.[30] The court noted that in the single prior application of that statute,[31] it had been decided that temporary custody may be granted to an extended-family member over the objection of a natural parent only upon a finding, by clear and convincing evidence, that the parent is unfit, in which case the trial court must make a finding that the parent has abused, abandoned, or neglected the child.[32]

In late March, the INS had unsuccessfully sought a written agreement with Lázaro González that he would surrender Elián to the INS if the appeal to the Eleventh Circuit failed.[33] On April 12, the INS instructed Lázaro González to deliver Elián the next day to an airport outside Miami, there to be reunited with his father. When González failed to do so, the INS revoked Elián's parole into the care of González.[34] Further negotiations for the surrender of Elián to the INS foundered, with the Miami relatives seeking a face-to-face meeting with Juan Miguel González prior to any surrender, in an effort to convince him to remain in the United States.[35] On April 21, the INS issued a warrant of arrest for Elián, and a federal magistrate issued under seal a search warrant authorizing the INS to enter the residence of Lázaro González to seize Elián.

On April 22, shortly after 5 A.M., eight federal agents knocked on, and then broke down the door

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[25] *See* Sue Anne Pressley & Karen DeYoung, *Federal Suit Filed over Elian: Action Alleges Reno, INS Chief Violated Cuban Boy's Rights,* WASH. POST, Jan. 20, 2000, at A5.

[26] Gonzalez *ex rel*. Gonzalez v. Reno, 86 F.Supp.2d 1167 (S.D.Fla. 2000).

[27] Gonzalez *ex rel*. Gonzalez v. Reno, No. 00–11424–D, 2000 WL 381901 (11th Cir. Apr. 19, 2000).

[28] *See "We Are Elian's True Family,"* WASH. POST, Apr. 7, 2000, at A21 (translated excerpts of statement of Juan Miguel González upon arrival at Dulles International Airport).

[29] *See* Dep't of Justice Press Release on Statement of Attorney General Reno (Apr. 7, 2000), *at* <http://www.usdoj.gov/opa/pr/2000/April/189ag.htm>.

[30] FLA. STAT. ch. 751 (1999).

[31] *See* Glockson v. Manna, 711 So.2d 1332 (Fla. Dist. Ct. App. 1998).

[32] Gonzalez *ex rel*. Gonzalez v. Gonzalez-Quintana, No. 00–00479–FC–28, 2000 WL 492102 (Fla. Cir. Ct. Apr. 13, 2000).

[33] *See* Sue Anne Pressley & Karen DeYoung, *Elian's Kin Defy Demand*, WASH. POST, Mar. 29, 2000, at A3.

[34] *See* Letter from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Lázaro González (Apr. 12, 2000) (on file with author); Letter from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Lázaro González (Apr. 14, 2000) (on file with author). The revocation was pursuant to 8 U.S.C. §§1103, 1182(d)(5), 1225 (Supp. IV 1998) and 8 C.F.R. §§103.1, 212.5, 235.2, 236.3 (1999). Section 1182(d)(5) provides that "when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

[35] *See* Karen DeYoung, *U.S. Lets Elian Deadline Pass*, WASH. POST, Apr. 14, 2000, at A1.

to, Lázaro González's home, removed Elián by force, and flew him to Andrews Air Force Base near Washington, D.C., where he was reunited with his father, stepmother, and half brother.[36] Thereafter, the family was taken to a private home at the Wye River Conference Center on Maryland's Eastern Shore,[37] and then to a private estate in Washington, D.C. The family remained there (unaccompanied by Cuban government officials), pending the issuance of the Eleventh Circuit's decision on Lázaro González's appeal. The INS issued a departure-control order[38] authorizing federal agents to use force, if necessary, to prevent Elián from leaving the United States without INS approval.

In a brief filed before the Eleventh Circuit, appellant Lázaro González argued that Elián did not want to return to Cuba, that he would be persecuted there if he did return, and that the U.S. government violated its own regulations in refusing to consider his application for asylum.[39] In its brief to the court, the U.S. government argued that there was no evidence that Elián understood or helped prepare the application for asylum, no evidence that he would meet the standards for granting asylum, and no reason for Lázaro González's views to outweigh those of the father, Juan Miguel González. Moreover, there was no basis for the court to conclude that the INS or the U.S. attorney general violated U.S. law or regulations in refusing to accept the application for asylum.

> The primary question this appeal presents, then, is whether the Commissioner's thoroughly considered and carefully crafted approach to considering asylum applications submitted by a third party on behalf of (or bearing the name of) a six-year-old child, against the express wishes of the child's sole surviving parent, rests on a permissible interpretation and application of the asylum statute. Relying on the words, "[a]ny alien . . . in the United States . . . may apply for asylum" in 8 U.S.C. §1158 (a)(1), appellant maintains that Elian "may apply." But the INS has never denied this. Appellant need only examine the Commissioner's decision for her recognition that the asylum statute contains "no age-based restrictions on applying for asylum."
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> The question here is not whether Elian "may apply" but whether he "has applied," a reference to 8 U.S.C. §1158(b)(1), the subsection of the asylum statute that identifies who may be granted asylum. Under this subsection, the Attorney General "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section" if the Attorney General finds that the alien is a "refugee." 8 U.S.C. §1158(b)(1). The Commissioner reasonably determined that (1) the usual rule is that a parent speaks for his child in immigration matters, as under the law generally, and (2) where an asylum application is submitted by a third party against the express wishes of the parent, the child will be deemed to have "applied" only if the child has the capacity to understand what he is applying for and has assented to or submitted the application himself, or if there is a substantial objective basis for an independent asylum claim and therefore for overriding the parent's wishes that no asylum application should be filed. Put another way, the Attorney General "established" those criteria as "requirements" that must be satisfied in order to conclude under 8 U.S.C. §1158(b)(1) that a minor in these circumstances "has applied for asylum" in accordance with "requirements" established by the Attorney General. The Attorney General's interpretation of the asylum statute is entitled to deference under *Chevron* and *Aguirre-Aguirre*[40] and is reasonable.
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[36] *See* Rick Bragg, *Cuban Boy Seized by U.S. Agents and Reunited with His Father*, N.Y. TIMES, Apr. 23, 2000, at 1.

[37] *See* Karen DeYoung, *U.S. to Let Friends from Cuba Visit Elian*, WASH. POST, Apr. 26, 2000, at A1.

[38] *See* 8 U.S.C. §1185 (1994).

[39] Brief for Appellant, Gonzalez *ex rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (filed Apr. 10). For Juan Miguel González's brief, see Brief of Intervenor Juan Miguel Gonzalez, Gonzalez *ex rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (filed May 1).

[40] [Author's Note: Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), *reprinted in* 38 ILM 786 (1999).]

The Commissioner's approach to the unusual circumstances of this case is consistent with asylum-related and family unification guidelines and international conventions. The United Nations Convention on the Rights of the Child does not speak to whether a child may assert an asylum claim contrary to a parent's wishes, but it makes clear that children's rights must be understood in the context of parental rights and duties. The *UNHCR Guidelines* emphasize the need to reunite unaccompanied minors with their families immediately, and counsel that where a child is so young that he cannot prove he has a well-founded fear of persecution, objective evidence should be looked to. This is consistent with the Commissioner's analysis, which, having found that Elian lacks the subjective capacity to apply for asylum, went on to discuss whether objective evidence, including Lazaro's asylum applications, demonstrated an "independent basis for asylum" notwithstanding his father's stated wishes. So, too, the *INS Children's Guidelines* provide general guidance on the capacity issue, and on looking to objective evidence where capacity is at issue. These guidelines are not enforceable, and do not solve every problem the INS is confronted with. What makes this case unique is Elian's lack of capacity coupled with his father's stated desire that Elian not apply for asylum.

Aliens who satisfy the applicable standard for asylum do not have a right to remain here. They are simply eligible to remain here, if the Attorney General, in her discretion, chooses to allow that. To establish eligibility, the applicant must prove that he suffered past persecution or will suffer future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Persecution is an extreme concept. The applicant must present specific and objective facts. He must demonstrate that he has a genuine fear of persecution on account of a proscribed ground, and that this fear is reasonable. Evidence of widespread human rights violations is not sufficient. The applicant must show that he will be singled out, and that he is being singled out, for example, on account of the applicant's political opinion. This is the backdrop against which this case must be understood. And it must also be understood that, once begun, the asylum adjudication process, from beginning to end, can take one or two years, or even longer. In the*Polovchak* case, Walter Polovchak was twelve years old when the litigation over his asylum claim commenced. It went on for six years. Cynthia Johns' case, *Johns v. INS*, went on for five years. This is the sort of delay that Juan Gonzalez faces, if he is deprived of his parental authority and some other adult is allowed to speak for Juan's son. In dismissing Lazaro's custody petition, the Florida state court spoke of having "watched the struggle between a family fighting for love and freedom and a father fighting for love and family." Wish as one might that Juan would fight for love, family, and freedom, that is a decision that he as a parent must make, and it must be respected.[41]

On April 27, the Eleventh Circuit denied the Miami relatives' request for an order permitting them to visit Elián and denied their request for the appointment of a neutral guardian. Further, the court granted Juan Miguel González the right to intervene in the case. Finally, the court ratified an order issued on April 25 by a judge of the Eleventh Circuit prohibiting Elián from going "any place in the United States that enjoys diplomatic immunity," a subtle acknowledgment of the concerns of the Miami relatives that Cuban government officials would seek to "reindoctrinate" him in communism.[42]

On June 1, the Eleventh Circuit affirmed the decision of the district court, emphasizing the scope of executive discretion under U.S. immigration law, and the limits of judicial review of that discretion. The circuit court found that, in filling in the gaps of U.S. law, the INS had made a

[41] Brief for Appellees at 28–32, Gonzalez *ex rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (filed Apr. 24) (citation omitted).

[42] Gonzalez *ex. rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (decision on motion to intervene); Gonzalez *ex rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (decision on motion of Miami relatives) (on file with author);*see* Karen DeYoung, *Court Rebuffs Miami Relatives, Lets Elian's Father Enter Case*, WASH. POST, Apr. 28, 2000, at A10.

reasonable policy choice for how to handle Elián's asylum applications and had applied that policy in a manner that was neither capricious nor arbitrary.[43] After efforts by the Miami relatives for further review by the Eleventh Circuit[44] and the Supreme Court[45] failed, Elián and his father returned to Cuba.[46]

[43] Gonzalez *ex rel*. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).
[44] Gonzalez *ex rel*. Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000).
[45] Gonzalez, Lazaro v. Reno, 530 U.S. 1270 (2000).
[46] *See* David Gonzalez & Lizette Alvarez, *Justices Allow Cuban Boy to Fly Home*, N.Y. TIMES, June 29, 2000, at A1.