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I. Universal Periodic Review*

The Universal Periodic Review (UPR) conducted by the United Nations Human Rights Council was established to identify and address human rights issues.¹ During each session, the Working Group reviews sixteen U.N. member States, analyzing their practices and making recommendations in support of the protection of human rights.² In late 2008 and throughout 2009, the Working Group concluded its third,³ fourth,⁴ and fifth sessions,⁵ reviewing human rights' protections in forty-eight nations. In a recent debate on the UPR mechanism, speakers reaffirmed their support for the mechanism and their belief in its "immense relevance."⁶ In its second year, the UPR continued to achieve full

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* The section on Universal Periodic Review was written by Dana Renee Bucy, J.D. Candidate, American University Washington College of Law.

1. See U.N. Office of the High Comm'r for Human Rights, *Basic Facts about the UPR* (Nov. 2008), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

2. *Id.*

3. See U.N. Human Rights Council, *Report of the Human Rights Council on its Tenth Session, Advance Unedited Version*, ¶¶ 261-725, U.N. Doc. A/HRC/10/29 (Apr. 20, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A-HRC-10-29_AUV.doc (summarizing the third session of the Working Group).

4. See U.N. Human Rights Council, *Report of the Human Rights Council on its Eleventh Session*, ¶¶ 168-745, U.N. Doc. A/HRC/11/37 (June 29, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.37.doc>.

5. The report summarizing the fifth session of the UPR has yet to be released. See U.N. Human Rights Council, *Draft Report of the Human Rights Council on its Twelfth Session*, ¶¶ 210-665, U.N. Doc. A/HRC/12/L.10 (Oct. 2, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/HRC_12_%20Draft_Report.doc.

6. Press Release, U.N. Human Rights Council, Human Rights Council Holds General Debate on Universal Periodic Review Mechanism (Sept. 25, 2009), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/D1ED2B34091E8815C125763C0057163E?opendocument>.

participation by all member States and was noted by Sweden as “one of the most important instruments of the Council.”⁷

Through recommendations of the Council and their acceptance by individual nations, a number of notable human rights improvements have been made,⁸ specifically regarding the support and ratification of prominent human rights instruments.⁹ For example, China¹⁰ and Saudi Arabia¹¹ expressed support for possible ratification of the International Covenant on Civil and Political Rights. Saudi Arabia is also evaluating its position regarding the International Covenant on Economic, Social, and Cultural Rights.¹² Congo was amenable to a recommendation to sign and ratify the Optional Protocols to the Convention on the Rights of the Child, and is considering ratification of all established human rights treaties to which it is not a party.¹³

Similarly, Afghanistan may incorporate international conventions to which it is not a party into domestic legislation to harmonize its national laws with international human rights obligations.¹⁴ Mexico now supports the continuing promotion of the ratification of the International Convention of the Rights of Migrant Workers and Members of Their Families, and has agreed to consider withdrawing its reservations to other human rights instruments.¹⁵ Finally, Chile expressed its support for the recommendations to ratify the Rome Statute of the International Criminal Court, and is considering ratifying the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁶

7. *Id.*

8. The recommendations and national responses discussed in this summary are by no means exhaustive. Full documentation of each nation’s review can be accessed at the United Nations Human Rights website. See United Nations Human Rights, Office of the High Comm’r for Human Rights, Universal Periodic Review Documentation, <http://www.ohchr.org/EN/HRBODIES/UPR/Pages/Documentation.aspx> (last visited Mar. 28, 2010).

9. See Human Rights Council Holds General Debate, *supra* note 6.

10. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, China*, ¶ 114, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/11/25 (Oct. 5, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/99/PDF/G0916299.pdf?OpenElement>.

11. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Saudi Arabia*, ¶ 87, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/11/23 (Mar. 4, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/117/53/PDF/G0911753.pdf?OpenElement>.

12. *Id.*

13. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Congo*, ¶ 7, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/12/6 (June 5, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/140/26/PDF/G0914026.pdf?OpenElement>.

14. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Afghanistan*, ¶ 95, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/12/9 (July 20, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/146/14/PDF/G0914614.pdf?OpenElement>.

15. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Mexico*, ¶ 93, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/11/27 (Mar. 3, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/136/33/PDF/G0913633.pdf?OpenElement>.

16. U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Chile*, ¶ 96, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/12/10 (June 4, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/139/22/PDF/G0913922.pdf?OpenElement>.

II. Convention on the Elimination of All Forms of Discrimination Against Women*

In 2009, the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) began celebrating the thirtieth anniversary of CEDAW and the tenth anniversary of the Optional Protocol to CEDAW. Much of the celebration will be focused on encouraging the remaining states to ratify CEDAW and the Optional Protocol.¹⁷ Currently, 186 states are parties to CEDAW, including Qatar, which ratified CEDAW in 2009.¹⁸ Algeria, Egypt, and Luxembourg withdrew certain reservations to the Convention in 2009.¹⁹ The Optional Protocol currently has ninety-eight state parties, including Turkmenistan and Guinea-Bissau, which both became parties in 2009.²⁰ Also during 2009, responsibility for the CEDAW Committee was transferred from the Division for the Advancement of Women to the Office of the U.N. High Commissioner for Human Rights (OHCHR).²¹

In 2009, the Committee held two sessions, the forty-third session in January, and the forty-fourth session from July through August.²² During the forty-third session, the Committee considered reports from Dominica, Armenia, Haiti, Cameroon, Libya, Germany, Guatemala, and Rwanda.²³ It also worked to strengthen its relationships with other U.N. human rights mechanisms, including the special rapporteurs on violence against women and the right to health, as well as the Committee on the Rights of the Child.²⁴ During the forty-fourth session, the Committee considered reports from Azerbaijan, Bhutan, Denmark, Guinea-Bissau, Japan, the Lao People's Democratic Republic, Liberia, Spain, Switzerland, Timor-Leste, and Tuvalu.²⁵ In July 2009, the Committee received its first follow-up report based on its concluding observations to India's combined second and third periodic reports.²⁶

* This section was authored by Joi Leonard, an associate with the Rose Law Firm in Little Rock, Arkansas.

17. See The Secretary-General, *Report of the Secretary-General on the Status of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 11, delivered to the General Assembly, U.N. Doc. A/64/342 (Sept. 8, 2009), available at <http://www.unhcr.org/refworld/pdfid/4acf08770.pdf> [hereinafter *Report of the Secretary-General*].

18. *Id.* ¶ 2.

19. *Id.* ¶ 4.

20. *Id.* ¶ 6.

21. *Id.* ¶ 7.

22. *Id.* ¶ 20.

23. See Conference of Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women, Forty-Second Session* (20 October-7 November 2008); see also *Forty-Third Session* (19 January-6 February 2009), ¶ 23, delivered to the General Assembly, U.N. Doc. A/64/38 (July 29, 2009), available at <http://www2.ohchr.org/english/bodies/cedaw/index.htm>.

24. Naëla Gabr, Chairperson of the Comm. on Elimination of Discrimination Against Women, Opening Statement at the Forty-Fourth Session (July 20, 2009), available at http://www2.ohchr.org/english/bodies/cedaw/docs/Opening_Speech_Chair_%2044_%20Ms_Gabr.pdf [hereinafter Gabr, Opening Statement].

25. See Convention on the Elimination of All Forms of Discrimination Against Women, *Ways and Means of Expediting Work of the Committee on the Elimination of Discrimination Against Women, Note by the Secretariat*, at 4, U.N. Doc. CEDAW/C/2009/IV/4 (Apr. 9, 2009) (44th Session, Agenda Item 6 of Provisional Agenda) [hereinafter *Ways and Means*].

26. See *Report of the Secretary-General*, *supra* note 17, at 7-8.

During 2009, the Committee adopted statements on three issues: the international financial crisis, the situation in Gaza, and gender and climate change.²⁷ The Committee also continued working on general recommendations regarding the “human rights of older women and the economic consequences of marriage and its dissolution.”²⁸ The recommendation on the human rights of older women focuses on the obligations of States’ parties with respect to aging with dignity, older women’s rights, and preventing discrimination against older women, and it includes policy recommendations for mainstreaming older women’s concerns so that older women can enjoy full participation.²⁹ Through the general recommendation, the Committee seeks to bring greater visibility to the rights of older women, which are not specifically addressed in any international human rights instrument or in State reports.³⁰

The general recommendation on the economic consequences of marriage and its dissolution seeks to address what the Committee views as “the perpetuation of inequality in the family,” including discriminatory family laws, traditional marriage patterns, laws regarding women’s ownership of property, and inheritance issues.³¹

The Convention saw some evidence of progress in court systems in 2009. The High Court in Bangladesh issued a milestone decision prohibiting sexual harassment, and the Court noted that CEDAW’s provisions, as well as the Committee’s General Recommendation No. 19 on violence against women, were central to its decision.³² The European Court of Human Rights also relied on CEDAW and case law stemming from the Optional Protocol in concluding that Turkey had breached its obligations under human rights law by failing to protect two women from domestic violence.³³

As of 2009, the following States are not yet parties to CEDAW: Somalia, Sudan, Iran, Nauru, Palau, Tonga, the Holy See, and the United States. In 2009, members of the CEDAW Committee met with U.S. representatives to discuss possible ratification of CEDAW.³⁴ President Obama, Vice President Biden, and Secretary of State Hillary Clinton have all voiced support for the ratification of CEDAW.³⁵

27. See *id.* at 9.

28. *Id.* at 10.

29. See Convention on the Elimination of All Forms of Discrimination Against Women, *Concept Note on the Draft General Recommendation on Older Women and Protection of Their Human Rights*, at 1, U.N. Doc. CEDAW/C/2009/II/WP.1/R (May 12, 2009) (44th Sess., Pre-Sess. Working Group).

30. *Id.* at 2-3.

31. See CEDAW Committee, *General Recommendation on Economic Consequences of Marriage and Its Dissolution: Concept Note*, at 2, U.N. Doc. CEDAW/C/2009/II/WP.2/R (June 5, 2009) (44th Sess., Pre-Sess. Working Group).

32. See CEDAW Success Stories, U.N. Development Fund for Women (UNIFEM), http://www.unifem.org/cedaw30/success_stories/ (last visited Feb. 15, 2010).

33. See U.N. High Comm’r for Human Rights, *Women’s Rights in Human Rights Systems: Past, Present and Future* (July 1, 2009), available at <http://www2.ohchr.org/english/bodies/cedaw/index.htm> (prepared by Navanethem Pillay).

34. See Gabr, Opening Statement, *supra* note 24.

35. See Posting of Peggy Simpson to The Women’s Media Center, <http://womensmediacenter.com/blog/2009/03/chances-improve-for-ratification-of-cedaw-by-peggy-simpson/> (Mar. 30, 2009, 9:35 EST); see also Madeleine Giansanti Cag, *Women’s Interest Network*, 44 INT’L LAW. (forthcoming 2010).

III. Twitter Revolution in Moldova*

Three months before elections in Iran, Moldova had its own “Twitter revolution” sparked by apparently fraudulent elections on April 5, 2009. Protests were fueled by social media such as Facebook, Twitter, and blogs, and are still debated. Harsh state repression followed the protests. The Council of Europe’s Commissioner for Human Rights reported on April 29, 2009, that more than 300 persons were arrested and beaten by police officers.³⁶ At least three persons were tortured to death.³⁷

As during the Iranian mass protests three months later, technology played a mixed role in the demonstrations and following repression. Natalia Morar, a twenty-five year old journalist charged with masterminding Moldova’s “coup,” explained on her blog how everything started. Five young activists talked for ten minutes about how to spread the word about a demonstration to protest electoral fraud. Then they spent several hours on Facebook and Twitter, and used blogs, mobile phone text messages, and e-mails. As a result, 10,000 people showed up the next day in the streets.³⁸ The same electronic means were used to spread the word in Moldova and around the world about the police beatings and torture.

The same technology, however, was also used to spread misinformation.³⁹ The families and friends of those taken into police custody without notice were told to monitor the website of the Ministry of Interior Affairs. The site eventually displayed incomplete lists of names, but also warnings such as “cemeteries and churches will be patrolled during the Easter holidays”⁴⁰ to maintain public order, further spreading panic among the population. Electronic media of the opposition parties and independent media were temporarily shut down.⁴¹

In the end, the Moldovan Prosecutor-General’s Office decided to charge only twenty people for participating in mass protests, and the offenses range from “improper behavior” to “attempt to overthrow the government.”⁴² Hundreds of prisoners were freed, but the independent press reports that the campaign of intimidation continued until a new liberal,

* This section was authored by Laura Cosovanu, an attorney and research associate at Stanford University’s Freeman Spogli Institute for International Studies.

36. Press Release, Council of Europe, Human Rights Were Violated in Moldova, Concludes Commissioner Hammarberg (Apr. 28, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1439365&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&RefreshDocsCache=yes>; see also World Movement for Democracy, *Moldovan Human Rights Organizations Express Concern Regarding Treatment of Protesters* (Apr. 14, 2009), <http://www.wmd.org/democracyalerts/apr1409.html>; see also Press Release, Article 19, Crackdown on Dissent Must Stop (Apr. 14, 2009), available at <http://www.article19.org/pdfs/press/moldova-crackdown-on-dissent-must-stop.pdf>.

37. Email from Iulian Fruntasu, Vice President, Moldova Liberal Democratic Party (Nov. 1, 2009) (on file with the author).

38. See Press Release, Amnesty International, *Moldova: Civil Society Activists at Risk of Arrest* (Apr. 8, 2009), available at <http://www.amnesty.org/en/for-media/press-releases/moldova-civil-society-activists-risk-arrest-20090408>.

39. See Evgeny Morozov, *Iran Elections: A Twitter Revolution?*, WASH. POST, June 17, 2009.

40. Moldova Ministry of Interior Affairs Official Website, <http://www.mai.md/> (last visited Apr. 26, 2009) (page archived and on file with author).

41. See Newsline - April 8, 2009, RADIO FREE EUROPE/RADIO LIBERTY, Apr. 8, 2008, <http://www.rferl.org/content/article/1144087.html>.

42. See Newsline - April 23, 2009, RADIO FREE EUROPE/RADIO LIBERTY, Apr. 23, 2009, <http://www.rferl.org/content/article/1144098.html>.

pro-Western government eventually defeated the incumbent Communist party in new elections held in July 2009 (following the Communists' failure to reach, even by fraud, the two thirds majority in Parliament required by the Moldovan constitution to elect a President). The new government started an investigation into the circumstances that led to the violence during and after the post-electoral protests in April 2009, as well as into the allegations of torture and other human rights violations.⁴³ Although the crisis may be heading to a proper political and legal resolution, a disturbing lesson remains that the same technologies that can serve as powerful instruments of liberation can also be wielded as tools of repression.

IV. Extraordinary Rendition*

In the past few years, the U.S. government's practice of transferring individuals suspected of terrorist activity to foreign countries without express legal authority has come under worldwide scrutiny. Done in secret, and in response to the directives of former President Bush's War on Terror, the policy stands in direct violation of domestic and international laws.⁴⁴

Similarly, the Geneva Conventions prohibit the transfer of prisoners of war to penitentiaries for disciplinary punishment and strictly limits the forcible transfer of protected persons to foreign states unless those persons are: (1) charged with ordinary criminal law offenses, and (2) extradited in compliance with extradition treaties concluded before the outbreak of hostilities.⁴⁵ The Geneva Conventions further establish that the forcible transfer of a protected person to another state in the absence of such a treaty constitutes a war crime.⁴⁶ Developed to protect nationals from the forced transfer to a state with low human rights standards from a state in which they seek protection, both the Convention Against Torture (CAT) and U.S. implementing legislation have increasingly been invoked to challenge this trend in U.S. counter-terrorist practices.⁴⁷

The Bush Administration never officially confirmed the practice of extraordinary rendition for torture, maintaining that terror suspects were sent only to foreign countries that gave assurances that individuals would not be tortured.⁴⁸

43. See Press Release, U.N. G.A., Third Committee, 32 and 33 meetings, U.N. Doc. GA/SHC/3961 (Oct. 23 2009), available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/AZHU-7XA5CQ?OpenDocument>.

* The section was authored by Natalie S. Feher, a member of the ABA Section of International Law International Human Rights Committee.

44. See Michael J. Garcia, *Renditions: Constraints Imposed by Laws on Torture*, CRS REPORT FOR CONGRESS, Order Code RL 32890 (Sept. 8, 2009), available at <http://www.fas.org/spp/crs/natsec/RL32890.pdf>.

45. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 87 [hereinafter Fourth Geneva Convention].

46. See, e.g., Third Geneva Convention, *supra* note 45, arts. 3, 17, 87, and 130; Fourth Geneva Convention, *supra* note 45, arts. 3, 32, 147.

47. But see Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

48. See Stephen Grey, *Extraordinary Rendition*, FRONTLINE/WORLD, Nov. 7, 2009, available at http://www.pbs.org/frontlineworld/stories/rendition701/video/video_index.html.

When President Obama took office, he announced the dismantling of the Bush Administration's "torture" programs in his first week in office, shutting down completely the extraordinary rendition program.⁴⁹ But left intact was the CIA's authority to carry out legal renditions, determined still to be a vital tool in the ongoing war on terrorism. A provision included other limits to the CIA's ability to detain and interrogate terror suspects.⁵⁰

The current administration has, however, continued some questionable legal practices with regards to this subject. In *Mohamed v. Jeppesen Dataplan, Inc.* five men sued a Boeing subsidiary for allegedly assisting the CIA to fly them to countries where they were detained in secret camps and tortured. The case was dismissed in early 2008 when the government intervened and asserted the "State secrets" privilege on the basis of national security.⁵¹ The ACLU appealed the case to the Ninth Circuit,⁵² where the Justice Department stated on February 9, 2009 that it would still assert the "State secrets" privilege.

V. Apartheid Claims Under the ATCA*

Plaintiffs Khulumani and Ntsebeza⁵³ filed actions under the Alien Tort Claims Act (ATCA)⁵⁴ against General Motors, Ford, Daimler, Rheinmetall, and IBM, alleging that those companies "aided and abetted apartheid crimes including torture, extrajudicial killing, and arbitrary denationalization."⁵⁵ The U.S.-based automotive companies and German-based defense company, Rheinmetall, are accused of manufacturing military vehicles and providing armaments and necessary military equipment to the South African government, while IBM is accused of providing computer hardware and support necessary for the South African government to carry out segregation.⁵⁶

"Although more than a dozen lawsuits were initially filed against a number of large U.S., European, and Canadian companies," only these cases survived.⁵⁷ The twenty-six plaintiffs are seeking approximately \$400 billion from the defendants.⁵⁸ The federal district court dismissed these cases in 2004,⁵⁹ but the Second Circuit vacated those dismis-

49. See generally Scott Horton, *Renditions Buffoonery*, HARPER'S MAG., Feb. 2, 2009, <http://www.harpers.org/archive/2009/02/hbc-90004326>.

50. See Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, at A1, available at <http://articles.latimes.com/2009/feb/01/nation/na-rendition1>.

51. Posting of Glenn Greenwald to Salon, http://www.salon.com/opinion/greenwald/2009/02/09/state_secrets/ (Feb. 9, 2009 15:32 EST).

52. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended by* 579 F.3d 943 (9th Cir. 2009), *reh'g, en banc, granted*, 586 F.3d 1108 (9th Cir. 2009).

* This section was authored by Omar John, a J.D. candidate at Florida Coastal School of Law.

53. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 242-43 (S.D.N.Y. 2009).

54. 28 U.S.C. §1350 (2009).

55. Press Release, Hausfeld L.L.P., South African Government Withdraws Opposition to Apartheid Lawsuits Pending in U.S. Federal Court (Sep. 3, 2009), available at http://www.hausfeldllp.com/pages/press_releases/272/south-african-government-withdraws-opposition-to-apartheid-lawsuits.

56. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 264-70.

57. Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2009/04/08/apartheid-claims-against-ford-gm-others-to-go-forward/tab/article/> (Apr. 8, 2009, 18:22 EST).

58. *SA U-turn on Apartheid Lawsuits*, BBC NEWS, Sep. 4, 2009, <http://news.bbc.co.uk/2/hi/africa/8237467.stm>.

59. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004).

sals.⁶⁰ The Second Circuit's decision was upheld due to the failure of the Supreme Court to meet quorum because five Justices had to recuse themselves.⁶¹ Since September 2009, the South African government, under the leadership of Jacob Zuma, reversed the position of the former Thabo Mbeki government and now states that New York is "is an appropriate forum" to hear the case.⁶²

The Second Circuit stated that plaintiffs must show that the corporation not only knew, but also that its purpose was to assist in the violation of the ATCA.⁶³ In a concurring opinion, Judge Hall stated that the plaintiffs should only have to prove that there was knowing practical assistance.⁶⁴ On remand, the district court stated that the appellate court's decision "left this court without a standard to apply or even a decision concerning the source of law from which this court should derive a standard."⁶⁵ The district court concluded that "international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations."⁶⁶ The case is next set to come before the court in January 2010.⁶⁷

VI. Capital Punishment*

A. THE UNITED STATES

The U.S. Supreme Court and lower federal courts addressed several significant death penalty issues in 2009 regarding procedural safeguards, legal representation, federalism, and execution methods.

The Supreme Court issued a one-paragraph opinion in *In re Troy Anthony Davis*,⁶⁸ which addressed a profound, though harsh, national debate about Supreme Court procedure, federalism, and claims of "actual innocence."⁶⁹ The Supreme Court remanded this habeas petition for testimony and findings of fact as to whether evidence unavailable at the

60. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam).

61. Justices Roberts, Breyer, and Alito recused themselves based on stock ownership. Justice Kennedy recused himself because his son works for Credit Suisse, one of the defendants. See Posting of Dan Slater to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/05/13/high-court-recusals-mean-s-africa-apartheid-case-can-move-forward/> (May 13, 2008, 9:00 EST); 28 U.S.C. §2109 (2009).

62. *SA U-turn on Apartheid Lawsuits*, *supra* note 58; see Letter from Jeffrey Thamsanqa Radebe, M.P., Minister of Justice and Constitutional Dev., Republic of S. Afr., to The Honorable Judge Shira A. Scheindlin, U.S. Dist. Judge, U.S. Dist. Court, Southern Dist. of N.Y., *available at* http://www.hausfeldllp.com/content_images/file/09_01_09_SA_Ministry_of_Justice_Ltr_to_Judge_Scheindlin.PDF (last visited Feb. 15, 2010).

63. *Khulumani*, 504 F.3d at 277.

64. *Id.* at 288-89.

65. Mark Hamblett, *Judge Narrows Claims in Apartheid Torts Case*, 4/9/2009 LAW.COM 1, (col. 4), *available at* <http://www.law.com/jsp/article.jsp?id=1202429769165>.

66. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 228, 262.

67. Peter Vermaas, *Apartheid Victims Want Western Companies to Cough Up*, NRC HANDELSBLAD, Oct. 2, 2009, http://www.nrc.nl/international/article2376593.ece/Apartheid_victims_want_Western_companies_to_cough_up.

* This section was authored by Lawrence G. Albrecht, President of First, Albrecht & Blondis, S.C.

68. See *In re Davis*, 130 S. Ct. 1, 1 (2009).

69. See, e.g., Adam Liptak, *Justices Tell Federal Court to Step Into Death Row Case*, N.Y. TIMES, Aug. 18, 2009, at A15, *available at* http://www.nytimes.com/2009/08/18/us/18scotus.html?_r=2 (article title differs in online edition); Bob Barr, Op-Ed., *Death Penalty Disgrace*, N.Y. TIMES, June 1, 2009, at A21, *available at* <http://www.nytimes.com/2009/06/01/opinion/01barr.html?scp=1&sq=&s>.

time of trial clearly establishes Davis' innocence. Justice Scalia's dissent, joined by Justice Thomas, dismissed the mandated hearing as "a fool's errand."⁷⁰

In a rare unanimous death penalty decision, the Supreme Court reversed the Sixth Circuit in *Bobby v. Bies*,⁷¹ and held that neither the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution nor the issue preclusion doctrine bars Ohio courts from conducting a full hearing on Bies' claim that his mental retardation bars the death penalty under *Atkins*,⁷² which was decided nearly a decade after Bies' conviction for aggravated murder of a ten-year-old boy. The Supreme Court granted certiorari and heard oral arguments on November 4, 2009, in the Alabama case of Holly Wood,⁷³ "who was convicted in 1994 of murdering his former girlfriend," but asserted that his attorney's failure to present evidence of his mental retardation and the lower court's abdication of meaningful judicial review functions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁷⁴ requires vacating the death penalty.⁷⁵ The Florida Supreme Court vacated the death sentence imposed on Timothy Lee Hurst and remanded for further jury evidentiary proceedings regarding counsel's failure to present penalty phase mitigating evidence of mental deficiency.⁷⁶

Twenty-seven years after Gary Cone was convicted of murder and sentenced to death, the Supreme Court held that the Tennessee courts' procedural rejection of his *Brady*⁷⁷ claim did not bar federal habeas review of the merits of that claim.⁷⁸

The Supreme Court heard argument on October 13, 2009 in *Smith v. Spisak*,⁷⁹ in which the Sixth Circuit held that defense counsel's conduct during the sentencing phase had violated the Sixth Amendment to the U.S. Constitution right to effective legal representation, and that the sentencing jury instructions violated the Eighth Amendment to the U.S. Constitution because the jury may have believed that a unanimous rejection of the death penalty was required before a life sentence could be considered.⁸⁰ Ohio argued that in habeas proceedings, the federal courts must defer under the AEDPA to the Ohio Supreme Court's decision to deny the constitutional claims.⁸¹

The botched attempt to kill Romell Broom by lethal injection set off a flurry of capital punishment motions in the federal courts and intervention by the governor of Ohio,

70. *In re Davis*, 130 S. Ct. at 4.

71. *Bobby v. Bies*, 129 S. Ct. 2145, 2153-54 (2009).

72. In *Atkins*, the Supreme Court held that the Eighth Amendment to the U.S. Constitution bars execution of mentally retarded offenders. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

73. See Adam Liptak, *Death Penalty Case Reveals Failings*, N.Y. TIMES, June 9, 2009, at A14; see also *Wood v. Allen*, 129 S. Ct. 2389 (2009).

74. 28 U.S.C. § 2254 (d)(1) (1996).

75. Brief for the Petitioner, *Wood v. Allen*, 2009 WL 2406378 (U.S.).

76. See *Hurst v. State*, 18 So. 3d 975, 1015-16 (Fla. 2009).

77. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that due process is violated when the prosecution suppresses evidence materially favorable to either the guilt or punishment of the accused.

78. See *Cone v. Bell*, 129 S. Ct. 1769 (2009).

79. The Supreme Court had earlier vacated and remanded the Sixth Circuit's initial decision for reconsideration in light of recent decisions. *Smith v. Spisak*, 129 S. Ct. 1319 (2009).

80. *Spisak v. Mitchell*, 465 F.3d 684, 704, 708 (6th Cir. 2006).

81. *Id.*

which resulted in the stay of four executions and reexamination of lethal injection protocols in Ohio.⁸²

Given the seemingly intractable array of legal issues precluding or delaying capital punishment, several states are increasingly assessing the costs of maintaining the death penalty.⁸³ New Mexico, citing these pragmatic concerns, abolished the death penalty in 2009.⁸⁴

B. CHINA

In China, at least 7,003 persons were sentenced to death, and at least 1,718 people were executed in 2008.⁸⁵ China imposed the death penalty on six people deemed responsible for the Uighur-Han ethnic conflict in 2009 in the Xinjiang region.⁸⁶ The Tibetan Center for Human Rights and Democracy asserted that Chinese authorities executed four people convicted of political protests in Lhasa who ignited fires and killed seven people.⁸⁷ The vice-president of the Supreme People's Court announced that China would reduce the sixty-plus categories of crime that authorize the death penalty.⁸⁸

C. INDONESIA

The regional parliament in Indonesia's "devoutly Muslim province of Aceh," where a version of Sharia law was implemented in 2001, unanimously passed legislation that imposes the death penalty by stoning for adulterers.⁸⁹

D. NORTH KOREA

North Korea publicly executed a Christian woman who was accused of distributing the Bible—a banned book—and of spying.⁹⁰

82. See, e.g., *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009) (stay of execution based on Eighth Amendment challenge to lethal injection after Romell Broom incident); Bob Driehaus, *Judge Delays Another Ohio Execution*, N.Y. TIMES, Oct. 20, 2009, at A19 (review of four executions stayed after the Broom incident); Bob Driehaus, *In Aftermath of Failed Executions, Ohio Governor Orders Postponement of 2 Executions*, N.Y. TIMES, Oct. 5, 2009, at A12; Bob Driehaus, *Prisoner in Ohio Wins Stay Against a Second attempt to Execute Him*, N.Y. TIMES, Sept. 19, 2009, at A9 (review of Broom case).

83. See Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 25, 2009, at A1; *Saving Lives and Money*, ECONOMIST, Mar. 1, 2009, at 32; *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22.

84. See *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A14.

85. Amnesty International, *Death Sentences and Executions in 2008* 13 (2009), available at <http://www.amnesty.org/en/library/asset/ACT50/003/2009/en/0b789cb1-baa8-4c1b-bc35-58b606309836/act500032009en.pdf>.

86. See Edward Wong & Mark McDonald, *China Sentences 6 to Death in Ethnic Riots*, N.Y. TIMES, Oct. 16, 2009, at A10.

87. See Andrew Jacobs, *Group Says China Has Executed 4 for Roles in Tibet Riots*, N.Y. TIMES, Oct. 24, 2009, at A5.

88. See Andrew Jacobs, *China Limits The Crimes Punishable by Death*, N.Y. TIMES, July 30, 2009, at A12.

89. See *Indonesia's Aceh Province Okes Stoning for Adulterers*, L.A. TIMES, Sept. 15, 2009, available at <http://articles.latimes.com/2009/sep/15/world/fg-aceh-islam15>.

90. See *Activists: N. Korea Publicly Executes Christian*, MSNBC.COM, July 24, 2009, http://www.msnbc.msn.com/id/32116646/ns/world_news-asiapacific/.

E. IRAN

Iran continued to stage mass hangings for a variety of criminal offenses.⁹¹ Iran also clarified that it will continue to execute juvenile offenders for murder and executed a woman who had murdered a relative when she was seventeen.⁹²

F. IRAQ

Twenty-eight members of the Shiite Soldiers of Heavens cult were sentenced to death by the Iraq federal court in Dhi Qar Province for attacks on other Shiite pilgrims.⁹³

G. SUDAN

In Sudan, death sentences for four men convicted of killing American diplomat John Granville and his Sudanese driver, Abdelrahman Abbas Rahama, were reviewed for possible commutation, which Sudanese law requires if the victim's family pardons the murderer;⁹⁴ however, the death sentences were affirmed.⁹⁵

H. UGANDA

Uganda's Supreme Court ruled, "in a case involving over 400 death row inmates," that discretionary imposition of "the death penalty is constitutional," although hanging is cruel, inhuman, and degrading punishment, and that it is "unreasonable to keep [inmates] on death row for more than three years."⁹⁶

I. TOGO

Togo's Parliament unanimously decided to abolish the death penalty and became "the [fifteenth] member of the African Union and the [ninety-fourth] country to abolish the death penalty."⁹⁷

VII. European Court of Human Rights: *Opuz v. Turkey**

In the landmark decision, *Opuz v. Turkey*, the European Court of Human Rights (ECHR) held on June 9, 2009 that gender-based domestic violence constitutes discrimina-

91. See *Iran Hangs 22 in Executions This Week*, N.Y. TIMES, Jan. 23, 2009, at A9; Nazila Fathi, *Iran Hangs 3 Men Held in Bombing of Mosque*, N.Y. TIMES, May 31, 2009, at A12.

92. See *Rights Groups Condemn Iran for Execution*, N.Y. TIMES, May 3, 2009, at A10.

93. See Campbell Robertson, *Iraq Hands Death Penalty to 28 Cultists For Attacks*, N.Y. TIMES, Aug. 14, 2009, at A7.

94. See *Sudan: Diplomat's Killers Back in Court*, N.Y. TIMES, Aug. 14, 2009, at A7.

95. See *Death Penalties Confirmed in Murder of U.S. Diplomat*, INT'L HERALD TRIB., Oct. 13, 2009, at 8.

96. See *Uganda Court Keeps Death Penalty*, BBC NEWS, Jan. 21, 2009, <http://news.bbc.co.uk/go/pr/ft/-/12/hi/africa/7841749.stm>.

97. See Amnesty International, *Togo: Fifteenth Country in Africa to Abolish the Death Penalty*, June 23, 2009, <http://www.amnesty.org/en/news-and-updates/good-news/togo-fifteenth-country-in-africa-to-abolish-the-death-penalty-20090623>.

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tion under the European Convention of Human Rights.⁹⁸ The Court referred to comparative international legal standards to achieve a progressive interpretation of Convention obligations in remedying domestic violence.⁹⁹ In *Bevacqua and S. v. Bulgaria*, the Court had previously held that issues of domestic violence fall within the scope of Article 8's right to respect for family life, which provides States a wide margin of deference in determining its level of interference in the relationships of private individuals, and, consequently, in responding to domestic violence.¹⁰⁰ *Opuz*, on the other hand, solidifies State obligations.¹⁰¹ The Court highlighted the gravity of domestic violence to justify piercing the veil of domestic law and engaging State responsibility for acts of private individuals under various provisions of the Convention, specifically the right to life, the prohibition against torture, and the prohibition against discrimination.¹⁰²

In *Opuz*, the applicant claimed that Turkey had failed to protect her and her mother from ongoing domestic violence beginning in 1995 perpetrated by the applicant's husband, HO.¹⁰³ The uncontested incidences of violence included assault inflicting grievous bodily harm, attempted murder, death threats, and harassment.¹⁰⁴ The applicant and her mother had brought several complaints to the authorities but repeatedly withdrew them in fear of retaliation by HO.¹⁰⁵ Turkish law required authorities to discontinue several criminal proceedings against HO upon withdrawal of the victims' complaints.¹⁰⁶ However, even after the passing of the Family Protection Act in 1998, which permitted judges to issue protective orders *sua sponte* in response to domestic violence, judicial and policing passivity interfered with the application of these measures.¹⁰⁷ Indeed, the applicant was chastised in an investigation report for having "wasted the securities forces' time" for her repeated complaints.¹⁰⁸ The applicant and her mother were persuaded to abandon their complaints by authorities on several occasions.¹⁰⁹ HO openly confessed to shooting and killing the applicant's mother in 2002 and he was convicted of her murder and sentenced to life in prison.¹¹⁰ But, HO received a reduction in his life sentence to fifteen years for demonstrating that he had committed an 'honor crime' in provocation by the applicant's mother.¹¹¹ HO is currently released while awaiting appeal.¹¹²

98. See *Opuz v. Turkey*, 33401/02 Eur. Ct. H. R. (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

99. See *id.* ¶¶ 164, 185, 192, 200.

100. See *Bevacqua and S v. Bulgaria*, 71127/01, Eur. Ct. H.R. at ¶ 84, (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=bevacqua&sessionId=35190073&skin=hudoc-en>.

101. *Opuz*, 33401/02, ¶¶ 128, 159, 191.

102. See *id.* ¶¶ 153, 176, 202.

103. *Id.* ¶ 3.

104. See *id.* ¶¶ 8, 133.

105. *Id.* ¶ 169.

106. *Id.* ¶ 88.

107. *Id.* ¶ 192.

108. *Id.* ¶ 29.

109. *Id.* ¶ 119.

110. *Id.* ¶ 57.

111. *Id.*

112. *Id.*

In relation to the applicant's complaints that her mother's death violated right to life protections in Article 2, the ECHR held that States must not only refrain from the intentional taking of life, but also take positive measures to safeguard the right to life of individuals within their jurisdiction.¹¹³ States must secure the right to life by establishing effective criminal and civil remedies and measures to prevent, suppress, and punish offenses against the person.¹¹⁴ The Court concluded that Turkey failed to exercise due diligence to prevent the death of the applicant's mother because the authorities could have foreseen a lethal attack by HO and failed to take reasonable measures to mitigate the harm.¹¹⁵ In addition, the State lacked an efficient and independent judicial system to punish and deter the violent attack against the applicant's mother.¹¹⁶ Notably, the ECHR held that domestic laws should not strictly preclude criminal investigations and prosecutions upon withdrawal of a victim's complaint.¹¹⁷ The Turkish Government raised Article 8 defensively, arguing that forcible separation of the applicant from her husband without the victim's complaint would have amounted to a breach of their right to family life under the Convention.¹¹⁸ However, the ECHR rejected this proposal, holding instead that States must strike a proper balance between the perpetrator's rights and the victim's rights to life and physical and mental integrity in domestic violence cases.¹¹⁹

The ECHR determined that the severity of the applicant's physical and mental injuries perpetrated by HO amounted to ill-treatment and that Turkey had failed to take reasonable measures to prevent and deter serious breaches of the applicant's personal integrity by HO.¹²⁰ The ECHR noted judicial passivity in applying the protective measures of the Family Protection Act and an overall atmosphere of impunity and tolerance to domestic violence by authorities.¹²¹

While horizontal communication between international courts is occurring with more frequency,¹²² courts often gloss over citations and rarely indicate specific reasons for reference.¹²³ But the ECHR explicitly referred to foreign law, specifically the CEDAW Committee and the Inter-American Commission, in characterizing, for the first time at the ECHR, gender-based domestic violence as a form of discrimination.¹²⁴ Importantly, while the legislation criminalizing domestic violence was *prima facie* neutral, the Court referred to the application of the law as discriminatory, pointing to an overall unresponsiveness of the judicial system and general tolerance of domestic violence against women by authorities.¹²⁵

113. *Id.* ¶ 128.

114. *Id.* ¶¶ 129, 130.

115. *See id.* ¶ ¶ 136, 148, 149.

116. *Id.* ¶ 152.

117. *Id.* ¶ 127.

118. *Id.* ¶ 140.

119. *See id.* ¶ ¶ 138, 147.

120. *See id.* ¶¶ 161, 171, 176.

121. *Id.* ¶ 170.

122. *See* Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 500 (2000).

123. *See* Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 C.M.L. REV. 629, 656 (2006).

124. *See Opuz*, 33401/02, ¶¶ 185, 186, 187, 200.

125. *Id.* ¶ 192.

