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International Human Rights

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I. General Overview

International human rights law and institutions continue to be inadequate to prevent or redress many of the most serious human rights violations witnessed around the world. Signs of progress in one area of the world have often been quickly offset by new reports of mass atrocities in another part and by realizations that there are not enough resources to enforce basic human rights norms.

Although human rights violations continue, the legal norms of international human rights law and the institutions that may be able to enforce them continue to develop. Recognizing that we cannot do justice in this review to all of the institutions that handle international human rights issues, we focus particularly in this year's annual review on developments from the European Court of Human Rights, an institution that has received inadequate attention in our earlier committee reviews of recent developments in international human rights law.[1] Indeed, what can be described as serious omissions of important legal and political developments can probably be found here and in each of those earlier articles. We feel it important to again expressly affirm that omissions of particular countries or issues on the human rights agenda cannot be construed as indicating that an event or issue is unimportant, but instead is a combination of: (1) a concession to the unfortunate but necessary space limitations in this journal; (2) recognition of the overlapping interest of other committees on many significant matters relating to international human rights, such as developments in the International Criminal Tribunals for the former Yugoslavia,[2]

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1. *See* Mark E. Wojcik et al., *International Human Rights*, 34 INT'L LAW. 761 (2000); Harvetta M. Asamoah et al., *International Human Rights*, 33 INT'L LAW. 555 (1999); Harvetta Asamoah et al., *International Human Rights*, 32 INT'L LAW. 559 (1998); James E. Dorsey, *International Human Rights*, 31 INT'L LAW. 659 (1997).

2. *See, e.g.*, Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683 (2000); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EURO. J. INT'L L. 569 (2000).

Rwanda,[3] and the Rome Statute for the International Criminal Court;[4] developments related to international human rights as they relate to corporations, international financial institutions,[5] and other trading regimes[6]; and the Supreme Court's decision in *Crosby v. National Foreign Trade Council*[7] that found that federal sanctions against Burma preempted the Massachusetts Burma law;[8] and (3) deference to other widely available sources that publish annual reviews of developments in human rights.[9] The listing of items below is not intended to suggest that one area or issue is more important than another.

This review, then, is intended to fill in some of the gaps that may be left by other publications, provide a brief overview of significant legal developments and trends related to international human rights law, and document some of the committee's own contributions and work in promoting the development of international human rights law.

3. *See, e.g.*, Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683 (2000); *Independent Inquiry into Rwandan Genocide Faults U.N. and Member States for Inadequate International Response*, 11 FOREIGN POL'Y BULL. 135 (2000).

4. Rome Statute of the International Criminal Court, 53rd Sess., U.N. Doc. A/CONF.183/9 (1998) (as corrected by the procés verbal of Nov. 10, 1998 and July 12, 1999). New signatories to the treaty for the International Criminal Court in the year 2000 included Algeria (Dec. 28); the Bahamas (Dec. 29); Bahrain (Dec. 11); Barbados (Sept. 8); Belize (Apr. 5); Bosnia and Herzegovina (July 17); Botswana (Sept. 8); Brazil (Feb. 7); Cambodia (Oct. 23); Cape Verde (Dec. 28); Comoros (Sept. 22); Democratic Republic of the Congo (Sept. 8); Dominican Republic (Sept. 8); Egypt (Dec. 26); Guinea (Sept. 7); Guinea-Bissau (Sept. 12); Guyana (Dec. 28); Iran (Dec. 31); Israel (Dec. 31); Jamaica (Sept. 8); Kuwait (Sept. 8); the Marshall Islands (Sept. 6); Mexico (Sept. 7); Mongolia (Dec. 29); Morocco (Sept. 8); Mozambique (Dec. 28); Nauru (Dec. 13); Nigeria (June 1); Oman (Dec. 20); Peru (Dec. 7); the Philippines (Dec. 28); the Republic of Korea (Mar. 8); the Republic of Moldova (Sept. 8); the Russian Federation (Sept. 13); São Tomé and Principe (Dec. 28); Seychelles (Dec. 28); Sudan (Sept. 8); Syria (Nov. 29); Thailand (Oct. 2); Ukraine (Jan. 20); the United Arab Emirates (Nov. 27); the United Republic of Tanzania (Dec. 29); the United States of America (Dec. 31); Uruguay (Dec. 19); Uzbekistan (Dec. 29); Yemen (Dec. 28); Yugoslavia (Dec. 19). States that ratified or acceded to the Treaty in 2000 included Austria (Dec. 28); Belgium (June 28); Belize (Apr. 5); Botswana (Sept. 8); Canada (July 7); Finland (Dec. 29); France (June 9); Gabon (Sept. 20); Germany (Dec. 11); Iceland (May 25); Lesotho (Sept. 6); Luxembourg (Sept. 8); Mali (Aug. 16), the Marshall Islands (Dec. 7); New Zealand (Sept. 7); Norway (Feb. 16); Sierra Leone (Sept. 15); South Africa (Nov. 27); Spain (Oct. 24); Tajikistan (May 5); and Venezuela (June 7). As of February 12, 2001, 139 States have signed and twenty-nine States have ratified or acceded to the treaty. It will enter into force sixty days after the 60th instrument of ratification is deposited at the United Nations. *See also* Brian J. Newquist, *The International Criminal Court*, 34 INT'L LAW. 691 (2000).

5. *See, e.g.*, John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331 (2000); Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT'L L. REV. 71 (2000).

6. *See, e.g.*, Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62 (2001).

7. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

8. The decision has already been widely discussed in several academic articles. *See, e.g.*, Daniel M. Price et al., *Crosby v. NFTC and the Future of State and Local Sanctions*, 32 LAW & POL'Y INT'L BUS. 37 (2000); Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 LAW & POL'Y INT'L BUS. 109 (2000); Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTO, and the Federal Courts*, 32 LAW & POL'Y INT'L BUS. 51 (2000).

9. *See, e.g.*, HUMAN RIGHTS WATCH, WORLD REPORT (2001) (a 540-page book reviewing human rights developments from November 1999 to October 2000) [hereinafter HUMAN RIGHTS WATCH]; Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 AM. UNIV. INT'L L. REV. 315 (2001).

II. Rights of the Child

As the new century dawned, children, the world's most vulnerable citizens, faced immense challenges and brutalities. More than 300,000 children under the age of eighteen were fighting in armed conflicts in at least thirty countries worldwide.[10] Two million children were forced into prostitution.[11] Over 250 million child laborers were being exploited for profit or were forced to work in order to survive.[12] Approximately 80 percent of the world's more than 40 million refugees and internally displaced people were women and children. By year's end, AIDS-stricken African countries had buried or orphaned millions of children, and an estimated 250,000 children were being infected with HIV monthly.[13] More than 600 million children between the ages of one and five lived in poverty.[14] And the widespread torture and ill treatment of children during armed conflict, at the hands of police, or under detention, cast an intolerable shame upon humanity.[15]

But also in the year 2000, those working to realize the promise of the U.N. Convention on the Rights of the Child, and the principles of the 1990 World Summit on Children, began articulating a vision of hope, and an agenda of change.

In particular, governments and nongovernmental organizations (NGOs) began preparing for the U.N. General Assembly Special Session on Children in New York in September 2001. The summit will review progress and problems in implementing the goals of the 1990 World Summit, and articulate new goals for the future. At the first preparatory committee meeting in May and June, NGOs debated the extent to which the Special Session should focus on a more traditional agenda (including health, nutrition, and basic education) or other concerns such as violence, child labor and contemporary forms of slavery, sexual exploitation, trafficking, juvenile justice and protection during armed conflict.[16]

A. Children in Armed Conflict

On May 25, 2000, following six years of negotiations, the U.N. adopted an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[17] The Optional Protocol bans the use of children under the age of eighteen in armed conflicts. It does not, however, preclude voluntary recruitment of sixteen- and

10. Coalition to Stop the Use of Child Soldiers, http://www.child-soldiers.org/.

11. The Protection Project, http://www.sais-jhu.edu/protectionproject.

12. International Confederation of Free Trade Unions, http://www.icftu.org.

13. UNICEF, The State of the World's Children 2000, http://www.unicef.org/sowc00.

14. UNICEF, The Progress of Nations 2000, http://www.unicef.org/pon00.

15. Amnesty International, Hidden Scandal, Secret Shame: Torture and Ill Treatment of Children (2000); Save the Children UK, Children, Torture and Power (2000).

16. In addition, in April, the U.N. Commission on Human Rights adopted resolution 2000/85 which, inter alia, called for full implementation of CRC principles; sought greater protection and promotion of children's rights respecting identity, family relations, and birth registration, health, and education; reaffirmed the importance of nondiscriminatory treatment; called for special measures to care for street children, refugees, internally displaced children, and child laborers; and urged further measures to combat child prostitution and pornography and end the use of children in armed conflict.

17. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54-263, U.N. GAOR, 54th Sess., Agenda Item 116(a), U.N. Doc. No. A/RES/54/263 (2001), *reprinted in* 8 Int'l Hum. Rts. Rep. 288 (2001). *See also* François Bugnion, *Les enfants soldats, le droit international humanitaire et la Charte africaine des droits et du bien-être de l'enfant*, 12 African J. Int'l & Comp. L. 262 (2000).

seventeen-year-olds into armed forces. An express Protocol provision allowed the United States to sign and ratify the Optional Protocol even though it has not yet ratified the underlying Convention on the Rights of the Child.[18] Thus, the key change in policy for the United States will be that seventeen-year-olds may still voluntarily join the armed forces, but must be kept out of combat until age eighteen. The United States signed the optional Protocol in July and forwarded it to the Senate for its advice and consent for ratification. In August, the ABA passed a resolution urging U.S. ratification, and ABA President Martha Barnett subsequently wrote Senator Helms underscoring the ABA's strong support for the Protocol. As of this writing, the Senate Foreign Relations Committee has not taken up the Protocol.

In August, the U.N. Security Council passed Resolution 1314, condemning the recruitment of children as soldiers and the killing and abuse of children in conflict. The Security Council recommended governmental prosecution of those who recruit child soldiers; special protection against rape and other abuses; incorporation of children's welfare into peace negotiations, and the training of peacekeeping forces in child protection.

Also in August, the U.N. Security Council passed Resolution 1315, to establish a Special Court for Sierra Leone, to try those alleged to have committed war crimes and other violations of international law. In connection with child soldiers, the draft statute of the Special Court specified that only the "abduction or forced recruitment" of children under age fifteen into armed conflict, rather than all recruitment, was covered by the court's jurisdiction, a weakening of the standard set by the statute for the International Criminal Court. In addition, the U.N. Secretary General left open to the Security Council whether child soldiers between ages fifteen and eighteen should themselves be prosecuted under the statute, prompting outrage from various human rights groups.

In September, representatives from 132 governments, youth, NGOs, and international organizations participated in the first International Conference on War-Effected Children, held in Canada. The conference resulted in a ministerial declaration entitled "Agenda for War-Effected Children." It called for increased efforts to protect children in conflict situations, end impunity for those violating international human rights and humanitarian law, and strengthen humanitarian assistance for children affected by war.

B. Sex Trafficking

Two new U.N. protocols were adopted in 2000 that should significantly strengthen efforts to combat global sex trafficking. On May 25, 2000, the U.N. adopted an Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[19] It calls on governments to ban these practices and make certain

18. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GOAR, 44th Sess., Agenda Item 108, U.N. Doc. A/Res/44/25 (1989); *see* Frank Newman & David Weissbrodt, Selected International Human Rights Instruments and Bibliography 80 (2d ed. 1996). At the annual meeting in New York, the ABA House of Delegates renewed its earlier recommendations in support of ratification of the CRC, made in February of 1991 and February of 1994. The United States signed the treaty on February 16, 1995, but has not ratified it. That signature came only after it had already entered into force on September 2, 1990. As of February 21, 2001, there are 191 state parties to the CRC, making it the most widely ratified human rights treaty in history. The United States and Somalia are the only countries that have not ratified the Convention on the Rights of the Child.

19. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, U.N. GAOR, 54th Sess., Agenda Item 116(a), U.N. Doc. No. A/RES/54-263, *reprinted in* 8 Int'l Hum. Rts. Rep. 293 (2001).

actions related thereto punishable under criminal law. It also sets forth various bases for asserting jurisdiction, strengthens extradition measures, and urges the adoption of appropriate measures to protect child victims during the judicial process. In addition, it urges all feasible measures to achieve a child victim's social reintegration and physical and psychological recovery, and urges that states have adequate procedures for seeking compensation or damages from their offenders. The United States signed the Optional Protocol in July and forwarded it to the Senate for its advice and consent for ratification. In August, the ABA passed a resolution urging U.S. ratification, and ABA President Martha Barnett subsequently wrote Senator Helms underscoring the ABA's strong support for the Protocol. As of this writing, the Senate Foreign Relations Committee has not taken up the Protocol.

On November 15, 2000, the U.N. adopted the Convention against Transnational Organized Crime, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Protocol negotiations were the subject of considerable controversy, particularly with respect to whether the trafficking offense should be limited to non-consensual practices. As finally approved, the Protocol requires the criminalization of sex trafficking, defined as:

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.[20]

Under the Protocol, a victim's "consent" to such exploitation is deemed irrelevant if any of the aforementioned means are used. In addition, the recruitment, transportation, transfer, harboring, or receipt of a child (any person under eighteen) for exploitation is covered by the definition even if it does not involve any of the aforementioned means.

The Protocol features measures to assist and protect victims of trafficking, and in this regard requires governments to take into account their age, gender and special needs, particularly the special needs of children, including appropriate housing, education and care. It also addresses the repatriation of victims, information exchange and training, and border measures. The United States signed the Convention and the Trafficking Protocol in December in Palermo, Italy. As of this writing, it has not yet forwarded the Convention to the Senate in connection with ratification.

The United States also significantly bolstered its resolve against the sex trade with passage of the "Trafficking Victims Protection Act."[21] The legislation, the first modern anti-slavery statute of its kind in the world, prohibits sex trafficking of children or of others by force, fraud or coercion, and increases penalties, including potential life imprisonment. It also establishes special visas for victims, provides for certain victim assistance and protection

20. The interpretive notes to the Protocol states that the terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, "which is therefore without prejudice as to how States Parties address prostitution in their respective domestic laws." Interpretive Notes for the Official Records (*travaux preparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention against Transnational Organized Crime, U.N. GOAR, 55th Sess., Agenda Item 105, U.N. Doc. No. A/55/383/Add.1 (2000).

21. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

measures, and requires that convicted traffickers give full restitution to victims. In addition, the legislation declares that it is U.S. policy not to provide non-humanitarian, non-trade related foreign assistance to any government that does not comply with minimum standards for the elimination of trafficking and is not making significant efforts to comply with such standards.

In April, several individuals from Thailand posing as family members attempted to enter the United States to set up a sex trafficking ring, but were apprehended in California. Traveling with them as a human prop was a three-year-old Thai boy, Phanupong Khaisri, suffering from HIV and other health problems. The boy faced immediate deportation until Thai activists in Los Angeles brought the case to court, and a U.S. district court judge issued a preliminary injunction against his deportation. It also ruled that the boy's court-appointed guardian could apply for political asylum on his behalf. With parallels to the Elian Gonzalez case, the judge denied requests that the boy's grandparents be given custody, after learning the grandmother had a past conviction for drug trafficking. As of December, the boy was living with his court-appointed guardian in Los Angeles while his political asylum application was under INS review.

Marvin Hersh, a professor at Florida Atlantic University, was jailed for 105 years for having traveled to Honduras to sexually abuse street children, and for trafficking a fourteen-year-old boy back to Florida as a "sex toy." Under 18 U.S.C § 2423, it is a crime for any American citizen to travel abroad with the intent to sexually abuse children.

C. Child Labor

International Labor Organization (ILO) Convention 182 against the Worst Forms of Child Labor[22] took effect in November 2000, and achieved the fastest ratification record in ILO history. It seeks an end to abusive child labor practices, which include child slavery, sexual exploitation, debt bondage, trafficking, and forced labor, including the forced recruitment of children for use in armed conflict.

In a move to bolster the treaty's impact, in May Congress passed the Trade and Development Act of 2000, which includes a provision submitted by Senator Tom Harkin requiring beneficiaries of U.S. trade preferences to meet and effectively enforce the standards established by ILO Convention 182. Under the new law, P.L. No. 106-200, the president will not designate a country as eligible for benefits under the Africa, Caribbean Basin, and Generalized System of Preferences programs if it has not implemented its obligations to eliminate the worst forms of child labor, as called for by ILO 182. The worst forms of child labor include slavery-like practices, child prostitution or use of a child for pornographic purposes, drug trafficking, or work that is likely to harm the health and safety of children. Thus, for the first time, a country's progress on eliminating the worst forms of child labor will be a condition to U.S. trade benefits.

In addition, the United States dramatically increased its support for the ILO's International Programme for the Elimination of Child Labor (IPEC) to $30 million annually, enabling dozens of programs to prevent child labor, remove children from child labor and provide them with rehabilitation and relevant education, and provide their parents with improved livelihoods, jobs, or income.

22. Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, 38 I.L.M. 1207 (1999).

The Organization for Economic Cooperation and Development (OECD) began a review of its Guidelines for Multinational Enterprises, with the objective of adding child labor to the list of its rules of corporate conduct. The proposed change calls for companies to "respect the human rights" of employees, "contribute to the effective abolition of child labour" and "contribute to the elimination of all forms of forced or compulsory labour,"[23] none of which are mentioned in the current version. In addition, in July, approximately fifty companies agreed to join the U.N. "Global Compact," thereby committing themselves to nine principles, including legally non-binding pledges to protect human rights, eliminate child labor and develop environmentally friendly technologies. The list includes Daimler Chrysler, Nike Inc., Royal Dutch/Shell Group, Bayer Corp., Dupont, Lm Ericsson, Healtheon/WebMD, Deutsche Bank AG, BP Amoco plc, Novartis AG, and Unilever.

McDonalds' "Happy Meal" toys were found to be made by children in China, prompting the company to terminate that supplier relationship. An investigation by the Hong Kong Christian Industrial Committee had revealed that, in August 2000, there were over 500 children under sixteen years of age employed at City Toys Ltd in Shajing, Shenzhen, working seven days every week for $3 per day. These children reportedly lived in barracks and were forced to sleep on wooden benches without mattresses.

In November, the U.S. Customs Service ordered that all men's and girls' clothing manufactured by a Chinese-owned company in Mongolia, Dong Fang Guo Ji, be stopped at the U.S. border, based on evidence it uses illegal forced child labor. According to Customs, Dong Fang shipped about $1.5 million in apparel to the United States annually, about 90 percent of which was sold directly to U.S. wholesalers under the Wuxi Guang Ming Overseas Fashion Ltd. and High Fashions Overseas Ltd. names. The rest of its business had been with U.S. labels, principally with Guess and Phillips Van Heusen, Customs said.

The Treasury Advisory Committee on International Child Labor Enforcement, an advisory group composed of agency and private sector/NGO representatives (including representatives from the ABA), completed work on its guidelines for businesses that may be importing goods made with forced or indentured child labor. (Customs is empowered to exclude such goods from entering the United States under 19 U.S.C. § 1307, and amended its regulations in August to make clear that its power includes seizure and forfeiture of prohibited imports.) The advisory document, which is available on the Customs website, alerts importers to potential signs of child labor, classified as either a "red flag" (a strong indicator to Customs of forced or indentured child labor, upon which Customs may base enforcement action or further investigation) or a "yellow flag" (possibly signaling the need for additional investigation).

D. Intercountry Adoption

On September 20, 2000, the Senate gave its advice and consent to ratification of the Hague Convention on Protection of Children and Cooperation of Intercountry Adoption.[24] The Intercountry Adoption Act,[25] enacted October 6, 2000, implements the treaty, which

23. The OECD Guidelines for Multinational Enterprises, *available at* http://www.oecd.org/daf/investment/guidelines/mnetext.htm.

24. Convention on Protection of Children and Cooperation of Intercountry Adoption, *open for signature* May 29, 1993, S. Treaty Doc. No. 105-51.

25. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

sets uniform standards and procedures governing intercountry adoption. The legislation is intended to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions subject to the Convention, and to ensure that such adoptions are in the children's best interests. It designates the State Department as the U.S. Central Authority for implementing the Convention, and requires that agencies be accredited in order to offer or provide adoption services in connection with a Convention adoption. Convention records governed by the Immigration and Nationality Act may be disclosed under federal law, as well as those federal records whose disclosure is deemed necessary to administering the Convention; state law governs access to non-Convention records (i.e., records of state adoption proceedings).

In October, Congress also enacted the Child Citizenship Act of 2000,[26] to extend automatic U.S. citizenship to thousands of foreign-born adopted children. It amends the Immigration and Nationality Act to provide automatic U.S. citizenship for a foreign-born child under the age of eighteen if at least one parent is a U.S. citizen, and the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence, including certain adopted children adopted by a U.S. citizen parent.

E. Asylum, Custody, and Abduction

Elian Gonzalez, a six-year-old Cuban boy found clinging to an inner tube off the coast of Miami in November 1999, became the subject of a dramatic custody battle between his Miami relatives and his Cuban father. Elian was released into the custody of his great uncle in Miami, Lazaro Gonzalez, who had fled Cuba ten years earlier. With the backing of Miami's Cuban exile community, Lazaro Gonzalez filed an application for asylum on Elian's behalf, alleging that he had a well-founded fear of persecution if returned to communist Cuba.

Elian's father, Juan Miguel Gonzalez, opposed the application on the basis that he alone could speak for the child, and sought its withdrawal to the INS. Upon investigation, the INS concluded that Elian's father was fully capable of making decisions on behalf of his son, and acceded to his request to withdraw the asylum application. The INS 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 application should be filed.

Lazaro Gonzalez filed suit first in Florida state court, arguing the issue was one of family law, and the court granted the uncle temporary custody, pending a full hearing. Then, on January 19, 2000, Lazaro Gonzalez challenged the INS decision in federal district court on the grounds that there was no lower age limit for making an asylum request. On March 21, 2000, a federal district judge dismissed the appeal, ruling that the INS had not violated the law when it determined that someone as young as Elian must be represented by a parent in asylum applications.[27] Lazaro Gonzalez appealed to the Eleventh Circuit Court of Ap-

26. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

27. Gonzalez ex rel. Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000).

peals, which on April 13, 2000, barred Elian from being taken out of the United States, pending determination of the case.[28]

Elian's father came to the United States in early April to take custody of his son, but the Miami relatives refused to meet with him. He was eventually reunited with his son after armed INS agents mounted a controversial, pre-dawn raid, and forced the boy from the Miami home where he was staying.

On June 1, 2000, 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.[29] Later that month, the U.S. Supreme Court refused to hear the appeal filed by the Miami relatives, or to extend the injunction keeping Elian in the United States.[30] Elian returned to Cuba with his father that same day.

During the legal wrangling, the case attracted unprecedented media attention, huge protests in the streets of Miami, and lively debate across America, in Congress (where some sought U.S. citizenship for the boy), and even among the presidential candidates, George W. Bush and Al Gore. The case particularly enflamed U.S.-Cuba relations, with Cuban officials denouncing U.S. immigration policies, and U.S. politicians denouncing Fidel Castro and his communist regime.

In June, frustrated by lack of foreign government cooperation (particularly from Austria, Germany and Sweden) in cases under the Hague Convention on International Child Abduction, the Senate passed H. Con. Res. 293,[31] urging all contracting parties to fully comply with the Convention. It particularly calls on them to honor their commitments and return abducted or wrongfully retained children to their place of habitual residence without reaching the merits of any underlying custody dispute and to remove obstacles to the exercise of parental access rights.

In September, judges from six delegations (Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States) attended the Common Law Judicial Conference on International Child Custody hosted by the U.S. Department of State. The delegates proposed certain "best practices" to improve operation of the Hague Convention on International Child Abduction. Among these best practices were recommendations that: simple and effective mechanisms exist to enforce orders for the return of children; the Article 13b "grave risk" defense be narrowly construed; left-behind parents seeking a child's return under the Convention be provided promptly with experienced legal representation, where possible at the expense of the requested state; and alternative legal and judicial approaches to enforcing access rights internationally be pursued, including prompt consideration of the 1996 Hague Convention on the Protection of Children (which provides, inter alia, a

28. That same day, the Florida court terminated its temporary protective order and dismissed the state court case on grounds of lack of subject matter jurisdiction due to federal preemption, and lack of standing of the uncle under the relevant Florida statute on temporary custody of minor children by extended family. *In re* Gonzalez, 2000 WL 492102 (Fla. Cir. Ct. Apr. 13, 2000). The court noted that under the statute, 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.

29. Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000), *rehearing denied sub nom.* Gonzalez ex rel. Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000).

30. Gonzalez ex rel. Gonzalez v. Reno, 120 S. Ct. 2737 (2000) (denying writ of certiorari).

31. H.R. Con. Res. 293, 106th Cong. (2000) (enacted).

mechanism for handling international access cases), and court-referred mediation in appropriate cases (to help parents make their own arrangements for international access).

In *England v. England*,[32] a case construing the Hague Convention, the Fifth Circuit reversed a district court ruling that even though two children were wrongfully removed from Australia, their country of habitual residence, to the United States in violation of the Hague Convention, they need not be returned to Australia. The district court's view was that return would expose the children to grave risks of psychological harm, based on the fact that one child had been adopted and experienced a turbulent history in orphanages and foster care, and difficult adoption proceedings. In addition, the court cited to the psychological trauma associated with separating the sisters during the proceeding, and that the older child objected to being returned. The Fifth Circuit reversed, finding that the evidence of grave risk of harm was not sufficient to meet the clear and convincing standard, and that there was also insufficient evidence that the older child was mature enough for the court to consider her views under the Convention's age and maturity exception.

In another significant Hague Convention case, *Croll v. Croll*,[33] the U.S. Court of Appeals for the Second Circuit reversed a district court and denied a father's request to order the return of his child to Hong Kong. The court ruled that the father's "rights of access" conferred by a Hong Kong custody decree were not considered "rights of custody" enforceable by a return remedy under the Convention.

F. Survival Rights

In a particularly heart-wrenching case in England, parents of conjoined twins gave up their legal battle to prevent doctors from physically separating the twin girls, which operation resulted in the death of one of them, as was expected. One of the girls, Mary, depended on the lungs and heart of the other girl, Jodie, in order to survive. Doctors had told the parents that if the twins were not separated, both would die, but with a successful operation, Jodie could live. The parents, who were Roman Catholic, refused to give permission for an operation that would kill one of their own children, and would rather leave the matter up to God's will. The UK appeals court authorized the operation, essentially ruling that doctors could kill one child to save the other without violating criminal law. But the ruling's narrow scope should alleviate fears that doctors might have unbridled authority to make such decisions against the will of the parents.

G. Corporal and Capital Punishment

In January 2000, Israel's Supreme Court effectively banned all parental corporal punishment, however light. Israel's National Council for the Child declared that the ruling "finally recognized the right of children not to be exposed to violence of any kind, even when those who use violence make excuses for it, saying it is 'educational' or 'punitive.'"[34]

Sadly, five individuals were executed between January and October 2000 for crimes committed when they were under the age of eighteen. Four of these executions took place in

32. England v. England, 234 F.3d 268 (5th Cir. 2000), *reh'g denied* (5th Cir. Feb. 13, 2001).

33. Croll v. Croll, 229 F.3d 133 (2nd Cir. 2000).

34. Dan Izenberg, *Supreme Court: Corporal Punishment of Children is Indefensible*, Jerusalem Post, Jan. 26, 2000, at 4.

the United States; the Democratic Republic of Congo carried out the fifth. Of the thirty-eight U.S. states that retain the death penalty, twenty-three permit its imposition for crimes committed under the age of eighteen. The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child (CRC) prohibit the imposition of the death penalty on juvenile offenders.

H. Right to Education

Fifteen hundred participants from 181 countries met in Sénégal for the World Education Forum, and adopted a Framework for Action committing their governments to achieve quality basic education for all, with a particular emphasis on girls' education and a pledge from donor countries and institutions that "no country seriously committed to basic education will be thwarted in the achievement of this goal by lack of resources."[35] Education was defined as a fundamental human right and the key to sustainable development and peace. The participating governments committed themselves to, among other goals, ensure that by 2015 all children have access to complete free and compulsory primary education of good quality; eliminate gender disparities in education by 2005 and achieve gender equality by 2015; and achieve a 50 percent improvement in levels of adult literacy by 2015, especially for women.

III. Rights of Women

The protection of the rights of women also continues to be of major concern to the International Human Rights Committee. Despite our own concern, we believe that women's issues should have received greater attention than they did in 2000, a year that marked the fifth anniversary of the United Nations World Conference on Women that was held in Beijing in 1995.[36]

The Committee assisted in drafting a report and recommendation that was adopted by the ABA House of Delegates in July 2000. The recommendation urged the U.S. Senate to ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[37] As of February 21, 2001, there were 166 state parties to CEDAW. The three states that have signed but not ratified are São Tomé and Principe, the United States, and Afghanistan. The violation of the rights of women under the Taliban regime in Afghanistan is of particular concern and appears at the moment to be hopeless

35. Dakar Framework for Action, *available at* http://www.unesco.org/education/efa/ed_for_all/framework.shtml.

36. For some discussion of the fifth anniversary of the Beijing Conference, see Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 Colum. Hum. Rts. L. Rev. 1 (2000).

37. Convention on The Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Annex, Agenda Item 75, U.N. Doc. A/RES/34/180 (1980); Frank Newman & David Weissbrodt, Selected International Human Rights Instruments 62 (2d ed. 1996). The ABA House of Delegates had previously approved recommendations in support of ratification of CEDAW in August 1984 and February 1996. The United States signed CEDAW on July 17, 1980 and the president submitted it to the U.S. Senate for its advice and consent to ratification on November 12, 1980. The treaty entered into force on September 3, 1981, and as of May 15, 2000 there are 165 state parties. The parties include all of the world's industrial countries except the United States.

to remedy. For example, in May 2000, the Taliban ordered a mother of seven children to be stoned to death for adultery in front of "an ecstatic stadium of men and children."[38]

IV. Racial Discrimination

Five years after it was due, the United States submitted its report required by the Convention on the Elimination of All Forms of Racial Discrimination.[39] The report, submitted to the United Nations Committee on the Elimination of Racial Discrimination, was praised for its "unprecedented and welcome candor" in acknowledging the persistence of racism, discrimination, and segregation in the United States.[40] But the report was also criticized for failing to properly depict the role of race discrimination in the criminal justice system.[41]

V. Torture

Four years after it was due, the United States submitted its report required by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[42] The first report, submitted to the United Nations Committee Against Torture, was praised in part for acknowledging problems relating to police abuse, excessive use of force in prisons, prison overcrowding, physical and mental abuse of prisoners, and the lack of adequate training for guards.[43] But the report was also criticized for failing to present the full extent of abuses of incarcerated men, women, and children.[44]

An Israeli Supreme Court decision from 1999 found that several methods used by the Israeli General Security Service constituted torture. That important decision produced some scholarly commentary that appeared during the year under review.[45]

VI. International Covenant on Civil and Political Rights

The United States has not yet submitted its second periodic report to the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights.[46] The U.S. report was due in 1998. The failure of the United States to submit its own reports on time is an embarrassment to our country and makes it more difficult to pressure other countries to submit their reports.

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38. Thomas M. Franck, *Are Human Rights Universal?*, 80 FOREIGN AFFAIRS 191, 191, 202 (2001) (debunking arguments that human rights law represents only Western cultural imperialism and showing instead that human rights advances are "the consequences of modernizing forces that are not culturally specific.").

39. Convention on the Elimination of All Forms of Racial Discrimination, *open for signature* Dec. 21, 1965, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

40. HUMAN RIGHTS WATCH, *supra* note 9, at 427.

41. *Id.* at 427-28.

42. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Agenda Item 99, U.N. Doc. No. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *as modified* 24 I.L.M. 535 (1985).

43. HUMAN RIGHTS WATCH, *supra* note 9, at 427.

44. *See id.*; *see also* Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000).

45. *See, e.g.*, Melissa L. Clark, Note, *Israel's High Court of Justice Ruling on the General Security Service Use of "Moderate Physical Pressure": An End to the Sanctioned Use of Torture?*, 11 IND. INT'L & COMP. L. REV. 145 (2000).

46. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

VII. International Covenant on Economic, Social, and Cultural Rights

The Committee assisted in drafting a report and recommendation that was adopted by the ABA House of Delegates in July 2000. The recommendation urged that the United States ratify the International Covenant on Economic, Social and Cultural Rights.[47]

VIII. European Human Rights

A. Overview

The European Court of Human Rights (ECHR) in Strasbourg enforces the European Convention on Human Rights.[48] Although the Convention is the ultimate instrument for enforcing human rights in Europe, it left some jurisdictional problems unaddressed. The Court recently heard a number of cases that challenged the Court to expand its jurisdiction. Most of these cases involved one of two types of jurisdictional twists: (1) use of a member state's police powers to suppress separatist or political reform movements; or (2) acts committed under the former, non-democratic regimes of a member state that would be manifestly illegal under the state's current laws.

In addition to the European Convention on Human Rights, the European Community Treaty, drafted as an engine for economic and political cooperation among Member States, has produced institutions that regularly confront human rights issues within the European Union. The EU has recognized the validity of the Convention but has refrained from becoming an independent signatory.[49] Hence, whenever the European Court of Justice adjudicates disputes within the EU that bear on human rights, it must interpret the various treaties (the Rome, Maastricht, and Amsterdam treaties), the Directives of the European Commission, and its own case law, expansively. In 2000, the ECJ heard cases regarding human rights that all touched on the same particular subject, the equality of the sexes in the workplace.[50]

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47. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1966); *see* Burns H. Weston et al., Supplement of Basic Documents to International Law and World Order 428 (3d ed. 1997). The treaty entered into force on January 3, 1976 and the United States signed it on October 5, 1977. It was submitted to the U.S. Senate for its advice and consent to ratification on February 23, 1978, and the ABA House of Delegates previously approved a recommendation in support of its ratification in February 1979. As of February 21, 2001, there were 147 state parties.

48. *See* Francis G. Jacobs & Robin C.A. White, The European Convention on Human Rights 3-14 (2d ed. 1996). The Convention was drafted by member nations of the Council of Europe and came into force on September 3, 1953.

49. Throughout 2000, the EU sponsored a committee, initially led by Roman Herzog, the former President of Germany, to develop a Charter of Human Rights. The committee's work was to have been largely concluded by the summit meeting held in Nice in December 2000, but such a codification of EU rights remains as yet elusive. The problem of defining fundamental rights within the jurisdiction of the EC/EU is hardly new. *See, e.g.*, Joseph H.H. Weiler, The Constitution of Europe (Cambridge Univ. Press 1999).

50. The purpose of this article is not to explore a new phenomenon in European human rights law, but to indicate how each of the European courts has heard cases lying on its respective "jurisdictional borderlines"; indeed, how such cases routinely appear on their dockets. For the European Court of Human Rights, the overarching question raised by these several cases was how sovereign nations, conjoined in a single compact of human rights law, should confront the legal disharmonies posed either by their own political pasts or by their current social composition. The continuing challenge for the European Court of Justice has been, in turn, to

B. European Court of Human Rights

1. *Contending with the Legacy of Past Regimes*

Political mutations in Europe throughout the twentieth century left a legacy of unresolved disputes that often ended up before the European Court of Human Rights (ECHR). Two sources of turmoil are the period of the Warsaw Pact and the Nazi era. The jurisdictional challenge for the ECHR is one of whether it can legitimately rectify injustices that occurred under previous regimes in its Member States.

Many defendants in national courts have argued that they were carrying out policies that were legal, even required, under the governments of the time. Following this theory, democratic successors to these regimes cannot justly punish people who abided by the law of the former governments. But the ECHR has not endorsed such historicist jurisprudence. While Article 7 of the Convention upholds the principle of *nullem crimen, nulla poena, sine lege* (no punishment without law), it cleaves to the legal principles of "civilized nations." These fundamental tenets are not all specified in the Convention. Rather, the ECHR must often derive them from the jurisprudence of the Convention's signatories. An example is the objective standard relied on by the German Constitutional Court in cases that went to the ECHR in 2000.[51] That the ECHR should consider itself invested with this broad power is no surprise, but follows from the particular role of the Court and the Convention. The ECHR was consciously established as a new type of court, one created to protect human rights in Europe, unfettered by historical or territorial borders.[52]

The heritage of the German Democratic Republic also resulted in a proportionately large number of cases for the ECHR. For instance, in *Gast and Popp v. Germany*,[53] the two applicants had been convicted in 1992 of spying for the GDR. They promptly challenged the legality of the verdict before the German Constitutional Court, which required a little over a year to review an expert opinion before determining that the Federal Republic of Germany could constitutionally prosecute people who had served the German Democratic Republic as spies. The defendants then applied to the Court, claiming that the time that had elapsed before the final decision was excessive. While the Court admitted the appeal under Article 6 (right to a fair trial), it found for the German government, reasoning that a con-

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harmonize the legal rights of Europeans, recognized disparately among the EU Member States, in a way that simultaneously respects the sovereign legal systems yet also protects individual Europeans. As the European Court of Human Rights finds that it must address the legacy of past transgressions of rights and current political conflicts, so must the European Court of Justice confront a persistent pressure for equal rights – at least among the sexes.

51. Streletz v. Germany, No. 34044/96 (1999); Krenz v. Germany, No. 44801/98 (1999); Kessler v. Germany, No. 35532/97, (1999); and K.-H. W. v. Germany, No. 37201/97 (1999).

52. The Articles of the Convention subjected all the Member States to a uniform standard of human rights:

> History had all too convincingly demonstrated the inadequacy of . . . traditional concepts of international law and State sovereignty which made the protection of individuals the exclusive prerogative of the States of which they were nationals. Their rights may require protection, above all, against their own State—and the values of democratic government require a collective guarantee—for there are no boundaries to the denial of liberty. The creation of the Council of Europe and the adoption of the Convention on Human Rights are an acknowledgment that the [protection of human rights] cannot be separated from the very existence of independent European States.

Jacobs & White, *supra* note 48, at 4-5. The ECHR was essentially mandated to develop a jurisprudence that supersedes the traditional equation of national sovereignty, where government equals law.

53. Gast and Popp v. Germany, No. 29357/95 (2000).

stitutional court is under a heightened burden to insure that its decisions are well reasoned and researched.

Another set of cases that received much attention concerned the policy promulgated in the GDR ordering border guards to shoot to kill anyone observed fleeing over the border to the West.[54] The defendants in three of the cases were prominent East German officials accused of having initiated the policy. The fourth was a soldier accused of having carried it out. The defendants appealed their convictions before the German Constitutional Court on the grounds that, under the German treaty of reunification, people could not be punished for acts performed in accordance with GDR law prior to reunification. Because their decisions and actions had been legal at the time, the defendants argued that they could not now be found guilty. The Court held that the convictions were valid, however, because the policy was so blatantly inhumane following the principle of "objective justice."[55] The defendants appealed the ruling to the ECHR, which deemed the complaints admissible. As of February 2001, the Court had not yet produced a decision on the merits.

Other ECHR cases concern the legal disposal of land that was once privately held but which was seized by Communist governments after World War II. The ECHR held that the Convention does not provide for the restitution of property taken by governments.[56] However, the Court is authorized to order monetary compensation for a taking of land. This holding is exemplified by *Garrett v. Portugal*,[57] an appeal filed by landowners in Portugal whose land was officially expropriated in the early post-Salazar "revolutionary" period. They complained that the new government never fairly compensated them for taking their land. The ECHR upheld the power of governments to enact an extensive land reform program to benefit its citizenry. But because the Portuguese government had failed to compensate the landowners, the Court found it in violation of Article 1 of Protocol No. 1 (protection of property) and ordered the government to make the applicants whole.

Finally, the ECHR determined that in some instances it lacked jurisdiction under Article 50 of the Convention to award compensation. In *Kurzac v. Poland*,[58] the Court agreed that the applicant had proven that the post-war Communist government of Poland had treated his brother unjustly. The Polish government in 1948 had imprisoned the applicant's brother because he had belonged to an underground Polish unit that had fought against the Soviets, rather than the Nazis, in 1943. An officer at the prison camp shot and killed him sometime

54. Streletz v. Germany, App. No. 34044/96 (1999); Krenz v. Germany, App. No. 44801/98 (1999); Kessler v. Germany, App. No. 35532/97 (1999), and K.-H. W. v. Germany, App. No. 37201/97 (1999).

55. Our decision does not violate the prohibition against retroactive rulings, as codified in Article 103, Section 2 of the Basic Law. [The defendant's] reliance on the validity of a particular interpretation of the criminal law is insupportable, given the fundamental criminal nature of the state policy and its promotion within the society, and this defense is grounded in a serious misrepresentation of basic human rights. For the perpetrators of this official state policy carried out an extreme political injustice, the validity of which could only be sustained so long as the government responsible for the policy remained in power. . . . The complainant has not offered any defense that . . . could persuade this Court of any reason to reject the law of objective justice, which has priority in this special situation, in favor of a legal resort to the protection of [discretionary] acts done in good faith, as defined under Article 103, Section 2 of the Basic Law.

In den Verfahren uber die Verfassungsbeschwerde, 2 BvQ 60/99, 2 BvR 2414/99, BverGE (2000) (Benjamin Apt trans.).

56. Potocka v. Poland, No. 3376/96 (2000).

57. Garrett v. Portugal, Applications Nos. 29813/96 and 30229/96 (2000).

58. Kurzac v. Poland, No. 31382/96 (2000).

in 1956. The Court could not order material damages, but acknowledged that applicants could seek the retrospective acquittal of a dead relative under Article 6(1).

2. State Responses to Separatist and Political Reform Groups

The European Court of Human Rights heard several cases in 2000 charging that British troops stationed in Northern Ireland used excessive force. The first such case in the year, *Caraher v. United Kingdom*,[59] involved a claim for restitution by the wife of a man who was shot when he drove past a controlled vehicle checkpoint without stopping. The two soldiers who were the original defendants claimed that, as the driver left a car park, he deliberately hit a third soldier and knocked him onto his hood. The other two soldiers then shot the driver. (At trial before the English court, it was revealed that British army policy was to shoot at the driver of a dangerous renegade car rather than at the car's tires.) The Crown Court acquitted the soldiers of all charges. However, the applicant had meanwhile filed a civil claim seeking compensation. In a settlement with the Ministry of Defence, she received 300,000 English pounds.

Arguing that she would have received a larger amount had she pursued her case to its legal end, the applicant appealed the ruling to the European Court of Human Rights under Article 34. Article 34 permits individuals or nongovernmental groups to appeal for relief under the Convention. The ECHR held that the soldiers had acted within the bounds of another provision of the Convention, Article 2(2). Article 2(2) protects from prosecution anyone who deprives another of his life "when [the killing] results from the use of force which is no more than absolutely necessary."[60] In particular, the Court reasoned that law enforcement personnel must be free to use appropriate force, as instructed, to uphold the law.[61]

In *Magee v. United Kingdom*,[62] the applicant was a suspect in an attempted bombing, who charged that he had been denied the presence of a solicitor during his first two days in detention. In that time he had become so intimidated that he broke his silence and confessed to aspects of the planned bombing. The Court held that the denial of access for such a long period, and in a situation where defense rights were irretrievably prejudiced, was a violation of the rights of an accused under Article 6 (Right to a fair trial). Other cases stemming from Ulster were *Jordan v. United Kingdom*,[63] *McKerr v. United Kingdom*,[64] *Kelly v. United Kingdom*,[65] and *Shanaghan v. United Kingdom*.[66] The ECHR admitted these complaints for

59. Caraher v. United Kingdom, No. 24520/94 (2000).

60. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(2), *available at* http://conventions.coe.int/treaty/EN/Treaties/html/005.htm.

61. This opinion is reminiscent of the ECHR's accession to the Constitutional Court's holdings in the GDR border shooting cases. Among the differences are that the official orders in those cases were not violative of human rights, as well as the legal products of a now-defunct political state. But the most straightforward explanation for the contrasting results of the decisions may be that the ECHR distinguishes between the self-defense of soldiers versus a policy directing soldiers to kill civilians in the abstract interests of the state.

62. Magee v. United Kingdom, No. 28135/95 (2000).

63. Jordan v. United Kingdom, No. 24746/94 (2000) (applicant's son shot and killed by an officer of the Royal Ulster Constabulatory in uncertain circumstances).

64. No. 28883/95 (2000) (applicant's father was shot by a Royal Ulster Constabulatory Home Support Unit in circumstances remaining in dispute after more than ten years of inquest proceedings).

65. Kelly v. United Kingdom, No. 30054/96 (2000) (applicant's relatives were killed in an ambush operation organized by the Royal Ulster Constabulatory).

66. Shanaghan v. United Kingdom, No. 37715/97 (2000) (applicant's son, an active member of Sinn Fein, was killed while driving to work; the shooting was claimed by a loyalist group but the applicant alleged that members of the police colluded in his death).

a hearing, but has not as yet issued any opinions. The cases allege killings of Northern Irish citizens by the Royal Ulster Constabulary, in violation of Article 2 (Right to life).

In *Association Ekin v. France*,[67] a case involving the Basque separatist movement, the complainants worked for non-profit press based in France that had published an anthology of writings by Spanish authors. At the time, the French Ministry of the Interior had banned the book because it included a piece submitted by the Basque Movement of National Liberation. Although the *Conseil d'Etat* ultimately reversed this administrative decision, the publisher appealed to the ECHR to find the French statute permitting a banning of foreign language publications to be in violation of Article 10 of the Convention (Freedom of expression). The Court sided with the applicants, holding that the French statute improperly restricted freedom of the expression to such a degree that it endangered the applicants' association.

The ECHR also heard a large number of complaints alleging maltreatment of Kurds and Kurdish separatists by Turkish police. No doubt the most prominent was *Öecalan v. Turkey*.[68] On December 14, 2000, a Chamber of seven judges from the First Section of the ECHR ruled to admit the complaints of Abdullah Öecalan, the putative leader of the PKK (the Kurdish liberation movement). The case was transferred to the Grand Chamber of the Court. The question before the ECHR judges was whether the Turkish authorities had adequately apprised the defendant of the grounds for his arrest and detention under Article 5 (Right to liberty and security). In *Fidan v. Turkey*,[69] a woman complained that she had been forced to undergo a gynecological examination in prison. The ECHR heard her case (appealed under Article 34) as a potential violation of Article 8 (Right to respect for private and family life). A similar matter appeared in *Veznedaroglu v. Turkey*,[70] where a woman alleged that she had been tortured in prison, in violation of Article 3 (Prohibition of torture). The Court held that, even absent proof that the guards themselves had committed the alleged acts of torture, the responsible officials had failed to investigate the applicant's allegations sufficiently. The Court found that the Turkish government was in violation of the Convention because it did not protect the applicant's rights to the extent required under the Convention.

The ECHR also ruled for the applicants in a number of other cases during 2000.[71] Each of these cases involved either the fatal shooting or the "disappearance" of several individuals, including a journalist and a doctor, who were reputedly associated with the PKK. The applicants relied on Article 2 (Right to life) to complain that the police had either surreptitiously arranged the killings or, at the very least, willfully not investigated them. In finding for applicants, the ECHR held that the government's culpability stemmed from its refusal to preserve lives that it knew to be in danger, and to pursue the people who had destroyed those lives. The Court ruled that the murders were in violation of Article 2.

67. Association Ekin v. France, No. 39288/98 (2000).

68. Öcalan v. Turkey, App. No. 46221/99 (2000).

69. Fidan v. Turkey, App. No. 24209/94 (2000).

70. Veznedaroglu v. Turkey, No. 32357/96 (2000).

71. Cemil Kiliç v. Turkey, No. 22492/93 (2000) (shooting of journalist by unidentified perpetrators and adequacy of investigation); Mahmut Kaya v. Turkey, No. 22492/93-(2000) (shooting of doctor by unidentified perpetrators and adequacy of investigation); Ismail Ertak v. Turkey, No. 20764/92 (2000) (disappearance of the applicant's son after his alleged arrest by the police and lack of investigation into the disappearance), Akkoç v. Turkey, Nos. 22947/93 and 22948/93 (2000) (shooting of teacher's husband by unidentified perpetrator and effectiveness of the investigation); and Tas v. Turkey, No. 24396/94 (2000).

Not every case that challenged the Turkish government with responsibility for the violent death of a PKK sympathizer was successful. The ECHR did not find sufficient evidence in *Ekinci v. Turkey*[72] to hold Turkish security forces at fault for shooting an official in the pro-Kurdish political movement. Given that the tie between the security forces and the victim's demise was so tenuous, the Court further acquitted the government of the charge that it did not do a complete investigation of the case.

Survivors of persons who were presumably killed because of their support for the PKK brought other cases before the court. The victims apparently suffered extra-legal torture and then "disappeared," either under the auspices of the state security forces or with their knowledge. In *Timurtas v. Turkey*,[73] a father charged that his son had disappeared and was apparently murdered after being taken into custody by security personnel. In *Salman v. Turkey*,[74] a doctor died of cardiac arrest after undergoing torture in prison. The state investigated both instances and acquitted the accused police officers. What stands out in these two cases is that the ECHR found the accused guilty of a multitude of infractions against the Convention: they illegally deprived the victims of their lives, per Article 2 (Right to life), subjected them to torture and cruel treatment, per Article 3 (Prohibition of torture), and failed assiduously and in good faith to investigate their deaths, in violation of Article 13 (Right to an effective remedy). In addition, the Court found that Abdulvahap Timurtas had been held incommunicado, in violation of Article 5 (Right to liberty and security).

Erdogdu v. Turkey,[75] *Sener v. Turkey*,[76] and *Albayrak v. Turkey*[77] were still other cases involving suppression of the freedom of the press in Turkey, as safeguarded under Article 10 (Freedom of expression). In the first two cases, the applicants were newspaper editors who were convicted in a Turkish court of publishing articles that referred to "Kurdistan." Because the Turkish government does not recognize this region to be distinct from the rest of the country, it prohibits public references to Kurdistan. Both applicants were fined and their publications seized. The ECHR ruled that their respective treatment violated Article 10 and that the policy under which they had been punished was unreasonably broad and restrictive. In addition, the Court awarded the applicants restitution to cover pecuniary damages. In *Albayrak*, the applicant was a judge accused of Kurdish sympathies. He was charged with having read an outlawed pro-Kurdish newspaper and watching Kurdish television channels through satellite transmissions. Although he was not forced from the bench, he was reprimanded, transferred, and formerly denied the opportunity for promotion. The Court has admitted his appeal under Article 10 (Freedom of expression) and Article 14 (Prohibition of discrimination).[78]

The PKK was not the only political group to charge excessive interference by the Turkish government. The ECHR agreed on May 30, 2000 to hear a series of cases filed by former members of the Democracy Party who had sat in the Turkish National Assembly.[79] The

72. Ekinci v. Turkey, No. 25625/94 (2000).
73. Timurtas v. Turkey, No. 23531/94 (2000).
74. Salman v. Turkey, No. 21986/93 (2000).
75. Erdogdu v. Turkey, Nos. 25067/94 and 25068/94 (1999).
76. Sener v. Turkey, No. 26680/95 (2000).
77. Albayrak v. Turkey, No. 38406/97 (2000).
78. *See also* Özgür Gündem v.Turkey, No. 23144/93 (2000) (Campaign of harassment against newspaper).
79. Sadak v. Turkey, No. 25144/94 (2000); Toguç v. Turkey, No. 26149/95 (2000); Günes v. Turkey, No. 26150/95 (2000); Kilinç v. Turkey, No. 26151/95(2000), Aydar v. Turkey, No. 26152/95 (2000); Yiğit v. Turkey, No. 26153/95 (2000); Kartal v. Turkey, No. 26154/95(2000); Sadak v. Turkey, No. 27100/95(2000); and Yurttaş v. Turkey, No. 27101/95(2000).

applicants all accused the Principal Public Prosecutor of illegally suspending their political immunity and ordering their removal from the National Assembly in 1994. The Turkish Constitutional Court then followed suit by outlawing the party altogether. This decision then enabled the Principal Public Prosecutor, in turn, to order the applicants arrested and imprisoned for advocating separatism and sedition. The ECHR took up the applicant's appeal, brought under Articles 6 (Right to a fair trial), 7 (No punishment without law), 9 (Freedom of thought, conscience, and religion), 10 (Freedom of expression), 11 (Freedom of assembly and association), and 14 (Prohibition of discrimination) under the European Convention of Human Rights, and Articles 1 (Protection of property) and 3 (Right to free elections) of Protocol No. 1 to the European Convention.

C. European Court of Justice

The ECJ and the European Commission have long understood that they must promote a level of uniform rights protection within the EU, and sexual equality proved the predominant theme in several ECJ cases in 2000. *Kreil v. Germany*[80] was the first such case of the year. The applicant was a female German soldier who desired to serve in the weapon electronics branch of the federal army. The military authorities disallowed her deployment to that unit, despite her appropriate training. The ECJ ruled that the German army could not preserve a policy that barred enlisted women from serving in any armed unit. The only justifiable basis for this distinction would be if the nature of a unit's activities manifestly threatened the well being of a mother or her child. But that argument could not legally be applied so as to block all women permanently from a military branch that required the use of arms. Such a policy would "allow them access only to the medical and military-music services," a result far too restrictive to be justifiable.[81]

In the ECJ's next sexual discrimination case, *Marburg v. Land Mecklenburg-Vorpommern*,[82] the local government of Mecklenburg-Vorpommern refused to employ a nurse because she was pregnant. Although the Basic Law prohibits discrimination in employment on the basis of sex, the law was seen to conflict with a federal statute to protect pregnant women from physical risk that might endanger the fetus. The state government insisted that it was prevented by the federal law from placing a woman in a permanent position that she could have to interrupt imminently because of pregnancy. The ECJ found that the federal statute was being applied in a discriminatory fashion, for only women would ever have to forfeit jobs, and that it violated the EU principle of sexual equality.

IX. Inter-American Human Rights

Work of the Inter-American Commission on Human Rights in Washington, D.C. and the Inter-American Court of Human Rights in San José, Costa Rica, continues to develop strong and valuable precedents for international human rights law. Unfortunately space limitations of the current volume require us to direct readers to another source for a review of these developments.[83]

80. Kreil v. Germany, No. C-258/98 (2000).

81. *Id.*

82. Marburg v. Land Mecklenburg-Vorpommern, No. C-207/98 (2000).

83. Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 Am. Univ. Int'l L. Rev. 315 (2001).

X. Labor Standards

A comprehensive review of developments in worker's rights is also beyond the scope of this year's survey of recent developments. One significant new development that might otherwise be missed, however, is found in the Free Trade Agreement entered into in October 2000 between the United States and Jordan. That agreement incorporates international labor rights directly into the main text, and expresses a recognition by the parties that "it is inappropriate to encourage trade by relaxing domestic labor laws."[84]

84. Human Rights Watch noted that this express incorporation of fair labor standards marked a departure from other international agreements, such as NAFTA, which relegated labor standards to a side agreement. HUMAN RIGHTS WATCH, *supra* note 9, at xviii.