

# HUMAN RIGHTS ADVOCATES

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## The Subcommittee on the Promotion and Protection of Human Rights

By Jeanna Steele

This past summer Cecilia Han and I attended the 55<sup>th</sup> Session of the United Nations' Human Rights Subcommittee. We represented Human Rights Advocates on several issues including: the Right to Water, the Administration of Justice and the Corporate Code of Conduct.

On the issue of the right to water we presented a long paper, written by U.S.F. law student. Jen Naegele, to Special Rapporteur, Mr. El-Hadji Guissé, titled: "Adequacy of the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights to Promote and Protect the Right to Clean and Accessible Drinking Water when Water Systems are Privatized."

Under Agenda Item II, I presented my paper titled, "Administration of Justice Abuses in the United States after 11 September" to several experts, including the chair of the Administration of Justice Working Group: Ms. Antoanella-Iulia Motoc, and Subcommittee experts: Mr. David Weissbrodt, Ms. Françoise Hampson and Mr. Louis Joinet. The paper covered the legal status of the "unlawful combatants" being held at the U.S. Naval base in Guantánamo Bay, Cuba, the designation "Enemy Combatant" of individuals held in the United States, the special registration requirement and treatment of detainees in the immediate aftermath of the 11 September attacks, and the impact of the legal changes brought about under the U.S.A. "PATRIOT Act."

We were able to make a seven-minute oral intervention on the issue of the illegal detention of the Guantánamo Bay detainees. In it we described the conditions of captivity for the more than 650 terror suspects who have been designated as Taliban and al-Qaida members and who continue to be held without any legal status in Guantánamo Bay. This lack of legal status has resulted in the denial of judicial review by habeas corpus petition in the United States

and violates Article 14 of the International Covenant on Civil and Political Rights which states that, "all persons...shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The question of whether U.S. courts have jurisdiction to consider the detainees' habeas challenges is currently being considered by the United States Supreme Court in *Al Odah v. United States* and will likely be decided in June of 2004.

The oral report also discussed the restrictions on the right to counsel under the set of 8 "Military Commission Instructions" promulgated under executive order. These Instructions violate the right to counsel guaranteed under the International Covenant on Civil and Political Rights by imposing onerous conditions on civilian defense counsel, including restrictions that effectively eliminate attorney-client privilege.

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The following recommendations were made on behalf of HRA:

HRA calls upon the U.S. to recognize the procedural rights of the detainees held at Guantánamo Bay under the U.S. Bill of Rights, the ICCPR, and the Third Geneva Convention, in particular those related to the obligations to provide public trials, judicial review and to give adequate counsel for any persons detained.

HRA welcomes the report of the Working Group on Arbitrary Detention and calls upon the U.S. to have the legal status of detainees at Guantánamo Bay determined by a competent tribunal.

HRA encourages the U.S. to address the concerns of the 59<sup>th</sup> Session of the Commission on Human Rights and to implement the recommendations of the Working Group on Arbitrary Detention.

HRA requests the Sub-Commission consult with the Working Group on the Administration of Justice and continue to investigate the treatment of individuals who are detained at Guantánamo Bay.

Finally, HRA requests that a monitoring mechanism be established at either the Commission or Sub-Commission to ensure that States comply with international human rights law when implementing counter-terrorism measures.

## **Transnational Corporations at the UN Sub-Commission**

By Cecilia Han

This year's sessions at the UN Sub-Commission on the Promotion and Protection of Human Rights yielded tremendous progress in the area of Transnational Corporations (TNC). The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights passed unanimously. The Commentary to these Norms were not officially adopted, but were referred to in the final version of the Draft Norms as a useful interpretative guide. In addition to the Draft Norms, the Sub-Commission passed a second resolution calling on the TNC Working Group to develop an enforcement mechanism to implement the Draft Norms.

About five years ago, the UN Sub-Commission created the TNC Working Group. The purpose of this Working Group was to study the activities of transnational corporations and the impact of these activities, particularly violations of human rights were occurring. The activities of well-known TNCs, e.g. Exxon and Chevron, unfortunately have been featured with great frequency. What typically happens is that a subsidiary of the TNC or a subcontractor of the TNC will contract with the local government for use of land and for workers. The environmental pollution and human rights abuses are non-negotiated terms that neither sides speaks of, but both expect. When Coca-Cola erected its bottling plant in India, the local farmers were unable to continue their livelihood of crop growing because the

bottling plant extracted almost all of the drinkable/usable water. The water that Coca-Cola left for the local population had such a high concentration of salt that people became ill after using the water. In Myanmar, the military forced villagers to work on Unocal's oil pipeline and summarily executed those who expressed their dissent. The governments of these countries tolerate these abuses because the TNC fuel money and capital into economies that would otherwise be stagnant.



Cecilia Han and Jeanna Steele at the UN Sub-Commission in Geneva.

The Draft Norms developed by the TNC Working Group spell out clearly the obligations of TNCs to the communities in which they operate. Under the Draft Norms, TNCs like Coca-Cola would be prohibited, among other things, from stripping the land of its resources and forcing villagers to work for them. For example, the Draft Norms have extensive sections on the duties of TNC towards the workers its employs which explicitly ground these duties in recognized international instruments such as the ILO Convention. Unlike the Global Compact and the OECD guidelines, the Draft Norms envision mandatory participation and cooperation by TNCs and governments. Furthermore, the Draft Norms contain detailed provisions on implementation mechanisms that range from the creation of a group of independent experts reviewing complaints to thematic procedures, like a special rapporteur or a

permanent working group. The Commentary to the Draft Norms provides helpful information for interpreting and implementing the Draft Norms.

At the meeting of the TNC Working Group this summer, the Draft Norms underwent some revision. One of the most prominent amendments to the Draft Norms was the inclusion of the International Convention on the Rights of Migrant Workers in the introductory clauses of the Draft Norms and in the Commentary which was fueled by the lobbying efforts of NGOs. Although the inclusion of that treaty was not opposed, its inclusion is a testament to the kind of impact that NGOs can and should have at the Sub-Commission. Secondly, in language prohibiting TNC from discriminating against workers on the basis of health status, the terms, “HIV/AIDS” were included. Many NGOs were particularly excited to see that discrimination against persons with HIV/AIDS was explicitly prohibited by the Draft Norms.

Throughout my entire time at the Sub-Commission, what struck me was the amount of cooperation among the NGOs on this particular topic. Every NGO representative I talked to who was working on the TNCs this session was committed to getting the norms passed by the Sub-Commission. This collaborative spirit led to the drafting of a joint press release among the participating NGOs welcoming the adoption of the Draft Norms. As an HRA representative, I felt excited about being able to put in my comments on the release and sign on to it as well. I had a wonderful time at the Sub-Commission and learned an unbelievable amount of information while I was there. I felt truly privileged to be able to see international human rights law being created in “real-time.” Thank you.

## **Don't Let Murder Silence Rights Activists' Message**

By Anne Wagley

“Let us be honest and ask, at the outset, what it is that we wish to achieve? We have all been impotent in changing the past behaviour and human rights record in Iraq. Let us therefore redouble our efforts to make sure that we are not powerless now. Let us seek results. Let us make a difference a real difference for the people of Iraq. I cannot think of a more noble and worthy cause.”

Sergio Vieira de Mello, the man who spoke these words—a man I knew and admired—died August 19 in the bombing of the United Nations Headquarters in Iraq.

Any death by violence is very sad, but the violent deaths of people who devoted their lives to helping others are truly tragic.

The world lost more than human lives when that bomb went off Tuesday. The world lost people of passion and compassion, people who put lives of comfort and security aside to live and work in tense and dangerous situations to help others.

Sergio Vieira de Mello was a human rights advocate who spent the past 30 years working for the United Nations, trying to solve the world's most difficult humanitarian situations. I met him in the late 1980s when the Office of the United Nations High Commissioner for Refugees was trying to deal with the forced repatriation of Vietnamese boat people from Hong Kong. I was the United Nations officer at Whitehead Detention Center in Hong Kong, a maximum security compound run by the Hong Kong Government, holding 24,000 Vietnamese who did not want to return to Vietnam under any circumstances.

The U.N. had a mandate to protect the refugees, but the British and Hong Kong governments did not consider them to be political refugees, and refused to grant them asylum or permission to stay.

The British plan was to take the Vietnamese, by force if necessary, load them onto airplanes in the middle of the night, and fly them back to Vietnam. The Vietnamese in Whitehead and the other detention centers in Hong Kong, were panicked, distraught, and began a series of desperate self-immolations and self-mutilations—sometimes resulting in death—in order to avoid being forcibly returned to Vietnam.

It was an impossible, unwinnable human rights situation.

As the head of the Asian Region for the United Nations High Commissioner for Refugees, Sergio was the only diplomat who could help mediate the ugly situation. For those of us working in the

detention centers, advocating for the Vietnamese, yet having to live with the horrifying violence, Sergio's calm, compassionate diplomacy was the assurance we needed to keep on working.

The United Nations did not win, and by 1997, when Britain handed Hong Kong back to Chinese rule, all the Vietnamese had been sent back to Vietnam.

Equally horrified at the situation of housing refugees in maximum security detention centers was a New York attorney, Arthur Helton, who came to Hong Kong in the late 1980s to write about the plight of the Vietnamese, and to advocate for more humanitarian policies.

I met with Arthur several times, as he urged me to document the human rights violations I witnessed every day. He was a mentor and teacher as I prepared my first report on the subject of arbitrary detention of refugees for the United Nations.

Arthur never stopped pushing for more effective responses to humanitarian crises, particularly those involving refugees and displaced people. He was representing the Council on Foreign Relations and was scheduled to discuss the humanitarian situation in Iraq with Sergio in his office at the United Nations Headquarters in Baghdad at 4:30 p.m.—the time the bomb went off.

Sergio and Arthur, and the others who died with them, were extraordinary people. Working in the field, in places of great humanitarian need, is a calling to which many may aspire, but few can handle. Living outside one's country is not easy, but living and working in a situation of personal danger, physical hardship, and extreme emotional stress is very difficult.

Sergio was one of those unique United Nations employees who spent the majority of his 30 years in the field. From Cambodia to Kosovo to East Timor, Sergio was a tireless advocate for human rights. In September of 2002 his exemplary career was acknowledged with his appointment as the United Nations High Commissioner for Human Rights. He was Kofi Annan's choice to represent the United Nations in the difficult situation in Iraq, even if it meant taking a leave of absence from his post as High Commissioner in Geneva.

Sergio was not a supporter of the invasion of Iraq by the United States, but the United Nations had to be there to assist in the reconstruction, and to advocate for the Iraqi people's human rights. And Arthur came to Baghdad to assess the scope of the humanitarian needs, to determine what could be done to foster justice and human rights. The deaths of Sergio and Arthur are tragedies, but they died for the noble cause they pursued so passionately.

Let us now redouble our efforts for peace and human rights, as Sergio asked.

*This commentary was first published in the Berkeley Daily Planet on August 22, 2003.*

## **Some Bright Spots in These Dark Times**

### ***Wyden/Murkowski PRI Bill Would Roll Back Parts of Patriot Act***

By Cindy Cohen

Concern about the USA-Patriot Act is real and well-founded. At this point, most HRA members have heard much about it. What people aren't hearing as much about are the efforts in the right direction. At my "day job" at the Electronic Frontier Foundation, we are working hard to support many of those efforts. In Congress, the leading one, and the one with the best chance of passage, is a bill co-sponsored by Republican Senator Lisa Murkowski of Alaska and Democratic Senator Ron Wyden of Oregon. Below is a thumbnail sketch of the bill, put together by EFF staff.

Supported by organizations from across the political spectrum, the Protecting the Rights of Individuals Act (PRI) seeks to place reasonable limits on the powers granted to law enforcement and intelligence agencies under the USA PATRIOT Act. PRI would amend many of PATRIOT's most troublesome provisions, reasserting traditional checks and balances on the Executive Branch to ensure the proper balance between law enforcement authority and Americans' fundamental liberties. Specifically, PRI:

**Limits the use of secret "sneak and peek" searches to terrorism investigations. PRI § 2**

amends 18 U.S.C. 3103a to ensure that delayed notice of a prior secret government search is allowed only when officials are investigating terrorism and only when such delays are absolutely necessary. The amendment also strictly limits the length of the delay.

**Protects 1 st Amendment rights by narrowing the definition of “domestic terrorism.”** PRI § 3 amends 18 U.S.C. 2331 to narrow PATRIOT’s overly broad definition of “domestic terrorism.” By doing so, PRI guarantees that political protestors will not be prosecuted as terrorists simply for exercising their 1 st Amendment rights.

**Shields Americans’ sensitive, personal information from government access without some specific suspicion.** PRI § 4 amends the Foreign Intelligence Surveillance Act (FISA) to protect private records, requiring that the government submit some minimal evidence that the party whose records are sought is a foreign power or an agent of a foreign power, such as a spy or an international terrorist, before it can get the necessary court order.

Rather than merely certify that the personal records sought are for a terrorism or intelligence investigation, the government must justify its request with a statement of the facts and circumstances it is relying upon. In the case of medical records, library records, records involving the purchase or rental of books, video, or music, or records regarding access to Internet materials, the government must meet the Constitution’s “probable cause” standard.

**Prevents the government from accessing library records without judicial approval.** PRI § 4 also amends 18 U.S.C. 2709 to prevent the use of “National Security Letters” to obtain library records. National Security Letters are administrative subpoenas that are issued directly by the Justice Department without any judicial oversight.

**Limits the use of “John Doe roving” wiretaps.** PRI § 5 amends 50 U.S.C. 1805 to ensure that FISA wiretap orders meet the 4 th Amendment’s “particularity” requirement and clearly limit the scope of the wiretap. “Roving” wiretap orders that do not specify the facility or location to be tapped must at least identify the person whose communications are targeted, while “John Doe” wiretap orders that do

not specify the targeted person must at least identify the facility or location to be tapped.

**Ensures that the government cannot monitor what Americans read on the Internet without probable cause.** PATRIOT extended “pen register/trap and trace” wiretap authority to the Internet, allowing surveillance of Americans’ Internet activities based merely on the government’s certification that they may be relevant to a criminal investigation. PRI § 6 amends 18 U.S.C. §§ 3121-3123 to require a showing of probable cause before the government can intercept Internet web addresses and email subject lines.

**Forbids government data mining without prior congressional approval.** PRI § 7 prevents the government from implementing any “data mining” program, such as the Terrorism (previously “Total”) Information Awareness program, unless authorized by Congress. It further requires extensive reporting to Congress on any government development or use of data-mining technology.

**Requires that the Attorney General provide Congress with basic information about foreign intelligence surveillance.** PRI § 8 amends FISA to ensure that Congress has information necessary for effective oversight of the Foreign Intelligence Surveillance process, requiring the Justice Department to submit annual reports on the number of orders for electronic surveillance, physical searches, and pen register/trap & trace taps, the number of times personal records have been accessed, and the number of U.S. persons placed under surveillance.

**Reinstates longstanding discovery procedures for the use of foreign intelligence evidence in criminal proceedings.** PRI § 9 amends FISA to allow a court to disclose foreign intelligence evidence to the criminal defendant against whom the evidence is used, to the extent that such disclosure will not harm national security.

**Restores the requirement that foreign intelligence must be the primary purpose of surveillance conducted under FISA.** PRI § 10 prevents law enforcement from using the lower standards of proof necessary for FISA surveillance in the investigation of ordinary crimes by requiring that the collection of foreign intelligence be the “primary purpose” of such surveillance.

**Prevents government access to education records without specific facts showing why those records are needed.** PRI § 11 amends 20 U.S.C. 1232g so that in order to get a court order for education records, the government must actually present facts giving reason to believe that the records sought are relevant to a terrorism investigation, rather than merely certify that such facts exist.

Members of Congress need to hear from constituents that they support rolling back the Patriot Act.

More information about the Patriot Act and efforts to combat it is available at <http://eff.org/Privacy/Surveillance/Terrorism.PATRIOT/>

## Update on the Juvenile Death Penalty

By Connie de la Vega and Sarah A. Canepa<sup>1</sup>

### Introduction

The imposition of the juvenile death penalty and the number of countries practicing it, have been steadily decreasing over the last 10 years. The United States has remained the only country that has continually executed juvenile offenders. In fact, in 2002, the United States was the only country to execute juvenile offenders, all three of whom were executed in Texas. There has been one execution of a juvenile offender in the world this year. Scott Hain was executed in April in Oklahoma. His case will be discussed below. There are currently around 80 inmates on death row in the United States who committed their crime as juveniles. Public support for the juvenile death penalty in the United States has consistently remained low over the last 40 years. A Gallup poll in May 2001 found that 69% of the American Public opposed the juvenile death penalty. The recent international and national developments

regarding the juvenile death penalty are summarized in this report.

### A. Developments in International Law

#### 1. Jus Cogens

International human rights advocates argue that international law prohibits the execution of individuals who were younger than 18 years old at the time of the commission of the crime ("juvenile death penalty"). In 2000, the Sub-Commission on the Promotion and Protection of Human Rights affirmed that the prohibition of the juvenile death penalty is customary international law. (The Death Penalty in Relation to Juvenile Offenders, Resolution 2000/17, adopted Aug. 17, 2000, E/CN.4/Sub.2/RES/2000/17 (2000)). The Sub-Commission recognized that several Human Rights Commission Resolutions confirm this customary international law: Question of Death Penalty, Resolution 1999/61, adopted April 28, 1999, E/CN.4/RES/1999/61 (1999); The Question of the Death Penalty, Resolution 2000/65, adopted April 27, 2000, E/CN.4/RES/2000/65 (2000).

Advocates argue that customary international law has risen to the level of *jus cogens* prohibiting the execution of juvenile offenders. A *jus cogens* preemptory norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, opened to signature May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698. Under Article 53 of the Vienna Convention on the Law of Treaties, a norm attains *jus cogens* status when it is: 1) general international law; 2) accepted by a large majority of states as a whole; 3) immune from derogation; and 4) modifiable only by a new norm of the same status. The prohibition of the juvenile death penalty satisfies all these elements. First, the prohibition of the juvenile death penalty is general international law because of the numerous treaties that prohibit it: International Covenant on Civil and Political Rights (ICCPR); Convention on the Rights of the Child (CRC); Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and American Convention on Human Rights. Also, Resolutions by the Sub-Commission on Human Rights, the Commission on Human Rights, the Economic and Social Council and the

<sup>1</sup> Connie de la Vega is a professor of law at the University of San Francisco School of Law. Sarah A. Canepa is a law student at the University of San Francisco and part of the International Human Rights Clinic. The authors attended the 59<sup>th</sup> Session of the Commission on Human Rights at the United Nations in Geneva, Switzerland to lobby on behalf of Human Rights Advocates on various human rights issues, specifically on the issue of the juvenile death penalty.

General Assembly oppose the juvenile death penalty. Second, nations have exhibited near unanimous acceptance of the prohibition of the juvenile death penalty. In 2002, the United States was the sole violator and in 2001, only three countries (Iran, Pakistan, and the United States) executed juveniles. Third, the prohibition of the juvenile death penalty is non-derogable. Article 4 of the ICCPR states there shall be "no derogation" from Article 6, which prohibits the juvenile death penalty. Fourth, there is no emerging norm of the same status that contradicts the current norm. Accordingly, under the Vienna Convention, the prohibition of the juvenile death penalty is a *jus cogens* norm from which no country is allowed to deviate.

Furthermore, on October 22, 2002, the Inter-American Commission on Human Rights issued a decision, concluding that the execution of offenders under the age of 18 at the time of the crime constitutes a norm of international customary law and a *jus cogens* norm. (Report No. 62/02, Case No. 12.285, *Domingues v. United States*, ¶ 84-85). Previously, in 1987, in *Roach and Pinkerton v. United States*, the Inter-American Commission had recognized that the prohibition of the execution of juveniles constituted a *jus cogens* norm but did not find consensus as to the age of majority for defining this norm. (*Domingues*, ¶ 18). However, the *Domingues* decision firmly established that since 1987, the *jus cogens* norm has evolved to establish 18 as the minimum age for the imposition of the death penalty. (*Domingues*, ¶ 103).

## 2. The 59<sup>th</sup> Session of United Nations Commission on Human Rights

At the United Nations Commission on Human Rights in spring 2003 the United States attempted to remove language condemning the execution of juvenile offenders contained in last years resolution under Agenda item 13, the Rights of the Child. The United States Delegation attempted to strong arm the European Union and GRULAC into voting with them to eliminate the language. However, both the European Union and the GRULAC did not yield to the pressure from the United States. The United States then called for a vote on paragraph 35(a) of the resolution on the Rights of the Child, regarding the juvenile death penalty. (E/CN.4/2003/RES/86 ¶ 35) The vote was 51 to 1, the United States being the only vote against the retention of the paragraph.

In the General Assembly, after the vote was taken, several countries made statements. The representative from Ireland "regretted that voting was demanded" and that the deletion of the paragraph was "not acceptable" (*United Nations Press Release; Commission on Human Rights Adopts Resolution on the situation in Iraq; Concludes Substantive Work*, Press Release, 25 April 2003, Afternoon at 9-10.) The representative from Uruguay speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC) agreed with European Union's statement and further stated that the administration of the death penalty as applied to juvenile offenders was against "the norms of international society." *Id.* In addition, the representative from Syria also stated that they supported European Union's statement that the resolution should be adopted by consensus. *Id.*

## B. Recent Developments Domestically Regarding Juvenile Offenders

### Christopher Simmons

One of the significant developments in the abolition of the juvenile death penalty took place recently in the Missouri Supreme Court. Mr. Simmons is represented by Jennifer L. Brewer and Patrick J. Berrigan. The Court in *Simmons v. Roper*, 2003 Mo. LEXIS 123 found the death penalty for juvenile offenders constituted cruel and unusual punishment and violated the 8<sup>th</sup> amendment to the United States Constitution. The opinion focused on the developments during the past fourteen years since *Stanford v. Kentucky* 492 U.S. 361 (1989) where U.S. Supreme Court ruled the death penalty for offenders over the age of 16 was constitutional and *Thompson v. Oklahoma*, 487 U.S. 815 (1988) where the Court ruled that death penalty for offenders under the age of sixteen constituted cruel and unusual punishment and therefore violated the 8<sup>th</sup> amendment.

The Missouri Court applied the United States Supreme Court's reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002) regarding the execution of mentally retarded offenders. In *Atkins*, the Court found that a national consensus had emerged against the execution of mentally retarded offenders. They compared the U.S. Supreme Courts earlier decision in *Penry v. Lynaugh*, 492 U.S. 302 to the Courts

reasoning in *Atkins*. Similarly the Missouri Supreme Court felt that a national consensus had developed since *Stanford* case had been decided. Relying on the Scalia's opinion in *Stanford*, where he recognized that the concept of cruel and unusual punishment should be determined from current standards of decency. *Simmons*, 2003 LEXIS at 13 (citing *Stanford v. Kentucky*, 492 U.S. at 370-77) The Missouri Court felt the standards of decency have evolved since the United States Supreme Court had last addressed the issue as was evident in the change in the number of states that still allow the juvenile death penalty. *Simmons*, 2003 LEXIS at 2.

The Missouri court decided the analysis used in *Atkins* closely resembled *Thompson v. Oklahoma* rather than *Stanford v. Kentucky* Based on the principles set forth in *Atkins*, *Thompson*, *Penry* and *Stanford* the Missouri Court analyzed the constitutionality of the juvenile death penalty and found that it violated the 8<sup>th</sup> amendment. During the course of the analysis, the Missouri Supreme Court looked at the both the National and International Consensus on the issue. The court recognized that the international community has consistently opposed the juvenile death penalty. The Court cited the Article 37(a) of the United Nations Convention on the Rights of the Child as expressly prohibiting the practice, and acknowledged that several other international treaties and agreements prohibit the practice. The opinion further went on to acknowledged that in the past few years, officially sanctioned executions of juvenile offenders have only taken in place in the U.S. and two other countries and that five of the seven offenders executed took place in the United States. *Simmons*, 2003 Mo. LEXIS at 40.

Due to the fact that the Missouri Supreme Court based its analysis of legality of the death penalty for juvenile offenders on the U.S. constitution, rather than the Missouri constitution, it remains to be seen how the decision will affect the abolition of the practice in the rest of the United States. The Attorney General of Missouri has filed a petition for writ of certiorari to the U.S. Supreme Court on this case.

### **Scott Hain**

The execution of Scott Hain has been the only execution of a juvenile offender to date in the United States this year. Scott Hain was sentenced to death for the 1987 deaths of two restaurant workers. Scott Hain

was 17 when he committed his crime. Though Scott's co-defendant, Lambert ultimately killed the victims, Hain received the death penalty. Mr. Hain was executed on April 3, 2003. On the day of his execution the 10<sup>th</sup> circuit Court of Appeals granted Mr. Hain a stay based on inadequate federal funding for his clemency request filed by his attorney Steve Presson. However, the Supreme Court in a special session summarily denied his appeal and Scott was executed later that night.

### **Kevin Stanford**

Kentucky Governor Paul Patton on June 18, 2003 announced that he planned to commute Kevin Stanford's sentence before he left office. Patton stated that he would not sign the death warrant based on Stanford's age at the time of the offense. Kevin was 17 at the time of the crime. Fourteen years ago, the United States Supreme court by deciding Kevin Stanford's case, upheld the death penalty for juvenile offenders. Mr. Stanford is represented by Gail Robinson and Margaret O'Donnell.

### **Nanon Mckewn Williams**

Recently, in Mr. William's state habeas corpus appeal to the United States Supreme Court, his attorneys Walter Long and Mark Olive, raised the issue of using international law to interpret the 8<sup>th</sup> amendment. Though the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989) found that international practices were not relevant to their decision, Mr. William's argues that *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) overruled the previous decision when it found international opinion to be significant in interpreting the evolving standards of decency for determining what constitutes cruel and unusual punishment under the 8<sup>th</sup> amendment. Mr. William's further argued that the abolition the practice of executing juvenile offenders has a greater consensus on an international level, then the abolition of the execution of mentally retarded offenders.

Three *Amicus Curiae* briefs were filed in support of Mr. Williams, including one representing former Nobel Peace Prize Laureates. In the *Amicus Curiae* brief filed by Connie de la Vega, on behalf of Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee, Bar of England & Wales further

elaborated on relevance of international law in determining the legality of the juvenile death penalty. (*brief available at: www.humanrightsadvocates.org*)

The prohibition of the practice of the juvenile death penalty has risen to the level of *jus cogens*, a preemptory norm in international law. The preemptory norm invalidates the United States reservation regarding Article 6(5) of the International Covenant on Civil and Political Rights. (International Covenant on Civil and Political Rights, Article 6(5), Dec. 19, 1966, 999 U.N.T.S. 171). Virtually every other country in the world has acknowledged that practice of the juvenile death penalty violates international law. The Court should consider the United State's obligation to comply with the *jus cogens* norm.

The U.S. Supreme Court denied the petition for writ of certiorari on 20 October 2003. (*Williams v. Texas*, 03-5956.) Since this was a petition on the state habeas proceedings, it is hoped that the issue will be revisited in the federal habeas proceedings.

### Conclusion

The increase in international pressure and the recent developments domestically may force the United States Supreme Court to reexamine the issue and finally acknowledge impact of international law on domestic practices like the juvenile death penalty.

## The Death Penalty: Can Delay Render Execution Unlawful?

By Philip Sapsford, Queen's Counsel,  
and Claudio Marinucci

Delay can render execution unlawful, if the delay be inordinate and not attributable to the conduct of the condemned.

Historically, the United Kingdom tradition has been that sentence of death be followed as soon as possible by execution. Time was to be allowed only for appeal and consideration by the Crown of reprieve.

However, on November 2, 1993, the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Goff of Chieveley, Lowry, Slynn of

Hadley and Woolf) delivered a far-reaching and landmark judgment in *Pratt & Morgan v. The Attorney General for Jamaica*.

A quotation from the opinion of Lord Griffiths will illustrate the view of the judicial Committee. Lord Griffiths stated:

"... The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal, even to the House of Lords within a matter of months. Delays in terms of years are unheard of ...

... There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long period of time ...

A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account. There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures.

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve - it is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the

appellate system that permits such delay and not to the prisoner who takes advantage of it. ... Appellate procedures that echo down the years are not compatible with capital punishment ... The death row phenomenon must not become established as part of our jurisprudence..."

A Royal Commission reported that the average delay in 1950 was six weeks (if there was an appeal) and three weeks if there was not. It considered the possibility of reducing this time even further "to shorten the strain on the prisoner and those about him", but felt that the existing time periods were no more than were necessary to enable proper preparations for an appeal and/or a reprieve petition.

International law provides that "... No one shall be subjected to torture or to inhuman or degrading treatment or punishment..." The leading European authority on what amounts to "inhuman and degrading" treatment in execution of capital sentences is *Soering v. United Kingdom*, which applied that description to the practice in the State of Virginia of holding condemned men on death row for six to eight years, a delay "primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible" (para.56). Extradition of Soering from Europe to Virginia to stand trial for murder was refused, not because he would be liable to be sentenced to death but because he would be exposed to the "death row phenomenon."

### The Lackey Case

The issue of "death row phenomenon" has been raised in cases in the United States, but has not yet been resolved by the US Supreme Court.

Clarence Lackey was 22 years old when, in 1978, he was convicted of murdering a 23-year-old girl in Lubbock, Texas. The Texas Court of Criminal Appeals considered the direct appeal for four years before overturning the 1978 conviction. However, Clarence Lackey was retried and convicted again in April 1983. This time, the Court of Criminal Appeals took until August 1991 to affirm the new conviction and sentence of death. His execution was set for March

6, 1995. However, the United States Supreme Court granted a stay of execution. In a rare memorandum, Justice John Paul Stevens set the wheels of appellate justice in motion by requiring State and federal courts to study whether long execution delays could constitute "cruel and unusual punishment" in violation of the 8th Amendment to the United States Constitution. Stevens, joined by newly appointed Justice Breyer, while denying certiorari relief to Clarence Lackey, stated:

"... the court's denial of certiorari does not constitute a ruling on the merits ... Often a denial of certiorari on a novel issue will permit the State and federal courts to serve as laboratories in which the issue receives further study before it is addressed by this court. [This] claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study ... the issue is an important undecided one."

This is now the basis for on-going efforts to address the issues of the death row phenomena in the United States.

The case of N.I. Sequoyah (NIS) in California provides an example of international efforts to end the death row phenomena in the United States. NIS was born Billy Ray Waldon on January 3rd 1952 in Tahlequah, Oklahoma.

Following high school, NIS enrolled in the United States Navy. He trained as an Electronic Warfare Technician and progressed to the rank of First Class Petty Officer responsible for Electronic Warfare Watch supervision. During his naval career, NIS became an advocate of the international language Esperanto. He participated in the meetings and conventions of several linguistic organizations, and lectured in Italy, France, Spain and Greece on the Cherokee and Japanese languages.

Following an honorable discharge from the navy in 1984, NIS actively pursued his interests in the linguistics, history and culture of Esperanto and Cherokee.

In June 1986 NIS was arrested and charged on eight counts for crimes committed in Oklahoma between the 15th and the 23rd of November 1985, and on

twenty-four counts for crimes committed in San Diego between the 7th and the 20th of December 1985. The charges included murder, rape, arson, armed robbery, use of a firearm with intent to kill, grievous bodily harm, and burglary.

NIS fought, at length, for the right of self-representation, which was granted in November 1989. There was widespread unbalanced media coverage of the case both before and during the trial, which began in June 1991.

Devoid of both motive and forensic evidence, the prosecution case rested on stolen property found in a car belonging to NIS, questionable eye-witness testimony, and a proficiency in outmaneuvering an unskilled and inadequately prepared defense, unable to attach substance to its claims of political subterfuge targeting American Indian activists.

NIS was found guilty in December 1991 and was sentenced to death in February 1992. Since March 1992 NIS has been an inmate of San Quentin State Prison.'

### **fos\*ters**

With these legal precedents in mind, fos\*ters (friends of sequoyah \* team research Switzerland) was founded in Switzerland in 1992 with the specific aim of securing active legal representation for N.I. Sequoyah. fos\*ters has an active core group of ten individuals backed up by approximately one hundred further members who have supported activities over the past eleven years.

fos\*ters founders established contact with Sequoyah's wife, researched the available information, which included 7000 of the more than 27000 pages of trial transcripts, and documented discrepancies, incongruencies and inadequacies of the case and its prosecution in a 350-page report. On the basis of this report, fos\*ters then began looking for both sponsorship and (legal) technical expertise to pursue its aims.

A chance encounter in the summer of 1994 brought fos\*ters into contact with the Bar Human Right Committee of England and Wales (BHRC) in London and through a succession of meetings and information exchanges an informal collaboration was established.

Having reviewed the complete set of trial transcripts provided by fos\*ters, the BHRC identified specific legal, procedural and humanitarian concerns with both the conduct of Sequoyah's trial and the status of his appeal and declared their willingness to submit an Amicus Curiae Brief on his behalf.

In pursuit of its goals, fos\*ters has also sought out and developed relationships with other organisations in both Europe and the United States. One such organization, the Geneva based Association for the Prevention of Torture is actively collaborating with the BHRC with regard to the Amicus Curiae Brief. fos\*ters is also in contact with the the International Secretariat of Amnesty International and the Office for the State [of California] Public Defender. Where necessary, the BHRC has assumed the role of technical coordinator.

fos\*ters members have visited Sequoyah in San Quentin annually and the association has also played a role in supporting visits by BHRC lawyers. Sequoyah's most regular visitor, Father Matthew Regan, a preacher and fund raiser for the charity Food for the Poor sadly passed away in June 2003.

fos\*ters is self-financed and self-motivated. The association is focussed on what it set out to do. Progress is slow, but with the help and support of its membership and the goodwill and active collaboration of other organisations progress is being achieved.

At the end of 2003, twelve years after the sentence of the first trial, the record correction procedure is still not completed. From a European point of view, this is unconscionable and Sequoyah is effectively denied the opportunity to establish his innocence because the Supreme Court of California refuses to list his appeal for hearing.

In October, Human Rights Advocates co-sponsored events at the San Francisco Bar Association and U.S.F. School of Law where Mr. Sapsford discussed these issues.

## **Convention for People With Disabilities Moves Forward**

By Sylvia Caras, PhD

Convention. Yes was the bumper sticker on the backs of the wheelchairs.

Convention. Yes was the goal.

Convention. Yes was the Decision passed.

From June 16-27, 2003, HRA accredited me to attend the Second Ad Hoc Committee on the Comprehensive and Integral International Convention to Promote and Protect the Right and Dignity of Persons with Disabilities at United Nations Headquarters in New York.

Three Panels provided expert input to the Second Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities. They emphasized both human rights and social development; noting that "the indivisibility, independence and interrelatedness of all human rights - civil, political, economic, social and cultural are of equal importance and equal weight in both jurisprudence and practice;" and suggesting methods of monitoring and addressing violations.

A third Ad Hoc Committee will convene next May/June 2004. In the meantime, a Working Group - 27 states, 12 NGOs of people with disabilities, and one representative from national human rights institutions accredited to the International Coordination Committee -- will meet in January to draft for the Committee's consideration a compiled convention with bracketed options. The process was initiated with a draft proposal submitted by Mexico in 2001, followed by regional meetings.

People with disabilities held firm to the twelve slots to represent ourselves, and will put forward a slate to include one name from each of the seven International Disability Alliance organizations - Disabled Peoples' International, Inclusion International, Rehabilitation International, World Blind Union, World Federation of the Deaf, World Federation of the Deaf-Blind, World Network of Users and Survivors of Psychiatry - and one from otherwise unrepresented groups in each of the five UN regions.

There was considerable jockeying and consultation about how best to include the voice of human rights organizations. The Committee also "invites the General Assembly, at its 58th session, to examine in greater detail the provision of reasonable accommodation for persons with disability to facilitate accessibility to the United Nations premises, technology and documents."

The Disability Caucus Drafting Committee prepared six bullets detailing suggestions for paragraphs to be included in the final resolution, covering comprehensiveness, principles, non-discrimination, fulfilling rights, diversity, and monitoring.

Tina Minkowitz, JD, UN representative of the World Network of Users and Survivors of Psychiatry ([www.wnusp.org](http://www.wnusp.org)), provided a fact sheet of human rights violations based on psychiatric disability.

Thanks to HRA providing accreditation, and SAMHSA providing funding, I was in place to be selected to the committee which will recommend a Disability Caucus intersessional infrastructure to sustain continuity until the Convention is completed. I was also able to have the organization I founded, People Who, [www.peoplewho.org](http://www.peoplewho.org), accredited to the Ad Hoc committee.

Daily bulletins and summaries: [www.rightsforall.org/updates.php](http://www.rightsforall.org/updates.php) Official documents of the Ad Hoc Committee: [www.un.org/esa/socdev/enable/rights/adhocmeetings.htm](http://www.un.org/esa/socdev/enable/rights/adhocmeetings.htm)

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