

### The Pinochet Precedent: Legal Obstacles and New Approaches to Prosecuting Crimes Against Humanity

by Teresa Young Reeves\*

On March 26, 2001, the Washington College of Law (WCL) and the Institute for Policy Studies (IPS) co-sponsored a conference at WCL entitled “The Pinochet Precedent: Individual Accountability for International Crimes.” The conference addressed various legal obstacles encountered in the struggle to bring former Chilean dictator General Augusto Pinochet to justice, and to suggest new approaches for lawyers and human rights defenders in ongoing and future proceedings against individuals accused of violations of international criminal law. Among the conference participants were WCL Dean and Center for Human Rights and Humanitarian Law Co-Director Claudio Grossman, and WCL Professors and Center Co-Directors Richard J. Wilson, Robert Goldman, and Diane Orentlicher. WCL Professor Michael Tigar also participated, along with 15 other lawyers and human rights defenders who traveled from across the United States and from as far as Senegal and Argentina.

The introductory panel discussion outlined the historical and political events leading up to the 1973 coup in Chile and subsequent legal proceedings against Pinochet. Juan E. Garcés, the leading attorney in the Spanish case against Pinochet, opened the panel with a chilling personal account of the coup, a day on which late Chilean President Salvador Allende asked Garcés to take refuge in an embassy because “someone needed to live to tell the history of that day.” U.S. attorney Samuel Buffone spoke next. In 1976 he and Professor Michael Tigar brought a successful civil suit against the Chilean government for the deaths of Orlando Letelier, former ambassador to the United States and Defense Minister under President Allende, and Ronni Moffitt, a U.S. citizen and development assistant at IPS. In describing the *Letelier-Moffitt* case as an “uphill battle,” Mr. Buffone explained that 25 years ago, the prevalent belief was that Pinochet was beyond the reach of

the law because, as a former head of state, he had sovereign immunity for acts committed during his regime. At that time, the concept of universal jurisdiction—the legal principle by which any country can prosecute certain international crimes, regardless of the nationality of the parties or the locus of the crime—was neither sufficiently developed nor commonly understood. In the wake of Spain’s request to extradite Pinochet from Britain for international law violations committed during his dictatorship, the import of universal jurisdiction has gained increased recognition.

The second panel discussed lessons learned from other universal jurisdiction cases, including the recent case against Hissène Habré, the former dictator of Chad. Human Rights Watch Advocacy Director Reed Brody opened the panel analogizing a human rights cliché—“[i]f you kill one person, you go to jail; if you kill 20, you go to an insane asylum; but if you kill 20,000 people, you get invited to a peace conference”—to the *Habré* case. Habré, who fled to Senegal after losing power, allegedly murdered an estimated 40,000 Chadians and tortured an estimated 200,000 people. Plaintiffs represented by Mr. Brody and Pascale Kambale, who also participated in the conference, brought charges against Habré in March 2001. The Senegalese *Cour de Cassation* has dismissed the case for lack of jurisdiction.

Mr. Kambale commented on why the *Habré* case ultimately failed. First, Mr. Kambale blamed the lawyers’ inability to persuade the court of public opinion that Habré had in fact committed the atrocious crimes alleged. Second, he cautioned that Africa needs to train its human rights lawyers to become more pro-active in bringing alleged human rights violators to justice, rather than waiting for national governments to bring suits. Third, Mr.

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**Dr. Kelly Dawn Askin**, Acting Executive Director of the War Crimes Research Office of the Washington College of Law’s (WCL) Center for Human Rights and Humanitarian Law (Center), was a Distinguished Speaker at Georgetown University Law Center in March. She spoke on “Contemporary Developments in Prosecuting Gender Based Crimes in International Law.” Also in March, she was interviewed on National Public Radio’s “Diane Rehm Show” on “War Crimes Against Women,” and gave interviews concerning recent judgments rendered by the International Criminal Tribunal for the former Yugoslavia to the *New York Times*, the BBC, and the Associated Press. She also wrote an editorial for *Newsday*, entitled “Rape’s Black Day in Court.” In April, Dr. Askin’s article on the *Kunarac* case was published by the Institute for War and Peace Reporting. Two other articles, entitled “Precedent in the International Criminal Tribunals” and “Recent Developments in Prosecuting Sexual Violence in International Law,” were published by the Crimes of War project. Also in April, Dr. Askin chaired a

panel entitled “International Trials for Internal Armed Conflicts and International Crimes Committed Domestically” at the American Society of International Law (ASIL) Annual Meeting in Washington, D.C.

**Claudio Grossman**, Dean, Co-Director of the Center, and President of the Inter-American Commission on Human Rights (IACHR), spoke on the freedom of the press at the Inter-American Press Association Meeting in Fortaleza, Brazil, and lectured at the opening of a course for ombudsmen in Costa Rica in March 2001, where he shared the podium with Costa Rican President Miguel Angel Rodríguez. He participated in the IACHR’s *in loco* visit to Chile in April. Also in April, he presented at a seminar entitled “Truth Commissions and New Challenges in Promoting Human Rights” at Diego Portales University in Chile; spoke on fundamental human rights and the Free Trade Agreement of the Americas at a conference in Quebec, Canada, entitled “Inter-American Cooperation: Beyond Free Trade;” and represented the IACHR at the 2001 Summit of the Amer-

icas, also in Quebec. In May, Dean Grossman will moderate a panel on the death penalty in the United States, marking the 25th anniversary of the *Gregg v. Georgia* decision.

**Robert Goldman**, Professor of Law and Co-Director of the Center, attended the most recent regular session of the IACHR in Washington, D.C. He was re-elected to the Executive Council of the Inter-American Institute of Human Rights, headquartered in San Jose, Costa Rica. On March 30, 2001, he spoke at a conference in Chicago organized by Northwestern University on the relevance of the Inter-American human rights system for Canada, Mexico, and the United States. On April 2, 2001, he traveled to Chile to participate in a special session of the IACHR.

**Diane F. Orentlicher**, Professor of Law and Co-Director of the Center, spoke on March 1, 2001, as a Distinguished Visitor at Indiana University’s School of Law on “Nuremberg Reconfigured: The Pinochet

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regardless of race or color, and ensuring the equal protection of that right. Moreover, the right to vote, and its equal protection, are not merely local and federal guarantees. Indeed, they are international human rights guaranteed to citizens of democracies throughout the world.

### International Human Rights Implications

Although the Florida plaintiffs raise their complaints of disenfranchisement under domestic law, their allegations also relate to rights protected by international legal instruments. Article 25 of the ICCPR, for example, which the United States ratified in 1992, preserves the right of all citizens to vote. Article 2(1) of the ICCPR prohibits, *inter alia*, distinctions between citizens on the basis of race or color. The General Comments to Article 25 (General Comments) further define the elements of the right to vote. The General Comments maintain that States Parties must take “effective measures” to protect the ability of all persons to exercise the right to vote on equal grounds. The sanctioning of voting mechanisms of disparate quality, however, prevented all voters from equally exercising their right to vote. Furthermore, the General Comments explain that where registration of voters is required, “obstacles to such registration should not be imposed.” In Florida, however, voting officials wrongfully purged registered voters from official voter lists and failed to remedy such errors in time to permit wrongfully disqualified voters to cast their ballots.

The General Comments to Article 25 also requires that any electoral system operating in a state “must be compatible with the rights protected by” this article, including the equal right to vote. They further explain that the method of allocating votes “should not distort the distribution of voters or discriminate against any group” and “should not restrict unreasonably” the right of citizens to vote. Florida, however, used differing voting procedures that impeded the right of all citizens to vote and to have their votes counted on equal grounds. In addition, Florida used voting mechanisms of varying quality in racially distinct communities that produced such distortion and discrimination. By disproportionately disqualifying votes legitimately cast by African-Americans, the inconsistent use of punch-card ballot machines plainly discriminated against black voters.

The voting procedures that characterized the 2000 presidential election effectively denied equal protection of the right to vote, as protected by U.S. domestic law and the ICCPR. Although U.S. courts have held that the ICCPR is not self-

executing and thus does not create a private right of action, scholars argue the U.S. ratification of the ICCPR gives the Covenant domestic legal force. The Florida plaintiffs, therefore, could enhance their domestic legal argument by incorporating Article 25 of the ICCPR.

### Conclusion

The ultimate resolution of the 2000 U.S. presidential election provoked widespread discussion of the fundamental right to equal protection. In spite of the discourse regarding standards that should have been implemented to determine which votes would be counted, a thorough application of the right to equal protection was ignored. The failure of officials to meet the obligation to determine which votes were valid disproportionately affected African-American and low-income minority populations. Moreover, the legislated use of disparate voting mechanisms in African-American communities, proven to generate substantially unequal rates of error, caused these communities to be statistically more prone to having their legitimate vote disqualified. In the most distressing circumstances, black voters were further encumbered by the negligence of election officials, who failed to properly oversee the purge of disqualified voters from official lists, or to confirm the legitimacy of any such disqualification. In many instances, this negligence was compounded by the disproportionate absence in predominantly black precincts of adequate technology to remedy errors at the polls. In providing unequal protection, the state government violated the local and federal civil rights of its constituents. ☹

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Kambale explained that the international community must work to bridge the division between international and domestic human rights law. According to Mr. Kambale, many francophone African countries devalue the utility of international law, believing it comparable to diplomatic law and, therefore, inapplicable to ordinary citizens.

The two remaining panels discussed U.S. accountability mechanisms for violations of international law and the future role of ad hoc criminal tribunals and the recently established International Criminal Court. Shawn Roberts, an international human rights lawyer and Legal Director for the Center for Justice & Accountability in San Francisco, California, outlined various strategies that may be used in the United States to protect victims of torture, summary execution, forced disappearances, crimes against humanity, and war crimes. Besides extradition for pros-

ecution and deportation, Ms. Roberts suggested U.S. lawyers pursue civil remedies under the Alien Tort Claims Act or under the Torture Victim Protection Act.

Although conference participants made it clear the legal community has made dramatic advances in overcoming the obstacles first presented by the *Letelier-Moffitt* case 25 years ago, the common theme invoked at the conference was that impunity for gross human rights violations continues today. WCL Professor Diane Orentlicher, currently on leave as a visiting scholar at Princeton University’s Program in Law and Public Affairs, reminded the audience that forcing accountability by ending impunity for gross human rights violations in part relies on the will of the people and the will of the political process to persuade governments to respect and ensure human rights. ☹

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