

The Contribution of British NGOs to the Development of International Law

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I. INTRODUCTION

When thinking about contributions to the development of the law, especially international law, the conference room immediately comes to mind. Yet as far as international law is concerned, the formally relevant actors are governments. It is only with the post-World War II period that non-governmental organizations came to be allowed into some international organizations and their deliberative fora as ‘observers’. As will be seen, they seized the opportunity with enthusiasm.

A more traditional role involves creating the conditions for legal change by political campaigning against current injustice. This is an instigation function. It is up to the targets of the campaigning, typically governments (usually the executive and legislative branches, but sometimes the judiciary) to bring about change, especially legal change.

In the case of international law, the problem has been, not only to achieve normative reform, but also to promote the development of machinery aimed at achieving implementation of the law, preferably courts, but sometimes quasi-judicial or non-judicial bodies. And once the machinery is in place then it can only act if it receives the sort of information necessary to trigger the action. For courts, that includes bringing cases or submitting amicus curiae briefs.

This chapter is organized according to these modes of action. It soon became apparent as work on the topic began that it would be over-ambitious to seek to present a history, organization by organization, of the role of British NGOs in the development of international human rights law. It would simply not be possible to do justice even to the relatively few NGOs whose activities are the

considered in this chapter. It therefore seemed more appropriate and, it is hoped, more elucidative of the international legal process to consider that process, but from a British NGO viewpoint.

The notion of British NGO requires some clarification. It covers both purely British NGOs, like Liberty (formerly the National Council for Civil Liberties – NCCL) and international NGOs with headquarters in the United Kingdom, notably Amnesty International, as well as NGOs with a primarily international vocation, albeit with largely British staff and governance such as Anti-Slavery International. All were founded by British citizens.¹ Particular attention will be given to the work of Anti-Slavery International and Amnesty International. This is not just because the former is generally acknowledged as the first human rights NGO and the author was intimately involved in the latter,² it is also because each of them brought major issues to world attention. With the former the issue was self-evidently slavery; with the latter the most prominent was torture, the prohibition of which has become a rule of *jus cogens*, while the death penalty was another significant theme, in respect of which international law has developed.

II. THE INSTIGATIVE FUNCTION

The classic example of simple campaigning against injustice prompting international legal developments does not fall within the time-frame of this book. It is the work against slavery by the Anti-Slavery Society (ASS), now Anti-Slavery International – ASI). Forerunners had successfully promoted UK non-participation and then active opposition internationally to the slave trade, notably the trans-Atlantic slave trade. And the courts had effectively abolished the status of slave in *Somerset's Case* as early as 1772.³ So when the British and Foreign Anti-Slavery Society was

¹ AI was founded by British barrister Peter Benenson via an article in the British Sunday newspaper *The Observer*, *The Forgotten Prisoners*, 28 May 1961. The founding of others will be indicated in the text, or in footnotes when they are first referred to.

² The author served as Legal Adviser and founding head of the legal office at the London-based International Secretariat of Amnesty International from 1973 to 1990.

³ S Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (AltaMira Press 2003) 2 (by making it impossible for slaves to be transferred out of the country and so, apparently,

formed in 1839 by British citizens, including leading Quakers,⁴ its goal was the worldwide abolition of slavery as such, as well as the remains of the slave trade. Like its predecessors, it focused on promoting awareness in Britain, with a view to encouraging the government to act internationally, including with some of its colonies. For, while the 1833 Emancipation Act had outlawed slavery in much of the empire, it did not apply to India, other Eastern possessions or the West African trading ports.⁵ British activism was rewarded with a network of bilateral and some multilateral treaties prohibiting involvement in the slave trade.⁶ Thus, the 1885 Berlin Declaration prohibited the export of slaves from the Congo basin, as ‘trading in slaves is forbidden in conformity with the principles of international law’.⁷ The initiative was taken by a Britain ‘anxious to ... please the humanitarian lobby’.⁸

A vivid twentieth century example of general campaigning leading to developments on the international plane including international law, is Amnesty International’s (AI) campaign against torture.⁹ In 1973, AI embarked on its first thematic campaign, the Campaign against Torture (CAT). Its goal was to raise awareness of the prevalence of torture around the world with a view to ‘arousing public opinion to the danger which threatens the citizens of every country’.¹⁰

The very existence of the campaign led to substantial press coverage as AI national sections

possible for them to desert their masters with impunity).

⁴ Ibid 7.

⁵ Ibid 5.

⁶ S Drescher, ‘From Consensus to Consensus: Slavery in International Law’, in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 85, 93.

⁷ General Act of the Berlin Conference on West Africa, 26 February 1885, Declaration Relating to the Slave Trade, art. 9.

⁸ Miers (n 3) 19.

⁹ See generally, AM Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton University Press 2001); N Rodley, ‘Amnesty International’s Work on Physical Integrity – A Personal Reflection’, in W de Jonge et al (eds), *50 Years of Amnesty International: Reflections and Perspectives* (SIM Special 36, Universiteit Utrecht 2011) 51.

¹⁰ Amnesty International, *Report on Torture* (2nd edn, Duckworth 1975) 10.

arranged conferences and seminars and similar awareness-raising events.¹¹ It was bolstered by an international petition calling on the UN General Assembly ‘to outlaw immediately the torture of prisoners throughout the world’.¹² This activity, in turn, was sufficient to lead to the adoption of a General Assembly resolution on 2 November 1973. Sweden, which introduced the draft of the eventual resolution explicitly referred to AI, as did Denmark.¹³ By the resolution, the Assembly ‘[r]ejects any form of torture and other cruel, inhuman or degrading treatment or punishment’.¹⁴ It would also return to the issue at an unspecified ‘future session’.

The climax of the CAT came the following month with the publication of a worldwide report on torture¹⁵ and an international conference in Paris, partly on Human Rights Day.¹⁶ Not only did the report attract extensive publicity, so did the conference. This was because UNESCO withdrew its agreement to host the conference as a result of the report’s being issued a week earlier.¹⁷ While AI’s French Section was able to find an alternative Paris venue to permit the conference to proceed on schedule, UNESCO’s denial of its premises itself led to major international attention being directed at the conference and the underlying campaign.¹⁸

The conference and the campaign were referred to by a number of delegations urging action at the

¹¹ Amnesty International Annual Report 1972-73, 23-4. AI’s campaigning work is carried out by territorial sections around the world. The sections convene in biennial (then annual) International Council Meetings to set general policy and elect an International Executive Committee that is responsible for determining policy and giving direction to the International Secretariat between Council meetings.

¹² Ibid 24.

¹³ See J Huckerby and N Rodley, ‘Outlawing Torture: The Story of Amnesty International’s Efforts to Shape the U.N. Convention against Torture’, in DR Hurwitz, ML Satterthwaite and D Ford (eds), *Human Rights Advocacy Stories* (Foundation Press 2009) 15.

¹⁴ General Assembly Res 3059 (XXVIII) (1973).

¹⁵ Above (n 10).

¹⁶ Amnesty International Conference for the Abolition of Torture, Paris, 10-11 December 1973, Final Report.

¹⁷ Ibid 18.

¹⁸ Author’s recollection.

very next session of the General Assembly in 1974.¹⁹ The ensuing resolution 3218 (XXIX) adopted on 6 November 1974, while only procedural in nature, effectively paved the way for the development of several normative instruments: the Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975),²⁰ the Code of Conduct for Law Enforcement Officials (1979),²¹ the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)²² and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).²³

While international law has embraced the complete abolition of slavery and torture, it has not yet reached that point in respect of the death penalty. When in 1973 AI came out for universal abolition of the death penalty for all crimes, only 25 countries were abolitionist, even for ordinary crimes.²⁴ Some forty years later a majority of States have abolished the death penalty in law for all crimes or ordinary crimes.²⁵ Four abolitionist protocols to human rights treaties have been adopted, one universal and three regional.²⁶ Although there are few straight lines to be drawn between AI's advocacy and the adoption of the protocols,²⁷ it is this author's sense that the rapid spread of abolition owes much to the sustained AI campaign. Particularly crucial was the transformation of

¹⁹ See NS Rodley and M Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009) 23-4.

²⁰ General Assembly Res 3452 (XXX) (1975).

²¹ General Assembly Res 34/169 (1979).

²² General Assembly Res 37/194 (1982).

²³ General Assembly Res 43/173 (1988).

²⁴ It is customary to distinguish between ordinary crimes upto and including murder and crimes committed against supreme state interest, typically in time of armed conflict.

²⁵ According to Amnesty International, as of the end of 2014, 105 countries were abolitionist, all but seven for all crimes (the seven for ordinary crimes). If one adds the 35 countries considered abolitionist de facto (no executions for the 10 previous years), that leaves only 58 actively retentionist states: Amnesty International Death Sentences and Executions 2014, Annex II, AI doc. ACT 50/001/2015.

²⁶ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty; Sixth and 13th Protocols to the European Convention on Human Rights; and Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

²⁷ But see below on the origins of Protocol 6 to the European Convention on Human Rights.

the issue previously conceived of as one of national criminal law policy to one of universal human rights, just as human rights thinking was assuming a predominant role in national and international discourse.

III. ADVOCATING AND PARTICIPATING IN THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS NORMS

It is instructive to compare the process of adopting the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. Starting with the establishment in 1924 of a Temporary Slavery Commission to prepare a draft convention, not only were NGOs kept out of the deliberations of the Commission, but information from them was not even permitted to be circulated. So the ASS fell back on supporting the inclusion of individual members, notably Lord Lugard representing the UK and Harold Grimshaw representing the ILO.²⁸

When it came to the Supplementary Convention, the Society was actively involved, as can be seen just from the number of references to its role in the index of a recent book on the *travaux préparatoires*.²⁹ In particular, it was keen to promote the inclusion of a broad range of slavery-like practices ('servitudes') notably peonage, debt bondage, forced marriages and adoption of children for exploitation.³⁰ All were in the draft, based on a British text that reached and was adopted by the Conference of Plenipotentiaries in 1956.³¹ Another issue, forced labour was eventually dealt with by the ILO, which was to adopt the 1957 Forced Labour Convention.

²⁸ Miers (n 3) 100-05.

²⁹ J Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Nijhoff 2008).

³⁰ Miers 327-31.

³¹ Allain (n 29) 232.

One issue that had been left vague was the meaning of the definition of slavery in article 1 of the 1926 Convention, according to which slavery was ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. The italicised words were susceptible to a narrow construction to cover only classic ‘chattel’ slavery³² or a more elastic notion covering at least some of the servitudes noted above. It was the ASS that successfully proposed the drafting solution that targeted them ‘whether or not they are covered by’ the definition in the 1926 Convention.³³

The most controversial aspect of article 1 of the new Convention related to whether the obligation to abolish these practices should be, like slavery in the 1926 Convention, ‘progressively and as soon as possible’ or immediate. The States were closely divided on the issue, nor was there consensus among the NGOs. The British draft took the gradualist approach and was supported in this by the ASS. Other NGOs, notably the International Abolitionist Federation and the Saint Joan’s International Social and Political Alliance, pressed for the obligation to be immediate.³⁴ The gradualist argument was that immediate termination of long-entrenched social practices would have caused more suffering than good to the very people whose freedom was sought. In the end, those seeking to remove the gradualist words only just failed to muster a majority.³⁵

A broad range of standard-setting relating to torture took place between 1975 and 1988. In addition to the instruments referred to earlier and most significantly, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was drafted between 1978 and 1984. In fact, the 1973 Conference had called for codes for military, police and prison

³² That is, where the slave is considered to be no more than the property of the slave-owner who enjoyed full rights of ownership, possession and disposal over the slave.

³³ Ibid 233-34.

³⁴ Ibid 251, 322-5. Originally called the British and Continental Federation for the Abolition of Prostitution, the IAF was founded by English feminist Josephine Butler in 1837; the St Joan’s International Alliance was founded in London in 1911 by Catholic women to advocate women’s suffrage.

³⁵ Ibid 325.

personnel,³⁶ issues taken up by the General Assembly the following year. At the time, AI had not developed a lobbying presence at the UN in New York, so it is unclear how far resolution 3218 (see above) was inspired by the Conference report. Interestingly, even though, by 1977, the organization had a firm focus on the UN, the decision of Sweden to initiate the drafting of a convention against torture was taken despite its not being the subject of AI lobbying. So this initiative could not be said to be taken in response to AI lobbying.

What is certainly clear is that once the drafting exercises got under way, AI devoted great energies to ensuring that the emergent texts reflected principles it considered important. For example, it even developed its own draft code of police ethics (Declaration of The Hague).³⁷ This code played a background role in the development of the UN's Code of Conduct for Law Enforcement Officials,³⁸ while it was adopted almost verbatim in the Declaration on the Police adopted by the Parliamentary Assembly of the Council of Europe.³⁹ This was remarkable insofar as the Declaration of The Hague called on police officers to disobey orders to torture. The 1979 UN Code was substantially more nuanced, despite AI's participation in the former Committee on Crime Prevention and Control that was responsible for preparing a draft to the superior bodies. It was not until 1990 that it was possible to include in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials the demand that 'no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials ... refuse to carry out an order to use force and firearms, or report such use by other officials'.⁴⁰ AI had participated in various meetings beginning with the Committee on Crime

³⁶ Rodley (n 9) 57.

³⁷ Alfred Heijder and Herman van Geuns, *Professional Codes of Ethics* (Amnesty International 1976) 12-14.

³⁸ Above (n 21).

³⁹ Council of Europe Parliamentary Assembly Res 690 (1979).

⁴⁰ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 8-27 August 1990, Report, UN doc. A/CONF.144/28/Rev.1 (1991), 110, para 25.

Prevention and Control, that had drafted the Principles.⁴¹ Even now the text had not gone as far as the European one that urged disobedience, not just an absence of adverse consequences when ethical police complied with the Code's provisions.

Perhaps the highest-profile AI involvement in a drafting exercise was in respect of UNCAT. AI, represented by its Legal Adviser,⁴² participated in all meetings of the Working Group of the UN Commission on Human Rights that worked on a draft submitted by Sweden in 1978 until completion of its work in 1984. In fact, by then AI had a policy of refraining from proposing specific texts in favour of advocating the principles the text should reflect.⁴³ It was also the case that the text proposed by Sweden already reflected the key principles AI was seeking, especially the principle of universal jurisdiction over suspected torturers, wherever they may be found. It may be that the inclusion of the principle in the Swedish draft owed something to the fact that the same principle was contained in a draft proposed under the auspices of the International Association of Penal Law. One of the participants in the IAPL meeting that agreed the draft was the then Swedish Attorney-General Helga Romander.⁴⁴

Accordingly, it fell to the two NGOs that most consistently followed the Commission's working group as observers, AI and the International Commission of Jurists (ICJ), rather to defend the principles already in the working text, than to have to struggle to get it incorporated. Even this less politically onerous task involved direct lobbying of representatives of States participating at the group's meetings and exploiting the opportunities of AI's and the ICJ's sections at the national level. For instance, the Dutch government had serious misgivings about universal jurisdiction, but

⁴¹ Meetings included an interregional preparatory meeting for the Congress and two sessions of the (now defunct) UN Committee on Crime Prevention and Control: see Rodley and Pollard (n 19) 497; AI participation was undertaken by the present writer, as was the case when the Code was drafted; he was also a member of AI's delegation to the Congress.

⁴² The present writer.

⁴³ Huckerby and Rodley (n 13) 24-8.

⁴⁴ Ibid 29-30; the present writer also participated.

abandoned them after AI's Dutch Section and the ICJ's Dutch affiliate⁴⁵ successfully sought the adoption of a resolution in the Dutch parliament calling on the government to accept the principle. The government switched position at the following session.⁴⁶

As noted earlier, AI did not play so direct a role in the development of instruments concerning the death penalty. However, the prime mover behind the first abolitionist instrument, the Sixth Protocol to the European Convention on Human Rights was Austrian Justice Minister, the late Dr Christian Broda. He himself attributed his taking up the issue to his participation in a 1977 AI conference on the death penalty, held in Stockholm. He would later, in a speech accepting the Council of Europe's Human Rights Prize, refer specifically to a working paper for the conference prepared by the present author, who was AI's Legal Adviser, and acknowledge that as the source of 'the idea ... that anyone who opposes torture must favour abolition of the death penalty'.⁴⁷ Insofar as the Second Protocol to the ICCPR aiming at the abolition of the death penalty was inspired by its European text, arguably AI may be given some indirect credit for that development.⁴⁸

Since these exercises, NGOs have become more used to working in coalitions, so it becomes harder to identify a specific British contribution. However, some NGOs may be especially prominent in the joint activities. For instance, Amnesty International played a leading role among NGOs active at the Rome Conference that drafted the Statute of the International Criminal Court. The NGO activity, involving the publication of a daily journal and the convening of regular briefings for participants, played a substantial role in the formulation of the Statute.⁴⁹ Examples included lobbying for the

⁴⁵ Huckerby and Rodley (n 13) 31.

⁴⁶ Author's recollection.

⁴⁷ Council of Europe, press release, 28 January 1987, doc. D (87) 3.

⁴⁸ AI also collaborated with Marc Bossuyt, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, who prepared the draft of what became the Second Optional Protocol (author's recollection).

⁴⁹ The author was able to witness this first hand when, as Special Rapporteur on the question of torture, he attended the Rome Conference on behalf of the special procedures of the UN Commission on Human Rights.

exclusion of the death penalty as a sanction available to the Court and an independent prosecutor's role in initiating investigations into crimes within the jurisdiction of the Court.⁵⁰ Similarly, while only one of several active NGOs, Minority Rights Group International (MRG) was able to play a substantial role in the development of the 1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities.⁵¹

A recent example was the exercise of revising the 1955 UN Standard Minimum Rules for the Treatment of Prisoners (SMR).⁵² Here the London-based Penal Reform International played a crucial role. It convened two meetings, together with the Human Rights Centre of the University of Essex, at the University's Colchester campus. These led to a series of recommendations for the revision process.⁵³ Several NGOs attended the various working group meetings, including the final one in Cape Town at which most of the revisions of the original Rules were agreed. PRI was active in the pre-group-meeting preparations and the coordination of activities of the NGOs attending the meetings.⁵⁴ Some three fifths of these were adopted, including particularly strong limits to and safeguards on the application of disciplinary sanctions.⁵⁵

IV. PROMOTING THE DEVELOPMENT OF THE MACHINERY

⁵⁰ Some retentionist states wanted the death penalty to be part of the arsenal for a court that would adjudicate the gravest of all crimes; some states wanted jurisdiction to be entirely dependent on referral by the Security Council.

⁵¹ A Phillips, 'Historical Background on the Declaration', in U Caruso and R Hofmann (eds), *The United Nations Declaration on Minorities: An Academic Account on the Occasion of Its 20th Anniversary (1992-2012)* (Brill/Nijhoff 2015) 3.

⁵² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by Economic and Social Council Resolutions 663 C (XXIV) (1957) and 2076 (LXII) (1977).

⁵³ See NS Rodley, A Huber and L McGregor, 'Updating the UN Standard Minimum Rules for the Treatment of Prisoners', in S Linton, G Simpson and WA Schabas (eds), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S Clark* (Brill/Nijhoff 2015) 135, 140-9.

⁵⁴ The present writer participated as an independent expert for the UN Office on Drugs and Crime.

⁵⁵ The revised text has been adopted by the UN Commission on Crime Prevention and Criminal Justice (Report on the 24th Session, UN doc. E/2015/30; E/CN.15/2015/19, draft res. A II, p. 17) with a view to their adoption at the 70th session of the UN General assembly in 2015. The Rules will become known as the Mandela Rules in recognition of the key role of the Cape Town meeting.

ASS had long campaigned for a committee to implement the Slavery Convention and the Supplementary Convention. However, even the latter convention was drafted a decade before the first human rights treaty body was created.⁵⁶ Nor had the UN Commission on Human Rights system of special procedures been developed (see below). Accordingly, it seemed like a breakthrough when the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities created its working group on slavery in 1975, even though the ASS had been proposing the appointment of a special adviser. The working group provided a forum for the presentation of information about slavery and slavery-like practices, but did not formulate country-specific conclusions, which a special adviser would have been expected to do.⁵⁷ At its first meeting it invited ASS secretary Colonel Patrick Montgomery to attend the group and he was then invited to be co-opted as a member; the initiative was not followed up at future sessions which he was evidently able to attend as an observer, just as any other accredited NGO representative.⁵⁸

Amnesty International would have more success in relation to the torture issue. By the time the UNCAT was being drafted, three human rights treaties already contained provision for expert monitoring bodies, namely, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Swedish draft convention indeed envisaged that the Human Rights Committee established under the ICCPR would also be the monitoring body for the eventual UNCAT. It would have the same functions, namely, the review of State reports that would be required to be submitted periodically to the Committee and, on an optional basis, the facility of considering inter-State and individual complaints. It also provided for a novel function (for a UN human rights treaty) of instituting an

⁵⁶ The Committee on the Elimination of Racial Discrimination, established in 1969 under art 8 of the Convention on the Elimination of All Forms of Racial Discrimination (1965).

⁵⁷ As such, the idea foreshadowed the development in the following decade of the system of UN human rights special procedures.

⁵⁸ Miers (n 3) 392-93.

inquiry into an apparent systematic practice of torture.⁵⁹

In 1981, it was decided for legal reasons to create a new Committee against Torture, rather than rely on the Human Rights Committee, but the proposed functions remained the same.⁶⁰ This inquiry function was controversial from the beginning and there were early moves to make the function optional, as with the complaints procedures. AI, both directly and through its national sections, lobbied hard to keep the function integral and compulsory. In the end, after being consulted by Sweden as the issue was blocking adoption at the General Assembly, AI agreed to a compromise whereby states could, by reservation on ratification or accession, elect not to be bound by the procedure.⁶¹ In other words, while the complaints procedures required States to opt in, the inquiry procedure would require that they opt out if they were to avoid it.⁶²

If AI's 1973 campaign against torture mainly fulfilled the role of paving the way for action by awareness raising, its renewed campaign in 1984-85 can safely be considered to have been a factor in the establishment by the then Commission on Human Rights of the post of Special Rapporteur on the question of torture. The 1973 Conference on Torture had called for the setting up of 'a body with powers to investigate complaints [of torture] and report to the United Nations General Assembly'.⁶³ This was clearly too ambitious in a period when standard-setting was a possibility, but definitely not implementation, other than pursuant to a treaty obligation. By the time of the renewed campaign, the first two 'thematic' mechanisms had been put in place: the Working Group on Enforced or Involuntary Disappearances (1980) and the Special Rapporteur on summary or arbitrary executions (1982).⁶⁴ Their existence prompted AI to decide that major objective of the renewed campaign should be the creation of an analogous mechanism that would deal with torture.

⁵⁹ UN doc. E/CN.4/1285 (1978).

⁶⁰ Rodley and Pollard (n 19) 209.

⁶¹ Huckerby and Rodley (n 13) 32-3.

⁶² Ibid 216; it was expected, correctly as it turned out, that states would be less likely to reserve to opt out, rather than declare to opt in.

⁶³ Above (n 16) p15.

⁶⁴ Rodley and Pollard (n 19) 202-4.

AI's national sections were mobilized to approach their governments in support of the idea, which was also the subject of an AI intervention at the 1985 session of the Commission. The idea was urged on the Commission by the head of the delegation of the Netherlands where AI had a particularly strong section. Even though the delegation of post-junta Argentina formally presented the draft resolution that aimed at creating the function of special rapporteur, the Netherlands delegation coordinated the lobbying for it.⁶⁵

Meanwhile, ASS contributed both to the demise of one UN mechanism and the creation of another. Frustrated with the inability of the Sub-Commission Working Group to perform any function that would involve drawing conclusions about the actions of States whose practices were in question, the ASS called for a review of the Group.⁶⁶ The Group decided in 1998 to invite Sub-Commission member David Weissbrodt and the ASS, represented by its director Michael Dottridge, to undertake such a review of the law against slavery and similar contemporary practices as well as of 'relevant monitoring mechanisms'.⁶⁷ This was an unprecedented tribute to the authority of the leading advocacy organization on the subject. The review recommended either the extension of the working methods of the Group or that the Commission activate a previous proposal 'that the Working Group be transformed into a special rapporteur of the Commission on Human Rights'.⁶⁸ In 2006, the Working Group itself recommended a similar range of options.⁶⁹ In 2007, the Human Rights Council that had replaced the Commission the previous year indeed created the function of Special Rapporteur on contemporary forms of slavery.⁷⁰ The Working Group ceased to exist with the Sub-Commission, whose functions were only partially replaced by its successor Human Rights Council Advisory Committee.

⁶⁵ *Idem.*

⁶⁶ Message to the author from Mike Dottridge, former ASS Director, 13 May 2015.

⁶⁷ UN doc. HR/PUB/02/4 (2002).

⁶⁸ *Ibid.* para 188.

⁶⁹ UN doc. A/HRC/Sub.1/58/25 (2006), rec. 9, para 33.

⁷⁰ Human Rights Council Res 6/14 (2007).

The work of AI and ASS was not the only significant example of British NGO promotion of the development of machinery. They are just examples. For instance, the role of the Minority Rights Group, now Minority Rights Group International (MRG), in lobbying for what became the Commission on Human Rights Independent Expert on Minority Issues (2005) and, in contrast to the ASS in relation to the Sub-Commission working group on slavery, the creation of a Human Rights Council Forum on Minority Issues (to replace the Sub-Commission Working Group on Minorities) is worth noting.⁷¹

V. FUELLING THE MACHINERY

Most of the UN human rights monitoring bodies, whether established by treaty or created by the Human Rights Council (or its predecessor Commission on Human Rights), is focussed more on considering patterns of human rights violation, rather than adjudicating individual cases. At the regional level, notably where human rights courts exist, individual cases will be a prime issue, but the (usually optional) individual complaints procedures will have the hallmarks of at least quasi-judicial activity. This includes the possibility for ordinary lawyers to bring cases, making the NGO role less dominant. This section begins with the NGO role in relation to non-judicial monitoring work, mainly in the form of providing information, before considering that in relation to judicial or quasi-judicial procedures.

A. Information Supply

It is uncontested that, without NGOs providing information relevant to the mandates of monitoring bodies, these bodies would have little to do. In their early days, they were almost wholly reliant on NGO information. Now there is a network of UN and other intergovernmental machinery, they can pick up on each others' information, but the original source will still typically be non-governmental.

⁷¹ C Chapman and K Ramsay, 'Two Campaigns to Strengthen United Nations Mechanisms on Minority Rights' (2011) 18 *International Journal on Minority Group Rights* 185. The MRG was launched in London in 1969 by British academics and activists. Its Executive Director, the late Ben Whitaker, was the British expert member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities from 1975 to 1988.

When the thematic machinery started (enforced disappearance, summary and arbitrary executions and torture), AI was supplying a large amount of information. Indeed, material provide for its own urgent action network (a progeny of its first campaign against torture) became the principal raw material for the urgent appeal procedures adopted by the WGEID, followed by the special rapporteurs. In fact, it is a plausible hypothesis that the perceived need by these new bodies to respond to the ‘urgent action’ submissions of AI that conduced to their adoption of the urgent appeals system.⁷²

AI’s role in providing information to an international body capable of magnifying the impact of that information is paralleled by that of other NGOs. The ASS was the main supplier of information to the Sub-Commission’s Working Group on Contemporary Forms of Slavery, just as ASI now provides substantial information to the Council’s Special Rapporteur.⁷³ So also the Minority Rights Group (now Minority Rights Group International – MRG) provides substantial information to the Council’s Special Rapporteur on Minorities Issues.⁷⁴

Similarly, NGOs played a crucial role in the evolution of treaty body procedures for review of States’ periodic reports. Formally, NGOs had no status and in the early days the Secretariat was not even allowed to circulate NGO material to treaty body members. So, if members were to be properly briefed on the reality of State compliance with the treaty obligations (or otherwise), it fell to NGOs with substantial information resources, as well as the material wherewithal to access the machinery, to do the job. AI was particularly active at sessions of the Human Rights Committee in that body’s formative years. This usually involved briefing members in their home bases before

⁷² The author ran the office that re-directed AI’s urgent actions to the Working Group and the Special Rapporteurs.

⁷³ In 1995, the Sub-Commission’s Working Group on Slavery became the Working Group on Contemporary Forms of Slavery.

⁷⁴ Indeed, the first holder of the mandate, Gay McDougall, is the current chair of the MRG.

sessions or at the sessions themselves. Nowadays, national NGOs have much greater awareness of and access to international machinery, thus reducing the burden of the international NGOs.

B. Judicial and Quasi-judicial Bodies

1. Amicus curiae briefs

The first third-party intervention by an NGO before the European Court of Human Rights was filed in 1984 by the former British NGO Interights and JUSTICE, the British branch of the International Commission of Jurists, on behalf of a trade union, the Post Office Engineering Union (POEU).⁷⁵ Effectively it was a double precedent: the first NGO (POEU) third party intervention and the first prepared by any human rights NGO on behalf of the intervening NGO.

The case was brought by James Malone, who had been charged with – and, after three trials, subsequently acquitted of – handling stolen goods.⁷⁶ During the first trial, he discovered that a police officer had details of a telephone conversation he had made. It turned out that the interception was authorized by a warrant issued by the Home Secretary. The case before the Court was primarily that the interception of Malone’s conversation was a breach of his rights under article 8 of the European Convention on Human Rights (ECHR), paragraph one of which provides that everyone has ‘the right to respect for his private and family life, his home and his correspondence’. The case also raised the issue of whether the provision by the Post Office to the police of bare details of calls made, but not the content of conversation, known as ‘metering’ was consistent with this right. The interest of the POEU included ‘a principled objection to being involved or associated with any illegal or improper use of the telecommunications network’.⁷⁷

The Court found that the absence of clarity in the law regarding interception of communications as

⁷⁵ Interights – the International Centre for the Legal Protection of Human Rights was formed in 1982 by a group of British Lawyers, led by Lord Lester of Herne Hill and including the present author, and had to close on funding grounds on 27 May 2014; JUSTICE was formed in 1957 by another group of British lawyers, including its founding director, Tom Sargant, and solicitor Norman Marsh, who would also join Peter Benenson in launching Amnesty International; the present author is a member of the Council of JUSTICE. The intervention was made possible by a recent amendment to the Court’s Rules of Procedure: see now Convention article 36 (2).

⁷⁶ *Malone v United Kingdom* (8691/79), Judgment, 2 August 1984.

⁷⁷ ECtHR Reports, Series B, vol. 67, 132.

to how fettered the executive discretion was, meant that the government's defence failed at the first hurdle: that is, the measure was not 'provided for by law' as required by article 8, paragraph 2.⁷⁸ As far as metering was concerned, there appeared to be no legal rules at all and so that practice too was not in accordance with the law.⁷⁹

These conclusions removed the need for the Court to proceed to the next hurdle under paragraph 2 and decide whether the law in fact was 'necessary in a democratic society ... for the prevention of ... crime'. Apart from mentioning the existence of the POEU's intervention,⁸⁰ the Court did not explicitly draw on it in its analysis.

However, a strong concurring opinion by Judge Pettiti focussed on it. The opinion criticized the Court for not having addressed the issue of necessity and it took the view that measures of interception should be subject to judicial warrant, which itself should be subject to judicial review. In this context he noted the POEU reference to 'proposals for the adoption of regulations capable of being adapted to new techniques ... and for a system of warrants issued by "magistrates"'. As far as the UK was concerned, the case led to legislation, the Interception of Communications Act 1985,⁸¹ which did not go as far as Judge Pettiti had considered appropriate. Nevertheless, it did create an offence of unlawful interception, require warrants to be issued at the level of the Home Secretary, create a Tribunal to which persons believing themselves to be subject to an interception warrant could clarify and challenge any such warrant and an Interception of Communications Commissioner who had to review the use of interception powers under the Act.

If the *Malone* case was the first example of a third party intervention from a human rights NGO before the European Court of Human Rights on behalf of a non-governmental entity with an actual interest in the subject-matter being litigated, the 1989 *Soering* case⁸² was the first by a NGO simply to represent its mandated human rights concerns. The NGO here was Amnesty International and its concern was the death penalty, which it opposed in all cases as incompatible with the fundamental values protected by of the right to life and of the prohibition of cruel, inhuman or degrading punishment.

The case involved a request by the United States of America for the extradition of German national

⁷⁸ (n 76) paras 79-80.

⁷⁹ Ibid para 87.

⁸⁰ Ibid para 8.

⁸¹ Later superseded by the Regulation of Investigatory Powers Act 2000.

⁸² *Soering v United Kingdom* (14038/88) (1989) Series A No 161.

Jens Soering from the United Kingdom to the Commonwealth of Virginia to stand trial for murder of his girl friend's parents. He was 19 years' old at the time the crime was committed. The UK and its courts had concluded the extradition could go ahead. The applicant's own case was that various elements of the case (the applicant's youth, the 'death row phenomenon' in some of the states of the US, the fact that he had apparently acted under the influence of his older girl friend in a *folie à deux*) conduced to the conclusion that the extradition would contravene the prohibition of inhuman and degrading treatment or punishment.

The problem for an unconditionally abolitionist organization like Amnesty International was how to argue that extraditing someone to a jurisdiction where he would face the death penalty was incompatible with the ECHR when article 2 of the Convention contemplated the permissibility of that penalty among states parties. So, AI stressed the 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice'.⁸³ From this it argued that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the parties to abrogate what was, after all, merely an exception to the right to life consecrated in article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of article 3.

The Court actually accepted the argument in theory, but then concluded it was inapplicable in the present case. This was because the very instrument tending to show the new regional consensus, the Sixth Protocol to the Convention was an indication that the states parties had chosen a different route to elimination of the exception to the right to life than that of de facto abrogation.⁸⁴ Fourteen years later, a chamber of the Court revisited the theory. By then, the Council of Europe, all of whose members were and had to be parties to the ECHR, had expanded from just consisting of Western European states to the whole of Europe, minus Belarus. And all were abolitionist de jure or, in the case of the Russian Federation, de facto. The Chamber opined that against a consistent background of abolition in Council of Europe countries, 'it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2'.⁸⁵ The Grand Chamber was more cautious, pointing out that outside peacetime, the States had agreed to amend article 2 by means of the 13th Protocol.⁸⁶ The fact remained that the possibility of subsequent state practice being able to abrogate an exception to a right was reaffirmed.

⁸³ Ibid para 102.

⁸⁴ Ibid para 103.

⁸⁵ *Öcalan v Turkey* (46221/99) Judgment 12 March 2003 (Chamber), para 195-6.

⁸⁶ *Öcalan v Turkey* (46221/99) Judgment 12 May 2005 (GC), para 164-5.

JUSTICE intervened in two European Court of Human Rights cases in which there was an alleged conflict between state obligations under the ECHR and those under the Charter of the United Nations. The first was *Al-Jedda*,⁸⁷ involving administrative internment without trial in Iraq; the second, *Nada v. Switzerland*,⁸⁸ involved Security Council ‘listing’ as part of its counter-terrorism activities.

Al-Jedda was an Iraqi interned by British troops in Basra as a jihadist security threat. The UK argued that the internment was required by Security Council Resolution 1546 which authorized the coalition forces in Iraq at that time to use ‘all necessary measures’ to restore security to the country. A key question was whether there was a conflict between the UK’s obligations under the ECHR with those under UN Charter Article 103 which purports to give primacy to Charter obligations over those of other treaties. A Security Council resolution adopted under Chapter VII of the UN Charter, as was the case with resolution 1546, may be binding.

In a joint intervention, Liberty (the National Council for Civil Liberties - NCCL)⁸⁹ and JUSTICE argued that other rules of international law do not displace ECHR rights in the absence of equivalent protection (seemingly not the case here). The Court acknowledged the intervention⁹⁰ but instead chose to base its finding of a violation on the simple grounds that resolution 1546 did not unambiguously require the use of administrative internment, a practice that the UN Secretary-General was himself opposing!⁹¹

Nada concerned an Italian/Egyptian dual national who was banned by Switzerland from entering or transiting through its territories. The ban lasted from 2003 to 2009. *Nada* lived in an Italian enclave surrounded by Switzerland. His principal arguments were that the ban breached his rights to liberty (article 5) and to family life (article 8). Switzerland, supported by the UK as government intervenor, argued that Charter article 103 required that the Security Council compulsory listings procedure prevail over ECHR obligations, thus denying the Court jurisdiction over the matter.⁹² The UK went as far as to claim that even if the Security Council took ostensibly binding decisions

⁸⁷ *Al-Jedda v United Kingdom* (27021/08), Judgment, 7 July 2011 (GC).

⁸⁸ *Nada v Switzerland* (10593/08), Judgment, 12 September 2012 (GC).

⁸⁹ Founded in 1934 in London by leading intellectuals including the writer HG Wells, as response to the violent police suppression in 1932 of a national hunger march.

⁹⁰ *Al-Jedda* (n 87) para 96.

⁹¹ *Ibid* paras 105-6.

⁹² *Ibid* paras 103 and 111 respectively.

that were incompatible with *jus cogens* norms, the Court would still not have jurisdiction.⁹³

JUSTICE's intervention presented an array of international and national case law at odds with the governments' arguments, as well as extensive quotes from the ICJ's 2008 Eminent Jurists' Panel on Terrorism, Counter-terrorism and Human Rights.⁹⁴ It then argued *inter alia* that article 103, aimed at securing the Charter purpose to maintain international peace and security was not to be interpreted 'in a vacuum', that is, without regard to the UN's other purposes, in particular respect for human rights.

The Court referred to the JUSTICE arguments extensively,⁹⁵ albeit it did not invoke them explicitly in its own analysis. As in *Al-Jedda*, the Court elided the issue of potential incompatibility between ECHR obligations and those under the UN Charter. It found that the relevant Security Council resolution (1390 (2002)) afforded 'a certain flexibility'⁹⁶ and that Switzerland had not persuaded the Court 'that it had taken - or at least attempted to take - all possible measures to adapt the sanctions regime to the applicant's individual situation'.⁹⁷ Accordingly, it found a violation of article 8.⁹⁸ On the other hand, it did not consider the fact of the applicant's being confined to the enclave constituted detention within the meaning of article 5 and so dismissed that element of the complaint as 'manifestly ill-founded'.

In effect then, the Court insisted that the relevant Security Council resolutions should as far as possible be interpreted as not requiring violations of human rights. This was clearly consistent with the argument of JUSTICE. It may also be that the organization's intervention went some way to offsetting the UK government's intervention.

It is a cliché of historical scholarship that the closer one is to the events being organized the harder it is to evaluate their historical significance. Law is no exception. In the final case of a third-party intervention by NGOs, *Jones and Others v UK*,⁹⁹ we are reminded that their views may not be

⁹³ Government brief, para 23, as cited in JUSTICE brief, <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/JUSTICE-submissions-in-Nada.pdf>, para. 44.

⁹⁴ <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf> accessed 20 August 2015.

⁹⁵ (n 88) paras 112-15.

⁹⁶ *Ibid* para 178.

⁹⁷ *Ibid* paragraph 196.

⁹⁸ And art 8 together with art 13 because of absence of available remedies (para 214).

⁹⁹ *Jones and others v United Kingdom* (34356/06 and 40528/06), Judgment, 14 January 2014

accepted at the time, but that does not rule out their possible role as harbinger of things to come. The intervention is also significant in that it was presented by four authoritative NGOs, namely, REDRESS,¹⁰⁰ Amnesty International, Interights and JUSTICE.

The case involved the alleged torture in Saudi Arabia of four UK nationals.¹⁰¹ They sought to bring a civil claim against Saudi Arabia and named responsible officials. The UK's highest court, the House of Lords, concluded that both the state and the officials enjoyed state immunity and that even though the claim alleged violation of a *jus cogens* rule (the prohibition of torture), that did not affect the immunity.

The applicant and the intervenors sought to argue for a *jus cogens* exception to the State immunity rule. As for the immunity of the State itself, it was perhaps not surprising that the Court upheld the (highly contested) Grand Chamber decision in *Al-Adsani*.¹⁰² While that case contemplated the possibility of evolution,¹⁰³ state practice had not substantially developed in that direction and a recent World Court case had reaffirmed the position¹⁰⁴.

The proposition that public officials not enjoying immunity *ratione personae*¹⁰⁵ might not enjoy immunity *ratione materiae* was more promising. After all, there was already substantial practice, including that of the UK in the Pinochet No. 3 case¹⁰⁶ that criminal proceedings could be brought against a (former) public official enjoying immunity *ratione personae* at the time of the infliction of the harms complained of. Indeed, Lord Mance at the appellate level before *Jones* reached the House of Lords had opined as much. However, he was overruled by the House of Lords, which drew a distinction between civil liability and criminal liability. The latter apparently did not

(IV).

¹⁰⁰ The organization of which the author is a patron was founded in the UK in 1992 by Keith Carmichael a torture survivor from detention in Saudi Arabia.

¹⁰¹ One was a dual UK/Canadian national.

¹⁰² *Al-Adsani v United Kingdom* (35763/97), Judgment, 21 November 2001 (GC).

¹⁰³ The Court found that there was not 'yet' acceptance of an exception for torture to the doctrine of state immunity (para 66) and held by nine votes to eight that there had been no denial of the right to a fair hearing resulting from the UK having accorded state immunity in a case brought against Kuwait alleging torture by that State.

¹⁰⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p 99.

¹⁰⁵ That is, immunity attaching by virtue of the individual as a formal representative of the State, notably, the Head of State, the foreign minister and, since the *Arrest Warrant* case, the head of government: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p 3, para. 51.

¹⁰⁶ *R v Bow Street Stipendiary Magistrate and ors ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827.

involve impleading the sovereignty of the foreign state.

The lack of clarity as to why this should be was a key argument of the intervenors. Indeed, they pointed out that in some legal systems the two types of action were integrated, for instance, by the mechanism of *partie civile* in French law.¹⁰⁷

However, the Chamber evidently felt compelled to follow the unanimous line of a House of Lords panel that included Lords Bingham and Hoffman.¹⁰⁸ Judge Kalaydjieva dissented, specifically citing Lord Mance's problem of basing a distinction on the differences between criminal law and civil law. The distinction may not prove tenable for much longer.

2. Representing claimants

Bringing test cases before courts or comparable authoritative decision-making bodies is a time-hallowed technique of civil liberties and human rights organizations, at both national and international levels. The aim, not always successful, is to clarify the law in the direction of the principles promoted by the organizations.

At the international level, the technique has been used by British NGOs before regional courts and commissions and UN treaty bodies. Depending on the rules of the court or commission in question, the NGO may provide lawyers to represent the complainant, or it will itself be 'counsel' for the complainant or it will even bring the case in its own name. The four examples that follow were all successful in securing the decision sought and thus plausibly thought of as nudging forward the protective cloak of international human rights law.

The *Tyrer*¹⁰⁹ case was submitted in 1972 to the European Commission of Human Rights in respect of the Isle of Man, a UK dependent territory, which alone in the British Isles retained judicial corporal punishment for minors convicted of certain crimes. The NCCL had long been opposed to such corporal punishment¹¹⁰ and when Anthony Tyrer, a 15-year-old schoolboy, was sentenced to three strokes of the birch for assault, NCCL agreed to take the case. The Commission scheduled a hearing in 1975. The core issues were whether the judicial corporal punishment was inhuman or

¹⁰⁷ Intervenors' brief: <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2014/12/Jones-intervenors-submissions-to-ECtHR.pdf>, para183.

¹⁰⁸ Above (n 99) paras 213-14.

¹⁰⁹ *Tyrer v United Kingdom* (5856/72), Judgment, 25 April 1978.

¹¹⁰ Coincidentally, in 1973 the NCCL published the book by Angela Kneale, *Against Birching: Judicial Corporal Punishment in the Isle of Man*.

degrading punishment within the meaning of ECHR article 3 and the Isle of Man could plausibly invoke article 63 dealing with dependent territories. Paragraph 3 of that article provides that the provisions of the Convention are to be ‘applied in such territories with due regard, however, to local requirements’.

On the core issue, the applicants’ legal team seemed in a strong position. The punishment had been abolished in England, Scotland and Wales since 1948 and in Northern Ireland in 1968 following the 1938 Cadogan Committee report that recommended abolition. The description of the actual infliction of the punishment on the bare buttocks and the medical reports in this and other cases submitted by the applicant¹¹¹ seemed to be captured perfectly by at least the word ‘degrading’. Moreover, the State was unable to cite any examples of the practice elsewhere in the region.

With this background it was perhaps unsurprising that the government sought to focus on the article 63(3) clawback. During the Commission proceedings, Tyrer’s counsel was able to point to the background of article 63(3) which was to allow for exceptions in colonial territories whose ‘state of civilisation did not permit ... the full application of the Convention’.¹¹² When invited by counsel to explain in what respect the Isle of Man fell into this category, the territory’s Attorney-General helpfully insisted that the territory had always been at the level or ahead of that standard.

Before the Commission adopted its report, the applicant sought to withdraw from the case. NCCL urged the Commission to proceed with it on the basis of its power to do so when ‘the case raised questions of a general character affecting the observance of the Convention’.¹¹³ The Commission indeed continued with the case and proceeded to find a violation of the ‘degrading’ punishment limb of article 3. It also referred the case to the European Court of Human Rights.

Since the applicant had withdrawn from the case, there was no longer a role for NCCL before the Court. However, the Commission successfully defended its position and the Court accepted it, in respect of both the territorial exception and the substance. So, at least for Europe, judicial corporal punishment was no longer possible.

Locally, the Isle of Man secured the UK’s withdrawal of the right to individual petition for the island in future cases. However, even without amending its legislation, no further cases of

¹¹¹ Author’s recollection.

¹¹² *Tyrer* (n 109) para 38.

¹¹³ *Ibid* para 24, referring to article 43 of the Commission’s Rules of Procedure; see now Convention art 37(1).

sentences of corporal punishment were handed down or, at any rate, carried out. Internationally, the case has been quoted as authority for similar rulings on judicial corporal punishment by the Inter-American Court of Human Rights, the African Commission of Human and People' Rights and several national supreme or constitutional courts.¹¹⁴

Leopoldo García Lucero was one of those detained in the national stadium and other places at the onset of the 1973 military coup led by General Augusto Pinochet against the constitutional government of President Salvador Allende of Chile. He was effectively disappeared and subjected to exorbitant physical torture, leaving him with multiple physical and mental disabilities. After 17 months' detention he was forcibly exiled to the UK, where he remains at the time of writing.

The claim in *García Lucero et al v Chile*¹¹⁵ before the Inter-American Commission and then Court of Human Rights brought on his behalf by REDRESS sought reparation for the torture, for failure to investigate and prosecute the perpetrators and failing to provide adequate compensation and rehabilitative facilities. The petitioner won on these issues at the level of the Inter-American Commission on Human Rights, but before the Court the success was narrower, albeit on an important issue. While the Commission was willing to look at everything that happened after the Inter-American Convention on Human Rights came into effect for Chile, including the continuing omissions to investigate and make reparation,¹¹⁶ the Court applied the *ratione temporis* rule more strictly, if only in the light of a reservation that specifically excluded the Court's jurisdiction for acts that commenced before it became a party.¹¹⁷ Accordingly, not only was the torture ruled out of consideration but also its consequences. Relevant additional factors were that an ex officio investigation had begun in 2011, that is thirty-six 36 years after the torture and seven years after Mr García had been authoritatively identified as a torture victim by the 2004 Valech Commission report and Mr García had refused to cooperate with the investigation.¹¹⁸

¹¹⁴ See Rodley and Pollard (n 19) 438-443.

¹¹⁵ I/ACtHR, *Case of García Lucero et al v Chile (Preliminary Objections, merits and reparation)*, Judgment, 28 August 2013:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_267_ing.pdf.

¹¹⁶ Ibid para 2.

¹¹⁷ The Human Rights Committee has given similar effect to a comparable reservation to the ICCPR: *Yurich v Chile* (Communication No. 1078/2002), UN doc. CCPR/C/85/D/1078/2002 (2005).

¹¹⁸ Above (n 108) para 126; the first post-dictatorship commission of inquiry (the Rettig Commission, 1991) dealt only with enforced disappearances and extra-judicial killings, including deaths as a result of torture, but not torture as such. Political imprisonment and torture were the focus of the Valech Commission.

The actual violation found by the Court was notable. It considered that there was an obligation on States parties to the Convention not only to investigate torture on the basis of complaint, but to do it *ex officio* once it has grounds to believe that torture has occurred. Those grounds were evidently present after the Valech Commission report, yet the investigation was only initiated in 2011 after the Commission had submitted the case to the Court!. This was a violation of the right to judicial guarantees laid down in articles 8 and 25, as well as the specific obligation of *ex officio* investigation under the Inter-American Convention to Prevent and Punish Torture (article 8). The Court also took account of the actual situation of the petitioner: 79 years' old and in poor health. It awarded him £20,000 non-pecuniary damages and required a speedy execution of the investigation.

This was not the first case of a finding of a violation of an obligation of *ex officio* investigation. The Court had done this in previous cases involving extrajudicial execution and enforced disappearance, as well as torture. What was new was that it found the same obligation violated in a case of torture where there had indeed been no complaints made and where the breach of this obligation was the only violation.¹¹⁹

The notion of *ex officio* investigation of torture had appeared as early as the 1975 UN Declaration against Torture (article 9). The purpose was to acknowledge that in situations where the practice of torture was prevalent, it would rarely be possible for the individual victims or others to make complaints or to do so safely. The obligation would then be adopted in the UN Convention against Torture (article 12) and, as noted, the Inter-American Convention. However, compliance with the obligation is not always easy to monitor. It may be problematic to know when a State has 'reasonable grounds to believe that an act of torture has been committed'.¹²⁰ In the case of a post-dictatorship Chile this was hardly a problem and the (overdue) investigation by the Valech Commission put the issue beyond doubt as far as Mr García Lucero was concerned. The case should be a good starting point for further examination of the obligation, which it will be recalled, the Court found implicit in the general obligation to provide judicial guarantees for the protection of human rights.

The *Akwanga*¹²¹ case was another brought by REDRESS, this time before the Human Rights Committee under the UN International Covenant on Civil and Political Rights (ICCPR). Ebenezer Akwanga, a peaceful political activist in southern Cameroon (English-speaking) at a time of

¹¹⁹ See I/A Court H.R., *Case of Lysias Fleury et al. v. Haiti (Merits and Reparations)*, Judgment of November 23, 2011. Series C No. 236 para 109, which shows that complaints *were* made

¹²⁰ UNCAT, art 12.

¹²¹ *Akwanga v Cameroon* (Communication No. 1813/2008), UN doc. CCPR/C/101/D/1813/2008.

internal tensions between that region and the francophone authorities, was (as found by the Committee) arrested, detained, tortured in several places of detention and sentenced to 20 years' imprisonment by a military tribunal.

The author of the communication claimed violation, inter alia, of the prohibition of torture (article 7) and the right to a fair hearing (article 14).¹²² In particular, he claimed 'the composition of the military court and the conduct of the trial' violated article 14. There were no special legal issues regarding the complaint of torture: the Committee evaluated the evidence, including medical reports, and found the complaint established.

As regards military jurisdiction, the Committee has traditionally been reluctant to conclude absolutely that civilians should never be tried by military courts, while remaining sceptical of their propriety. Thus, as early as 1984, referring to 'military or special courts which try civilians', it expressed the view that the Covenant 'does not prohibit such categories of courts' but that 'the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14'.¹²³ In 2007, it adopted a new General Comment on article 14, in which it spelt out what was meant by exceptional. That is, such trials should be 'limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where, with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.'¹²⁴ Finding this principle applied to the case at hand and that the State party had not demonstrated the existence of the relevant factors, the Committee concluded in *Akwanga* that it did not then need to examine 'whether the military tribunal, as a matter of fact, afforded the full guarantees of 14'.¹²⁵ In an individual concurring opinion, six Committee members stated explicitly that this high threshold indicated 'that military courts should not in principle have jurisdiction to try civilians'.¹²⁶ This did not go as far as one member would have wished in another individual opinion. For him, 'the trial of civilians by military courts is incompatible with article 14',¹²⁷ and the Committee should not 'take

¹²² In Committee parlance, the word 'author' is used for the complainant.

¹²³ General Comment No. 13: Art 14 (Administration of Justice), UN doc. U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para 4.

¹²⁴ Art 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007), para 22.

¹²⁵ (n 121) para 7.5.

¹²⁶ Ibid Annex: Individual opinion of Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley and Ms. Margo Waterval.

¹²⁷ Ibid: Individual opinion of Committee member Mr. Fabián Omar Salvioli, para 3

account of actual practices on the part of states'.¹²⁸ While international law rules for the interpretation of treaties may not allow the Committee so easily to disregard state practice,¹²⁹ it is clear that the underlying trend of the Committee is one that will only accommodate the trial of a civilian by a military court, if at all, in vanishingly rare cases. Meanwhile, the *Akwanga* case has clearly consolidated this posture of extreme suspicion of military courts' trying civilians.

The final example of a test case brought by a British NGO is the *Enderois* case brought by MRG before the African Commission on Human and Peoples' rights. A 'semi-nomadic' pastoralist group with strong religious attachment to the ancestral land that roamed around Lake Bagoria area, the Enderois community was evicted by the Kenyan authorities to make way for the development of a national park. MRG brought the case together with two Kenyan NGOs, the Centre for Minority Rights Development and the Enderois Welfare Council.

The complaint sought reparation invoking not only compensation, but also restitution of the lands. The Commission found multiple violations of the African Charter, including property rights (article 14), freedom of religion (article 8) and the right to development (article 22). At the heart of the violations was the process of eviction, which broadly ran roughshod over the community's concerns by not offering an effective process of consultation.¹³⁰ It was also necessary to show that the Enderois constituted an 'indigenous' group.

The Commission delivered on all counts. It referred to international texts on minority and indigenous rights, including the principle of self-identification, to conclude that the Enderois group was indeed indigenous. It is understood to be the first time that African indigenous rights over land have been recognized. The finding of the violation of the right to development was made possible by the fact that the African Charter provides for a number of 'group rights', of which the right to development is one. Still, the case represents the first formal finding of a violation of the right. Perhaps more significantly, it found that it was precisely a national development project that violated the community's right to development, as well as the right to dispose of the people's wealth and natural resources.¹³¹ As such, the case represents a healthy check on the standard invocation of the state's priority of promoting economic development at the expense of respect for

¹²⁸ Ibid para 6

¹²⁹ Vienna Convention on the Law of Treaties art 32(3)(b).

¹³⁰ See to the same effect *Poma Poma v Peru* (Communication No.1457/2006), UN Doc. CCPR/C/95/D/1457/2006 (2009). The elements of required consultation are dealt with comprehensively in I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and reparations)*, Judgment of June 27, 2012. Series C No. 245, paras 124-232.

¹³¹ African Charter art 21.

individual rights.

The Commission, as requested, recommended both monetary compensation and restitution of the traditional lands, to be delivered by a process that would involve ‘dialogue’ with the complainants. The award of restitution is a particularly strong measure of reparation.

VI. CONCLUSION

Nearly two decades ago, I wrote the following evaluation of the contribution of NGOs generally to the development of international human rights law: ‘NGOs have been an engine, perhaps the engine, in the development of human rights as an international concern, in the evolution of the laws, norms and standards in the field of human rights and in the establishment and subsequent functioning of IGO human rights machinery.’¹³² I am aware of no reason to reconsider the validity of that assessment, other than whether the ‘perhaps’ was not too tentative. More particularly, British or British-based NGOs appear on examination to have played a prominent role within the broader NGO community’s endeavours in this field. They have stimulated action by drawing attention to great human rights issues, they have initiated and participated in standard-setting exercises, they have promoted and contributed to the development of machinery to hold States accountable for their compliance (or otherwise) with those standards and they have been directly involved in exploiting the machinery in defence of victims of violations.

This chapter was written at a time when the United Kingdom was threatening to repeal the 1998 Human Rights Act by which the ECHR was incorporated into UK law. The incumbent government would not even rule out withdrawal from the ECHR, a move that would necessarily entail exclusion from the Council of Europe, that is, the regional political and institutional architecture of post-World War II human rights protection [check position at proof stage]. It may be expected that British human rights NGOs will continue to distinguish themselves by resisting vigorously any serious impediment to the legal enforcement within the UK of internationally recognized human rights and, in the process, the tradition of promotion and defence of human rights that they have established with distinction. It may also be a healthy reminder of the general proposition that human rights protection requires constant vindication and re-vindication.

¹³² NS Rodley, ‘Human Rights NGOs: Rights and Obligations (Present Status and Perspectives)’, in TC Van Boven et al (eds), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status for Non-State Actors* (SIM Special No. 19, Utrecht 1997) 41.

