



## Litigating Human Rights: Promise v. Perils

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### HUMAN RIGHTS INITIATIVE

PROJECT DIRECTOR: Joanne Bauer  
PROJECT OFFICER: Catherine Moller  
PROJECT ASSISTANT: Roger Duthie

### INTRODUCTION

From international tribunals, to groundbreaking suits against multinational corporations that pollute, to the precedent-setting case against General Augusto Pinochet of Chile, litigation is fundamental to building international justice and is becoming an increasingly attractive tool for human rights movements throughout the world. But when is human rights litigation worthwhile from the perspective of those whose rights have been abused?

This issue of *Human Rights Dialogue* examines human rights litigation as one aspect of the "human rights box." Introduced in our last issue, the metaphor of the "box" encompasses a set of historical and structural circumstances that allow the human rights framework to gain currency among elites while limiting advances, and even creating setbacks, for the awareness and acceptance of human rights among the general population. The goal of this series is to investigate ways of overcoming barriers to greater participation in the human rights movement. Toward this end, this issue explores the effectiveness of litigation in bringing human rights violators to justice and, in so doing, increasing the broader public legitimacy of human rights.

Are the grievances of victims of human rights violations ultimately heard and addressed through the litigation process? What is the impact of human rights litigation on affected communities? Do lawsuits help to mobilize victims and increase awareness of human rights, or do they result in factionalization and dashed hopes?

In the following essays, these questions are addressed by the plaintiffs of human rights litigation and by the lawyers, nongovernmental organizations (NGOs), and scholars who work closely with them. Their stories speak to the challenges and possibilities of litigation. They cover a wide spectrum of completed and ongoing cases around the world—concerning pollution, social discrimination, abuses of state power, and war crimes—pursued in a number of different venues: national courts or tribunals of the country in which the violation occurred, the courts of a foreign country, and judicial or quasi-judicial bodies established by interstate agreements or organizations.

All of the cases in this sampling aim to uphold human rights principles, even if they do not necessarily access human rights law.

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HUMAN RIGHTS DIALOGUE, a quarterly Carnegie Council publication, challenges prevailing paradigms and grapples with fundamental human rights dilemmas. *Dialogue* provides an international forum for an active and evolving debate about how to make the human rights regime more responsive to the vital human needs of all societies.

## Introduction

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However, the degree to which the claimants consider their rights to have been violated varies. In some situations, such as the legal action against Arco Oriente in the Ecuadorian Amazon (p. 15), indigenous groups gained broad awareness of human rights in the course of bringing their case to court. At other times, the lawyers or activists who organized plaintiffs came to associate their struggle with international human rights, as we see in Clarice Friloux's account of the dumping of oilfield waste in her Southern Louisiana neighborhood (p. 17). In cases such as the Ok Tedi litigation against the Australian multinational, Broken Hill Proprietary, in Papua New Guinea (p. 10), the claimants had little awareness of human rights. They did, however express ideas such as equality before the law and the right to an adequate standard of living, even if they did not specifically refer to "human rights."

What may appear to the casual observer as an instance of successful human rights litigation—a case won—can be seen quite differently by those seeking redress. As Benedict Kingsbury tells us in his essay on the problems of representation in litigation (p. 3), all too often neither the lawyer nor the resulting terms of the case adequately take into account the interests of the plaintiffs. Sometimes, especially when a large and diverse group of victim-claimants is involved, competing ideas of justice emerge, making it difficult to bring justice to all.

Some of the best opportunities for litigation to broaden public awareness and support for human rights occur outside the courtroom. Intermediaries—such as lawyers, NGOs, and churches—play a pivotal role in raising awareness, organizing campaigns, empowering local people, and addressing specific grievances. But frequently such opportunities are lost.

In Judith Kimerling's account of contested representation in a case against Texaco in Ecuador (p. 6), the failure of lawyers and NGOs to foster transparent, accountable, and participatory processes in local decision making threatens the case's potential to leave an enduring human rights legacy. Ramon Casiple, the leader of the largest Philippine victim-claimants' group in the litigation against former president Ferdinand Marcos, describes the delays and frustrations experienced by the claimants when "advocates" tried to speak for them (p. 8). Revisiting Papua New Guinea nearly four years after a settlement agreement was reached in the Ok Tedi Mine case, anthropologist Stuart Kirsch finds that, despite a victory in the courtroom,

social justice cannot be realized without alternatives to the affected communities' economic dependency on an environmentally devastating mine. Aloys Habimana's essay, on Rwandans' negative image of international justice, challenges the International Criminal Tribunal of Rwanda to better serve its objectives by becoming more engaged with the people of Rwanda (p. 14).

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Other articles provide instructive examples on the positive role of intermediaries. Tamara Jezic and Chris Jochnick's

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case study demonstrates that litigation is successful and human rights legitimacy is broadened when litigation is used as a tool to catalyze community participation and support a larger struggle. Similarly, Clarice Friloux's formidable fight against the oil industry in Louisiana illustrates the power of a unified community and good representation. Using their experience in opposing the appropriation of Palestinian land by the Israeli state, Samera Esmeir and Rina Rosenberg demonstrate that litigation is just one tool for social justice; they argue that it should not be used if it limits community mobilization and fails to reflect the values of those seeking redress (p. 18).

In the case of the Mapalad farming cooperative in the Philippines, external actors helped make the litigation experience worthwhile for claimants, despite ultimately losing in court (p. 19). Authors Josel Gonzales, Kaka Bag-ao, and Azon Gaitel-Llenderal illustrate the tension between realizing benefits for the claimants and seeking wide-ranging strategic impact through litigation. This theme is expanded in the concluding interview with Ndubisi Obiorah, a human rights lawyer in Nigeria, who discusses the effect litigation has had on awareness of human rights in his homeland (p. 22).

This issue of *Dialogue* takes as its starting point the idea that law is the basis of human rights. The power of the human rights regime depends on enforcement backed by a punitive legal structure. In the course of strengthening the application of law as a tool for the protection of human rights, we must maintain our focus on the purpose of human rights work: to promote and protect the vital human needs of all. By spotlighting the perspectives of affected groups, the essays that follow illustrate how human rights litigation can fulfill its promise while avoiding its perils. ❖

## Representation in Human Rights Litigation

BY BENEDICT KINGSBURY, *professor of law, New York University Law School, USA*

In modern liberal rule-of-law systems, the prevalent image of a human rights claim is of a victim instructing a public-spirited lawyer, who then goes to court and obtains a judgment upholding the claimant and ordering a suitable remedy. In practice, however, the pursuit of human rights through litigation is vastly more complex.

Human rights litigation involves difficult questions of power and representation for lawyers, NGOs, and plaintiffs: How can the interests of plaintiffs be served by those who are far removed by geographic and cultural distances? What if a group's own priorities are overwhelmed by external actors? Who decides which group interests can be compromised in negotiations for a litigation settlement? These questions of transnational litigation arise repeatedly in practice, but have not been discussed widely enough in the rush to foster new cultures of public-interest litigation in the many countries that lack such a tradition.

Litigation can be valuable or disruptive to a community in ways that may have little to do with the delivery of basic justice. Some losing cases set disastrous precedents, while others build community and draw attention to issues. Some winning cases can be counterproductive, others transformative. Litigation, along with the political and media activity that accompanies it, creates expectations, channels concerns, structures community organization, and even molds people's sense of identity. Often, litigation shapes the future relationship between parties so that there is no going back to what existed prior to the human rights violations that brought the parties to court.

For human rights litigation to meet its potential as a means of political expression and community mobilization for human rights victims depends, in part, on the extrajudicial skills of the lawyers who represent them. Plaintiffs often have little background in legal language and procedure, while lawyers may not have a full understanding of the community. In order for the plaintiffs to be involved in developing their legal strategy and in framing the issues, a two-way process of translation and adaptation must take place between the plaintiffs and their lawyers.

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Where litigation involves a large and diverse group, there is frequently confusion over the boundaries of the relevant community, who exactly is a leader with a mandate to instruct the lawyers, whether dissenting views within the community have been adequately aired, and who controls the presentation of the group's case in national politics and the news media. These problems are magnified when the plaintiffs are physically or culturally distant from the site of the litigation and when there are other intermediaries, such as NGOs, priests, anthropologists, politicians, or confederations of indigenous organizations. Such issues arose almost from the outset in the ongoing case in U.S. courts against Texaco for damage in its Ecuadorian Amazon operations (see Kimerling, p. 6), and became a problem as a financial settlement looked likely in the U.S. case brought by victims of the Marcos government in the Philippines (see Casiple, p. 8).

Different problems of representation arise as foreign NGOs, and in some cases foreign governments, are becoming increasingly involved in local proceedings

## Representation in Human Rights Litigation

(continued from page 3)

in which they have a particular interest. An example is the amicus briefs submitted by international NGOs to the South African Constitutional Court in its case on the illegality of the death penalty in South Africa. Some of these NGOs want to establish a global norm against the death penalty and are interested in using a decision from this widely respected court to persuade courts and politicians in other countries. Sometimes foreign NGOs provide most of the legal staff for a case, transmitting legal theories and arguments between countries, as with the aboriginal land title claim brought (without judicial success) in 1996 in the Supreme Court in Belize by the Toledo Maya Cultural Council with the aid of the U.S.-based Indian Law Resource Center.

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In both the South Africa and Belize cases, the external involvement likely reinforced rather than redirected the basic objective of one local party in the case. But in other cases, external actors may have separate political interests that result in legal or strategic positions that differ from and subsume those of the local parties. Outside organizations may supply so much expertise, strategy, funding, lobbying, and public relations to local parties that these parties become in effect proxies for external interests.

Many legal systems are designed so that complicated cases often get resolved not by the court alone, but by the parties to a case negotiating and implementing a settlement. The process of reaching a settlement adds to the problems of representation, as

the case arising from oil operations in Ecuador shows. The various parties involved in the issue include an organization of Huaorani Indians with only intermittent involvement in the cash economy; a larger Indian confederation in Quito dominated by members of non-Huaorani groups with more experience of politics; foreign church personnel and lawyers with considerable local knowledge; and an activist, legally oriented NGO in California. The cast of characters also includes national and international oil companies and a large environmental NGO in New York that sought, apparently with limited familiarity with or endorsement from the Amazon peoples involved, to negotiate the terms of a multimillion dollar NGO-oil company deal for environmental cleanup and protection. On top of this came influential U.S. journalists, several lawsuits in the United States, including one run with some success by a large U.S. law firm, and a remarkable reversal by the Ecuador government from opposition to endorsement of the case.

Any settlement agreement in such a case would involve most of these myriad actors and their diverse interests. Even with the utmost good faith, it is a staggering task for a foreign law firm to brief clients sufficiently for them to make informed choices, ensure the necessary political and media support, then cut deals with other more powerful interests, all the while preserving the wishes of the clients—leaving aside questions related to the considerable litigation costs.

Furthermore, what attracts external actors to a settlement package may not be viewed the same way locally—for example, an environmentally inspired requirement that an existing forest remain undisturbed may conflict with the land-use priorities of local people. As the ongoing debate about Broken Hill Proprietary's settlement with residents affected by the Ok Tedi Mine in Papua New Guinea illustrates, the local ramifications of some large settlements are not always well

understood by unfamiliar outsiders (see Kirsch, p. 10).

Yet external involvement can also yield benefits for affected communities. In certain cases concerning indigenous peoples played out in the Inter-American Commission on Human Rights (IACHR), positive outcomes have occurred. Several of these cases have been filed and argued by foreign NGOs, often in situations where local groups of victims were not organized, lacked institutional capacity, or were impeded by violence or distance. For example, the case involving atrocities committed in 1993 in Colotenango, Guatemala, by civil defense patrols was filed by the human rights office of the archbishop of Guatemala, together with the external Centro por la Justicia y el Derecho Internacional and Human Rights Watch Americas. The case was resolved by a “friendly settlement” that made reparations to victims and to the whole community in the form of development projects. The settlement was reached after considerable negotiation with the government, active encouragement and pressure from the IACHR, NGO lobbying, and possibly some connections to external development assistance funds.

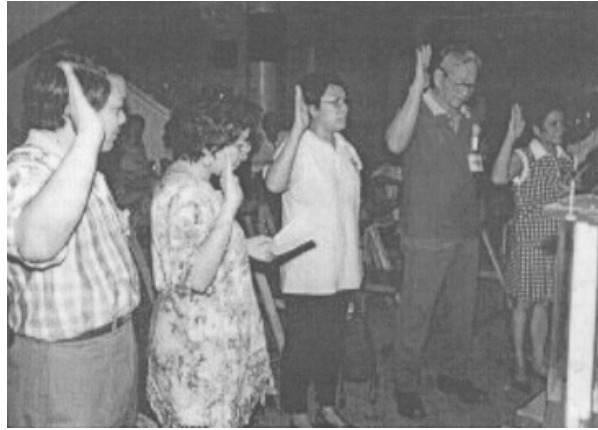
In this case and others of its kind, marshalling these processes in Washington, D.C., and other capitals would be beyond the capacities of many indigenous groups. The involvement of outside organizations reduced the threat of local leaders' being co-opted, corrupted, or coerced by suboptimal settlement offers. Moreover, external monitoring by a body such as the IACHR may have improved delivery of the promised settlement.

If courts and tribunals are to be significant sites for human rights struggles, lawyers and activists must be more systematic and reflective in facing questions of representation and power, particularly in transnational human rights litigation. Within the legal profession, useful actions may involve transnational ethical codes, training and sharing of practical

experience, extension of the supervisory competence of local bar associations to the international level, and the development of transnational accountability. For lawyers and NGOs, high priority must be given to the resource-intensive process of translation and adaptation between them and their clients to ensure comprehensive representation. Clearer ethical standards may be required concerning responsibilities to clients in the context of litigation aimed largely at setting precedents for others, and concerning responsibilities to weigh the substantive consequences of litigation against its symbolic, often momentary, value.

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On the client side of litigation, increased funding from foundations and greater effort on the part of NGOs could help address problems of representation. These bodies should routinely encourage and fund local meetings and education about the issues facing communities considering or involved in human rights litigation. Polling devices or other local processes can be used to establish the wishes of large, affected groups as well as distill community ideas for suitable settlement terms. Much more could be done to facilitate the sharing of grassroots experiences in different parts of the world, as well as to promote comparative studies of the successful and unsuccessful experiences of such groups with litigation and with different settlement structures. Institutional efforts to support lawyers and other activists, such as the International Commission of Jurists and the UN Working Group on Human Rights Defenders, could be broadened into networks of plaintiffs and complainants. The actions of multinational corporations are frequently the impetus



Claimants 1081

*Officers of Claimants 1081, victims of human rights abuse by the Marcos regime, take their oaths during the founding assembly in 1994.*

for human rights litigation, so corporate training programs to improve understanding and respect for communities may have a considerable impact in averting the demand for litigation. Finally, the education of judges about the community and lawyering dynamics of complex human rights cases, including the problems of the settlement processes, may improve the management of representation problems.

International NGOs and government institutions are having an impact on the number, roles, visibility, and prestige of local NGOs oriented toward legal proceedings. Local groups have become more sophisticated in using the international litigation machinery directly, or have become more influential partners whose involvement adds legitimacy. This process of diffusion, learning, emulation, and professionalization may well generate increased demand within states for more legalistic procedures and judicial innovation. The need to overcome problems of transnational and local representation is thus intensifying, but at the same time a useful repository of experience is being built, as many essays in this issue of *Dialogue* indicate.

But countertendencies are also present, fueled by the resistance of the powerful to social change, the frequently mixed results of litigation for the most disadvantaged, and a suspicion among some activists that the courts only protect the rights of the

neoliberal economic order and the rising middle class. Suspicion is heightened by concerns about the “democratic deficit” of international institutions—the fear that their composition and decision-making processes are unrepresentative and involve too little public participation.

In this essay I have addressed process problems in the representation of plaintiffs by lawyers and NGOs, and argued that solving them is a neglected precondition for the global development of human rights litigation. But this is only a precondition. Which plaintiffs and which causes different legal systems are really able to protect are substantive problems that improvements in representation may ameliorate, but cannot solve. ❖

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## The Story from the Oil Patch: The Under-Represented in *Aguinda v. Texaco*

BY JUDITH KIMERLING, *assistant professor of law and political science, City University of New York, School of Law, and Queens College, USA*

When *Human Rights Dialogue* asked me to write about *Aguinda v. Texaco*, I hesitated. I am a North American lawyer who has worked in the affected region since 1989, and my research was the basis for environmental allegations in the complaint. I have been drawn into the grassroots politics surrounding the suit. However, I decided to write because the peoples whose rights are being defended often appear as backdrops to a distant drama in which the key protagonists are outsiders: lawyers, government officials, and NGOs. Outside the media spotlight, the lawsuit has a life of its own in a remote Amazon region in Ecuador where its legacy will be direct and enduring. Increasingly, residents are struggling to understand the litigation and make it responsive to their needs.

Since arriving in Ecuador in 1964, Texaco has drilled hundreds of wells and extracted nearly 1.5 billion barrels of crude oil in an area spanning a million acres in the Amazon. Until 1992 it dumped tons of toxic waste into the environment and spilled more oil than the Exxon Valdez. In 1993, U.S.-based class-action lawyers filed a suit against Texaco in a New York federal court on behalf of an estimated 30,000 indigenous and settler residents in the affected areas of the northern Ecuadorian Amazon region.

News of the \$1.5 billion lawsuit spread quickly in the oil patch. Notoriety in the press and a steady stream of visitors sparked great expectations among residents. A group of settlers formed the Amazon Defense Front (FDA) to prepare a local institution to administer monies from the suit. However, others, including indigenous peoples, were reserved. There has been a long history of broken promises and exploitation by outsiders

in the region. Community members were confused and concerned, and asked me: Why can strangers claim to represent us when we have our own representative organizations? How can they defend our rights and solve our problems without knowing us and our world? Some saw the suit as an effort to use their names and suffering for private gain.

Nonetheless, the suit struck a chord. The allegations echoed longstanding grievances among the Amazonian peoples and elevated their cries for a healthy environment to new levels of national and international attention. Potent ideas spread among the population: poor and indigenous peoples have legal rights; rich and powerful oil companies have obligations to them and are subject to a higher authority, independent of politicians and engineers. The introduction of the principle of equality before the law was revolutionary and resonated deeply. With a lawsuit in Texaco's home country, many local people hoped their voices would finally be heard. Of course, there were also those who simply saw an opportunity for cash.

There has been considerable confusion, which remains to this day, about who is a representative, who is a member of the proposed class, and, consequently, who can expect to benefit from the suit and have a voice in its conduct. Class-action law permits the named plaintiffs to sue, as representatives of a plaintiff class, on behalf of a large group of similarly situated individuals, but this fact is not understood by the affected communities in *Aguinda v. Texaco*. The plaintiffs were selected and a proposed class defined by the lawyers without consulting local groups. The complaint, which names some 80 class representatives, has not

been translated into Spanish and distributed. During early organizing attempts, when a group of local leaders requested the names of the plaintiffs, the lawyers told them the names could not be published because it might endanger the plaintiffs' lives.

Over time, the lawsuit seemed to carry the struggle away from the Amazon to distant courts. Many factors made it difficult for residents to participate: the technical nature of litigation, dependency on lawyers, exclusion from legal proceedings, slow progress, the awe and confidence accorded U.S. courts, absence of personal contact with attorneys, lack of information, linguistic and cultural gulfs, poverty, and poor transportation and communication facilities. Assistance from external NGOs and the lawyers could have helped to address some of these barriers and clear up the confusion about the case, but only a limited amount of help was provided.

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THOSE WHOSE RIGHTS ARE BEING DEFENDED OFTEN APPEAR AS BACKDROPS TO A DISTANT DRAMA IN WHICH THE KEY PROTAGONISTS ARE OUTSIDERS: LAWYERS, GOVERNMENT OFFICIALS, AND NGOS.

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Initially, it seemed that FDA might help fill this gap. It developed ties with the lawyers and NGOs and helped them pressure Ecuador's government to drop formal opposition to the suit. It spread the word that the case was the "last chance" for cleanup and organized workshops to educate a group of community leaders, called "promoters," about oil and the environment. But over time even FDA and its NGO partners essentially left the conduct of the suit to the lawyers, as if a victory in court would automatically

benefit Amazonia and its peoples. Supporting the litigation became an end unto itself, rather than one means among others to a greater goal.

In 1996 the lawsuit was dismissed in favor of litigation in Ecuador. The U.S. Court of Appeals later reversed this ruling; since then a decision by a district court in New York on whether to accept the case is pending.

While the case has stalled, a series of events has recently revitalized local organizing. In 1998 a settler group, who had been trained as promoters by the FDA but felt they did not have decision-making power within the organization, formed the Committee of the Affected (Comite). “We have this education,” one participant said, “so now we want to use it.” But FDA felt threatened and accused Comite of causing divisiveness and weakening the plaintiffs’ position in the lawsuit. It issued resolutions designating the president of FDA, another settler, and a Quito activist—none of whom are class representatives—as “official spokespersons” for the lawsuit in Ecuador. The resolutions recognized some indigenous spokespeople, but left out the Huaorani and Quichua, who comprise the majority of indigenous members of the proposed class and do not want others to speak for them. The FDA resolutions further stated that any initiative by outside groups to assist affected communities or participate in the lawsuit must be approved and coordinated by FDA and the official settler spokesperson.

Undeterred, Comite stepped up their organizing activities after learning that the Ecuadorian government had executed an agreement with Texaco a year before certifying that the company had completed cleanup activities. According to the local peoples, the “cleanup” was a sham, and the environmental damage continues. Comite was unsettled by the government’s action and the failure of the lawyers and FDA to inform them of it. (Because FDA had long been involved in the case, Comite believed that it

must have had prior knowledge about the agreement.)

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In late 1999, sensational news hit the Amazon communities: private negotiations between the plaintiffs’ attorneys and Texaco for a settlement were taking place. After hearing press reports about the negotiations, Comite contacted me to clarify the status of the case. In response to my inquiries, an attorney for the plaintiffs denied the talks; however Texaco revealed that preliminary negotiations had been under way for about a month. Back in Amazonia, FDA stated that no such talks were occurring. Ironically, it is precisely this pattern of closed-door deal making, without participation by affected peoples, that brought environmental devastation in the first place.

In response to the news, the international NGO Accion Ecologica organized a public forum in Quito called “I Too Am Affected.” The forum, held in December 1999, brought together some 60 delegates from indigenous and settler organizations, including Comite. Although invited, FDA declined to attend. Delegates expressed concern about the lack of information and the possibility of a deal that would benefit only a privileged few. They adopted resolutions that they be informed “in a permanent and transparent manner” about the case, and that the litigation seek “the restoration of the affected region, closure of sources of contamination, and measures to resolve health problems of all affected people.” The delegates called for a general assembly among all affected groups to unite positions and seek common strategies. Further, they resolved to solicit my participation as an attorney in the case, to “guarantee clarity and transparency in the process.”

By catalyzing people to action and inspiring calls for unity, the pending negotiation has created an opportunity to make the litigation responsive to the peoples whose rights are being violated and to sow the seeds of an enduring human rights legacy in the region. At the same time, as in any class action, there is a risk that the lawsuit will abruptly end with a collusive settlement or one negotiated in good faith that falls dramatically short of expectations. Such results could set back local struggles for environmental justice by promoting conflict, corruption, and cynicism.

To avoid these dangers, the lawyers must develop creative, participatory, and transparent mechanisms to inform and consult with all affected peoples before a proposed settlement is signed and presented to the court. NGOs can help by assisting local groups to participate in the process and by continuing to pressure Texaco to clean up, regardless of the outcome of the lawsuit. In these ways, the local communities’ nascent ideas of human rights can be nurtured into an empowering and unifying force. ❖

*Read Human Rights Dialogue, Summer 2000, for the perspective of FDA and its partner groups on the Aguinda v. Texaco case.*

## Waiting for Justice in the Marcos Litigation

BY RAMON C. CASIPLE, *secretary-general, Claimants 1081, Philippines*

When the human rights case against former Philippine president Ferdinand Marcos was filed in 1986 before the Hawaii Federal District Court, none of the victim-claimants thought it would succeed. Nor did we think that it would take so long, or create more heartaches and pain.

We were not in this for the money. Most of us supported the case for the promise of justice a successful prosecution held. We were satisfied on September 22, 1992, when the jury issued a guilty verdict against Marcos for the human rights crimes of forced disappearance, summary execution, and torture of some 10,000 Filipinos. The Marcos Estate was ordered to pay US\$1.97 billion as compensatory and exemplary damages.

However, the pending monetary reward introduced an unexpected complication into our struggle. Cracks began to appear within the hitherto united ranks of human rights organizations behind the class suit even as the Marcos family, the Swiss banks, and the Philippine government tried new maneuvers to offset the effects of the verdict.

The Samahan ng mga Ex-Detainees Laban sa Detensyon at para sa Amnestiya, or Society of Ex-Detainees against Detention and for Amnesty (SELDA), together with other human rights organizations, played a major role in initiating the class suit. Things began to go awry after the 1992 verdict, when a few SELDA leaders with connections to the underground Communist Party of the Philippines sought sole control of the determination and delivery of the compensation due to the victims. They made an attempt to replace lead counsel Robert Swift and gain power of attorney to represent the claimants in negotiations with Imelda Marcos, the widow of the dictator. SELDA members who

disagreed with these tactics were forced to leave the organization. Ultimately, the U.S. District Court prohibited any negotiations that were not under the direction of the lead counsel.

In its quest for control, SELDA also attempted to prevent the formation of an organization composed solely of Marcos human rights claimants, but failed. Claimants 1081, of which I am currently the secretary-general, held its first assembly in October 1994. At present, we have more than 3,000 members, or one-third of the overall number in the class suit. Although SELDA is composed of former political detainees under Marcos and other Philippine leaders, only a few hundred people are Marcos torture victims and thus eligible claimants. Because Claimants 1081 is the largest organized group of Marcos class suit members, and composed exclusively of them, we are effective in representing and coordinating claimants with the case counsels as well as with the human rights community. We consult with other class members outside of Claimants 1081, in regional meetings and in regular bimonthly meetings held in Manila. In addition, we frequently gather with Attorney Swift and his Filipino co-counsels, and in turn, the court or counsel regularly communicates with all class members by mail.

Besides SELDA, others have sought to organize and influence the Marcos human rights victims. Some politicians, NGO leaders, local lawyers, underground rebels, and even criminal elements have tried to lure the claimants with assertions that they have initiated and won the judgment against Marcos or by presenting themselves as having insider knowledge of the compensation distribution process. In some cases, they have then offered to “help” the claimant get his or her share of the damages with pro-bono

services, power of attorney, or similar schemes. These unscrupulous actors do so in order to exploit the widespread Filipino principle of *utang-loob*, or honoring social debt. They thus position themselves for a share of the monetary rewards from those claimants who accept the bogus offers and mistakenly believe themselves obliged to repay those who seemingly assisted them.

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### THE PENDING MONETARY REWARD INTRODUCED AN UNEXPECTED COMPLICATION INTO OUR STRUGGLE.

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Interference of this kind has contributed to a split among the ranks of human rights advocates over whether a settlement agreement of US\$150 million between the Marcos Estate and the claimants is enough. The 1992 court award of US\$1.97 billion was based on identified Marcos assets. However, by the time Imelda Marcos's appeal was denied and the decision became final and executory in 1997, the Philippine state had already laid claim to or spent much of the money. Anticipating this, Attorney Swift launched negotiations for the victim-claimants to receive a portion of the funds in 1995. Those who are against a settlement fault the lead counsel for not seeking the entire US\$1.97 billion award. They claim that such a small payment allows the Marcoses to portray the settlement agreement as “proof” of the dictator's innocence.

Claimants 1081 advances the other side of the debate. Our position is that the 1992 guilty verdict rendered basic justice to the victims. The damages awarded enhance the overall sense of justice, but primarily provide a modicum of compensation to the victims for their losses. Rather than seek the maximum possible reward, Claimants 1081 believes that we should adopt the course of action that



has the greatest rehabilitative impact on the lives of the victims. After years of litigation, more than a hundred claimants have already died without seeing the end result. Many others are weak, ailing, or elderly. Taking the settlement would mean that we would no longer have to wait. It represents the best course of action considering our dwindling resources and formidable opposition.

Illusionary promises, backstabbing, turnarounds, and intrigues prevailed in the lengthy negotiations between the Marcos family, Swiss banks, the Philippine government, Attorney Swift on behalf of the claimants, SELDA, and some other groups. Finally, on April 29, 1999, the Hawaii Federal District Court approved the settlement agreement with the consent of more than 8,500 claimants against the opposition of only 83 claimants: The Marcos Estate will pay US\$150 million to 9,536 Marcos victims as compensatory damages. Although the details are not yet final, the least severe category of torture victim will likely be entitled to a minimum of PhP480,000 (US\$ 12,000), an amount sufficient to buy a few hectares of agricultural land, build a modest house, and buy a few *carabao* (work animals) and farm implements. When one considers that more than 90 percent of the claimants are peasants from rural areas, the reward becomes significant.

OUR CASE WOULD HAVE BEEN GREATLY FACILITATED HAD INTERNATIONAL BODIES, SUCH AS A STRONG INTERNATIONAL CRIMINAL COURT, BEEN IN PLACE.

Yet, even with the settlement, it is the unjust fate of the Marcos human rights victims that we must continue to wait. Although there is agreement among all parties, including the Philippine government, the case has been bogged down once again. The Sandigangbayan, the ombudsman



Claimants 1081

*Members of Claimants 1081 attend a picket-rally.*

court, has prevented the transfer of the money from identified Marcos Swiss assets to the Hawaii court on the basis of pre-existing laws that place restrictions on the distribution of state funds illegally obtained.

Over the past 14 years, the case has proved too complicated and has been burdened with numerous setbacks. Still, we are proud that it is a landmark in the prosecution of dictators and other gross human rights violators. Many of the Marcos victims or their families, including myself, had long ago embraced human rights work because of our harrowing experience under the dictator. The case, framed in human rights terms, triumphed over the traditional "act of state" defense and Marcos's attempts to hide behind the cloak of sovereignty. We would like to think that we have inspired others around the world to seek justice through human rights litigation and other available legal processes.

However, the Marcos litigation also demonstrates that human rights law and international jurisdiction need strengthening: The authority and procedures for the prosecution of human rights cases must be integrated into international agreements and national laws. Our case would have been greatly facilitated had international bodies, such as a strong International Criminal Court, been in place.

Moreover, our experience illustrates that the interests of the victims do not always coincide with those of the advocates who speak on their behalf. Advocacy groups should be encouraged to initiate and support human rights litigation. Claimants 1081 would not exist had other human rights organizations not laid the groundwork for our fight, nor would we have succeeded without ongoing external assistance in legal research, media campaigns, and fundraising. But when victims of human rights abuse have organized so that they are able to speak on their own behalf and make their own decisions in the litigation process, external actors should step aside, respect the autonomy of the victims, and not create additional delays in the delivery of justice. ❖

## An Incomplete Victory at Ok Tedi

BY STUART KIRSCH, *visiting assistant professor of anthropology, University of Michigan, USA*

A legal claim brought by 30,000 indigenous landowners from Papua New Guinea against Australia's largest corporation, Broken Hill Proprietary (BHP), captured the attention of the media and the Australian public for two years during the 1990s. Since 1986, BHP had dumped 80,000 tons of tailings and other wastes from its Ok Tedi copper and gold mine into the Ok Tedi River, located in Papua New Guinea's remote, mountainous rainforests. The lawsuit addressed the resulting environmental damage, including widespread deforestation, the destruction of the local waterways, and the loss of wildlife habitats. A negotiated settlement worth approximately \$500 million in compensation and commitments to tailings containment was reached in June 1996.

agreement stipulated that BHP would implement the most practical tailings containment option following a review of the mine's environmental impact and the alternative technologies needed to limit pollution. But in August 1999, BHP announced that none of the proposed tailings containment options would substantially mitigate the destructive processes already in train. The conditions downstream from the mine will worsen over the next 40 years, they said, regardless of whether the mine closes or continues to operate. The CEO of BHP publicly acknowledged that the impact of the mine was far greater than previously anticipated, and that its continued operation is incompatible with their corporate environmental values.

Since their August announcement, the company has succeeded in framing

Tedi that were supposed to enhance local economic opportunity. The primary concern of the affected community is survival. Its members see no alternative but to allow the mine to operate for another decade, in the hope that they may yet reap some of the benefits of development, even though the mine's destructive impact will continue unabated.

Rex Dagi and Alex Maun, who grew up in villages along the lower Ok Tedi River, are the primary plaintiffs in the lawsuit and internationally recognized environmental activists. In a recent interview, they summarized their predicament to me: "What is growing [along the river banks] now? Just pitpit, elephant grass, and softwood trees. Why protect them? They can grow anywhere. If we were talking about hardwood forests, that would be different. But now? It is not worth protecting what remains here." Dagi went on to explain, "If it is safe [for people], then they should continue to dump tailings into the river [and keep the mine open]. They will never fix this river—it is already dead. They should give us money instead." Maun added, "We want fortnightly compensation payments. When we say fortnightly, it means survival. We need an alternative means of subsistence."

But local priorities are not necessarily given prominence by the global alliance of journalists, lawyers, anthropologists, and NGOs that originally challenged BHP and prompted the settlement. Despite an initial flurry of interest after the results of the environmental inquiry were announced last August, the media have been largely silent. The lawyers for the plaintiffs are waiting for BHP to commit to a position on the future of the mine before determining whether there are legal grounds to revisit the case in the Victoria Supreme Court.

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NOT ENOUGH ATTENTION HAS BEEN GIVEN TO THE POSSIBILITY THAT TRADITIONAL SKILLS AND KNOWLEDGE OF LOCAL RESOURCES MIGHT PROVIDE THE AFFECTED COMMUNITIES WITH ALTERNATIVES TO THEIR DEPENDENCE ON MINING REVENUES.

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The Ok Tedi case is widely regarded as one of the most successful examples of a foreign tort claim made on environmental grounds against a multinational corporation. Although the case was not framed explicitly in human rights terms, it endorsed the right to a safe environment and established that a subsistence economy is entitled to protection under the law. The suit also brought substantial financial benefits to the river communities and has kept an international spotlight on the need for long-term solutions to the problems caused by the mine.

In the last year, however, serious problems with the settlement have emerged, leaving local communities frustrated and angry. The settlement

the debate as if there were only two options: that the mine stay open and continue to pollute the river, or that BHP close down its operations, causing extensive social and economic hardships at both the local and national levels. A spokesperson for the mine told me, "The social costs of closing down the mine without establishing a sustainable economy based on agricultural development are far greater than the ecological costs of continued dumping into the river."

The Ok Tedi Mine is the economic engine of its region and the only source of support for rural development. Yet the mine has destroyed the ecosystem that once supported the subsistence economy, and the government has largely squandered revenues from Ok

NGOs in Papua New Guinea and abroad are preparing for another battle with BHP, although there is debate about the best course of action. One Greenpeace-Pacific lawyer, who was party to the original lawsuit, continues to stress environmental issues and the precedent set by the case. "What legacy will we provide for future generations of Papua New Guineans?" he asked me. "How does this case shape policy in the minerals and petroleum sector? If we disengage now, there is no chance of affecting other mining projects in Papua New Guinea."

Other activists have stressed the need for an independent review of the studies produced by the mine and an open debate on the environmental future of the region. NGOs have also called upon BHP to develop and make public a mine closure plan that specifies its financial commitment to rehabilitation when the mine closes—whether this year or in a decade's time—after the ore has been exhausted.

My concern is that all parties involved continue to emphasize external intervention as the only solution. Not enough attention has been given



Stuart Kirsch

*Winter in the tropics, Ok Tedi*

to the possibility that traditional skills and knowledge of local resources might provide the affected communities with alternatives to their dependence on mining revenues. Moreover, by introducing a capitalist model of large-scale economic development to the region, the mine has restricted the communities' ability to envision alternatives to external intervention. Thus the communities' response to their problems has been confined to the terms of monetary compensation.

Negotiations with BHP, initiated during the settlement of the lawsuit, have also limited local consideration of alternatives. Because of its position as gatekeeper for the distribution of settlement funds, BHP is now regarded by local residents as a partner in their development. Cooperation with the mine has precluded the formulation of a more substantial critique of BHP's position. Why, for example, should a company continue to benefit from operations that are supposedly incompatible with its corporate values? If the mine must stay open, why not return all of the profits that it earns to the communities damaged by its operations?

The people living downstream from the Ok Tedi Mine may have won their legal battle, but they are dissatisfied with the outcome. Their experience suggests that litigation, as a form of political action to protect human rights, may not achieve social justice on its own. Participation in legal proceedings and negotiations with the mine may have even perpetuated community members' dependence on external intervention and constrained their ability to imagine an alternative to their situation. As the Ok Tedi case sadly demonstrates, policy reforms and legal precedents do not necessarily translate into improved conditions for the peoples whose rights have been violated. ❖

### *Human Rights Dialogue* Summer 2000

#### Women and Human Rights

The Beijing Platform for Action emerged from the United Nations Fourth World Conference on Women in 1995. The Beijing Plus Five meeting, to be held in June 2000 in New York, will assess the implementation of the platform in critical areas of concern, including human rights. *Human Rights Dialogue* will contribute to this agenda by addressing women's rights in its Summer 2000 issue.

Although women's rights are gaining increasing prominence on the international stage, many women have little or no awareness of "human rights." This issue will

examine what human rights language and concepts can achieve for women and girls at the local level.

Are those struggling for gender equity at the local level embracing a human rights framework? If so, why, when, and under what conditions is it successful from their perspective? What is the potential contribution of the struggle for gender equity to the human rights movement, and vice versa?

Local women's rights advocates from around the world will discuss how to mediate between universal rights and conflicting cultural principles while advancing women's causes.

## Readers' Responses

### A PLACE FOR ELITES

In international affairs at the start of the new millennium there is much talk about grassroots organizing and a bottom-up rather than top-down approach to problem solving. This is evident in economic matters where the “Washington consensus” on elite policy making through the World Bank and the International Monetary Fund has given way—at least in theory—to the rhetoric of a post-Washington consensus in favor of civil society and sustainable development. In the Winter 2000 issue of *Human Rights Dialogue*, we see the same trend manifest itself regarding human rights. Several of the articles stress the need for more grassroots activism on behalf of international human rights to counter various defects and limitations in the current state of affairs, chief among which seems to be a Western-based elitism and legalism. This demand for change is, in principle, all well and good, and several authors make very persuasive arguments.

At the same time, I would say there is still an important place for the pampered academic who just teaches about human rights and for the human rights lawyer or law professor in love with legal technicalities. Many a

grassroots organizer can trace his or her commitment to human rights back to a university course in which the instructor inspired the then-student to action. In recent years lawyers, some of them also law professors, helped argue the case against General Augusto Pinochet concerning his crimes against humanity in Chile. The legal technicalities in British courts then set the stage for the attempt to apply the Pinochet precedent to gross violators of human rights in Africa. So while we need a human rights discourse that resonates among ordinary people in various cultures, more elitist sectors, even in the West, still have important roles to play. Of course, my argument is self-serving because I am a pampered Western academic, but at least I am not a legalist.

I would also say that a certain gloom-and-doom tone pervades some of the articles. The situation at the grassroots level might not be as completely terrible as represented in some of these essays. Note that many ordinary citizens in East Timor, not to mention much of Indonesia as a whole, demanded progressive change in the name of human rights despite major repression. They have made some progress (with the support, I might add, of a number of Western “elitist” human rights organizations). I am not

so sure we should be so pessimistic about the future of human rights among the non-elites of the world.

*David Forsythe*  
Professor of Political Science  
University of Nebraska, Lincoln, USA

### DOMESTIC VIOLENCE IN TUVALU

The Winter 2000 issue of *Human Rights Dialogue*, “Human Rights for All? The Problem of the Human Rights Box,” articulated many of my own thoughts.

I recently worked for a year as a lawyer on the Pacific Island of Tuvalu, where I helped organize numerous workshops on domestic violence. The whole time, not one woman sought advice about domestic violence. Why did our message not get through?

There is a feeling in Tuvalu that “this is the way it’s been and the way it will always be”—an attitude fostered by a poorly trained and ill-informed police force and magistracy. What woman living in a small island community could be expected to report her husband for abuse when in all likelihood the police are his relatives? How could she then continue to live in that community? What relevance do human rights have for a woman in this situation? Human rights as a term is remote and of no relevance to the very people who need protection. The vocabulary itself alienates.

The challenge facing human rights organizations is to recognize their weaknesses and to mount a cohesive and effective campaign for everyone. Only then will people be able to recognize, and even more important utilize, their rights.

*Nicholas Barnes*  
Principal Legal Officer  
Attorney General’s Chambers  
Republic of the Fiji Islands

### THE PRICE OF NONINTERVENTION IN KOSOVO

Dimitrina Petrova claims that NATO’s military intervention in Kosovo had a “deleterious effect on the credibility of human rights in the Balkans” [“Human Rights in the Aftermath of Kosovo,” Winter 2000].

However, she has not offered her thoughts on whether there was indeed a viable alternative strategy for the human rights community to confront the appalling human rights violations of the Milosevic regime in Kosovo in 1998 and 1999. It is my conviction that by late March 1999, the international

community had exhausted all other instruments to reverse the brutal Yugoslav campaign against Kosovo’s Albanians. With no other viable options, what does she think the effect would have been if the international community had done nothing to stop Milosevic’s horrific campaign?

*Ambassador Gérard Stoudmann*  
Director, OSCE Office for Democratic  
Institutions and Human Rights  
Warsaw, Poland

## IMPLEMENTING CHILDREN'S RIGHTS

*Human Rights Dialogue* argues that the “international human rights movement [has] priorities that neither adequately reflect local needs nor take full stock of the expertise of people on the ground” [“Introduction,” Winter 2000]. In the children’s rights field, we are starting to develop methodologies to take these two concerns into account.

The Convention on the Rights of the Child (CRC) represents the world’s consensus on children’s rights. However, all sectors of society must work together toward its success. If people get the feeling that this international instrument is only for “policing,” then I am afraid we have missed the boat and created only resistance. An important part of the implementation of the international consensus about children’s rights has to be carried out at the local level. Defence for Children International–Israel has been experimenting with strengthening this support by opening information centers, walk-in centers, and social-legal defense centers for young people, and these ideas have been replicated by other organizations across the country.

We have come to realize that to implement the CRC in full, an alliance with a group such as the Association of the Development of Village Initiatives in Benin is as important as one with the Ministry of Justice in that country. The UN bodies that monitor the implementation of human rights treaties should also be encouraged to ask the official states parties to report on local developments. This would signal that not only are actions by governments important, but the people themselves can contribute to making human rights conventions a reality.

*Philip Veerman*  
Development Director  
Defence for Children International,  
Jerusalem, Israel

## AFRICA'S PROBLEM: GOVERNANCE

Chidi Odinkalu urges the human rights movement to adopt the strategies and values of the successful African social justice movements of the past, and to articulate “demands that evoke responses from the political process” [“Why More Africans Don’t Use Human Rights Language,” Winter 2000]. There is a mass of information, however, on how many who championed human rights and self-determination in Africa’s independence movements fared poorly after they came to power. Unless the continent evolves strong institutions that effectively support democracy, change may continue to be cosmetic.

Those who choose to defend rights in Africa, whether in the context of advocacy for policy reforms or through community-based programs, have to contend with the wrath that accompanies the occupation. Human rights campaigners are ignored, detained, or attacked by government or progovernment forces. In many instances human rights groups are accused of conniving or working for foreign interests. Little has been done to dispel and correct the unfortunate and discrediting perception that human rights are a purely Western idea, and most African governments still view human rights groups as peddling their donors’ agendas. This is what makes defending rights from the safety of distance attractive. Groups in the West have more space to defend issues that are only raised with caution from Africa. For the human rights worker on the ground, “channeling frustrations into articulate demands that evoke responses from the political process” is not as easy as Odinkalu makes it sound.

Odinkalu also criticizes the absence of membership bases and popular mobilization in human rights organizations. While membership organizations claim a certain type of legitimacy, such a model is not necessarily ideal. In

Africa, membership organizations have to contend with state interference and the participation of freeloaders. Mass mobilization is becoming increasingly difficult as governments legislate or enforce laws that infringe on the rights to association and assembly. Trade unions have been besieged with politics of patronage and lost their traditional role of protecting their members from despotic regimes. Attempts at mobilization open up real possibilities of confrontations, which do not necessarily address the cause of peace or rampant human rights abuse. New strategies and initiatives are required in the face of the deteriorating human rights situation.

There is no question that the human rights movement, whether in Africa or the West, is elitist in nature. The question is whether we are making progress, given our constraints. At the 1993 Vienna World Conference on Human Rights, international human rights groups undertook to facilitate the emergence of stronger human rights groups in the South. This would be an important step toward protecting us from repressive governments’ actions. Little evidence exists, however, that anything has been done to address the question of institutional capacity or to foster cooperation among human rights groups in Africa.

*Ngande Mwanajiti*  
Executive Director, AFRONET  
Lusaka, Zambia

Do you have a response to “Litigating Human Rights: Promise v. Perils”? Share it with thousands of other *Human Rights Dialogue* readers. Send your comments before May 25, 2000, to: Roger Duthie, Human Rights Initiative, Carnegie Council on Ethics and International Affairs, 170 East 64th Street, New York, NY 10021-7496, fax: (212) 752-2432, e-mail: rduthie@cceia.org. We regret that we will not be able to print every response. Please limit your response to 300 words, and be sure to include your name and contact information. We reserve the right to edit text as necessary.

## What Does “International Justice” Look Like in Post-Genocide Rwanda?

BY ALOYSIUS HABIMANA, *project coordinator, Rwandese League for the Promotion and Defense of Human Rights (LIPRODHOR), Rwanda*

Recently an independent team of investigators commissioned by the United Nations confirmed what we in Rwanda already knew: The UN bears some responsibility for the 1994 genocide that took about a million lives, mostly Tutsi. Earlier reports had determined that the killings could have been avoided if the UN had responded to early warning signs.

Aware of its abandonment of the Rwandan people when innocents were slain before the blue helmets, the UN hastened to set up the International Criminal Tribunal of Rwanda with the special mandate of prosecuting the leading perpetrators. Rwandans believe that only justice can bring peace and normalcy to our traumatized society. And the truth is that the Tribunal is the best hope we have of achieving this. Yet, to most Rwandans, the Tribunal faces serious shortcomings and is no more than a UN political scheme to save face, doing too little too late for Rwanda.

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TO MOST RWANDANS, THE TRIBUNAL IS NO MORE THAN A POLITICAL SCHEME BY THE UN TO SAVE FACE, DOING TOO LITTLE TOO LATE FOR RWANDA.

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In November 1994, those of us in favor of the Tribunal were dismayed when the Rwandan government voted against it in the Security Council. The government objected to the fact that the Tribunal cannot apply the death penalty, as per international law. The government also did not approve of the decision to carry out Tribunal proceedings outside of Rwanda, in Arusha, Tanzania.

The government later reversed its position, but it still objects to these

terms, as do a great number of Rwandans and especially genocide survivors. Many Rwandans find it unacceptable that the convicted masterminds are allowed to escape a punishment of death. This is particularly absurd to them since lesser genocide offenders receive the death penalty from our national courts.

The fact that the prosecutorial branch of the Tribunal has offices in Kigali, Rwanda’s capital, is of little consolation. Many Rwandans are bitter towards “those people of Arusha,” as the Tribunal investigators are sometimes called. After the visit of some investigators to the Mabanza rural commune in Kibuye Prefecture, an area known for particularly bloody massacres, its mayor commented: “It is a pity these people of Arusha have left without even bothering to show a single sign of sympathy before the remains of ours who were massacred in these hills.” The mayor also disapproved of the fact that the investigators came to gather information for the defense of the accused, while the Tribunal provides no assistance to the town’s starving widows and orphans.

When pressed, many Rwandans acknowledge the impartiality of the Arusha proceedings compared to those the Rwandan magistrates conduct. Along with my colleagues at LIPRODHOR, I have monitored both sets of proceedings for years. Rwandan jurisdictions would do well to adopt the practices of the Tribunal magistrates who utilize experts in trial proceedings, examine case files in depth, apply high standards for thorough evidence, and provide the full right to defense of the accused prior to judgment. The Rwandan public and genocide survivors also have a high regard for the Tribunal’s witness-protection system, which helps to shelter survivors from

potential intimidators; national tribunals have no such program.

Still, public opinion of the Tribunal is overwhelmingly negative. The most recurrent criticism is linked to its perceived incompetence. People wonder how up until now the Tribunal has only managed to convict 7 people and detain 39 in the Arusha facilities, given all the money it reportedly absorbs. It took over three years to arrive at a recent guilty verdict for Georges Rutaganda, the former leader of the infamous Interahamwe militia, which implemented the genocide.

Some Rwandan political activists and survivors’ organizations adopt a hard line against the Tribunal, even rejecting its right to prosecute. They cynically declare that “foreigners” have created the Tribunal “to make business out of the genocide . . . out of the blood of ours who passed away.” After the November 1999 decision to release the heinous *génocidaire* Jean Bosco Barayagwiza on a technicality, IBUKA, the most prominent of such organizations, accused the UN of denying the magnitude of the genocide. IBUKA also called the Tribunal a “trompe l’oeil” for survivors, which translates in our local language as a “don’t-cry-child toy.”

Like the government, the survivors assert that the root cause of the genocide lies with the colonialist policy of “ethnic divide and rule.” They feel that the international community, which stood by and did nothing as Rwandans suffered, cannot feign to be here now to teach us how to handle our problems. The government, if given the financial resources, can do the work of bringing the offenders to justice. Unfortunately, in taking such stands, some of these survivor groups may be

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## The Meaning of a Legal Victory in the Ecuadorian Amazon

BY TAMARA JEZIC, *lawyer*, and CHRIS JOCHNICK, *legal director*, Center for Economic and Social Rights, Ecuador

**O**n September 8, 1999, the Independent Federation of Shuar People of Ecuador, FIPSE, won an unprecedented legal victory in defense of its right to organizational integrity. The case's legal relevance, however, is outweighed by its role as an organizing tool within the larger campaign to defend a territory.

In April 1998, the Ecuadorian government granted U.S. oil company Arco Oriente (Arco) the rights to exploit oil in a 500,000-acre area of primary rainforest in the Ecuadorian Amazon, which falls entirely on Shuar and Achuar homelands. The Shuar and Achuar indigenous peoples, numbering about 50,000, had organized themselves and were aware of the dangers posed by this lease. They knew that oil development in the northern Ecuadorian Amazon had had a devastating impact on local communities, including the loss of land and wildlife, contamination of rivers, new diseases, and destruction of indigenous cultures. They were also familiar with Arco's efforts to undermine indigenous organizations in a neighboring province. Workshops organized by indigenous organizations, the local church mission, and NGOs had helped raise awareness of the impact of oil development as well as the rights of indigenous peoples.

In reaction to the news of Arco's license, the three governing federations of the Shuar and Achuar people—FIPSE (Shuar), FISCH (Shuar), and FINAE (Achuar)—called for special assemblies and pronounced their unconditional opposition to oil development on their lands. FIPSE resolved to prohibit any individual or community negotiations with the company. FIPSE president Tito Puanchir stated publicly:

The Shuar and Achuar Peoples have struggled, since colonization, to maintain and

reaffirm our identity and culture. . . . We have organized ourselves and defined a series of procedures destined to protect our integrity as a People. The decisions that affect all the members of the organizations like ours should be discussed in a General Assembly and have the approval of the majority of our members. [Letter from Tito Puanchir to Oil and Gas Journal, October 25, 1999]

However, Arco president Herb Vickers claimed that the company was "committed to working more on the local level because, in its opinion, the large indigenous organizations no longer represent the people" (*Diario el Expreso*, July 25, 1999). Like other oil companies, Arco deployed divisive strategies to enter Shuar territory. It flew into several isolated base communities with offerings of health centers, work, potable water, and free flights. The company also met with Shuar individuals, the governor of a neighboring province, and members of the armed forces in attempts to gain access to Shuar territory. It succeeded in convincing leaders of three FIPSE subgroups to sign a contract authorizing the company to enter their territory in exchange for \$3,000 for each subgroup.

FIPSE members denounced these actions and looked to the courts to defend their territory and communities. Since early 1998, FIPSE had been organizing workshops with lawyers and educators from our organization, the Ecuadorian office of the Center for Economic and Social Rights (CESR), an international NGO with years of experience working with indigenous communities in the Amazon. With FIPSE's active support, CESR lawyers

drafted an *amparo* petition seeking to prohibit Arco from approaching FIPSE individuals and territory without authorization from the FIPSE General Assembly. Under the constitutional right of *amparo*, a court may grant an emergency injunction to stop, avoid, or remedy actions of a public authority or private party that violate constitutional or international rights and threaten imminent harm. Surprisingly, *amparo* has rarely been invoked for human rights purposes, and never to protect an indigenous organization from any kind of threat.

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THE LAWSUIT IS NO PANACEA, BUT IT HAS SLOWED ARCO'S PLANS.

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The petition argued that by ignoring the decision of the FIPSE General Assembly and attempting to negotiate directly with individuals and communities, Arco's actions violated the rights of the Shuar to preserve their customs and institutions and to determine their own development priorities as provided for by International Labor Organization (ILO) Convention 169 and the Ecuadorian constitution. In a meeting in the Amazon with more than 100 Shuar representatives, CESR lawyers explained the petition, along with its limitations and other legal options. The lawyers reworked the petition based on participants' suggestions and coordinated its filing with a public demonstration organized by the Shuar.

On August 24, 1999, hundreds of Shuar and Achuar descended upon the town of Macas to protest oil development, meet with local officials, march to the regional governor's offices, and present the *amparo* petition to the local courthouse. On September 8, a civil court judge ruled that Arco had

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## The Meaning of a Legal Victory in the Ecuadorian Amazon

(continued from page 15)

violated the Shuar people's rights to organizational integrity and ordered the company to refrain from negotiating with FIPSE members or communities without the authorization of the FIPSE General Assembly.

While the victory was swift and unprecedented, its legal impact should not be exaggerated. Given the political clout of Arco and the overwhelming importance of oil to the struggling economy, the injunction itself is not likely to pose long-term problems for the company. Ecuador's ineffective judicial system and a systematic favoritism toward oil companies make such decisions difficult to enforce, and Arco has an appeal pending. Moreover, the court ruling does not prohibit drilling on FIPSE territory. In response, CESR, FIPSE, and a national trade union have presented a petition to the ILO to raise international awareness about the threats posed by Arco and put pressure on the government and oil industry to ensure respect for indigenous rights in the development process.

The lawsuit is no panacea, but it has slowed Arco's plans. More significantly, it has injected the notion of "rights" into the Shuar and Achuar's political struggle. Understanding the harms and injustice of oil development as human rights violations has helped them to strengthen their resolve and focus their campaign. The lawsuit also provided a motivating victory, much public attention, and a tangible rallying point for communities. To ensure that the *amparo* petition served these larger ends, it was crucial that CESR and others spent much time with the communities building trust, understanding, and a sense of ownership for the legal action. Strategically, an *amparo* petition is well suited to strengthening local organizing efforts: It is quick, relatively uncomplicated, and allows for a broad interpretation



Kevin Koenig

*Members of the Shuar community demonstrate in front of the courthouse in Macas on the day they filed an amparo action, August 24, 1999.*

of rights consistent with the threats felt by community members. As Puanchir stated following the legal victory:

We are learning how to defend ourselves and to claim our rights. . . . [Arco] has total support of all the institutions of the country including the armed forces. They tried to intimidate and undermine the Shuar organization. It weakened and divided us, but it was an opportunity for us to look for new strategies to overcome the problem. Now the people are on alert. We are more united than before. . . . If they divide us, we're finished. Our unity demonstrates that we are resisting. We are going to achieve what we are looking for. . . . Now we have a judicial decision that recognizes our effort and offers us protection. [Interview with Gabrielle Watson, Oxfam, September 15, 1999]

The Shuar and Achuar will likely face many future threats in trying to defend their piece of the Amazon. Litigation will never provide a final bulwark against outside threats, and lawyers cannot hope to play a decisive

role. Instead, legal victories must be viewed as pieces of larger campaigns and evaluated in terms of their benefits to local organizing and activism, which represent the best long-term hope for these communities. ❖



## Big Oil in Louisiana and a Community's Bottom Line

*The following is excerpted from an interview with Clarice Friloux, chair, Grand Bois Citizens' Committee, USA*

**M**y family has lived in Grand Bois, Louisiana, for the last hundred years. In 1990, US Liquids (then Campbell Wells) started digging big holes in our neighborhood that eventually looked like Olympic-sized swimming pools. At the beginning we didn't realize that the facility was dumping hazardous material from oil companies. They told us it was mud and salt water, and that they had liners in the pits to protect our groundwater. The state permitted this type of facility, so we thought it couldn't be anything dangerous.

As the years went by, the community became more aware of chemicals that were harming us. Everyone was sick—sore throats, burning eyes, headaches, dizziness, nausea, diarrhea. Convoys of trucks were bringing in waste daily, and the smell was everywhere. In March 1994 we decided that it was time we stood together and fought for our lives. We called in the state troopers and reporters.

At that time, none of us in the community knew what a councilman was used for. We didn't even know our sheriff—we had no need for any of that. When my sister-in-law and I first went to see our councilmen, we were nervous because we had never spoken in front of people. They told us that we needed to hire an attorney or we would never get anywhere. Laws would have to be changed, they told us, and the best way to do that was to take the facility and the oil companies to court.

We filed a lawsuit against US Liquids and Exxon, one of the oil companies dumping waste in the facility. We originally thought litigation would make a difference. We thought people would see that it is time to stop allowing these companies to do this. But in Louisiana, oil and gas is our number one industry. We are fighting some big people here. In fact, I think our litigation has hurt the larger struggle against the industry in the long run. We have

raised awareness, but it is clear that the people in South Louisiana will keep fighting for their oil and gas, no matter what. It doesn't matter how many communities are being poisoned, as long as their husbands and wives are bringing in those big paychecks. They can sleep on it as long as it doesn't hit home. You can't get a jury to sit on a trial in South Louisiana that hasn't been affected by the oil and gas industry. They think that if they hurt Exxon, Texaco, or Chevron, they are hurting their jobs. They sympathize with us, but in the end, between sympathy and a paycheck, people come in second.

I've gone to the state capital over and over again. We are trying to change the laws, but it hasn't worked. Our state legislators are also part of the oil and gas industry. I'm talking to deaf ears. They look at me and say, "What are you doing here? Go back to your small town. You're just a bored housewife. What US Liquids and Exxon are doing is legal. This stuff has to be put somewhere."

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.....

Our main problem is our governor. He has stopped bills aimed at changing the laws for hazardous material. He tried to replace our district senator because the senator fought for us in Grand Bois. The governor has attempted to split us up and has attacked us personally. He ordered a bogus evaluation of our community, and these "findings" then came up everywhere we went. When I spoke at Tulane Law School, his representatives were there. Everything I said, they said differently, trying to embarrass me in front of the media. Other than this, the media, our senators, representatives, and local councilmen have all backed

us 100 percent. We have also received a lot of help in getting our message out from local and national environmental groups.

The litigation process is so long. I have to give a lot of time to lawyers, to organizations, on the phone and in community meetings. A few times I have called up Glad Jones, our attorney, and said, "I'm not doing this anymore. I just want to forget about it. I want my life back." Sometimes when I had to buy the postage, envelopes, and paper for the community in letter-writing campaigns, I thought to myself, "What am I going to do for money for the rest of the week?" I have even felt threatened. Cars have pulled up and watched my house for a couple of hours. I fear my kids could be kidnapped coming off the bus.

It has been difficult. But even with all the frustration, I've never regretted filing a lawsuit against the facility. I continue to fight because my husband, my mom, and my whole family are from here. We are fighting this as a team. If it is not that way, if it is not as important to the next person, it won't work.

Another important thing is hiring the right person to represent you in a court of law. Glad Jones is one in a million and has been very good to us. He always makes the meetings here, every other month or whenever we need him. Some people had to leave the community because of medical problems, but the rest of us decided we were going to stay and fight. There are only 300 people and 94 homes here. We protect each other's property, we leave our homes unlocked, our keys in our cars. We love our community. There are no drugs or crime, and there's wildlife, hunting, and fishing. But our properties have no value anymore. We can't just leave and start all over again.

A year into the litigation I began to think in terms of our human rights being abused. I used to think it was

*Continued on page 18*

## Big Oil in Louisiana

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just because most of us are Native Americans. Then when I started meeting other communities, I began to realize that we were not the only ones. Most of the communities who have environmental problems like ours are low-income and minority. When I started seeing these communities being destroyed just like mine, I realized that for all of us, our rights are being abused. The facility and the oil companies have taken away our clean air and clean water; every basic thing that human beings need.

But I am a housewife, and I have two small kids. I can only fight one part of the struggle, for our community and my family. I sympathize with what's going on in other communities, but I don't have the time to fight directly for them. It is a shame.

Our main goal had always been to get a closure of the facility, not damage payments. When, on August 7, 1998, two days before the end of the trial, US Liquids offered us a settlement that included a partial closure, our eyes opened up really wide. Even if we continued the suit and won, we knew that the judge was not going to give us any kind of closure. We decided against Glad's advice on the settlement. Glad wanted to take them to the cleaners. But I told him that if they are offering us closure, we would have to accept it. And if you knew the amount, you would know it was not about the money at all. Today, the facility is only accepting 10 percent of the waste it used to take in—that is the bottom line. We will also continue to use the courts against Exxon, with whom we did not settle. Because we had not filed a class action suit, but instead brought a case with just ten claimants, we can bring a new case against them with another ten people. And we can keep doing this, ten people at a time, for another 30 years or whatever it takes, until that facility is totally closed down and cleaned up. ❖

## Resisting Litigation in Umm El-Fahem

BY SAMERA ESMEIR, *Ph.D. candidate, Institute for Law and Society, New York University, USA*, and RINA ROSENBERG, *development director, Adalah: The Legal Center for Arab Minority Rights in Israel, Israel*

Some human rights organizations err by pursuing litigation as their sole strategy. Doing so often means relying upon a course of action that does not recognize the interests of the abused and can harm popular mobilization. Human rights organizations must therefore be careful when deciding to use legal tools in political struggles. A case in point is the 1998 land expropriation attempt in Umm El-Fahem, a Palestinian town in central Israel.

Part of the ongoing process of Palestinian dispossession since the 1948 establishment of the state of Israel, the policy of confiscation lies at the heart of the historic conflict between the two groups. Over 80 percent of Palestinian-owned lands have been taken by the Israeli government, which does not recognize the right of Palestinians to self-determination.

In May 1998, the Israeli Defense Forces informed residents of Umm El-Fahem that some of their lands were to be transformed into a military firing range. Landowners' entry would be limited; they would be able to cultivate their farms only on weekends and would need special entry permits and costly insurance policies. The landowners sent numerous letters of protest to Israel's prime minister and staged demonstrations in Jerusalem, to no avail. Several months later the town's mayor asked our group, Adalah, the Legal Center for Arab Minority Rights in Israel, to file a petition to the Supreme Court of Israel.

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LEGAL LOGIC DEPOLITICIZES UNEQUAL POWER RELATIONS AND TURNS THE POLICY OF LAND EXPROPRIATION INTO ISOLATED EVENTS, REMOVED FROM THEIR LARGER CONTEXT. LAWYERS WHO ARGUE AGAINST CONFISCATION INHERIT THESE MODES OF PRESENTATION.

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We declined the request. Legal logic depoliticizes unequal power relations by casting them as competing interests that can be balanced in a rational, objective, and ahistorical way. In the Israeli courts, the Palestinian struggle for land is reduced to a standoff between the government, which wishes to take the land "for the benefit of the public," and individuals struggling to preserve their rights to property ownership. The application of law turns the policy of land expropriation into a series of isolated events removed from their larger context. Lawyers who argue against confiscation inherit these modes of presentation, and must thereby abandon notions of justice and group rights in favor of a language of "balanced interests," which detracts from the larger Palestinian struggle.

In this case, because Israel sought to expropriate the Umm El-Fahem land for military use, we would also inevitably have had to confront security arguments in court. Political chimeras typically invoked in the national struggle over lands, security arguments are of paramount importance to the state, privileged by the Supreme Court, and virtually impossible to counter. The only way to challenge these arguments in court is to contend that they do not justify violation of ownership rights in a specific case. In doing so, lawyers must unwillingly take on the inherently flawed and obfuscatory thinking of the security argument in order to establish an exception to it, thus endowing it with a measure of validity.

In the absence of the courts, what is left to do for those who wish to challenge Palestinian land confiscation policies? In the case of Umm El-Fahem, the community has continued the fight successfully through political means—protests, strikes, networking, parliamentary discussions, and the media—for

the purposes of influencing public opinion and embarrassing the Israeli government. By these tactics, it has succeeded in delaying the confiscation. For two years, the issue has been the focus of negotiations between the local Umm El-Fahem committee and the Israeli Ministry of Defense regarding the permanent status of the land. No agreement has yet been reached, but no confiscation has been executed either.

Having resisted litigation, we at Adalah have been assisting the Umm El-Fahem community in other, more effective ways. In September 1998 the Umm El-Fahem landowners and community leaders set up a protest tent on the disputed land and initiated mass demonstrations. The violent reaction of the Israeli police forces received widespread local and international media attention. Since then, Adalah has been providing technical assistance to community groups that formed in response to this incident, advising a group of local lawyers who are gathering affidavits from witnesses and injured individuals and representing those arrested and indicted. We also provide legal advice to a representative group of the owners of the confiscated lands, community leaders, and sympathetic members of the Knesset (Israel's parliament).

What would have happened had the Umm El-Fahem case been litigated? The court would likely have dismissed it. Would such an unfortunate verdict have mobilized a political struggle in the community, as sometimes happens? Not likely in this situation. The community's involvement was already at its peak at the time they wanted us to help them approach the Supreme Court. Why didn't we consider a case based on international human rights law, which can, in theory and sometimes in practice, circumvent the limitations of a state legal system to help victims redress human rights violations? Again, it is unlikely that an

## Caught in the Claws of the Rich: The Struggle of the Mapalad Farmers

BY JOSEL GONZALES, *coordinator; PAKISAMA-Northern Mindanao; and KAKA BAG-AO and AZON GAITE-LLANDERAL, attorneys, the Balay Mindanaw Foundation, Philippines\**

**M**ost of the members of the Mapalad farming cooperative in San Vicente, Bukidnon, belong to the indigenous Higaonon tribe of the Philippines. They are poor, seasonal laborers who make brooms during the summer months to augment their income. They dream of their own piece of land to ensure food on their tables, education for their children, a roof over their heads, and clothing to wear.

Their dream was nearly realized when the government named the 137 Mapalad farmers beneficiaries to the 144-hectare Quisumbing family farm. This was determined by the Comprehensive Agrarian Reform Law of 1988, which distributes to the landless poor vast amounts of the country's agricultural land that has historically been concentrated in the hands of a few influential landlord families. The Mapalad members participate in the paralegal assistance program we started in order to help the poor to access their rights under this law.

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HOW CAN THE INTERESTS OF THE POOR BE ADVANCED IF THE LEGAL SYSTEM IS CAUGHT IN THE CLAWS OF THE RICH?

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When the Quisumbings were due to relinquish their farm to the Mapalad cooperative in 1994, they instead sought to hold onto their land by gaining permission to convert it to industrial and commercial use, which would render it ineligible for redistribution. To the surprise of the prolandlord municipal and provincial governments, the Department of Agrarian Reform (DAR) rejected the Quisumbing's application.

In response, Governor Carlos Fortich of Bukidnon, a landlord himself, went straight to the top and wrote a letter to the Office of the President. Upon receiving this letter in March 1996, Executive-Secretary Ruben Torres promptly reversed the DAR decision in the name of the president. Just when the Quisumbings thought they had won, to their surprise they discovered that they no longer owned the farm. DAR had transferred the ownership of the land to the Mapalad farmers back in October 1995. The Quisumbings filed a case in the Regional Trial Court of Bukidnon in April 1997, claiming ownership on the basis of the executive-secretary's pronouncement. It was upon receiving the court petition that the cooperative members learned that the land had been legally theirs. The Mapalad paralegals we had trained discussed the case with their leaders and others in their cooperative. Together with us, their lawyers, they decided to mount a legal defense against the Quisumbings.

So began the battle in the courts. However, as part of their legal education, we trained the Mapalad farmers not to rely on litigation alone in their struggle. They decided to enter their property and start cultivation, and in July 1997, with the support of the local church and neighboring farmers, they occupied the land. Three days later, armed goons descended upon them, firing shots in the air, letting farm animals loose, burning tents, and confiscating farm implements. Escorted by thugs, Norberto Quisumbing Jr. accosted Peter Tuminhay, the Mapalad leader, and threatened to kill the farmers if they did not vacate the

\*PAKISAMA-Northern Mindanao is a national peasant federation to which the Mapalad cooperative belongs. Attorneys Kaka Bag-ao and Azon Gaité-Lländleral are both counsels of the Mapalad farmers.

## Caught in the Claws of the Rich: The Struggle of the Mapalad Farmers

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premises. Although they would have gladly shed blood for their land, the farmers decided to leave and try other strategies.

The farmers' next step was to make known the injustice through a peaceful yet powerful act: they decided to go on a hunger strike. Nineteen of the farmers picketed the DAR office in Manila, refusing to eat or drink anything but water until the president reversed the executive-secretary's decision. Their plight made headlines in the national and local media, capturing the imagination of the Filipino public, which is unaccustomed to such measures. The groundswell of public support forced then-president Ramos to take action on their case after 28 days of hunger. He announced a compromise: 100 hectares for the Mapalad farmers and 44 hectares for the Quisumbings.

But the Quisumbings would not accept this. Drawing from their inexhaustible sources of influence, they brought a case to the Supreme Court. When the attention of the Filipino public was focused on elections in May 1998, the court quietly voted 5-0 in favor of the Quisumbings, voiding the Ramos compromise and converting the land to industrial and commercial use. The justices, large landowners themselves, did not address the fact that the land was designated for redistribution as per agrarian reform laws, and that it is illegal for the government to reclassify it. Moreover, according to a 1992 Presidential Administrative Order, prime agricultural land with irrigation facilities, such as the property in question, may not be converted to commercial and industrial use.

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THE MAPALAD CASE SHOWS THAT  
IT IS NOT ENOUGH TO HAVE LAWS  
ON YOUR SIDE.  
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Balay Mindanaw Foundation

*Mapalad farmers  
protest against  
land conversion.*

Together with the Mapalad paralegals, we filed a motion for reconsideration, timing this with demonstrations in front of the Supreme Court as well as signature and letter-writing campaigns. Sadly, not only did the court maintain its position, it also issued a ban on gatherings in its vicinity and took an even harder line against the farmers. In violation of the Agrarian Reform Law, the court added that the farmers do not have the right to own the land because they are merely seasonal workers.

Today, the Mapalad farmers are tired, angry, and disappointed with the legal system, but their spirit is not defeated. They remain convinced that the land is legally theirs and resolve to make the government accountable to deliver social justice.

Armed with knowledge of the law and given the opportunity to use their paralegal skills, the farmers developed a powerful voice in their own campaign. Because they clearly understand their rights and are able to articulate them, they are emboldened to face various government agencies and demand what is due them. The farmers also learned that legal action can open avenues for the state to respond to extralegal modes of struggle: Having their case in the Office of the President set the stage for Ramos to act, but it was their hunger strike and the public outcry it produced that forced him to rule in their favor.

But the Mapalad case shows that it is not enough to have laws on your side, even with the possession of legal knowledge and support combined with successful mobilization and public-relations strategies. The law is a double-edged sword: It protects and advances the interests of the poor and implements reforms, but it also preserves the status quo and perpetuates the interests of the elite. How can the interests of the poor be advanced if the legal system is caught in the claws of the rich?

The Mapalad farmers' struggle reveals the corruption and bias of the entire Philippines justice system. The Supreme Court bent over backwards to accommodate the interests of rich landowners such as the Bukidnon governor and the Quisumbings but, in an obvious cover-up, became a stickler for rules and technicalities when deciding against the farmers. In the Philippines, it is more expedient to sacrifice the rights of the poor than to trample on the claims of the powerful. Traditional and elite politics permeate every corner of the government and legal system, threatening social justice measures like agrarian reform. The struggles of the Mapalad farmers and other marginalized groups cannot be separated from the larger effort to reform the legal system to better safeguard the delivery of justice in the Philippines. ❖

## What Does “International Justice” Look Like in Post-Genocide Rwanda?

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doing more to advance government propaganda than the cause of justice.

Such harsh criticisms of the Tribunal have widespread influence among the public, particularly because survivor groups dominate state-controlled radio and television, the most important means of communication in Rwanda. There are two written bulletins published by private groups (one of which is my organization, LIPRODHOR) that inform the Rwandan population on the functioning of the Tribunal. But with half the population illiterate, most Rwandans know little about the real work of the Tribunal.

The negative image of the Tribunal undermines Rwandans’ hope for justice in general, and international justice in particular. As a consequence, in the long run we may be more prone to take matters into our own hands and repeat the sort of violent human tragedy that brought the Tribunal into being in the first place. Particularly in our country, with its history of impunity, it is not possible to separate justice and respect for human rights.

The Tribunal can make a difference for the future of human rights in Rwanda by exposing the truth of the genocide: It was not a result of ancient, tribal hatred, but rather a carefully planned exploitation of ethnic differences by rulers seeking to hold onto their power. With this truth, we may lay the groundwork for reconciliation, and through reconciliation, we can build understanding of each other’s human rights.

Yet today, bitter perceptions among the public are severe enough to threaten the continued existence of the Tribunal. What saves it is Rwandan indifference. Victims of the genocide are much more concerned about what

is happening in Rwandan courts, where over 125,000 detainees are held, the vast majority of those suspected of participation in the killings. These cases are more personal since the accused are those whom the victims saw breaking into their homes with machetes and clubs, not the masterminds who schemed to “leave none to tell the story” in the distant state offices. Furthermore, unlike the Tribunal, the national courts compensate survivors for material losses.

To gain legitimacy in Rwanda the Tribunal needs to improve its work and efficiency while ameliorating its image. This is not to say that it should cave in to government and survivor-group criticism; it should do nothing that would threaten its independence and pursuit of justice. But it does need to improve its communication strategies with the Rwandan people to counter misperceptions of its role, procedures, and philosophy and to let the importance of its work be known. The longer the Tribunal keeps a distance from the people, the less it will appear to be serving the interests of Rwandans.

This will not be an easy task. Post-genocide Rwandan society is deeply divided. The war left behind not only chronic poverty, family dislocation, ethnic hatred, and trauma, but also a widespread legacy of negativism from which the Tribunal likely suffers. Even local human rights activists are confronted by the accusing fingers of their compatriots asking, “What did you do during the genocide when innocent people were being butchered?” Disillusionment mingled with trauma can constitute a great obstacle to any initiative, no matter how well intentioned. No institution can be expected to gain support from all strata of the population. Still, efforts must be made. If the Tribunal were to overcome these challenges, it would show that international justice can be more than just rhetoric. ❖

## Resisting Litigation in Umm El-Fahem

(continued from page 19)

Israeli court would accept such a petition. Although many of Umm El-Fahem’s leaders frequently invoke human rights language, and international law reflects Palestinians’ notions of justice better than Israeli law, human rights does not resonate with the average person in the community. For this reason, the political value of a human rights case would have been as minimal as a case tried within the Israeli legal system.

Whether national or international laws are applied, litigation cannot mobilize communities when grounded in an alien legal logic. And, generally speaking, litigation can foster an overreliance on indirect intermediaries such as human rights organizations, and displace direct popular struggle against the state as the primary means for achieving social justice. In the absence of litigation, the activists of Umm El-Fahem have been prompted to engage successfully in grassroots struggle, using modes of presentation that allow a clearer articulation of their interests. ❖

## Interview with Ndubisi Obiorah

*Senior legal officer, Human Rights Law Service (HURILAWS), Nigeria*

**Human Rights Dialogue:** In your experience, when is litigation an effective strategy to address human rights violations?

**Ndubisi Obiorah:** The context usually determines this. But because litigation is excruciatingly slow, we try to avoid it if we can. Litigation is typically a last resort. First we intervene with government officials, local or traditional authorities, state security forces, community leaders, and private-sector leaders.

In the case of the January 1998 Mobil oil spill that damaged the fisheries of the Ibeno community in south-eastern Nigeria, we first wrote letters to government officials and the oil company. However, they did nothing to help, and when the security forces attempted to intimidate Ibeno community leaders, we saw no choice but to sue immediately. Mobil's top-notch lawyers are now prolonging the case by any means possible. We expect to spend one or two years in preliminary appeals, another year or two in the substantive trial, and then another couple of years in appellate proceedings.

Human rights litigation is most effective when it can achieve the immediate, practical results desired by the plaintiff. For instance, litigation in Nigeria has helped indigent criminal suspects in long-term detention without trial to get out of prison and receive compensation.

Some human rights violations, such as female genital mutilation (FGM), are better addressed by a combination of approaches. If human rights lawyers sued the government for failing to protect young girls, it might have very limited immediate and direct impact on the victims. If we wanted to sue the parents or the circumcisers, it would be difficult because Nigerian jurisprudence on standing to sue is

restrictive, and it would also be hard to find a willing plaintiff. Rural society in Nigeria is extremely patriarchal, and traditional culture emphasizes filial obedience. It is commonly believed that death or disability as a result of FGM is caused by promiscuity of the victim or her mother. Also, some women's rights groups see litigation as too adversarial to be effective and are skeptical of its utility; they fear litigation would only serve to drive female circumcision underground. Social advocacy efforts in the rural communities where the violation occurs are more effective in the long run.

One significant advantage to litigation is the media coverage it attracts. Naming and shaming violators can end unjust situations. Since Nigeria moved toward democratic civilian rule in 1999, the press is particularly likely to cover human rights abuses by the state security forces or the repression of opposition politics. The Nigerian media paints human rights lawyers as "white knights" who come to the rescue when, for example, students face disciplinary proceedings by university administrators for participating in anti-government demonstrations. Such coverage has led to greater public awareness of human rights among Nigerians and encouraged poor people, particularly those who are literate, to approach HURILAWS for legal assistance.

**Dialogue:** In your experience, is there adequate representation of the interests of those whose human rights are being defended?

**Obiorah:** It is often the case that lawyers drive the litigation strategy where the litigant is poor, ignorant, and dependent upon the lawyer's goodwill or access to donor funding. Disagreements between claimants and

counsel are surprisingly rare, which may be due to deference to the counsel's legal skills. Sometimes the priorities of victims of human rights abuses take a backseat to a human rights group's political agenda. In one case, a

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ONE SIGNIFICANT ADVANTAGE TO LITIGATION IS THE MEDIA COVERAGE IT ATTRACTS. NAMING AND SHAMING VIOLATORS CAN END UNJUST SITUATIONS.

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victim of domestic violence by her late husband's relatives received legal assistance from an NGO. The NGO filed a lawsuit seeking various remedies, but focused the case on securing a declaration that customary inheritance law in southeastern Nigeria was discriminatory against women and therefore unconstitutional. While this is a laudable cause, it compromised the victim, who was primarily interested in recovering family assets seized by her husband's relatives. The client was thus reduced to no more than a nominal plaintiff or cause—a guinea pig, in effect.

As I mentioned, the media's coverage of litigation can be helpful. However, a major problem in human rights litigation in Nigeria is the practice of some NGOs' filing cases for the purpose of generating media attention rather than prosecuting the case to judgment or representing the interests of the plaintiffs. Preliminary proceedings are heavily promoted but, as the media spotlight inevitably shifts, these NGOs lose interest in litigating the case. After several inconclusive court hearings, such cases are usually dismissed.

In one situation, an activist was on trial for an offense which at that time could have brought a death sentence in Nigeria. His counsel suddenly withdrew from the case, without the activist's knowledge or consent, alleging

bias on the part of the judge based on some, in my opinion, innocuous, although impolitic, remarks. It later surfaced that the withdrawal had been dramatically staged to attract media attention to supposed judicial bias against members of the attorney's NGO. Such practices are a breach of legal ethics and are inimical to the credibility of human rights litigation and the human rights community in Nigeria. But they do happen.

When rural people come to HURILAWS, we make sure that litigation is their last resort. If we go to court, we foster our clients' sense of involvement and control, keeping them informed and consulting them on proposed steps. Above all, we do not put our political agenda ahead of the victim. When we decide to advance a cause by "strategic impact litigation," we use nominal plaintiffs who are human rights activists, social reformers, opposition politicians, or even our own staff members. In such situations, the plaintiff is well informed and willing to participate in a strategic impact case in order to further our social justice goals.

*Dialogue:* Do the people you serve understand your work as "human rights litigation" or just "litigation"? Do they understand their struggles to be international human rights struggles?

*Obiorah:* Many understand our work in representing them in court as human rights litigation. In advising victims of human rights abuse, we always inform them that their rights are guaranteed under the African Charter on Human and Peoples' Rights as well as the Nigerian Constitution. Those with a higher level of education have a greater opportunity to know that they have rights described in international treaties. For the urban educated with access to mass media, "human rights" and "democracy" are a part of daily discourse; this is in part due to Nigeria's traumatic recent past. Of course, this is much less so for the rural poor. But in troubled areas such as the Niger Delta where many human rights abuses occur, the level of awareness is higher than in other parts of Nigeria.

*Dialogue:* What is the impact of human rights litigation for the people whose rights are being defended? Does it help them to achieve social justice?

*Obiorah:* Unfortunately, some claimants are disappointed by human rights litigation because it does not provide comprehensive solutions to problems of social justice, which require a combination of strategies such as public education and community outreach. Claimants are also frustrated by the excruciatingly slow pace of proceedings and abstract legal technicalities.

Nevertheless, if we keep in mind the limits of human rights litigation, it can be a powerful force for good. Human rights litigation can help parties to become more aware of human rights, if only by frequent association with human rights activists in the course of the litigation. Participating in litigation can also help strengthen community solidarity. For instance, a group of evacuees from Maroko, a squatter settlement on the outskirts of Lagos that was demolished in 1991 by the state government, set up a community association initially for the purpose of documenting legal claims for litigation. This association is now functioning on more levels and is an asset to the community. ❖

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