

Eight Perspectives on *Yvon Neptune v. Haiti*

By JENS IVERSON*

I. Introduction

A. Purpose

The purpose of this article is to examine a recent decision by the Inter-American Court of Human Rights (“Court”), *Yvon Neptune v. Haiti*¹ (“Decision”) from a number of complementary viewpoints. In doing so, I hope the article can be of use to a variety of groups, and help those groups to understand and work with each other more successfully.

Yvon Neptune v. Haiti is noteworthy in a number of respects. It is the only available final decision from the Court regarding human rights violations in Haiti.² The Petitioner, Yvon Neptune, was the Prime Minister of Haiti from 2002-2004.³ He was also one of scores

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1. Case of *Yvon Neptune v. Haiti*, Merits, I/A Court H.R. Reparations and Costs, Series C No. 180 (Judgment of May 6, 2008), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.doc [hereinafter Decision].

2. *See* all jurisprudence from the Court regarding Haiti, *available at* http://www.corteidh.or.cr/pais.cfm?id_Pais=22&CFID=559122&CFTOKEN=95363513.

3. Decision, *supra* note 1, ¶¶ 5, 9.

of victims of detention without due process, along with other of political opponents of the Interim Government of Haiti ("IGH").⁴ His detention was nominally based upon human rights abuses he had allegedly committed.⁵ Thus in this case, human rights rhetoric was not only a shield against state power, but also a sword used by the state.

Yvon Neptune's 25-month detention was found to be in violation of eleven provisions of the American Convention on Human Rights ("American Convention") by the Court.⁶ The Court determined that Haiti's substandard judicial processes and conditions of detention amounted to human rights violations, and ordered Haiti to provide not only individual reparation and satisfaction but also system-wide reform of its judiciary and detention system.⁷ Whether Haiti will ultimately comply with the decision remains to be seen, although in the meantime it is clear they have done nothing.⁸ The degree to which pervasive, systematic human rights violations continue will rely on a variety of actors. All of these actors are part of the story of this case. At least some of these actors will be considered in this Commentary.

B. Roadmap

Parts II and III will introduce the Inter-American Human Rights System and the Haitian context for the Decision, respectively. Part IV briefly outlines the procedural history and outcome of the case. Parts V through XII will examine the case from a variety of perspectives. Parts V, VI, VII, and VIII will look at the significance

4. See *inter alia* Liste Partielle des Militants du Parti Politique Fanmi Lavalas Illegalement Arretes Sous le gouvernement Alexandre/Latortue et Encore Detenus Arbitrairement, <http://www.ijdh.org/pdf/headline1-10-07.pdf> (last visited Feb. 16, 2009); Amnesty International Urgent Action AMR 36/008/2005, July 25, 2005, available at <http://www.amnesty.org/en/library/info/AMR36/008/2005/en> (last visited Feb. 16 2009); Amnesty International Report AMR 36/003/2006, Jan. 10, 2006, available at <http://www.amnesty.org/en/library/info/AMR36/003/2006/en> last visited Feb. 16, 2009; Amnesty International Report AMR 36/010/2006, (Sept. 1, 2006), available at <http://www.amnesty.org/en/library/info/AMR36/010/2006/en> (last visited Feb. 16 2009); and Amnesty International Urgent Action AMR 36/002/2006, Jan. 6, 2006, available at <http://www.amnesty.org/en/library/info/AMR36/002/2006/en> (last visited Feb. 16 2009).

5. Decision, *supra* note 1, ¶ 8.

6. Decision, *supra* note 1, ¶ 192.

7. *Id.*

8. Communication from Brian Concannon, Mar. 9, 2009.

of the Decision to Neptune, to others incarcerated in Haiti, to Haitian activists and attorneys, and to Haitian government officials, respectively. Part IX looks at the virtual clinic model from the perspective of U.S. law students, and Part X examines the virtual clinic model for human rights organizations. Part XI addresses the significance of the Decision for foreign governments and international agencies, while Part XII discusses the importance of the Decision for the Inter-American Human Rights System more generally. The Comment concludes in Part XIII with a review and an analysis of options to move forward.

II. A Very Brief Introduction to the Inter-American Human Rights System

The Court was only able to come to its determination in *Yvon Neptune v. Haiti* after the sustained efforts of Haitian and U.S. attorneys, activists, law professors and law students, and of course Neptune himself. Survivors of human rights abuse cannot simply file a complaint with the Court – for survivors, the road to the Court begins elsewhere, and requires a minimal understanding of the Inter-American Human Rights System.

There are two bodies in the Inter-American Human Rights System charged with promoting and protecting Human Rights. The 1969 American Convention established the Court and gave additional responsibilities and capacities to the Inter-American Commission on Human Rights (“Commission”),⁹ which was established a decade earlier.¹⁰ The Commission receives petitions alleging human rights violations, and may submit cases to the Court. If the Commission submits a case to the Court, the Commission appears before the Court to litigate the case.¹¹

The best guide for petitioners before the Commission can be found in the Rules of Procedure of the Inter-American Commission on Human Rights (“Rules”), particularly Title II.¹² Petitions before

9. Organization of American States, American Convention on Human Rights art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 99 (1969); see generally American Convention on Human Rights Part II.

10. Inter-American Commission on Human Rights, <http://www.cidh.oas.org/what.htm> (last visited Feb. 7, 2009).

11. American Convention on Human Rights, *supra* note 9, art. 57.

12. Available at <http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm>, (last visited Feb. 7, 2009) [hereinafter Rules]; see also GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum

the Commission must allege that a member state of the Organization of American States ("OAS") is responsible for a human rights violation. The human rights violation alleged must violate the 1948 American Declaration of the Rights and Duties of Man, the Convention (when the Member State involved has ratified the Convention)¹³ or "other applicable instruments[.]"¹⁴ The petition must demonstrate that domestic remedies have been exhausted or that further pursuit of domestic remedies would be futile.¹⁵ The petition must be filed within six months of the exhaustion of remedies or, if futility is alleged, within a reasonable amount of time since the alleged violation has occurred.¹⁶ All other technicalities described in the Rules must also be complied with, including the use of one of the four official languages¹⁷ and the relevant information regarding the petitioner and the alleged violation.¹⁸

Assuming the petition is successful and the violation is not resolved, the Commission may submit the resulting case to the Court.¹⁹ If, after following the Rules of Procedure of the Court,²⁰ the Court finds that a right or freedom guaranteed by the Convention has been violated, the Court will issue a ruling that ensures the enjoyment of the right or freedom and, if appropriate, ensures remedy and compensation to the injured party.²¹ The judgment of the Court is final and not subject to appeal.²² States Parties to the Convention must comply with any judgment of the Court in a case in which they are a party.²³

ed., Transnational Publishers, Inc. 3d ed., 1999).

13. See Rules arts. 49-50.

14. *Id.* at art. 27.

15. *Id.* at art. 31.

16. *Id.* at art. 32.

17. *Id.* at art. 22.

18. *Id.* at art. 28.

19. American Convention on Human Rights, *supra* note 9, art. 61.

20. Rules of Procedure of the Inter-American Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 145 (1992) available at <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm> (last visited Feb. 7, 2009).

21. American Convention on Human Rights, *supra* note 9, art. 63.

22. *Id.* at art. 67.

23. *Id.* at art. 68.

III. A Very Brief Introduction to Haitian Politics and Geopolitics

Aside from attorneys, activists, law professors and law students, two other actors are important to understand the political backdrop of the case: Haitian government officials and foreign governments. Haitian politics is not a simple matter; nor is it a pleasant one. Many approaches to analyzing a legal decision would purposefully eschew any political analysis. Many authors, familiar with the vehemently held opinions by many with regards to Haitian political issues, would avoid any comment so as to avoid charges of bias or failing to treat a matter in adequate depth. To understand the IACHR findings regarding former-Prime Minister Neptune as well as the allegations against him, however, a brief tour of the political terrain may be helpful.

Haiti is the poorest country in the western hemisphere. Haitian poverty is deeply rooted in the history of Haitian politics and foreign relations. The successful rebellion against French colonialism and slavery was not rewarded by recognition by the United States (the only other independent state in the Western Hemisphere) or by European colonial powers. France only ceased to threaten Haiti's independence and offer recognition after payment for the loss of property caused by the liberation of French slaves. That payment caused crippling debt, which continued into the mid-twentieth century. Domestically, the promise of liberty quickly turned to domestic tyranny, as Haiti was ruled largely by a succession of unelected military rulers, broken primarily by U.S. occupation from 1915 to 1934.

In 1990, Jean-Bertrand Aristide was elected and, after being ousted by a military junta from 1991 to 1993, his populist government disbanded the military and pursued a wide-ranging anti-poverty program. The first democratic transition between elected Presidents in Haiti's history occurred in 1996. Haiti looked like it might become a more stable country. On 20 March 1998, Haiti accepted the jurisdiction of the Court. This period was not without controversy. For example, the 2000 election was claimed by some to be flawed.²⁴ In addition, the government during this period faced

24. See Standards Urged for Community of Democracies: Letter to Convening Countries of the Community of Democracies, (Aug. 8, 2001), available at <http://www.hrw.org/en/news/2001/08/08/standards-urged-community-democracies> (last visited Mar. 1, 2009). But see *Option Zero In Haiti*, New Left Review 27, 37-9 (2004), available at <http://www.ijdh.org/pdf/NLRart.pdf> last

allegations of not responding adequately to crimes committed by government supporters.²⁵

Neptune began his term as Prime Minister of Haiti on 15 March 2002 as a member of the ruling Lavalas Party. On 29 February 2004, rebel forces made their way to the capital, and within days the government was overthrown. On 12 March 2004 the new President Boniface Alexandre proclaimed Gerard Latortue the new Prime Minister.²⁶ The IGH arrested hundreds of Lavalas politicians. Neptune cooperated with the transition, but was forced into hiding due to threats against his life. On 27 June 2004, hearing that an arrest warrant had been issued against him, out of respect for the law and as a model for others, Neptune turned himself in to the police.

IV. Case History

This section will describe in more detail the case history of the Decision and the outcome of the case. It will not go into complete detail as to the procedural history of actions within the domestic Haitian legal system, instead focusing on the Inter-American Human Rights System, which is the primary focus of this Commentary.

Before beginning with the procedural history, it is worth looking at a few of the underlying facts of the case, as stated in the Petition and unquestioned throughout the process before the Commission and the Court.

A. Basic Facts

A rebellion broke out in early February 2004. By 7 February

viewed (Mar. 1, 2009). For a view which noted both the success of the election for the general Haitian population and flaws see The Organization of American States, The Election Observation Mission For The Legislative, Municipal And Local Elections In Haiti February To July, 2000 (Dec. 13 2000), available at http://www.oas.org/sap/docs/permanent_council/2000/cp_doc_3383_00_eng.pdf (last visited Mar. 1, 2009).

25. See, e.g., Haiti: Political Violence Condemned, Human Rights Watch, (Dec. 17, 2001), available at <http://www.hrw.org/en/news/2001/12/17/haiti-political-violence-condemned>, (last visited Mar. 1, 2009). The former elite displaced by the elected government were, predictably, a large source of allegations against the government, see *Option Zero In Haiti*, New Left Review 27, 37-9 (2004), available at <http://www.ijdh.org/pdf/NLRart.pdf> (last visited Mar. 1, 2009).

26. Latortue, in turn, installed a new judicial elite. On December 9, 2006, he fired five members of Haiti's highest court, the *Cour de Cassation*, and replaced them without following the procedures mandated by the Haitian Constitution.

2004, an anti-government group named RAMICOS took control of the police station in St. Marc, near the capital city, Port-au-Prince.²⁷ On 9 February 2004, Prime Minister Neptune briefly visited St. Marc to encourage the police to establish order and defend the city from forces heading towards St. Marc and Port-au-Prince.²⁸ Two days after the visit, police and civilians entered La Scierie, a RAMICOS stronghold, which touched off violence throughout the city. The ensuing conflict left at least three dead, and many cars and houses burnt.²⁹ Neptune maintains he had no knowledge of the operation before it happened, and never received a report from the police or any government body.³⁰

Shortly after the fall of the government on 29 February 2004, a 2 March 2004 press release was issued by a group called NCHR-Haiti claiming that 50 people were killed in La Scierie on 11 February 2004, and called for Neptune's arrest.³¹ Journalists and human rights workers who visited the area after the alleged events contradicted NCHR-Haiti's allegations, specifically finding only a few bodies.³² But NCHR-Haiti, with financial support from the government of Canada, aggressively pushed for a criminal prosecution of Lavalas supporters it accused of being involved in the La Scierie incident. NCHR-Haiti's parent organization, NCHR-New York, eventually criticized NCHR-Haiti for its role in the case, and forced it to change its name. The Executive Director of NCHR-New York stated "The sum total of the lack of action by Haitian government authorities on this case because of inertia, incompetence, omission or ill will amounts to a travesty of justice."³³

Police detained Neptune in the Haitian National Penitentiary ("Penitencier National") on 27 June 2004.³⁴ Article 26 of the Haitian

27. Decision, *supra* note 1, ¶ 8, citing Application submitted by the Commission, ¶¶ 25-28 (folios 107 and 108).

28. *Id.*

29. *Id.*

30. Petition to the Inter-American Commission on Human Rights regarding Yvon Neptune, Apr. 20, 2005 ¶ 11 available at http://ijdh.org/pdf/YvonNeptuneIACHRPetition_ENU.pdf (last visited Apr. 4, 2009) [hereinafter Petition].

31. Petition, ¶¶ 12, 15.

32. *Id.* ¶ 12.

33. Press Release, National Coalition for Haitian Rights, NCHR-Haiti Does Not Speak for the National Coalition for Haitian Rights (NCHR) (Mar. 11, 2005). NCHR-Haiti changed its name to the National Network for the Defense of Human Rights.

34. Decision, *supra* note 1, ¶ 9.

Constitution commands that a detainee be released unless a judge permits further detention.

B. Procedural History

On 20 April 2005, a Petition was filed on Neptune's behalf, over nine months after his incarceration. It alleged violations of multiple provisions of Articles 5 (humane treatment), 7 (personal liberty), and 8 (fair trial) of the American Convention.

On 4 May 2005, the Commission transmitted the Petition to the Haitian State, requesting a response in an abbreviated time due to the risk to Neptune's health posed by Neptune's hunger strike.³⁵ On 6 May 2005, the Commission called upon the Haitian State to "take the urgent measures necessary to guarantee the right to life, physical integrity and access to effective judicial protection and guarantees of Mr. Neptune."³⁶

On 12 October 2005, the Commission issued a Report, which concluded that it was competent to consider the Petition, that the Petition met the requirements set out in Articles 46 and 47 of the American Convention (including exhaustion of domestic remedies, timely filing, and stating of an appropriate claim), and declared the Petition admissible.³⁷ The petitioners were aided by the State's failure to respond to the Petition, which the Commission treated as a waiver of the claim of non-exhaustion of domestic remedies.³⁸ Even if there was not such a waiver, the petitioners had a strong argument that further actions would have been futile.³⁹ The Commission also declared that the facts alleged indicated possible violations of Articles 1 (obligation to respect rights) and 25 (the right to judicial protection) of the American Convention.⁴⁰

On 27 July 2006, Neptune was given a provisional release for reasons of health.⁴¹ This provisional release could be revoked at any

35. Report N° 64/05, Petition 445/2005, Admissibility Yvonne Neptune Haiti, ¶ 5 available at http://hastingshumanrights.org/documents/Neptune_PetitionForAdmissibility.pdf (last visited Feb. 12, 2009) [hereinafter Report].

36. Press Release, Inter-Am. Comm'n on Human Rights, IACHR Expresses Concern Over the Situation of Yvon Neptune (May 6, 2005), available at <http://www.cidh.org/Comunicados/English/2005/19.05.htm>.

37. Report, ¶ 4.

38. *Id.* ¶ 32.

39. See American Convention, Art. 46(2)(a).

40. Report, ¶ 39.

41. Decision, *supra* note 1, ¶ 57.

time. He has remained in a state of legal limbo ever since.

On 2 November 2006, at the invitation of the Commission, the petitioners wrote in support of the referral of the case to the Court. On 14 December 2006, the Commission referred the case to the Court, asking the Court to declare violations of several provisions of Articles 1, 5, 7, 8, and 25 of the American Convention and order Remedies.⁴²

On 13 April 2007, the Appeals Court of Gonaives ruled (“Appeals Court order”) that the case against Neptune must be dismissed for lack of jurisdiction.⁴³ Ordinarily, such orders are served within a few days. The order has never been served, leaving Neptune at constant risk of rearrest at the order of any politically motivated magistrate.

On 6 May 2008, the Court issued its Decision in the case of *Yvon Neptune v. Haiti*. It found the State of Haiti violated 11 provisions of the American Convention. Remedies provided by the Decision included the findings of the decision itself and the award of \$95,000 in damages and costs.⁴⁴ Included among the orders intended to guarantee non-repetition were the orders to end Neptune’s continuing judicial insecurity⁴⁵ and, significantly, to follow constitutionally mandated protections against political prosecutions of government officials⁴⁶ and to adopt a plan to reform the prison system so as to respect basic human rights guarantees within two years.⁴⁷

As of this publication, Haiti has done nothing to comply with the Decision, and the charges against Neptune remain in a state of limbo, not formally dropped but not apparently pursued.⁴⁸ In a 4 September 2008 letter from the Haitian Ministry of Foreign Affairs to the Court, Haiti did not indicate any intention to obey the Decision and worried about the encouragement it might provide to other detainees to petition the Court – stating that stating that the State of Haiti believes that the decision set an unfortunate precedent, one likely to destabilize the country.⁴⁹

42. *Id.* ¶¶ 1-2.

43. *Id.* ¶ 58.

44. *Id.* ¶¶ 159-69, 186.

45. *Id.* ¶ 192.

46. *Id.*

47. *Id.*

48. Interview with Brian Concannon, (Feb. 16, 2009).

49. “L’Etat haïtien croit cet arrêt est un malheureux précédent, propre à

V. The Significance for Neptune

The Decision has at least four areas of significance for Neptune: life, liberty, property, and reputation. First, Neptune survived his illegal detention. Second, the decision should give Neptune an increased reason to hope that he will be free from further detention without due process of the law, although this hope is limited by a reasonable fear of further detention by Haiti's refusal to effectuate the order of the Gonaives Appeals Court. Third, the State of Haiti has been ordered to provide financial compensation to Neptune. Fourth, the fact that no evidence was brought to support the allegations against him should help clear his name for those who remained in doubt.

Neptune did not die in prison, and he is no longer illegally detained. The first prospect seemed likely at points. Particularly during the periods when Neptune went on hunger strike,⁵⁰ when the prison officials killed prisoners in his prison,⁵¹ or when gunmen stormed the prison and kidnapped him,⁵² it was unsure whether Neptune would survive to see the slow processes of the Inter-American Human Rights System finish. His detention, deemed illegal by the Court,⁵³ has ended. Given the number of individuals who remain in detention without any judicial review of the charges against them, his release is very likely due in part to the case and affiliated efforts, including public pressure put on the IGH to release him.

As a practical matter, Neptune cannot be sure that the State of Haiti will not detain him on the same charges, particularly if the elected government is overthrown again, but also if any politically motivated magistrate wishes to move forward based on the formalistic excuse that it has not received legal notice that the charges have been quashed. Even if the Decision is given the binding effect that it is supposed to have by the State of Haiti, it is important to note that the Court is not a criminal court, and did not make a finding as to the underlying factual allegations against Neptune. Neptune, however, has a strong argument that the deficiencies of the previous effort to prosecute him should not be

déstabiliser davantage le pays le plus pauvre de l'hémiphère américain." Letter on file with the author.

50. Decision, *supra* note 1, ¶ 135.

51. *Id.* ¶ 137.

52. *Id.*

53. *Id.* ¶ 192.

without legal effect, and that no further efforts should be made to prosecute Neptune on this matter. Such a prosecution may not amount to a violation of *ne bis in idem* (the principle in civil law that largely mirrors the common law prohibition against double jeopardy), but any investigation would have to put together an extremely strong dossier to justify renewing criminal proceedings after two years of illegal detention from the last effort by the State of Haiti. Any action against Neptune would immediately come under close scrutiny by human rights groups and the Inter-American Human Rights System. The Decision limits the appropriate venue, which lessens the possibility of a politically motivated prosecution. The Decision also clearly states that prosecutions of “crimes” which do not exist in the penal code are impermissible. Finally, the compensation the State of Haiti is already obliged to pay Neptune and the negative publicity surrounding this prosecution presumably provides some disincentive to prosecute Neptune with anything less than an ironclad prosecution case. This is countered, however, by the reality that the Haitian Government continues to ignore the Decision and refuses to serve the Appeals Court order and remove Neptune’s ongoing legal uncertainty.

In addition to preserving his life and liberty, the Decision has a very specific importance to Neptune: It orders monetary compensation. The amounts ordered are not large by the standards of most U.S. attorneys, and are less than what was asked for, largely due to the lack of documentation presented to the Court.⁵⁴ Nonetheless, due to the Decision, the State of Haiti is obliged to pay Neptune \$10,000⁵⁵ for the expenses borne by his family during his incarceration,⁵⁶ \$50,000 for lost compensation,⁵⁷ \$30,000 in damages,⁵⁸ and \$5,000 is ordered for fees and costs,⁵⁹ for a total of \$95,000. This amount is not an unusual award from the Court.

Finally, the Decision goes some way to clearing Neptune’s name. This is greatly hampered, however, by his continued judicial insecurity. While again, the Court is not a criminal court and did not make a factual determination regarding the allegations formerly

54. For example, no documentation was provided regarding lost income (Decision, ¶ 162), costs (¶ 161) legal costs (¶ 186).

55. All figures are in United States Dollars.

56. Decision, *supra* note 1, ¶ 161.

57. *Id.* ¶ 163.

58. *Id.* ¶ 168.

59. *Id.* ¶ 186.

laid against Neptune, the Decision nonetheless reveals the lack of substantiation presented to support the charges against Neptune. As argued in the submission from the Commission and noted by the Court, even after years of detention, “[t]he mental and physical elements necessary to establish Mr. Neptune’s criminal responsibility based upon a complicity theory remain entirely unclear.”⁶⁰ This issue may be of particular importance to Neptune, given his life as a politician and a public person.

Neptune has been reluctant to participate in public life due to his ongoing juridical insecurity.⁶¹ He lives in constant fear of rearrest on politically motivated charges if he again enters the public arena. In the end, the significance of the Decision to Neptune is yet to be determined. If the Government of Haiti drops all charges and Neptune’s rights and security are restored, the Decision will have brought provided Neptune with significant redress. Until that point, the promise of justice will remain fundamentally unrealized.

VI. The Significance for Others Incarcerated in Haiti

The Decision made factual findings and orders that have implications for those incarcerated in Haiti, well beyond Neptune who is now released. The most direct importance of the Decision for incarcerated persons is the Decision’s order to substantially improve the conditions of Haitian prisons. More indirectly, Neptune’s successful challenge of being detained without any ongoing judicial process may provide a model for others in a similar situation, or at least some reason to be hopeful. Finally, there may be some potential for creating a political push for more humane and effective criminal justice system within Haiti.

To begin to examine the situation for those incarcerated in Haiti in general, it is useful to look at the specific findings regarding Neptune’s conditions of confinement. The Court found it worth specifically noting that between 27 June 2004 and 10 March 2005, Neptune was imprisoned in a dark cement cell measuring 4.5 meters by 2.5 meters.⁶² The cell had no windows, and poor ventilation to reduce the stench from the walls contaminated by human waste.⁶³

60. *Id.* ¶ 46, citing Application submitted by the Commission, Dec. 14, 2006, ¶ 113 (merits file, Vol. I, folio 129).

61. *Id.* ¶ 178.

62. *Id.* ¶ 132.

63. *Id.*

Rats and insects infested the cell, particularly at night.⁶⁴ Neptune survived on the water and food his family brought him every day.⁶⁵ Due to the complete lack of security and widespread violence within the prison, he feared for his life every time he left his cell.⁶⁶ The Court found that the conditions of detention constituted inhuman treatment and violated Article 5.2 of the American Convention.⁶⁷

For many, prison conditions are much worse than those faced by Neptune. In most prisons in Haiti today, one will find extreme overcrowding, spreading disease, lack of bedding, poor ventilation, and food and water shortages.⁶⁸ The State of Haiti provides neither adequate medical care, nor the security needed to prevent outbreaks of violence.⁶⁹ The small percentage of the prison population who have been convicted of a crime are not separated from those who have not been convicted.⁷⁰

Fewer than 10 percent of those detained have been convicted of a crime.⁷¹ Many are imprisoned for purely political reasons.⁷² The median pre-trial detainee stays imprisoned for 20 months.⁷³ Courts have called the prison conditions inhuman, even likening them to conditions in a slave ship.⁷⁴ There is a nationwide bribery racket that requires payment for freedom.⁷⁵

The effect of the Decision should be to improve prison conditions. It specifically orders the State of Haiti to establish, within two years, a program of action to substantially improve the conditions of Haitian prisons.⁷⁶ The basis of this order is the duty of Haiti to develop and implement a prison policy that prevents critical situations that endanger the basic rights of detainees, particularly guaranteeing the life and personal safety of inmates and also to

64. *Id.*

65. *Id.* ¶ 133.

66. *Id.*

67. *Id.* ¶ 138.

68. *Id.* ¶ 137.

69. *Id.*

70. *Id.* ¶ 148.

71. Health & Human Rights Prison Project, p. 5, available at <http://ijdh.org/pdf/HHRPP.pdf> (last visited Mar. 1, 2009).

72. See generally http://www.ijdh.org/articles/article_political_prisoners.htm (last visited Mar. 1, 2009).

73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

76. Decision, *supra* note 1, ¶ 183.

ensure those deprived of their liberty have the conditions necessary to live with dignity.⁷⁷ While the Decision cannot physically force the State of Haiti to improve prison conditions, as a matter of law, it makes it clear that failure to improve prison conditions is a violation not only of the rights of detainees, but a violation of the State of Haiti's treaty obligation to respect the decisions of the Court.

Just as Haitian prison conditions are inhumane, the state of the Haitian criminal justice system is deficient.⁷⁸ As demonstrated by the percentage of detainees who have not been convicted of any crime, the right to a speedy trial is routinely violated.⁷⁹ Simply put, unless the physical, technical, and human infrastructure of the criminal justice system is radically improved, there will be no domestic check on wrongful detention. Preventing corruption and establishing the rule of law is essentially impossible in such conditions. Indeed, only the irregular provision of food and water keeps many detainees alive, and many detainees are only released through the extrajudicial discretion of those running detention units.

Many Haitians do not extend great support for expenditures upon the prison system or the judiciary. Given the inhumane conditions which many Haitians endure, it is perhaps understandable that humane prison conditions are not always first priority. Government officials, donors, attorneys, law students, and activists need to be aware of this lack of support if they are to help the incarcerated.

Incarcerated people are in one of the weakest positions in society. This weakness can only be overcome if the goals of ending corruption and establishing the rule of law are valued and some measure of empathy and solidarity with those detained is achieved. Neptune's example of someone illegally detained and eventually freed through the rule of law may be useful for those advocating for the rights of detainees.

VII. The Significance for Haitian Activists and

77. *Id.* ¶ 182.

78. Regarding the systematic problems with the Haitian criminal courts, see Brian Concannon Jr., *Beyond complementarity: The International Criminal Court and national prosecutions, a view from Haiti*, COLUM. HUM. RTS. L. REV., v. 32 no. 1 (Fall 2000), pp. 209-16.

79. See Dr. Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement of the Judiciary System in Haiti*, HASTINGS INT'L & COMP. L. R. (2009).

Attorneys Advocating on Behalf of Detainees

Haitian activists and attorneys advocating on behalf of detainees can, if it seems most like the most appropriate use of limited resources, use the Decision both as a model for further legal actions and as a political tool.

The Decision found that the State of Haiti violated eleven provisions of the American Convention. Three of those provisions are worth particular notice:

Article 5.2 states in full: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Article 5.4 states in full: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons."

Article 7.5 states in pertinent part: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings."

These three provisions are violated for the vast majority of Haitian detainees. Given proper documentation of the violation of these provisions through affidavits, as well as an overall description of the situation of the detainee, Haitian activists and attorneys should be able to file petitions before the Commission using the Petition on behalf of Neptune as a template. Specific reference to the Decision may be helpful, as the Court has already found those specific conditions and facts to constitute a violation. As occurred with Neptune, the Commission may identify additional violations of the American Convention based on the overall description provided. In addition, having the Commission contact the State of Haiti regarding a particular detainee, which is standard practice after the Commission receives a well-formed petition, may be enough to encourage the Haitian criminal justice system to move a detainee from obscurity into a more timely evaluation of whether release is appropriate. Such a remedy is hardly a certainty, however.

The Decision also could be useful strictly on the domestic level. If Haiti fails to improve its prisons, particularly if it fails to even come up with a plan to improve its prisons as required by the

Decision within two years, activists for detainee rights can use the Decision as a tool to gain media attention and political support. The two-year anniversary of the Decision, 6 May 2010, should be kept in mind as a media hook and a campaign focus.

VIII. The Significance for Haitian Government Officials

Haitian activists may appear to be in conflict with government officials, who may frequently demand change and hold them to account. In fact, those who organize outside of the institutions of government for the human rights of detainees ultimately need Haitian government officials and civil servants who want to protect human rights in Haiti to be able to do so. Haitian government officials may need the visible pressure on the outside to justify otherwise politically unpopular expenditures on prisons and the criminal justice system. Similarly, the Decision arguably gives political cover for reform, allowing some blame for the expense of improving the prisons and courts to be shifted to the Court and to foreign pressures generally. In turn, groups such as the Bureau des Avocats Internationaux ("BAI") can be started or funded by the Government if the group feels that does not compromise their independence.⁸⁰ The BAI was started with government funding, and led the investigation and prosecution of the *Raboteau* Trial, one of the most notable important human rights cases in the Americas over the last two decades.

Neptune's case holds particular interest for Haitian government officials. Neptune, after all, is himself a former government official. His arrest may reasonably be seen as a political prosecution of a political actor, one that resulted from a loss in political power. Haitian government officials are more likely to be themselves subject to political prosecutions should they fall out of power. On the other hand, Haitian government officials of good will may reasonably wish an independent judiciary to have the capacity to check corruption of other Haitian government officials. The relationship between government officials and the criminal justice

80. For more on the BAI, see Brian Concannon Jr., *The Bureau des Avocats Internationaux, a Victim-Centered Approach*, in EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS, (David Barnhizer ed., 2001); Ken Bresler, *If You Are Not Corrupt, Arrest the Criminals: Prosecuting Human Rights Violators in Haiti*, Case Study at Harvard's Kennedy School of Government (Spring 2003) available at <http://law.marquette.edu/s3/site/images/haitiCaseStudy.pdf> (last visited Mar. 1, 2009).

system has the inherent tension between preventing the judiciary from being a tool of corrupt power and allowing the judiciary to keep the government free from corruption.

In theory, one useful tool to manage this tension is highlighted by the Decision: the High Court of Justice. The High Court of Justice is a special court formed by the legislature, similar to impeachment in the United States. The Haitian Constitution requires regular courts to wait until the High Court of Justice convicts an individual before trying a high public official, a procedure that was not followed in Neptune's case.

In reality, the High Court of Justice has never been formed, existing only in an untested provision of the Haitian Constitution. There are no established rules of procedure, no jurisprudence, and no institutional principles or experience that would guide such an experience. Currently, the Senate has so many empty seats it can hardly create a quorum. If this tool is used, it will be need to be monitored closely.

Finally, given the possibility of political prosecutions, all government officials who might be on the receiving end of a prosecution should at a minimum take some interest in improving prison conditions. The tension described above provides no reason not to improve prison conditions. If not because it is a good cause or for the votes of the friends and families of detainees, some government officials should improve prison conditions out of simple, long-term, self-interested prudence. Those interested in institutionalizing protections for human rights should consider steps such as ratifying relevant human rights treaties and joining institutions such as the Caribbean Court of Justice.

IX. The Significance as a Model for U.S. Law Students - The "Virtual Clinic" Model.

For U.S. law students, the interest in working on international human rights far outstrips the opportunities provided. It is certainly worthwhile to focus on human rights problems within the United States, but opportunities to work on human rights problems abroad, often referred to as international human rights problems, are also worthwhile. Human rights clinics do exist, but they are often small, and mostly in elite institutions. Direct observation of international human rights problems is expensive, often involving travel. In addition it often requires overcoming language barriers, cultural barriers, and ignorance about the context of the human

rights problem.

At the University of California, Hastings College of the Law ("Hastings"), there was a depth of professorial knowledge of international human rights problems, and a relationship with Haitian attorneys and U.S. attorneys who focus on Haiti through the Hastings to Haiti Partnership. Hastings also has a strong range of clinical programs, but at that point lacked a clinical program focused on international human rights violations.

The effort, which eventually resulted in the filing of the Petition on behalf of Neptune, was originally called the Virtual Human Rights Clinic ("VHRC"). The VHRC was "virtual" because unlike a normal clinic, the students, lead attorneys, and client never met in person, relying on conference calls and email to coordinate the creation of the Petition and supporting Declarations. It had no physical address, no office space, and no exclusive facilities aside from a website created and funded by the students. It was student-led, with only minimal supervision by Hastings professors. The VHRC had no template for the Petition it wished to author. Most difficult was the challenge of institutional durability faced by many student led organizations - that as students graduated or moved on to other projects, the effort would collapse. This challenge was addressed due to the ability of the VHRC to partner with institutions that had already proven their durability, namely the Institute for Justice and Democracy in Haiti ("IJDH") and the BAI. The IJDH and the BAI were critical in providing direction for the effort. Together, these groups have helped victims prosecute human rights cases, defended detainees, and raised public consciousness on Haitian human rights issues for over a decade. The students who began the VHRC knew that if they could help to start the ball rolling, begin the chain of legal proceedings that eventually led to the Decision, that the IJDH and the BAI could continue the process. In many ways, the virtual clinic model may be closer to a "collective externship" than a traditional clinical education, with students receiving, at the most, independent study credit and the low-level of supervision typically associated with independent study.

The VHRC also launched a concerted media effort, realizing that international attention could help protect Neptune while in prison, and increase his chances for eventual release. A website was launched, and news bulletins were released and published the day

of filing the Petition before the Commission.⁸¹ Local and national radio and national television interviews were arranged.⁸² On 6 May 2005, after an initial radio blitz, and less than three weeks after the filing of the Petition, Amnesty International called upon its members to write the Prime Minister, Justice Minister and Public Prosecutor to express concern regarding Neptune's illegal detention and threatened health while in prison.⁸³

The "virtual clinic" model overcomes many of the barriers that may keep many law students from gaining experience in international human rights work. By partnering the time, energy, and willingness to learn of the students with the technical expertise of the professors and the institutional permanence and practical knowledge of the institutions, the virtual clinic model made it possible for the different actors to achieve together what they could not achieve separately. In part because of the success of the VHRC, Hastings has expanded its clinical program to include an institutional human rights clinic, which is complimented by the student-led Hastings International Human Rights Organization ("HIHRO") (the current name for the organization, which began as the VHRC, then became the Hastings Human Rights Project for Haiti ("HHRPH")), as well as the HHP.

The virtual clinic model demonstrates that with the right amount of student energy and self-direction, cooperation with human rights institutions, professorial knowledge, barriers of cost and infrastructure can be overcome. U.S. law students can gain practical experience in the field of international human rights. Substantive human rights projects can be launched and successfully concluded. Solidarity across international borders can be increased.

The argument in favor of the virtual clinic model should in no way be read as an effort to diminish the value of a formal clinical program which works directly with clients and provides intensive professorial oversight; nor should it diminish the value of an individual externship with a human rights institutions. It is simply an alternative that interested U.S. law students and human rights

81. See Generally Hastings Human Rights Project for Haiti, <http://hastingshumanrights.org> (information regarding press outreach and supplementary information about the Decision and the VHRC).

82. *Id.*

83. Document - Haiti: Health Concern/Legal Concern, *Yvon Neptune*, AMNESTY INT'L, (May 6, 2005), <http://www.amnesty.org/en/library/asset/AMR36/004/2005/en/domAMR360042005en.html>.

organizations may wish to investigate. Organizations such as the IJDH that already partner with law schools are particularly well suited to take advantage of such an arrangement.

X. The Significance for Human Rights Organizations

Human rights organizations, even collectively, do not have the money, time, or physical infrastructure to adequately address human rights issues around the world. Internships or externships can help address the need, but they are not without costs in money, time and physical structure, even if they are more cost-efficient in some respects than hiring staff.

The virtual clinic model has potential advantages for human rights organizations. Instead of recruiting, housing, training and monitoring one intern, it allows human rights organizations to harness the efforts of a group of self-motivated and self-organized law students, often through a single point of contact. If properly managed, the human rights organization will only be associated with efforts that further its mission.

The virtual clinic model also can have an advantage by creating an institutional memory that can be transmitted efficiently from student to student, rather than having to educate each intern from scratch each time. This is particularly important when the subject matter has a long, steep learning curve, such as Haitian human rights efforts. Some law students may work for three years at a virtual human rights clinic, which is rare for an internship.

The virtual clinic model also has potential dangers for human rights organizations. Without a group of students that are self-motivated enough to organize and direct themselves, little may be accomplished. The effort in setting up the group may be wasted for some organizations. Students will inevitably leave, and new students may have other interests than the focus of the human rights organization. Even with a group of students that remain interested in the focus of the human rights organization over multiple years, a single human rights organization may not be able to come up with projects on a schedule that matches the annual rhythm of a law student's interest and time.

Ideally, human rights organizations and law schools could have enough overlapping relationships that a friendly competition could arise. Some schools, formal clinics or virtual clinics (perhaps in the

form of student clubs⁸⁴) could win the reputation of being able to direct themselves on worthwhile projects for human rights groups. Human rights groups, in turn, could strive to earn the reputation of supplying interesting, rewarding projects.

This kind of competition could arise without any center, or it could arise through a centralized coordinating organization that centralized proposals, or through several centers. This kind of competition will only arise, however, once the model for the virtual human rights clinic becomes more widespread.

Human rights are inherently a good topic for the virtual approach. While all subjects, including human rights, are enriched by context and personal interaction, human rights as a concept is based upon the idea of universality and the enlightenment. While efforts to protect human rights may have a dark side,⁸⁵ most practitioners reasonably believe that there is far more to gain from the defense of human rights than is lost. The vehicles for human rights protection, unlike, say tenant defense or local labor law violations are often broad in scope. Thus, there exists the Inter-American system, the European system, the African system, and UN systems, among others.

Of course, more abstract bonds of interaction can have problems with trust, miscommunication, and manipulation. To take an obvious example, in Haiti, where claims of human rights violations can be politically motivated, one can imagine anti-Lavalas and pro-Lavalas groups using willing students to line up on either side of a particular dispute. In such circumstances, there is the possibility that such efforts on behalf of human rights will be seen as manipulative or disingenuous, either not living up to the universal ideals held by the supporter of human rights effort, or showing how problematic those universal ideals can be in practice. There is no neat solution for this problem, but I believe that the more attention by people of good will that is brought to complex claims of antagonistic victimhood, the greater the likelihood of peaceful dispute resolution.

For those who are specifically focused on Haiti or on detainee rights, the Decision and the virtual human rights clinic model have a

84. At most law schools, student clubs or organizations are easy to form and qualify for low-level institutional financial support through student government or other means.

85. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

particular importance. U.S.-based, Haitian-focused organizations are already accustomed to managing communication across the great divides of wealth and culture between the (geographically proximate) United States and Haiti. Efforts such as the American Civil Liberties Union's National Prison Project are already working with partners across the country and overcoming institutional barriers to communication. Both types of organizations, those focused on Haiti and those focused on detainee rights, are well suited to exploit the virtual human rights clinic model and harvest the energy and intelligence of law students without physical, face-to-face communication. Both types of organization can cite the Decision in their work. Both types of organization can follow the specific tactic of filing a petition before the commission, using the Petition used in this case as a model if appropriate.

It is also important to note the follow-up work that human rights groups have already pursued on this specific case. Following the leadership of IJDH and the BAI to ensure compliance with the decision, organizations such as the National Lawyers Guild, the American Association of Jurists, the International Association of Democratic Lawyers, the New England Human Rights Organization, and others have reached out directly to the Haitian government as well as to foreign governments and regional groups such as the Caribbean Community.⁸⁶ These efforts are vital if the opportunity provided by the decision is to be realized.

XI. The Significance for Foreign Governments and International Development Agencies

For foreign governments and international development agencies ("Foreign Governments and Agencies"), simply identifying concrete problems to address can be a challenge. The Decision neatly describes and demonstrates one problem: the calamitous state of the Haitian criminal justice system, particularly its prison system and lack of judicial review of detention. Fixing this problem is central not only to good governance, but to addressing other important problems of disease and poverty. Prisons are centers for disease, and they usually thrust the families of prisoners even further into destitution. Fixing prison conditions are a distinct, achievable goal for Foreign Governments and Agencies. The Decision should focus their attention on this neglected problem.

86. Correspondence on file with the author.

Particular attention should be paid to the notorious Penitencier National.

The failings of the criminal justice system may seem like a purely domestic problem, but in fact is closely tied to many international objectives of Foreign Governments and Agencies. For example, organizations wish to work with a stable Haitian government, ruled by law, transparent and reliable in its procedures. Such a government is not only more likely to economically develop, but is also more likely to manage other problems of concern to Foreign Governments and Agencies including reducing international drug smuggling and large numbers of asylum-seekers and economic migrants. With the problem of a failed criminal justice system identified as an undeniable a legal fact, Foreign Governments and Agencies can be part of the solution, if they wish to be.

To start, Foreign Governments and Agencies can provide direct financial and technical assistance to the Haitian criminal justice system. It is important to note that “economic conditionality” should not be required for such aid, that is, there is no need to condition loans or grants in order to restrict other government expenditures to match the economic and financial policies of the foreign government or international development agency. Financial and technical assistance should not be seen as impinging on the economic sovereignty of Haiti by demanding a change in social services, welfare, or trade policy, as is often the case with economically conditioned aid. Instead, the agency or government can simply fund the construction of new detention facilities and courtrooms, provide technical training, and respond to the demand from local communities. This aid should, if possible, be in addition to aid already given to Haiti.

In addition, foreign governments and agencies can directly, or through funding other groups indirectly, monitor prison conditions, report on the state of the judiciary, and identify possible instances of political prosecution and imprisonment. This may be a continuation of an established practice, as in the case of U.S. State Department reports, or it may be an entirely new effort. Regardless, if a better functioning Haitian criminal justice system is important to the realization of the goals of foreign governments or agencies, they should be prepared to sustain such monitoring.

Whatever foreign governments and agencies attempt to heal what they identify as a sickened Haitian criminal justice system,

they should keep in mind the maxim “first, do no harm.” Haitians have welcomed [medical and other] assistance from other countries such as Venezuela and Cuba. But many are also understandably wary of interference with domestic issues after a history of enslavement, colonialism, exploitation, occupation, support of authoritarian regimes, and isolation of elected governments. Foreign governments and agencies should expect skepticism, and may have to earn good will over a period of decades if they wish to partner meaningfully with Haitians.

XII. The Significance for the Inter-American Human Rights System

Neither the Commission nor the Court has an enforcement mechanism in the sense of a police force or military. The only real enforcement mechanism is the Haitian government itself, which is bound by law to respect the decision, including monitor and report the situation. By requiring the Haitian government to report back, the Court constructively works with the Haitian government and encourages the Haitian government to work with detainees and their advocates.

It is in the interest of the Commission and the Court to have the decisions of the Court (such as *Yvon Neptune v. Haiti*) respected. One asset available to these institutions is permanency. Indeed, compared to the lifespan of a typical Haitian government, these institutions appear venerable and durable. This is only really an asset if decisions are allowed to build upon each other, creating a sense of time and history, sending the message that “naming and shaming” will continue for as long as it needs to, and that ongoing systematic human rights abuses will not be forgotten or ignored. Accordingly, the Commission and the Court should be open to further petitions or referrals of this nature, either regarding Haiti or regarding the human rights violations found in *Yvon Neptune v. Haiti* in other countries. The Commission and Court should also be willing to reference the case as precedent, and underline its importance. Finally, the Commission and Court should also be willing to issue new decisions if Haiti does not comply with the Decision if prompted by further petition or on its own action, as such noncompliance represents an ongoing violation of the American Convention.⁸⁷

87. Paragraph 191 of the Decision states as follows:

XIII. The Road Ahead

In many ways, the very fact that the Decision exists is representative of Haiti's fragile but real democratic transition. Prior to the establishment of democracy in 1990 and the acceptance of the Court's jurisdiction in 1998, the question of protecting human rights in Haiti through domestic and international legal processes would not have seriously arisen. After all, the Court cannot act without jurisdiction, and the domestic judiciary was largely powerless against dictatorship. If Neptune had died in detention, it's unlikely the process would have culminated in the Decision. Neptune survived in part due to international attention focused on his case. Under a dictatorship, he probably would not have survived. The Decision also required activists and attorneys in Haiti and the United States communicating with each other and publicly demanding justice. These efforts are always hard, but easier now than they would have been under a dictatorship. On the other hand, the Decision also demonstrates the current deficits in Haitian democracy, the uncertainty of civil rights and political processes, and the abhorrent conditions that undermine the foundation of Haiti's future. The Decision represents a partial victory, a battered but surviving promise of justice.

History, says the aphorism, is written by the victors. Of course, good history is more complicated than that. Sometimes the partial victors, exhausted from their struggles, are too busy afterwards to write it down. Advocates with limited resources do not always prioritize making their limited victories as widely celebrated as they might be. Despite illustrating a number of perspectives, the underlying perspective of this Article is inevitably in part a perspective of a victor, as I participated in the advocacy on behalf of the Inter-American Human Rights System and was pleased by the Decision. Too often such victories are essentially forgotten by the next generation of interested participants, particularly if barriers of language, geography, and culture stand between the story of the victory and the potential audience for the story. Too often those with an interest in building systems that protect human rights only

In keeping with its consistent practice, the Court reserves the authority, inherent in its attributes and derived also from Article 65 of the American Convention, to monitor the execution of all aspects of this judgment. The case will be closed when the State has complied fully with all aspects of the judgment. Within one year from notification of this judgment, Haiti must provide the Court with a report on the measures adopted to comply with it.

focus on problems, and neglect victories, however problematic those victories may be. This Commentary attempts to present a story with an underlying perspective that celebrates victory and looks to further victory while acknowledging the limits and challenges of the situation.

Some readers may feel that the Commentary does not treat a particular perspective with as much depth as might be desired. Others may feel that some perspectives were neglected, such as the perspective of economic, social, or cultural human rights,⁸⁸ the perspective of crime survivors, the perspective of private international investors, or others. There is doubtless some truth in any such criticism, which can only serve as an invitation for further work, additional perspectives, and deeper analysis.

I hope that this Commentary provides an example, however limited or cursory, of approaching the same topic from a variety of perspectives. Perhaps this will assist those who are involved, or would like to be involved, in the effort of protecting the human rights of detainees to act together in a greater spirit of solidarity and mutual understanding.

88. One example of an effort which integrates economic, social and cultural human rights with civil and political rights is the Health and Human Rights Prison Project, a joint effort of IJDH, BAI, Partners in Health and Zanmi Lasante. A complete description of the project is *available at* <http://ijdh.org/pdf/HHRPP.pdf> (last visited Mar. 1, 2009).

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