

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

THE 34TH ORDINARY SESSION of the African Commission on Human and Peoples' Rights (Commission) took place in Banjul, the Gambia, on November 6 – 20, 2003. Opened by the Vice-President of the Gambia, Isatou Njie Saidy, the delegates of the states parties were urged to ratify the Protocol Establishing an African Court on Human and Peoples' Rights (Court), which was first introduced in 1998, and the Protocol Relating to the Rights of Women. The protocol establishing the Court outlines details such as the Court's jurisdiction and its ability to offer advisory opinions. The protocol relating to the rights of women supplements the African Charter on Human and Peoples' Rights (Charter) and guarantees significant rights for women, such as the right to equal representation in the judiciary. In addition, the protocol calls for the legal prohibition of female genital mutilation. State and non-state participants in the session reiterated the urgency of ratifying the protocols and demanded that the Commission take further action to speed the entry of the protocols into force.

In a separate resolution, the Commission adopted the report of the fact-finding mission to Zimbabwe, which had previously been ignored. According to the *Zimbabwe Independent*, the report was alleged to have detailed human rights abuses and condemned the government of President Robert Mugabe for perpetrating the abuses. The report has not yet been published for the public.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

While the 34th Ordinary Session of the Commission failed to establish the Court, the Union of Comoros became the 15th African state to ratify the Protocol for the Establishment of the Court on December 30, 2003. The protocol came into force within thirty days of the deposit of the 15th instrument of ratification, which occurred on

January 25, 2004. The Secretary-General of the African Union (AU) must now request each state party to present a list of candidates for judges within ninety days and the lists must be presented thirty days prior to the next AU Assembly, which will occur in July this year. After receiving the instrument, Professor Alpha Oumar Konaré, Chairperson of the AU, appealed to other African states to expedite signing or ratifying the protocol. Thirty-nine states have thus far signed, but have not yet ratified the protocol, which was introduced in 1998, while eleven states have not signed the protocol at all.

The protocol grants the Court broad jurisdiction over all cases and disputes submitted concerning the interpretation and application of the Charter, the protocol and any other African human rights convention. Additionally, the Court is granted the right to provide advisory opinions to the AU or any of its organs. The protocol initially entitled only the Commission or states parties to submit cases, but later provided that on exceptional grounds, individuals, non-governmental organizations, and groups of individuals may submit cases to the Court.

International organizations have noted the importance of the Court in the overall development of human rights in Africa. Amnesty International states, for example, that “[t]he establishment of an independent and effective African Court enabled to render decisions that are binding represents an important development and will make a vital contribution to the efforts to strengthen the African regional human rights system, and stimulate positive change throughout Africa.”

EUROPEAN COURT OF HUMAN RIGHTS

THE EUROPEAN COURT of Human Rights (ECHR) was established in 1959 under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). Enforcing the obligations entered into by the Council of Europe's contracting states, the court is com-

posed of the number of judges equal to that of the contracting states. Any contracting state or individual claiming to be a victim of a violation of the Convention may lodge a complaint with the court. In its decisions, the court takes into account the various legal systems of the contracting states.

M.C. v. BULGARIA

The recent judgment of the ECHR in *M.C. v. Bulgaria* paved the way for greater protection of European victims of sexual violence. This case, brought by a young female rape victim, rejected the notion that force must be established in cases of sexual violence. The ECHR's decision to compel Bulgaria to pay damages to M.C. will likely serve as a guide to reform the treatment of rape cases under Bulgarian law.

In her complaint before the ECHR, M.C. alleged that she was raped by two male acquaintances when she was fourteen years old. The incident surrounding M.C.'s complaint took place in July 1995, when M.C. went to a disco with an acquaintance and two unfamiliar men. Later, she continued on to another disco with a group, including the two men. On their return trip, the men decided to stop and swim in a reservoir, despite M.C.'s objections. M.C. remained in the car, but claimed that when one of the men returned, he forced her to have sex with him and that she was unable to push him away. The next morning, M.C. was at a private home when she alleged that the second of the two men raped her. Again, she was unable to resist his strength. She maintained that she cried throughout this incident and following the rape. Later, her mother took her to the hospital, where a medical examination revealed bruises on her neck and evidence of sexual activity.

Bulgarian authorities then conducted an investigation into the alleged rapes. Under Bulgarian law, threats or the use of force are necessary elements of rape. Following his inquiry into the incident, the district prosecutor concluded that neither threats nor the use

of force were established beyond a reasonable doubt. Thus, he concluded that the men did not force M.C. to have sexual intercourse with them, and he terminated the proceedings in March 1997.

M.C. filed a petition with the ECHR in December 1997, and it was declared admissible in December 2002. She argued that her country's laws failed to ensure protection against rape and sexual abuse because Bulgaria prosecuted only those cases in which the victim actively resisted the conduct in question. Further, M.C. argued that under the European Convention, Bulgaria has a positive obligation to protect an individual's physical integrity and private life, as well as to provide an effective remedy for breaches of those rights. In her complaint, M.C. relied on article 3 of the European Convention, prohibiting degrading treatment; article 8, upholding the right to respect for private life; article 13, guaranteeing the right to an effective remedy; and article 14, prohibiting discrimination.

In its judgment of December 4, 2003, the ECHR unanimously found violations of articles 3 and 8 of the European Convention. The court maintained that under these articles, state parties to the European Convention have positive obligations to enact criminal legislation to effectively punish rape and sexual violence, and to apply such legislation over the course of the investigation and prosecution of sexual crimes.

The court observed that in most European and other common law jurisdictions, all references to physical force were removed from rape legislation and case law. Although most European countries are influenced by the continental legal standards, according to which the definition of rape contains references to violence or threats of violence by the perpetrator, the constituent element of rape in the case law of these countries is lack of consent. The court also highlighted the obligations of states parties under article 1 to secure the rights and freedoms defined in the European Convention. Read with article 3, article 1 requires states to take measures designed to protect individuals from ill-treatment, including such treatment at the hands of private individuals. Under article 8, states are obligated to protect the right to respect for private life. While measures to secure compliance under article 8 fall within a state's margin of

appreciation, efficient criminal law provisions are necessary to deter serious acts such as rape.

Article 3 has also been interpreted by the court to create a positive obligation to conduct official investigations. Such an obligation is not limited to cases of ill-treatment by state agents. The jurisprudence of the court has not foreclosed the possibility that a state's positive obligation under article 8 may extend to the effectiveness of a criminal investigation. Thus, the court concluded that states have obligations under articles 3 and 8 to enact provisions and to effectively punish rape through investigation and prosecution.

The court further stated that member states of the Council of Europe have agreed that punishing non-consensual sexual acts, notwithstanding resistance by the victim, is necessary to effectively protect women against violence. Moreover, the court relied on the determination of the International Criminal Tribunal for the former Yugoslavia that in international criminal law, sexual penetration without the victim's consent constitutes rape. This suggests a universal trend of viewing lack of consent as the essential element of rape and sexual abuse. Thus, member states' positive obligations under articles 3 and 8 of the European Convention necessitate the punishment and prosecution of any non-consensual sexual act without regard to the presence or absence of physical resistance by the victim.

The court also found that the methods used by the Bulgarian investigator and prosecutor were insufficient to fulfill Bulgaria's positive obligations under articles 3 and 8 of the European Convention. The court held that Bulgarian authorities should have examined all the facts of M.C.'s case, and that they should have based their decision on an analysis of all the surrounding circumstances. Notably, the court stated that the Bulgarian authorities should have focused on the issue of non-consent of the victim. In the view of the court, Bulgaria's positive obligations under articles 3 and 8 are elucidated by modern standards in international law. Specifically, states must establish effective criminal law systems that punish all forms of rape and sexual abuse.

The ECHR deemed further analysis under articles 13 or 14 of the European Convention unnecessary. The court awarded M.C. 8,000

euros for non-pecuniary damages and 4,110 euros for her expenses.

LOIZIDOU V. TURKEY

On December 2, 2003, the Netherlands Chairmanship of the Committee of Ministers of the Council of Europe announced that Turkey executed the judgment issued in the July 1998 case of *Loizidou v. Turkey* by paying Ms. Loizidou the sum that she was awarded as just satisfaction under article 50 of the European Convention. In this case, the ECHR held that Turkey had deprived Titina Loizidou, a Greek Cypriot, of access to and enjoyment of her property in northern Cyprus.

Ms. Loizidou owned several plots of land in Kyrenia, northern Cyprus. Cyprus was violently split between Turkey and Greece in 1974, when Turkey invaded northern Cyprus and began its occupation. Ms. Loizidou lost her property following the Turkish invasion, even though she had already begun construction of a home on one of her plots of land. She and her family fled to the south of Cyprus in 1974.

In 1989, Ms. Loizidou lodged a complaint before the ECHR. Seven years later, in 1996, the ECHR ruled for Ms. Loizidou, holding that the continuous denial of access to her property in northern Cyprus and the resulting loss of all control over it was a matter within Turkey's "jurisdiction." Under article 1 of the European Convention, Turkey, a contracting party, has the obligation to secure rights and freedoms to everyone in its jurisdiction. Thus, Turkey could be held accountable for Ms. Loizidou's loss. The court also found a breach of article 1 of Protocol 1 of the Convention governing peaceful enjoyment of possessions where, in effect, Ms. Loizidou had lost both control over her property and the possibility to enjoy it. The court dismissed Turkey's objections, arguing that the interference with Ms. Loizidou's property was not imputable to Turkey and that the court could not proceed with the case until there was political agreement on the situation in Cyprus.

On July 28, 1998, a Grand Chamber of the ECHR ordered Turkey to pay Ms. Loizidou damages pursuant to the 1996 judgment. According to the court, Turkey was to pay Ms. Loizidou pecuniary damages, non-pecuniary damages, and costs and expenses within three months.

The execution of the judgment in the *Loizidou* case is significant not only because of the human rights issue, but also because of the precedent Turkey's compliance with the ruling of the ECHR establishes. Ms. Loizidou is the first individual to receive a payment of damages from Turkey. It is estimated that there are several hundred similar applications lodged by Greek Cypriots before the ECHR. Although Ms. Loizidou still does not have access to or use of her property, the Chair of the Committee of Ministers of the Council of Europe stated that "the conclusion of the *Loizidou* case, which is the result of efforts by all member states, demonstrates the effectiveness of the right of individual appeal available to 800 million Europeans before the Strasbourg Court."

INTER-AMERICAN HUMAN RIGHTS SYSTEM

IN RESPONSE TO A PETITION by Mexico, the Inter-American Court of Human Rights (Inter-American Court or Court) issued Advisory Opinion 18 on the rights of undocumented migrant workers in September 2003. The advisory opinion stated that undocumented migrant workers have the same fundamental human rights of equal protection before the law and non-discrimination as legal workers and that they should have the opportunity to exercise those rights regardless of their immigration status.

In November 2003, the Court found that Guatemala was responsible for the planning, execution, and cover-up of Myrna Mack Chang's 1990 murder. It held that Guatemala had violated article 4 (right to life), article 5 (right to personal integrity), article 8 (right to a fair trial), and article 25 (right to judicial protection) of the American Convention on Human Rights (American Convention or Convention). The Court ordered a creative reparations schema and gave the Guatemalan government one year to comply.

ADVISORY OPINION 18

On September 17, 2003, the Inter-American Court issued Advisory Opinion 18 on the rights of undocumented migrant workers in the region. Mexico, with approximately 2,490,000 undocumented migrant workers

abroad, petitioned the Court to address the legal rights of these individuals. Several other member states submitted written comments to the Court, including Honduras, Nicaragua, El Salvador, Costa Rica, Uruguay, Paraguay, the Dominican Republic, Brazil, Panama, Argentina, and Peru. Regional and international bodies, such as the Inter-American Commission on Human Rights (Inter-American Commission or Commission) and the United Nations, presented comments as well. In addition, universities, NGOs, and law firms throughout the region submitted *amicus curiae* briefs to the Court.

Mexico's Petition

In its May 2002 petition, Mexico voiced concern that member states of the Organization of American States (OAS) were discriminating against undocumented migrant workers in their enforcement of fundamental labor rights. Mexico alleged that this disparity violated the principles of equal protection before the law and non-discrimination. Mexico identified fundamental labor rights as the right to equal pay for equal work, the right to reasonable and satisfactory payment (including social security benefits and back pay), the right to establish or join a labor union, the right to judicial and administrative guarantees to determine one's rights, and the prohibition against forced and child labor. While Mexico recognized the right of member states to withhold certain political rights and social benefits based on immigration status, it maintained that such disparate treatment could not violate international human rights principles.

In submitting this issue for the Court's consideration, Mexico cited relevant international human rights instruments such as the OAS Charter, which requires that member states respect international law (article 3(1)), the rights of individuals, and the principles of universal morality (article 17); the American Declaration on the Rights and Duties of Man, which guarantees all persons equal protection before the law (article 2); the American Convention, which guarantees domestic legal effects (article 2) and equal protection before the law (article 24) and requires member states to respect and ensure the exercise of all rights contained in the Convention without discrimination (article 1(1)); the Universal

Declaration of Human Rights, which requires universal equality in dignity and rights (article 1), equal protection (article 7), and entitlement to the rights included in the Declaration (article 2(1)); and the International Covenant on Civil and Political Rights, which applies to all people within the territory of a state party (article 2(1)), requires state parties to give effect to the rights recognized in the Covenant (article 2(2)), does not permit derogation from fundamental human rights based on the pretext that the Covenant does not recognize them (article 5(2)), and guarantees the right to equal protection (article 26).

Mexico alleged that, within the proposed legal framework, the national immigration policies of certain member states lie in direct contravention to international human rights norms in that they violate the universally recognized principles of equal protection and non-discrimination.

The Court's Opinion

The Court held that the immigration status of an individual cannot serve as justification for the deprivation of that individual's human rights, including fundamental labor rights. Member states have the obligation to respect and guarantee the rights of all workers, regardless of their immigration status, such as the right to equal and satisfactory pay for equal work and the right to organize and collectively bargain. The Court emphasized that undocumented migrant workers have the same fundamental human rights as all other workers and therefore they should have the ability to exercise and realize such rights in practice. Finally, the Court found that no member state shall condition their adherence to the principles of equality before the law and non-discrimination on domestic public policy objectives, including their immigration policy.

Analysis

While Advisory Opinion 18 never explicitly names the United States, the Court's words seem to be directed almost exclusively at the United States and its national immigration policy. In January 2002, the U.S. Supreme Court held in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board (Hoffman)* that an undocumented

worker, fired for union activity, was not entitled to back pay because he was not authorized to work in the United States. This decision, which overtly restricted undocumented migrant workers' fundamental labor rights (the right to unionize and the right to back pay), is commonly believed to have been the impetus for Mexico's advisory opinion petition to the Court. Additionally, the U.S. Supreme Court holding in *Hoffman* was widely condemned by prominent U.S. and Latin American labor unions, NGOs, and universities as well as Latin American governments.

According to a 2001 study by the Pew Hispanic Center, the United States has approximately 5.3 million undocumented workers, many of whom are from Mexico and other countries in the region. A number of U.S. immigration bills passed in the last few decades have restricted the rights of undocumented workers, including the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which instituted harsher penalties for immigration violations and severely restricted social benefits for undocumented immigrants.

While the United States is not subject to the jurisdiction of the Inter-American Court, Advisory Opinion 18 is nonetheless important because it lays out a set of governing principles. Advisory Opinion 18 gives countries that provide a source of undocumented migrant labor, such as Mexico, a concrete legal basis for criticizing the illegal labor practices of member states, including those of the United States.

(For an in depth analysis of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, see "A Wink and a Nod: The Hoffman Case and its Effects on Freedom of Association for Undocumented Workers," in the *Human Rights Brief*, vol. 10, issue 3.)

MYRNA MACK CHANG V. GUATEMALA

On November 25, 2003, the Inter-American Court issued a decision against Guatemala for the 1990 extrajudicial execution of Myrna Mack Chang, a Guatemalan anthropologist who researched human rights abuses perpetrated by state security forces against the Maya Indians during Guatemala's

36-year civil war. This decision comes after thirteen years of attempts by Helen Mack, the victim's sister, to bring all responsible state agents to justice.

The Allegations

The victims' counsel, including attorneys from the Center for Justice and International Law (CEJIL), and the law firm of Hogan & Hartson, L.L.P., alleged that Guatemala violated article 4 (right to life), article 5 (right to personal integrity), article 8 (right to a fair trial), and article 25 (right to judicial protection) of the American Convention on Human Rights (Convention). The Inter-American Commission found a violation of all of the articles alleged by victims' counsel except for article 5 (right to personal integrity).

The Court's Findings

The Court found that Guatemala was responsible for the planning, execution, and cover-up of Myrna Mack Chang's murder. It held that Guatemala violated Myrna's right to life by executing her (article 4). The Court found that Guatemala violated the personal integrity of the Mack family by murdering their family member (article 5). The Court further held that Guatemala violated the family's right to a fair trial and right to judicial protection (articles 8 and 25) by failing to effectively investigate Myrna's murder and prosecute those responsible.

The Court ordered Guatemala to fully and effectively investigate the facts of the case; identify, judge, and punish all of those responsible for Myrna's murder; and remove all obstacles and mechanisms that maintain impunity in Guatemala in general. The Court further ordered Guatemala to publish this sentence in a national newspaper within three months; carry out a public act recognizing responsibility for the murder; publicly honor the memory of a police investigator who was murdered by the state for his investigations and findings in the Mack case; and to provide human rights training to Guatemalan police, armed forces, and other security forces. The Court also ordered Guatemala to establish a permanent scholarship fund in Myrna's name for one year of anthropology study at a major Guatemalan university; to name a street or

plaza after her in Guatemala City; and to place a memorial plaque in the murder location with an explanation of the events leading to her death.

The court also granted monetary reparations, ordering Guatemala to pay \$266,000 in material damages and \$350,000 in non-material damages to Myrna's family, and \$163,000 in costs and legal fees. The Court gave Guatemala one year to comply with this ruling.

Analysis

The implications of this case have been far-reaching throughout Guatemalan society. Many important changes have taken place in Guatemala in the past year, some as a direct result of this case. In late 2003, the Estado Mayor Presidencial (EMP), a high-ranking military unit responsible for planning Myrna's murder, was dismantled. This step by the Guatemalan government resulted, in large part, from zealous and consistent pressure by international human rights groups inspired by the Myrna Mack Chang case.

In January 2004, Colonel Juan Valencia Osorio, former head of the EMP, was convicted of ordering Myrna Mack Chang's murder by the Guatemalan Supreme Court. Osorio had previously been convicted of this crime and sentenced to thirty years in prison in 2002, but his conviction was overturned by a Guatemalan appeals court. The Inter-American Court decision was instrumental in leading the Guatemalan Supreme Court to reconfirm Osorio's previous conviction and thirty-year prison sentence.

(For more information on the legal history and political context of this case, please see "The Case of Myrna Mack Chang: Overcoming Institutional Impunity in Guatemala," in the *Human Rights Brief*, vol. 10, issue 3). **HRB**

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