

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

THE EUROPEAN COURT of Human Rights (Court) was established in 1959 by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The Court enforces the obligations entered into by the Council of Europe's Contracting States and is composed of a number of judges equal to the number of Contracting States. Any Contracting State or individual may allege violations of the Convention by filing a complaint with the Court. In its decisions the Court acknowledges the Contracting States' various legal systems.

The Court is divided into four Sections. Article 27 of the Convention provides that each of the four Sections shall consist of a committee of three judges, a Chamber of seven judges, and a Grand Chamber of seventeen judges. After a case is assigned to a particular Section, a rapporteur will examine the case and assign it to either a three-member committee or a Chamber. A committee can decide with a unanimous vote to dismiss a complaint. Individual complaints that are not dismissed are referred to a Chamber, which then determines the merits of the case.

Under Article 43 of the Convention, any party to a case may request an appeal to a Grand Chamber within three months of a Chamber judgment. A Grand Chamber will accept such requests if, after review by a panel of five judges, the request raises a serious issue of general importance or concerns the interpretation or application of the Convention. When a Grand Chamber admits a complaint, no judge that has heard the arguments in Chamber will participate in the Grand Chamber hearing except the President of the Chamber that previously heard the case and the judge from the defending state, who sits in the Grand Chamber as a formality. A Grand Chamber rarely admits complaints. Grand Chambers delivered only 12 of the Court's 703 judgments in 2003, and 16 of the Court's 718 judgments in 2004.

LEYLA ŞAHİN V. TURKEY

Leyla Şahin, a Turkish national from a traditional Muslim family, believes that she

has a religious duty to wear the Islamic headscarf (*türban*). Ms. Şahin enrolled in the Faculty of Medicine at Istanbul University on August 26, 1997, after completing four years of study at Bursa University, during which time she regularly wore a *türban*. On February 23, 1998, the university's Vice Chancellor issued a circular to staff and faculty that prohibited students from wearing the *türban* in lectures, courses, and tutorials. This circular required university faculty and staff to enforce the new regulations and outlined the disciplinary measures that would be taken against students who violated the regulations. Consequently, in March, April, and June 1998 the university's staff and faculty denied Ms. Şahin admission to written exams, enrollment in courses, and admission to lectures because she was wearing a *türban*. In May 1998 the Dean of the university issued Ms. Şahin a warning for violating the rules on dress.

Ms. Şahin applied to the Istanbul Administrative Court (Administrative Court) on July 29, 1998, and requested that the court void the circular. She claimed infringements of Articles 8, 9, and 14 of the Convention and Article 2 of Protocol No. 1. She alleged that the circular lacked a statutory basis and that the Vice-Chancellor's office had no power to regulate student dress in institutions of higher learning. The Istanbul Administrative Court held that the university had the power to regulate student dress to maintain order and dismissed her complaint. Her appeal was similarly dismissed.

On April 13, 1999, the university suspended Ms. Şahin from the Faculty of Medicine for one semester because she violated the dress code and participated in a student demonstration against the new regulation. The university also brought proceedings against other students for participating in the demonstration. Ms. Şahin applied again to the Administrative Court to invalidate the university's actions. The Administrative Court denied her request on the grounds that settled case law demonstrated that the university was acting within its regulatory power to maintain order on the university's campus. On September 16, 1999, Ms. Şahin abandoned her studies at Istanbul University and enrolled in Vienna University.

Ms. Şahin lodged a complaint with the European Commission of Human Rights (Commission) on July 21, 1998. She alleged that the university's regulations banning the *türban* violated her rights under Articles 8, 9, 10, and 14 of the Convention, and Article 2 of Protocol No. 1. Article 8 protects the right to respect for private and family life; Article 9 ensures freedom of thought, conscience, and religion; Article 10 preserves freedom of expression; Article 14 prohibits discrimination; and Article 2 of Protocol No. 1 establishes the right to education. In the Chamber and subsequent Grand Chamber judgments, the Court held that Article 9 and Article 2 of Protocol No. 1 were dispositive of the case and focused on those Articles in both its opinions.

A Chamber judgment was delivered on June 29, 2004. The Chamber held unanimously that the regulations impaired the applicant's right to manifest her religion but concluded that these limitations were legitimate. Article 9, section 2 permits limitations on freedom to manifest one's religion that are prescribed by law and necessary to a democratic society in the interests of public order, health or morals, or for the protection of the rights and freedoms of others. The Chamber concluded that there were no separate violations under the other Articles. On September 27, 2004, Ms. Şahin appealed the Chamber's decision and requested a Grand Chamber hearing.

On November 10, 2005, the Grand Chamber delivered its judgment on Ms. Şahin's appeal. The Grand Chamber discussed the political history and evolution of the Turkish state, the manner in which Turkish courts and legislators developed regulations on the wearing of the *türban*, and the variations among European states in regulating manifestations of religious belief and practice in educational institutions.

Turkey has an established history of regulating religious attire in public and women's dress in particular. Public dress codes during the two decades following the proclamation of the Turkish Republic in October 1923 sought to promote gender equality under the law and to establish secularism. The Grand Chamber noted that the

Turkish state's regulations on the wearing of the *türban* were an outgrowth of its evolution as a symbol of Islam in Turkey's modern political landscape. The Turkish Supreme Administrative Court relied on this assumption when it rendered a judgment in December 1984 that recognized limitations on the wearing of the *türban* in educational institutions as lawful.

The Turkish Constitutional Court (Constitutional Court) has similarly justified the regulations on the wearing of the *türban* under the Turkish Republic's constitutional guarantees of gender equality and secularism. The Constitutional Court has held that the principles of the Turkish Republic and the Constitution guarantee the individual right to choose whether to follow a particular religion, and that permitting the *türban* in educational institutions amounts to government endorsement of Islam because the educational institutions at issue are state universities. The Constitutional Court has also recognized that the *türban* is both a religious garment and a political statement. Therefore, the freedom to manifest one's religion can be restricted on public order grounds to defend the constitutional principle of secularism.

The Grand Chamber agreed with this assessment and found that the regulations implemented at Istanbul University were within the bounds of the Constitutional Court's rulings. It considered the regulations on the *türban*, or the absence thereof, in each Contracting State, and noted that Azerbaijan and Albania are the only other Contracting States that regulate the wearing of the *türban* at the university level. The Grand Chamber also recognized the political overtones that the *türban* could introduce at the university or secondary school setting. The Court thus adopted a relativistic approach to the issue of whether the limitation on the *türban* in Turkey was justified under Article 9, section 2.

At issue before the Court was whether Turkey had exercised proper discretion in determining the extent or the existence of competing interests in the regulations of the wearing of the *türban* at the university level. Interestingly, the Court's Grand Chamber judgment did not address critically whether the wearing of the *türban* encouraged disorderly conduct. Although it noted that one of the justifications for the restriction at Istanbul University was the potential for the *türban* to interfere with a physician's ability to engage safely in laboratory work, this justification was not the crux of the Turkish

Constitutional Court's ruling, which invoked fear of public disorder as the general basis for such restrictions.

A substantial 12-page dissenting opinion by one of the Court's female judges, Judge Tulkens (Belgium), followed the Grand Chamber's decision. Her dissent expressed dislike for the majority's wide "margin of appreciation" accorded to Contracting States in discharging their obligations under the Convention. According to Judge Tulkens, the majority opinion would allow states substantial discretion in conforming to Convention obligations. As apparent justification for this degree of discretion, the majority opinion noted a lack of consensus among Contracting States regarding the regulation of religious dress in public educational institutions. The majority opinion also noted that national courts and administrative organs have better access to public sentiment and information on these issues. Judge Tulkens doubted that a lack of consensus among European states should cause the Court to eschew its duty to supervise Contracting States' efforts to conform to Convention standards.

Judge Tulkens also felt that the Court had not properly demonstrated that Turkish secularism and public order had been threatened by permitting the wearing of the *türban* at Istanbul University. The only instance of public disorder referred to by the Court was a student demonstration at Istanbul University that was organized to avert the adoption of the regulation banning the *türban*. Clearly, the regulation itself caused the disorder and not the wearing of the *türban*. The Court did not describe specific circumstances that would necessitate such regulations on public order grounds at Istanbul University. Rather, it deferred to the Turkish authorities to decide.

INTER-AMERICAN SYSTEM

EDITOR'S NOTE: Please see David Baluarte's article, "Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash," on page 25 for an analysis of another important decision by the Inter-American Court, *Yean and Bosico v. Dominican Republic*.

The Inter-American Human Rights System was created with the adoption of the American Declaration of the Rights and Duties of Man (Declaration) in 1948. In 1959 the Inter-American Commission on Human Rights (Commission) was established as an independent organ of the Organization of American States (OAS), and

it held its first session one year later. In 1969 the American Convention on Human Rights (Convention) was adopted. The Convention further defined the role of the Commission and created the Inter-American Court of Human Rights (Inter-American Court). According to the Convention, once the Commission determines a case is admissible and meritorious, it will make recommendations and, in some cases, present the case to the Inter-American Court for adjudication. The Inter-American Court hears these cases, determines liability under relevant regional treaties and agreements, and assesses and awards damages and other forms of reparations to victims of human rights violations.

During its most recent session, in *Mapiripán v. Colombia*, the Inter-American Court set a new precedent by rejecting domestic rules of impunity and reiterating its jurisdiction and body of law as controlling over the laws of OAS member states.

MAPIRIPÁN V. COLOMBIA

On September 5, 2003, the Commission filed the case *Massacre of Mapiripán (Masacre de Mapiripán)* before the Inter-American Court, which alleged Colombia's violation of Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the Convention. The Commission and non-governmental organizations, including *Corporación Colectivo de Abogados "José Alvear Restrepo"* and the *Center for International Justice and Law*, represented the victims' families. They alleged that from July 15 - July 20, 1997, state agents and approximately 100 members of the Colombian Units of Self-Defense (*Autodefensas Unidas de Colombia*) kidnapped, tortured, and murdered at least 49 civilians and threw their bodies in the Guaviare River in Mapiripán.

On March 7, 2005, the Inter-American Court held a public audience, where representatives of the Commission, the victims' families, and representatives of Colombia presented their arguments. Although Colombia initially argued that the victims had not exhausted their domestic legal remedies, it later implicitly accepted the Inter-American Court's jurisdiction and recognized its violations of Articles 4, 5, and 7 of the Convention. On September 15, 2005, at the most recent sentencing hearing, the

Inter-American Court again examined, evaluated, and admitted the testimony of the victims' relatives, human rights lawyers, a psychologist, and an attorney from the Colombian Supreme Court.

After examining this evidence, the Inter-American Court recognized the following acts as true: (1) that the Colombian armed conflict and illegal armed groups called paramilitaries (*paramilitares*) existed, (2) that in its effort to combat guerrilla groups, Colombia created self-defense groups whose goal was to aid the armed forces in anti-subversive operations and to defend themselves from guerrillas, (3) that in the 1980s the self-defense groups shifted their objectives and became *paramilitares*, which negatively influenced the stability, social order, and public peace of the country, (4) that Colombia issued laws such as Decree 128, which established socio-economic and other benefits for armed organizations that had begun to demobilize, (5) that relationships existed between *paramilitares* and members of the armed forces, (6) that *paramilitares*, drug-trafficking organizations, and the Colombia Revolutionary Armed Forces (FARC) tried to control the Municipality of Mapiripán, (7) that members of the armed forces believed that many Mapiripán residents were involved in subversive acts and were members of the FARC, (8) that the Colombian Army facilitated the transportation of 100 members of the self-defense groups on July 12, 1997, (9) that these members tortured and dismembered individuals they believed worked for or sympathized with the FARC on July 15, 1997, (10) that the paramilitary incursion in Mapiripán was an act that was carefully planned by the Colombian armed forces, and (11) that Colombia failed to completely and efficiently investigate these acts and denied the victims' families access to the courts.

Despite Colombia's argument that state agents acting in their individual capacities directed the Mapiripán massacre, the Inter-American Court concluded that Colombia was responsible for this series of violations. The Inter-American Court based its conclusions on the state's failure to detain the *paramilitares* after state agents facilitated their aerial and ground transportation. Additionally, the Inter-American Court noted that members of the Colombian Army carefully planned and executed the

massacre, and that the state failed to protect the residents of Mapiripán from July 15 - July 20, 1997.

At its most recent session, the Inter-American Court considered and condemned two additional violations: violations of the rights of children and violations of the right to the freedom of movement and residence. The Inter-American Court noted the possible brutality endured by minors during the Mapiripán massacre because many of them were murdered, displaced, orphaned, and/or subjected to physical and psychological pain. As a result of this brutality, the Inter-American Court requested that Colombia verify the ages of the victims to accurately determine the number of minors affected by the massacre. In this respect, Colombia may also have violated Article 19 of the Convention (Rights of the Child), which affords special "measures of protection required ... as a minor on the part of the family, society, and the state." In addition, the Inter-American Court suggested Colombia may have violated Articles 38 and 39 of the Convention of the Rights of the Child, which provide that states must specially guard minors during an armed conflict and respect the norms of international humanitarian law that protect them.

The Inter-American Court also considered Colombia's violation of Article 22 of the Convention (Freedom of Movement and Residence). The first provision of Article 22 states that "[e]very person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law." According to the Inter-American Court, Colombia violated Article 22 in three ways: (1) by holding the Mapiripán residents as hostages in their own homes while it carried out the detentions, murders, and disappearances of the victims, (2) by forcing the Mapiripán residents, in trying to escape the violence created by the state, to abandon their houses, belongings, lands, and relationships, and (3) by failing to guarantee the necessary security conditions for the victims' families so that they could safely return to their property in Mapiripán.

Under Article 63 of the Convention, which calls for the state to compensate the injured party, the Inter-American Court recognized the rights of the victims' families to be indemnified by Colombia. The Inter-American Court ordered Colombia to pay the

victims' families for the loss of their income, as well as for their physical and emotional suffering. Noting the importance of identification of the victims' bodies to the reparations process, the Inter-American Court stated that identified bodies should receive burials in accordance with their families' beliefs. The Inter-American Court ordered that Colombia publicly apologize for the massacre and recognize its international responsibility, guarantee the protection of the former residents who return to Mapiripán, install a monument that commemorates the events of the massacre, and educate the armed forces about human rights and humanitarian law. Finally, the Inter-American Court ordered Colombia to investigate the acts, as well as to identify, process, and sanction those responsible for the massacre.

Setting a new precedent, the Inter-American Court condemned Colombia's Law 975, the Law of Justice and Peace (*Ley de Justicia y Paz*), which reincorporates members of these armed groups and orders them to contribute effectively to national peace. As the victims' representatives argued, this law prevents the full disclosure of events such as the Massacre of Mapiripán and ignores the armed groups' responsibility for human rights violations. Finding this law unacceptable, the Inter-American Court reiterated that no domestic law can impede the state from fulfilling its duty to investigate and sanction those responsible for human rights violations. In particular, the Inter-American Court declared that the state cannot issue laws of amnesty for those who may have committed grave human rights violations. The Inter-American Court expressed that the state's responsibility to investigate and sanction these violations is crucial because it prevents impunity and deters future acts of violence.

The Inter-American Court's most recent decision in *Mapiripán* will influence upcoming judicial decisions and state laws that address impunity. It also represents the Inter-American Court's awareness that sentencing should not be controlled by superficial laws with appealing names, but rather should operate as a means to punish human rights violators and to enforce international human rights and humanitarian law. Lastly, *Mapiripán* is a timely reminder that the Inter-American System's law is controlling over domestic laws and that its jurisdiction over this and similar cases was granted through the ratification of the Convention.

AFRICAN COMMISSION

THE AFRICAN HUMAN RIGHTS System began to take shape under the Organization of African Unity (OAU), which was founded in 1963. The African Union (AU) replaced the OAU in July 2001, following ratification of the AU's Constitutive Act. The African Charter on Human and People's Rights (Charter), entered into force in 1986, established the African Commission on Human and People's Rights (Commission), which is responsible for interpreting all provisions of the Charter. The Commission meets twice annually to consider periodic reports, as well as complaints brought against State Parties to the Charter. At the time of writing, the proposed African Court on Human and People's Rights (ACHPR), established in 2004 as a court to enforce the Charter, was not yet operational (see below).

AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

The 38th Ordinary Session of the Commission was held from November 21 -

December 5, 2005, in Banjul, Gambia. The Commission adopted a resolution on the operationalization of an independent and effective ACHPR and another on the renewal of the mandate and composition of the ACPHR working group. It also adopted a resolution acknowledging the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Commission adopted further resolutions on the human rights situations in the Darfur region of Sudan, Eritrea, Ethiopia, the Democratic Republic of Congo, Uganda, and Zimbabwe. Additionally, a resolution was passed on the protection of human rights and the rule of law while countering terrorism. It also passed the "Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome statute of the International Criminal Court."

Commissioners Mumba Malila, Reine Alapini-Gansou, and Faith Pansy Tlakula were nominated as Special Rapporteurs on prisons and conditions of detention, human

rights defenders in Africa, and freedom of expression in Africa, respectively. Additionally, the Commission adopted resolutions on the composition and operationalization of the Working Group on the Death Penalty and on the composition and extension of the mandate of the Working Group on Indigenous Populations/Communities in Africa. The 39th Ordinary Session of the Commission will be held from May 9-23, 2006, in Banjul, Gambia. **HRB**

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ENDNOTES: Impoverishment of Displacement *continued from page 24*

related to the French *déraciner* and the English *deracinate*, and means "to uproot" or "to tear from one's native land."

³ Chalfont, letter to David K. E. Bruce (Dec. 30, 1966). National Archives and Records Administration II, RG 59/150/64-65, Subject-Numeric Files 1964-1966, Box 1552; Vytautas Bandjunis, *Diego Garcia: Creation of the Indian Ocean Base* (Writer's Showcase 2001).

⁴ Marcel Moulinie, statement, *Queen v. Secretary of State for the Foreign & Commonwealth Office, ex parte Bancoult*, ¶ 14; see also CBS News, "Diego Garcia: Exiles Still Barred," <http://www.cbsnews.com/stories/2003/06/12/60minutes/main558378.shtml> (June 13, 2003).

⁵ Larry W. Bowman and Jeffrey A. Lefebvre, "The Indian Ocean: U.S. Military and Strategic Perspectives," n. 28, in William L. Dowdy and Russell B. Trood, eds., *The Indian Ocean: Perspectives on a Strategic Arena* (Duke University Press 1985); Pranay B. Gupte, *New York Times*, "Dispossessed in Mauritius Are Inflamed," A5 (Dec. 14, 1982).

⁶ David Ottaway, *Washington Post*, "Islanders Were Evicted for U.S. Base," A1 (Sept. 9, 1975).

⁷ A. R. G. Prosser, report, "Visit to Mauritius, From 24 January to 2 February: Mauritius-Resettlement of Persons Transferred from Chagos Archipelago" (Sept. 1976).

⁸ Mauritius Legislative Assembly, report, "Report of the Select Committee on the Excision of the Chagos Archipelago," 3-5 (June 1983).

⁹ Tania Dräbel, report, "Evaluation des besoins sociaux de la communauté déplacée de l'Archipel de Chagos, volet un: santé et éducation," 4 (Dec. 1997).

¹⁰ *Queen v. Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2001] Q.B. 1067 (Nov. 3, 2000).

¹¹ BBC News, "Evicted islanders vow to fight on," http://news.bbc.co.uk/2/hi/uk_news/3177260 (Oct. 9, 2003); *Chagos Islanders v. Attorney General and British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB) (Oct. 9, 2003).

¹² See *Bancoult v. McNamara*, 370 F. Supp. 2d 1 (D.D.C. 2004).

¹³ The researchers are not and have never been employed or paid for the

work. The U.S. legal team reimbursed most research expenses during August 2001 - December 2002, and some research expenses during 2004.

¹⁴ Michael M. Cernea, "Concept and Method: Applying the IRR Model in Africa to Resettlement and Poverty," 196, in Itaru Ohta and Yntiso Gebre, eds., *Displacement Risk in Africa: Refugees, Resettlers and Their Host Populations* (Kyoto University Press 2005).

¹⁵ Michael M. Cernea, paper for Workshop on Typologies of Relevance to the Study of Forced Migration, U.S. National Academy of Sciences, "The Typology of Development-Induced Displacements: Field of Research, Concepts, Gaps and Bridges," 13 (Sept. 22-23, 2004).

¹⁶ Michael M. Cernea, "The Risks and Reconstruction Model for Resettling Displaced Populations," *World Development* 25(10):1569-87 (1997).

¹⁷ Although these subprocesses are the most common among hundreds of cases of involuntary displacement, each will differ in intensity across cases and among groups within a population; some cases will also feature the absence of some subprocesses or the presence of other less common subprocesses.

¹⁸ Michael M. Cernea, "Risks, Safeguards, and Reconstruction: A Model for Population Displacement and Resettlement," 11-55, in Michael M. Cernea and Christopher McDowell, eds., *Risks and Reconstruction: Experiences of Resettlers and Refugees* (The World Bank 2000).

¹⁹ Vine, et al.

²⁰ Both methods assume that the monetary value of Chagossians' property was minimal and incorporate the value of property into the land calculation.

²¹ U.S. Congress, "Compact of Free Association Act of 1985," P.L. 99-239, 99th Congress (Jan. 14, 1986).

²² Peter Marks, *Newsday Magazine*, "Paradise Lost: The Americanization of the Marshall Islands," 10 (June 12, 1986); UK Foreign and Commonwealth Office, report, "Partnership for Progress and Prosperity" (2002).

²³ A useful comparison is the theoretical case of a student in the Bronx improperly denied a year of public schooling. Proper monetary reparation would not be the yearly per pupil expenditure in a decrepit, substandard Bronx public school, which is roughly half that of a suburban New York City public school. Proper reparation would be the per pupil expenditure in the suburban school.