

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

In 1959, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) established the European Court of Human Rights (Court). The Court enforces the obligations entered into by the Council of Europe's Contracting States. Any Contracting State or individual may allege violations of the Convention by filing a complaint with the Court.

GOVERNMENTS HAVE NO JUSTIFICATION TO BALANCE RISK OF TORTURE AGAINST THREAT TO NATIONAL SECURITY

In *Saadi v. Italy*, decided on February 28, 2008, the Court ruled that a country may not deport a person who threatens national security to a country with a history of torture. This ruling, hailed as a landmark case by Amnesty International and other human rights organizations, contradicts the policies of countries, such as the United Kingdom, that send terror suspects to countries that abuse prisoners. Furthermore, the ruling affirms the absolute prohibition of torture and other inhuman or degrading treatment or punishment.

Tunisian national Nassim Saadi was arrested and accused of conspiracy to commit acts of violence in countries other than Italy, including attacks with explosive devices. On May 9, 2005, an Italian court changed the international terrorism charges to criminal conspiracy, and found Mr. Saadi guilty of conspiracy, forgery, and receiving stolen goods. Meanwhile, a military court in Tunisia sentenced Mr. Saadi, in his absence, to 20 years' imprisonment for membership in a terrorist organization.

After the Italian authorities released Mr. Saadi in August 2006, the Ministry of the Interior ordered his deportation to Tunisia, relying on a 2005 Italian law entitled "Urgent Measures to Combat International Terrorism." In response, Mr. Saadi applied for political asylum, but Italy denied his application in September 2006. In May 2007, Italy asked the Tunisian government

for assurances that Tunisian authorities would not subject Mr. Saadi to torture or other inhuman or degrading treatment or punishment. That June, Tunisia replied that Tunisian legislation guaranteed prisoners' rights, and that Tunisia had acceded to the relevant international treaties.

Mr. Saadi lodged a claim with the Court in September 2006, alleging that he would be subject to torture or inhuman and degrading treatment contrary to Article 3 of the Convention if Italy were to deport him to Tunisia. He also claimed that Tunisia violated the Article 6 right to a fair trial by using a military court to convict him in his absence. Because Mr. Saadi's partner and son lived in Italy, he also claimed that Italy would violate the Article 8 right to respect for private and family life by deporting him and thereby depriving his partner and son from his presence and support. Finally, Mr. Saadi alleged that his deportation violated Article 1 of Protocol 7 on procedural safeguards relating to the expulsion of aliens, and was not necessary to protect public order or maintain national security.

In its Grand Chamber judgment of February 28, 2008, the Court emphasized that concern for protecting a population against terrorism cannot compromise the absolute nature of Article 3's prohibition on torture and other inhuman or degrading treatment or punishment. As a third party intervener, the United Kingdom argued that the national security threat justified the risk of torture. The Court said, however, that "the concepts of risk and dangerousness do not lend themselves to balancing. [T]he prospect that he may pose a serious threat to the community . . . does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return."

Furthermore, the Court explained that for deportation to violate Article 3, Mr. Saadi only had to show substantial grounds for believing there was a risk of ill-treatment. Reports by Amnesty International, Human Rights Watch, and the U.S. State Department detailing numerous cases of torture against accused terrorists were sufficient.

In light of the probability that Mr. Saadi would suffer torture or inhuman treatment, and the fact that Tunisia did not explicitly assure Italy that Tunisian authorities would not subject Mr. Saadi to ill-treatment, the Court found that deporting Mr. Saadi to Tunisia would breach Article 3 of the Convention. While this decision was explicitly against Italy, it also negated the United Kingdom's argument that concern for national security could outweigh the risk of torture.

FRANCE CANNOT DISCRIMINATE AGAINST HOMOSEXUALS WHEN GRANTING SINGLE-PARENT ADOPTIONS

In January 2008, the Court held that France could not refuse to authorize a woman to adopt based on her sexual orientation. The woman, identified by the initials E.B., alleged that France discriminated against her because she is homosexual. She claimed that Article 14 of the Convention, regarding discriminatory treatment, when taken in conjunction with Article 8 on respect for private and family life, governed her case.

Despite evidence that members of the children's welfare service — including a psychologist, a technical officer, and the head of the department — recommended against E.B. receiving authorization to adopt because of the lack of a "paternal referent" and because she had an "unusual attitude towards men in that men are rejected," France argued that the refusal was not discriminatory because it was not based, either explicitly or implicitly, on E.B.'s sexual orientation. Instead, France refused authorization out of concern for the child's welfare because the child would not have a male role model and because E.B.'s partner was ambivalent about E.B.'s adoption plans.

The Court noted that there is no right to adopt in Article 8, other international agreements, or domestic law. The Court further noted, however, that France went beyond its Article 8 obligations by expressly granting single persons the right to apply for

authorization to adopt. Because it extended its Article 8 obligations, France cannot, in the application of those extended obligations, take discriminatory measures within the meaning of Article 14.

In refusing E.B.'s application, authorities consistently referred to her homosexuality. When they did not refer to her sexual orientation, they mentioned E.B.'s status as a single person, although French law makes express provisions for the right of single persons to apply for authorization to adopt. Therefore, E.B. experienced different treatment from both couples and other single persons seeking to adopt. Although Article 14 says different treatment is not discriminatory if the difference has an objective and reasonable justification, in this case France could not present the convincing and weighty reasons necessary to justify different treatment based on sexual orientation. The Court found for E.B., awarding her 10,000 Euros (US\$15,550) in just satisfaction and 14,528 Euros (US\$22,590) for costs and expenses.

The Court's decision, however, was not unanimous. Only ten of 17 judges found a violation of Article 14 taken in conjunction with Article 8. The dissenters emphasized that the Convention does not provide for a right to adopt. While the refusal to grant authorization based exclusively on sexual orientation is contrary to both the French Civil Code and the Convention, the dissenting judges asserted that in this case France had legitimate reasons for refusing to grant authorization — because the child would have no paternal role model, and because E.B.'s partner was ambivalent about the adoption plans.

Although the decision was not unanimous, the Court did affirm that states may not discriminate based on sexual orientation. Also, the majority stressed that if a country expands its obligations, it must grant those expanded rights to all persons in an equal manner.

TURKEY RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS IN CASE OF MISSING GREEK CYPRIOTS

On January 10, 2008, the Court found that Turkey violated the human rights of missing Greek Cypriots in *Varnava and Others v. Turkey*. The decision reemphasized that state authorities cannot ignore

complaints regarding missing persons, and must conduct legitimate investigations. Furthermore, the Court determined that the complainants would not receive monetary damages because the judgment against Turkey alone should be sufficient compensation. The case involved the disappearance of nine individuals as a result of Turkish military operations in July and August 1974 and the continuing division of Cyprus.

The Court found, by votes of six to one, that Turkey violated Articles 2, 3, and 5 of the Convention on the right to life, the prohibition against torture or inhuman or degrading treatment or punishment, and the right to liberty and security of person, respectively. The one dissenting vote came from the Turkish Cypriot judge, who argued that the Court should have found the application inadmissible.

The Court found a continuing violation of Article 2 protecting the right to life because Turkish authorities failed to conduct an effective investigation into the whereabouts and fates of the nine missing individuals. Turkey alleged that there was no continuing violation because the applicants based the claims on "imaginary suppositions concerning continuing captivity for which there was no concrete proof and in respect of which the applicants' accounts were flagrantly contradictory." The Court however emphasized that the fate of the missing was unknown, and that the Court had a procedural obligation to find a violation because there was proof of an arguable claim that an individual last seen in the custody of the state disappeared in a life-threatening context.

The Court also found a continuing violation of Article 3 because the failure to determine the fates of the missing constitutes continuous inhuman treatment of the relatives of the nine missing men. Finally, the Court found a continuing violation of Article 5 on the right to liberty and security of person because there was an arguable claim that the missing had been deprived of their liberty at the time of their disappearance, and Turkish authorities failed to conduct an effective investigation into that disappearance.

Although Turkey was in clear violation of the Convention, the applicants did not receive monetary damages. The

Court ruled that the finding of a violation was enough just satisfaction for the non-pecuniary damage sustained by the applicants, thereby recognizing the importance of judgments over than monetary damages in bringing closure to victims' families. The applicants recovered 4,000 Euros (US\$6,220) each for costs. In ruling against Turkey, the Court reaffirmed the responsibility of governments to conduct effective investigations into missing persons cases.

Displeased with the decision, Turkey filed an appeal with the Grand Chamber, the Court's appeals body, in hopes that it will order the Court to presume the nine missing men dead, rather than "missing." Turkey did embrace the Court's refusal to order compensation, as court-ordered compensation would constitute an unwelcome precedent. In contrast, the Cypriot government welcomed the ruling, hailing it as a positive development in the midst of a "sensitive and tragic" humanitarian issue.

INTER-AMERICAN SYSTEM

The Inter-American Human Rights System was created with the Adoption of the American Declaration of the Rights and Duties of Man in 1948. In 1959, the Inter-American Commission on Human Rights was established as an independent organ of the Organization of American States. In the 1969, the American Convention on Human Rights (the Convention) was adopted. This Convention further defined the role of the Commission and created the Inter-American Court of Human Rights (the Court). The Commission may recommend cases to the Court, which determines liability under relevant regional treaties and agreements, including the Convention.

HEARINGS AT THE COMMISSION: CASE OF LYSIAS FLEURY (PETITION 12.459) WILL PROCEED WITHIN THE COMMISSION

On March 7, 2008 the Inter-American Commission on Human Rights (Commission) heard a report in the Case of Lysias Fleury, a Haitian human rights advocate. Mr. Fleury alleges that on June 24, 2002, Haitian police arrested him at his home, and pistol-whipped, beat, kicked and forced him to clean excrement from his cell with

his hands. He claims that he received this treatment because of his human rights work for the Commission Episcopale Nationale Justice et Paix (Justice and Peace Commission of the Bishops Conference, hereinafter Justice and Peace Commission).

The Commission admitted the case on February 26, 2004 under Articles 46 and 47 of the American Convention on Human Rights (Convention). For the Commission to grant admissibility and proceed to the merits, the petitioner must have exhausted domestic remedies under Article 26(1) (a) of the Convention. The petition must also be submitted within six months of the alleged abuse or exhaustion of domestic remedies and claim a violation of one or more of the rights protected by the Convention. States cannot claim non-exhaustion of domestic remedies as a defense if remedies are not exhausted due to inaction on the part of the state.

On June 27, 2002, the director of the Justice and Peace Commission presented a criminal complaint to the Inspector General of the National Police, and on August 1, 2002 Mr. Fleury requested that the Public Ministry initiate criminal proceedings against the police officers. Because neither agency took action, the Commission considered domestic remedies exhausted. In addition, the Commission determined that because Haiti did not invoke the failure to exhaust domestic remedies as a defense in the first stages of the proceedings, Haiti waived this defense. At the hearing, however, the state argued that because Haiti was politically unstable between 2003 and 2006, the government should not be held responsible for not following through on Mr. Fleury's claim, arguing that domestic remedies are now available. The Commission recognizes the well-established international law principle of the Doctrine of Continuity of State, which provides that changes in government do not generally relieve a current government from responsibility for past abuses.

The Commission found Mr. Fleury's allegations of violations of Articles 5 (providing a right to humane treatment), 7 (protecting personal liberty), 8 (guaranteeing fair trial rights), 11 (protecting privacy) and 25 (providing a right to judicial protection) sufficiently plausible to warrant proceeding to the merits. On March 7, 2008 the Haitian government and Mr. Fleury,

who is represented by Washington College of Law's International Human Rights Law Clinic, presented their positions to the Commission. During the hearing, Haiti recognized that the alleged abuses took place, that it knows the identity of the police officers, and that no action has been taken to bring them to justice — in fact, one officer has been promoted. The Haitian constitution and other national legislation provide for domestic remedies, but the government has so far failed to make them available to Mr. Fleury.

The Commission will accept additional memos from the parties and will then issue a ruling on the merits. The state will then have two months to respond. The Commission can then decide to issue another report giving the state a further two months to respond. If the Commission is not satisfied with Haiti's response it can submit the case to the Inter-American Court of Human Rights.

DECISIONS OF THE COURT: ECUADOR DEEMED NOT COMPLYING WITH JUDGMENT IN *ALBAN CORNEJO Y OTROS VS. ECUADOR*

The Inter-American Court of Human Rights (Court) ruled on the case of *Alban Cornejo y otros vs. Ecuador* on November 22, 2007. The Commission submitted this case to the Court on July 5, 2006 after determining that Ecuador had not satisfactorily complied with its decision of February 28, 2006.

On December 17, 1987 Laura Susana Alban Cornejo, while in a private hospital for meningitis, experienced great pain and was given ten milligrams of morphine, whereupon she died. The Commission and Alban Cornejo's parents alleged violations of Articles 8 (protecting fair trial rights), and 25 (providing a right to judicial protection) of the Convention. The Court has previously held that states are responsible for acts or omissions committed by any of their agencies that violate the protected rights of persons within their jurisdiction. Ecuador accepted partial responsibility for violations of the rights protected by Articles 8.1 and 25.1, arising from various acts and omissions of state agents who, by not ensuring that the medical attention provided was of sufficiently good quality, did not exercise adequate control over the hospital. The Court held these rights were

violated in relation to Articles 4 (protecting the right to life), 5.1 (providing a right to humane treatment) and 1.1 (providing an obligation to respect rights).

The Court also held that the state violated Article 5.1 on independent grounds due to the lack of judicial response in clarifying the circumstances of Alban Cornejo's death. The Court found that her death affected the physical, mental, and moral integrity of her parents because they witnessed the medical personnel's malpractice and subsequent state inaction and because Alban Cornejo's mother was forced to give up her profession as psychologist to dedicate herself to the search for justice.

The remedies ordered include the publication of parts of the sentence, the diffusion of information on the rights of patients under national and international law, the execution of a training program for judges and health professionals on national standards, and the payment of reparations and costs.

CASE UPDATE: COMPLIANCE WITH JUDGMENT IN *CANTORAL HUAMANÍ GARCÍA SANTA CRUZ VS. PERU*

On January 28, 2008 the Court responded to Peru's request for an interpretation of the sentence in the case of *Cantoral Huamani y García Santa Cruz*. The Court's July 10, 2007 decision (see 15 No. 1 HUM. RTS. BRIEF, 52) held that Peru had violated Articles 4 (protecting the right to life), 5 (providing a right to humane treatment), 7 (protecting personal liberty), and 16 (guaranteeing freedom of association) of the Convention for the kidnapping, torture, and extrajudicial execution of Saúl Isaac Cantoral Huamani and Consuelo Trinidad García Santa Cruz. In addition, the Court held that the state violated Articles 5 and 8.1 (protecting fair trial rights), and 25 (providing a right to judicial protection) in relation to the victims' families.

The state asked three questions. First, it asked if the Peruvian judiciary arrives at a different conclusion from the Court's regarding the responsibility of state agents, will Peru be able to submit a petition for revision of the sentence? The Court held this question inadmissible because it was not intended to clarify the sentence but rather referred to sentence revision powers

not granted by the Convention, the Statute, or the Court Rules. Finally, the Court noted that the sentence in the case established state responsibility, not individual responsibility.

Second, the state asked if it should give the sum of \$7,500 to the victim's widow Pelagia Mélida Contreras Montoya de Cantoral or to the Mining Federation of which the victim was Secretary General. This sum was found in the hostel where Cantoral Huamaní was staying at the time of his death, taken by the state, and subsequently lost. Because the Court found that the question arose out of a doubt concerning the meaning of the sentence, it proceeded to rule on the question. The Court held that because the victim's widow was part of the suit, unlike the Mining Federation, she should receive the money.

Third, the state asked the Court to reexamine whether Cantoral Huamaní's mother Elisa Huamaní Infanzón indeed died on August 17, 1989, six months after her son was killed. The Court had found this to be true. The state claimed in its request for an interpretation of the sentence that she was still alive. The Court held that this request was not for clarification, but that it rather posed a factual question that had already

been considered at the procedural stage and to which the state had not objected. Thus, the Court declared this question inadmissible.

CASE UPDATE: COMPLIANCE WITH JUDGMENT IN *ESCUÉ ZAPATA VS. COLOMBIA*

On May 1, 2008 the Court examined the Colombian government's request for an interpretation of the decision in the case of *Escué Zapata vs. Colombia*. The Court handed down the decision in this case on July 4, 2007 (see 15 No. 1 HUM. RTS. BRIEF, 51). It held that Colombia had violated Articles 4 (protecting the right to life); 5.1 and 5.2 (providing a right to humane treatment); 7.1 and 7.2 (protecting personal liberty); 8.1 (protecting fair trial rights); 11.2 (protecting privacy rights); and 25 (providing a right to judicial protection) of the Convention. German Escué Zapata, a member of one of Colombia's 87 indigenous communities and a former mayor of the city of Jambaló, was taken from his home by the Colombian military, bound, beaten, and arbitrarily executed by gunfire. By asking questions on the decision, the state extends the period of time in which to comply with the Court's sentence.

Colombia has asked the Court four questions. First, it asked whether a fund established for the collective use of the Jambaló community need be a particular type, such as a fiduciary account or an inter-administrative agreement. Second, it inquired whether the state is responsible for costs associated with the victim's daughter's studies if she does not finish within the normal five years, what its responsibility is if she is not admitted, and whether the state can cover lodging, transportation, and material costs with a one-time payment. Third, it asked how the Court's holding should be published — for example, which parts need to be included? Fourth, it asked if litigation costs should be paid to the victim's representatives or the victim's mother. **HRB**

Natalie M. Huls, a J.D. candidate at the Washington College of Law, covers the European Court of Human Rights for the Human Rights Brief.

Sara Ramey, a J.D. candidate at the Washington College of Law, covers the Inter-American System for the Human Rights Brief.

UNITED NATIONS UPDATE

NEWLY FORMED UN GROUP WORKING TO ENSURE RIGHTS OF PERSONS WITH DISABILITIES

More than 20 UN departments, agencies, programs, and funds have combined to create the Inter-Agency Support Group for the Convention on the Rights of Persons with Disabilities (Convention) to support measures to ensure the rights of the world's 650,000,000 persons with disabilities. The Convention, adopted by the General Assembly at the end of 2006, is only three ratifications short of the 20 needed to become a binding international legal document. When it opened for signature, 40 countries initially indicated their desire to sign onto the Convention.

The Convention aims to ensure that persons with disabilities are guaranteed

equal human rights to non-disabled persons. It covers such rights as equality, non-discrimination, independent living, and cultural and political participation. The purpose of the Support Group is to raise awareness of the Convention in hopes of securing the remaining ratifications needed and to create an infrastructure capable of implementing its goals. To this end, the Support Group will focus on implementing policies, international cooperative programs, and capacity-building for Member States, civil society, and the UN, and the creating a Committee on the Rights of Persons with Disabilities.

The international community of people with disabilities, as well as disability advocates and experts, have embraced the Convention as a way to further the interests of disabled people worldwide. In some

countries, disabled people may be denied the right to open a bank account or to refuse medical treatment. Article 12 of the Convention guarantees disabled people the right to own property, manage their financial affairs, and to enjoy legal capacity on an equal basis with others. Some advocates stress that much work remains at a domestic level before many countries, even relatively progressive and developed ones, can fully implement the Convention. The European Union has been criticized as having high levels of unemployment for adults with disabilities and segregated school systems for disabled children. Critics warn that so long as disabled people remain disenfranchised, they will be difficult to represent politically as their voice will only be heard by proxy. While some believe that the Convention will help overcome such problems, others suggest that