

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

European Court of Justice strikes down Security Council Blacklist

The European Court of Justice (ECJ) ruled that the implementation of the United Nations Security Council's Al-Qaida blacklist without access to an effective remedy violates human rights. In 1999, the Security Council adopted Resolution 1267, which requires all states to freeze assets and ban travel of individuals and entities associated with Al-Qaida or the Taliban. The European Union (EU) passed a series of regulations implementing the resolution and its subsequent amendments. The list of individuals and entities subject to the sanctions is created by the Al-Qaida and Taliban Sanctions Committee, comprised of representatives from each member of the Security Council. Because affected individuals have no standing to challenge who is put on or taken off the list, the ECJ held on September 3, 2008, in *Kadi and Al Barakaat v. Council of the European Union* that the EU regulations violated their fundamental rights to be heard, to respect for property, and to an effective remedy which form part of the EU law.

The crucial issue before the court was whether the ECJ had the power to review the legality of EU regulations. The Court of First Instance, the judicial body from which *Kadi* appealed, held that the ECJ generally does not have this power. This is because EU regulations only implement obligations arising from the UN Charter, which by virtue of Article 103, has primacy over the law of the European Community.

The ECJ approached this sensitive matter by carefully circumscribing its power of review to the conformity of the EU regulations with the legal order of the European Community. The ECJ stressed its inability to review the lawfulness of Security Council resolutions themselves. Nevertheless, the ECJ held that the fact that obligations were imposed by an international treaty "cannot have the effect of prejudicing the constitutional principles of the EC treaty, which include the prin-

ciple that all Community acts must respect fundamental rights" and that "measures incompatible with respect for human rights are not acceptable in the Community." The ECJ positioned the effects of international law in the legal order of the European Community below the "very foundations of the Community legal order, one of which is the protection of fundamental rights." It thus implicitly refused to give Article 103 of the UN Charter an effect of overriding all conflicting rules.

The Court must be hailed for giving precedence to the protection of human rights over any possible conflicting international obligations. It is hoped that the judgment will have an impact on the work of the Security Council, which should amend its procedures to be more respectful of human rights. Otherwise, it runs the risk of undermining the effectiveness of its decisions in instances like *Kadi*, where states may be unwilling to fully implement such decisions due to conflicts with the protection of human rights.

Deporting Severely Ill Violates Article 3 Only in 'Exceptional Circumstances'

In *N. v the United Kingdom*, the Grand Chamber of the European Court of Human Rights (ECHR) upheld a decision to deport an asylum seeker with AIDS back to Uganda. Despite the unavailability of vital antiretroviral treatment in her home country, the removal of Ms. N. would not violate Article 3 of the European Convention on Human Rights (the Convention).

Ms. N. was diagnosed with AIDS shortly after arriving in the United Kingdom (UK) in 1998. Although Ms. N.'s condition was stabilized after intensive antiretroviral treatment, a 2001 expert report determined that without continuing regular treatment, her life expectancy would be less than one year. Ms. N. claimed that the acute physical and mental suffering, followed by an early death in Uganda due to the lack of adequate medical treatment, would violate Article 3's prohibition against inhuman or degrading treatment.

On May 27, 2008, the court held that the removal of an alien with a serious mental or physical illness to a country with inferior treatment facilities may raise an issue under Article 3, but only in "a very exceptional case, where the humanitarian grounds against the removal are compelling." The criteria for an "exceptional case" are the severity of the illness, availability of the treatment, and the prospect for family and social support in the target country.

The Court did not find such exceptionality in the present case. Although it accepted that the applicant's life and life expectancy would be adversely affected if she were returned to Uganda, the Court still found that she was not critically ill when the case was decided and that the lack of access to medical treatment and support in Uganda was speculative.

The Court should be hailed for recognizing the possibility that removal of a seriously ill alien might violate Article 3; however, the Court's application of the Article to this case was questionable. First, the Court was satisfied with the statement that antiretroviral medication is generally available in Uganda, but it did not consider whether the applicant herself would have access to it. Indeed, the three dissenters pointed to the fact that the available evidence clearly proved that Ms. N. would not have access. Second, the reliance of the Court on the fact that the applicant's condition was stabilized is dubious and at odds with the case law. It is not the time proximity between deportation and the suffering that is decisive, but the foreseeability of the prohibited treatment as a consequence of the deportation.

Additional European Court of Human Rights Cases

In *Vajnai v. Hungary* the Court found that a criminal conviction for wearing a red star symbol violated the freedom of expression. The Court held that, because not all uses of the symbol connote communist totalitarian rule, a flat ban on the symbol would be "too broad." On the contrary, in *Soulas v. France*, the Court upheld criminal sanctions against the author of a

book that argued that Muslims were gradually overtaking Europe, stating that the book incited hatred and violence towards Muslim communities.

In *Salah Sheekh v. the Netherlands* the Court explored the issue of internal flight alternative, a contested area of refugee law. The supporters of the concept argue that if persons are able to escape persecution by moving into a different part of their country, they cannot claim refugee status abroad. The Court held that as a precondition for relying on an internal flight alternative, certain guarantees have to be in place. “The person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise.”

In *Maslov v. Austria* the Grand Chamber found that Article 8 prohibits an expulsion from the country of immigrant juvenile offenders because of effects on their family life. It stressed that, for juveniles, “very serious reasons are required to justify expulsion.” Nevertheless, it was careful to leave the door open especially for cases of particularly violent offenders.

In *Budayeva v. Russia*, the Court held that the positive obligations of states under the right to life in Article 2 extend also to situations of natural disasters. Thus, the Court found Russia responsible for deaths in a 2001 mudslide for failing to take measures against an imminent and identifiable natural hazard. Russia’s request for a referral to the Grand Chamber is still pending.

In *Yumak and Sadak v. Turkey*, the Grand Chamber ruled 13 to four that the extraordinarily high ten percent electoral threshold imposed in parliamentary elections in Turkey is excessive, but does not violate the right to free elections in the specific circumstances of the case. The primary mitigating circumstance was that individual candidates were not subject to the threshold and, in practice, strategies such as candidates running independently rather than on a party list of which they were members were successful in achieving seats in the Parliament. The dissenters severely criticized the Court for relying on informal ways around the threshold.

Ghosts of the past haunted the Court in *Kononov v. Latvia* and *Korbely v. Hungary*. Both Kononov, a member of Red Partisans during World War II, and Korbely, a member of Hungarian communist army during

the 1956 Hungary uprising, were convicted of killing civilians. In both cases, the Court found, by a close margin, a violation of Article 7 (no punishment without law) because the convictions could not be based either on domestic law or on the right interpretation of international humanitarian law (IHL). The core of the judgments lies in the analysis of a status of a civilian under IHL. In *Kononov*, the Court held that men who received rifles and grenades from the German military administration and sided with them could not be regarded as civilians under the laws and customs of war as codified in the Hague 1907 Regulations. In *Korbely*, the Grand Chamber found that the victim was a member of armed group of insurgents, carried a handgun secretly and did not signal in an unequivocal way an intention to surrender when caught. Thus the victim did not fall under any category of a protected person under the Common article 3 of the Geneva Conventions. The Latvian government has already indicated a will to have the case reviewed by the Grand Chamber.

INTER-AMERICAN SYSTEM

Haiti Violated Former Prime Minister’s Rights

The Inter-American Court on Human Rights (the Court) issued judgment in *Yvon Neptune v. Haiti* on May 6, 2008, marking its first decision on Haiti. The Inter-American Commission on Human Rights (the Commission) submitted the case to the Court in December 2006 due to the failure of the Haitian government (Haiti) to respond to the recommendations of the Commission. The Court found that Haiti violated Neptune’s rights as protected by the American Convention on Human Rights, including judicial protections, personal liberty, and personal integrity. The Court, however, did not find a violation of Article 9 (freedom from retroactive laws).

Neptune served as Haitian prime minister amidst a political crisis that spanned March 2002 to March 2004 in the government of former president Bertrand Aristide. Following a February 2004 armed confrontation in the city of La Scierie (Saint-Marc) resulting in many deaths, the government fell and an interim government was established. Days before, Neptune visited La Scierie as prime minister and urged police forces to impose order in the city. Soon after the visit, the Saint-Marc Court of First Instance ordered Neptune’s arrest

for ordering and participating in the ‘massacre’ at La Scierie. Although Neptune did not receive direct notification, he turned himself in after hearing about the order on the radio in June 2004. Neptune was detained for twenty-five months in two Haitian prisons. In April 2007, an appellate court held that the order against Neptune had been made by a court without jurisdiction. The Haitian constitution stipulates that state agents can not be judged by ordinary courts. The matter was directed to the High Court of Justice, where it remained pending at the time of this decision. Neptune was granted temporary humanitarian release in July 2006.

Haiti asserted that the alleged violations occurred prior to the establishment of the current government. The Court held that difficult conditions did not justify failure to comply with obligations of the Convention. Haiti argued that because of the separation of powers, the executive was not responsible for the judiciary’s failures. The Court, however, asserted the international legal principle of unity of the state, holding Haiti as a whole responsible for violations, regardless of which branch of government directly caused them.

The Court found Haiti in violation of Neptune’s judicial protections under Articles 8 and 25 as a result of the unjustifiable delay of access to justice, prolongation of uncertainty, and lack of judgment by a competent judge on the merits. First, the Court held that Haiti failed to give Neptune sufficient notice of the charges against him until September 2005 when he had been detained for over a year. Second, the Court noted that Haiti had detained Neptune for more than two years upon the order of a tribunal lacking jurisdiction over him. Third, his case was mandated to the High Court of Justice which had no operative procedures. This resulted in undue delays in Neptune’s access to justice. The Court held that temporary release without any formal documentation rendered Neptune vulnerable to re-imprisonment and to reprisals from Haitian society.

The Court also found the state violated Neptune’s rights to personal liberty within Article 7 and his right to personal integrity protected by Article 5. Under Article 7, Neptune’s detention was illegal and arbitrary because it had been prescribed by a court without jurisdiction. Additionally, he was not adequately informed of the reasons for his detention nor allowed to appear

before a judge until 11 months after his arrest. The unhygienic cells, restrictions on movement, threats from guards and other inmates, and the failure to prevent escalation of violence resulting in a riot that endangered Neptune's life amounted to Article 5 violations. Further, Haitian officials held Neptune in the same cells as convicted criminals, in direct contravention of Article 5.

The Court prescribed reparations, including \$95,000 in costs and damages to be paid to Neptune. The Court ordered Haiti to expeditiously decide the case against Neptune, to set forth rules for the High Court enabling it to be operative and consistent with the Convention, and to improve the conditions of detention facilities in line with international standards.

IACHR Decides First Case on Just Compensation

On May 6, 2008, the Court decided *Chiriboga v. Ecuador*, and ruled that the Ecuadorian government had limited the Chiribogas' property rights (Article 21) in contravention of the judicial protections (Articles 8 and 25) provided in the American Convention on Human Rights. In 1991, the Municipal Council of Quito issued a declaration expropriating petitioners' inherited land for public use as the *Parque Metropolitano*, an area for recreation and ecological protection. The state possessed the land in 1997, rendering the petitioners unable to exercise their rights to use and enjoy the property. The state made a unilateral determination of value contested by petitioners and rebuffed by expert assessments. The determination consequently gave rise to condemnation proceedings that remained pending.

Ecuador contended that petitioners failed to exhaust domestic remedies. The Court found that petitioners instituted multiple actions in Ecuador to establish the illegality of the declaration of public utility on the basis that they received insufficient notice and were subjected to discriminatory treatment in the targeting of their land. An excessive amount of time passed in which state courts failed to produce definite rulings on the petitioners' claims. The Court also noted that the writ of *amparo*, which would have offered petitioners protection from expropriation, had been denied. Accordingly, petitioners had exhausted domestic remedies.

Article 21 provides that the right to property is not absolute and can be limited for reasons of public utility or social interest where the owner is justly compensated and the expropriation is governed by law. The Court found that the expropriation represented a reasonable limitation because it was aimed at environmental protection. The state's unilateral assessment of property value, however, was not a just compensation, and the condemnation proceedings exceeded a reasonable time period and were ineffective. Ecuador's failure to provide the judicial protections of notice and effective remedy in relation to the deprivation of property constituted a violation of Articles 21, 8, and 25.

The judgment prescribed reparations, including the provision of just compensation within six months, with the Court reserving the right to award compensation and costs if Ecuador was unable to do so on its own.

Panama Responsible for 1970s Disappearances

In its August 12, 2008 decision, the Court found that the Panamanian government violated Heliodoro Portugal and his family's rights to personal liberty, humane treatment, fair trial, and judicial protection as delineated in the American Convention on Human Rights. The Court also found that Panama failed to criminalize forced disappearance and to fulfill its obligation to criminalize torture as prescribed by the Inter-American Convention on the Forced Disappearances of Persons and the Inter-American Convention to Prevent and Punish Torture, respectively. Portugal, a suspected communist intellectual, was abducted in 1970 and had remained missing for 30 years. After Panama's transition to democracy, Portugal's daughter reported the disappearance in 1990. Remains found near military barracks in 2000 were determined to be those of Portugal.

Panama claimed inadmissibility due to failure to exhaust domestic remedies, asserting that family members never made a direct accusation and that the investigation had been conducted without delay. The Court found that the initiation of a direct accusation was not a requirement, and given Portugal's disappearance over 30 years ago, there had been an unjustified delay in the investigation. In response to Panama's assertion that the Court lacked temporal jurisdiction, the Court held that

it would be limited to those violations occurring after May 1990 when Panama recognized the jurisdiction of the Court. Because Portugal was killed before this time, the Court could not rule on the question of extrajudicial killing.

The Court could rule, however, on personal liberty, because the forced disappearance continued until 2000 when Portugal's remains were identified. The Court denied Panama's argument that the alleged disappearance and ill-treatment ended when Portugal was killed, prior to the recognition of jurisdiction. The Court found that Panama violated Article 7 from the moment it accepted jurisdiction until the moment Portugal's remains were identified. The Court also found Panama violated the Article 5 right to humane treatment, holding that the inactivity of state authorities, lack of effective investigation, and failure to sanction those responsible violated the mental and moral integrity of the family members. In addition, the Court found Panama in violation of procedural rights asserted in Articles 8 and 25 and determined that domestic recourses were ineffective in guaranteeing access to justice, a thorough investigation, and the sanctioning of those responsible. No investigation occurred in the 38 years that Portugal was missing. During 18 of these years Panama, as a state party to the Convention, was obligated to investigate. It was unreasonable for Panama to have allowed 18 years to pass without investigating.

Although petitioners alleged violations of freedom of thought and expression, the Court held that familial access to information about what happened to Portugal was not within the limits of Article 13. Due to the timing of the disappearance, the Court did not have jurisdiction to rule on the ideological basis for disappearance. In addition to material and immaterial damages, the Court ordered Panama to provide free medical and psychological care to the family members and to pay litigation costs. **HRB**

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