

## UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

### EUROPEAN COURT OF HUMAN RIGHTS

#### Portugal's limitations of advocates of abortion declared illegal

In *Women on Waves and others v. Portugal*, the Court gave strong backing to freedom of expression and found a violation of the European Convention on Human Rights in the very sensitive context of abortion. Generally, the Court has so far refrained from giving any clear answer to the question whether there is a right to abortion under the Convention or on the contrary whether abortion is prohibited. Yet, the Court has been quite protective of freedom of speech of pro-choice advocates. In 1992 in *Open Door and Dublin Well Woman v. Ireland*, the Court found that the Irish strict anti-abortion laws, which included an absolute ban on abortion counseling, violated the freedom of expression. The present case decided on February, 3, 2009 follows this precedent.

A Dutch NGO, Women on Waves, operates a ship, which it sends to countries where abortion is illegal. The ship then sails into international waters where its medical personnel can legally undertake early abortions. In 2004 this ship intended to come to Portugal and stay in its ports to hold seminars and meetings on the topics of the prevention of sexually transmitted diseases, family planning, and the decriminalization of abortion. The Portuguese authorities, however, prohibited the ship to enter its territorial waters because they claimed that it was to "distribute pharmaceutical products not authorized by the Portuguese health authorities" and to encourage "the practice of certain illegal acts." The Portuguese government sent two warships to enforce the order and patrol the Dutch ship which remained in international waters.

Seven judges had no problem to find unanimously a violation of the freedom of expression. They acknowledged the illegality of abortion in Portugal and the values underlying it but stressed that freedom of expression has the greatest value precisely when it exercises "offend, shock and challenge the established order." The Court found as unsubstantiated the government's claim that illegal abortions were to be conducted on the ship once in Portuguese

waters. Regarding the fear of distribution of unauthorized medicine, the Court held that other measures were available to the government (such as seizure of the prohibited drugs) and that the outright ban on access for the ship to its waters was clearly disproportionate. Sending warships against a civilian ship, according to the court, not only negatively affected the rights of the Dutch NGO but also had a chilling effect on others wishing to exercise their freedom of speech. Similarly, the Court dismissed the government's claim that the intended seminars could take place by stressing that it is not for the government to dictate how and where freedom of expression can be exercised. If Women on Waves wanted to hold the seminars on the ship, it was their right to do so.

The activities of Women on Waves were part of a broader campaign to legalize abortion in Portugal. This aim was finally achieved in 2007 when abortion on demand until 12 weeks into pregnancy was made legal after a non-binding referendum to that effect.

#### States must take effective measures to prevent killings

A violation of the right to life was found by the Court in *Branko Tomašić and Others v. Croatia*. Croatia has failed to take reasonable steps to prevent deaths of a mother and a child killed by the mother's former partner and father of the child. The case, decided on January, 15, 2009, serves as a recapitulation of the positive obligations of states arising from the right to life in the European Convention on Human Rights.

The existence of positive obligations under the right to life is well established in the Court's case-law and as such is not disputed. States have an obligation first of all to have in place criminal law provisions to protect the right backed by effective "law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions." Moreover, in 1998 in the now classic case of *Osman v. the United Kingdom*, the Court ruled that if there exists a "real and immediate risk to the life of an identified individual" of which the authorities knew or should have known, they must take reasonable operational measures to prevent that risk from materializing. The application of this Osman test was an issue in this case.

After their separation, the father repeatedly threatened to kill the mother and the child. For that he was convicted of death threats and sentenced to five months imprisonment and was ordered to undergo a psychiatric treatment in the prison. The treatment was not, however, properly administered. Several weeks after serving his sentence the father went to the house of the mother and the child and shot both of them before shooting himself. The police were tipped off by a neighbor who saw the father approaching the house but they unfortunately arrived twenty minutes late.

In applying the Osman test the Court found that the authorities clearly knew of the danger posed by the father. These threats were real as evidenced by the fact that he was imprisoned for them. Yet, the Court found that Croatia failed to take any adequate measures to reduce the risk. The Court noticed that no search of the father's house was conducted to find out if his claims that he possessed weapons to carry out the killings were true. Further, the Court stressed that the father was diagnosed in need for continued psychiatric treatment. Yet, his ordered psychiatric treatment was about to last only two months and even that short treatment was not conducted by qualified psychiatric professionals. Moreover, no psychiatric assessment was conducted prior to his release. Consequently, the Court unanimously decided that the authorities failed "to take all necessary and reasonable steps" to protect the lives of the mother and the child and thus violated their right to life.

The case is a testament to the strong protection the Court affords to the right to life, which it describes as "one of the most fundamental provisions in the Convention." Here, even though the father had been imprisoned for death threats and the police arrived at the scene as soon as possible, it was not enough to fulfill the states' positive obligations arising from the right to life. Even though such obligations cannot put a "disproportionate burden on authorities," they must nevertheless be effective in protecting this fundamental right. Thus, the test of reasonability of measures the state must take to prevent killings is quite high. That seems to be fully justified in view of the finality of violations of the right to life.

## A Selection of Other Recent Significant Cases

In several cases the Court has been faced with the unfortunately ever pervasive question of torture and other inhuman treatment. In *Atalay v. Turkey* it found that the prohibition of ill-treatment is so fundamental that its violations must be adequately criminally punished. Consequently the short suspended imprisonment of the responsible police officer and acquittal on appeal of two others fell short of the Convention's standards and Turkey failed to fulfill its positive obligations under the prohibition of ill-treatment. In *Ben Khemais v. Italy* the Court found that diplomatic assurances given by Tunisia, where the applicant was to be deported, could not be effective in view of the reports of persistent torture in Tunisian prisons. This judgment is another addition to the list of decisions that held that diplomatic assurances in cases of torture cannot be deemed effective. Whether they can ever be thus becomes more and more questionable.

In *A. and others v. the United Kingdom* the Grand Chamber of the Court on February, 19, 2009 confirmed the 2004 holding of the House of Lords that the British post 9/11 scheme of indefinite detention of non-British terrorist suspects was discriminatory and violated their right to liberty. At the same time, though, it found that the scheme did not per se constitute inhuman treatment.

In *Olujic v. Croatia* the Court reminded judges that they cannot publicly express their opinions about a case or a party to a case that they are about to decide. If they do so they compromise their impartiality in violation of the right to a fair trial of the parties to the case. On the other hand judges have the right to comment on the internal affairs in the judiciary. In *Kudeshkina v. Russia* a judge was dismissed because of disseminating deceptive and insulting perceptions of the judicial system after publicly questioning the independence of the Moscow judiciary. The Court found this to be an illegal interference with her freedom of expression.

A question of whether a disproportionate punishment can violate the European Convention on Human rights was considered by the Court in the similar cases of *Ismayilov v. Russia* and *Grifhorst v. France*. In both cases the complainants were convicted of not declaring the carrying of large amounts of lawfully acquired foreign currency when crossing the border. They were sentenced to a suspended term of imprisonment and a fine respectively

and their money was confiscated. In both cases the Court found a violation of their right to property because the confiscations taken together with the other penalties were disproportionate and thus could not be considered a proportionate interference with their property.

In the largely identical cases of *Armoniene v. Lithuania* and *Biriuk v. Lithuania* the Court delved into the issue of insufficiency of damages for violations of privacy awarded under national laws. It found that the statutory limit on the amount of damages which results in low awarded damages disproportionate to the seriousness of the breach fall short of the positive obligations of states to effectively protect the right to privacy of its inhabitants. The principal reason was that the limit diminishes the deterrent effect of the prohibition on infringements of privacy.

In *Sergey Zolotukhin v. Russia* the Grand Chamber unified the Court's diverse interpretation of the non bis in idem rule. It unanimously ruled that a second prosecution is prohibited if it arises from identical or substantially the same facts irrespective of their possible different legal classification.

## INTER-AMERICAN SYSTEM

### IACHR Demands State Responsibility for Forced Disappearances in *Ticona Estrada et al. v. Bolivia*

In its November 27, 2008 judgment in the case of *Ticona Estrada et al. v. Bolivia*, the Inter-American Court of Human Rights (Court) found Bolivia liable for the forced disappearance of Renato Ticona Estrada. The judgment marked the Court's commitment to combating impunity and to guaranteeing adequate reparations for victims of human rights violations.

Bolivia came before the Inter-American system to address allegations by Estrada's family members that the state had violated the human rights of Estrada, his brother, Hugo, and their family members. Renato disappeared on July 22, 1980, when he and his brother were randomly detained by military officers and tortured. While the military officials transferred Hugo to medical facilities following this treatment, they handed Renato over to the Division of Public Order, and he was never seen again. This disappearance occurred amidst a pattern of repression and systematic human rights abuses by the Bolivian military and paramilitary groups, which came to power through a coup d'état in 1980.

Bolivia responded to the alleged violations brought by the victim's family members and the Inter-American Commission for Human Rights (Commission) by issuing a partial acknowledgment of its responsibility. In particular, Bolivia recognized its international responsibility for violating Renato Ticona Estrada's right to juridical personality (Article 3), right to life (Article 4), right to humane treatment (Article 5), right to personal liberty (Article 7), right to a fair trial (Article 8) and right to judicial protection (Article 5) as enshrined in the American Convention on Human Rights (Convention). In addition, the state recognized its responsibility for various provisions of the Inter-American Convention on the Forced Disappearance of Persons (IACFDP) and a series of provisions of the American Convention relating to the family members, including Hugo Ticona Estrada. The state's representative formally apologized for these violations. Despite this partial acknowledgement, however, Bolivia contested the reparations requested by the family members and the Commission, the alleged violations of Hugo Ticona Estrada's due process rights (Articles 8 and 25), and the violation of the IACFDP in relation to Renato. Bolivia challenged the reported failure to adopt domestic legal provisions in accordance with the Convention (Article 2).

The Court found that the state failed to comply with its obligations under Article 2 to adopt sufficient domestic provisions in relation to forced disappearances. Specifically, Bolivia failed to define the crime of forced disappearance in its domestic laws, as required, until after the immediate case was brought before the Inter-American system. Although the violation had since been rectified with the incorporation of this crime into Bolivian law in 2006, the Court held the state responsible for this violation. The Court also found Bolivia responsible for the due process violations suffered by Hugo Ticona Estrada insofar as the state had failed to investigate his claims of torture, to punish those responsible, and to provide full reparation.

On the issue of the IACFDP, the Court found in Bolivia's favor, noting that the offense of forced disappearance does not include a duty to hold detainees in a recognized place of detention because detention does not share the same continuity over time as does the forced disappearance. Interestingly, although Bolivia had conceded responsibility for violating Renato Ticona Estrada's right to juridical personality enshrined in Article 3, the Court found that no such violation had been committed because the specific meaning of that right,

that every person should be recognized as having rights and obligations, was not infringed in this case.

The Court prescribed extensive reparations, including pecuniary and non-pecuniary damages and took into consideration the lost income of Renato Ticona Estrada based on his life expectancy. The Court directed Bolivia to expeditiously continue criminal proceedings in relation to this case, and to conduct a thorough and prompt investigation into the matter.

### **Court finds Arbitrary Detention Violations in *Bayarri v. Argentina***

On October 30, 2008, the Court issued its judgment in the case of *Bayarri v. Argentina*, holding that the unlawful and arbitrary detention of Juan Carlos Bayarri for thirteen years constituted a violation of the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8) and the right to judicial protection (Article 25) of the Convention.

Argentina contested the admissibility of the case before the Court based on Bayarri's alleged failure to exhaust domestic remedies. Although it had not challenged the admissibility of the case before the Commission, Argentina alleged that the state had since offered a domestic remedy for Bayarri. The Court held that the possibility of a new domestic remedy did not create another procedural opportunity for a state to question the admissibility of the petition; admissibility is established the moment a petition is filed before the Commission, and at that time, Bayarri had no effective domestic remedy available.

Substantively, the Court held that Argentina had violated the Article 5 right to humane treatment by subjecting Bayarri to various forms of torture. The Court found that Argentina had tacitly accepted the legal determinations by its own domestic courts, which concluded in 2004 and 2005, respectively, that Bayarri's confession had been coerced through torture and that proceedings against him did not meet domestic standards of due process. In addition, the Court noted that Argentina failed to investigate Bayarri's physical and mental suffering with due diligence.

The Court also found a violation of Article 7 insofar as Bayarri had experienced unlawful detention. In 2005, a domestic court confirmed that Bayarri had been detained without an arrest warrant and had

been held at a clandestine facility. He was not promptly brought before a judge and was held in preventive detention for thirteen years, a time period well beyond that permissible under domestic law.

Further, the Court determined that Argentina violated Articles 8 and 25, which guarantee a fair trial and judicial protection, respectively. The Court observed that it took fourteen years for domestic courts to conclude an investigation of the facts in this case. The first judgment against Bayarri was handed down ten years after his detention, and the final judgment of acquittal was not issued until 2004. These delays constituted a violation of Article 8. Further, because Argentina's ineffective investigation made it impossible to clarify the facts and to determine alleged criminal responsibility, the state violated the Article 25 right to judicial protection.

Because the Commission had not previously deemed the family members victims, the Court only considered Bayarri in its reparations analysis. The Court prescribed pecuniary damages for medical and psychological treatment and for future care, as well as for lost earnings. In addition, the Court mandated that Argentina must conclude the criminal case against Bayarri and ensure procedural protections in that process.

### **Court Protects Lawyer's Rights to Privacy**

The Court issued a judgment in the case of *Tristan Donoso v. Panama* on January 27, 2009, holding that Panama violated various rights of Panamanian lawyer Santander Tristan Donoso in relation to the recording and dissemination of a phone conversation between Donoso and a client. Based on the contents of this conversation, which pertained to suspicious contributions to the political campaign of the then-attorney general, the attorney general initiated defamation proceedings against Donoso, which culminated in a conviction in 2004. Donoso and his representatives subsequently petitioned in the Inter-American system for relief.

The Court analyzed the alleged violations of Donoso's human rights, including the right to privacy (Article 11), freedom of thought and expression (Article 13), the right to a fair trial (Article 8), and judicial protection (Article 25). The Court found violations of some part of each of the articles alleged.

In determining whether there had been a violation of Article 11, the Court observed that the right to privacy is not absolute, but rather must be protected from arbitrary and abusive interferences. Because there was no proof that the attorney general or any other state actor had ordered or facilitated the infringement on Donoso's privacy, the Court could not find that Panama had violated Article 11 with the recording. The Court then considered the dissemination of the conversation to members of the press and the church. The Court found that while the state did have an interest in preventing potential defamation of its officials, the attorney general's actions in leaking the recorded conversation to these parties was an inappropriate strategy for pursuing this interest. Additionally, the inflammatory language used by the attorney general when he presented the recorded conversation to the church and others damaged Donoso's honor and reputation, both of which are protected under Article 11. On these grounds, the Court held that Panama had violated Donoso's right to privacy.

Regarding the alleged violation of Article 13, freedom of thought and expression, the Court concluded that Donoso reasonably believed that the campaign involved corrupt business practices. Thus, the Court held that the criminal sanction imposed against Donoso was manifestly unnecessary and violated his right to freedom of expression.

Because Panama had conducted a diligent investigation in the matter against Donoso, it did not violate its due process obligations pursuant to Article 25. The Court did hold, however, that because the conviction against Donoso was based only on an illegally-obtained tape, his conviction could not stand and his right to a fair trial under Article 8 had been violated.

The Court called for a series of pecuniary and non-pecuniary damages as reparation for Donoso. Additionally, it mandated that Panama invalidate Donoso's criminal conviction. **HRB**

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