

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

AFRICAN REGIONAL AND SUB-REGIONAL COURTS

HISTORIC OPPORTUNITY FOR JUSTICE IN EAST AFRICA

“The East African Court of Justice (EACJ) needs your initiative to empower it to handle the cases, structures, and archives of the ICTR after the Tribunal closes,” urged Hassan Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) in a paper read by fellow prosecutor Paul Ngarua before East African heads of state on October 5, 2009. These remarks took many by surprise and have initiated a contentious debate concerning the prospect of a permanent mechanism for the adjudication of human rights cases in eastern Africa.

The most significant obstacle to Jallow’s proposal, as pointed out by Rwandan Ombudsman Tito Rutaremara, is that the “EACJ is not a penal court.” The jurisdiction of the EACJ is limited to handling the regional blocs’ affairs in accordance with the Treaty Establishing the East African Community (EAC Treaty). Presently, the EAC Treaty provides the EACJ no explicit subject matter jurisdiction over genocide, war crimes, and crimes against humanity. Accordingly, to enable the EACJ to assume the competency and jurisdiction of the ICTR, the EAC Council would have to enact an additional protocol to the EAC Treaty. Article 27 of the EAC Treaty explicitly envisages this possibility, stating that jurisdiction could be expanded to include “such other original, appellate, human rights and other jurisdiction as will be determined by the [EAC] Council at a suitable subsequent date.”

Additional objections to Jallow’s proposal came from Rwandan officials who assert that the ICTR is still in negotiations with the Rwandan government concerning the transfer of ICTR cases to Rwandan courts in Kigali. As Rwandan EACJ Judge Emily Kayitesi explained, Rwanda has already begun taking steps, such as upgrading detention facilities and building capacity within the judicial sector, to prepare for this possibility.

It remains uncertain whether the Rwandan government can bring its legal system in line with international standards before the ICTR’s mandate expires in 2012. In 2008, ICTR judges denied applications by ICTR prosecutors to transfer five cases to Rwandan courts, citing the insufficient capacity of the Rwandan justice system to ensure witness protection. Nevertheless, Rwandan objections may pose an obstacle to the EACJ’s adoption of the mandate of the ICTR. To be implemented, Jallow’s proposal needs the consensus of the EAC Council, and therefore, Rwandan support is critical.

Although expanding the competency and jurisdiction of the EACJ would require the allocation of significant additional resources and personnel, doing so would bring the EAC more closely in line with the goals underlying its establishment. According to Articles 6(d) and 123(3)(c) of the EAC Treaty, the promotion and protection of human rights is a foundational principle of the EAC. Article 6(d) states that the principles that shall guide the work of the EAC are “adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

Additionally, there are numerous advantages to adjudicating human rights cases at the regional level. One of the most prominent is that the close economic, political, and cultural ties of neighboring states may make enforcement of judgments more likely. Proximity of regional courts to the litigating parties could also reduce travel costs and allow for greater victim participation in proceedings. Lastly, a regional court may be better positioned to address transnational conflicts.

Incorporating human rights into the EACJ’s jurisdiction would also facilitate greater access to justice for individuals and non-state actors filing claims based on human rights violations. Currently, the continent-wide African Court of Justice

(ACJ) does not provide standing to most individuals and non-state actors. According to Article 34(6) of the ACJ Protocol, individuals and non-state actors can bring claims before the ACJ only if they are nationals of a country that has made an official declaration of exception. Currently, Burkina Faso is the only AU Member State that has made this declaration.

In light of the unprecedented work completed by the ICTR and the substantial challenges that will follow in its wake, Jallow’s proposal represents a historic opportunity for justice in East Africa. By expanding the competency and jurisdiction of the EACJ to enable the Court to adjudicate remaining ICTR cases, enforce ICTR sentences and witness protection measures, and manage ICTR archives, the EAC could simultaneously enable a new mechanism for regional human rights protection. As such, carrying out the ICTR Chief Prosecutor’s proposal has the potential to dramatically reshape justice in East Africa.

ECOWAS COURT AND THE PROMISE OF THE LOCAL REMEDIES RULE

On November 20, 2009, the Council of Ministers of the Economic Community of West African States (ECOWAS) meets to discuss pending proposals. One of the most contentious issues promises to be a proposal put forth by the Gambian government to restrict access to the ECOWAS Community Court of Justice.

The two components of the Gambian proposal that have elicited the strongest backlash are amendments to Articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05 of the Community Court of Justice. Article 9(4) provides that “the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.” Article 10(d) provides that “access to the Court is open to . . . individuals on application for relief for violation of their human rights.” The proposed amendments seek to curtail the reach of both articles by adding two requirements: first, that domestic remedies must be exhausted before a case can be heard by the Court; second, that the subject matter of a human rights claim before the Court must

fall within the scope of an international human rights instrument ratified by the respondent country.

Within ECOWAS, the Gambian government's proposal has received strong criticism from legal experts. The Gambian *Foroyaa* newspaper reported that, in a meeting of legal experts convened by the ECOWAS Commission from September 28 to October 3 to discuss the Gambian proposals, representatives of all Member States except The Gambia criticized the proposals. At a subsequent meeting, the ECOWAS Ministers of Justice unanimously rejected the Gambian proposal.

Civil society organizations have also rebuked the Gambian government's proposal. The Socio-Economic Rights and Accountability Project (SERAP) and the Centre for Defence of Human Rights and Democracy in Africa (CDHRDA) initiated legal action on September 28 against The Gambia before the ECOWAS Community Court of Justice. In their suit, SERAP and CDHRDA challenge the legality of the Gambian proposal under the ECOWAS Treaty. The lawsuit requests declarations by the Community Court of Justice that the Gambian proposal "infringes [on] the provisions of the ECOWAS Treaty and the Supplementary Protocol," and "is unlawful and of no legal effect because of [The Gambia's] continuing disobedience [of] the judgments and orders of the Community Court of Justice."

While requiring that the subject matter of human rights lawsuits fall within the scope of international human rights instruments ratified by the respondent country could restrict access to justice, requiring claimants to exhaust local remedies would not. Indeed, it has been argued that necessitating the exhaustion of local remedies (the local remedies rule) carries with it numerous benefits.

By requiring plaintiffs to first seek resolution of claims in domestic courts, the local remedies rule can prevent the development of contradictory interpretations of law between national courts and the Community Court of Justice. Local proceedings may also be cheaper and more effective by virtue of their proximity to the location of the alleged human rights violation. Additionally, because Article 76 of the ECOWAS Revised Treaty states that rulings of the Community Court of Justice are "final and shall not be subject to

appeal," first instance lawsuits filed before the Community Court of Justice waive the potential benefits of judicial review. With the local remedies rule in place, parties retain the option to appeal against an erroneous ruling in a first instance trial. Moreover, lodging a complaint against a government in national courts provides a government the opportunity to respond without the drama of a lawsuit on the international stage. Meanwhile, the prospect of subsequent review by the Community Court of Justice may provide complainants leverage to obtain more generous settlements at the domestic level, and may encourage domestic courts to more closely track international standards.

On account of many such benefits, the local remedies rule is widely implemented both globally and regionally. At the global level, Article 2 of the Optional Protocol of the International Covenant on Civil and Political Rights requires that the complainant has "exhausted all available domestic remedies," before submitting a complaint to the Human Rights Commission. At the regional level, Article 50 of the Charter establishing the African Court of Human and Peoples' Rights requires that "all local remedies, if they exist, have been exhausted" before the Court may exercise jurisdiction. Similarly, the local remedies rule is present in Article 26 of the European Convention on Human Rights and Article 46(1)(a) of the American Convention on Human Rights.

In light of the potential benefits of the local remedies rule proposed by the Gambian government, a critical and balanced debate is warranted. If the ECOWAS Council of Ministers takes advantage of this opportunity and rejects the position set forth by the Ministers of Justice, the Community Court of Justice could become a model for the adjudication of human rights cases at the regional level.

EUROPEAN COURT OF HUMAN RIGHTS

DEPORTATION OF IRANIAN REFUGEES DECLARED UNLAWFUL, DISCRIMINATORY ASYLUM PRACTICES GO UNMENTIONED

Turkey's decision to deport two Iranian refugees violated the European Convention on Human Rights, according to a recent decision by the European Court of Human Rights. Decided on

September 22, 2009, *Abdolkhani and Karimnia v. Turkey* held that because the applicants, two former members of the Iranian People's Mujahedin Organization, would likely have been tortured or killed if forced to return to Iran, Turkey's decision to deport them constituted a human rights violation.

Abdolkhani and Karimnia initially traveled to Turkey in April 2008 after the Iraqi refugee camp where they had been staying closed. Upon arrival the applicants were arrested and sent back to Iraq. They immediately reentered Turkey and on June 21, 2008, were arrested again. Even though Turkey knew that the UN High Commissioner for Refugees (UNHCR) recognized Abdolkhani and Karimnia as political refugees, a Turkish court convicted them of illegal entry and attempted to deport them once more, this time to Iran. When Iran refused to allow their return, Turkey detained Abdolkhani and Karimnia without further explanation or access to legal counsel. They have remained in custody since June 2008.

Since Turkey knew that the applicants would likely face physical harm if deported to Iraq or Iran, the Court held that Turkey's action exposed them "to an arbitrary deprivation of life, detention and ill-treatment in their country of origin" and thus violated their rights under Article 3, the prohibition of torture. The Court also determined that Turkey's failure to provide Abdolkhani and Karimnia with both an explanation for their post-trial detention and access to legal counsel violated the applicants' rights under Article 5, the right to liberty and security, and Article 13, the right to an effective remedy.

Although the Court did find Turkey's actions violated the Convention, the decision failed to address the underlying issue of this case: discrimination against refugees based on national origin. Turkey's 1994 Asylum Regulation defines a refugee as a "foreign national who, as a result of events occurring in Europe," has a well-founded fear of persecution. Turkish law thus allows the granting of asylum to Europeans, whereas non-Europeans may remain in Turkey only temporarily while they seek resettlement elsewhere. As the vast majority of asylum seekers originate from Iran, Iraq, Somalia, and Afghanistan, these geographical limitations severely impact

thousands of individuals seeking refuge in Turkey.

Because the Court did not mention the issue of discrimination, an immediate change to Turkey's asylum policy is unlikely. Although it has been working with the UNHCR to reform its asylum laws, Turkey currently has no host country agreement and still does not grant refugee status to non-Europeans.

The international community remains hopeful that the Court's decision will catalyze policy change. Deljou Abadi, Director of the Iranian Refugees' Alliance, Inc. and legal representative for Abdolkhani and Karimnia, praised the Court's decision as "underlin[ing] the longstanding call for Turkey to bring its laws and practices relating to asylum, deportation and detention of refugees and asylum seekers in line with international standards." This optimism, however, may be premature. Despite the Court's ruling, Abdolkhani and Karimnia remain detained as of October 13, casting serious doubt on the decision's potential to change Turkish policy in the near future.

PROGRESS REPORT RAISES QUESTIONS OF COMMITMENT TO COURT'S AUTHORITY

A progress report presented to the Council of Europe (CoE) Parliamentary Assembly by Christos Pourgourides, a rapporteur assigned to monitor implementation of the Court's decisions, revealed that of the 47 CoE Member States, 36 have failed to execute critical Court judgments five or more years after the cases were decided. Article 46 of the European Convention binds Member States to Court judgments and designates the Committee of Ministers to monitor enforcement progress. The new report, declassified on September 11, 2009, expressed concern over the increasing number of cases pending before the Committee of Ministers, which has risen from 2,298 in 2000 to 6,614 in 2008.

According to Pourgourides, three categories of unenforced decisions are particularly prevalent: death or mistreatment by state officials without adequate investigation; exceedingly lengthy judicial proceedings; and non-enforcement of domestic judicial decisions. Cases involving death or mistreatment by state officials generally address violations of Articles 2 and 3 of the Convention. These cases are of principal concern because Articles 2 and 3 embody the most fundamental guarantees

of the Convention, the right to life and the prohibition of torture. The report specifically noted Bulgaria, Greece, Russia, and Turkey as countries with outstanding judgments in this category of cases. The second and third subjects Pourgourides identified as serious problem areas pertain to malfunctions in domestic judicial processes. Greece, Italy, and Poland are the leading Member States with cases presenting claims of lengthy judicial proceedings, while Turkey and Russia have the most unenforced cases dealing with the failure to enforce domestic court decisions.

According to the report, Russia has one of the worst records of implementing judgments, signaling a lack of commitment to the Court. As of October 1, 2009, Russia had approximately 690 judgments pending before the Committee of Ministers. According to *Kommersant*, a Russian newspaper, "In Russia the European Court is often treated [as] an anti-Russian organization, whose verdicts are directed against the state." Additionally, a recent Human Rights Watch report noted that in several cases Russia has flatly contested the Court's findings. These sentiments severely inhibit compliance with Court decisions.

Lack of enforcement of Court decisions is a significant obstacle to the advancement of human rights in Europe. When Member States fail to enforce Court decisions, unlawful practices remain uncorrected, and the same injustices continue to appear in new cases before the Court. This places a considerable burden on the Court, "distracting it from its essential function." Had earlier decisions been effectively implemented, the Court would not need to spend time repeatedly addressing systematic problems.

Improving enforcement of Court decisions requires active involvement of the Parliamentary Assembly. To this end Pourgourides has engaged in dialogue with 11 Member States that have had significant implementation problems. Still, steadfast commitments from domestic governments to abide by final judgments are the "principal pillar" for the efficacy of the Court. Pourgourides concludes his report with a call to action, stressing to Member States that "without speedy and full execution of the Strasbourg Court's judgments [by domestic governments,] there can be no justice.

DEATH OF ITALIAN G8 PROTESTER NOT A VIOLATION OF RIGHT TO LIFE

On August 25, 2009, the Grand Chamber issued a judgment in *Giuliani and Gaggio v. Italy*. This case addressed Italy's responsibility in the death of Carlo Giuliani, a protestor shot by an officer of the Italian *carabinieri* (police) at the 2001 Group of Eight Summit in Genoa. The Court found no violation of Giuliani's right to life under Article 2 of the European Convention concerning excessive use of force or Italy's positive obligations to protect life. It did, however, hold that Italy violated Article 2 by failing to adequately investigate his death.

The 2001 Summit was characterized by violent clashes between anti-globalization protestors and law enforcement officers. On July 20, during one such demonstration, a *carabiniere* vehicle was surrounded by a crowd as violent protestors advanced on the three officers inside. After issuing a warning, a *carabiniere* in the vehicle fired two shots, one of which hit Giuliani in the head, fatally wounding him. In the subsequent confusion, the officers drove over Giuliani's body twice as they fled the scene.

Unhappy with the status of the investigation and prosecution of their son's case in Italy, Giuliani's parents and sister brought this action before the Court. In their complaint, Giuliani's family members alleged several violations of the Convention. Principally, they asserted that Italy's use of excessive force, failure to maintain public order, and failure to launch an effective investigation amounted to a failure to protect Giuliani's right to life and a breach of Article 2.

The Court found no violation of the Article 2 provisions banning the use of excessive force and requiring states to preserve public order. Because the *carabinieri* acted in self defense, reasoned the Court, the officers were not responsible for Giuliani's death. Additionally, it concluded, they did all they could to manage the situation.

The Court did, however, declare that Italy violated Article 2 provisions concerning the procedural obligations of domestic investigations. Under Article 2, state investigations of a homicide must clearly "establish the cause of death."

In this case, the premature decision to allow Giuliani to be cremated and failure to conduct an extensive study of ballistic evidence severely inhibited the investigation, making comprehensive calculations of the accident scene nearly impossible.

The Court's decision on this controversial issue left critical questions unanswered. Italian news sources speculated as to why the Court acknowledged a violation of Article 2, labeled as "one of the most fundamental provisions in the Convention," solely on the procedural obligations rather than on the substantive issue of protecting the right to life. The main reason the Court found no violation of the substantive obligations was the incomplete autopsy and forensic examination, which prevented investigators and the Court from forming conclusions on the manner of Giuliani's death. The Court nevertheless found the Italian government responsible for these investigative "shortcomings" in declaring a violation of the procedural obligations of Article 2, punishing the State for infringing on the right to life without explicitly declaring a human rights violation.

INTER-AMERICAN SYSTEM

IACtHR EXPANDS JURISPRUDENCE ON RIGHT TO PRIVACY IN THE AMERICAS

The Inter-American Court of Human Rights (IACtHR) condemned Brazil's use of wiretaps to illegally monitor two organizations in Paraná State associated with the Landless Movement (*Movimento dos Trabalhadores Rurais Sem Terra*, MST), a social movement that redistributes fallow land owned by wealthy *fazendeiros* (farmers) to the poor. *Escher v. Brazil*, decided July 6, 2009, expands the right to privacy enshrined in the American Convention on Human Rights (ACHR).

Between May 5 and 12, 1999, Paraná State Military Police officers petitioned Judge Elisabeth Khater of the Loanda District Court to authorize two separate requests to intercept and monitor telephone lines belonging to ADECON (*Associação Comunitária de Trabalhadores*) and COANA (*Cooperativa Agrícola de Conciliação Avante Ltda*) — two organizations associated with the MST. Judge Khater authorized the request without a

time limit, void of explanation, and subsequently failed to notify the Office of the Public Prosecutor about the request, violating the required procedural safeguards in authorizing such request.

In June 1999, the Military Police played extracts of conversations recorded from tapping these phone lines, on a nationally televised news program and held a press conference at which it played sections of the recordings and disseminated written transcripts of the conversations to journalists. In July 1999, the Military Police presented the recordings to Judge Khater. She did not forward the materials to the Office of the Public Prosecutor until March 2000, almost one year after the wiretapping began. In September 2000, the Office of the Public Prosecutor announced that the investigation was illegitimate and politically motivated — a mere pretext to monitor the MST. Moreover, the Office of the Public Prosecutor issued an opinion that found that the victims' rights to intimacy, privacy and freedom of association under the Brazilian Constitution had been violated and requested the Loanda District Court to declare the interceptions invalid. Judge Khater, however, ordered the tapes incinerated in April 2002.

On May 15, 2007, Arlie José Escher and Luciano de Vargas, members of ADECON and COANA and two of the named petitioners in the case before the IACtHR, sued Paraná State in the Fourth Property Court of Curitiba for reparations. Vargas's civil suit was dismissed and Escher's civil action is pending final judgment.

The IACtHR found that Brazil violated the organizations' right to privacy, honor, and reputation recognized in Article 11 of the ACHR (Right to Privacy), by unlawfully intercepting, recording, and disseminating the victim's telephone conversations. The Court noted the Brazilian government may legitimately intercept a telephone conversation within the bounds of the ACHR if the interception is (a) established by law; (b) has a legitimate purpose; and (c) is appropriate, necessary, and proportionate. In this case, the Court found that the State did not comply with the requirement of legality, as the interceptions violated Federal Statute No. 9,296/96. Further, the IACtHR found that Brazil violated Article 11 by disseminating private conversations that were protected by judicial confidentiality without following legal safeguards.

Moreover, the IACtHR found that Brazil violated the right to freedom of association recognized in Article 16 of the ACHR (Freedom of Association) because COANA and ADECON were illegally monitored only because of their political and ideological leanings. The Court also found that Brazil violated the rights to judicial guarantees and judicial protection recognized in Articles 8(1) (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the ACHR.

Escher expands the scope and applicability of Article 11 of the ACHR to take scientific and technological progress into consideration. Importantly, the Court demands that the State adapt traditional means to protect the right to privacy as the fluid nature of information makes privacy more susceptible to abuse. While wiretapping was a widespread law enforcement mechanism at the time the ACHR was drafted, the Court appears to create legal precedent that will allow the Court to deal with other technologies in subsequent cases.

Furthermore, *Escher* places the Inter-American jurisprudence on par with the European human rights system. In *Halford v. UK* (1997), the European Court of Human Rights (ECtHR) found that the UK violated Allison Halford's right under Article 8 (Right to Privacy) of the European Convention of Human Rights when her supervisor, a senior police officer, intercepted her telephone conversations. The decision was important as it reinforced the right to privacy at work, a public place. Moreover, in the *Case of Liberty and Others v. UK* (2008), the ECtHR similarly found protected privacy interests in various aspects of telephone conversations, and condemned the use of illegal government phone-tapping practices.

Escher, however, does not invalidate the State's authority to limit privacy rights for the common good, as it firmly states that the right to privacy is not absolute. The facts in *Escher* illustrate governmental abuse of that authority where the wiretappings were politically motivated, unlawful, and served no legitimate law enforcement purpose. As IACtHR Judge Sergio García Ramírez's concurring opinion notes, because the abuse of authority exemplified in *Escher* is emblematic of the realities across the hemisphere, it is important for an impartial body like the IACtHR to rule

on these issues, as it is insulated from domestic rhetoric that falsely pits public safety against fundamental rights.

VENEZUELA VIOLATED JUDGE'S RIGHTS AFTER ARBITRARY DISMISSAL

The IACtHR held that Venezuela failed to provide an effective remedy and equal access to public services after the Political Administrative Chamber of the Venezuelan Supreme Court of Justice (SPA) refused to reinstate a judge who was unlawfully dismissed. *Trujillo v. Venezuela*, decided June 30, 2009, underscores that the current judicial restructuring process in Venezuela is not an excuse to infringe on judicial independence.

María Trujillo served as a provisional First Instance Judge of the Criminal Judicial Circuit in Caracas from July 21, 1999 to February 26, 2002. The Commission for the Operation and Restructuring of the Judicial System (CFRSJ) then dismissed Trujillo alleging that she was involved in “abuse or excessive use of authority” and that she failed to “exercise due attention and diligence.” On October 13, 2004, the SPA found Trujillo had not committed the alleged offenses and nullified the dismissal order, but did not reinstate Trujillo to her former position nor require payment of her outstanding salaries. The SPA explained that as a provisional judge, Trujillo could not be immediately reinstated but she could participate in public competitions to be considered for similar judicial positions as the SPA’s decisions expunged all documents regarding her unlawful dismissal.

The IACtHR found that Venezuela violated Article 25(1) (Right to an Effective Remedy) of the ACHR when it denied Trujillo’s reinstatement. Immediate reinstatement is the adequate remedy in a case of a judge dismissed without proper justification. The IACtHR also found that Venezuela violated Article 23(1) (Right to Participate in Government) of the ACHR because Trujillo suffered arbitrary unequal treatment when she should have had the right to remain in public service as a provisional judge. The IACtHR prescribed, among several reparations, the reinstatement of Trujillo to a similar position to the one previously occupied.

The IACtHR strongly condemned the appointment and removal of these temporary judges without prior or consistent procedures and the lack of guarantees against unjustified dismissals. Furthermore, it condemned that temporary judges in Venezuela can serve for years without obtaining tenure, and thereafter be removed. The IACtHR stated that Venezuela could not justify its refusal to reinstate a provisional judge as a necessary part of restructuring its judiciary. The IACtHR noted that while Venezuela’s goals of restructuring to create competitive and transparent processes in judge selection are consistent with the ACHR, its implementation, which has now lasted over ten years, has proven to be ineffective and poses a threat to judicial independence. The *Trujillo* decision articulates that providing judges with tenure, the possibility of promotion, and guarantees against unjustified dismissal militate towards greater judicial independence.

Without these safeguards, however, judicial independence is at serious risk.

The ruling is not the first time international human rights watchdogs have criticized Venezuela’s use of provisional judges. Human Rights Watch reports that the UN Human Rights Committee was concerned that “Venezuelan judges could be removed for merely fulfilling their judicial duties.” Moreover, in 2003, the Inter-American Commission on Human Rights stated that “having a high percentage of provisional judges has a serious detrimental impact on citizens’ right to proper justice and on the judges’ right to stability in their positions as a guarantee of judicial independence and autonomy.” The IACtHR’s decision in *Trujillo* is consonant with the views of these other human rights bodies. **HRB**

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