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UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

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

Due to the ECHR's increasing jurisdiction and rapidly expanding caseload, the European Council of Ministers has implemented a series of new procedures to enable the Court to function more efficiently. These procedures include joining cases that raise identical issues and adopting stricter criteria for cases to even be considered by the Court. Contracting States have endorsed the measures, but have expressed concern that, in the name of efficiency, the Court is putting individual rights at risk.

With the accession of numerous Contracting States since 1990, the Court has been inundated with applications. The number of applications grew from 404 in 1981 to 29,650 in 2005. The increase in the Court's caseload threatens its ability to adjudicate applications in a timely fashion. The Court presently warns its applicants that they may have to wait up to a year before receiving a preliminary response to their complaint.

In 2004, the Member States of the Council of Europe wrote, signed, and ratified Protocol No. 14 to the Convention in order to improve the efficiency of the Court's processing system in light of the increasing burden of applications. Protocol 14 introduces amendments in two main areas. First, the Court adopted new admissibility criteria that allow cases to be dismissed if they raise frivolous complaints or if the applicant has not suffered significant damage. These rules add flexibility to the Court's decisions to take or reject cases. Although some worry that this change jeopardizes the right to a trial, applicants are safeguarded by two clauses in the Protocol. The Court may not dismiss an application for want of significant disadvantage if respect for human rights requires an examination on its merits. In addition, the Court cannot reject an application if the matter

has not been adequately considered by the courts in the applicant's home nation.

The second way in which Protocol 14 sought to increase the Court's efficiency was by streamlining its filtering capacity. The Protocol made a single judge competent to determine admissibility of an individual application. It also empowered panels of three judges to rule simultaneously on whether to consolidate, admit individually, or dismiss cases that raise nearly identical issues of fact or law.

Some Contracting Parties question whether these reforms have struck the appropriate balance between an individual's Article 34 right to bring a matter before the Court and the Court's practical need to be able to reject some applications. In response to these concerns, the Court has developed a system that allows the Court to resolve cases without actually hearing them on the merits. This "pilot judgments" system empowers the Court to directly order respondent governments to remedy violations of Convention rights.

Thus, although there has been much debate over whether the efficiency amendments of Protocol 14 sacrifice the rights of individuals to bring their grievances before the Court, the ECHR feels it needs to give the reforms a chance to avoid being consumed by its burgeoning docket.

HASAN DENIZ v. TURKEY

While Article 10 of the Convention guarantees the right to freedom of expression, Section 2 allows States Parties to impose restrictions on this freedom when necessary to protect public interests that are "necessary in a democratic society." Ongoing attempts by the Turkish government to combat perceived terrorist and secessionist threats have forced the Court to articulate how countries must balance these two provisions. Where the Turkish government has convicted individuals for expressions of dissent, the ECHR has consistently subjected the government's justifications to the "closest scrutiny," most often finding that restricting the freedom of expression was not justified. *Hasan Deniz v. Turkey*, decided June 27, 2006, is a recent example of this trend.

Mr. Deniz worked as the editor for the daily newspaper *Özgür Bakis* from April 18 to June 9, 1999. On June 1, 1999, the prosecutor for the Republic of Turkey demanded the seizure of the daily because of an article entitled "*Est-ce Un Proces Historique?*" ("A Historic Case?") written by Fikret Baskaya. The article portrayed the history of the struggle of the Kurdish population in Turkey and their current status in Turkish society, focusing on a famous trial of leaders of the PKK, a Kurdish Resistance movement. The same day the article was published, the associate judge of the National Security Court in Istanbul ordered the seizure of the newspaper.

By a judgment on June 13, 1999, the National Security Court convicted Mr. Deniz for disseminating separatist propaganda, a violation of Article 36 of the penal code of Turkey. The court sentenced Mr. Deniz to six months in prison and a fine of 1,553 EUR, though it later commuted his prison sentence to a fine of 1,555 EUR. Publication of his newspaper was also banned for three days. The Court of Cassation, the highest appellate court in Turkey, confirmed the judgment on appeal.

On April 2, 2001, Mr. Deniz filed an application with the ECHR. His application argued that the actions of the Turkish court violated his right to freedom of expression guaranteed by Article 10 of the Convention. Consistent with its treatment of similar cases, the Court took into account the difficulties Turkey faced in its struggle against terrorism. The Court held, however, that the motives of the National Security Court did not create a substantial ground for interfering in the right to freedom of expression. While certain passages of the article painted a negative picture of the Turkish State and told a hostile narrative at points, the Court held that the article was neither a story of hate nor an incitement to rebellion. The Court had held these elements to be essential to justifying suspension of the right to expression in past cases. The Court additionally held that the heavy fines and temporary suspension of the newspaper were disproportionate to the government's goals and that Turkey had violated Article 10 of the Convention.

Mr. Deniz's application also argued that there had been a violation of Article 6 of the Convention, the right to have the foundation of one's case reviewed before an independent and impartial tribunal and the right to defend one's self or have defense provided by the state. Mr. Deniz alleged that the Security Court lacked fairness because he never had the opportunity to challenge the written judgment that the prosecutor submitted to the Court of Cassation. The ECHR held that there had been a violation of Article 6, sections 1 and 3 of the Convention.

Mr. Deniz also alleged that the government of Turkey had violated Articles 7 (no punishment without law), 9 (freedom of thought, conscience and religion), 13 (right to an effective remedy), 14 (prohibition of discrimination), 17 (prohibition of abuse of rights) and 18 (limitation on use of restrictions on rights) of the Convention, but the Court disagreed. Because he did not seek reparations for these alleged violations, the Court was unable to grant a monetary remedy.

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

DAMIÃO XIMENES LOPES V. BRAZIL

On July 4, 2006, the Inter-American Court released its first verdict against the Federative Republic of Brazil. In *Damião Ximenes Lopes v. Brazil*, the Court found Brazil liable for the death of Damião Ximenes Lopes, a 30 year old patient

at a psychiatric clinic. For the first time, the Inter-American Court addressed the issue of mental health disability and expanded state accountability. States may now be held responsible for institutional violations of the American Convention on Human Rights (Convention), provided that the institution is operating under state authority. The Court condemned Brazil for violating Articles 1, 4, 5, 8, and 25 of the Convention, and failing to meet its obligation to protect and respect human rights; to guarantee the right to life and personal dignity; to provide humane treatment for vulnerable individuals; and to ensure the right to a fair trial, due process, and judicial protection.

The Casa de Repouso Guararapes psychiatric clinic admitted Damião Ximenes Lopes for treatment on October 1, 1999. Within days, his family reported evidence of torture: Damião was kept naked with his hands tied, nose bloodied, and face and abdomen swollen. Though the family immediately notified the clinical director, Damião died on October 4, 1999.

Suspecting death by torture, the Ximenes Lopes family sought to obtain Damião's medical records and police report. But the local mayor, who is the owner of Casa de Repouso Guararapes, prevented the family from accessing any information regarding Damião's case. The family widely criticized this obstruction of justice and sought assistance from the Civil Police, Federal Prosecution Service, and Ceará Legislative Assembly Human Rights Commission. When these attempts to secure domestic remedy failed, Damião's sister filed a petition with the Inter-American Commission.

As a result of Damião's death, Brazilian authorities closed the Casa de Repouso Guararapes on July 10, 2000, a closure long overdue, as the clinic had been cited previously for inadequate administration. The government of Brazil had negligently failed to regulate the clinic's conditions, and because the Casa de Repouso Guararapes was publicly providing medical care to state psychiatric patients, the Brazilian government was responsible for ensuring its compliance with national health care standards. Likewise, institutional violations of international law were attributable to the Brazilian state. The Court ordered Brazil to monetarily compensate Damião's family for obstruction of justice and the cruel and inhumane treatment that caused Damião's suffering and death.

Brazil ratified the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities on July 17, 2001. Consequently the Court held that Brazil must meet a higher standard of care for persons living with mental disabilities. The Court made an important economic, social, and cultural stride in requiring that Brazil give appropriate fiscal support to institutions providing psychiatric and other health services. The Court establishes — by way of this crucial precedent — that the State must ensure that even private institutions, such as the one in this case, meet the increased standard of protection and care for "persons of vulnerability," particularly those living with mental disabilities.

The significance of the Inter-American Court's decision in this case is immense. The Court made wide-reaching statements, declaring: "All persons facing vulnerable situations are entitled to special protection." This ruling applies not only to persons with mental disabilities, but also to persons suffering from any adverse circumstance and vulnerability, including those living in extreme poverty, "at-risk" youth, and indigenous peoples. The Court held that States Parties must eliminate all discrimination against people in vulnerable situations and pass appropriate legislation to enforce and promote their integration within society. Through regulations, a state may strengthen its domestic legal system in order to better meet its special duty of care toward persons with mental disabilities.

The case of *Ximenes Lopes* sets a vital precedent in the Inter-American System. It signifies a wave of change, characterized by the recognition and proper interpretation of human rights principles pertaining to persons with mental disabilities and the proper application of these principles. The Inter-American Court also addressed the economic component of human rights enforcement, holding that through regulations and proper appropriation of funds to those institutions acting as agents of the state, the state would better meet its higher standard of responsibility toward "vulnerable persons." Because most countries in Latin America have not yet enacted appropriate regulations into their domestic legal systems to combat discrimination against persons with mental disabilities, "a more vigorous application of international human rights standards by the Inter-American Human Rights System is necessary to hold States accountable for their treatment

of persons with mental disabilities, especially in the context of ... detention in psychiatric institutions.”

This case is the first time the Inter-American Court has ruled on the issue of mental health disability. Such a decision is greatly needed in this region where involuntary detention in psychiatric wards and inhumane conditions in clinics is a widespread problem. *Damião Ximenes Lopes v. Brazil* is especially important in that the Court has now introduced into the region — emulating the position taken by the European Court on Human Rights — the idea that the rights of the mentally disabled are to be respected and protected to the same extent as all other human rights.

The Court made both legal and economic arguments as to how the rights of vulnerable peoples, particularly those with a mental health disability, are to be observed and protected. With its decision, the Court has importantly given an explicit interpretation of the widely ratified Convention, ensuring that States may not ignore their obligation toward the rights of the mentally ill. States Parties must now incorporate regulations into their domestic legal systems that promote the higher standards of protection of vulnerable people. They must also allocate more funding to ensure that the institutions that provide state services, such as health care and treatment, meet the high standard of care required for vulnerable people.

What is most significant about this decision, though, is that the Court's decision is not limited to the requirement of appropriate funding for institutions providing psychiatric health services. Rather, its holding affects States' funding on a wide-ranging level, requiring them to allocate more monies to any institution serving the needs of “vulnerable people.” In this manner, the Court's ruling in *Damião Ximenes Lopes v. Brazil* will serve to expand State understanding, protection, and realization of the rights of vulnerable persons.

AFRICAN COMMISSION

AFRICAN COURT TAKES SHAPE AND APPROACHES OPERATIONAL STATUS

The much anticipated dream of many human rights activists in Africa is about to materialize: the African Court on Human and Peoples' Rights (ACHPR) will soon become operational. The existence of the ACHPR is a substantial step, particularly considering the

failure of the African Court of Justice, which, after long delay, never actualized. The ACHPR will join the European Court of Human Rights and the Inter-American Court of Human Rights as the third major regional mechanism to deliberate on human rights violations. The ACHPR adds a much needed enforcement mechanism to the African Commission on Human and Peoples' Rights (Commission), considered ineffective by many, in its service of the African Charter on Human and Peoples' Rights (Charter). Article 2 of the Protocol to the Charter on the Establishment of an ACHPR (Protocol) states that the purpose of the Court is to “complement the protective mandate of the [Commission].” Prior to the adoption of the Protocol, the Commission was entirely responsible for the protection of the rights afforded under the Charter.

The wave of ratifications necessary to bring the ACHPR into force came with the transformation of the Organization of African Unity into the African Union. The Protocol entered into force on January 25, 2004, after being ratified by fifteen African Union member states. The States subject to the ACHPR's jurisdiction are: Algeria, Burkina Faso, Burundi, Côte D'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, and Uganda.

The ACHPR's foundation lies in the Charter, which was adopted in 1987 by the Organization of African Unity. Its jurisdiction, as laid out in Article 3 of the Protocol, extends “to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.” The Commission will play the role of investigating violations and promoting rights while the Court will serve as the Commission's means of enforcement. The ACHPR is unique among courts of this nature in that both NGOs and individuals can ask the Court for advisory opinions, depending on the circumstances.

The ACHPR is composed of 11 judges. As Article 11 of the Protocol states, judges must be “nationals of Member States of the African Union (OAU), elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.” Additionally, no two judges may be nationals of the same

state. This article reflects the Commission's desire for the ACHPR to be composed of a broad array of people from across the continent. Opening the pool of possible members to the ACHPR, the article has no provision requiring candidates to have any formal legal background. Further requirements, such as election methods, representation, and terms in office, are elaborated in Articles 12 through 21 of the Protocol.

On July 17, 2006, the ACHPR judges were sworn in: Sophia A.B. Akufo from Ghana (two year term); Hamdi Faraj Fanoush from Libya (four year term); Modibo Tounty Guindo from Mali (six year term); El-Hadji Guisse from Senegal (four year term); George W. Kanyeihamba from Uganda (two year term); Kelello Justina Mafoso-Guni from Lesotho (four year term); Jean Mutsinzi from Rwanda (six year term); Bernard Ngoepe from South Africa (two year term); Gerard Niyungeko from Burundi (six year term); Fatsah Ouguergouz from Algeria (four year term); and Jean Emile Somda from Burkina Faso (two year term). While the Commission is currently located in Gambia, the ACHPR will likely be located in Arusha, Tanzania. In this location, the ACHPR will move into the seat formerly occupied by the International Criminal Tribunal for Rwanda, which is expected to conclude in 2008.

These small steps will hopefully lead to larger ones. Africans and the rest of the world are watching the advancement of the ACHPR with great anticipation, hoping to bring a measure of justice to a continent riddled by gross human rights violations and widespread impunity. *HRB*

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