

2003

## Updates from the Regional Human Rights Systems

Lilah Rosenblum

*American University Washington College of Law*

Patricia Staible

*American University Washington College of Law*

Kristin Edison

*American University Washington College of Law*

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### Recommended Citation

Rosenblum, Lilah, Patricia Staible, and Kristin Edison. "Updates from the Regional Human Rights Systems." *Human Rights Brief* 11, no. 1 (2003): 32-35.

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## UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

### INTER-AMERICAN HUMAN RIGHTS SYSTEM

*Cinco Pensionistas v. Peru* and *Juan Humberto Sánchez v. Honduras* are among the first cases to be decided by the Inter-American Court of Human Rights (Court) under the new procedural rules passed in 2001. Among the new rules is a provision that allows the victims' counsel to allege violations of the American Convention on Human Rights (Convention) in its complaint to the Court that have not been alleged by the Inter-American Commission on Human Rights (Commission). Previously, the Court would only hear evidence of violations alleged by the Commission.

In *Cinco Pensionistas*, decided on February 28, 2003, the victims' counsel exercised their new right to allege a violation of the convention that was not alleged by the Commission. Although the Court did not find the particular violation alleged, it is nonetheless significant that the victims' counsel was able to bring the claim even though the Commission did not make a concurrent allegation. A significant jurisprudential development was the Court's identification of the right to a social service, in this case a pension, as a private property right. A negative development, however, was the Court's decision to narrowly interpret protections of economic, social, and cultural rights under the Convention.

In *Juan Humberto Sánchez*, decided on June 7, 2003, the Court heard the first case of forced disappearance and extrajudicial execution against Honduras since deciding *Velasquez Rodríguez v. Honduras* in 1988. This is significant in that the Court felt compelled to reiterate what it had recommended to Honduras 15 years ago regarding judicial reform and respect for human rights. Additionally, this case marks a significant development in the interpretation of violations of the right to life and clarifies the definition of arbitrary and illegal detentions in its discussion of the right to personal liberty.

#### **CINCO PENSIONISTAS V. PERU**

The victims in this case were five Peruvian government employees whose pensions were arbitrarily reduced in 1992. The five pensioners had worked for a government agency for over twenty years and were guaranteed a pension at a level stipulated by Peruvian domestic law. In 1992, the government significantly reduced their pensions.

The five pensioners brought their claim to the Supreme Court of Peru in 1994. The Supreme Court ordered the government to restore their pensions. When the government failed to do so, they went before the Constitutional Tribunal of Peru, which instructed the government to comply with the Supreme Court verdict. The government again failed to comply with this order.

In February 1998 the Human Rights Program of the Labor Advisory Center of Peru (CEDAL) and the Association for Human Rights (APRODEH), filed a petition with the Commission alleging that the Peruvian government had arbitrarily reduced the wages of the five pensioners. The Commission decided in favor of the pensioners after a merits hearing and brought the case before the Court in December 2001. CEDAL and the Center for Justice and International Law (CEJIL) acted jointly as the pensioners' counsel before the Court. Together, the Commission and the pensioners' counsel alleged that the Peruvian government violated Articles 21 (right to private property), 25 (right to judicial protection), and 26 (right to progressive development of economic, social, and cultural rights) of the Convention. Additionally, the pensioners' counsel exercised their right under the 2001 procedural rules to make allegations beyond those made by the Commission and independently alleged a violation of Article 8 (right to a fair trial). Although the Court did not find sufficient evidence to substantiate the allegation of an Article 8 violation, its ruling did acknowledge the right of a victim's counsel to make allegations beyond those alleged by the Commission before the Court.

Both in complaints to the Court and in the Court's decisions themselves, the rights to a fair trial and to judicial protection (Articles 8 and 25) are generally discussed together. In this case, however, they were considered separately, with the Court finding an Article 25 violation, but not an Article 8 violation. The Court found that because the Peruvian government failed to comply with the Supreme Court's decision to restore the pensions, Peru had violated the pensioners' right to judicial protection. Subsection (2)(c) of Article 25 requires that the government ensure the enforcement of remedies ordered by the Court. In this case, the government failed to do so by refusing to comply with the Supreme Court's ruling.

Additionally, the Court found that the State's arbitrary reduction of the pensions constituted a violation of Article 21, the right to private property. The Court stated that, in accordance with Peruvian domestic law, Article 21 protects the right of the five pensioners to collect a pension because it is an acquired right to property. Traditionally, private property has been considered a tract of land or other tangible good. Yet in this case, the Court elevates the status of a social service from a privilege to a property right that cannot be limited or rescinded for any purpose other than for reasons of public utility or social interest. In this case, the reduction of the pensions had no public utility and did not serve the social interest.

Finally, the Court did not find that the pension reduction in this case was a violation of Article 26, the right to progressive development of economic, social, and cultural rights. In this decision, the Court offers a narrow interpretation of the Convention by holding that individuals and small groups cannot successfully claim relief under Article 26 and that violations of that article can only occur on the scale of society at large. The Court did not consider the limited experience of five pensioners to be representative of Peruvian society as a whole. This narrow interpretation will make it difficult to substantiate Article 26 violations in future cases before the Court.

In its decision on damages, the Court ordered Peru to pay \$3,000 to each pensioner plus litigation costs for violations of Articles 21 and 25.

#### **JUAN HUMBERTO SÁNCHEZ V. HONDURAS**

Juan Humberto Sánchez was arbitrarily detained by the Honduran military for his alleged connection with the Farabundo Martí National Liberation Front (FMLN), a Salvadoran guerrilla movement. Sánchez was initially detained on July 10, 1992 and released the following day for lack of evidence. He was then re-captured by military agents the night of his release while in his home. His corpse was found with signs of torture on July 21, 1992.

In October 1992, the Commission for the Defense of Human Rights in Central America (CODEHUCA) filed a petition with the Commission on behalf of Sánchez and his next

of kin. The Commission decided in favor of the victims after a merits hearing and brought the case before the Court in September 2001. CODEHUACA and CEJIL acted jointly as the victims' counsel before the Court.

Both the victims' counsel and the Commission alleged that Honduras had violated several articles of the Convention, including Articles 4 (right to life), 5 (right to personal integrity), 7 (right to personal liberty), 8 (right to a fair trial), and 25 (right to judicial protection). The Court found that Honduras had violated all of the aforementioned articles of the Convention.

The Court found that Honduras violated Article 4 when Honduran military personnel extrajudicially executed Sánchez. In its decision, the Court expanded the notion of state responsibility for cases involving extrajudicial executions. It held that a state can be liable for extrajudicial execution not only through act or omission, but also by failing to prevent such an act from occurring. The Court held that the State not only has a negative obligation to refrain from arbitrarily depriving a person of his or her life, but has a positive obligation to take the necessary steps to protect and preserve the right to life. The State must uphold this positive obligation through prevention and punishment, especially in the case of its own security forces. The Court framed this execution as part of a larger pattern of extrajudicial execution tolerated, and even driven, by the State.

The Court held that Honduras violated Sánchez's right to personal liberty through his arbitrary detention, a violation of Article 7. It found that the conditions of Sánchez's detention did not conform to the standards required by Article 7. Sánchez was detained by military agents, rather than police; he was detained at night in his family's home; he was not immediately put before a judge; and neither he nor his family were informed of the reason for his detention as required under the Convention.

In addition, the Court held that the State violated the personal integrity of both Sánchez and his family members. By torturing Sánchez, the State violated his physical integrity. The State violated Sánchez's family's psychological and moral integrity by treating Sánchez inhumanely and executing him. A person's physical, psychological, and moral integrity are all protected by Article 5.

Finally, the Court held that Honduras had violated Articles 8 and 25, the rights to a fair trial and judicial protection. Because of the nature of his illegal and arbitrary detention, Sánchez was

unable to access the judicial system, determine the reasons for his arrest, seek legal counsel, or defend himself in front of competent authorities. The investigation of his execution was ineffective, resulting in the failure to identify and sanction those responsible. The Court found this case to be representative of a larger pattern of weak judicial protection in Honduras, with its high rate of impunity, lack of judicial resources, and ineffective investigations of extrajudicial executions.

In its decision on damages, the Court ordered Honduras to pay \$39,700 to Sánchez's family for material damages and \$245,000 for immaterial damages.

#### **AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS**

The African Commission on Human & Peoples' Rights (Commission) came into force in 1986 after the Organization of African Union, now the African Union, adopted the African Charter on Human and Peoples' Rights. Since its inception, the Commission's mandate has been to ensure the promotion and protection of human rights throughout the African region. The 33rd Ordinary Session occurred earlier this year in May. The 34th Ordinary Session, originally planned to take place in October, was rescheduled for November 6-20, 2003.

#### **33RD ORDINARY SESSION: ESTABLISHING NATIONAL HUMAN RIGHTS INSTITUTIONS**

During May 15-29, 2003, the 33rd Ordinary Session of the Commission was held in Niamey, Republic of Niger. The Commission addressed several issues of note and adopted the Directives and Principles on the Right to a Fair Trial and Legal Aid in Africa. Further, the Commission considered how it could find sufficient human and financial support, as well as a suitable headquarters in order to increase its monitoring capabilities and strengthen its efficacy.

The Commission continued to encourage the establishment of national institutions of human rights by states that have not yet established them. The Commission outlined the mandate for such institutions and urged the countries that do not yet have them in place to establish national institutions of human rights. The Commission also continued to state its determination to strengthen collaboration between these institutions and the Commission.

Debate among non-governmental and international organizations continues on the effectiveness and the wisdom of establishing national institutions of human rights. Several states have

established such commissions, but failed to provide sufficient amounts of funding and/or appointed directors lacking prior experience in the field of human rights. This has created dependent institutions rather than institutions that independently oversee government action. Yet, some human rights groups feel that the establishment of the institutions is a sign that African governments, including some of the most repressive, are accepting the international human rights discourse and acknowledging that human rights protections should be a part of their government portfolio.

Human rights organizations also argue that national institutions, often without hesitation, are subjected to the whims of the government body and used as a smokescreen to hide government human rights abuses. Further, the national human rights institutions may actually undermine the work of the non-governmental organization (NGO) human rights community either by denouncing their findings or by remaining strategically silent on attacks of human rights defenders.

Even so, the Commission views the national institutions as bodies that strengthen the cooperation between the states' governments and the Commission. The Commission believes that institutions provide a liaison between itself and the individual government through which greater transparency and accountability is achieved. A report by Human Rights Watch offered hope in stating "the Ghanaian, South African, and Ugandan [institutions] – a testament to the integrity of those [institutions] members – appear to be the most promising in their willingness to actively speak out strongly against government abuses and to exhibit their independence in the interest of protecting the rights of their citizens. Although it is still early, the Malawian and Senegalese [institutions] also show promise."

#### **THE 34TH ORDINARY SESSION: REPORT ON ZIMBABWE AND THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

During the 34th Ordinary Session, the Commission intends to address and adopt the draft report on the fact-finding mission to Zimbabwe. Other countries such as Cote d'Ivoire, the Seychelles, Niger, Djibouti, Sudan, Angola, Libya, Cameroon, Benin and the Democratic Republic of Congo will come under the scrutiny of the Commission in the form of a variety of reports brought before it for adoption. The Commission is also to address many of the substantive issues in the implementation of the

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charter, as is its custom. The Commission intends to address the proposed African Court on Human and Peoples' Rights (Court) and create strategies for the ratification of the Protocol to create such a court in those countries that have not yet done so. In addition, the Commission plans to discuss the situation of human rights defenders, indigenous populations and communities, refugees and displaced persons, and the human rights situation in Africa generally.

Though recent human rights abuses in Zimbabwe will not likely be in the Commission's draft report arising from its fact-finding mission (scheduled for presentation in November of 2003), the draft report will likely condemn the further breakdown of the rule of law in Zimbabwe. For example, the report will likely discuss increasing government controls on independent media within the country. On September 11, 2003 the *Daily News of Zimbabwe*, the only independent newspaper in Zimbabwe, was declared to be operating illegally by the Supreme Court of Zimbabwe. The following day, September 12, 2003, the police raided the offices of the newspaper and seized their computer equipment.

The *Daily News* was found in violation of the Access to Information and Protection of Privacy Act (AIPPA), a law put in place by President Robert Mugabe that requires the registration of all media groups and journalists with the government's Media and Information Commission (MIC) and authorizes the operation of media groups and journalists only with the MIC's approval. As of September 28, 2003, 9 journalists were charged with violating Section 83, governing the license requirement of the AIPPA, and it was expected that forty-five additional *Daily News* journalists would also be charged. The journalists were charged with assisting in the production of an illegal newspaper.

In response, the *Daily News* challenged the constitutionality of the registration requirement, but the challenge was unsuccessful. The *Daily News* journalists who were charged with violating Section 83 of the AIPPA had applied for accreditation but their applications were not forwarded through the MIC because of the constitutional challenge made by the *Daily News*. As a result, the *Daily News* filed applications with the Zimbabwean courts seeking an overturn of the MIC's decision to deny it a license and filed suit seeking the return of their computer equipment.

Though the Commission itself did not directly address the matter of establishing the African Court on Human and Peoples' Rights, a subsidiary conference occurred during the 33rd

Ordinary Session. The Conference for West African States on the Protocol for the Establishment of the African Court on Human and Peoples' Rights (Conference) met in Niamey, Niger on May 28-29, 2003. During the Conference, the attendees sought the Commission's approval of the Protocol to establish the African Court on Human and Peoples' Rights (Protocol). Senior representatives from 12 West African countries along with observer participants of additional countries attended the conference.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) states that "[it] shall come into force thirty days after fifteen instruments of ratification or accession have been deposited." At the time of the Conference in May, 9 states had ratified the Protocol, 3 states were in the advanced stages of ratification, and 1 state was in the beginning stages of ratification. The Conference proceeded to address the constraints and obstacles to the ratification of the Protocol, as well as strategies to ensure early ratification of the Protocol by all West African countries.

The Conference also established the Coalition on the African Court on Human and Peoples' Rights (Coalition), a group comprised of national human rights institutions as well as national and international non-governmental organizations. The Coalition's mandate granted it the power to facilitate full ratification of the Protocol together with the Declaration Accepting non-State Access to the Court under Article 34(6) of the Protocol by all West African states before October 21, 2003. In addition, the Coalition was asked to work to realize the widest possible ratification of the Protocol and to ensure an early establishment of the Court. Additionally, the Coalition was given the task of establishing a liaison with the Commission of the African Union and the Commission with the purpose of ensuring the effective participation of African Civil Society in resolving practical issues associated with the establishment of an effective Court, such as the location of the headquarters, the election of judges, the establishment of the Registry of the Court, Rules of Procedure and the funding and complementarities between the Court and the Commission.

### European Commission on Human Rights

#### *The Case of Ernst and Others v. Belgium*

On July 15, 2003, the European Court of Human Rights (Court) unanimously held in

*Ernst and Others v. Belgium* that investigative measures taken by Belgian authorities violated freedom of expression and respect of private life under Articles 10 and 8 of the European Convention on Human Rights (Convention).

The four applicants are Belgian journalists and their complaint stems from searches of their offices and homes and from the seizure of documents carried out by Belgian authorities in 1995. At the time, information surrounding certain high profile criminal cases was leaked to members of the media. The investigating judge heading the prosecution for breach of confidence ordered the Serious Crimes Squad to conduct searches of the offices, homes, and two vehicles belonging to the applicants. In the course of the searches, the Crime Squad seized documents, computer disks and the hard drives of the applicants' computers. The length of these searches varied between a half hour and three hours. The applicants were neither informed of the reasons for the search, nor were they notified that it was to occur. The applicants were not named as civil parties in the criminal investigation.

In September 1995, the applicants lodged a complaint with the investigating judge of the Brussels Court of First Instance. Because the case was directed against a sitting judge, the case was transferred to the prosecutor's office, the Minister of Justice, and finally to the Court of Cassation. The Court of Cassation found the complaint inadmissible because it exceeded the jurisdiction of the Court, and the applicants were informed that the Court would take no further action in their case.

Having exhausted their domestic remedies, the applicants lodged a complaint with the European Commission of Human Rights (Commission) in September 1996. When the case was transferred to the Court in November 1998, the applicants asserted that the Government's action interfered with their freedom of expression in breach of Article 10 of the Convention, violated their right to respect for private life guaranteed by Article 8, discriminated against them under Articles 14 and 6, and constituted a failure of effective remedy under Article 13. They prevailed on claims under Article 10 and 8.

Article 10 of the Convention guarantees freedom of expression subject to the state's right to implement legitimate measures under domestic law that are necessary in a democratic society to safeguard the public. When the press is involved, the Court balances the interests of society in maintaining the liberty of the press with the goals of the state. In addition, the Court maintains that any measures impeding freedom of

expression must be reasonably proportionate to legitimate aims. The Court applied a three-part test. First, the law must provide for the measure in question. Second, the goal of the measure must be legitimate. Third, there must be a satisfactory relationship between the measure and the goals of the state.

In this case, the Court found the law provided for the measure. Second, the Court found that the reason for the interference in question was primarily aimed at protecting the reputation of others and maintaining the authority and impartiality of the judiciary. Finally, in light of the extensive nature of the searches, the Court held that the Government had not demonstrated that the search and seizure procedure was necessary to determine whether the applicants were parties to the offenses under investigation. Thus, the Court found a violation of Article 10 and turned to the applicants' allegations under Article 8.

Article 8 protects an individual's right to respect for private life from state infringement. State administered measures that infringe upon an individual's right to respect for private life must be provided for by the law and proportionate to a legitimate state aim. Thus, any interference with an Article 8 right must be narrowly tailored to legitimate goals.

In this case, the Court found the measure was proscribed by the law and satisfied the first requirement. The Court also found the Government was pursuing legitimate state aims of preventing crime and protecting the rights and freedoms of others. However, the Court found that the procedural safeguards employed by Belgian authorities while conducting the searches and seizures were not executed in a manner proportionate to the legitimate aims pursued. The applicants had been neither accused of any offense nor had they been informed of the reasons for the searches. The search warrants were also drafted in overly broad terms, allowing for the seizure of any document or object that might further the investigation. Therefore, the Court found a violation of Article 8 and ordered Belgium to pay each applicant two thousand euros for moral damages and nine thousand euros for the applicants' fees and expenses.

### The Case of *Karner v. Austria*

In the case of *Karner v. Austria*, decided on July 24, 2003, the Court found that an Austrian tenancy law was discriminatory on the basis of sexual orientation and in violation of Articles 14 and 8 of the Convention.

Karner was an Austrian national who lived in an apartment leased by his homosexual partner. In 1991, his partner was diagnosed with HIV and designated Mr. Karner his heir before his death in 1994. In 1995, the landlord of the apartment instituted proceedings against Mr. Karner in order to terminate his tenancy. Both the District Court and the Regional Court agreed with Mr. Karner and held that under the Rent Act (the statute in question), the right to succession of a tenancy equally applied to homosexual partners as well as to heterosexual couples. However, on appeal, the Austrian Supreme Court reversed the judgment and terminated Mr. Karner's lease. The Supreme Court held that the statutory language of "life companion" had to be interpreted at the time of the enactment of Rent Act of 1974, and that the legislature's intention was to preserve the traditional family and exclude same-sex couples.

In 1997, Mr. Karner lodged a complaint with European Commission of Human Rights. He alleged that the Supreme Court's decision not to recognize his right to succeed the tenancy constituted discrimination on the basis of sexual orientation in violation of Article 14 of the Convention read in conjunction with Article 8. Before the case was found admissible, Mr. Karner passed away and his mother waived her right to succeed to the estate. Mr. Karner's lawyer asked the Court not to strike the application until other heirs to Mr. Karner's estate were identified. When no heirs were identified, the Austrian Government requested the application be struck from the list of cases because no one intended to pursue Mr. Karner's application.

Although no heirs came forward, Mr. Karner's complaint was declared partly admissible. In many similar cases, the Court deferred to the applicant's heirs or close family. Because the goal of the Convention system lies in individual relief, the Court only strikes applications that lack an individual wish to pursue proceedings. However, the Court also hears applications on public policy grounds. In this case, the Court considered the differential treatment of homosexuals in relation to the succession of tenancies under Austrian law an important question of interest for both Austria and for other Member States to the Convention. The Court noted that continued examination of Mr. Karner's case would "elucidate, safeguard and develop the standards of protection under the Convention."

Judge Grabenwarter, alone in his dissent, stated that although combating discrimination against homosexuals is an important human rights concern, it does not justify continued examination of a case after the applicant's death.

He highlighted that under Article 37 of the Convention, the Court may decide, at any time in the proceeding, to strike an application if circumstances indicate that the applicant will not pursue the application. He argued that the Court had taken a significant misstep in its jurisprudence by not striking down the case.

The Court decided to continue the examination of the case, affirming that the subject matter of the application was properly squared with Article 8, paragraph 1, treating elements of private life, family, and home. In addition, the Court held that but for his sexual orientation, Mr. Karner could have been accepted as a life companion entitled to succession of his partner's lease, and thus, Article 14 was applicable. In its decision, the Court highlighted the principle of proportionality, which provides that differential treatment is discriminatory if it does not pursue a legitimate aim or if the means employed are disproportionate to the aim sought. Particularly serious reasons are necessary to justify differential treatment based on sexual orientation.

The Court accepted the theoretical justification for differential treatment given by the Government that the statutory provision aimed to protect the traditional family unit. But in keeping with the principle of proportionality, the Court deemed the aim too abstract and not narrowly tailored. The Government was required to demonstrate that the exclusion of homosexual couples from the scope of the legislation was necessary to protect the traditional family unit. Because the Government did not offer arguments to support this conclusion, it did not justify the interpretation of the statutory provision within its limited 1974 context. Therefore, the Court found a violation of Article 14 in conjunction with Article 8. *HRB*

*Lilah Rosenblum, a JD/MA candidate at the Washington College of Law, covers the Inter-American human rights system for the Human Rights Brief. Alejandra Nuño and Francisco Quintana, staff attorneys for CEJIL, provided research support for this column.*

*Patricia Staible, a J.D. candidate at the Washington College of Law, covers the African Commission on Human and Peoples' Rights for the Human Rights Brief.*

*Kristin Edison, a J.D. candidate at the Washington College of Law, covers the European Court of Human Rights for the Human Rights Brief.*