

REGIONAL HUMAN RIGHTS SYSTEMS

AFRICAN SYSTEMS

AFRICAN UNION CONSIDERS PROPOSALS TO ADD INTERNATIONAL CRIMINAL JURISDICTION TO THE PAN-AFRICAN COURT

The African Union (AU) is considering whether to add jurisdiction to hear international criminal law cases in the future African Court of Justice and Human Rights, a merger of the current human rights court and the court of justice. Drafters submitted a proposal to the AU in July 2012 to amend the 2008 Protocol on the Statute of the African Court of Justice and Human Rights (2008 Protocol) to include an international criminal law section along with both the pending general affairs and existing human rights sections. The 2008 Protocol still needs twelve more ratifications before the AU will merge the African Court on Human and Peoples' Rights (Human Rights Court) with the African Court of Justice—the latter being a court established in the Constitutive Act of the African Union—under one body: the African Court of Justice and Human Rights. Under the proposed third section, the new combined Court would also have jurisdiction to hear criminal cases against individuals. However, the AU has delayed making a decision on the matter but plans to do so sometime this year. Although some have supported the proposal, other stakeholders have urged the AU to reconsider the proposed merger due to potential human rights ramifications.

Skeptics of the proposal have expressed fear that the expanded jurisdiction into international crimes would undermine the human rights progress made in the region. Frans Viljoen of the Centre for Human Rights at the University of Pretoria has argued that the disparate mandates between the proposed general affairs and human rights sections, both of which would hold states responsible, and the international criminal section, which would hold individuals responsible, would create a lack of uniformity in their operations. The three sections would require varied legal standards, intensities of fact-finding, and amounts of resources. These planned

differences thus leave open the possibility that less expertise will be devoted to human rights and its importance will be diminished within the new system. For example, the proposed protocol only calls for five human rights judges, as opposed to the current eleven that sit on the Human Rights Court, and it proposes that a general court of appeals—with judges that do not necessarily possess particularized human rights experience—hear cases from the human rights section.

The debate, however, also centers on the political tensions between the AU and the International Criminal Court (ICC) in The Hague. The ICC, which has jurisprudence that has come almost exclusively from situations in African countries, and the AU have often disagreed on how to handle cases. However, the AU has typically only resisted moves by the ICC to hold current leaders of African states accountable before the court, presumably due to the perceived negative impacts of ICC indictments against African heads of state in ongoing negotiations and peace processes for the AU. The AU Heads of State and Government decided in 2009 not to comply with the arrest warrant for Sudanese President Omar al-Bashir in order to promote peace in Sudan. In doing so, the AU encouraged further investigation into the addition of international criminal jurisdiction to the pan-African judicial system in light of the negative impact the indictment by an international court had on establishing peace in Sudan. More recently, the AU in 2011 took issue with the ICC's charges against Moammar Qaddafi, the former Libyan leader, and stated at the 17th AU Summit that the arrest warrant for Qaddafi hindered progress toward negotiating a resolution in Libya.

In light of the already existing tensions between the AU and the ICC, it is unclear how the ICC will handle its overlap with the proposed court's jurisdiction. The complementarity principle under the Rome Statute encourages domestic prosecution and only allows the ICC to investigate when the domestic judicial system fails to do so adequately, but the ICC has

yet to extend this principle to regional criminal courts. Some proponents of the proposal, such as Chidi Anselm Odinkalu of the Open Society Justice Initiative, have endorsed the new court as a way to expand the complementarity principle to allow the AU a chance to respond to situations in African states and improve accountability in the pan-African system.

If the AU adopts a criminal jurisdiction addition to the African Court of Justice and Human Rights, the pan-African human rights system would be the first regional human rights system to adopt a court with an international criminal mandate, bringing with it new challenges. A major concern of adopting international criminal jurisdiction is the amount of resources required to protect witnesses, engage in extensive fact-finding, and maintain the three chambers: the pre-trial chamber, the trial chamber, and the appellate chamber. For a regional human rights system, stretching resources to meet these economic needs will be a challenge. Issues of jurisdictional overlap with the ICC and maintaining the strength of the current human rights mandate present additional challenges. How the AU deals with the difficulties that will come with a new international regional criminal court could negatively impact human rights in the region but could also set a precedent for other regional human rights systems to take on international criminal mandates.

ECOWAS COURT AGREES TO HEAR CASE BROUGHT BY INMATES ON DEATH ROW AGAINST THE GAMBIA

The Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) agreed to hear a case against the Gambia involving its decision to impose death sentences. The Socio-Economic Rights and Accountability Project (SERAP), a Nigerian-based NGO, filed a complaint with the ECCJ in September 2012 on behalf of two Nigerian prison inmates, Michael Ifunanya and Stanley Agbaeze, who are currently on death row in The Gambia. The plaintiffs allege violations of their rights to life, due process of law, justice and judicial independence, a fair hearing, appeal, and

effective remedy. The ECCJ is set to hear the case in May 2013.

The case arises out of a controversial order issued in August 2012 by Gambian President Yahya Jammeh to execute all 42 inmates on death row within a month to deter violent crime in the country. President Jammeh executed nine of the inmates before mounting international pressure caused him to desist. Amnesty International had previously labeled The Gambia as abolitionist in practice, categorizing it as one of 141 states that no longer implement the death penalty. The nine executions end a 27-year period without capital punishment and implicate the rights of inmates. At least one of the executed inmates, Lamin Darboe, had an appeal pending at the time of his execution.

The plaintiffs want the ECCJ to order The Gambia to enforce rights expressed in several instruments. The African Charter on Human and Peoples' Rights (African Charter) includes the right to appeal under Article 7, which the plaintiffs were denied after sentencing. Additionally, the African Commission on Human and Peoples' Rights adopted a resolution in 2008 calling for a moratorium on the death penalty. The UN General Assembly has also backed a moratorium on the death penalty with the goal of abolishing the practice. Finally, the plaintiffs ask The Gambia to comply with its own Constitution: Provision 18 of The Gambian Constitution allows for the death penalty but directs the National Assembly to reconsider the possibility of abolishing the death penalty within ten years of the Constitution coming into force. The National Assembly failed to conduct the review in 2007.

Even if the ECCJ does order the Gambia to implement the instruments and awards damages to the plaintiffs, The Gambia may choose not to comply with the decision. Although ECCJ decisions are legally binding on Member States, The Gambia has a history of noncompliance. The Gambia has yet to comply with two ECCJ decisions issued in 2008 and 2010 for the detention and torture of two journalists. The ECCJ requires Member States to set up national implementation mechanisms under Article 24 of the Supplementary Protocol to enforce ECCJ decisions, but The Gambia has yet to create the necessary system. ECOWAS announced a new focus on effective implementation in September

2012, but how it will ensure future compliance with ECCJ decisions from noncompliant Member States remains to be seen. Justice Ana Nana Daboya of the ECCJ has publicly stated that noncompliance with ECCJ decisions is a violation of Member States' obligations and should be cause for financial sanctions.

If the ECCJ rules in favor of the plaintiffs and ECOWAS takes action to enforce the judgment, the ECCJ's ruling could not just ensure the rights of the rest of the inmates on death row but in the process could also help shape more broadly the effectiveness of ECCJ rulings in the future. There are still 38 inmates left on death row and a favorable outcome for the two plaintiffs in May could help ensure the right to life and to a fair trial, pursuant to Articles 4 and 7 of the African Charter for all the inmates. Additionally, ECOWAS could use a ruling against The Gambia to set a precedent of enforcement of ECCJ decisions against traditionally noncompliant Member States. ECOWAS has not specified how it would enforce ECCJ decisions itself if it should choose to do so, but it could take the suggestion of Justice Ana Nana Daboya and impose financial sanctions on noncompliant states. Thus the ECCJ's decision in May will be an important one because it could potentially shape the status of the death penalty in Member States and make a significant step toward ensuring future compliance with its decisions.

Brittany West, a J.D. candidate at the American University Washington College of Law, is a staff writer for the Human Rights Brief.

EUROPEAN SYSTEM

EUROPEAN COURT OF HUMAN RIGHTS RULES ON EXPRESSING RELIGIOUS BELIEFS AT WORK

In a landmark judgment on religious freedom, the European Court of Human Rights (ECtHR, Court) ruled that there is a right to manifest individual faith by wearing religious adornments and that the religious beliefs of state employees cannot justify an exception to anti-discrimination laws. The Court in *Eweida and Others v. the United Kingdom* joined four claims containing similar issues of religious freedom in the workplace. In all four cases, the applicants claimed that

their rights to non-discrimination and free "thought, conscience or religion" had been violated by judgments in U.K. domestic courts. Articles 9 and 14 of the European Convention on Human Rights (ECHR) guarantee the right to right to freedom of thought, conscience and religion and prohibit discrimination. Two of the cases also included issues regarding the balance between the freedom to display religious symbols and an employer's stated dress codes. The remaining two cases regarded an employee's right to abstain from serving homosexual clients because of the employee's personal religious beliefs.

On the issue of religious symbols, the two petitioners argued the employers placed undue restrictions on their religious freedom by prohibiting visible cross necklaces which represented their Christian faith. In balancing a British Airways employee's wish to manifest her religious belief with her employer's desire to project a certain corporate image, the Court found that the employer acted unfairly. Although the company's desire was legitimate, the ECtHR found that the national courts had given too much weight to the employer's interests in light of factors including the company permitting other religious symbols (such as turbans and hijabs), the discreet nature of the cross, and the lack of evidence that the employer's reputation would be impacted. However, the second case shows that this right is not absolute. The Court deferred to the employer hospital's assessment because they were better situated to make the decision given the safety and infection risks posed by a necklace in the healthcare setting. Thus, the nature of the workplace is relevant to enforcing dress codes that limit the display of religious symbols.

In the second issue, the Court found that the right to express religious beliefs is limited by a state's obligation to not promulgate discriminatory practices. The petitioners, a public registrar and a publically employed relationship counselor, challenged their dismissals for refusing to serve gay and lesbian clients by arguing that it was disproportionate and discriminatory for employers to require employees to provide services to same-sex couples when doing so obligated them to violate their religious beliefs, which compelled them to refuse to condone same-sex couples. The Court disagreed and found in both cases that the employers' policies were aimed at

providing services on a non-discriminatory basis to ensure the rights of all. The Court stressed that freedom of religion encompasses the freedom to manifest one's religion, including in the workplace, but that a person's religious practice can be restricted where it encroaches on the rights of others.

U.K. and European law both recognize religious freedom as a human right but not as an absolute right that applies irrespective of its effect on others. Thus, the *Eweida* judgment highlights this conflict where the Court must balance between respecting individual rights to freedom of expressing one's religion with collective rights to be free from discrimination.

In decisions such as in *Dahlab v. Switzerland* (2001), the Court has ruled that a person's right to religious freedom is mitigated by work place duties, such as in declining to protect a teacher's right to wear a head scarf in class, as in *Dahlab*. Furthermore, the Court has held in cases such as *Stedman v. United Kingdom* (1997) that because an employee has the freedom to choose their employment, their right to religious freedom is not automatically obstructed by workplace requirements that touch on religion, such as in signing a contract for a job that requires work on Sunday, as in *Stedman*. In the *Eweida* judgment, the Court made a stronger statement for personal religious freedom and held that it is relevant to the principle of equality, and an employer's policies that impinges upon religious freedom must be justified. Here, the Court weighed the employer's interests and the employee's ability to resign against the appropriateness of the restriction upon religious freedom. The Court affirmed the states' wide discretion in reconciling these countervailing rights, and in many cases, this wide discretion provided by the Court will give states the ultimate decision for balancing these divergent rights.

ROMA CHILDREN'S WRONGFUL PLACEMENT IN SPECIAL SCHOOLS IS DISCRIMINATORY

Hungary's segregation of its education system based on students' mental disabilities violates the right to education and freedom from discrimination, according to the European Court for Human Rights (ECtHR, Court) Chamber ruling in *Horváth and Kiss v. Hungary*. The case

concerned two young Roma men who authorities placed in a school for the mentally disabled. The ECtHR found against the state and more broadly articulated that European governments must institute constructive measures to end segregation and discrimination against Roma children in schools.

The two young Roma men were diagnosed as children with mild mental disabilities and the state placed them in a remedial school. These institutions have a limited and more basic curriculum, offering what the Court found to be lower-quality education than mainstream counterparts. Because of this inequality, the Court found that the students' education did not give them access to the type of career they wanted and created *de facto* segregation from the wider population. The applicants also alleged that the tests used to identify children for placement in these schools were outdated and culturally biased in their application. To this end, the petitioners argued that the tests were designed by the state to segregate Roma children from the rest of the population. Because of this, the petitioners argued that education of Roma children in these remedial schools constituted ethnic discrimination by relegating them to a lesser form of schooling. Although the government did not dispute the racial bias in at least some of the tests used, it argued that an alternative examination would compensate for cultural bias. The government also claimed that the over representation of Roma children in the special schools resulted from deficiencies tied to their own cultural upbringing, which the government contended is a factor outside the scope of the right to education. However, the Court flatly rejected this argument.

Ruling in favor of the applicants, the Court found a foundational violation of Article 2 of Protocol No. 1 (right to education) that and a complimentary violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR, Convention). The Court recognized that Hungary has a long history of placing Roma children in special schools, and that the authorities failed to take into account both Roma children's, and the petitioners' specific needs as members of a disadvantaged and historically marginalized group. Furthermore, the Court agreed that Roma children have continually been overrepresented in the remedial

schools. The Court has clearly stated that states cannot implement policies that are prejudicial to one ethnic group, and despite the government's assertions, the ECtHR found that there was at least a "danger" that the education tests were culturally biased and lacked sufficient "special safeguards" to protect against misdiagnosis. The Court concluded that there are "positive obligations" on a state to address and remedy practices that lead to discriminatory results, particularly when that discrimination is rooted in a historical discrimination against the group. Furthermore, the Court found that Hungary had failed to "provide the necessary safeguards against misdiagnosis."

The *Horváth and Kiss* judgment establishes that public education systems must enact "particularly stringent" positive measures to protect pupils that have suffered past discrimination that has continuing effects, and the state must address structural disadvantages within school systems. According to the Court, it is the state's burden to demonstrate that the placement tests used, as well as their application in practice, are capable of "fairly and objectively" determining the mental capacity of the applicants without undue influence by cultural bias. In a procedural issue, the decision reinforced that reliable statistical evidence may establish *prima facie* discrimination and shift the burden of proof to the state. Finally, this judgment reaffirmed that in the public education setting, it is not necessary to prove discriminatory intent to find discrimination.

This judgment is another in a series of cases highlighting the broad violation of the human rights of Roma children across Europe. The Court found in the present case that the education of Roma children under an inferior curriculum has limited their future educational opportunities by coercing them to pursue their studies in "special vocational secondary schools." This limits their ability to obtain higher education, and as a consequence, the education received did not satisfy the positive obligations of the State to undo a history of racial segregation in education. By stating that "the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests," this judgment is part of a broader recognition of the often problematic and

discriminatory situation of Roma children in Hungary and other parts of Europe.

Antonia Latsch, a 2013 L.L.M. recipient from the American University Washington College of Law, is a staff writer for the Human Rights Brief.

INTER-AMERICAN SYSTEM

COUNTRY VISITS CONTINUE TO SERVE AS VITAL TOOL FOR HUMAN RIGHTS PROTECTION IN THE AMERICAS

In its latest country report, the Inter-American Commission on Human Rights (IACHR, Commission) reflected on its 2008 country visit to Jamaica and raised grave concerns regarding the high levels of continued violence inside the country. The report suggests the importance of country visits in order to collect evidence, conduct interviews, and learn more about the human rights situation in the Member State being visited.

Under Article 106 of the Organization of American States (OAS) Charter, the Commission's mandate is to "promote the observance and protection of human rights." To meet its mandate the Commission undertakes a variety of activities, including investigating petitions, publishing human rights reports, conducting in-country visits, and presenting cases to the Inter-American Court of Human Rights (IACtHR, Court). Since 1961, the IACHR has organized country visits in order to conduct in-depth observations. Member States must grant permission for these visits. In order for a visit to count as an *in loco* visit, in 2001 it was settled that at least two Commissioners must participate in the visit; an *in loco* visit also requires Commissioners visit in their capacity as Commissioner, and not in their Rapporteur capacity. In comparison, country visits may include less than the two required Commissioners and the visits often relate to the thematic rapporteurships. Since its inception, the Commission has conducted 92 *in loco* visits.

The Commission's Strategic Plan stated that it hoped to conduct two *in loco* visits per year, for a total of ten such visits between 2011 and 2015. Thus far, it appears that there has been one *in loco* visit since the Strategic Plan was announced in 2011, but there has been a greater number of country visits, including three visits

in 2011, two in 2012, and already one in 2013. *In loco* visits generally lead to a published report on the situation on human rights observed, a document that is distributed to the Permanent Council and General Assembly of the OAS.

Jamaica, Suriname, and Colombia all serve as recent case studies and highlight the value of country visits as an avenue for promoting and protecting human rights. Since at least 2008 the Commission has closely monitored the human rights situation in Jamaica. That year, the IACHR conducted an *in loco* visit to Jamaica in which Commissioners met with government officials and civil society to conduct independent investigations into alleged human rights violations, including assertions of arbitrary detentions, high crime rates, and failures to investigate by the police. The Commission has continued to monitor human rights in Jamaica by holding public hearings and most recently publishing a report. The report summarizes the Commission's four-year observations, and though it welcomes Jamaica's reports that homicides have decreased, the Commission stated that it remains extremely concerned at the high level of insecurity. Furthermore, the Commission expressed concern that the violence primarily affects the urban poor. For its part, Jamaica conceded that it continues to battle high levels of violence, but stated that it is doing what it can given financial constraints.

The Commission is also observing human rights in Suriname, where it conducted its most recent *in loco* visit. The visit's goal was to examine the rights of women and indigenous peoples in Suriname. Regarding indigenous rights, Commissioner Dinah Shelton, Rapporteur on the Rights of Indigenous Peoples, reinforced the need for Suriname to fully comply with the *Moiwana* and *Saramaka* judgments of the IACtHR and underscored the need for the national government to consult with local communities on mining projects. On the rights of women, Commissioner Tracy Robinson, Rapporteur on the Rights of Women, applauded the Suriname government for its recent legislative efforts to protect women and promote equality. She simultaneously stressed the need to put financial and human resources behind these policies to ensure follow-through and increase inclusion of women across private and public sectors as well as in

political decision-making. The visit also raised concerns regarding discrimination against LGBTI communities in Suriname, and Commissioner Robinson called on authorities to create a government policy that advances gender equality and protects against discrimination.

Lastly, during a visit to Colombia, the Commission stated that it appreciated the government's efforts to protect human rights after five decades of violence. However, the Commission also heard from members of civil society who stressed "the execution of protection measures in the interior of the country and in rural areas represents greater challenges when compared to the measures implemented in urban areas." Thus, through a country visit the Commission learned about the government's progress, and confirmed implementation through dialogue with civil society.

Today, scholars believe that visits *in loco* are a way for Member States to show cooperation with the Inter-American System, and for the Commission to collect evidence before a case and improve the quality of its decisions. "The Commission visits and the follow-up reports create powerful incentives for states to consider the international implications of their human rights policies. *In loco* visits and country reports, therefore, significantly contribute to the Commission's work in dealing with gross and mass violations of rights," wrote Claudio Grossman, current Chair of the United Nations Committee Against Torture and IACHR Commissioner from 1994-2001.

INTER-AMERICAN COURT DETERMINES THAT DOMINICAN REPUBLIC USED EXCESSIVE FORCE AGAINST HAITIAN MIGRANTS

Following more than two decades of tensions between Haitian descendants and the Dominican Republic, at least one group of Haitians now has a judgment against the Dominican Republic. The Inter-American Court of Human Rights (IACtHR, Court), in its decision in the *Case of Nadege Dorzema et al. v. Dominican Republic*, said that seven people died and several more were seriously injured at the hands of the Dominican Republic's military officers when they forcefully expelled Haitian migrants from the country.

The IACtHR decision, announced in November 2012, cited violations of the

American Convention on Human Rights (American Convention). The Court noted that the Dominican Republic originally tried the case by a military tribunal, which acquitted the officers. The Court found violations of the right to life (Article 4) regarding the seven people who died as a result of excessive force, as well as a violation of the right to personal integrity (Article 5) concerning those who survived but were injured by military police. In particular, the Court focused on the procedures for detention and the expulsion of Haitian migrants from the Dominican Republic. The Court found that some of the victims were illegally and arbitrarily detained, which violated the right to personal liberty (Article 7). Furthermore, the expelled victims received none of the internationally or domestically recognized protections inherent in removal proceedings, a violation of judicial protection (Article 25). The collective expulsion of migrants likewise violated the right to freedom of movement and of residence (Article 22). Lastly the Court found that there was *de facto* discrimination against the victims because of their migrant status, and that the blanket discrimination is a violation of the obligation to respect the rights guaranteed by the American Convention (Article 1).

The latest decision involving the Dominican Republic follows a string of constant and regular provisional measures granted by the Court that were focused on protecting Haitian migrants inside the Dominican Republic. The Inter-American Human Rights System has long raised concerns about treatment of Haitians inside the Dominican Republic, a sentiment noted by the report following the Inter-American Commission on Human Rights' (IACHR, Commission) visit to the island nation in 1991. Likewise, in 1999, the Commission published a country report

that expressed apprehension about Haitian migrant workers and their families. Also in 1999, the IACHR received a petition alleging that mass expulsions of Haitians were taking place in the Dominican Republic. According to the petition, people were expelled at high rates with no opportunity to inspect the victims' documents or familial ties to the Dominican Republic, and the victims believed they were being selected by the color of their skin. Thereafter, representatives of Haiti and the Dominican Republic entered into agreement that the Dominican Republic would alert Haiti when its nationals were deported.

At a public hearing on the Commission's request for provisional measures for Haitians and Dominicans of Haitian descent in the Dominican Republic before the IACtHR in August 2000, the Commission argued that although immigration law is within the sovereign authority of each country, each state must conduct its immigration policy with restraint, and if subjecting someone to deportation, the state must do so within the constraints of the law. For its part, at the same public hearing in 2000, the Dominican Republic contested that its immigration practices respected due process and that it needed to repatriate those Haitians illegally present in the country. Acting on the briefs, reports, and testimony from this public hearing, the Court ordered a provisional measure to protect certain named individuals from being deported, and permitted other deported individuals to return to the Dominican Republic. The Court also asked the Commission and the State to report with frequent updates on the situation.

In 2006, the Court expressed concern regarding a judgment by the Supreme Court of Justice of the Dominican Republic, which found the "Commission for the Implementation of Provisional Measures"

unconstitutional and invalidated the procedures established to implement IACtHR provisional measures. Thus, the IACtHR expressed anxiety that no other mechanism was in place to implement provisional measures. In 2010, following the earthquake in Haiti, some sources cited as much as a fifteen percent increase in the Haitian population in the Dominican Republic, making the treatment of migrants a continuing issue.

By 2012, the IACtHR acknowledged improvements by the Dominican Republic and praised its appointment of state authorities entrusted with the implementation of provisional measures. However, the Court raised concern that Dominican authorities did not respond to requests from the Court.

In *Nadege Dorzema et al. v. Dominican Republic*, the IACtHR ordered that the Dominican Republic undertake reparations. The reparations include ordering the investigation be reopened, that the authorities determine the whereabouts of the victims' bodies, that the state offer medical and psychological support, that the state accept public responsibility, that the state provide training on the rights of migrants and the use of force, and that the state pay reparations to the victims.

In the twelve-year span from 2000-2012, the IACtHR granted ten provisional measures addressing the protection of Haitians or Dominicans of Haitian descent now in the Dominican Republic. The most recent decision of the IACtHR demonstrates that both the Commission and Court continue to monitor the treatment of Haitian migrants inside the Dominican Republic.

Jessica Alatorre, a J.D. candidate at the American University Washington College of Law, is a staff writer for the Human Rights Brief.