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UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

THE EUROPEAN COURT of Human Rights (Court) was established in 1959 by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Enforcing the obligations entered into by the Council of Europe's Contracting States, the Court is composed of a number of judges equal to the number of Contracting States. Any Contracting State or individual may lodge a complaint with the Court for violations of the Convention. In its decisions, the Court acknowledges the various legal systems of the Contracting States.

With the accession of numerous Contracting States since 1990, the Court has been inundated with applications. The number of applications registered with the Court grew from 404 in 1981 to 13,858 in 2001. The increase in the Court's caseload threatens its ability to adjudicate applications in a timely fashion. Widespread academic and institutional debate has sought to determine what measures should be taken to adapt the Court's procedures to the demands of an insurmountable caseload.

Much of the debate has focused on whether the individual right of application should be sacrificed in cases where the Court can serve as an advisor to national governments in remedying the cause of the complaint at the national level. Advocates of this approach stress that Article 13 of the Convention requires that national authorities provide an effective remedy for violations of the Convention. Opponents of this approach, however, stress that Article 34 of the Convention mandates an individual right to lodge an application with the Court.

The Court has recently moved to redress faulty or malfunctioning national legislation that is systemic in nature and affects many individuals by developing a "pilot judgment" program. Pilot judgment allows the Court to address many applications that share a common cause of action without rendering individual judgments or directly awarding damages to the complainants. Under pilot judgment, the Court is permitted to circumvent

individual applications and issue directives to the respondent government to remedy a legislative or administrative defect at the national level. Thus, through the use of the pilot judgment program, the Court can address an entire class of meritorious applications without directly providing a remedy. The Court has developed pilot judgment in response to the Council of Europe's hesitancy to adopt a new Protocol that would permit the Court to modify its procedures for multiple claims with a common cause of action that can be remedied by state action at the national level.

If the pilot judgment scheme takes hold, the Court will be forced to effect a general reform of its procedures to ensure adequate remedial measures, or "just satisfaction." Article 41 entitles applicants to just satisfaction when the remedy at the national level is lacking or inadequate. If the Court adopted an approach that included implementing an advisory body for national governments, the Court would have to redefine its relationship to national courts and legislatures under the Convention. Currently, there is no procedure for referring a violation back to a national body from the Court.

BRONIOWSKI V. POLAND

On June 22, 2004, the Court delivered its judgment in *Broniowski v. Poland*, and on September 23, 2005, the Court issued a friendly settlement judgment in the case. The Court issues a friendly settlement judgment when the parties to a dispute have successfully negotiated a remedy that addresses the violation and reflects the findings of the Court in its review of the application.

At the close of the Second World War, the Polish state ceded a vast strip of land stretching from present-day Vilnius to areas southeast of Lvov, now located in the western region of present-day Ukraine, to the Soviet Republics of Ukraine, Belarus, and Lithuania. This territory is commonly known as the "territories beyond the Bug River." In its statement to the Court in the *Broniowski* proceedings, the Polish government estimated that approximately

1,240,000 individuals were displaced as a result of the ceding of this land, and that, notwithstanding the post-war grant of portions of German land along Poland's western border, the area of the Polish state had been reduced by nearly 20 percent.

The Polish government devised a plan to compensate those who had lost their property and land to the Soviet Union. New legislation accorded displaced persons the right to offset the value of the property lost in relocation against the price of property that they might bid upon in a sale of state assets. For each displaced person, the Polish government assessed the value of the property that was surrendered and issued certificates to determine the credit that was available for the purchase of state property.

In *Broniowski*, the Court held that Poland had violated Article 1 of the Convention by failing to fulfill its obligation to provide property or the "right to credit" in compensation for land abandoned at the end of the Second World War in the territories beyond the Bug River. The Court cited numerous administrative and legislative barriers to the realization of the property interest that was guaranteed to the "evacuees" in treaties with the Soviet Republics of Ukraine, Belarus, and Lithuania. According to the Court, Poland's inaction and obstruction had rendered the property interest worthless.

Traditionally, the Court has enforced remedial measures that provide for pecuniary and non-pecuniary damages. In *Broniowski*, however, the Court did not directly provide a remedy to the applicant. The Court reserved *Broniowski* for further review, adjourned all other claims based on the same cause, and directed Poland in very general terms to "secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1." The Court "invited the Government and the applicant to submit, within six months from the date of notifica-

tion of [this] judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach." The Court's decision acknowledged the 167 Bug River claims pending before the Court, as well as the approximately 80,000 potential claimants under the same cause who had yet to make a claim against the Polish state.

Subsequent to the *Broniowski* decision, which directed the Polish government to redress the situation at the national level, the Polish Constitutional Court delivered a judgment on December 15, 2004, regarding a claim by Members of the Polish Parliament that challenged the constitutionality of the laws and administrative practices that inhibited the realization of the Bug River property interests. The Polish Constitutional Court found that the laws in question were unconstitutional and inhibitive of the property rights of the Bug River evacuees. Further, the Polish government passed the July 2005 Act, which guarantees realization of the Bug River claimants' property interests.

In the *Broniowski* friendly settlement judgment, the European Court of Human Rights quoted the Polish Constitutional Court's decision at length and noted that the July 2005 Act was passed "with a view to taking account of the findings of the [European Court of Human Rights] principal judgment" in *Broniowski*. The European Court of Human Rights struck *Broniowski*'s application from its list of cases, holding that the complaint had been remedied at the national level and no longer required the Court's attention. The European Court of Human Rights noted, however, that it would follow legislative developments in the matter to ensure that the settlement between the parties was satisfactory.

In the initial *Broniowski* judgment prior to the friendly settlement of the case, the Court had rendered pilot judgment on the grounds that Poland had violated Article 1 because of "a systemic problem connected with the malfunctioning of domestic legislation and practice." The language of the holding is very broad and could potentially be applied to many situations. Considering that the legal systems of many of the new Contracting States are undergoing major transitions, such malfunctioning legislation is likely to be common. It is not clear

whether the Court will use pilot judgment as a means to efficiently redress similar claims with a common cause, as in *Broniowski*, or to take on a more active role in ensuring that legislative and administrative practices at the national level conform to Convention standards. Thus, the *Broniowski* decision could have significant implications for the future of the Court's jurisdiction.

It is open to debate whether the Court will continue to adjudicate individual claims on a case-by-case basis or expand upon the *Broniowski* precedent by addressing classes of claims with a pilot judgment that directs national governments to correct inadequate national legislation and administration. The utility of pilot judgments is evident given the increasing number of claims brought before the Court. The shift toward a more efficient court system, however, may not provide sufficient redress for individual harms. For the time being, the *Broniowski* friendly settlement has postponed the necessity of directly addressing these issues. By acting to ensure the realization of the Bug River claimants property interests as mandated by the Court, the Polish government's actions indicate that the Court's pilot judgment program has substantial and direct influence over legislative and administrative practices at the national level.

EDITOR'S NOTE: Due to space constraints, the decision summarized below was unable to run in the Spring 2005 issue of the *Human Rights Brief*.

STEEL AND MORRIS V. THE UNITED KINGDOM

On February 15, 2005, the Court delivered its judgment in *Steel and Morris v. The United Kingdom*. In a unanimous decision the Court held that the appellants, Helen Steel and David Morris, had suffered violations of Article 6 (Right to a Fair Hearing) and Article 10 (Freedom of Expression) of the Convention as a result of the British government's refusal to provide them with legal aid as defendants in a libel suit brought against them by the McDonald's Corporation.

The case grew out of Steel and Morris' involvement in an anti-McDonald's campaign initiated by London Greenpeace in the mid-1980s. A six-page brochure produced by the organization entitled "What's

wrong with McDonald's?" accused the corporation of contributing to economic imperialism, malnourishment within developing countries, rainforest destruction, animal cruelty, and the exploitation of children. In response, the company issued a writ for libel against Steel and Morris and three other Greenpeace members, claiming more than GBP 100,000 in damages. Although proceedings were withdrawn against the other three members in exchange for an apology, the case against Steel and Morris proceeded to trial in the United Kingdom High Court in June 1994. In defense Steel and Morris denied responsibility for publishing the brochure, denied that the statements complained of were defamatory, and argued in the alternative that the statements were "substantially true or else were fair comment on matter of fact."

Prior to trial Steel and Morris had applied for legal aid from the British government. The British government denied legal aid because public legal assistance was not available for defamation proceedings at that time. Despite some *ad hoc* assistance offered by volunteer lawyers and public donations, Steel and Morris represented themselves throughout the trial and appeal and bore all costs. The trial lasted for 313 court days and remains the longest trial in English history.

In June 1997 Justice Bell delivered his opinion, finding Steel and Morris liable for the brochure's false and defamatory messages. He awarded McDonald's GBP 60,000 in damages. The Court of Appeal subsequently heard the case in January 1999. In their appeal Steel and Morris noted that corporations like McDonald's "must be open to unfettered scrutiny and criticism, particularly on issues of public interest." The Court of Appeal accepted some of the challenges to Justice Bell's findings regarding the truthfulness of the brochure and reduced the damages to GBP 40,000. The House of Lords denied Steel and Morris further appeal.

Steel and Morris' application with the European Court of Human Rights was lodged on September 20, 2000, declared partly admissible on April 6, 2004, and heard on September 7, 2004. Their principal complaint was that the denial of legal aid prevented a fair trial, thus violating Articles 6 and 10 of the Convention. Article 6 provides that "everyone is entitled to a fair and

public hearing” and Article 10 protects the right to freedom of expression, including the right to “hold opinions and to receive and impart information and ideas without interference by public authority.”

With respect to Article 6, the British government argued that Steel and Morris might not have been granted legal aid, even if it had been available for defamation suits at the time. Further, the British government stated that the law and facts at issue were not sufficiently difficult to render legal aid essential. The Court affirmed that Article 6 allows states to choose the means used to guarantee the right to a fair trial and gives states the power to impose certain conditions for granting legal aid. The Court noted, however, that the present case was unique because “the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention.”

Because the proceedings were complex, Steel and Morris’ lack of legal training led them to make a number of procedural mistakes that resulted in severe financial consequences. The Court concluded that “neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants ... was any substitute for competent and sustained representation by an experienced lawyer familiar ... with the law of libel.” The Court further noted that the question of whether legal aid, assuming it had been available, would have been granted to the applicants was a “matter of pure speculation.” Even if the request for aid had been denied or granted conditionally, the Court noted that similar issues would arise, such as “whether the refusal of legal aid or the conditions attached to it were such as to impose an unfair restriction on the applicants’ ability to present an effective defense.” Therefore, the Court concluded that the British government’s denial of legal aid deprived Steel and Morris of the opportunity to present their case effectively and contributed to an “unacceptable inequality of arms” with McDonald’s sufficient to constitute an Article 6 violation.

With respect to the Article 10 judgment, the central issue was whether the British government’s denial of legal aid also constituted an impermissible “interference by

public authority” with Steel and Morris’ freedom of expression. Steel and Morris emphasized the inter-relationship between Articles 6 and 10, arguing that they unfairly bore the burden of proving the truth of the brochure’s allegations without legal aid. Steel and Morris also argued that to require “strict proof” of every allegation was “contrary to the interests of democracy ... because it would compel those without the means to undertake court proceedings to withdraw from public debate.” The British government countered that because Steel and Morris were not journalists they should not receive the high level of protection afforded by Article 10 and that they had violated the Article’s “good faith” proviso by not carrying out sufficient research prior to publishing the brochure. The Court agreed with the latter argument but noted the “strong public interest in enabling [small and informal campaign] groups and individuals outside the mainstream to contribute to the public debate” in a democratic society. The Court concluded that Article 10 protection should not be limited to journalists.

By presenting the anti-McDonald’s brochure as a statement of fact rather than a value judgment, the Court reasoned that Steel and Morris had overstepped certain bounds “in respect of the reputation and rights of others” and should be subject to similar standards of factual accuracy, even if a certain degree of hyperbole was “to be tolerated” in a campaign leaflet. The Court was not persuaded by Steel and Morris’ argument that McDonald’s should be precluded from bringing suit because it is a multinational company. Given a state’s interest in “protecting the commercial success and viability of companies... for the wider economic good,” the Court affirmed that the defendant should bear the burden of proof in libel suits.

Nevertheless, to “safeguard the countervailing interests in free expression and open debate,” the Court noted that the provision of such a remedy to corporate bodies must be tempered by procedural fairness and an equality of arms at trial. “Given the enormity and complex nature of that undertaking,” the Court held that the “correct balance” was not struck between the need to protect Steel and Morris’ right to freedom of expression and the need to protect McDonald’s “rights and reputation.” This balance was all

the more important in light of the possible “chilling effect” this could have on the circulation of information about the activities of powerful corporate entities. The Court concluded that the lack of procedural fairness and equality also gave rise to a breach of Article 10.

Pursuant to Article 41 (Just Satisfaction) of the Convention, the Court ordered Britain to pay EUR 20,000 in non-pecuniary damages to Steel and EUR 15,000 in non-pecuniary damages to Morris for the general “anxiety and disruption to their lives far in excess of that experienced by a represented litigant.” The Court also ordered Britain to pay court costs of EUR 47,311. The Court rejected Steel and Morris’ request for a “rider” to cover their liability to McDonald’s. The Court did not consider pecuniary damages because Steel and Morris failed to show any lost earnings as a result of their lack of legal aid.

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 (Declaration) in 1948. In 1959 the Inter-American Commission on Human Rights (Commission) was established as an independent organ of the Organization of American States (OAS) and it held its first session one 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 that a case is admissible and meritorious, it will make recommendations and, in some cases, 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 reparation to victims of human rights violations.

In June 2005 the Inter-American Court decided two important cases related to the rights of indigenous peoples in the Americas. In *Yakye Axa v. Paraguay*, the Yakye Axa indigenous community sought possessory rights over the community’s ancestral lands, which Paraguay had prom-

ised to them for more than a decade. In *Yatama v. Nicaragua*, the sole indigenous political party in Nicaragua sought recognition as a political entity in the country's elections and to increase indigenous representation in the Nicaraguan political system.

YAKYE AXA V. PARAGUAY

On June 14, 2003, the Commission and representatives of the victims brought a suit before the Inter-American Court claiming that Paraguay violated the rights of the Yakye Axa indigenous community by breaching Articles 4 (Right to Life), 8 (Right to a Fair Trial), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention. The allegations stated that since 1993 Paraguay has failed to guarantee the Yakye Axa community a possessory right to their ancestral property, which has created an environment of nutritional, medical, and sanitary vulnerability. The Commission and the representatives of the victims also noted that Paraguay's procedures for filing complaints and guaranteeing property rights to the Yakye Axa community were ineffective.

Article 4 of the Convention guarantees that "every person has the right to have his life respected." Article 8 provides that "every person has the right to a hearing, with due guarantees and within a reasonable time" and Article 21 ensures that "everyone has the right to simple and prompt recourse." Article 25 states that "everyone has the right to the use and enjoyment of his property." The Inter-American Court ruled in favor of the plaintiffs and held that the long delay in returning the land to the Yakye Axa community constituted a failure of duty to protect the community, thus violating judicial protection. The Court ordered that Paraguay offer effective protection to the indigenous community's customs, as well as their economic and political characteristics. It also ordered Paraguay to monitor the community's vulnerabilities.

Paraguay must now recognize rights that are associated with the right to property. For the first time, the Inter-American Court acknowledged that communal property of indigenous communities closely relates to indigenous traditions and expressions, customs, rituals, values, art, and relationships with nature. These rights will be violated if a community has reduced access to their lands.

The Inter-American Court also found that exclusion of the Yakye Axa community from their traditional lands for the past 12 years had endangered their survival. These conditions, the Inter-American Court observed, have negatively impacted the nutrition and health of the Yakye Axa community members, especially children. The Court held that these problems result from violations of the right to a dignified existence and other basic rights, such as the right to education and the right to a cultural identity.

To measure damages, the Inter-American Court assessed the victims' lost incomes and the expenses incurred by the court action. Considering the value of the land to the Yakye Axa community, the Inter-American Court asked Paraguay to create a program and a community fund for development that should be implemented when the land is returned to the community. Finally, the Inter-American Court asked for a public act of recognition of responsibility, communicated in the Enxet and Spanish (or Guarani) languages.

YATAMA V. NICARAGUA

In the 1990s Nicaragua passed a law that excluded electoral candidates affiliated with the sole national indigenous political party, Yatama, from voting. The representatives of the victims and the Commission alleged that the Nicaraguan Court violated Articles 8 (Right to a Fair Trial), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) of the Convention. Article 8 provides that "every person has a right to a hearing, with due guarantees and within a reasonable time." Article 24 ensures that "all persons are equal before the law" and Article 25 states "everyone has the right to simple and prompt recourse."

The Inter-American Court decided the merits of *Yatama v. Nicaragua* on June 23, 2005. In its decision, the Inter-American Court observed that Yatama candidates were not included on the ballots, posing a risk to the country's democratic political system and violating the Convention. By preventing Yatama candidates' access to the ballots, the government impeded indigenous communities from voting for the only indigenous and ethnic political party in Nicaragua. The Court reasoned that such exclusion amounted to an alienation of the indigenous popu-

lation from the political system, as evidenced by the 2000 municipal elections, where only 20 percent of the indigenous community voted. As a result of the exclusion of Yatama candidates from the electoral process and its effect on the civil rights of indigenous peoples, the Inter-American Court ruled that the Nicaragua also violated Articles 8, 23, 24, and 25 of the Convention.

According to the Inter-American Court, Nicaragua engaged in political and legal discrimination by preventing the equal participation of Yatama candidates in the municipal elections of November 2000. For example, under the January 2000 reforms to the Electoral Law, candidates must gather signatures equivalent to three percent of the voters that registered in the past election, as well as represent individuals in 80 percent of Nicaragua's municipalities, to gain ballot access. This is virtually impossible to satisfy for the Yatama community candidates. The Court ordered that the Nicaraguan government ensure the Yatama community's access to the political system and allow their integration into the state's organs and institutions in a direct and proportional manner.

To guarantee the effectiveness of the political rights of members of indigenous and ethnic communities of the Atlantic Coast, the Inter-American Court noted the importance of adopting the protections specified in Articles 4, 49, 89, and 180 of the Political Constitution, as well as Article 11.7 of the Statute for Autonomy of the Atlantic Coast Regions. Article 4 of the Nicaraguan Political Constitution provides for governmental recognition of indigenous communities and their rights. Article 49 enables communities of the Atlantic Coast to create organizations that advance their own interests. Articles 89 and 180 grant these communities the right to preserve and develop their cultural identity and preserve their historic traditions. Finally, Article 117 of the Statute for Autonomy establishes that members of the Atlantic Coast have a right to select their autonomous regional authorities.

The Inter-American Court ordered that Nicaragua publish in its official newspaper and other newspapers of national circulation portions of the Court's order. These portions of the Court's order and a national recognition of responsibility must also be transmit-

ted via radio in the three indigenous languages of the region — Miskito, Sumo, and Rama — as well as in Spanish and English. Further, the Court held that Nicaragua must create, within a reasonable time, a judicial resource that is simple, speedy, and effective to regulate the decisions of the Supreme Electoral Council, which is the co-equal branch of government that controls elections. Ultimately, Nicaragua should modify its electoral rules and clearly establish the Yatama community's right to become a political party.

With regard to the Yatama candidates excluded from elections, the Inter-American Court ordered that Nicaragua pay \$80,000 for all material damages and expenses they incurred as a result of the litigation. It also recognized the importance of political acts, such as public recognitions of the wrongs committed and the adoption of measures that would include the participation of indigenous communities of Nicaragua's Atlantic Coast in the electoral process in accordance with the communities' values, customs, and rights.

By recognizing the importance of the right to land and tradition, *Yakye Axa* and *Yatama* reflect the Inter-American Court's increasing protection of the rights and values of indigenous peoples. The Inter-American System has also taken important steps in promoting the rights of indigenous communities by ensuring their ability to gain greater political access, which in turn will guarantee a more inclusive democracy.

AFRICAN COMMISSION

THE AFRICAN HUMAN RIGHTS SYSTEM began to take shape under the Organization of African Unity (OAU), which was founded in 1963. The African Union (AU) replaced the OAU in July 2001 following the ratification of the AU's Constitutive Act. The African Charter on Human and Peoples' Rights (Charter), entered into force in 1986, established the African Commission on Human and Peoples' Rights (Commission), which is responsible for interpreting all provisions of the Charter. The Commission meets twice annually to consider periodic reports, as well as complaints brought against State Parties to the Charter. At the time of writing, the proposed African Court on Human and Peoples' Rights, established in 2004 as a court for enforcement of the

Charter, was not yet operational (see below).

AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

The 37th Ordinary Session of the African Commission on Human and Peoples' Rights was held from April 27 - May 11, 2005, in Banjul, Gambia. The Commission continued discussions on the July 2004 decision of the African Union to merge the Commission's proposed African Court on Human and Peoples' Rights (ACHPR) with the AU's African Court of Justice, and passed a resolution on the Protocol addressing the establishment of the ACHPR. The Commission noted that the two Courts have essentially different mandates and litigants. It expressed concern that the decision to merge them, and the non-ratification of the Protocol by the majority of the AU Member States, has hindered establishment of the ACHPR. The Commission noted that the AU Executive Council's January 2005 decision, EX.CL/Dec.165 (VI), allows the ACHPR to continue functioning, notwithstanding discussions on the merger. It asked the Assembly of the Heads of State and the Government of the African Union to implement the ACHPR as soon as possible by electing judges, choosing the seat of the Court, and providing adequate resources. It also called on Member States that have not yet done so to ratify the Protocol. Although 42 of the 53 Member States have signed the Protocol, only 15 have ratified or acceded to it.

The Commission adopted Resolutions on the human rights situations in Darfur, Sudan, and Togo. The Resolution on Darfur requested that the government of Sudan comply with its obligations under the Constitutive Act of the African Union, the United Nations Charter, and the African Charter on Human and Peoples' Rights to continue its cooperation with international agencies and humanitarian organizations and to cooperate fully with the Prosecutor of the International Criminal Court (ICC). It also called on parties to the conflict to observe the terms of the Ceasefire Agreements in Ndjamena, Chad, and to stop all attacks on civilians immediately. Finally, it asked the UN Security Council to continue monitoring the implementations of its resolutions and the international com-

munity to help meet the AU's logistical, material, and financial needs in responding to the crisis. The Resolution on Togo announced a decision to send a fact-finding mission to investigate human rights violations occurring before, during, and after the April 2005 election of Faure Gnassingbe, son of the recently deceased Togolese president, Gnassingbe Eyadema.

The Commission adopted a Resolution to create a working group to review its rules of procedure (including internal and external relationships), establish a Voluntary Fund for Human Rights in Africa, and follow-up on the evaluations, recommendations, decisions, and structure of its reports. Finally, the Commission granted Observer Status to an additional 13 NGOs, bringing the total number of organizations with such status to 332. The 38th Ordinary Session of the Commission will be held from November 21 - December 5, 2005. *HRB*

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