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Resolutions, Declarations, and Other Documents

United Nations Secretary-General's Briefing to the General Assembly on the Emergency in Haiti (Jan. 13, 2010) and Security Council Resolution 1908 (Jan. 19, 2010)

Click here for Secretary-General Briefing (approximately 3 pages); click here for Resolution 1908 (Jan. 19, 2009)

The recent earthquake in Haiti has prompted an international outcry and has led to immediate relief efforts. International organizations, as well as foreign governments, have pledged logistical and financial assistance to Haiti where some estimate 200,000 people have died as a result of the earthquake. Already, international envoys have commenced assisting the relief efforts.

On January 13, 2010, the United Nations Secretary-General Ban Ki-moon briefed the General Assembly on Haiti, describing the crisis faced by the people of Haiti, its government, and everyone involved. He also stressed that the "most urgent need is emergency search and rescue." He appealed to both UN humanitarian agencies and key world leaders, including President Barack Obama, to aid in providing urgent medical assistance, rescue, shelter, and food to those affected by the earthquake.

On January 19, 2010, the UN Security Council approved Resolution 1908, "increas[ing] the overall force levels of the United Nations peacekeeping mission in Haiti [MINUSTAH] to support the immediate recovery, reconstruction and stability efforts." The decision to dispatch additional UN troops came in the aftermath of Ban's visit to Haiti on January 17, where he asked the Security Council for an additional 1,500 police officers and 2,000 troops to reinforce the 9,000 uniformed UN personnel already present in Haiti as part of MINUSTAH.

MINUSTAH has been in operation since 2004, when it was established by the Security Council through Resolution 1542 to assist the government of Haiti with "challenges to the political, social and economic stability." It was initially approved for a period of six months but has been periodically extended.

For more current information on the relief efforts in Haiti, visit the MINUSTAH official website at http://minustah.org/.

Judicial and Similar Proceedings

European Court of Human Rights

Gillan & Quinton v. United Kingdom (Jan. 12, 2010)

Click here for document (approximately 31 pages)

The European Court of Human Rights (Court) issued a judgment holding that the random stop and search of two British citizens, pursuant to Section 44 of the United Kingdom Terrorism Act 2000 (Terrorism Act), amounted to a violation of Article 8 (right to privacy) of the European Convention on Human Rights (Convention). Finding a violation of Article 8, the Court did not adjudicate the alleged violations of Articles 5 (right to liberty and security), 10 (freedom of expression), and 11 (freedom of peaceful assembly) of the Convention.

The two applicants were stopped and searched during a 2003 arms fair in East London. Applicant Gillan was riding his bicycle when a police officer approached him and asked to search his backpack. The search lasted about twenty minutes, and Gillan was then let go. The second applicant, a journalist, was stopped when she

attempted to film demonstrators protesting the arms fair. She was detained for less than thirty minutes. When no incriminating items where found on her person, she was also let go. In both instances, the police officers claimed authority under Section 44 of the Terrorism Act.

Section 44 of the Terrorism Act authorizes, *inter alia*, the police to stop and search individuals found in a specified area if the stop and search is "expedient for the prevention of acts of terrorism." Both applicants were informed by the police that Section 44 was the legal basis for the stop and search. Notably, however, neither applicant knew that the police were given an authorization order to search the area wherein the arms fair took place.

The applicants first challenged the search in domestic courts. The national courts generally agreed that the power to stop and search without reasonable ground was "unusual," but noted that the serious possibility of terrorism justified interference with protected rights. Finally, the applicants' appeal from the lower court was dismissed by the House of Lords. Notably, Lord Bingham held that the applicability of Article 8 Convention was "doubtful":

> It is true that "private life" has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level.

The applicants then brought their case to the European Court of Human Rights, which disagreed with the conclusion of the British national courts. First, the Court noted that the "concept of 'private life' is a broad term not susceptible to exhaustive definition." To determine whether the government has interfered with an individual's privacy, the Court must look at "a number of elements," including the person's reasonable expectations of privacy. Second, the Court reviewed the authority given to police officers in effectuating random searches, holding that "the use of the coercive powers conferred by legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life."

Once the Court ruled that the forced stop and search amounted to violation of Article 8, the next step was to determine whether the interference could be justified under paragraph 2 of Article 8. To be justified, a government measure must be "in accordance with law," requiring that the measure "have a basis in domestic law and . . . be compatible with the rule of law." In short, the domestic law must "be adequately accessible and foreseeable."

The Court again sided with the applicants. The Court reviewed several types of legal sources, including the police code enumerating permissible methods for stops and searches, as well as statistical data demonstrating a massive increase in random searches since the enactment of the Terrorist Act. The Court concluded that "the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse." As a result, such measures are not in accordance with the law, "and it follows that there has been a violation of Article 8 of the Convention."

Rantsev v. Cyprus & Russia (Jan. 7, 2010)

Click here for document (approximately 59 pages)

The European Court of Human Rights (Court) ruled that Cyprus and Russia violated Article 4 (prohibition of slavery and forced labor) of the European Convention on Human Rights (Convention) for allegedly neither preventing nor investigating the trafficking of a young Russian woman (Oxana Rantseva) to Cyprus. Specifically, the Court held that Cyprus had violated Article 4 for failing to implement "appropriate legal and administrative framework to combat trafficking" despite well-documented information on the abuse of immigrant visas, which effectively legalized the practice of trafficking; Russia had violated the same provision for its failure to investigate the circumstances surrounding Rantseva's recruitment to Cyprus on a suspicious visa.

Rantseva arrived in Cyprus in 2001 on an "artiste" visa. Within a few days, she was found dead. Given conflicting police and witness statements, how Rantseva died was unclear. Allegedly, she left her employer in Cyprus and disappeared. The employer located her and took her to a police station where he intended to report

her for visa violations. She was briefly detained, subsequently released into her employer's custody, and within hours was found dead outside the window of an apartment building where she and the employer had both spent the night. The employer and two other witnesses claimed that she had jumped to her death in an attempt to escape. The results of the investigation by the Cypriot police were inconclusive, but a local court, asked to determine the cause of death, concluded that the evidence did not suggest that her death was a homicide. Rantseva's father, the applicant, believed that her death was suspicious and requested that her body be repatriated from Cyprus to Russia for a new autopsy. The result of the second autopsy showed that she had died under strange circumstances requiring additional investigation. Even though the applicant insisted on further investigations, in 2006, the Cypriot government informed the Russian government that the investigation into her death was completed in 2001.

The applicant appealed to the European Court alleging that Cyprus had violated Articles 2 (right to life), 3 (prohibition of torture or to inhuman or degrading treatment or punishment), 4 (prohibition of slavery and forced labor), 5 (right to liberty and security of person), and 8 (respect for his private and family life) of the Convention for failing to investigate his daughter's death, for failing to protect her life, and for failing to punish those responsible for her death and ill-treatment. He also claimed that Russia had violated Articles 2 and 4 for its failure both to investigate the alleged trafficking and death of his daughter and to protect her from the risk of trafficking.

As to violation of Article 2 of the Convention, the Court ruled that Cyprus, but not Russia, had violated the procedural provisions of Article 2 by failing to conduct an effective investigation into Rantseva's death. As to the alleged violation of Article 3, the Court concluded that it would consider this issue in connection with alleged violation of Article 4 because "any inhuman or degrading treatment suffered by Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation."

The discussion about the alleged violation of Article 4 is the most notable part of the judgment. Here the Court considered whether a state is under a positive obligation to combat trafficking in human beings and to take measures to protect victims of trafficking. Cyprus argued that a state was only obligated to penalize and prosecute "act[s] aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour," and that this obligation arose only if the government in question "knew or ought to have known of a real and immediate risk that an identified individual was being held in such a situation." This knowledge, the Cypriot government argued, was lacking in the present case as "there was nothing in the investigation file, nor was there any other evidence, to indicate that Ms Rantseva was held in slavery or servitude or was required to perform forced or compulsory labour." Russia, on the other hand, argued that the case was outside of the scope of Article 4 and objected to the applicant's allegation that its criminal law lacked a provision on trafficking, stressing instead other international instruments to which Russia was a party that prescribed trafficking. As to the claim that the Russian government should have protected Rantseva, Russia argued that it could not prohibit its citizens from leaving the country; such prohibition would violate the right of free movement.

The Court first noted that trafficking in human beings is not expressly mentioned in Article 4, an "unsurprising" occurrence given that the Convention was based on the Universal Declaration of Human Rights, which also made no mention of trafficking. However, the Court cautioned that the Convention should not be read in a "vacuum" but interpreted in context of the effective protection of individual human rights. Interpreting Article 4 in this context, the Court concluded that trafficking itself was in violation of Article 4:

> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery," "servitude" or "forced and compulsory labour." Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.

Since trafficking in human beings is prescribed by the Convention, a state is obligated to implement national legislation that offers effective legal and regulatory framework to protect individuals from trafficking. Furthermore, both the state from which the individual is trafficked and the state that is the final destination are responsible for investigating trafficking offenses. While Cyprus had implemented legislation prohibiting trafficking, evidence indicated that this framework was ineffective and allowed for pervasive abuse. In fact, reports by the Cypriot Ombudsman, the Council of Europe's Human Rights Commissioner, and the U.S. State Department, recorded the frequency of trafficking in human beings for sexual exploitation.

In the present case, the Court concluded that "sufficient indicators [were] available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances

giving rise to a credible suspicion that Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation." This knowledge created an obligation on the part of the Cypriot government to protect her from falling victim to trafficking. With respect to Russia, the Court held that Russian authorities "had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantseva to Cyprus." Since this obligation was not met, Russia also violated Article 4.

Sejdic & Finci v. Bosnia and Herzegovina (Dec. 22, 2009)

Click here for document (approximately 42 pages)

Recently the Grand Chamber of the European Court of Human Rights (Court) held that the Constitution of Bosnia and Herzegovina, which allows only the three Bosnian ethnic majorities to run for the House of Peoples and the presidency, was in violation of the European Convention on Human Rights.

Two applicants complained that their inability to run for elections for the House of Peoples and the presidency of Bosnia and Herzegovina because of their Jewish and Roma origin was in violation of Articles 3, 13 and 14 (non-discrimination) of the European Convention on Human Rights, Article 3 of Protocol No. 1 (right to free elections), and Article 1 of Protocol No. 12 (non-discrimination) to the Convention, and amounted to racial discrimination.

To understand the legal context of the judgment, it is necessary to review the peace process that led to the establishment of the Constitution of Bosnia and Herzegovina. The Constitution is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement, signed in 1995 to end the conflict in Bosnia. The Constitution divides Bosnia and Herzegovina into two entities: the Federation of Bosnia and Herzegovina and Republika Srpska. To prevent conflict among the three major ethnic groups (Bosniacs, Croats, and Serbs), the Constitution provides for "power-sharing arrangements," requiring the consent of all three ethnic majorities. To this end, the Constitution mandates that the House of Peoples and the presidency be shared by the three ethnicities by following a special formula to ensure equal representation. Consequently, individuals not belonging to the three ethnic majorities are not eligible to run for elections. The applicants argued that this limitation disqualified them from running for office.

The Bosnian government argued that the discriminatory provisions of the Constitution were well justified. It stressed the recent war between the three major ethnic groups and the "ultimate goal" of the document, which was the "establishment of peace and dialogue between the three main ethnic groups."

The Court disagreed with the Bosnian government, concluding that "by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto without reservation, the respondent state has voluntarily agreed to meet the relevant standards." Furthermore, with respect to the ethnic requirements for candidacy for the House of Peoples, the Court noted the progress in the region and the "significant positive developments" in Bosnia and concluded that the continued discrimination on the basis of ethnic origin "lack[ed] an objective and reasonable justification" and violated Article 14 in conjunction with Article 3 of Protocol 1 to the Convention. As to the ineligibility to run for the presidency, the Court held that this discrimination was in violation of Article 1 of Protocol 12 to the Convention.

Judges Ljiljana Mijovic and Khanlar Hajiyev partly concurred and partly dissented with the majority. Judge Giovanni Bonello strongly dissented against the Court's reasoning, declaring that the present judgment "has divorced Bosnia and Herzegovina from the realities of its own recent past."

African Court on Human and Peoples' Rights

Michelot Yogogombaye v. Republic of Senegal (Dec. 15, 2009)

Click here for document (approximately 11 pages)

The African Court on Human and Peoples' Rights issued its first decision this past December dismissing an

individual's application against the Republic of Senegal for lack of jurisdiction.

The applicant, Michelot Yogogombaye, filed an application requesting the Court to prevent the government of Senegal from trying the former Chadian head of state, Hissene Habre, for "crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State." Yogogombaye alleged that the proceedings would violate both the principle against nonretroactivity of laws and the principle of universal jurisdiction.

The Court, relying on Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights, concluded that it had jurisdiction to review applications against states that made a declaration accepting individual applications. However, because Senegal had not made the necessary declaration required by Article 34(6), the Court lacked jurisdiction to hear this case.

Briefly Noted

New Insight Available - The WTO Seal Products Dispute: A Preview of the Key Legal Issues by Simon Lester (Jan. 13, 2010)

Click here for document (approximately 6 pages)

A new *Insight* by Simon Lester discusses the request for consultations under the World Trade Organization (WTO) Agreement by Canada against the European Communities concerning the recent adoption by the European Parliament and Council of a Regulation banning marketing and importation of all seal products from commercial hunting.

ADDITIONAL ANNOUCEMENTS

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Deadline February 28, 2010

The ILM Editorial Advisory Committee meets bi-monthly in Washington, D.C. at ASIL headquarters to select international legal documents that will be published in the next issue of ILM. Documents submitted for consideration include, among others, UN Security Council resolutions, treaties, and case law from a wide array of international tribunals. For more information about ILM and its content, please visit http://www.asil.org/ilm.cfm.

We welcome applications by ASIL members for one opening on the current committee. Interested candidates are encouraged to apply by sending a curriculum vitae and a brief expression of interest to Djurdja Lazic, ILM Managing Editor, at ilm.eac@asil.org, by February 28, 2010.

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