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CANADIAN CONSTITUTIONAL CHALLENGE TO NAFTA RAISES CRITICAL ISSUES OF HUMAN RIGHTS IN TRADE AND INVESTMENT TREATIES

By Bruce Porter¹

Introduction

The adverse effect of international trade and investment agreements on the protection and enjoyment of human rights has been a growing concern among human rights NGOs and UN human rights bodies in recent years. For instance, the UN Sub-Commission on the Promotion and Protection of Human Rights has affirmed that human rights must receive adequate protection and consideration in trade and investment regimes.² In addition, the UN Committee on Economic, Social and Cultural Rights has asserted that governments must ensure that “*international human rights obligations are considered as a matter of priority*” in trade negotiations.³ Recently, the Director General of the World Trade Organisation (WTO) cautioned that for institutions such as the WTO to continue to ignore the obvious link between human rights and trade would be a “*recipe for trouble*.”⁴

Surprisingly, the consensus among international human rights institutions, NGOs, and other actors that human rights must be more adequately protected within trade and investment regimes has not been translated into legal challenges to trade and investment agreements that are at odds with domestic human rights protections. However, a constitutional challenge to the investor-state dispute procedures under the North American Free Trade Agreement (NAFTA), which »

- 1 Co-ordinator, Charter Committee on Poverty Issues; Executive Director, Social Rights Advocacy Centre.
- 2 Sub-Commission on the Promotion and Protection of Human Rights, ‘Human Rights as the Primary Objective of Trade, Investment and Financial Policy,’ ESC Res. 1998/12, UN ESCOR, 50th Sess., UN Doc.E/CN.4/Sub.2/RES/1998/12 (1998); Sub-Commission on the Promotion and Protection of Human Rights, ‘Trade Liberalization and Human Rights,’ ESC Res. 1999/30, UN ESCOR, 51st Sess., UN Doc.E/CN.4/Sub.2/RES/1999/30 (1999).
- 3 Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization 26/11/99. E/C.12/1999/9.
- 4 Quoted in NGO Human Rights Caucus ‘Human Rights Caucus Response to Lamy: Human Rights Cannot be Traded’ (15 Dec. 2005): http://www.dd-rd.ca/english/commdoc/prepare1/human_rights_caucus_Lamy.htm

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EDITORIAL

The first article in this edition, by Bruce Porter of the Charter Committee on Poverty Issues, focuses on a Canadian constitutional challenge to the Chapter 11 investor-state dispute procedures established by the North American Free Trade Agreement. This is followed by an article by Antoine Buyse, MA, analysing a recent decision of the European Court of Human Rights involving the rights of Roma living in intolerable conditions as a result of racial discrimination and the destruction of their housing. The next section is a round-up of recent judgments and decisions in ESC rights cases. This edition's 'case to watch' is an action being taken in Indonesia. The Jakarta Legal Aid Institute is seeking compensation for denial of socio-economic rights on the basis of unlawful political discrimination. Finally, there is information on forthcoming events.

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- » has been launched jointly by three Canadian NGOs, may break new ground in this respect.⁵

It is not unprecedented for domestic courts to review international adjudicative regimes against domestic human rights standards. In the 1970s, the German and Italian Constitutional Courts insisted that domestic courts must “measure [European] community law against the norms on fundamental rights in the [German] Constitution”⁶ and against “the fundamental principles of our [Italy’s] constitutional order or the inalienable rights of the human person.”⁷ These early domestic court decisions played an important part in motivating the European Community to improve fundamental human rights protections within European treaty law.⁸

In recent years, however, despite the development of increasingly powerful adjudicative regimes for investors’ rights that impact upon constitutionally protected human rights in many countries, the responsibility of national courts to ensure that constitutional rights are adequately protected seems to have been largely ignored.

The human rights implications of NAFTA investor-state dispute procedures

Investor-state dispute procedures under NAFTA have been a particular focus of concern for human rights experts, NGOs, and UN bodies.⁹ Under the dispute procedures set out in Chapter 11 of NAFTA, foreign investors enjoy unprecedented powers to demand compensatory damages for government measures found to infringe NAFTA – even where such measures may be designed to protect the rights of citizens to equality, health or personal security.

NAFTA’s Chapter 11 accords individual investors the right to invoke international arbitration to claim damages arising from a broad range of administrative or regulatory measures taken by governments. Such ‘measures’ include regulatory actions that are alleged to have indirectly expropriated an investor’s property. As a result, in one case, the Canadian Government was required to pay over \$8 million¹⁰ to a US investor who successfully challenged a ban on exports of PCB waste that was necessary to ensure Canadian compliance with an environmental treaty.¹¹ In another instance, Canada agreed to pay more than \$20 million to a US firm and to remove a ban on a gasoline additive considered hazardous to health.¹² The mere threat of such challenges

- 5 The action has been brought by the members of the Canadian Union of Postal Workers, the members of the Charter Committee on Poverty Issues (CCPI) and the Council of Canadians. CCPI joined the action to advance arguments based on the Canadian Charter of Rights and Freedoms and international human rights law. These are the focus of the present article.
- 6 German Constitutional Court, *Solange I*, BVerfGE 37, 271 (1974) 170, 174 at para. 37; German Constitutional Court, *Solange II*, BVerfGE 73, 378 (1986).
- 7 Italian Constitutional Court, *Frontini* [1974] 2 CMLR 372 [Frontini].
- 8 Ari Afilalo, ‘Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Chapter’ 34 *NYUJ Intl. L. & Pol.* 1 (2001).
- 9 The Committee on Economic, Social and Cultural Rights recently asked Canada to provide information on how it has guaranteed that Covenant rights will be given “primary consideration in the adjudication of North American Free Trade Agreement (NAFTA) disputes.” (*List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA*, UN ESCOR, 2005, UN Doc E/C.12/Q/CAN/2 (2005) at para. 19).
- 10 All awards cited are in Canadian dollars.
- 11 *S.D. Myers, Inc. v. The Government of Canada*, 12 Nov. 2000. Documents available online at: <http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp>
- 12 *Ethyl Corporation v. The Government of Canada*. Documents available online at: <http://www.dfait-maeci.gc.ca/tna-nac/ethyl-en.asp>.

has had a profound effect on public policy related to the protection of fundamental human rights. For example, when legislation requiring plain packaging for cigarettes was considered by the Parliament of Canada, cigarette companies threatened a NAFTA Chapter 11 challenge to recover hundreds of millions of dollars in compensation. The proposed legislation was never enacted.¹³

NAFTA has created a new form of legal accountability to corporate economic rights that is at odds with the Canadian Charter of Rights and Freedoms ('Canadian Charter'). When the Charter was adopted in 1982, corporate economic 'property' rights were deliberately denied constitutional protection – in part to avoid sanctioning US-style corporate challenges to regulatory measures as 'takings'. In effect, NAFTA Chapter 11 has constitutionalised these corporate economic rights through the 'back door'.¹⁴

The rights protected by the Canadian Charter are subject to reasonable limitations and balances, with particular weight given to the rights of marginalised or vulnerable groups and the values of social justice and equality. In contrast, however, the corporate economic rights established by NAFTA are adjudicated without any reference to, or limitation by, the rights of citizens or disadvantaged groups.¹⁵ Unlike remedies granted for Charter violations, massive compensatory awards ordered by NAFTA Tribunals are enforced without any consideration of their implications for the funding of those social programs or health services upon which the rights of Canadians rely.¹⁶ The adjudication and enforcement of investor rights under NAFTA's

Chapter 11 thus represents a fundamental departure from Canadian constitutional norms.

NAFTA also breaks with the norms of dispute resolution under international law. Rather than relying on state-to-state dispute resolution, NAFTA Chapter 11 allows private parties to unilaterally initiate challenges to public policy that would otherwise be adjudicated by domestic courts under the rubric of domestic constitutional law. NAFTA tribunals review measures that may be necessary to ensure state compliance with public international human rights law under rules of private commercial arbitration. The tribunals have no competence to consider broader human rights issues that may be at stake.

The constitutional challenge

The constitutional challenge to NAFTA Chapter 11 investor-state dispute procedures has two components.¹⁷ First, the applicants allege that the legal disputes between individual investors and government measures which are adjudicated by NAFTA tribunals are matters that are exclusively reserved to federally appointed courts by Sect. 96 of Canada's Constitution Act 1867. Sect. 96 has been interpreted as preventing Parliament and provincial legislatures either from transferring the work of superior courts to tribunals or other bodies, or from removing or derogating from the core or inherent powers of the superior courts.

Second, it is alleged that the investor-state dispute procedures violate the principle of constitutional supremacy under the Canadian Charter, as well as specific Charter rights. This component of the challenge is the focus of

the Charter Committee on Poverty Issues' involvement in the case. The issue here is *not* whether it is unconstitutional for a tribunal – as opposed to a superior court – to adjudicate investor-state disputes. Rather, the question is whether it is unconstitutional to permit the adjudication of these types of claims beyond the protective reach of the Canadian Charter and in the absence of protection of fundamental human rights by any other means. It is this second line of argument that puts into Canadian domestic constitutional terms the widespread concern that adjudication under trade and investment regimes does not respect the primacy of fundamental human rights.

In Canada, decision-making bodies, whether tribunals or courts, are obliged to interpret and apply law and to exercise discretion consistently with the Canadian Charter and with the values of international human rights law.¹⁸ NAFTA tribunals, however, are under no such obligation and do not do so. We allege that it is unconstitutional to confer the adjudication of individual legal challenges against government measures under NAFTA on a tribunal that is unable to ensure that its decision-making is informed by, or consistent with, fundamental human rights.

We argue in particular that the broadly framed rights to "*life, liberty and security of the person*" and to equality under Sections 7 and 15 of the Canadian Charter are violated by the Canadian Government's decision to confer authority over the adjudication of investor-state disputes to NAFTA tribunals. The issues placed before NAFTA tribunals clearly engage these rights, yet the tribunals have no compe-

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13 Samrat Ganguly, 'The Investor-State Dispute Mechanism and a Sovereign's Power to Protect Public Health' 38 *Colum. J. Transnat'l L.* 113 (1999).

14 Afilalo (n. 8 above); David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' (1996) 46 *U.T.L.J.* 499.

15 For information on the Supreme Court's approach to limiting corporate rights so as to protect the rights of vulnerable groups, see *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 986-1000.

16 The Supreme Court of Canada has found that even pay equity awards required to guarantee women's equal pay for equal work are subject to limitations in light of competing claims on scarce resources. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras. 75, 93.

17 All of the documents related to the challenge are available at: http://www.dfait-maeci.gc.ca/tna-nac/disp/cupw_archive-en.asp

18 *Baker v. Canada (Minister of Citizenship and Immigration)* (1997), 174 D.L.R. (4th) 193 at paras. 53-54, 74-75. [Baker]; *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) [Slaight].

» tence or authority to consider or protect them. As a result, policies and measures that are critical to ensuring equality and the enjoyment of security of the person are subject to review and compensatory orders without any consideration of, or balancing against, these core Charter rights.

The decision of the Ontario Superior Court

In a decision handed down on 8 July 2005, Justice Peppal of the Ontario Superior Court dismissed both aspects of the constitutional challenge. Her decision has been appealed to the Court of Appeal for Ontario.¹⁹

Justice Peppal declined to make a finding on the human rights issues raised, on the basis that the Charter allegations were “*premature*”. She accepted the applicants’ standing to advance the Charter arguments but found that, in order to avoid prematurity, the applicants must establish that a particular NAFTA Tribunal order, or government action emanating from a Tribunal order, violates the Charter.

The issue raised in this case, however, is not whether particular tribunal orders have resulted, or will result, in Charter violations. Rather, the issue is whether the adjudicative regime is *itself* unconstitutional. Justice Peppal’s decision on prematurity effectively immunises from constitutional review an adjudicative mechanism for the protection of individual investor rights that has dramatically altered governmental accountability to law in Canada and has undermined the protection of fundamental rights. If accepted on appeal, the judgment would leave vulnerable groups with the bleak prospect of having to challenge, as a direct violation of a Charter right, every compensatory order and reduced or rolled-back protective measure

resulting from actual or possible investor challenges. The investor-state procedures themselves would remain intact and immune from Charter scrutiny.

The guarantee of decision-making informed by human rights

The Supreme Court of Canada has made it clear that the Canadian Charter guarantees that all decision-making and adjudication of legal disputes by courts or any other decision-making body must *itself* be informed by, and consistent with, the paramount value placed on fundamental human rights.²⁰ This crucial dimension of the protection of human rights under both the Canadian Charter and international human rights law is particularly important to disadvantaged, marginalised and vulnerable groups in instances where advantaged interests challenge protective or regulatory measures. Yet this aspect of fundamental rights protection is entirely absent in NAFTA adjudication. In light of the nature of the interests that are adjudicated in Chapter 11 investor-state procedures, the loss of this component of Charter and international human rights protection constitutes a serious violation of the rights to equality and to life, liberty and security of the person enshrined in the Canadian Charter.

The mandate and responsibility of domestic courts to review international adjudicative regimes

A central question that is likely to arise in cases such as this is whether it is appropriate for courts to apply domestic constitutional requirements to an adjudicative regime created in part by international treaty. Relying on an affidavit from James Crawford of Cambridge University, the Government of Canada argued at trial that dispute resolution proce-

dures under NAFTA (or any other treaty) constitute a distinct sphere of law to which domestic constitutional requirements should not be applied. It was argued that this should be so even when, as is the case with NAFTA Chapter 11, remedies are enforced by domestic courts. Justice Peppal agreed with these submissions.

In our view, such an argument is without foundation in either domestic or international law. Ensuring that governments do not contract out of constitutional rights by way of treaties is a core responsibility of domestic courts, and the constitutional accountability of governments in treaty negotiation has been clearly affirmed by the Supreme Court of Canada.²¹ The Court has also held that Parliament or provincial legislatures may not circumvent the Charter by conferring decision-making functions on private entities beyond the reach of the Charter, without ensuring that Charter rights will be protected.²²

Domestic courts will show some deference to the political branches of government with respect to the negotiation of treaties. However, judicial deference should never justify a failure to fulfil the courts’ responsibility for ensuring the protection of constitutionally guaranteed human rights in the adjudication of issues that directly affect the enjoyment of those rights. As noted by the UN Committee on Economic, Social and Cultural Rights, safeguarding fundamental human rights in the interpretation and application of law is a pre-eminent responsibility of domestic courts under international as well as domestic law: “*[n]eglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.*”²³

19 *R. v. Council of Canadians et al* 2005 CanLii 28426 (On S.C.). Available at www.canlii.org.

20 *Baker* (n. 18 above), at paras. 53-54, 74-75; *Slaight* (n. 18 above).

21 *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.), per Dickson CJ, at 491 and Wilson J., at 497-98; *Canada v. Schmidt* [1987] 1 S.C.R. 500, at 524 (para. 52).

22 *Eldridge v. British Columbia (A.G.)* (1997), 151 D.L.R. (4th) 577 (S.C.C.), at para. 40; *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 (S.C.C.) at 559-565.

23 Committee on Economic, Social and Cultural Rights, General Comment No. 9 on the Domestic Application of the Covenant, UN ESCOR, 1998, UN Doc. E/C.12/1998/24 (1998) para. 14.

The Supreme Court of Canada has found that its role in safeguarding rights under the Canadian Charter and its function in promoting international human rights values in all decision-making are compatible and complementary. The Court has thereby upheld the supremacy of fundamental human rights in *both* international and domestic law.²⁴ This understanding of domestic and international human rights protections as constituting an interwoven fabric of rights and values (rather than two distinct or competing spheres of law) is fundamental to our claim.

It remains to be seen whether, when the appeal of the NAFTA challenge is heard, the Court of Appeal for Ontario will be prepared to assume the critical responsibility of domestic courts to ensure that human rights are protected in the adjudication of trade and investment disputes. The UN High Commissioner for Human Rights and former Supreme Court of Canada Justice Louise Arbour has commented on the “*timidity*” of Canadian courts and litigants with respect to applying the Canadian Charter to assaults on the economic and

social rights of poor people and other vulnerable groups.²⁵ This case, however, calls on the court to assume its constitutional mandate and responsibility with some courage. We can only hope that the increasing recognition of the link between trade and investment regimes and human rights at the international level will help to convince the Canadian courts and those in other jurisdictions to fulfil their responsibility with respect to one of the most critical human rights issues of our time.

24 *Baker* (n. 18 above), *Slaight* (n. 18 above).

25 Louise Arbour, ‘Freedom from want’ - from charity to entitlement’, Lafontaine-Baldwin Lecture, 3 March 2005: <http://www.unhcr.ch/hurricane/hurricane.nsf/view0158E08B5CD49476BEC1256FBD006EC8B1?opendocument>

DESTRUCTION OF HOUSING AND DISCRIMINATION AGAINST ROMA – DEVELOPMENTS AT THE ECtHR?

By Antoine Buyse, MA²⁶

Introduction

Rows in bars are a frequent occurrence, but rarely do they have such grave consequences as in the case of *Moldovan & Ors. v. Romania (No.2)*.²⁷ In 1993, a fight broke out in the small village of Hădăreni. It ended in the burning and whole-scale destruction of several houses and property of Roma by other villagers, with the participation of the local police. The Roma had to flee their places of residence and for more than ten years lived in abysmal conditions, including severely overcrowded and unheated rooms, cellars, and even pigsties, stables and hen-houses. After years of proceedings, during which discriminatory judgments were issued by national courts, the police forces were acquitted and convicted civilian offenders were given reduced sentences and subsequently pardoned. In addition, compensation was only partial and very belatedly granted. The authorities rebuilt some of the houses, but in such a way that they were unfit for human habitation.

The European Court of Human Rights’ decision

Twenty-five of the victims eventually turned to the European Court of Human Rights (‘the Court’) for relief. The Romanian government tried to end the case in a friendly settlement,²⁸ offering *ex gratia* compensation. However, this

offer was refused by seven of the victims. They pursued their case and alleged that there had been several violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), including the prohibition of inhuman or degrading treatment (Article 3); the right

to respect for the home (Article 8); the right to a fair and public hearing (Article 6); and the prohibition of discrimination (Article 14).

In an earlier judgment, the Court had held that destruction of houses by the state may constitute grave violations of both Articles 3 and 8.²⁹ In this case, the Court was procedurally barred from examining the destruction of housing as this had occurred before the entry into force of the ECHR with respect to Romania. However, the Court could, and did, assess the subsequent acts of state agents in response to the destruction due to their direct repercussions on the plaintiffs’ Convention rights.

The Court stated that the living conditions of the victims fell within the scope of the right to respect for private and family life and for the home. This is somewhat surprising because the Court has previously held that Article 8 does not contain the right to a home.³⁰ It was generally thought that the

26 Law Faculty, Leiden University, the Netherlands.

27 12 July 2005 [Appl.nos. 41138/98 & 63420/01].

28 *Moldovan & Ors. v. Romania* [No.1], 5 July 2005.

29 *Selçuk & Asker v. Turkey* [1998] 26 EHRR 477.

30 E.g., *Fadeyeva v. Russia*, 9 June 2005 [Appl.no. 55723/00] para. 133.

right to decent accommodation was not protected by the Convention. *Moldovan*, however, shows that the ECHR *does* provide a certain minimum level of protection against unacceptable living conditions when the state has caused an individual to fall below that level (e.g., by causing the loss of her or his home). In this case, the combination of acts (attempts to cover-up the events; discrimination before the courts) and omissions (not rebuilding the houses properly; refusal to compensate for most of the damage) on the part of the state gave rise to a violation of Article 8. The living conditions themselves, in combination with the racial discrimination that the victims were subjected to

during national proceedings, also violated Article 3, amounting to “degrading treatment”.

In addition, the Court found that the national proceedings had lasted far too long. Romania had thus violated the Convention right to a fair and public hearing within a reasonable time (Article 6 ECHR).

The Court then turned to the prohibition of discrimination set out in Article 14 ECHR. Under the ECHR, discrimination must always be linked to one of the other rights protected by the Covenant. In this case, other rights were clearly affected, so the Court could address this issue. The Court noted that

the applicants’ Roma ethnicity appeared to have been decisive for the length and the result of the domestic proceedings, and commented on the discriminatory remarks made repeatedly by the authorities throughout the case determining the applicants’ rights under Article 8. The Court held that Romania had given no justification for this difference in treatment of the Roma. Thus, Article 14 had been violated. The European Court awarded sums ranging from 11 000 to 95 000 euros in pecuniary and non-pecuniary damages to the applicants.

This casenote was prepared by Antoine Buyse, MA

ROUND-UP OF RECENT DECISIONS IN ESC RIGHTS CASES

Education rights/remedies - In January 2001, Justice Leland DeGrasse of the State Supreme Court of New York³¹ handed down his decision in the case of *Campaign for Fiscal Equity v. State of New York et al.*³² He found that the defendants’ method for funding education in New York State violated the Education Article of the New York Constitution because the education provided to New York City students was so deficient that it fell below the “constitutional floor” set by that article. He held that the State’s actions were a substantial cause of this violation. He stated that he would not prescribe a detailed remedy at this point; instead, he

ordered the State Legislature and Governor to devise and implement necessary reform of the State’s public school financing system.³³ They failed to do so and, on 14 February 2005, the judge proposed his own solution, ordering, *inter alia*, that an additional US\$ 5.6 billion in annual operating expenses³⁴ be provided within four years to ensure that the city’s public school children will be given the opportunity to obtain the sound basic education that they are guaranteed under the State Constitution.³⁵ He also ordered that US\$ 9.2 billion in added funding for capital projects be provided over five years.³⁶ The State has declared its inten-

tion to appeal the case to the Court of Appeal.

Environmental rights/right to life/non-state actors - The case of *Gbemre v. Shell Petroleum Development Company, the Nigerian National Petroleum Corporation & Attorney General of the Federation*³⁷ was brought by members of the Iwherekana Community in Delta State, Nigeria. In November 2005, the Federal High Court of Nigeria (Benin Judicial Division) held that the flaring of gas by the Shell Petroleum Development Company and the Nigerian National Petroleum Company in the course of their oil exploration and production activities violated

31 Note that New York State is unique in that its ‘Supreme Court’ is actually a trial court of universal original jurisdiction – the lowest level state court. In every other US state, the Supreme Court is the highest court.

32 719 N.Y.S.2d 475.

33 DeGrasse J’s decision in relation to the Education Article was subsequently upheld by the Court of Appeal in *Campaign for Fiscal Equity et al. v. State of New York et al.* 100 N.Y. 2d 893. However, the Court of Appeal modified DeGrasse J’s holding that “in the course of reforming the school finance system, a threshold task that must be performed by defendants is ascertaining, to the extent possible, the actual costs of providing a sound basic education in districts around the State”. Instead, the Court of Appeal held that the State need only ascertain the actual cost of providing a sound basic education in New York City.

34 Operating expenses include the construction of new classrooms, laboratories, gymnasiums and libraries.

35 Adapted from S. Roberts, ‘Judicial Enforcement’, *New York Times*, 22 Feb. 2005.

36 For the terms of DeGrasse J’s final order, see: www.cfequity.org

37 Suit No. FHC/B/C/53/05, 14 Nov. 2005. Copy of order available at: www.climatelaw.org

the applicants' constitutional rights to life³⁸ (including a healthy environment) and to respect for the dignity of the human person.³⁹ The Court declared that the constitutional rights to life and dignity of the human person, reinforced by provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁴⁰ "inevitably includes (sic) the right to clean poison-free, pollution-free and healthy environment".⁴¹ The Court also found legislation permitting flaring of gas in Nigeria to be unconstitutional. The court, *inter alia*, ordered the respondents to cease all gas flaring and directed the Attorney-General and Minister of Justice to set into motion the processes necessary to amend the offending legislation. Shell and NNPC have appealed the order and their application for a stay of execution is currently before the courts. Since the ruling, Shell and the NNPC have continued gas flaring. On 16 December 2005, contempt-of-court proceedings were taken in the High Court against Shell's failure to halt its illegal activities.⁴² The Court ruled that the contempt proceedings should be put on hold until the stay application is determined. In the interim, the defendants are obliged to comply with the High Court's order.

Prisoner's rights/health rights

In the recent case of *Verbitsky, Horacio s/ Habeas Corpus*,⁴³ the Supreme Court of Argentina handed down a ruling on a class action filed on behalf of all the prisoners in the Province of Buenos Aires. The action was filed by a non-

governmental organisation, the Center for Legal and Social Studies, who complained about prison overcrowding. In its decision, the Court declared that the United Nations Minimum Rules for the Treatment of Prisoners⁴⁴ ought to be considered when interpreting Article 18 of the national Constitution, which provides that all prisons must be healthy and clean. Thus, such rules are the minimum standard with which all detentions must comply. The Supreme Court ordered the provincial Government to design and implement a policy to address the problem of overcrowded prisons.

*Casenote prepared by Julieta Rossi*⁴⁵

Discrimination/education rights/Roma - In *European Roma Rights Centre v. Ministry of Education, Sofia Municipality and 103rd Secondary School of Sofia*,⁴⁶ the Sofia District court found that the Bulgarian Ministry of Education, the Sofia Municipality and School Number 103 of Sofia had violated the prohibition on racial segregation and unequal treatment set out in Bulgarian and international law.⁴⁷ The case was brought by the European Roma Rights Centre (ERRC), which challenged the failure of the Bulgarian authorities to terminate the conditions of racially segregated education of the Romani children attending a ghetto school, School 103. The action sought to ensure that the Romani children get equal access to education and equal treatment in education. The ERRC claimed that the fact that 100 per cent of the student body of School 103

was Romani constituted segregation on racial or ethnic grounds in educational institutions. This was in contravention of Article 29 of the Protection against Discrimination Act 2003 (PDA). This Act imposes a positive obligation on the authorities to take measures to prevent and eliminate discrimination. The ERRC claimed further that action and inaction on the part of the Bulgarian authorities, including substandard material conditions in the school, lower expectations of the students' performance, lack of training for teachers working with bilingual children, and lack of control on school attendance, were in violation of the rights to equal education (equal treatment regarding education) and to an integrated environment for the children.

The Court found in favour of the ERRC on both aspects of the claim. With regard to the second aspect, the Court found that the poor material conditions in School 103, the low educational results of the children, and the failure of the school authorities to exert control on truancy were manifestations of unequal and degrading treatment of the children in violation of the prohibition on racial segregation enshrined in the PDA. Regardless of the fact that the national standard educational requirements were applicable to the school, the available evidence indicating that the Romani children could not meet these requirements to a degree comparable with that of children in other schools was sufficient to prove a violation of their right to equal and integrated education.

38 Article 33(1) of the Constitution of the Federal Republic of Nigeria.

39 *Ibid*, Article 34(1).

40 Cap. A.9, Vol.1 Laws of the Federation of Nigeria 2004. This Act incorporates the African Charter on Human and Peoples' Rights into Nigerian Law. Articles 4, 16 and 24 of the African Charter guarantee respectively the right to life and integrity of the person, the right to enjoy the best attainable state of physical and mental health, and the right of peoples to a general satisfactory environment favourable to their development.

41 At p.3 of the Order.

42 Source: Climate Justice Programme, 'Gas Flaring in Nigeria: contempt proceedings start against Shell and NNPC', Press Release 16 Dec. 2005: www.climatelaw.org.

43 Supreme Court of Argentina, 3 May 2005.

44 Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

45 Director, Economic, Social and Cultural Rights Programme, CELS, Argentina.

46 Case 11630/2004. Decided on 25 Oct. 2005. Copy of decision available from quarterly@cohre.org.

47 Casenote adapted from European Roma Rights Centre, 'Desegregation Court Victory: ERRC Prevails in Court against Bulgarian Ministry of Education on School Segregation of Roma', 26 Oct. 2005: www.errc.org.

A CASE TO WATCH

In 1965, members of the Communist Party of Indonesia (PKI) were accused of murdering six top Indonesian generals in an attempted coup. In the events that followed, the Indonesian military and paramilitary massacred at least a million people supposedly associated with the PKI. Some 40 years later, members of the PKI and their alleged associates continue to be subjected to a range of human rights violations. In 2005, the Jakarta Legal Aid Institute (LBH Jakarta) commenced an action in the Jakarta Civil Court, for seven groups, concerning a systemic pattern of discrimination against the victims of the 1965 Tragedy and their families.

This case seeks compensation for PKI members and associates who have been denied access to employment benefits available to other people working in the public service. Other victims have been prevented from enjoying employment opportunities. A third group are war veterans who have been denied veterans' benefits and military honours. A fourth group have had their houses burned and destroyed. Children of alleged PKI associates have been denied access to education. Other claimants allege that their music and literature has been censored and destroyed due to their political association. LBH Jakarta has brought a class action against the Indonesian Government as well as the current President Susilo Bambang Yudhoyono and past Presidents Soekarnoputri, Wahid, Habibie and Soeharto. It is alleged that these denials were the result of unlawful political discrimination.

In May 2005, the Jakarta Civil Court rejected a challenge to the action that argued that the plaintiffs could not sue current and past Presidents. However, in September 2005, the Court held that it did not have the jurisdiction to deal with the case because the action involved a review of policies which authorised the differential treatment of PKI members. The Court stated that the correct jurisdiction for the action was the Administrative Court. Under Indonesian law, an administrative law challenge must be commenced within 90 days of a policy being issued. As a result, such a case would be out of time for the purposes of admissibility. LBH Jakarta has now lodged an appeal against this decision to the High Court of Indonesia. LBH Jakarta argues that it is not challenging the policies *per se*, rather every act of discrimination, regardless of whether or not those acts were authorised by legislation or policy. The Centre on Housing Rights and Evictions (COHRE) has filed an Amicus Brief in support of the appeal.

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The Editorial Board of the *Housing and ESC Rights Law Quarterly* is:

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EVENTS

- The Committee on the Elimination of Racial Discrimination is holding its 68th Session from 20 February to 10 March 2006 in Geneva. The Committee is considering the State Reports of Lithuania, South Africa, Guyana, Mexico, El Salvador, Guatemala, Uzbekistan, Botswana, Bosnia & Herzegovina, Israel, Mozambique, Ethiopia, Antigua and Barbuda, Congo, Papua New Guinea and Nicaragua.
- The Human Rights Committee will hold its 86th Session from 13 to 31 March 2006 in New York. The Committee will consider the State Reports of Democratic Republic of Congo, Hong-Kong, Norway and Saint-Vincent and the Grenadines.



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