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Regional Human Rights Systems

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REGIONAL HUMAN RIGHTS SYSTEMS

African Systems

ECOWAS Court Refuses to Suspend Case Against Hissène Habré

The Economic Community of West African States' adjudicatory body, the Community Court of Justice (ECCJ), recently denied Hissène Habré's petition to suspend the ongoing trial against him in the Extraordinary African Chambers. The Chambers, an *ad hoc* tribunal in Senegal, indicted Habré on June 2, 2013, for war crimes, crimes against humanity, and torture committed during his rule in Chad between 1982 and 1990. Habré's regime was responsible for 200,000 victims of torture and more than 400,000 deaths. The victims of Habré's rule attempted to seek justice in several different forums prior to the establishment of the Chambers. Seven of the victims first brought a case against Habré in a domestic Senegalese court in 2000, but the victims later brought the case in Belgium because the Senegalese court found Habré could not be tried domestically for crimes committed outside Senegal. The Senegalese courts, however, found they lacked jurisdiction to rule on an extradition request from Belgium.

Before the Chambers took on the case, Senegal's inability to try Habré came under international scrutiny. The United Nations Committee against Torture issued a decision against Senegal in response to the lack of legal remedies for the victims, finding that Senegal violated the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under Articles 5 and 7 of the CAT, a State Party must establish jurisdiction over and prosecute an offender of the Convention if the offender is in the State Party's territory and the State Party cannot extradite him.

Amidst international pressure and with the passage of new domestic legislation in 2007 that allowed for the prosecution of war crimes, crimes against humanity, and torture, Senegal prepared to try Habré in domestic courts. However, a later 2010 ECCJ ruling found that Habré had to be tried by an *ad hoc* tribunal of international character and not a domestic Senegalese court because Senegalese domestic law did not incorporate universal jurisdiction at the time of Habré's rule. A domestic court, therefore, would have to apply universal jurisdiction retroactively in violation of Article 15 of the International Covenant on Civil and Political Rights. International pressure to take concrete action on Habré's case continued and, in 2012, Senegal and the African Union (AU) created the Chambers as an *ad hoc* tribunal, integrating it into Senegal's domestic legal system.

On April 23, 2013, Habré asked the ECCJ to suspend all activities of the Chambers, arguing the illegitimacy of the Chambers and the inability of the Chambers to provide him a fair trial. The ECCJ dismissed the petition on November 5, 2013, finding that it did not have the authority to grant such a request because the Chambers were established through an agreement between Senegal and the AU. The ECCJ does not have jurisdiction to rule on the African Union's actions. Although a small decision in the lengthy trial, this recent ruling by the ECCJ may help guarantee justice for the victims, support for international criminal prosecution in Africa, and legitimacy for the ECCJ's own rulings.

The Habré trial carries the burden of proving that African courts can prosecute African leaders for international crimes. Discontent among African nations with the actions of the International Criminal Court (ICC) has led to support for international criminal prosecution of African leaders in African courts rather than in the ICC. Kenya's recent withdrawal from the jurisdiction of the ICC in September 2013 threatens to instigate a mass exodus of several other African countries from the ICC. Adding to the tension, the AU has debated whether to add international criminal jurisdiction to the pan-African court for several years. The ECCJ's November decision in Habré's case allows the Chambers to prove that African courts can prosecute African leaders under international criminal law without the ICC.

Additionally, the ECCJ's latest decision encourages acceptance of the ECCJ as a legitimate human rights court in the region. In the past, the ECCJ's decisions have been plagued with noncompliance of Member States. In an attempt to curb noncompliance, in 2012, the ECCJ announced a new focus on effective implementation. The AU's support of the ECCJ's 2010 ruling and the subsequent compliance with the ruling through the creation of the Chambers in 2012 strengthened the ECCJ's credibility. As the ECCJ's newest November ruling on the matter is consistent with its original 2010 ruling, the ECCJ is proving itself as a legitimate court in the region.

AU Promises Commission to Investigate Human Rights Abuses in South Sudan

The African Union (AU) recently initiated a Commission of Inquiry to investigate gross human rights abuses in South Sudan. This measure follows months of fighting, which began mid-December in South Sudan, displacing 189,000 people in the first three weeks. As of mid-February 2014, over 850,000 people were displaced both internally in South Sudan and as refugees in neighboring countries. The United Nations Peacekeeping Mission to South Sudan reported that, along with large numbers of displaced persons, the fighting has also led to extrajudicial killings, mass killings, sexual violence, child soldiers, and arbitrary detention. In addition to investigating these gross human rights abuses, the Commission will recommend mechanisms to promote reconciliation between the two warring factions in the country. President Olusegun Obasanjo, the former Chairperson of the African Union, heads the five-member Commission.

The conflict broke out in December 2013 between soldiers that support South Sudanese President Salva Kiir and a group that supports the former Vice-President Riek Machar. President Kiir and Machar belong to two different ethnic groups in the

region, the Nuer and the Dinka, respectively. UN representatives have called the fighting an ethnic conflict, but the start of the conflict stems from political considerations. In July 2013, President Salva Kiir dismissed his cabinet, including the former Vice-President. When fighting started in December in the capital of Juba, President Kiir announced that Machar's soldiers had instigated the attack. However, Machar denies that he ever attempted a coup. The conflict then quickly spread from Juba, reaching the rest of the country.

In light of the human rights abuses arising from the conflict, civil society indicated its support for the AU's creation of the Commission of Inquiry. In fact, several organizations signed on to a statement that both supports the AU's decision and makes recommendations to the AU. Civil society organizations, however, recommended that the AU develop the terms of reference and choose members as quickly as possible so that the Commission can get underway immediately. Additionally, they recommended that the Commission's mandate require accountability for committing human rights abuses and the independence of members of the Commission.

The Commission of Inquiry issued its terms of reference on March 7, 2014. The Commission's mandate requires its five members to identify perpetrators of human rights abuses and make recommendations to appropriate human rights mechanisms that will hold the perpetrators accountable. Additionally, the Commission will investigate human rights abuses and make recommendations to prevent further conflict.

Despite the recent formation of the Commission, the AU still supports the ongoing efforts of other organizations in monitoring and mitigating the human rights abuses in the conflict. The Intergovernmental Authority on Development (IGAD), an organization that promotes peace in the east African region, will continue monitoring the situation and engaging in a mediation process. The IGAD was involved in the peace talks held in Ethiopia that led to the Cessation of Hostilities Agreement in late January, in which both sides agreed to a cease-fire. However, the two sides subsequently broke the cease-fire. The IGAD has publicly stated that disregarding the Cessation of Hostilities Agreement undermines the mediation process.

Critics of the AU, however, are worried that the pan-African regional body cannot effectively put a stop to the mounting death toll. African conflicts, including in South Sudan, draw the presence of foreign military and the UN peacekeepers rather than forces from the African Union. The Standby Brigades, a promised regional force under the AU headed by a 2002 initiative, never became a reality. This combined with the failure of the African led peace talks have led critics to question whether the member states of the African Union can work together to provide African solutions to African conflicts, including the current conflict in South Sudan.

Even though other organizations have made strides in negotiating peace and reconciliation, the timely development of an independent commission remains important, including to the UN Security Council, which has demanded accountability for human rights violations committed in South Sudan. In light of reports of mass killings, sexual violence, other gross human rights abuses, and over 850,000 displaced persons, representatives of the UN Office of the High Commissioner of Human Rights and the UN Secretary General Ban Ki Moon have called for prosecution of those responsible for the grave crimes committed since January. The Commission can provide accountability for these human rights abuses while keeping the inquiry within the region. The fast and effective establishment of the Commission would set a precedent for how to address human rights abuses that arise out of conflict within the region and would lend credibility to the AU when it comes to holding human rights abusers accountable.

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European Human Rights System

Life sentences under fire in the United Kingdom

Currently, there are fifty-two convicted criminals serving life sentences in the United Kingdom without the possibility of parole. In July 2013, the upper chamber of the European Court of Human Rights (ECtHR) decided that life sentences for three murderers convicted in the United Kingdom breached their human rights because life sentence without any prospect of release or review amount to inhuman and degrading treatment. The United Kingdom continues to disagree with the Court's ruling and sent a formal letter to the Council of Europe expressing those views. A U.K. Ministry of Justice spokesperson stated that "[t]he government remains firmly of the view that whole-life orders are wholly justified in the most heinous cases, and that they should continue to be available to the courts." The Ministry committed to arguing in upcoming related cases that a judge not only can, but in fact must, impose life sentences without parole in certain cases.

Under the U.K. law, certain offenders qualify for a statutory life sentence and some life sentences allow judges to set a minimum term that an offender must serve before reaching eligibility for parole. Life sentences with a minimum sentence of forty years, for example, allows for parole eligibility after forty years are served. However, a life sentence with a whole-life order makes the convicted person ineligible for parole for life. The European Court criticized the current U.K. law as unclear concerning the prospect of the release of the fifty-two prisoners currently serving a whole-life order and how the law might affect future defendants accused of crimes that receive whole-life orders. The Secretary of State holds the power under the U.K. law to release a prisoner serving a whole-life order and is legally bound to act in a way that is compatible with the European Convention on Human Rights (ECHR). However, the Court pointed out that in practice, such discretion is only used to grant release under highly restrictive conditions such as terminal illness.

Proponents' of whole-life orders responses to the ruling include the proposal to replace whole-life orders with 100-year terms. Critics of the policy and the government's response to the ECtHR ruling argue that there is no real difference between a 100-year term (parole after serving 100 years) and a life sentence (no parole) and that such an attempt to circumvent the ruling is disingenuous. According to the United Kingdom's Human

Rights Act of 1988, British courts must only "take into account" ECtHR decisions. Additionally, the U.K. government argues that Britain's Supreme Court, rather than the ECtHR, issues the final ruling on human rights issues in the United Kingdom. However, Article 46(1) of the ECHR establishes the binding nature of the ECtHR's final judgments.

Several cases are coming up in the U.K. courts that will test the United Kingdom's defiance of the ECtHR's ruling. The Court of Appeals in the upcoming test cases is expected to address whether courts can continue to pass whole-life orders in spite of the ruling. Lord Igor Judge, former Lord Chief Justice, acknowledges that British judges differ in opinion on the extent to which ECtHR decisions bind the United Kingdom. If the U.K. courts rule in such a way that seems to be incompatible with the ECtHR's July 2013 judgment, the Committee of Ministers at the European Court, which oversees the executions of judgments, will likely refer the matter to the ECtHR. The ECtHR would then issue a ruling on the United Kingdom's interpretation of its July 2013 decision and would determine whether the United Kingdom has failed to abide by that judgment. For the Council of Europe, this open disagreement with the European Court of Human Rights fits a pattern of contempt from the United Kingdom, which remains under criticism by the Council for its response to the Court's ruling on prisoner voting. ECtHR President Judge Spielmann stated that Britain could even face the possibility of leaving the European Union if it does not adhere to European human rights laws and labels such a possibility a "political disaster."

The ECtHR Hears Cases on Both Sides of the Artsakh Conflict

The Artsakh war, also known as the Karabakh war, is a conflict that broke out twenty-five years ago in 1988 between Armenia and Azerbaijan over the Nagorno-Karabakh region (NKAO), which is physically located in Azerbaijan but whose inhabitants are mostly Armenian. In cases filed almost ten years ago alleging human rights violations that occurred more than twenty years ago, the European Court of Human Rights (ECtHR) now considers controversial issues revolving around the conflict. In *Sargsyan vs. Azerbaijan* and *Chiragov vs. Armenia*, victims of the conflict brought complaints against each state involved. The two cases are drawing international attention to the Artsakh war, which much of the outside world views as a frozen conflict — a term that refers to a situation in which active armed conflict has mostly ceased, but no peace treaty or transition framework exists as a resolution.

Some commentators theorize that simultaneously hearing both cases is the Court's way of attempting to intervene in a twenty-five year old conflict. *Sargsyan vs. Azerbaijan* and *Chiragov vs. Armenia* are rival cases and the Court is hearing them side-by-side. In *Sargsyan*, the Armenian applicant filed a complaint against Azerbaijan alleging that he was forced to flee his home in Gulistan after his property was destroyed by Azerbaijani armed forces in June 1992. Meanwhile, six Azerbaijani Kurds brought a complaint against Armenia to the Court in *Chiragov*, alleging that they were unable to return to their homes in the Lachin region and were forced to flee in May 1992 because of the conflict. Both complaints rely on the European Convention on Human Rights, citing violations of Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination), and Article 1 of Protocol No. 1 (protection of property).

The Court held initial hearings for the two cases on September 15, 2010, before declaring both cases at least partly admissible. In its admissibility decision for *Sargsyan*, the Court considered Azerbaijan's argument that the complaint fell outside the temporal jurisdiction of the Court because the displacement occurred in 1992, before Azerbaijan ratified the European Convention on Human Rights in 2002. However, the Court discounted Azerbaijan's argument, reasoning that the lack of access to the applicant's property and home was a "continuing situation" that fell within the competence of the Court's jurisdiction to examine from the date of Azerbaijan's ratification of the Convention. The Court then considered contentious issues in *Chiragov* during a hearing on January 22, 2014 including, whether Armenia exercises effective control over the Artsakh region, and whether the requirement to exhaust domestic remedies was fulfilled if the applicants did not first file with the Artsakh courts in consideration of the fact that Artsakh is not a recognized state. The ECtHR considered the merits of *Sargysan* in a hearing on February 5, 2014.

Despite the May 1994 cease-fire agreement between the two sides that technically remains in effect, the region has continued to suffer from political unsettlement and volatility. The International Crisis Group (ICG) published a report in September 2013 addressing the low-intensity, but increasingly volatile, confrontation along the border between the two countries, indicating that the issue is ripe for intervention. The ICG urged action against the "near-term threats to stability [that] are becoming more acute" in the region.

The cases will likely have far reaching implications for the thousands of internally displaced persons and refugees from the conflict. Based on the ECtHR's decision to hear both cases simultaneously and give them equal treatment, some commentators predict that the Court will eventually find for both sets of complainants, opening the door for thousands of refugees facing the same circumstances. Because ECtHR decisions are binding on States Parties, decisions that are favorable to applicants in both cases, such as ordering that they be allowed to return to their homes and be compensated, could set precedent for the Court to impose a "partially humanitarian solution" for many others who are similarly situated.

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Inter-American System

Inter-American Court Finds Peru Violated Rights of a Woman Detained During 1990s Era of Political Violence

The Inter-American Court of Human Rights (IACtHR, Court) held Peru's 1992 detention of J, a Peruvian woman,

violated several regional human rights treaties to which the country is a State Party. Specifically, in its November 2013 decision, the Court found that Peru violated the right to be free from illegal and arbitrary detention and inhuman treatment as well as the right to a fair trial and privacy.

The victim, whom the Court calls "J," was arrested and accused of terrorism in April 1992 during a tumultuous period of political violence in Peru. The Court found that state officials deprived J of her right to judicial proceedings and subjected her to acts of torture and sexual violence. According to the facts of the case, J was held in the National Counter-Terrorism Directorate (DINCOTE) for seventeen days in inhumane conditions and without judicial oversight. J was eventually released, but continued to experience violations of her due process rights in criminal proceedings. She was acquitted in June 1993, subsequently left Peru, received asylum in Northern Ireland, and is now a naturalized British citizen. According to the Inter-American Commission on Human Rights (IACHR, Commission), Peru's "faceless" and anonymous Supreme Court reversed the acquittal and issued new proceedings against J, for which an international warrant for her arrest persists today.

The Peruvian government suspected J of committing acts of terror. At the time, Peru prosecuted people for terrorism under Decree Law No. 25.475. A United Nations Human Rights Committee Report notes that innocent people were detained under the broad law on accusations of suspected terrorism in Peru. The Truth and Reconciliation Commission of Peru (TRC) found that between 61,000 and 77,000 people were killed during the political violence. The Peruvian government, military, police, and other security forces were found to be responsible for nearly half — forty-five percent — of the deaths. The Shining Path, a Maoist opposition group, was responsible for approximately fifty-four percent of the deaths. The TRC reported that 6,443 acts of torture were committed, attributing seventy-five percent of those acts of torture to the Peruvian government.

The Inter-American Commission on Human Rights found that Peru had committed violations of the American Convention on Human Rights (Convention), the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará). The case was referred to the Court due to state noncompliance with the Commission's recommendations.

The Court ruled that Peru had violated several of its obligations in regional human rights treaties. The Court focused on the legality of J's arrest, the search of her home, the conditions of her detention, acts of torture, and the limitations on her due process and legal rights. The Court found that Peru violated a number of provisions under the American Convention; specifically, Article 1 (Obligation to Respect Rights), Article 2 (Domestic Legal Effect), Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), and Article 11 (Right to Privacy). Furthermore, the Court found violations of the Convention to Prevent and Punish Torture at Article 6, which requires states to take measures to prevent and punish torture, and Article 8, which provides the right of the accuser of torture to an impartial examination of his or her case.

In examining the sexual violence allegations, the Court evaluated the TRC findings, statements made by plaintiff J, statements made by the prosecutor's office, the medical exam of J, and the lack of investigations by the State, while being mindful of the context in which the events took place. In agreement with the Commission, the Court held that there was sufficient information to conclude that J was indeed abused and sexually assaulted. The Court, however, only held that Peru violated Article 7.b of the Convention of Belém do Pará failing to prevent, investigate, and impose penalties for violence against women.

This finding of the Court is a progression from its conclusion in a factually similar case decided in 1997. In Loayza-Tamayo v. Peru, the Court found violations of torture, cruel and inhumane treatment for allegations of beatings, maltreatment, torture and threats of further violence. The Court did not, however, conclude that any sexual abuse had taken place despite evidence proving the sexual violence allegations as well as the gender-neutral allegations. In citing a violation of the Convention Belém do Pará, the current Court for *J. v. Peru* now appears to abandon the suggestion in Loayza-Tamayo that a higher burden of proof is required for allegations of sexual violence.

J. v. Peru was the only case the Court heard in 2013 dealing with gender-based allegations founded in the Convention of Belém do Pará. Peru did not ratify Belém do Pará until 1996. Because the 1992 events against J happened before Peru's ratification of the Convention of Belém do Pará, the Court concluded that Article 7.b of the Convention of Belém do Pará was the only provision over which the Court held jurisdiction in this case.

IACtHR Finds Argentina Responsible for Murder of Police Commissioner, But Falls Short of Addressing Institutional Corruption

Last term, the Inter-American Court of Human Rights (IACtHR, Court) decided the case of *Gutiérrez and Family v. Argentina*, concluding that Argentina state officials were responsible for the 1994 extrajudicial killing of Jorge Omar Gutiérrez, the then Assistant Commissioner of the Buenos Aires Provincial Police, and guilty of obstruction of justice in the subsequent investigation. Argentina accepted responsibility for the murder and obstruction of justice in proceedings before the Inter-American Commission on Human Rights (IACHR, Commission) and the Court. However, it remains to be seen what effect the November 2013 ruling will have on reform in Buenos Aires to combat corruption in the police force.

Throughout the 1990s, under the presidency of Carlos Menem, the government was known for its rampant corruption. Responding to this corruption in 1994, Assistant Commissioner Gutiérrez investigated a smuggling operation in which state officials allegedly facilitated a bypass of customs through a series of warehouses outside of the Ezeiza International Airport. On the night of August 29, 1994, Commissioner Gutiérrez was supposed to be driven home by one of his officers. He was instead dropped off at a train station, where his only option to get home was to board the train. Two allegedly corrupt officers were waiting for him on the train, and shot Gutiérrez in the back

of the neck. Witnesses from the train testified during the investigation that the murderers were Federal Police agents. The state then stalled the investigation and obstructed the proceedings, threatening and beating testifying witnesses. Argentina accepted responsibility before the Commission and the Court, noting that "it was highly likely that agents of the Argentine Federal Police had been involved in the death of Assistant Commissioner Gutiérrez."

The IACHR heard the case in 2011 and concluded that Argentina committed violations of Articles 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the American Convention on Human Rights (American Convention) and recommended a full, impartial, and swift investigation of the murder and reparations to the family. The case was referred to the Court for issues of non-compliance in 2013.

The Court agreed with the Commission that state agents were responsible for the execution of Assistant Commissioner Gutiérrez and affirmed that Argentina violated Articles 4, 5, 8, and 25 of the American Convention. The Court also concluded that Argentina violated Article 5(1) (Right to Personal Integrity) of Gutiérrez's family for the failure to investigate and punish perpetrators responsible for the extrajudicial execution of Gutiérrez.

In presenting the case to the Court, the Commission referred to "structural deficiencies" in the functioning of the police and the provincial system of justice. The Commission argued that the Court would be ignoring a vital dimension of the case's ongoing violations of Articles 5, 8, and 25 if it did not examine the systematic nature of institutional corruption. The Court refused to address institutional corruption, however, citing a need to limit the factual framework of this matter. Although the Court did not consider the macro structural issues of police corruption, it did hold that the current police system's ongoing failure to adequately investigate Gutierrez's murder continues to violate his family's right to judicial protection.

State corruption in Argentina remains a major problem. In the 2010 Transparency International Corruption Perception Index, Argentina ranked 105th out of 178 countries, amongst Algeria, Kazakhstan, Moldova, and Senegal. Similarly, the 2011 World Justice Project Rule of Law Index ranked Argentina forty-sixth out of sixty-six for "absence of corruption," and fifty-seventh for "regulation and compliance with the law." Although the Gutiérrez case puts an international spotlight on the severe corruption within the Buenos Aires province and Federal Police forces, it is unclear what impact the Court's decision will have locally.

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