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## Updates from the Regional Human Rights Systems

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## UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

### AFRICAN REGIONAL & SUB-REGIONAL SYSTEMS

#### AFRICAN COMMISSION RECOGNIZES THE DAFURIANS AS A PEOPLE

A decision released in July 2010 by the African Commission on Human and Peoples' Rights is the latest in the Commission's attempts over several decades to address widespread human rights violations in the Southern and Darfur regions of Sudan. In a 1999 decision, the Commission found the government of Sudan had committed widespread human rights violations throughout Sudan between 1989 and 1993. In 2005, the Commission passed a resolution urging the government to comply with its obligations under international agreements, including the Constitutive Act of the African Union, the United Nations Charter, and the African Charter on Human and Peoples' Rights, and to desist from attacks against the Darfurian people. The latest decision once again finds widespread violations and, most significantly, expands the jurisprudence on Sudan by recognizing Darfurians as a people with standing to claim collective rights under the African Charter.

The Center on Housing Rights and Evictions (COHRE), a Geneva-based international NGO, filed its communication with the Commission in 2003 against the government of Sudan for mass violations of the African Charter. In that year, armed groups including the Sudan Liberation Army/Movement and the Justice and Equality Movement, rebelled against the government of Sudan, reacting to its marginalization and underdevelopment of the Darfur region. The government of Sudan suppressed the uprising by sponsoring the Murhaleen and Janjaweed militias, which have targeted civilian populations, destroyed and contaminated water wells, and forcibly evicted thousands by razing homes and entire villages, leading to mass displacement. Based on these actions, COHRE alleged that the government of Sudan violated Articles 4-7, 12, 14, 16, 18, and 22 of the African Charter. These articles include, respectively, the general duty of member states to recognize the Charter rights and give them effect in domestic

legislation, as well as the specific rights to life and integrity of person; to dignity; to liberty and security of person; to be heard; to freedom of movement and residence within a state; to property; to family, obliging the state to protect the family's physical and moral health; and to economic, social, and cultural (ESC) development.

The government of Sudan protested the admissibility of the communication for failure to exhaust local remedies. The Commission, however, agreed with the petitioner's assertion that because the government is aware of widespread human rights violations but provides no recourse, local remedies are "unavailable, ineffective and insufficient," and found the Communication admissible. On the merits of the communication, Sudan denied the allegations, blaming the Darfur situation largely on the instability and interference of neighboring states such as Chad and the Democratic Republic of Congo. Sudan claimed that through the Darfur Peace Agreement of May 2006, it has already begun addressing any human rights violations. However, the agreement has generally failed to achieve its intended goals, including peace or wealth and power-sharing for the Darfur region.

In its analysis, the Commission relied on its own precedent, precedent from the European Court of Human Rights, and UN and NGO reports to hold that the government of Sudan had violated Articles 1, 4-7, 12(1), 14, 16, 18(1), and 22. The Commission made several important recommendations for the government of Sudan to remedy or address these violations, including to provide remedies for victims, investigate abuses, create the economic and social infrastructure that would allow for the safe return for internally displaced persons and refugees, establish a National Reconciliation Forum to address the long-term sources of conflict, "undertake major reforms of its legislative and judicial framework," and "desist from adopting amnesty laws for perpetrators for human rights abuses."

The decision notably discusses Article 22, the right to economic, social, and

cultural (ESC) development, whose incorporation in the African Charter is unique among the regional systems. Article 22 provides that

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The Commission found that the Darfurian people had been denied the opportunity to engage in ESC activities because of government-sponsored attacks and forced displacement, which violated their right to ESC development. Rather than further elaborate the substantive right to ESC development, the Commission focused on analyzing the necessary precondition to qualify for this right under the Charter: designation or recognition as "a people," since the right to ESC development is one of the collective rather than individual rights recognized in the Charter. As in previous decisions, the Commission used the characteristics by which a people self identify, including "language, religion, culture . . . territory . . . history, [and] ethno-anthropological factors." It also recognized that race and ethnicity can identify a people in a multi-racial state.

In recognizing Darfurians as a people, the Commission has increased their ability to claim other collective rights such as self-determination. In *Katangese Peoples' Congress v. Zaire*, the Commission held that for a people to exercise the right to external self-determination, they must have suffered massive human rights violations. While the Commission has in the COHRE decision recognized both the Darfurians as a people and found the state responsible for massive human rights violations, it is unclear whether the Commission would hold in the future that Darfurians meet its high threshold for a right to self-determination through secession.

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## COLLOQUIUM ON AFRICAN HUMAN RIGHTS SYSTEM AIMS AT NEW ERA OF COMMUNICATION AND COOPERATION

Delegates from Africa's principal judicial and quasi-judicial human rights institutions met in early October 2010 in Arusha, Tanzania to reflect on the ongoing evolution of mechanisms for the protection and promotion of human rights on the continent. Participants included the continental bodies — the African Court on Human and Peoples' Rights and African Commission on Human and Peoples' Rights — as well as some of the various sub-regional bodies authorized to adjudicate human rights issues, such as the East African Court of Justice (EACJ), the Tribunal of the Southern African Development Community (SADC), and the Court of Justice of the Economic Community of West African States (ECOWAS).

The first of its kind in Africa, the Colloquium of African Human Rights Courts provided a crucial and heretofore absent forum in which the participants could deliberate and air common concerns. In their Final Communiqué, the participants agreed, among other things, to hold colloquia every two years, evidencing that the various institutions have prioritized cooperative dialogue on procedural and substantive matters of joint interest. This commitment to close relations may assuage realistic fears that these human rights courts will come into conflict over jurisdiction or the interpretation of common human rights instruments, such as the African Charter on Human and Peoples' Rights. It suggests these institutions recognize that a unified, coherent jurisprudence is integral to the success of human rights imperative in Africa.

Of fundamental importance is the relationship between the two continental bodies, the African Commission and the African Court. As the preamble to its Protocol indicates, the African Court was founded to “complement and reinforce the functions of the African Commission” in furtherance of the Commission's three mandates to promote, protect, and interpret human rights. The Protocol establishes in Article 5.1 the entities that may bring cases to the African Court, the first of which is the African Commission. While there are other possible entities — states, NGOs, and individuals — the Commission will likely be the main source of referrals in

this formative stage of the Court's evolution. States are not likely to bring cases against other states or against themselves, and NGOs and individuals can only have access to the Court if their home state has filed a special declaration granting permission. To date, only four states have issued such a declaration. Further emphasizing the Commission's role as a gate-keeper, when cases are brought directly by NGOs or individuals, Article 6.1 of the Protocol outlines the Court's right to request the opinion of the Commission on preliminary questions of admissibility. Given the complementary and cooperative roles played by the two bodies, their respective rules of procedure ought to be harmonized to improve efficient and consistent outcomes for petitioners.

The relationship of the African Court to the various sub-regional courts also requires careful consideration. While their existence as able adjudicators and symbols of regional unity is integral to the success of human rights initiatives in Africa, the sub-regional courts share a mandate similar to that of the African Court, and there is a resulting risk of overlapping subject matter jurisdiction. Discussions at the Colloquium primarily aimed to diminish concerns that these courts might issue differing or even conflicting interpretations of the relevant human rights instruments. The Danish Institute for Human Rights has suggested granting the African Court appellate authority to hear and interpret questions of law in cases adjudicated by the sub-regional bodies. The courts might also explore an arrangement whereby the sub-regional courts are permitted to refer questions of interpretation to the African Court, which would then issue an advisory opinion.

Given the complexity of Africa's evolving human rights regime, achieving harmony among the various institutions will be a considerable and protracted undertaking. There is hope that the Colloquium has both symbolically and substantively laid the foundation for this effort, and that the agreement to hold future colloquia marks the beginning of an enduring commitment to exchange agendas and working methods, experiences, and views of common issues. As the network evolves, however, the obstacle will likely not arise from a lack of will so much as a lack of funding and resources sufficient, for example, to facilitate in-person meetings or sustain

an efficient, technologically modern communication network. The Commission, for example, is highly dependent on support from various donors for its operations, and those donations are frequently earmarked for specific projects. Within this context, cooperation must not only be effective, but must also be able to adjust to whatever funds and resources are available.

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## EUROPEAN COURT OF HUMAN RIGHTS

### EUROPEAN COURT OF HUMAN RIGHTS UPHOLDS TURKISH JOURNALIST'S RIGHT TO FREEDOM OF EXPRESSION

On September 14, 2010, in a unanimous Chamber decision upholding the right to freedom of expression, the European Court of Human Rights ruled that Turkish authorities violated Articles 2, 10, and 13 of the European Convention on Human Rights.

*Dink v. Turkey* examined the case of Firat Dink, a Turkish journalist of Armenian origin who was shot three times in the head in January 2007. The Court held that the Turkish State violated Article 2 for failing to protect Dink's right to life and for ineffectively investigating his murder; Article 10 for unjustly interfering with Dink's right to freedom of expression; and Article 13 for failing to effectively investigate the killing.

Dink, who took the pen name Hrant Dink, wrote frequently for a Turkish-Armenian weekly newspaper about the plight of Turkish-Armenian citizens. He firmly believed that Turkish citizens of Armenian origin share a conflicted view of their own history. In a series of articles published between 2003 and 2004, Dink wrote that “Armenians' obsession for Turkey to recognize their status as victims of genocide has become their *raison d'être*, but Turkey has treated this need with indifference, and thus, the suffering of the Armenians remains an ongoing issue.” In Dink's eighth article, while discussing the relationship between Turkish-Armenians and Turkish society as a whole, he wrote that “the purified blood that will replace the blood poisoned by the ‘Turk’ can be found in the noble vein linking Armenians to Armenia.”

In context, the quote expressed how the Turkish-Armenian perception of the Turkish state had disintegrated to the point of poisoning their ability to interact with and engage in Turkish society. But the bravado of Dink's rhetoric caught the attention of the Turkish government. In 2004, the public prosecutor brought criminal proceedings against Dink under article 301 of the Turkish Criminal Code, which criminalizes the denigration of "Turkishness." The Turkish court convicted Dink of denigrating Turkish identity, despite contextual evidence in his columns suggesting the contrary.

On February 17, 2006, during Dink's appeals process within the Turkish court system, an informant alerted Turkish authorities to an assassination plot. The Istanbul police knew the names of potential suspects and yet did nothing, failing to alert Dink of any credible or imminent threat. Eleven months later, a 17-year-old Turkish extremist national shot Dink in the head.

That the Court upheld Dink's right to freedom of expression even after his death is an important finding. After reviewing eight of his controversial articles, the Court found Dink's use of "the impugned expression showed clearly that what he described as 'poison' had not been 'Turkish blood,' as held by the [Turkish] Court of Cassation, but the 'perception of Turkish people' by Armenians and the obsessive nature of the Armenian diaspora's campaign to have Turkey recognise [sic] the events of the 1915 genocide." The Court clarified that, according to prior case law, the right to freedom of expression under the Convention can only be infringed under a three-part conjunctive test. Namely, if the infringement is prescribed by law, pursues a "legitimate aim," and can be regarded as "necessary in a democratic society." The Court focused its analysis on the third prong of the test and reiterated its position that Article 10 "prohibit[s] restrictions on freedom of expression in the sphere of political debate and issues of public interest." The Court further observed that Dink's writings were in his capacity as a journalist, on an issue of public concern. Lastly, the Court maintained that seeking historical truth is an "integral part of freedom of expression." Balancing Dink's interests against those of the State, the Court held that "Firat Dink's conviction for denigrating Turkish identity had

not answered any 'pressing social need.'" Turkey had therefore violated Dink's right to freedom of expression.

The Court ordered Turkey to pay Dink's family approximately 133,000 in non-pecuniary damages and court costs. The Turkish State will not appeal the decision. Eighteen total suspects are still on trial in Turkey at the time of this writing, including Ogün Samast, the main suspect in the assassination, who will be tried in juvenile court.

But the Turkish-Armenian citizens who so fervently supported Dink will feel vindicated only if Turkey complies with the Court's decree. The Turkish ministry said it would implement provisions of the judgment and take measures to prevent similar violations in the future. If so, generations of Turkish journalists might finally know the true comforts of free speech, and not have to fear unjust prosecution. Then, Dink will achieve in martyrdom what he was just beginning to convey as editor-in-chief of *Agos*, the bilingual weekly newspaper that still features its former boss, relaxed and smiling, prominently on its website.

#### **SUBSIDIARITY AND THE EUROPEAN COURT: A SOLUTION FOR NON-COMPLIANCE?**

The European Court of Human Rights risks drowning under a massive case load unless the national courts of EU member states and legislators show more respect for the Court's judgments, said Christos Pourgourides, Chairperson of the Committee on Legal Affairs for the Parliamentary Assembly of the Council of Europe (PACE). In his speech, delivered October 1, 2010, in Skopje, Macedonia, Mr. Pourgourides called upon members of the European Council to adopt the idea of subsidiarity, a principle that requires the judicial systems of each member state to acknowledge the judgments of the Court. Such adherence would both enhance the notion of human rights and, over time, limit repetitive cases before the Court.

Pourgourides cited two egregious examples of repetition that could have been curbed through adherence to the subsidiarity principle. In a 1979 case, *Marckx v. Belgium*, the Court held that children born out of wedlock must not be discriminated against, but such discrimination was not officially condemned in France until *Mazurek v. France* in 2000, when the Court

upheld the inheritance rights of a man born out of wedlock. Also, in 1981 the Court held in *Dudgeon v. the United Kingdom* that homosexual acts between consenting adults in the United Kingdom must not be criminalized, but these acts were not decriminalized in Cyprus until 1993, when the Court heard *Modins v. Cyprus*. In resisting Court precedent, the Cyprus government said its court acted before the implications of *Dudgeon* were properly understood. "Such practice is simply unacceptable if we agree that the common objective of all parties to the Convention, under its first article, is to 'secure' the rights and freedoms laid down in the [European Convention on Human Rights]," Pourgourides said in his speech.

Subsidiarity is an organizational belief that decisions are best made in the lowest levels of government as opposed to at a supranational level. In this context of judicial organization, there is a reliance on each member state to uphold the judgments of the Court, so that similar claims from multiple jurisdictions will not be heard. Since the Treaty on the European Union established the principle of subsidiarity as a general rule in 1992, proponents such as Mr. Pourgourides have spoken to its value. His remarks were delivered at a conference called "Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice." The aim of subsidiarity is not to restrict the power of the Court, but to make it more efficient. However, subsidiarity is not an immediate fix. Its practice would first require cooperation among all member states and generations of patience.

However, it is unlikely that subsidiarity will completely solve the Court's case overload. By most accounts, the Court's pending caseload exceeds 100,000 applications and continues to grow. For example, the Court received more than 50,000 new applications in 2008, but rendered only 30,000 admissibility decisions and less than 2,000 judgments. "Such a disparity is a double-edged sword for the Court," said members of the International Law Discussion Group in a 2009 meeting at London's Chatham House. The primary problem acknowledged during the meeting is that "many repetitive, but well-founded cases still go to Strasbourg when they should have been dealt with at the national level. The result is that Strasbourg has become the agent for effecting change in

society. This is both painful for the country concerned and crippling for the Court.”

Although Strasburg has become an agent for shaping societal change, some countries are not eager to integrate the Court’s judgments into their own case law because inaction is far easier. Moreover, the biggest hurdle in the implementation of subsidiarity is that even though the Court’s judgments can be reasonably described as “persuasive authority,” all parties of the Convention are not bound by its decisions and can easily hide behind the case-by-case nature of the Court.

Mr. Pourgourides has proposed some practical steps toward implementation. First, national legislatures and courts must be made aware of the Court’s case law through translations and comprehensive reviews in legal journals. Second, national parliaments must closely follow the evolution of the Court’s case law. Third, the highest national courts must ensure lower courts are aware of and respect the Court’s case law. Fourth, dialogue between the Court and member states must be constant and facilitated by third parties. Fifth, member states must learn more about key cases whose significance extends beyond the country that has been found in violation.

Whether Mr. Pourgourides’ suggestions bear fruit will not be known until long after he retires from his duties. He has, at least, outlined a starting point for success and perhaps the most substantive solutions to the Court’s most pressing threat.

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## INTER-AMERICAN SYSTEM

### INTER-AMERICAN COURT TO HEAR FIRST CASE ON DISCRIMINATION BASED ON SEXUAL ORIENTATION

On September 17, 2010, the Inter-American Commission on Human Rights (IACHR) submitted the unprecedented case of Chilean judge Karen Atala to the Inter-American Court of Human Rights (Inter-American Court). In her petition, Atala alleges discrimination based on sexual orientation in the custody case of her children. The Chilean Supreme Court granted permanent custody to the children’s father in 2004, following a com-

plaint he made after Atala moved in with her same-sex partner. He alleged that exposure to Atala’s lifestyle caused the social, familial, and educational deterioration of their children. In granting the children’s father custody, the Chilean Supreme Court said that it based its decision on the best interest of the children. This is the first case of discrimination based on sexual orientation that the Inter-American Court will hear. A favorable result for Atala will address equal protection under the law for lesbian, gay, bisexual, and transgender (LGBT) individuals and the rights of non-traditional families.

In its Admissibility Report, the IACHR found that Atala had claims under the American Convention on Human Rights (ACHR) because of how the Chilean State (State) considered her sexual orientation in the custody proceedings. The IACHR found that Atala’s rights were violated under Article 24 of the ACHR, equal protection under the law; Article 11(2), right to privacy; and Article 17(1), the rights of the family. The IACHR also acknowledged the potential violation of the rights of Atala’s children under Articles 19 and 17(4) because the Chilean Supreme Court did not consider the children’s desire to stay with Atala. The IACHR referred the case to the Inter-American Court after it concluded that the State was responsible for violations of the ACHR, and had not complied with its recommendations for legislative and public policy reform on discrimination based on sexual orientation.

Chile defended its Supreme Court’s interpretation of the best interests of the child before the IACHR, which included removing the children from a living situation that could contribute to “a risk to [the children’s] development given the current climate of Chilean society.” The State further argued that it did not discriminate against Atala based on sexual orientation, because its decision was not based on her relationship with her same-sex partner. Rather, its decision was based on the effect of her same-sex cohabitation on her children.

Several civil society organizations submitted *amicus curiae* briefs in the proceedings before the IACHR contesting the Chilean Supreme Court’s interpretation of the best interests of the child. The New York City Bar Association’s *amicus* brief argued that the Court’s decision goes against the

best interest of the children, because it “reinforce[s] derogatory stereotypes and place[s] a judicial seal of approval on the very homophobic prejudice that creates and fosters a hostile environment in the first instance.” The New York Bar’s *amicus* brief also cited cases in Argentina, Costa Rica and Brazil where domestic courts have protected the custody rights of gay and transgender parents and condemned discrimination based on sexual orientation in custody cases.

Chile’s domestic legal system is divided on the idea that homosexual parents “deteriorate” children who cohabit with them. The Chilean State is defending a decision by its Supreme Court that is contrary to the findings of Chile’s own lower courts. In the Chilean Supreme Court itself, the decision was contentious, with a three to two division. A decision by the Inter-American Court for Atala has the potential for impactful change within Chile. In response to a 2001 decision by the Inter-American Court finding Chile in violation of the ACHR, Chile rewrote part of its Constitution. The Inter-American Court’s power to assign reparations could achieve similar legislative change.

Macarena Saez, a lawyer with Chilean legal organization Libertades Públicas A.G., represented Atala in front of the IACHR. She says that this case has already achieved something great for the LGBT community. “What makes history is what the Commission decides,” she said, “and the Commission has said that sexual orientation is not grounds for discrimination.”

### JUSTICE AFTER 29 YEARS: INTER-AMERICAN COURT FINDS GUATEMALA RESPONSIBLE FOR FORCED DISAPPEARANCE OF MAYAN LEADER

On May 25, 2010, the Inter-American Court of Human Rights (Inter-American Court) held that Guatemala violated the human rights of Florencio Chitay Nech and his family through his forced disappearance and the displacement of his family during the 1981 Guatemalan internal armed conflict. The Inter-American Court’s decision affirmed the State’s responsibility to investigate forced disappearances regardless of the passage of time, and applied the freedom of residence to indigenous children who were displaced due to threats of violence.

Chitay Nech was an indigenous Kaqchikel Maya, a farmer, and a co-op store owner. In 1973, he became politically active, and in 1977, he was elected as First Councilman (Deputy Mayor) of San Martín Jilotepeque in the Department of Chimaltenango. When the Mayor of San Martín Jilotepeque was disappeared in 1980, Chitay Nech assumed his position. While Mayor, there were threats against Chitay Nech's life and raids of his home. After the second raid, Chitay Nech fled to Guatemala City with his family. It was there, on April 1, 1981, that Chitay Nech was abducted in front of his five-year-old son, Estermerio. His whereabouts are still unknown.

Two months following the disappearance, Chitay Nech's family moved back to San Martín Jilotepeque, but their relatives refused to take them in for fear of government reprisals. Chitay Nech's family eventually separated out of necessity.

On the day that Chitay Nech disappeared, his wife, Marta Rodríguez Quex, reported the incident to the police. Three weeks after his disappearance it was publicized by the media. Despite the reports, the Guatemalan police did not seriously assist the family in locating Chitay Nech. The Inter-American Court accepted the case, in part, because of the State's failure to conduct an investigation into Chitay Nech's forced disappearance.

The Inter-American Commission on Human Rights (IACHR) urged the Inter-American Court to find Guatemala responsible for violations of Chitay Nech's rights to judicial personality (Article 3), life (Article 4), humane treatment (Article 5), personal liberty (Article 7), and participation in government (Article 23) under the American Convention on Human Rights (ACHR). The IACHR further asserted that Guatemala violated Chitay Nech and his family's rights to a fair trial (Article 8) and judicial protection (Article 25). They also alleged that Chitay Nech's children's right to humane treatment (Article 5) and the rights of the family (Article 17) were violated. Lastly, the IACHR cited violations of Articles I and II of the Inter-American Convention on Forced Disappearance of Persons (ICFDP).

The victim's representatives introduced additional violations and extended the IACHR's assertions to other affected parties. Chitay Nech's wife and sister-in-law

were added to the list of family members against whom the violations were committed. They claimed violations of the right to property (Article 21) and the right to freedom of movement and residence (Article 22) of the ACHR. In response to the allegations, the State conceded violations of Articles 4, 5, 7, 17, 19 and 23 of the ACHR. However, the State continued to deny violating Articles 3, 8, 25 of the ACHR and objected to the addition of the alleged violations of Articles 21 and 22.

The Inter-American Court considered testimony and documented history in making its decision about the State's involvement in Chitay Nech's disappearance. Thirteen witnesses for the representatives testified about the circumstances of Chitay Nech's disappearance and the use of forced disappearance against the Maya. One witness testified for the State on the effectiveness of domestic remedies. Relying on this evidence, the Inter-American Court found the State responsible for the forced disappearance of Chitay Nech.

Unlawful detention, lack of trial, prolonged isolation, and secret execution all constitute deprivations of human rights inherent to forced disappearances. Guatemala also denied Chitay Nech's political freedoms by causing his forced disappearance. These violations were compounded by his status as an elected official. The State not only infringed on Chitay Nech's political rights, but the political rights of the community to elect him as an official. The Inter-American Court found the State violated the right to political participation (Article 23(1)(a)) for these reasons.

The Inter-American Court also ruled that when the State failed to investigate Chitay Nech's disappearance, it violated his children's rights to a fair trial and judicial protection under articles 8(1) and 25(1) under the ACHR and Article 1(b) under the ICFDP. Through the forced displacement of the family, the State also violated the children's right to residence, movement, and protection of the family under Articles 22 and 17, and the minor children's access to cultural life under Article 19. The Inter-American Court emphasized that the cultural loss of the family's Mayan heritage contributed to the cruelty of their displacement.

The Inter-American Court ordered the State to make reparations, including mone-

tary compensation, to Chitay Nech and his family within a year of the decision. The Inter-American Court also required the State to notify the citizens of Guatemala of the Inter-American Court's judgment through newspaper articles and radio-broadcasts. Additionally, the Court ordered Guatemala to begin an investigation to find and punish the responsible parties for Chitay Nech's disappearance, to search for Chitay Nech, to name a street after him, and to offer psychological and psychiatric assistance to the family if desired.

In applying Article 22's right to freedom of residence to the children displaced by threats of violence, the Inter-American Court extended its application beyond previous boundaries. They acknowledged that the freedom of residence is violated when a family is displaced by attempting to escape threatened violence. This decision additionally reiterated the obligation of Guatemala to investigate and compensate people whose family members have been forcibly disappeared, regardless of the amount of time passed since their disappearance.

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#### **INTER-AMERICAN COURT RULES IN FAVOR OF PARAGUAYAN INDIGENOUS GROUP IN LAND RIGHTS CASE**

The Inter-American Court of Human Rights (Court) decided its third Paraguayan indigenous peoples' land rights case on August 24, 2010, holding that a portion of the ancestral lands of the Xákmok Kásek Indigenous Community should be returned. Notably, the Court recognized not only that Article 21 of the American Convention on Human Rights (ACHR) protects the indigenous group's communal land claim, but also that the community has a right to reclaim specific ancestral lands because of their historical, cultural, and spiritual significance to the indigenous group.

The Xákmok Kásek people are a multi-ethnic community of fewer than 300 individuals from Enxet, Sanapaná, and other ethnic groups who seek to regain 10,700 hectares of land within the Paraguayan Chaco. The claimed land, part of which has been declared a protected area by the Paraguayan government, is currently

occupied by a privately owned farm in the northwestern department of Presidente Hayes. The creation of the protected area further curtailed the nomadic and traditionally self-sufficient way of life of the Xákmok Kásek and forced many members of the community to seek employment on private farms.

The Xákmok Kásek community has attempted to reclaim its rights to these ancestral lands since 1986 and first filed a complaint with the Inter-American Commission on Human Rights (IACHR) in 2001. The IACHR found that the Paraguayan government was not meeting its international obligations under the American Convention, in particular with respect to the rights to property and life. After the Paraguayan government failed to comply with the IACHR's recommendations, it submitted the case to the Inter-American Court for adjudication in July 2009.

The IACHR submitted that Paraguay was obligated to recognize the Xákmok Kásek's ancestral land claim even if the State did not have possession of the land because it was privately owned. Tierraviva, a non-governmental organization representing the victims, alleged that the Xákmok Kásek's lack of land ownership severely limits the community's traditional means of subsistence, which is based on its nomadic lifestyle. In response, Paraguay claimed that it had diligently attempted to enable the Xákmok Kásek people to exercise their right to land, pointing to legislation granting indigenous communities access to land and to successful land reclamation achieved by other indigenous groups. Although Paraguay also maintained that the community's claim could be satisfied by granting alternate traditional lands, the Court found that Paraguay had not actually identified suitable and available land. Noting that it had provided medical and sanitation services as well as food assistance, Paraguay also rejected the notion that it could be found liable for the deaths of the Xákmok Kásek community members.

In its recent ruling, the Court found that Paraguay violated the Xákmok Kásek indigenous community's rights under the ACHR, such as the right to life (Article 4), property (Article 21), humane treatment (Article 5), legal access and protection (Articles 8 and 25), and juridical personal-

ity (Article 3), in particular with respect to documentation of identity. Additionally, the Court found that the rights of the child (Article 19) and the right to non-discrimination (Article 1) had been violated. In its judgment, the Court ordered Paraguay to return, by August 2013, the 10,700 hectares claimed by the Xákmok Kásek or to identify another suitable site within the group's traditional lands. The judgment also requested the State to hold a public ceremony internationally recognizing the harm suffered by the Xákmok Kásek community. The ruling identified the failings of Paraguayan legislation in resolving indigenous land claims, particularly when indigenous rights to traditional land conflict with private property ownership rights. The ruling advised the Paraguayan government to revise its legislation or administrative system so it can address indigenous land claims successfully and efficiently in the future. Additionally, the Court urged the Paraguayan government to immediately provide medical, psychosocial, and sanitation services to the community, as well as adequate food, clean water, and educational resources. Lastly, the Court asked the Paraguayan government to designate specialists to conduct a needs assessment with respect to the community's basic necessities by February 2011.

The Court's ruling is an achievement not only for the Xákmok Kásek but also for the country's indigenous population as a whole. The ruling publicly recognizes both the right to communal property for the country's indigenous groups and the immense need for improved services and resources for a population historically underserved and marginalized. The Court's recommendations, if fulfilled, will signify Paraguay's recognition of the harm to its indigenous populations and will lead to enhanced protection of their basic human rights.

#### **INTER-AMERICAN COURT HOLDS THAT MEXICO VIOLATED THE HUMAN RIGHTS OF TWO WOMEN RAPED BY MEXICAN MILITARY PERSONNEL**

The Inter-American Court of Human Rights (Court) decided two rape cases in August 2010 brought by indigenous women against Mexico. In *Cantú* and *Ortega*, the Court held that two women raped by Mexican soldiers were denied access to justice when their cases were placed under military jurisdiction and not

adequately investigated by either civilian or military authorities. The Court found Mexico in violation of the American Convention on Human Rights (ACHR), the Inter-American Convention to Prevent and Punish Torture (Convention on Torture), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention on Violence against Women). The Court concluded that the Mexican military justice system is inherently unsuited to investigate human rights violations allegedly perpetrated by members of the Armed Forces.

The women, both members of the Me'phaa (Tlapanec) indigenous group, faced similar difficulties following their rapes. Neither woman received timely and adequate medical treatment following her ordeal. Cantú was initially refused services because of the doctor's alleged fear of military retaliation and a lack of proper medical equipment. Ortega was not provided medical treatment until the day following her rape because there was no female physician available to examine her. Neither woman was given a psychological evaluation. Cantú, only seventeen at the time of her rape, was left by her husband and outcast by her community such that she was forced to relocate to another town. Ortega and her family were repeatedly threatened and attacked, and her brother was murdered for his support and advocacy on her behalf.

Ortega's initial attempt to report her case was denied because it implicated the military. It took more than two months for the Public Prosecution Service to determine which office had jurisdiction over Cantú's case. Both cases were eventually transferred from the local Public Prosecution Service to the Military Prosecution Service despite appeals by the women for their cases to remain in the civilian system. After more than a year of inaction, the victims filed petitions with the Inter-American Commission on Human Rights (IACHR) with the help of several civil society organizations.

The IACHR held that Mexico violated the women's rights to non-discrimination, humane treatment, privacy, and juridical protection and as a result, made several recommendations to Mexico. After the government failed to comply with the recommendations, the IACHR submitted the cases of Ortega and Cantú to the Court

for adjudication in May and August 2009, respectively. The IACHR's application to the Court highlighted that the State's failure to investigate the victims' claims without unnecessary delays and bring the perpetrators to justice was rooted in racial and gender discrimination. Moreover, the IACHR posited that allowing cases where both the investigators and the defendants are members of the same security force leads to partiality and impunity, which is more pronounced in a system that lacks competence in dealing with issues of sexual violence.

In its rulings, the Court found that Mexico violated the victims' rights to non-discrimination, humane treatment, legal protection, and privacy, Articles 1, 5, 8, 11, and 25 of the ACHR. The Court also found that Mexico had failed to meet its obligation to investigate and prosecute cases of torture under Articles 1, 2, and 6 of the Convention on Torture. Additionally, it found that Mexico had violated Article

7 of the Convention on Violence against Women by failing to take adequate steps to prevent, investigate, and punish violence against women. Finally, the Court found that Cantú's right to special protection as a minor was violated under Article 19 of the ACHR. The Court ordered Mexico to pay \$171,000 in reparations to Ortega and her family members and \$147,000 to Cantú. It also ordered Mexico to investigate the rapes of both women with due diligence, to reform the Code of Military Justice limiting the scope of military jurisdiction in cases of civilian human rights' abuses, and to allocate resources and establish mechanisms of prevention and protection for indigenous women and girls, amongst other measures.

The Court's rulings indicate the Inter-American system's growing focus on eliminating impunity within the Mexican military and the lack of transparency in the military justice system. The ruling mirrors a 2001 verdict where the Court found that

Mexico had likewise failed to conduct a thorough, impartial, and civilian investigation of the rape of three indigenous sisters by military personnel. These rulings signify the Court's recognition of the special vulnerability of indigenous communities in militarized zones and the need to implement safeguards to mitigate the harmful effects of military presence and improve access to assistance and justice, especially for women. Finally, the Court's rulings highlight the continued shortcomings of the Mexican institutions involved in cases of human rights violations perpetrated against indigenous women, from failures to provide culturally and linguistically competent service provision to victims to coordination amongst investigative and judicial agencies to adequately address sexual abuse cases without re-victimization.

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