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Regional Human Rights Systems

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REGIONAL HUMAN RIGHTS SYSTEMS

AFRICAN SYSTEMS

AFRICAN COMMISSION SET TO REVIEW DISSOLUTION OF SUBREGIONAL TRIBUNAL

The African Commission on Human and Peoples' Rights (the Commission) agreed to hear a case brought by two Zimbabwean farmers, Luke Tembani and Ben Freeth, who allege that an August 2012 decision by the Southern African Development Community (SADC) Summit of Heads of State or Government (SADC Summit) to dissolve the SADC Tribunal (Tribunal) violates the African Charter on Human and Peoples' Rights (African Charter). The Commission's opinion will determine whether, under the African Charter and international norms, any of the fifteen heads of state within the SADC Summit, each named as a respondent in the complaint, violated their obligations in their roles creating policy direction for the SADC. Thus before the case is even heard, it sets a new precedent for individuals to name multiple heads of state as respondents before an international body.

After Zimbabwe refused to comply with a decision in *Mike Campbell Ltd. and Others v. Zimbabwe*, in which the Tribunal found in favor of farmers' land rights, the SADC Summit suspended the Tribunal in 2010 to review its role. Although the SADC's Committee of Ministers of Justice recommended reappointing and replacing the Tribunal judges, the SADC Summit decided in May 2011 to continue the suspension and, later in 2012, to permanently dissolve the current Tribunal. The SADC Summit has asked the Ministers of Justice to write a new mandate for a SADC Tribunal that would only hear cases between States regarding the interpretation of the SADC Treaty and SADC protocols. The previous Tribunal jurisdiction also encompassed the ability to hear cases brought by individuals concerning violations of human rights. Freeth's father and Tembani filed the complaint in *Mike Campbell* under the old mandate but have yet to receive compensation owed from the ruling because the Tribunal's suspension also affected enforcement of previous decisions.

Concurrently, other interested parties in the region are also seeking to challenge the dissolution of the Tribunal. Two non-governmental organizations, the Southern African Litigation Centre (SALC) and the Pan African Lawyers Union (PALU), submitted a request, under Article 4 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) to the African Court on Human and Peoples' Rights (the Court) for an advisory opinion regarding the legitimacy of the dissolution process. The NGOs make their claim under the African Charter, the SADC Tribunal Protocol, the SADC Treaty, the UN Principles on the Independence of the Judiciary, and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. With these documents, the Court would decide if the actions taken by the SADC Summit violated the rights to justice, to effective remedies, and to an independent judiciary. Although an advisory opinion is not binding, the organizations hope that the SADC institutions will take into account an advisory opinion issued by the Court since the SADC, as a subregional economic community (SEC), should make an effort to coordinate policies with the African Union (AU), a stated goal of the AU in Article 3 of its Constitutive Act. As stated in the SADC Treaty, the SADC means to take into account the AU Constitutive Act including the goals listed therein. However, the Court would likely delay stepping into the issue because under Article 4 of the Protocol, the Court is barred from issuing an advisory opinion if there is a case pending before the Commission regarding the same matter, such as the case brought by Tembani and Freeth.

If the petitioners are successful in either the case pending before the Commission or the request before the Court, the resulting opinion could potentially affect both the southern African region's rule of law system as well as the strength of SECs' adjudicatory mechanisms across the African

continent. In dissolving the Tribunal and denying any subsequent adjudicatory body a human rights mandate, the SADC Summit undermined the progress the fifteen Member States of SADC have made in developing an effective rule-of-law system and providing redress for individuals who otherwise depend on inadequate domestic courts. Supporting the SADC Tribunal would also help the Commission or the Court to show support for the other similarly organized SEC tribunals in Africa, such as the Economic Community of West African States (ECOWAS) Community Court of Justice, thereby strengthening the rule of law in the region.

ECOWAS COMMUNITY COURT OF JUSTICE HOLDS NIGERIAN GOVERNMENT LIABLE FOR HUMAN RIGHTS VIOLATIONS BY OIL COMPANIES

The Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ), in a recent opinion, demanded that the Federal Republic of Nigeria protect its citizens' right to an adequate environment favorable for development. The ECCJ's judgment in *SERAP v. The Federal Republic of Nigeria* on December 14, 2012, ordered Nigeria to fix environmental damage in the Niger Delta, protect against further environmental damage, and hold the perpetrators of environmental damage accountable. The plaintiffs, Socio-Economic Rights and Accountability Project (SERAP), and the ECCJ's opinion cite oil companies as the main perpetrators of environmental damage in the Niger Delta. The opinion connects the lack of enforcement of legislation and regulations against oil companies in Nigeria to degradation of the environment. SERAP originally named seven oil companies as defendants in the complaint, but the ECCJ ultimately found that it did not have jurisdiction over them. However, under this ruling, the ECCJ is requiring Nigeria to enforce environmental regulations against oil companies operating within Nigeria, such as the Shell Petroleum Development Company (Shell), thereby holding foreign companies liable for domestic human rights violations.

SERAP argued that international oil companies have created an inadequate standard of living through the pollution of food and water. Two oil spills in 2001 and 2008 resulted in the contamination of local rivers and creeks in Ogbobo and Ogoniland from Shell-owned pipelines. Local water supplies were contaminated, causing the depletion of edible fish, which the local community depends upon for adequate food. Additionally, SERAP argued that similar oil spills in the Niger Delta have destroyed crops and the quality of soil used in farming. As a result, poverty in the area has increased as people's livelihoods are destroyed. Therefore, SERAP argued that the Nigerian government and seven different oil companies violated the right to an adequate standard of living, as determined by adequate access to food, water, healthcare, and a clean environment.

Although SERAP alleged that Nigeria violated 29 articles from a variety of international human rights instruments, the ECCJ limited its judgment to Articles 1 and 24 of the African Charter on Human and Peoples' Rights (African Charter). Although Nigeria raised a preliminary challenge stating that the ECCJ could not rule on instruments outside of the treaties, conventions, and protocols of ECOWAS, the Court found that it could rule on violations of other international instruments under Article 1(h) of the Protocol on Democracy and Good Governance (Protocol), which allows for outside international human rights instruments to govern the human rights obligations of ECOWAS Member States. However, the Court, determining that many of the articles cited by the plaintiffs were equivalent to each other, found it could cite the article that affords the best protection for the alleged violation. Therefore, the ECCJ focused on the right to an adequate environment (Article 24) and States' obligation to ensure rights (Article 1).

The ECCJ's decision reinforced the duty of ECOWAS Member States to protect against environmental degradation by oil companies that results in an inadequate standard of living. Negative effects on the environment due to the operations of oil companies in the region has been an ongoing issue in Nigeria as well as a growing issue in other ECOWAS Member States. With this decision, the ECCJ has shown that it will hold Member States of ECOWAS to their obligations to protect

the rights of citizens under Article 1 of the African Charter, including by enforcing existing legislation — a step some Member States are reluctant to take against foreign companies. Furthermore, under the decision, ECOWAS Member States are responsible for the violations of human rights by international companies operating within the state. The Nigerian government has a long history of permitting international oil companies to operate within its borders: Shell has operated in Nigeria since the 1930s. Therefore, the Nigerian government may lack the necessary incentive to enforce the decision against oil companies. Additionally, Nigeria has yet to use its domestic implementation system for ECCJ decisions. If the Nigerian government chooses not to enforce the ECCJ's ruling and hold oil companies liable, it will set a counter-precedent for ECOWAS Member States.

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EUROPEAN SYSTEM

ECTHR REINSTATES UKRAINIAN SUPREME COURT JUDGE

For the first time in its history, the European Court of Human Rights (ECTHR) ordered a Member State to reinstate a dismissed former judge. In its January 2013 judgment for *Oleksandr Volkov v. Ukraine*, the ECTHR found that Ukraine violated Article 6 (right to fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) when the High Council of Justice dismissed Supreme Court Justice Oleksandr Volkov in May 2010 due to an alleged "breach of oath." The ECTHR ordered Ukraine to reinstate him as a Supreme Court judge immediately. Furthermore, in view of the serious systematic problems concerning the functioning of the Ukrainian judiciary, the Court, under Articles 41 (just satisfaction) and 46 (binding force and execution of judgments), recommended that Ukraine immediately reform its system of judicial discipline.

Volkov became a Supreme Court judge in 2003. In December 2007, he was elected as a member of the High Council of Justice, but the Parliamentary Committee of the judiciary refused to allow him

to take the oath of office or assume his duties. Two members of the High Council of Justice conducted preliminary inquiries in December 2008 and March 2009, looking into possible misconduct by Volkov. According to the ECtHR, Volkov had failed to recuse himself in cases concerning family members and had made, "gross procedural violations." However, Volkov did not have an opportunity to rebut these charges.

Following these inquiries, the President of the High Council of Justice submitted two applications to Parliament for Volkov's dismissal. In June 2010, Parliament voted for Volkov's dismissal for "breach of oath." Volkov subsequently challenged his dismissal before the Higher Administrative Court (HAC), but that court found the High Council of Justice's dismissal had been lawful and refused to re-consider.

In response to Volkov's petition, the ECtHR found four separate violations of the Article 6 right to fair trial. First, the Court held that the judicial bodies that had considered Volkov's case were neither independent nor impartial. The Court emphasized that there were "structural deficiencies in the proceedings before the High Council for Justice," including clear indications that a number of members had personal biases against Volkov. The Court further found that Parliament's hearing of the case increased the politicization of the judicial process and further inhibited the possibility of an independent judiciary and separation of powers. Furthermore, the review of the case by the Higher Administrative Court did not remedy these defects.

The ECTHR additionally found that Ukraine breached the principle of legal certainty by not limiting the period of review for the proceedings against Volkov. By violating fair voting practices through casting multiple ballots, the Court held that the Ukrainian parliament violated the Ukrainian Constitution and other legislation and therefore the principle of legal certainty. The ECTHR found a violation of the Article 8 right to privacy because the Court deemed Volkov's dismissal to be inconsistent with domestic law as well as impermissible interference with his private and professional life. Because Ukraine had not established guidelines or normative practices establishing a consistent interpretation of the notion of "breach of oath," the procedure lacked adequate procedural safeguards to prevent arbitrary use.

In conclusion, the Court found that the serious systemic problems resulted from the failure to organize the judicial branch to ensure sufficient separation of powers. The Court faulted the Ukrainian judiciary system for not providing sufficient “guarantees against abuse and misuse of disciplinary measures,” and found that this failure undermines the entire Ukrainian democracy. To remedy these violations, the ECtHR ordered Ukraine to carry out reform of the judicial discipline system, including legislative reform to help create sufficient separation of the judiciary from other branches of state power.

The ECtHR’s order and competence to reinstate judges based on the violation of the right to a fair trial and the right to respect for private life found in this case demonstrate the scope and outreach a decision of the ECtHR potentially holds. By insisting upon an independent judiciary and fair proceedings, the Court’s decision can help propel necessary legal reforms and limit detrimental political influences. A politically independent national judiciary is a critical tool, necessary for the protection of human rights in countries.

HEIGHTED PROTECTION FOR CHILDREN IN IMMIGRATION PROCEEDINGS AFFIRMED BY ECtHR

The European Court of Human Rights (EctHR) ruled in *Butt v. Norway* that the State violated the right to respect for private and family life protected by Article 8 of the European Convention on Human Rights (ECHR) by withdrawing residence permits of two Pakistani siblings. The December 4, 2012, ECtHR decision affirmed a heightened standard of protection for children in immigration proceedings by expanding the possible range of exceptional circumstances under which Article 8 concerns outweigh state policy.

Siblings Johangir Abbas Butt and Fozia Butt received humanitarian residence permits from Norway in 1992. However, Norwegian immigration withdrew the permits in 1999 because their mother failed to disclose that the family had returned to live in Pakistan from 1992 to 1996. Since returning, the siblings have lived intermittently with their aunt and uncle, legal residents of Norway.

Article 8 of the ECHR offers general protection of a person’s private life, family life, and home from arbitrary interference

by the state. Section 2 of Article 8 specifies that public authority cannot interfere with this right unless it “is in accordance with the law and is necessary [. . .] for the protection of health or morals, or for the protection of the rights and freedoms of others.” Thus, relying on ECHR Article 8 right to privacy of family life and the home, the siblings argued that their deportation to Pakistan would break their strong ties with Norway where they had lived since childhood. They argued further that their links to Pakistan were weak since their mother died in 2007 and they had not been in contact with their father since 1996.

In similar cases in front of the ECtHR, the Court deferred to the state if the petitioner had acted fraudulently. However, in *Butt v. Norway* the ECtHR held that the siblings could not be held responsible for the illicit conduct of their mother so long as they were unaware of their illegal status in Norway. Given these “exceptional circumstances,” the Court expanded its protection for children’s rights and held that, “exceptional circumstances” could make it necessary to put the interests of the children first, implying that a parent might need to be granted residence as well. To protect children’s rights, the Court articulated that the child’s individual circumstances must be taken into account when deciding if a child should bear the negative consequences of parental action. In this case, given that the mother had died, the Court found little possibility of future exploitation of the immigration system. Furthermore, given that the children had strong interest in staying in Norway due to their strong social ties, such as their family and obtaining an education, the Court found that this satisfied the standards for “family life” and “private life” encompassed in Article 8.

Thus, *Butt v. Norway* expanded the principles of previous judgments regarding children’s rights protected by Article 8 under the doctrine of “exceptional circumstances” under which the rights of the individual rise above those of the state’s immigration policy needs. In this case, the Court has created a new exception under “exceptional circumstances” for the protection of children even when a parent acts fraudulently in immigration proceedings. Because culpability cannot begin before a child gains knowledge, States must now consider their age and mental awareness of their immigration status. In essence, the

Court has recognized that under Article 8 children cannot be legally responsible or deported based solely on the mistakes of their parents.

Future cases will prove whether the Court will fully embrace the high standard of the *Butt* case and acknowledge the relevance of ties with the receiving State as well as the children’s lack of knowledge about their precarious residency status. Although the essential object of Article 8 of the ECHR is to protect the individual against arbitrary action by public authorities, Article 8 implies positive obligations inherent in effective “respect” for family life, particularly in immigration and asylum issues. This case suggests that this positive obligation requires States to pay closer attention to exceptional circumstance factors such as the extent to which family life is effectively ruptured, the extent of the child’s ties in the contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin, and whether there are factors of immigration control or considerations of public order weighing in favor of a child.

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INTER-AMERICAN SYSTEM

INTER-AMERICAN COURT OF HUMAN RIGHTS RULES AGAINST COSTA RICA’S ABSOLUTE BAN ON IN-VITRO FERTILIZATION

In a case touching on the right to life of an embryo, the Inter-American Court of Human Rights (IACtHR) ruled in November 2012 that an absolute ban of in-vitro fertilization (IVF) violates the right to privacy, the right to family, and the right to personal integrity. In 2000, Costa Rica became the first country to pass a total ban on IVF, citing a concern for the right to life contained in the Costa Rican Constitution and the American Convention on Human Rights. In response, nine infertile couples brought a petition against Costa Rica to the Inter-American Commission on Human Rights (IACHR). The case, *Murillo et al. v. Costa Rica*, was transferred to the IACtHR, which agreed with the petitioners and the Commission that the absolute ban on the use of IVF procedures violates

the rights to privacy, to family, and to personal integrity. In addition, the IACtHR interpreted the meaning of the right to life provision contained in the American Convention by clarifying that the right to life does not stand alone and independent of other rights.

In 1995, Costa Rica's Ministry of Health authorized the use of IVF and between 1995 and 2000 fifteen babies were born through the procedure. In response to IVF's authorization, a petitioner filed a claim alleging that the use of IVF was unconstitutional. In 2000, Costa Rica's Supreme Court held that IVF violated the right to life and human dignity provisions of the country's constitution, and also Article 4 (right to life) of the American Convention. The country's highest court held that life begins at conception and thus any intentional or accidental discarding or mishandling of embryos violated the right to life.

Article 4 of the American Convention states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." However, until now, the "moment of conception" language has been undefined. In deciding on the Costa Rican case, the IACtHR noted its status as the ultimate interpretative authority on the American Convention and ruled that personal integrity, personal liberty, privacy, and right to a family outweighed some of the nuanced interpretations offered by Costa Rica on the reach of the right to life provision. In particular, the Court focused on the right of couples to start a family (Article 17) and the right to privacy (Article 11). The Court noted that both provisions touch on reproductive health and access to necessary technologies in order to have children.

The Court did not shy away from Article 4 and the right to life but made a careful analysis as to the interpretation of the words "in general" and "conception." In describing the IVF procedure, the IACtHR noted that scientific literature talks about two distinct moments, implantation and fertilization, and reasoned that only upon completing the cycle of fertilization can conception exist. The Court interpreted this to mean that if fertilization is required for formation of the zygote (the fertilized egg created from the union of ovum and sperm), then non-implanted embryos

could never realize their full development and thus the Court determined that the rights of those embryos are null. Therefore, the Court held, conception cannot occur before implantation and the right to life protections cannot apply to non-implanted embryos. The Court reasoned that the "in general" wording allowed for this interpretation. Accordingly, the IACtHR held that Costa Rica's Supreme Court failed to consider other rights affected by an absolute ban on IVF, which resulted in an arbitrary and excessive intrusion into private and family life, with disproportionate impacts on certain groups; as a result, the interference had a discriminatory impact.

The Court also agreed with the petitioners that the absolute ban unfairly discriminated against poorer families due to the prohibitive cost of travel for couples without financial means. The Court added that the ban had a particular discriminatory effect on women who were already undergoing IVF treatment when the ban was instituted.

The decision could have important impacts throughout the Americas region because the Court's decisions are binding on all countries that have ratified the Court's contentious jurisdiction. Since announcing that the Court's decision was forthcoming, both sides have presented arguments as to whether Article 4's right to life provision begins at conception and includes embryos. Some argued that if the Court ruled in favor of the petitioners, then the decision would open the door for changes to laws concerning contraception, abortion laws, and research on humans.

Among the reparations ordered by the Court are that Costa Rica re-institute access to IVF, offer counseling to plaintiffs, and slowly incorporate access to IVF into its health system through its social security programs. Costa Rica has said it will comply with the Court's decision and allow in-vitro fertilization again.

INTER-AMERICAN COMMISSION INCREASINGLY REQUESTING PRECAUTIONARY MEASURES FOR CUBA

A disproportionate number of requests for precautionary measures granted by the Inter-American Commission on Human Rights (IACHR) in 2012 were for Cuban citizens. Of the 26 total precautionary measures requested by the Commission, five were focused on the island nation. The

requested measures focused primarily on the protection of human rights defenders and the situation inside Cuba's prisons.

Precautionary measures and annual reports represent the limited options available to the Inter-American System of Human Rights (IASHR) to engage with Cuba. In 1962 the Organization of American States (OAS) excluded Cuba from participating due to its Marxist-leaning government, which the OAS cited as "incompatible with the principles and objectives of the Inter-American System." In 2009, the OAS reopened lines of communication with Cuba but left it to Cuba to initiate dialogue. Thus, until and when Cuba decides to strengthen its relationship and discourse with the OAS structure, the IASHR has limited reach in its enforcement of human rights in Cuba. However, Article 23 of the IACHR Rules of Procedure states that anyone legally recognized by an OAS Member State may bring a petition to the Commission and ask that the American Declaration on the Rights and Duties of Man apply. Furthermore, Article 51 of the Rules establishes that the Commission may examine any petition of alleged violations in light of the American Declaration for states that are not a party to the American Convention. Cuba is not a signatory to the American Convention on Human Rights, but the general principles and customary international norms enshrined in the American Declaration may be applied to Cuba due to their OAS membership. Hence, requests for precautionary measures and annual reports remain available through the Commission.

The Commission is the first entrance into the IASHR, and where a party believes that protective interim measures are necessary to prevent irreparable harm, they may request that the Commission encourage a state to adopt precautionary measures so as to protect people or subject matter of a pending case. Since 2010, there has been an increase in the number of precautionary measures the Commission has urged Cuba to adopt. Other countries, such as Mexico and Colombia, are consistently on the list of most precautionary measures requested, but Cuba's presence has increased from only two granted requests in 2010 to four granted precautionary measures in 2011 and five in 2012. This increase may, in part, relate to Cuba's recent re-introduction into the IASHR.

From 2010 to 2012, requests for precautionary measures centered on two key topics: treatment inside Cuba's prison system and protection against discrimination based on one's political thoughts and associations. The Commission's most recent 2011 annual report included a chapter on Cuba in which the Commission extensively discussed the situation for human rights defenders and political dissidents in Cuba; imprisonment was addressed only as related to those issues.

In all cases, the Commission requested that Cuba reach an agreement with the beneficiary of the precautionary measures and report back to the Commission on progress toward investigating facts and protecting the person involved. Notably,

the Commission itself generally makes clear that issuance of a precautionary measure does not prejudice that a human rights violation has occurred. In the past, Cuba has acted on some of the precautionary measure requests, such as the release of an epileptic woman from prison, while others have gone unanswered, such as the continued imprisonment of political dissident Sonia Garro. Cuba's response to more recent requests is unknown.

Debate exists as to the legitimacy of the Commission's use of interim measures. Article 63 of the American Convention expressly dictates that the Inter-American Court of Human Rights (IACtHR) has the power to issue provisional measures in cases of extreme gravity and urgency. However,

the Convention makes no corresponding reference regarding the Commission's ability to issue interim measures. Yet, under Article 25 of the Commission's own governing Rules of Procedure, the Commission has established that it too has the power to issue interim measures to protect against irreparable harm. The Commission derives this power from the its duty to ensure compliance with state's commitments, outlined in Article 18 of the Commission's Statute, and also based on the Commission's functions as outlined in Article 41 of the American Convention.

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Entrevista con Yesica Sanchez Maya, Directora Adjunta del Consorcio-Oaxaca
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