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Updates from Inter-Governmental and Non-Governmental Organizations

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Impact of Harmonizing Rules of Procedure on the African Human Rights System

In November 2010, the Open Society Justice Initiative (OSJI), an organization dedicated to the use of litigation, advocacy, technical assistance, and research to support international judicial processes, issued a report by Professors David C. Baluarte and Christian M. De Vos on the major regional human rights systems. *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* examines the implementation of decisions from the African, European, and Inter-American regional human rights systems and the United Nations treaty bodies, and makes recommendations about how their decisions can be better enforced.

Through its comparative study, the OSJI report underscores how the regional systems can draw lessons from one another's experiences — for example, on the differentiation and coordination of a Commission and a Court. The African regional human rights system is currently implementing evolutionary changes to the interaction of its Commission and Court, seeking to address procedural and operational challenges. Created in 1986, the African Commission on Human and People's Rights (Commission) is the regional body tasked with interpreting the African Charter on Human and People's Rights. However, the decisions of the Commission are non-binding and have generally not been implemented by the responsible states. The more recent 2004 creation of an African Court of Human and Peoples' Rights raised initial hopes of greater accountability. Under the Protocol that established the Court, the Commission may refer cases to the Court when a State Party has failed to comply with Commission recommendations. Yet, this has rarely been done and, unfortunately, procedural impasses and uncertainties have hindered the Court's progress.

In 2010, the Commission harmonized its Rules of Procedure with those of the Court. These procedures clarify the relationship between the Commission and the Court, and may help promote regional accountability. The OSJI report details the contents of these harmonized Rules, not yet publicly available, and offers a unique perspective on how the organs in the African system can coordinate future actions by implementing their harmonized Rules of Procedure. The report focuses on Rule 115 (permitting the Commission to refer cases of state non-compliance to the Court after nine months), Rule 118 (establishing that the Court and the Commission shall meet at least once a year), and Rule 121(1) (creating a procedure for referral from the Commission to the Court); however, Rule 121(1) serves as a lynchpin by clarifying the Commission's ability to make non-compliance referrals to the African Court.

The harmonization of the referral procedures is one of the most interesting and anticipated aspects of the new Rules. Much like the Inter-American system, the Rules for the African System allow states the opportunity to first comply with the Commission's recommendations and also filter individual communications through the Commission before they reach the Court. Professor Baluarte told the *Human Rights Brief* that, "prior to the process [of] writ[ing] and implement[ing] the 2010 Rules of Procedure, communication between the Commission and Court was limited," but the referral mechanism has been strengthened by reading the new Rules 115, 118, and 121(1) together.

The OSJI report is optimistic that the new referral process will increase accountability. Indeed, this optimism seems well placed where the Commission and Court have just made procedural history with the Commission's first referral of the Libyan situation based on widespread and systematic violations of the African Charter. With the new Rules of Procedure not yet publicly available, it may take time yet for the full impact of the new procedures to work its way through the system. However, the harmonized Rules of Procedure are a significant accomplishment and an important first step demonstrating a commitment to protecting human rights and implementing judicial decisions in the region.

The Right to Education as a Legally Enforceable Human Right

March 8, 2011 marked the 100th anniversary of International Women's Day (IWD), a holiday to celebrate the economic, political, and social achievements of women. In a message to commemorate the centennial anniversary, UN Secretary General Ban Ki-Moon stated that "in too many countries and societies, women remain second-class citizens," in large part due to their limited access to education. "Although the gender gap in education is closing," Ban Ki-Moon noted, "there are wide differences within and across countries, and far too many girls are still denied schooling, leave prematurely or complete school with few skills and fewer opportunities." This statement supports a widely held understanding that education is a key driver of economic, political, and social advancement, and as such, an essential component of an effort to achieve greater gender equality.

The legal basis for upholding equal access to education is widely acknowledged. The right to free, compulsory primary education for all is recognized by both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights. Education promotes gender equality by allowing individuals to access knowledge and methods for improving their lives. Accordingly, education not only enables women to take advantage of the same opportunities as men, but also fosters the understanding that achievement is not limited by gender.

NGOs support women's right to education through a variety of legal and non-legal mechanisms. Litigation is an essential element of the efforts of many NGOs to promote the right to education for women. For instance, the Socio-Economic Rights and Accountability Project (SERAP) and Amnesty International brought a case against the Federal Government of Nigeria and the Universal Basic Education Commission (UBEC) of Nigeria before the ECOWAS Community Court of Justice. The Court declared that the right to education is a legally enforceable human right.

NGOs also work to find new solutions to practical obstacles in the way of women's access to education. For example, in Mozambique, where menstruation kept women and girls from school and jobs on account of the high costs of sanitary napkins, NGOs worked to create cheaper sanitary napkins made from banana leaves, and petitioned for taxes to be lifted on women's hygiene products. The success of this project compelled the nearby Rwandan government to pay for pads for schoolgirls.

Despite 100 years of recognizing International Women's Day, women and girls continue to be discriminated against in access to education. While international obligations and treaties exist, requiring equality between men and women, social prohibitions and discrimination continue to limit women's right to equal education. NGOs are helping to challenge and change these practices through legal means and other creative solutions that ensure that women and girls will continue to progress toward equality, especially in education.

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International Justice and National Stability in Lebanon

In 2005, the government of Lebanon requested that the United Nations establish an international tribunal to prosecute those responsible for the February 14 assassination of former Lebanese Prime Minister Rafiq Hariri and 22 others that same year. In response, Security Council Resolution 1757 created the Special Tribunal for Lebanon (STL) and its governing statute in 2007. Unique among the UN-established international tribunals, the STL applies only Lebanese law rather than a hybrid of national and international criminal law or solely international criminal law. Despite the fact that its establishment was initially based upon the Lebanese government's request, many in Lebanon, particularly within the Syrian-backed Hezbollah movement, oppose the STL and say that it is a foreign influence with too much power over the domestic judiciary. As a result, greater Hezbollah influence within the Lebanese government has raised concerns that the government will cease cooperating with the Tribunal.

In January 2011, as the STL prepared to issue its first sealed indictments, rumors surfaced that the indictments would implicate Lebanese Hezbollah members in the Hariri assassination. When Prime Minister Saad Hariri — the son of the late Hariri — refused to bow to pressure and withdraw support for the Tribunal, ten Hezbollah-affiliated ministers dramatically resigned from the government in protest, leading to a temporary governmental collapse and ousting Hariri from power.

In the aftermath, the new Prime Minister-designate, Najib Mikati has faced significant pressure from Hezbollah to rescind Lebanese political support for the STL. The new Lebanese government, dependent on the participation of its Hezbollah members, may seek to undermine STL's legitimacy or deprive it of the 49 percent of funding for which the Lebanese government is responsible. The STL has no independent enforcement agency and relies on the Lebanese authorities for detention and jailing capabilities; thus, loss of government support could seriously impair the STL with lengthy execution of warrants or a failure to "find" suspects. While the STL was designed by the United Nations to function independently of Lebanese politics, the Tribunal may face significant operational and enforcement problems.

The STL is a bold experiment for the United Nations. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), which were set up to investigate and prosecute entire classes of international crimes committed throughout a conflict, the STL's mandate covers certain specific acts of "terrorism," as defined in Lebanese domestic law. Further, in contrast to the ICTY and ICTR, which originally provided functional judicial authority where there arguably was none, the STL functions concordantly with a relatively established Lebanese judiciary. The STL was initially proposed because of concerns that the Lebanese court system would be unable to maintain political independence throughout such high-profile investigations.

In addition to concerns of redundancy with the domestic judicial system, the STL is criticized for its slow progress and alleged overspending. The STL only began operations in 2009 and submitted the first, sealed indictments in early 2011. Yet, without having begun trials, the STL has spent upwards of U.S. $70 million over just the past fiscal year. To compare, the International Criminal Court spent U.S. $149 million over the same time period on investigations and prosecutions in several situations around the world. The STL's response, that these early investigation costs will be reduced in coming years, is disputed since the trial process, involving an unknown number of suspects, may be long and costly.

Despite the obstacles and political risk of continuing the STL, the United Nations and the STL have repeatedly indicated that Pre-Trial Judge Daniel Fransen would begin unsealing the indictments or ordering Lebanon to arrest those indicted. For the STL to achieve its mandate of bringing justice to those behind the February 2005 assassinations, it must remain independent from Lebanese politics in conducting investigations and prosecutions. The United Nations has expressed a firm commitment to the STL, but where the future of the Lebanese government remains uncertain, so too does the viability of the STL.

Libyan Crisis Presents Opportunity for Reforming the UN Human Rights Council

In 2006, the United Nations Human Rights Commission, an inter-governmental human rights body under the General Assembly, was replaced with the Human Rights Council (UNHRC). The predecessor Commission had struggled with legitimacy in light of its member states' alleged human rights violations and a U.S. boycott under the Bush administration. The UNHRC was created in hopes that it would overcome the failings of its predecessor, but it too has been the subject of substantial criticism. Accusations include that the Council fails to swiftly respond to human rights crises and that its own member states such as China, Cuba, and Saudi Arabia have actively committed human rights abuses. In 2008, Secretary-General Ban Ki-Moon challenged the Council to insist on accountability and to respond to crises as they unfold. Recent developments in Libya have finally brought the type of response the Secretary-General was looking for, possibly indicating a new commitment to addressing tougher issues.

On February 25, 2011, the UNHRC held a special session to address the grow-

ing human rights crisis in its member state, Libya. At the session, the UNHRC passed Resolution S-15/L.1 by consensus, calling on Libya to respect human rights and taking the unprecedented step of establishing a commission of inquiry to investigate allegations of human rights abuses. On March 1, 2011, the General Assembly took further action by suspending Libya's membership in the UNHRC. The UNHRC's unprecedented establishment of a commission of inquiry expands on previous country-specific procedures, which have involved appointing experts to nations of concern, such as Burundi and Somalia, to monitor ongoing human rights abuses. These experts visit the country and periodically report findings to the Council. The UNHRC's Libya commission is designed to investigate with an eye toward future accountability, rather than merely monitoring.

According to Sihasak Phuangketkeow, president of the UNHRC, the commission of inquiry will "investigate all alleged violations of human rights, [to] establish the facts surrounding those alleged violations and, also, if possible, [to] identify those who are responsible and consider accountability measures." Unfortunately, despite its broad investigatory goals, the commission, like previous country-specific procedures, is dependent on authorities in Libya for access and cooperation. Although a special session was called on February 25, 2011, to address the urgency of the Libya conflict, the commission will not report its findings to the UNHRC until June 2011, during the Council's next scheduled meeting. Further, the UNHRC has previously struggled with states that do not implement its recommendations and it is not clear Libya will respond to the commission of inquiry and its findings. Despite the shortcomings of the commission of inquiry, NGOs and editorials have lauded the commission's aims of assessing responsibility and laying the groundwork for future action as a welcome change from the less effective mechanisms of the past.

The commission on Libya is just a first step and the Council now has an opportunity to implement other positive changes. Libya's membership in the UNHRC, although now suspended, reveals a flaw in the Council's membership process. UNHRC membership is currently open to all member states. Admission is based on regional allocation, and although states are mandated to "take into account the contribution of candidates [for the] promotion and protection of human rights" prior to voting, there is no safeguard to prevent the election of grave human rights violators.

To continue improving its function and legitimacy as a protector of human rights, the UNHRC could mandate that the periodic reviews of prospective members be taken into account during the election process. It could further disqualify those states with extremely poor human rights records. An improved vetting process for UNHRC membership could reward a state's outstanding contribution to human rights, rather than relying only on international support. More stringent admissions could, however, lead to unintended consequences. States might be less willing to cooperate with the UNHRC's periodic reviews, or be unwilling to admit to human rights violations if faced with disqualification from the Council. Furthermore, standards that are too strict could unintentionally limit membership to developed countries with the wealth to implement and effectively protect human rights. Reformation of the membership process would be difficult, but not impossible, and would require the UNHRC to show awareness of the concerns held by prospective member states.

Sergei Magnitsky Case Highlights the Office of the Special Rapporteur on Torture

Russian lawyer Sergei Magnitsky died in a Moscow jail on November 16, 2009 after being arrested and jailed by the Russian government on charges of participation in a tax evasion scheme. Magnitsky denied these charges, claiming instead that his detention was a "personal vendetta" against him for implicating government officials and the mafia in a U.S. $230 million tax fraud and corruption scandal. After being held for over eleven months in squalid conditions and allegedly denied medical services, Magnitsky was only eight days away from release when he died. The criminal case against him never reached trial.

REDRESS, an organization that seeks accountability for those who commit torture, requested UN Special Rapporteur on Torture Juan E. Mendez to investigate the suspicious nature of Magnitsky's death. REDRESS alleges that the Russian government isolated Magnitsky, prevented him from meeting with his family or counsel, and kept him in inhuman conditions in order to force him to retract his testimony against Russian officials. REDRESS asserts that these conditions amounted to torture as defined in Article 1 of the Convention against Torture (CAT), which Russia has ratified. Under this definition, torture is the intentional infliction of severe pain or suffering, whether physical or mental, in order to intimidate, coerce, or punish that individual. REDRESS further claims that the government violated Article 2(1) of the CAT because it failed to implement effective measures to prevent acts of torture in its jurisdiction. Nor has Russia adequately criminalized torture. In fact, under the Russian Criminal Code (RCC), torture does not apply to state officials acting within their official capacity, which is a fundamental element of the CAT definition. REDRESS accordingly chose to bring the case to the Special Rapporteur in order to bring international pressure on the Russian government as Russia conducts its own investigation.

Special Rapporteur Mendez is taking the first steps to address this matter, acting within his mandate under a resolution of the former UN Human Rights Commission. Though unable to comment on the inquiry itself, in his capacity as a visiting law professor at American University Washington College of Law, Mendez explained, "Rapporteurships don't have investigatory powers . . . . What they do is make inquires to seek clarification of circumstances." Mendez further explained that, according to the general procedures of the Rapporteurship, his inquiry involves transmitting summaries of all credible and reliable torture allegations to the Russian government. The government is obligated under Article 13 of the CAT to investigate the allegations and respond. If the government responds, further exchanges may occur. At the conclusion of this dialogue, Mendez will submit his report to the Human Rights Council, which will then publish the information.

For its part, Russia claims to have completed a preliminary investigation, which found that those responsible for Magnitsky's health during his incarceration committed no wrongdoing, and to be preparing to issue a formal report on the matter. The government also stated that any UN inquiries into the matter would violate Russian legal procedures, although it does not specify how. Faced with this lack of cooperation, REDRESS could look to the UN Committee against Torture or the UN Voluntary Fund for Victims of Torture for

alternative remedies. The Committee has the power to examine individual complaints alleging CAT violations. But, according to Committee guidelines Article 21, it may only do so if domestic remedies have been exhausted. This rule may be waived if domestic remedies are shown to be "unreasonably prolonged or unlikely to bring effective relief." If the Russian government's internal investigation precludes judicial remedies, then the Committee will likely be able to admit and consider the complaint against Russia. Another option is for the Committee to raise the incident in its 2011 annual report or during its periodic review of Russia's compliance with the CAT, likely to occur in 2012.

In the meantime, Magnitsky's family may be able to access psychological and other support services through an NGO funded by the UN Voluntary Fund for Victims. The fund offers grants to NGO programs that directly benefit victims and their families. The grant money is normally used to support NGOs that provide psychological, medical, social, legal, and financial assistance to victims and their families. In an average year, the fund receives U.S. $14 million in requests and awards U.S. $9 million. In fact, the Voluntary Fund is already one of the major grant funders of REDRESS, enabling it to do legal and advocacy work on behalf of people like the Manitsky family. A Board of Trustees consults with the Special Rapporteur on Torture and the Committee against Torture when reviewing past and new applications for grants. Thus in recognition of REDRESS's important work on the Manitzky case, Mendez could support further funding to the organization. Although such support services may help survivors of torture, legal redress itself must come from the wrongdoing party, in this case the individuals responsible for Magnitsky's death and the Russian state.

Though the Magnitsky family no doubt faces numerous difficulties in its quest for redress, the involvement of the UN Special Rapporteur could potentially help in highlighting a significant human rights violation allegedly committed by Russia. The possibility of further action by the UN Committee against Torture or organizations operating with the support of grant funding from the Voluntary Fund demonstrates that UN bodies and mechanisms may facilitate justice and assistance for victims of torture and their families, even when the violation is committed by a member of the Security Council.

UNAMID's Difficulties in Darfur Reflect Outdated Mandate

When the fighting in Darfur became an international concern in June 2004, the African Union (AU) was first to respond with military force. It was not until 2007, after a series of UN Security Council resolutions on Darfur, that the African Union-United Nations Hybrid Operation in Darfur (UNAMID) was formed by UN Resolution 1769, placing the African Union Force in Darfur (AMIS) under UN authority. Resolution 1769 aimed to ensure better protection for civilians and assist with the implementation of the 2006 Darfur Peace Agreement (DPA).

UNAMID has struggled to provide effective aid, often seeming a step behind real diplomatic and political conditions on the ground. Already extended three times, UNAMID's mandate is set to terminate on July 31, 2011 if not reauthorized. Although the DPA is largely outdated, it is unlikely that a new peace agreement will come out of ongoing negotiations in Doha by the end of July. Nevertheless, if extended, UNAMID's mandate should be updated to reflect the DPA's failure and operation's primary purpose going forward: to protect civilian and aid groups in the increasingly violent region.

Widely criticized even in 2006, many now believe that the DPA has fully collapsed. Minni Minawi's faction of the Sudan Liberation Army (SLA-Minawi) was the only movement of many that actually signed the DPA, and after five years the government has failed to implement almost any aspect of the agreement. Further, SLA-Minawi and the Sudanese Army resumed fighting in early 2011. Today, new peace talks are taking place in Doha, Qatar between the Sudanese government and Darfur rebel groups, including the well established Justice and Equality Movement (JEM) and the uneasy alliance, Liberation and Justice Movement (LJM). While promising, the peace talks are threatened by the chief mediator Djibril Bassole's departure, multiple extensions, and the splintering of the LJM.

While UNAMID still has substantial military strength — over 22,000 troops, military observers, and police officers — the DPA, now effectively defunct, remains a central component of the mandate. Further, human rights organizations have claimed UNAMID is slow to respond in protecting civilians and is too deferential to the wishes of Sudan. UNAMID is required to inform the government of any military movement, which in practice operates as a *de facto* request for permission. Aid groups allege such limitations have significantly hampered the mission's effectiveness.

In actuality, UNAMID's mandate would allow much broader operations. Thus, it could be argued that it is failing to fulfill its mandate — reflecting either problems with implementation, problems with design, or both. When a peacekeeping force operates outside its mandate, the UN has in practice generally followed one of four paths. It can continue the mission under the existing mandate, but authorize some flexibility for the mission to adapt to changing conditions on the ground and thereby avoid having to renegotiate the mandate with the host country. Alternatively, the UN could request Security Council approval to alter the mandate, or even try to negotiate a new mandate with the host nation. Finally, the UN could terminate the mission. Termination of the mission, however, is the least desirable alternative, since it could further destabilize the region and lead to the collapse of the current peace talks in Doha.

If the UN chooses to keep UNAMID operating under the current mandate, it would likely do so in order to affirm that the mission to protect civilians is now its primary function. UNAMID's mandate also provides for it to assist with the implementation of any future peace agreements, and UNAMID could thus find itself implementing whatever new agreement may come out of the current peace talks in Doha. Furthermore, with its military strength, UNAMID could take a more active role in preventing violence against civilians. UNAMID could model itself after the UN Preventive Deployment Force (UNPREDEP), the successful mission in Macedonia, which aggressively patrolled and combated arms trafficking. Such a role may, however, make UNAMID more vulnerable to casualties, which have already reached 81 since the mission's founding. Although UNAMID might for this reason be unwilling to take stronger military action, this path would be preferable to increased cooperation with the Sudanese government.

Thus, UNAMID is most likely to continue under the current mandate or one

adapted slightly to the changing situation. Whether it can effectively protect civilians under an ongoing or altered mandate, however, remains an open question.

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