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Updates from the Regional Human Rights Systems

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UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

INTER-AMERICAN SYSTEM

THE UNITED STATES VIOLATES THE HUMAN RIGHTS OF A DOMESTIC VIOLENCE VICTIM AND HER CHILDREN

In August 2011, the Inter-American Commission on Human Rights (Commission) published its merits report on a petition submitted by the American Civil Liberties Union on behalf of Jessica Lenahan (formerly Gonzales) of Castle Rock, Colorado against the United States (U.S.). The Commission found that the U.S. had violated Lenahan's three daughters' rights to life, equal protection, and special protection as girl-children.

Lenahan v. U.S. is the first case brought against the U.S. before the Commission that draws domestic violence into the international human rights arena. The Commission's decision emphasizes states' obligations to protect people from recognized dangers, an obligation the U.S. Supreme Court rejects.

In May 1999, Lenahan was granted a restraining order against her estranged and violent husband, Simon Gonzales, also the girls' father. The following month, Gonzales took her daughters without informing Lenahan, violating the restraining order that had granted Lenahan sole physical custody. In clear distress, Lenahan communicated with the Castle Rock Police Department (Police Department) eight times in ten hours. Her complaints were summarily dismissed. When Gonzales drove to the police station and opened fire, police returned fire, killing him. Afterwards, the officers found the girls' bodies in Gonzales' truck, though it remains unclear whether they were killed by Gonzales or by the officers' return fire.

Lenahan filed suit against the town of Castle Rock for failing to protect her daughters. Lenahan argued that the town deprived her of her property interest in the restraining order without due process of law when the Police Department failed to enforce the restraining order. The District Court dismissed the case because it found no evidence of a viola-

tion of Lenahan's right to due process. The Court of Appeals found that Lenahan had a cognizable procedural due process claim and remanded for further consideration. Castle Rock sought certiorari, and the U.S. Supreme Court accepted the case in 2004. In June 2005, the Supreme Court ruled that Castle Rock had not violated Lenahan's due process rights. Instead, it found that Colorado's statute did not obligate the Police Department to respond to her complaints, but permitted officers to exercise discretion over enforcing the restraining order.

Having exhausted her domestic remedies, Lenahan petitioned the Commission to hear her case in December 2005, arguing that the U.S. had violated her daughters' right to life when it failed to protect them from a known danger. The Commission found the case admissible in July 2007. Before the Commission, the U.S. contested that Lenahan had informed the officers of the valid restraining order and that she had adequately communicated the danger Gonzales presented to her children. The U.S. also claimed that Lenahan did have full access to judicial process, and that the Supreme Court's ruling against her did not indicate that she was denied judicial protection.

Notably, the U.S. claimed that the American Declaration on the Rights and Duties of Man (American Declaration) does not impose an affirmative duty to protect individuals from private actors and that, given the information it alleged was provided by Lenahan, the Police Department responded in accordance with its obligations under domestic and international law. The U.S. argued that even if the American Declaration did impose an affirmative duty, it is merely a declaration of human rights principles and not a binding legal instrument. Moreover, the U.S. contended that the Commission's recommendations do not create any legal obligations because it has not ratified the American Convention on Human Rights (American Convention).

The Commission held in its merits report, however, that the U.S. was in fact

aware the three girls were in danger and failed to protect them, thus violating their right to life (Article I) under the American Declaration. In issuing the restraining order against Gonzales, the police had acknowledged the risk he posed to Lenahan and her daughters, creating an obligation to protect them from that risk. Furthermore, since the U.S. did not conduct a "prompt, thorough, exhaustive and impartial" investigation into the girls' deaths, it violated their rights to equal protection (Article II), judicial protection (Article XVIII), and special protection as girl-children (Article VII).

The Commission reiterated that the norms embodied by the American Declaration are recognized as a source of legal obligation for all OAS member states and therefore, the U.S. should adhere to them. The Commission concluded the merits report by recommending that the U.S. thoroughly investigate the girls' deaths, provide reparations to Lenahan, and adopt legislation requiring the enforcement of restraining orders and the protection of children harmed by domestic violence. Although the Commission cannot enforce compliance with its recommendations, the decision does serve as persuasive authority, as well as an admonition of the U.S.'s lack of protection of domestic violence victims and survivors.

VENEZUELA FAILS TO ADHERE TO INTER-AMERICAN COURT RULING

In September 2011, the Inter-American Court of Human Rights (Inter-American Court) ruled in *López Mendoza v. Venezuela* that the State had violated presidential candidate Leopoldo López's right to be elected by prohibiting him from holding public office. Though the decision is binding on Venezuela since it is a party to the American Convention on Human Rights (American Convention), it is unclear whether Venezuela will heed the ruling. The State's Supreme Court of Justice recently overruled *López Mendoza v. Venezuela*, declaring the Inter-American Court's ruling "unenforceable" because López is only temporarily barred from serving in public office and was not denied

the right to vote or exercise other political rights. Civil society has criticized the Supreme Court's decision for flagrantly ignoring international law.

Leopoldo López is a former mayor of Chacao who was prohibited from running for mayor of Caracas after the State brought two corruption charges against him. López was accused of budgetary and fiscal irregularities as mayor and as a state oil company employee. He was tried in two administrative proceedings and fined. In 2008, the Supreme Court of Justice prohibited López, along with 276 other politicians, from running for public office.

In March 2008, López petitioned the Inter-American Commission on Human Rights (Commission) to hear his case, arguing that his rights to participate in government and to due process had been violated when he was prevented from serving in an elected position without first being convicted in a criminal court. He claimed that an individual could only be prevented from holding an elected position through a criminal proceeding. The Commission found the case admissible in July 2008 and submitted it to the Inter-American Court for adjudication in December 2009.

The Inter-American Court ruled that López's right to participate in government under Article 23 of the American Convention was violated when he was prohibited from holding public office without being convicted by a criminal court. Additionally, the Inter-American Court found that the State had violated López's right to a defense under Article 8 by not requiring concrete evidence of López's corruption in the administrative proceedings against him. The Inter-American Court found that the Supreme Court of Justice's issuance of a decision after three and a half years was reasonable considering the case's complexity. Finally, it ruled that the State did not violate López's right to equality before the law under Article 24, since there was insufficient evidence to determine whether the other 276 candidates prevented from running for election had been treated differently.

The State argued before the Inter-American Court that it had not violated López's rights because a criminal conviction was only necessary for the total deprivation of a person's right to be elected, not for a temporary sanction. The State also

argued that the administrative process provided an adequate procedure for petitioners to defend themselves. The Inter-American Court rejected both arguments by holding that the right to be elected can only be restricted after a criminal conviction.

Venezuelan President Hugo Chávez has expressed disapproval of the Inter-American Court's ruling, claiming that it violates the State's sovereignty. The State's Attorney General brought the issue to the Supreme Court of Justice in September 2011, which held that the Inter-American Court's decision was unenforceable and that López's political rights had not been violated. The Supreme Court of Justice determined that López would not be allowed to serve in public office despite a Constitutional provision according international treaties the same weight as domestic law. The Supreme Court of Justice decision clarified that López is only prohibited from actually serving in an elected position, not from running. As of October 19, 2011, Lopez is now running for president, having been granted permission by the Consejo Nacional Electoral (National Electoral Council, CNE). The CNE, deriving its authority from Venezuela's Constitution, was designed to be insulated from the political process.

This is not the first time President Chávez and his administration have used the courts to assert political power. In May 2004, President Chávez signed a law increasing the number of Supreme Court justices and creating two new methods of removing justices. The law facilitates filling the available positions with justices who are likely to support President Chávez's policies. A February 2010 Commission report found that the State intimidates and punishes those with contrary political opinions. In addition, the State has increased the scope of its insult laws and the penalty for "incitement," which gives the government censorship power. These laws and reports, along with the Supreme Court of Justice's recent decision, indicate that Venezuela is continuing to use all three branches of government to repress political opposition. Though the CNE's decision to allow López to register contrary to President Chávez's wishes could be an indication of coming change, it remains to be seen whether the Supreme Court of Justice would allow López to take office if elected.

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EUROPEAN COURT OF HUMAN RIGHTS

ECTHR DECISION FOR RUSSIAN OIL COMPANY EMPHASIZES FOCUS ON PROCEDURAL HUMAN RIGHTS VIOLATIONS

The European Court of Human Rights (ECtHR) ruled on September 20, 2011, that Russia violated defunct Russian oil company Yukos' rights to property and a fair trial but dismissed charges that the acts were politically motivated. The case of *Yukos v. Russia* arose from a tax-evasion investigation that bankrupted one of the country's largest companies and jailed two of its top executives. Corporate plaintiffs, while permitted, are uncommon under Article 34 of the ECHR, which allows individuals, non-governmental organization, and any "group of people" to bring a case against any country that is party to the convention. In ECtHR jurisprudence, the occurrence of cases brought by companies or individuals with corporate interests are rare, accounting for only 3.8 percent of the 1998-2003 case law.

Yukos filed a claim with the ECtHR shortly after the Russian Tax Ministry issued an initial ruling in April 2004 that because the company had used illegal tax shelters, it owed \$2.88 billion, a figure that eventually grew to more than \$10 billion. Immediately after the ruling, the government began freezing the company's assets, and within three months, Yukos' claim in the Moscow City Commercial Court and its subsequent appeal were denied and the government sold a large part of the company. By 2007, after exhausting all domestic appeals and failing to strike an agreement with the Tax Ministry for repayment, the company dissolved. Yukos' complaint to the ECtHR alleged that the speed of the proceedings violated Russian law and prevented an adequate defense under Article 6 of the European Convention on Human Rights (ECHR). The complaint further alleged that the tax enforcement and selling of assets were "unlawful, arbitrary and disproportionate" under Article 1 of Protocol 1 and Articles 1, 7, 13, 14, and 18 of the ECHR.

The ECtHR Chamber found that the proceedings moved faster than the already rapid Russian legal system allows and violated minimum protections under Article 6(3) by failing to provide adequate time to review all the relevant material, some of which was provided just four days before the initial trial. The Chamber further found Russia in violation of Article 1 of Protocol 1—the right to property—by assessing disproportionate fines and prematurely seizing company assets. The ECtHR also ruled, however, that because the tax investigation was legitimate and no evidence was provided that other companies used Yukos' methods, there were no grounds for claims of prejudicial treatment.

The human rights community has been critical of the *Yukos* case, especially of the potentially political undertones of dismantling Yukos and jailing its CEO Mikhail Khodorkovsky, a critic of the Putin administration whom Amnesty International declared in 2011 a “prisoner of conscience.” The claims of political prejudice failed in both the *Yukos* case and Khodorkovsky's own case earlier this year. Antoine Buyse, senior researcher at the Netherlands Institute of Human Rights in Utrecht, explained that because the ECtHR is concerned about Russia implementing its rulings, “the court prefers to stay on firm ground and finds violations which can be clearly argued.”

Such an approach is common with the court's history of finding procedural human rights violations with the ECtHR basing nearly half of its decisions from 1959-2009 in a right to a fair trial. The other issue in the *Yukos* case, the protection of property, is the second most cited right in the ECtHR's jurisprudence. By dismissing the issue of political prejudice in the *Yukos* trial, the court averts a decision that would be much less palatable to Russia, which is the defendant state in nearly a quarter of new cases brought in 2009. The ECtHR's decision may thus appear at odds with the concept of broad human rights protection, but the court is unlike many other bodies in that its decisions are binding across the 47 member states of the Council of Europe. Given the mandate of the ECtHR and the political conditions in its member states, the case might be a template for a permanent, regional body to successfully protect the human rights of an entire continent while maintaining relations and sustaining cooperation from member states.

TWO DECISIONS EXPAND EXTRATERRITORIAL JURISDICTION OF EUROPEAN COURT

Judicial enforcement of human rights violations during foreign intervention was expanded by two Grand Chamber decisions handed down by the European Court of Human Rights (ECtHR) in July 2011. Both cases arise from the war in Iraq, where the human rights community has voiced frustration over perceived violations by occupying powers.

In *Al-Skeini and others v. the United Kingdom*, the ECtHR expanded its extraterritorial jurisdiction to apply the European Convention on Human Rights (ECHR) outside the borders of its member states. Previous jurisprudence had limited such application to nations over which a European state controls—a standard of occupation much higher than the UK's involvement in Iraq. British troops joined the initial invasion in 2003, and the United Kingdom (UK) was responsible for security in the region of southern Iraq in which the six Iraqi nationals whose families filed suit were killed in 2003. The families claim British soldiers were responsible and brought the ECtHR suit over allegedly inadequate investigations by the British government into the deaths. The ECtHR rejected the UK's claim that the ECHR did not apply, noting that there still existed restrictions on application outside of borders, but that under the special circumstance where a country “exercised public powers on the territory of another State,” jurisdiction could be established by control over that territory's people. Specifically, the ECtHR's conclusion established jurisdiction within ECHR Article 1, the obligation to protect. Once that bar was met, the ECtHR found a violation of Article 2—the right to life—for the failure to investigate.

In a separate decision issued the same day, the ECtHR further expanded the court's jurisdiction in Iraq to cover a member state's detention of a man, without trial, for suspected terrorist recruitment. In *Al-Jedda v. the United Kingdom*, an Iraqi man with British citizenship was held in a UK-controlled detention facility in Iraq for three years before being stripped of his citizenship but released without charges. The ECtHR found the British government in violation of ECHR Article 5.1—the right to liberty and security—after the court dismissed the claim that UN Security Council Resolution 1546, which authorized the

war, superseded the ECHR and bound the British government to reject the convention. The court did not completely rule out the possibility that a UN resolution could supersede application of the ECHR, but limited it to instances where the resolution was specific.

The decision in *Al-Skeini* has been heralded as a landmark case by human rights groups, who see it as facilitating the universal application of international human rights law. “The European Court has spoken clearly—Britain can't claim its soldiers have no human rights duties once they are in another country,” said Clive Baldwin, senior legal advisor to Human Rights Watch. “The British government should now finally accept human rights law applies to its acts anywhere in the world and ensure a full and independent inquiry into all these killings.” The decision raises questions about the extraterritorial jurisdiction of other human rights institutions as applied to Iraq and the so-called global war on terror. Serious allegations of violations—for instance, against the United States Justice Department's decision not to investigate acts of torture by CIA interrogators—are often brought by victims or human rights groups that have been left with little judicial recourse. Although the ECtHR decision would not apply to the United States, if such allegations were to implicate a European citizen, there could be a method for victims or rights advocates to seek redress after the court's decisions in *Al-Skeini* and *Al-Jedda*.

Additional cases concerning the UK's involvement in Iraq could follow at the ECtHR, or domestic courts may begin to adhere to the new precedent. Extraterritorial jurisdiction could also become relevant with Europe's lead in supporting the Arab Spring, especially Libya. Under current circumstances, it is unlikely the ECtHR would rule that any member state meets the jurisdictional standards in Libya unless involvement expands. However, as member states consider the nature of their involvement or occupation abroad, the *Al-Skeini* and *Al-Jedda* decisions could, taken together, guide military policy and influence the legal approach of human rights groups to alleged violations.

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AFRICAN HUMAN RIGHTS SYSTEM

AFRICAN COMMITTEE FINDS KENYA IN VIOLATION OF THE RIGHTS AND WELFARE OF THE CHILD

In its landmark decision in *Nubian Minors v. Kenya*, the African Committee of Experts on the Rights and Welfare of the Child (Committee) for the first time found that the Government of Kenya had violated the African Charter on the Rights and Welfare of the Child (Children's Charter) in its treatment of Kenyan children of Nubian descent. As an organization with a mandate to protect and promote rights and welfare of the child, the Committee oversees the implementation of the Children's Charter. Accordingly, following a Communication filed by the Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI), the Committee found that the Kenyan government has failed to ensure Nubian children the right to Kenyan citizenship at birth, which creates a myriad of obstacles throughout their development.

Though Article 14 of the 2010 Kenyan Constitution confers citizenship to persons born within the country with at least one parent also born in Kenya, Nubians have historically been considered aliens without protection and benefits of citizenship despite meeting the legal requirements. Consequently, Nubian children grow up virtually stateless, without the citizenship status afforded to all other children born within Kenya's borders. According to the Communication, public hospitals in Kenya routinely deny Nubian parents birth certificates for their children, often providing the pretext that the parents—having faced discrimination themselves—lack valid identification. Without a birth certificate, Nubian children are thereafter denied essential government benefits, such as access to education and health care. By age 18, they must undergo a complex and lengthy vetting process to obtain an identification card that proves their Kenyan citizenship. As adults without the proper identification, Nubians will not have the right to own property and they will face many obstacles when seeking employment. Taken together, these forms of state-sponsored discrimination trap Nubian children in poverty and limit their opportunities for personal development.

As a State Party to the Children's Charter, Kenya has an obligation to protect the rights of children. Pursuant to Article 44 of the Charter, the Committee has jurisdiction to review the Communication against Kenya. Specifically, IHRDA and OSJI alleged violations of Article 6(2), 6(3), and 6(4), which guarantee the right to nationality upon birth and the proper registration of such. The IHRDA and OSJI further alleged violations of Article 3, which prohibits unlawful discrimination *inter alia* based on ethnicity, and Articles 11(3) and 14(2), which grant equal access to education and health care, respectively.

In its decision, the Committee found that under Article 6(4), Kenya is required to take measures to ensure that children have nationality upon birth. The Committee also found that Kenya violated Article 3, because of a discriminatory practice in the country toward children protected under the Charter that does not serve a legitimate state interest, but rather renders Nubian children stateless. The Committee also held that limited access to education and health-care stemmed from a preexisting violation of Articles 6(2) and 6(3). The Committee recommended that Kenya take legislative and administrative measures to ensure that Nubian children received citizenship, and to implement a non-discriminatory birth registration practices. The Committee also recommended that Kenya report on the implementation of such measures within six months.

The decision is a milestone in the fulfillment of a founding principle of the Charter, to ensure the rights of children regardless of race or ethnicity. The Committee's decision is made publicly available, and Kenya is required to submit a report on measures implemented to comply with the decision. Accordingly, Kenya has to institute mechanisms to ensure that hospitals allow Nubian parents to register their children at birth. The Committee will appoint a member responsible for monitoring compliance. In the face of noncompliance, the Committee may consider bringing the case to the African Court on Human and Peoples' Rights, pursuant to Article 5 of the Court's founding Protocol.

Following the Committee's finding, the Citizenship Rights in Africa Initiative has submitted a recommendation to the Task Force on Citizenship and

Related Provisions of the Constitution, calling for a complete revision of the Citizenship Act to confer citizenship to individuals born to stateless parents in Kenya. Established by Kenya's Minister of State for Immigration and Registration of Persons, the task force should act on the recommendation to supplement the citizenship provision of the constitution to comply with the recommendation of the Committee. With no supporting legal foundation, the Kenyan vetting process—which requires an additional proof of identity for Nubians and an interview before a vetting committee to obtain identification document—should also be revoked. Ultimately, Kenya ought to grant Nubian children citizenship to demonstrate its recognition of Nubians as Kenyans by birth, entitled to equal benefits and protection afford to all citizens in the country.

THE KAMPALA CONVENTION: BRIDGING THE GAP IN THE PROTECTION OF INTERNALLY DISPLACED PERSONS IN THE AFRICAN HUMAN RIGHTS SYSTEM

Forced to leave their homes due to violent conflicts, gross human rights violations or natural disasters, an estimated 12 million people in Africa are classified as internally displaced persons (IDPs), among the most vulnerable groups with little to no legal protection in the African human rights system. IDPs do not cross international borders, and therefore are not beneficiaries of international laws protecting refugees. IDPs are often forced into host communities within their countries where they continue to face security risks while also confronting hardships accessing basic necessities, such as food and water. Though IDPs in Africa are entitled to the general rights and protections enshrined in regional human rights instruments, such protections do not address the concerns unique to them. In 2009, the African Union (AU) unanimously adopted the Convention for the Protection and Assistance of IDPs (Kampala Convention), the first legal instrument of its kind throughout the international community. While the Kampala Convention was at the time of its construction a historic advancement—adopted unanimously by the AU—the document is to date not legally enforceable because it has not received ratification by fifteen countries.

The Kampala Convention represents the first attempt by the African Union—and the international community as a whole—to enumerate legally binding State Party obligations toward IDPs. The Kampala Convention provides legal protection for IDPs on three fronts: Article 3 requires signatory states to take steps to prevent displacement, including incorporating the Convention into their domestic law to ensure compliance; Articles 5 and 9 outline state obligations to protect and assist IDPs once they are displaced, including facilitating access for humanitarian organizations; and Article 11 requires states to take measures to sustainably reintegrate IDPs back into the society. Article 6 outlines the responsibilities of international organizations and humanitarian agencies when providing aid. Where States Parties fail in their obligations, Article 12 compels them to provide compensation to redress any transgression the IDP may have suffered as a result, and further seeks to hold armed forces accountable for any criminal acts they commit against IDPs.

Many states lack the political will, or simply do not prioritize the problems of IDPs in their national agenda. When a State ratifies the Kampala Convention, it becomes legally bound to adopt implementing legislation and align its domes-

tic approach to that of the Convention, which may implicate a change in the current political culture. Ratification, thus, requires the concerted political will of key officials, which seems to be lacking in those states that have not ratified the Convention. Specific provisions, such as Article 10—which requires states to prevent displacement due to private development projects implicates land rights and foreign investment—and Article 11—which requires states to provide reparations—leave state parliaments reluctant to ratify the Convention.

States Parties may also lack the capacity or resources to comply with the obligation of Kampala Convention. In many states, the needs of IDPs outmatch and overwhelm the limited resources state budgets can apportion to assist them. However, though the Kampala Convention places a heavy—though necessary—financial burden on states to structure their domestic laws to ensure compliance, this burden is balanced by Article 8, which articulates the State's right to seek assistance from the AU. Moreover, the Kampala Convention provides for cooperation among states within the AU, and between states and various international organizations and humanitarian agencies.

Thirty-one countries in AU have signed the Convention without ratification, which, under customary international law, requires the signatory states not to act in a way contrary to the purpose of the Convention even though it has not entered into force. Some states, such as Uganda—the first to ratify—have actively pursued implementation. Prior to ratification in the Gambia, there was a campaign to educate national assembly members and various civil society organizations about the benefits of the Kampala Convention, which seemed to propel the ratification process. All African states ought to ratify the Kampala Convention not only as a way of protecting IDPs once an armed conflict or natural disaster breaks out, but also as a preventative measure to prevent displacement before it rises to the level of a humanitarian crisis. There is a gap in the protection of IDPs in the African regional human rights system, and the Kampala Convention is the legal instrument that will aid in bridging that gap.

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