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Regional Human Rights System

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REGIONAL HUMAN RIGHTS SYSTEM

AFRICAN SYSTEMS

THE FUTURE OF EACJ HUMAN RIGHTS JURISPRUDENCE REMAINS UNDECIDED

A recent case decided in the East African Court of Justice (EACJ) raised issues related to human rights jurisdiction in the EACJ, the judicial body of the East African Community. The human rights community considers *Samuel Mukira Mohochi v. Attorney-General of Uganda* as the most recent addition to the EACJ's evolving human rights jurisprudence. Despite the petitioner's assertions of human rights jurisdiction, the Court emphasized that it does not have jurisdiction to hear human rights cases. Yet, the Court nevertheless found violations of the Treaty for the Establishment of the East African Community (EAC Treaty), which provided de facto protection for the plaintiff's human rights.

Samuel Mukira Mohochi, petitioner and human rights activist, attempted to enter Uganda in April 2011 for a scheduled meeting with the Chief Justice of the Ugandan Supreme Court. Mr. Mohochi, however, was stopped by immigration officials, detained, and sent back to Kenya without notice as to why Uganda refused him entry or a chance to contest the denial of entry. After Uganda denied him freedom of movement, a right guaranteed under the EAC Treaty and the African Charter on Human and Peoples' Rights (the African Charter), Mr. Mohochi brought the case to the EACJ.

The complaint alleged violations of both the EAC Treaty as well as the African Charter, the main human rights treaty under the African Union. The Court, however, has not been granted jurisdiction to hear claims based on violations of the African Charter. Under Article 27 of the EAC Treaty, human rights jurisdiction may be granted in the future at the discretion of the Council of Ministers, an organ of the EAC. The Council has yet to grant this jurisdiction to the Court. Accordingly, the Court did not rule on violations of the African Charter, but it did hold Uganda to its obligations under Article 6(d) of the EAC Treaty, which obligates Member States to uphold good governance and to protect human and peoples' rights under the African Charter. Additionally, the Court found violations of Article 104 of the EAC Treaty and Article 7(1) of the Protocol on the Establishment of East African Community Common Market, both of which establish the Member States' obligation to ensure freedom of movement of citizens between States.

In 2005, the Council of Ministers undertook initiatives to extend jurisdiction of the EACJ. However, these initiatives were not adequately implemented. The Council approved a draft Protocol to Operationalize Extended Jurisdiction of the East African Court of Justice in July 2005. At the conclusion of its meeting in June 2012, the Council directed the EAC Secretariat to write up a report on policy and legal implications of extended jurisdiction. Extension of jurisdiction remains on the Council's agenda.

While the Council of Ministers continues to debate the extension of jurisdiction, members of the human rights community argue that the EACJ already has the jurisdiction to hear human rights cases. They assert that Article 27(2) of the EAC Treaty does not clearly deny the EACJ human rights jurisdiction, and when Article 27 is considered together with the reference to human rights in Article 6(d), the EACJ has jurisdiction to hear human rights cases. Proponents of this view cite cases such as *Mohochi*, in which the EACJ has effectively ruled on human rights violations as evidence of the court's human rights jurisdiction. The EACJ, however, remains firm in declaring its lack of human rights jurisdiction.

Although resisting explicit classification of the Court's decisions as "human rights cases," — nevertheless indirectly based on human rights principles — the EACJ repeatedly hears certain human rights claims and circumvents potential jurisdictional issues. However, the Council's final confirmation of extended jurisdiction is the only way to ensure future adjudication based on human rights provisions. Other Sub-regional Economic Communities (SECs) have added human rights jurisdiction to their judicial organs later in their history. For example, the Economic Community of the West African States (ECOWAS) Community Court of Justice, established in 1991, originally only had jurisdiction to interpret the ECOWAS Treaty, but extended its jurisdiction to include human rights cases in 2005. The EAC may follow suit and grant human rights jurisdiction to the EACJ rather than continue to create its own limited jurisprudence on individuals' rights.

THE AFRICAN UNION WORKS TOWARDS ELIMINATING SEXUAL VIOLENCE IN AFRICA

The African Union (AU) recently hosted a meeting to work towards eliminating or significantly reducing rape and other forms of sexual violence in conflict and post conflict African countries. The African Union Commission (AUC), the executive body of the AU, convened experts to address the resulting human rights violations and peace and security consequences of a culture of sexual violence that persists in conflict and post conflict countries. The meeting took place under the African Solidarity Initiative (ASI), an AU program started in 2012 to support reconstruction in post conflict countries on the continent. When first formed, the ASI identified key areas on which to focus support for post conflict countries, including gender inequality and sexual violence.

The AU has held meetings on sexual violence in the past. At a meeting of the Peace and Security Council of the African Union in 2011, survivors of sexual violence in conflict and post conflict countries testified as to their experiences. During the 2011 meeting, the Peace and Security Council made a commitment to eliminate sexual violence. The recent meeting on sexual violence in conflict areas may be considered one of the first concrete steps resulting from this commitment two years earlier.

Warring groups use sexual violence as a means of control with little consequences for their actions. Sexual violence tactics may be employed to embarrass or punish civilians, award troops, destroy cultures, and ethnically cleanse communities. In the Democratic Republic of the Congo (DRC), a country where four women are raped every five minutes according to a 2011 study, military and other combatants have consistently used sexual violence as a weapon to retaliate and punish people thought to support other militia or rebel groups. Additionally, rape is often used to intimidate communities so that the military or rebel groups can take control of the area and use the abandoned resources.

Sexual violence in conflict and post conflict areas extends beyond its use as a weapon of war. Women in conflict zones are often vulnerable due to a lack of resources and available protection. For instance, military groups often separate internally displaced women from other family members and force these women to submit to sex in exchange for protection or food. Additionally, military groups promising to protect a population are often the perpetrators of sexual violence against that same population. Moreover, the high rates of sexual violence during a conflict can lead to a shift in the social norms, resulting in high rates of sexual violence post conflict as well. A study conducted in the eastern part of the DRC demonstrated that rapes unrelated to conflict went up from one percent to thirty-eight percent between 2004 and 2008.

The experts meeting on sexual violence took a multi-pronged approach to eliminating sexual violence, including changing the normative view that sexual violence in conflict and post conflict societies is acceptable. The experts focused on eight countries that the ASI has previously assessed for post conflict needs: Burundi, Ivory Coast, the Central African Republic, the DRC, Liberia, Sierra Leone, the Republic of Southern Sudan, and the Republic of Sudan. One of the meeting's priorities was to, through the lens of the eight countries, brainstorm a plan to address the underlying causes of sexual violence, including social norms and a lack of access to justice. These approaches seek to contribute to a framework for combatting the widespread impunity that encourages the vicious cycle of sexual violence.

Two of the eight countries on which the ASI focuses have already made binding commitments to prohibit sexual violence domestically. Liberia and the DRC have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 4 of the Protocol prohibits violence against women, including forced sex. The multifaceted approach that the ASI is taking towards sexual violence in conflict and post conflict countries and the resulting framework will provide guidelines for countries in determining how to address the issue and, in the case of Liberia and the DRC, fulfill their commitments to the Protocol.

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European Human Rights System

ECtHR Holds Websites Liable for Anonymous User Comments

In a holding that has come under sharp criticism by freedom of expression activists, the European Court of Human Rights (ECtHR, Court) ruled that Delfi, one of Estonia's largest online news providers, is responsible for defamatory comments posted by its users about a ferry company. The Court held that websites have a responsibility to monitor their users' comments and remove unlawful remarks. In an electronic age that has become increasingly unfriendly to newspapers, news outlets have found refuge in online platforms. As a result of the changing medium and interactive functionality, websites are very conscience of the negative effect that disallowing anonymous comments will have on their business.

The Court held that Delfi's liability was both "practical" and "reasonable"—practical because posts were anonymous which made tracing the commenters difficult, and reasonable because Delfi received commercial benefits from its user participation. This ruling rejected Delfi's argument that the European eCommerce Directive defines websites in similar situations as merely "passive and neutral" hosts.

The Court also rejected Delfi's argument that the ruling is a violation of Article 10 of the European Convention on Human Rights (ECHR), which protects freedom of expression. In its analysis, the Court engaged in a delicate balance between the news portal's right to freedom of expression protected under Article 10 and the ferry company's right to protection of reputation protected under Article 8. The Court considered factors such as the reputation of the company and its prior conduct, the subject of the report that encouraged such comments, the contribution of the comments to a debate of general interest, the consequences of the publication, and the severity of the sanction. In weighing the factors, the ECtHR upheld the ruling against the news outlet as a necessary interference of expression in the interest of a democratic society to protect the reputation and rights of others.

Perhaps the most troubling aspect of this ruling for similar websites around the world is that it gives rise to special jurisdictional issues. Disputes over the liability of user comments fall under the jurisdiction where a comment is read, not where it is written or where the website is based. Companies like Forbes have expressed concern that under this ruling they must take care that no one using their online platform defames anyone under not only Estonian law but also under laws of other countries such as France and the United Kingdom where libel laws are strictly applied. Forbes also pointed out that companies with no assets in Europe may be a bit safer, but that sites such as Facebook could potentially be subject to the incredibly varying national privacy and libel laws of each of the twenty-eight members of the European Union. Activists for the freedom of expression from the organization Index on Censorship fear that websites around the globe will be forced to prohibit anonymous comments entirely. Recognizing jurisdiction where the comments are read rather than written or posted also poses a threat of forum shopping. Those more susceptible and vulnerable to defamatory remarks could make a point to be in the jurisdiction where the libel laws are most favorable to the alleged victim.

Further cause for concern has been raised over the Court's rejection of Delfi's argument that the ferry company could have sued users posting offensive comments, and instead holding that it would be difficult and "disproportionate" for the ferry company to identify the anonymous users. The decision suggests that had

Delfi taken extra precautions to protect the reputation of others, such as requiring user authentication and more closely monitoring the comments, it may have been saved from liability. If courts strictly follow this ruling, in theory, online platforms that require users to provide names and contact information to authenticate their accounts will be much safer from potential liability. This would include websites that are almost entirely based on user comments, such as Facebook, Twitter, and Reddit. Once the websites require user authentication, individual users could then be identified and held liable for defamatory comments. Many websites, however, rely on the popularity of allowing anonymous comments and website trials that include intense authentication processes have resulted in significantly less users and viewers alike.

Online platforms are taking solace in the fact that the judgment is not final and is subject to further review. Delfi will likely request referral of the case to the Grand Chamber. It must do so within three months, at which point a panel of five judges will either (1) decline the referral, making the current Chamber judgment final, or (2) determine that the Grand Chamber should hear the case and deliver a final judgment.

Poland refuses second ECtHR request for information regarding secret CIA detention centers on its soil

Despite extensive allegations and evidence that the United States Central Intelligence Agency (CIA) operated secret facilities in several foreign countries, Poland is the only country that has launched a domestic criminal investigation into the matter. Through domestic proceedings, Poland is investigating allegations that the country hosted a CIA "black site," or secret detention center, which could potentially violate both domestic Polish law and international law such as Article 3 of the European Convention on Human Rights (ECHR), along with its implementing legislation, prohibiting torture. However, the investigation has been ongoing since March 2008 with little progress.

In response to Guantanamo detainee Abu Zubaydah's allegations that he was subjected to violent interrogation techniques at a CIA site in northern Poland, the European Court of Human Rights (ECtHR) has once again asked Poland to provide more information about its cooperation with the United States and its participation in the CIA black site program. Zubaydah filed a complaint against Poland with the ECtHR on March 25, 2013. Polish officials deny hosting any black sites and claim potential interference into domestic proceedings as the justification for not cooperating further with the ECtHR. This is Poland's second refusal to provide the Court with information on this issue within a year. Poland also refused to answer the Court's questions regarding information on the sites last September during a case against it brought by Abd al-Rahim Al-Nashiri, who was allegedly detained and tortured by the CIA in Poland from December 5, 2002 to June 6, 2003.

In *Al-Nashiri v. Poland*, the ECtHR questioned whether Poland has "complied with its duty under Article 3 of the Convention to carry out an 'effective and thorough investigation into the allegations of torture, other forms of ill-treatment prohibited by this provision, and incommunicado detention alleged to have occurred on its territory in connection with the CIA High Value Detainees Programme . . . ." Human rights officials such as Human Rights Commissioner Nils Muiznieks and NGOs like Open Society and Human Rights Watch claim that the domestic investigation is ineffective and there remains a potential violation of Article 3 of the ECHR.

An allegation of a violation of Article 3 – which prohibits torture or inhuman or degrading treatment or punishment – requires an effective investigation by the state in question. Failure to conduct an appropriate investigation could be a violation of Article 13, which provides the right to an effective remedy before a national authority. The United Nations has stated that alleged "gross human rights violations and serious violations of humanitarian law" require an effective investigation. Furthermore, victims and their relatives must have "effective access to the investigative process" and relevant information must be disclosed to the general public. These protections are essential to the victim's right to truth. U.N. Special Rapporteur on Torture, Juan Méndez, has commented that "[t]he blanket invocation of state secrets . . . such as the United States secret detention, interrogation and rendition programme or third-party intelligence . . . prevents effective investigation and renders the right to a remedy illusory" and thus also incompatible with Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to an effective remedy of violations of the ICCPR.

The Court has frequently found for petitioners when it deems domestic investigations ineffective and has stated that domestic remedies must be sufficient in "practice as well as in theory." Domestic remedies cannot be inadequate, ineffective, or illusory. Thus, Zubaydah and Al-Nashiri may argue that they cannot exhaust domestic remedies in Poland because the Polish Government is unable to offer actual examples of applicable remedies being effective in similar cases. Although the investigation in Poland accompanies a criminal case, the slow pace of the current proceedings is withholding information necessary to pursue a domestic civil case.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Poland in June 2013, but did not focus on the investigation with regards to that visit or in its 2009 report on Poland. Because there are now two cases before the Court on the issue of CIA black sites in Poland, Poland faces increased pressure to make progress in its own investigations. It is unclear how much longer Poland will be able to excuse itself from providing information based on its own proceedings while those proceedings are making little headway.

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Inter-American System

Commission Amends Precautionary Measure Rules and Expresses Concern for United States' Continued Failure to Comply in Death Penalty Cases

On September 19, 2013, the United States ignored a request from the Inter-American Commission on Human Rights (IACHR, Commission) to delay the execution of Robert Gene Garza, a death

row inmate in Texas, who was granted precautionary measures on August 26, 2013. Garza's case was admitted to the Commission on September 16, 2013 for further investigation of alleged due process violations. Two days later, the Commission issued a press release reminding the United States of its obligation to adhere to the precautionary measures suspending Garza's execution until the Commission decided the merits of the case. However, the United States proceeded with the execution and Garza was put to death on September 19, 2013 by lethal injection.

The United States' failure to comply with the precautionary measures follows the release of the Commission's newly amended Rules of Procedure, effective August 1, 2013. The reforms included significant amendments to Article 25, which governs the doctrine of precautionary measures. Under its powers derived from Article 25 of the Rules of Procedure, Article 106 of the Organization of American States (OAS) Charter, and Article 18(b) of the Statute of the Inter-American Commission on Human Rights, the IACHR grants precautionary measures in serious and urgent situations to prevent irreparable harm. Professor Rodríguez-Pinzon notes that the Commission considers precautionary measures to be "inherent" to their adjudicatory functions.

Article 25 now reads with more specificity, providing definitions for "serious situation," "urgent situation," and "irreparable harm." Addressing the contested issue of states' obligations to adhere to precautionary measures, Article 25 also outlines the relevant provisions in international law from which the Commission derives the power to grant precautionary measures. The amendments to Article 25(10) allow for more explicit follow-up measures including "timetables for implementation, hearings, working meetings, and visits for follow-up and review." This language allows the Commission to closely observe precautionary measures through targeted supervision.

Garza's execution last month is not the first time the United States has ignored precautionary measures. The United States has consistently stated that the orders are not legally binding, rejecting precautionary measures in many cases including *Marlin Gray v. United States*, *Juan Raul Garza v. United States*, and *Detainees of Guantanamo Bay, Cuba v. United States*. The United States argued in *Marlin Gray* that the Rules of Procedure were approved by the Commission itself but were not adopted by the Member States, and therefore cannot be binding. Additionally, the United States asserted that the OAS Charter Statute refers only to precautionary measures as related to parties to the Convention, and the United States is not a party to the Convention. In *Garza v. Lappin*, the U.S. Federal Court of Appeals for the 7th Circuit denied the enforcement of precautionary measures granted by the Commission in the 2001 case of Juan Raul Garza, stating that the American Declaration of the Rights and Duties of Man (Declaration) is "merely an aspirational document that, in itself, creates no directly enforceable rights."

In July 2013, the Commission issued a decision on the merits examining, in part, the U.S. government's disregard for precautionary measures granted to sixteen men on death row. In *Clarence Allen Lackey et al. v. United States*, the IACHR expressed profound concerns over U.S. failure to comply with the precautionary measures. The sixteen petitioners were granted precautionary measures to prevent irreparable harm while their cases alleging due process violations were pending before the Commission. The Commission writes that U.S. noncompliance with precautionary measures negatively affects the regional human rights system, noting that the behavior "emasculates the efficacy of the Commission's process" and undermines the Commission's "ability to effectively investigate and issue a finding on death penalty cases." The Commission notes also that executing a person during an investigation of due process violations deprives them of the right to petition, which itself could also be considered a violation of due process. The Commission held that the United States committed an "aggravated violation of the State's obligation to protect the right to life."

Though the legally binding status of the Declaration has been debated, the General Assembly of the OAS argues that Member States have a legal obligation to adhere to its principles. The IACHR considers state compliance with its mandates and orders, including precautionary measures, as vital to preserve the very system that the Member States themselves created. However, the United States contests the duty to comply with precautionary measures under the Declaration. The Commission's prior Rules of Procedure failed to strongly communicate the obligatory nature of precautionary measures. The recent reforms attempt to make more explicit the terms under which precautionary measures may be granted and strengthens the follow up mechanisms. Despite the improvements to Article 25 and the doctrine of precautionary measures, the United States continues to claim that it is not bound.

Inter-American Court Ponders Right to Migrate in *Tide Méndez v. Dominican Republic* Hearing

A public hearing in the case commenced on October 8, 2013, during the 48th Special Session of the Inter-American Court of Human Rights (IACtHR, Court) in Mexico City. The petitioners, both Dominican nationals and Haitian nationals, allege arbitrary detention and mass expulsion based on racial discrimination. The hearing was held two weeks after the Dominican Republic's Constitutional Tribunal issued a ruling that effectively stripped the citizenship of thousands of Dominicans born since 1929 to undocumented migrant parents. In the hearing, the Court contemplated a human right to migrate.

The case focuses on the arbitrary detention and expulsion of six Haitians and twenty-one Dominican nationals of Haitian descent. All the petitioners were arrested and deported to Haiti without a proper hearing, an opportunity to collect belongings, or a notification to their family. At the time of the petitioners' expulsions, the Dominican Constitution granted citizenship to individuals born on Dominican soil except for "legitimate children of diplomats or other people who are 'in transit.'" In 2010, however, the Dominican Republic amended its Constitution so that only children of Dominican residents could obtain citizenship.

The Inter-American Commission on Human Rights (IACHR, Commission) first examined in March 2012, and found a pattern of discrimination in Dominican policies, which unfairly targeted individuals of Haitian origin. The Commission found that petitioners were selected for detention and expulsion based largely on phenotypic characteristics and skin color. The Commission's recommendations

included that the petitioners be allowed to return home to the Dominican Republic. After the state failed to comply with the Commission's recommendations, the case was referred to the Court.

One theme from the IACtHR's October hearing focused on whether there should be a recognized human right to migrate. Judge Eduardo Vio Grossi commented that states are not afforded the ability to create immigration policies contrary to human rights principles. Judge Grossi contemplated a human right to migrate and protection against being expelled. The right to move within or to leave one's country is codified in Article 13 of the Universal Declaration of Human Rights and in Article 22 of the American Convention on Human Rights. The notion of the human right not only to enter, but also to remain in another country, may be emerging in the Americas. The Commission's expert, Pablo Ceriani, testified that the principle of migration as a human right is a recent trend in the Americas, though there is a lack of consensus among states. Reforms in Argentina, Bolivia, and Uruguay have recognized a right to migrate. The 2004 Argentine law recognizes migration as an "essential and inalienable human right," and grants constitutional protections to all individuals within the country regardless of immigration status. In the hearing, Ceriani and Judge Grossi seemed inclined to recognize a human right to migrate.

Judge Manuel Ventura Robles subsequently questioned Ceriani about the September 26th Constitutional Tribunal ruling of the Dominican Republic. The state objected to the question, arguing that the substance of this new law was not under review before the Court. President Garcia-Sayán, however, overruled the objection. Ceriani explained that the right to a nationality is fundamental. While states differ in their processes for nationalization, Ceriani testified it is a violation of this fundamental right to refuse the protections of nationality when a person may not be recognized as a national anywhere else.

The Dominican Republic has a long history of defending itself before the Inter-American Human Rights System on cases involving racial discrimination of Haitians. The Commission issued precautionary measures in 1999 to prevent the practice of mass detention and deportation of both Haitian nationals and Dominican nationals of Haitian descent; the Court upgraded these to provisional measures in 2000. The Court examined a similar theme again in 2006, and found that the Dominican Republic's immigration policies were not consistent with principles set forth in the American Convention. The Court established that children born to migrant parents in the territory should be permitted to acquire that nationality because it is not realistic that they obtain citizenship from their parents' home country.

The Court's decision is expected in early 2014. In the interim, the Judge's questions about the Dominican Republic's Constitutional Tribunal ruling raise profound issues about anti-Haitian discrimination prevalent throughout the Dominican Republic and the human right to nationality and to migrate.

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