American Society of International Law

Vol. 3, Issue 1
March 2022

International Courts & Tribunals Interest Group Newsletter

Introductory Note

Welcome to the March 2022 edition of the ICTIG newsletter. With several recent developments in international courts and tribunals, including Ukraine's filing of a new case against Russia at the ICJ and the ICC Prosecutor's decision to open an investigation relating to Russia's attack on Ukraine, we remain convinced of the importance of this interest group and its members in the pursuit of world peace and justice.

The interest group remained active in recent months, with the symposium "International Law without International Courts" in December, ICTIG's annual works-in-progress event in early February, and an In Memoriam event for James Crawford in March. We are planning other events for the remainder of the year and look forward to updating you in due course.

In the meantime, David Bigge's tenure as co-chair ends in April. We have heard from several potential nominees to take his place, and we hope that you will read their nominating submissions and take part in the vote to determine ICTIG leadership for the next three years.

-David Bigge and Freya Baetens, ICTIG Co-Chairs

Developments at International Courts & Tribunals

Election of New Secretary General of the Permanent Court of Arbitration

The Administrative Council of the Permanent Court of Arbitration (PCA) has elected a new Secretary General for a five-year term starting June 1, 2022. Marcin Czepelak, currently the Polish ambassador to the Netherlands and the Organization for the Prohibition of Chemical Weapons, defeated candidates from the Netherlands and Mauritius to succeed Hugo Siblesz as head of the PCA. The 2022 PCA election was only the second contested election for PCA Secretary General and marks the first time the PCA Secretary General will not be a Dutch national. In addition to his diplomatic duties, Czepalek is an associate professor in private international law at Jagiellonian University in Kraków.

ADBAT Celebrates its 30th Birthday

In November 2021, the Asian Development Bank Administrative Tribunal (ADBAT) celebrated its 30th anniversary with a virtual conversation featuring the five Tribunal

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Members: President Ago Shin-ichi, Vice-President Anne Trebilcock, and Members Chris de Cooker, Raul Pangalangan and Sylvia Cartwright, Executive Secretary Cesar Villanueva, and Senior Attorney to the Tribunal Christine Griffiths. The conversation highlighted the tools available on the website and the revised Rules of Procedure. A publication, Reflections on 30 Years of the Asian Development Bank Administrative Tribunal, also marked the anniversary. A future issue of the *Asian Journal of International Law* is to include articles by several Tribunal Members.

Protocol No. 15 Takes Effect at the ECtHR

On February 1, Protocol No. 15 came into force, reducing the time limit for applications to the European Court of Human Rights following a final decision that exhausts domestic remedies. Specifically, the period is reduced from six to four months, and applies only to applications in which the relevant domestic decision was adopted on or after February 1, 2022.

Myanmar Attempts to Withdraw Preliminary Objections in Gambia Case

On February 1, the National Unity Government of Myanmar (NUG)—formed as a government-in-exile after the military coup last year against State Counselor Aung San Suu Kyi and her National League for Democracy—made a submission to the International Court of Justice in connection with the court's pending case concerning accusations of genocide against Myanmar's Rohingya minority (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*)). The NUG's declaration stated that Myanmar "withdraws all preliminary objections in the case of The Gambia v. Myanmar concerning the military operations against the Rohingya population in Myanmar in 2016 and 2017."

In the short-term, the status of Myanmar's preliminary objections is somewhat moot, given that the Court concluded its hearing on those objections on February 28, and is evidently minded to consider them in full in a judgment which can be expected around mid-summer. Nevertheless, the purported withdrawal again revives the question of the recognition of Myanmar's lawful government before the ICJ, which heard oral submissions from a military-appointed agent (replacing Suu Kyi) and a reshuffled legal counsel team. The junta-led team has maintained the civilian government's preliminary objections to the Court's jurisdiction, formulated prior to the coup that resulted in Suu Kyi's ouster.

For practical purposes, the military regime will continue to represent Myanmar into the court's consideration of the merits if Myanmar's preliminary objections are rejected.

Committee of Ministers Applies Infringement Procedure to Refer Case of Jailed Advocate back to ECtHR

For only the second time in the European Court of Human Rights' history, the Committee of Ministers of the Council of Europe has referred a case back to the Court for a ruling on whether the State has refused to comply with a judgment. In its 2019 judgment in the case of *Kavala v. Turkey*, the ECtHR concluded that the arrest and pre-trial detention of human rights defender Mehmet Osman Kavala, beginning in 2017, violated his rights under Article 5 (liberty and security) of the European Convention on Human Rights. Accordingly, the Court ordered Turkey "to take all necessary measures to put an end to the applicant's detention and to secure his immediate release."

Mr. Kavala remains in prison, despite the Committee of Ministers' decisions and recommendations through its supervision of Turkey's execution of the judgment. Accordingly, on February 2, 2022, the Committee of Ministers adopted an interim resolution launching an infringement procedure, pursuant to Article 46(4) of the Convention, which permits the Committee of Ministers to refer to the Court the question of whether a State party has failed to abide by a final judgment of the Court. As detailed in the Court's press release, the ECtHR will consider the question as a Grand Chamber, taking into account the written comments of the parties and the Committee of Ministers. Following its decision, the ECtHR will refer the case back to the Committee of Ministers for appropriate action.

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Kosovo Specialist Chambers Concludes Trial against Gucati & Haradinaj

The Kosovo Specialist Chambers (KSC), the hybrid court created to prosecute atrocities committed during and following the Kosovo Conflict in 1999, is preparing to conclude its first trial. The two defendants, Hysni Gucati and Nasim Haradinaj, were charged by the Specialist Prosecutor's Office (SPO)—the prosecutorial arm of the KSC—with intimidating and retaliating against witnesses and violating secrecy of proceedings for broadcasting confidential information regarding the identities of potential witnesses. The trial began on October 7, 2021, and the evidentiary proceedings were closed on February 3, 2022. Closing statements were held on March 14 - 18, 2022.

ICC Prosecutor Concludes Preliminary Examination in Bolivia

On February 14, 2022, ICC Prosecutor Karim Khan formally announced the completion of the Office of the Prosecutor (OTP)'s preliminary examination into the Situation in Bolivia. The Government of Bolivia had originally referred the Situation to the OTP in September 2020, alleging that members of the political party *Movimiento al Socialismo* and associated organizations coordinated road blockades at various points throughout the country to prevent free passage, which impeded the country's access to necessary medical supplies and services related to the COVID-19 pandemic, and ultimately resulted in the deaths of over 40 individuals, as well as serious physical and mental harm to the Bolivian people. The referral alleged that the blockade organizers' and participants' conduct amounted to crimes against humanity of murder and other inhumane acts. In its Final Report closing the preliminary examination, the OTP concluded that the alleged conduct did not meet the requisite elements for crimes against humanity under the Rome Statute, namely because the alleged conduct did not amount to an "attack" against the civilian population, and the alleged acts did not amount to murder or other inhumane acts.

Gicheru Case Opens at ICC

The trial in the case of *The Prosecutor v. Paul Gicheru* opened before Trial Chamber III of the International Criminal Court on February 15, 2022. Mr. Gicheru has been charged with offenses against the administration of justice for allegedly corruptly influencing witnesses in the *Ruto and Sang* case, related to 2007 post-election violence in Kenya. Specifically, the Prosecutor charged Mr. Gicheru with eight instances of using bribery, intimidation, and threats to corrupt potential Prosecution witnesses to refuse to testify or to give false testimony for the Prosecution. The Trial began with a reading of the charges against Mr. Gicheru. Mr. Gicheru pled not guilty to all charges against him. The Prosecution's presentation of evidence is currently ongoing.

Caribbean Court of Justice Accepted into the International Framework for Court Excellence

On February 15, the Caribbean Court of Justice announced it had been accepted into the International Consortium for Court Excellence (ICCE), becoming the first regional court to join the network of national courts and institutions focused on judicial administration. The CCJ has implemented an online document filing system and other advances through its implementation of the International Framework for Court Excellence, an ICCE management system that is a prerequisite to membership in the Consortium.

Three Regional Human Rights Courts Release 2020 Joint Law Report

The African Court on Human and Peoples' Rights, European Court of Human Rights, and Inter-American Court of Human Rights have launched their 2020 Joint Law Report, a 105-page summary of key developments in each court's jurisprudence. The report also includes select statistics concerning the courts' caseloads and some reflections on the impact of the COVID-19 pandemic on their functioning. The case summaries are concise and clearly organized by right, principle, or admissibility requirement, making the report an accessible and helpful resource for understanding current interpretations of regional human rights standards and identifying significant cases decided in 2020. The report forms part of the increased collaboration between the three regional human rights courts, in the framework of the joint declarations adopted in San José in 2018 and Kampala in 2019.

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AfCHPR Publishes Communiqué on Implementation and Impact of its Decisions

On February 10, the African Court on Human and Peoples' Rights published the outcome document from its Conference on the Implementation and Impact of the Decisions of the African Court on Human and Peoples' Rights: Challenges and Prospects, held in November 2021 in Dar es Salaam, Tanzania. The "Dar es Salaam Communiqué" describes the conference agenda, participants, and discussions before laying out 67 conclusions and recommendations concerning: implementation of the AfCHPR's decisions, impact of AfCHPR decisions in domestic systems, the role of African Union organs in monitoring implementation, the role of the AfCHPR in ensuring implementation, and follow-up to the conference.

The recommendations take into account the fact that States have fully complied with the Court's judgments in only seven percent of cases and 10 percent of provisional measures rulings. The recommendations emphasize the importance of improved dissemination of the Court's decisions, tracking implementation of these decisions, and broader engagement with the Court by a range of actors. Notably, the Communiqué proposes the repeal of Article 34(6) of the Protocol establishing the Court, which would mean individuals and non-governmental organizations could bring complaints against any State party, eliminating the option for States to individually declare their acceptance of the Court's jurisdiction over such complaints.

ICC Prosecutor Opens Investigation Situation in Ukraine

On February 28, 2022, following Russia's invasion of Ukraine, ICC Prosecutor Karim Khan formally announced that he would proceed with opening an investigation into the Situation in Ukraine. The announcement followed his statement several days earlier in which he recognized the Court's jurisdiction over alleged Russian war crimes and crimes against humanity committed in Ukraine. While Ukraine is not a State Party to the Rome Statute, it lodged a declaration with the ICC in 2015 accepting ICC jurisdiction over atrocity crimes committed on its territories from 2014 onwards. Prosecutor Khan clarified, however, that the ICC lacked jurisdiction over the crime of aggression as it pertained to Ukraine, given that neither the Russian Federation is also not a State Party to the Rome Statute. In his announcement on February 28, Prosecutor Khan recognized that a "reasonable basis" exists to believe that Russia has committed both war crimes and crimes against humanity in Ukraine.

Then, on March 2, Prosecutor Khan announced that 39 States Parties to the Rome Statute had referred the Situation in Ukraine to the Office of the Prosecutor, and subsequently announced that the number of referrals had risen to 41 as of March 11. These referrals have the effect of "significantly expediting" the Prosecutor's investigation, as it means that Prosecutor Khan does not have to obtain authorization from the ICC Pre-Trial Chamber to formally open an investigation.

Council of Europe Expels Russia

In response to Russia's invasion of Ukraine, the Council of Europe decided on March 8 to suspend Russia from representation in the Committee of Ministers and Parliamentary Assembly. On March 15, Russia notified the Council it was withdrawing from the intergovernmental organization, possibly in order to preempt its expulsion. At the same time, Russia indicated its intention to denounce the European Convention on Human Rights. However, on March 16, the Committee of Ministers decided to expel Russia, effective that same day, and to meet again to consider the financial and legal implications. The decision marks the first time the Council of Europe has expelled a Member State.

Article 8 of the Statute of the Council of Europe allows the Committee of Ministers to determine the date on which an expelled State ceases to be a member of the Council. Separately, Article 58 of the European Convention on Human Rights specifies that denunciation of that treaty takes effect following six months' notice, or when a State is no longer a Member of the Council of Europe. Because the Committee of Ministers expelled Russia effective March 16, it would appear that Russia is no longer considered a party to the Convention as of that date. However, the European Court of Human Rights has announced it will suspend consideration of pending applications against Russia while it determines the legal consequences of the State's expulsion. ■

New Publications

Articles, Essays, Book Chapters & Book Reviews

ICTIG members have recently published articles, essays, and book chapters including the following:

- James Thuo Gathii & Olabisi D. Akinkugbe, *Judicialization of Election Disputes in Africa's International Courts*, 84 Law and Contemporary Problems 181 (2022).
- Md. Rizwanul Islam, *Bangladesh-Bhutan PTA: Less is More?*, 18 South Carolina Journal of International Law & Business 26 (2021).
- Md. Rizwanul Islam, *Overhaul of the SDT Provisions in the WTO: Separating the Eligible from the Ineligible*, 34 Pace International Law Review 1 (2021).
- Anne Trebilcock, *Governance Challenges and Opportunities for the International Labour Organization in the Wake of the COVID-19 Pandemic*, 18 International Organizations Law Review 370 (2021).

Notable Judgments & Decisions

East African Court of Justice Denies Injunction Against Eviction of Banyoro People from Ancestral Lands in Uganda

Sara L. Ochs, University of Louisville Brandeis School of Law

On November 25, 2021, the East African Court of Justice First Instance Division issued a ruling in the case of *Adam Kyomuhendo and the Indigenous Peoples Strategy Forum v. The Attorney General of the Republic of Uganda*, on the Applicants' application for an Interim Order from the Court to prevent the Republic of Uganda from proceeding with geological activities that would allegedly result in the eviction of the indigenous Banyoro People from their ancestral lands. The Applicants specifically alleged that since 2019, in an effort to create a geothermal electricity plant, the Republic of Uganda had been conducting geological activities in Kiboro Village, which resulted in environmental and human rights violations against the Kiboro population and threatened the integrity of ancestral lands in Kiboro Village.

Prior to addressing the Application's merits, the First Instance Division, on its own initiative, raised the question of Mr. Kyomuhendo's standing to bring the matter before the Court on behalf of the second Applicant, the Indigenous Peoples Strategy Forum. The First Instance Division recognized that pursuant to article 19 of the Rules of Court, a director may represent his company before the Court so long as he is "appointed by a resolution under the seal of … the company." Despite Applicants' affidavit submitted in support of their Application in which Mr. Kyomuhendo identified himself as the team leader and litigation director of the Indigenous Peoples Strategy Forum, the First Instance Division recognized that Mr. Kyomuhendo had submitted no resolution or documentation to prove his relationship with the second Applicant. As such, the First Instance Division determined that Applicants' affidavit was "incurably defective" and incompetent to support their Application. Rather than providing Applicants with an opportunity to cure their Application, the First Instance Division dismissed the Application in its entirety and awarded costs to the Republic of Uganda.

ICJ Indicates Provisional Measures in Armenia-Azerbaijan Racial Discrimination Convention Cases

DF Aziz

On December 7, 2021, the International Court of Justice indicated provisional measures in two International Convention on the Elimination of All Forms of Racial Discrimination (CERD) cases initiated under Article 22 of CERD by Armenia and Azerbaijan against each other. Both Parties requested provisional measures. The two requests were heard separately but sequentially in October 2021.

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Per the filings, the immediate impetus for the cases was the 2020 conflict between Armenia and Azerbaijan. Identical language in both Orders acknowledges the "longstanding and wide-ranging" broader context. Armenia requested eight provisional measures, concerning: Armenian individuals captured during the 2020 hostilities or their aftermath; espousal of hatred against Armenians; Armenian historic, cultural and religious heritage; preservation of evidence; non-aggravation; and reporting on compliance. Azerbaijan requested six provisional measures concerning: landmines in Azerbaijani territory; incitement of hate speech against Azerbaijanis, including through social and traditional media; non-aggravation; and reporting on compliance.

The Court indicated that Azerbaijan had to: protect from violence and bodily harm all persons captured who remained in detention, and ensure their security and equality before the law (14-1; Judge Yusuf against); take all measures to prevent the incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin (unanimous); and take all measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage (13-2; Judge Yusuf and Judge *ad hoc* Keith against). The Court unanimously indicated that Armenia had to take all measures to prevent the incitement and promotion of racial hatred targeted at persons of Azerbaijani national or ethnic origin. Both Parties had to refrain from any action that might aggravate or extend the disputes before the Court. The Orders are notable for: the Court's approach to the plausibility requirement in its provisional measures jurisprudence; the Court's view that the rights protected under the CERD Article 4 hate speech prohibition "are of such a nature that prejudice to them is capable of causing irreparable harm"; and the application of CERD Article 4 to online hate speech.

UK Supreme Court Issues Judgment in *"Maduro Board" of the Central Bank of Venezuela v. "Guaidó Board" of the Central Bank of Venezuela*

Massimo Lando, Assistant Professor, City University of Hong Kong

On December 20, 2021, the UK Supreme Court handed down its judgment on the preliminary issues raised in a case concerning access to certain financial assets belonging to the Government of Venezuela and located in England and Wales. The case was between the Board of the Central Bank of Venezuela appointed by Mr. Nicolas Maduro and the Board of the Central Bank of Venezuela appointed by Mr. Juan Guaidó. As is well known, both men have been asserting that they are the lawful President and Head of Government of Venezuela.

The case was decided by the Commercial Court at first instance, which found for the Guaidó Board, while the Court of Appeal subsequently reversed the Commercial Court's decision by finding for the Maduro Board. The Guaidó Board appealed on two bases: first, under the "one voice" principle, English courts should have recognized Mr. Juan Guaidó as the President of Venezuela, and thus the one capable of having access to the State's financial assets in England; second, under the act of state doctrine it was not open to English courts to question the lawfulness Mr. Juan Guaidó's act of appointing certain persons to the Board of the Central Bank of Venezuela. The Supreme Court found in favor of Mr. Juan Guaidó on both arguments. First, it overcame the distinction between *de facto* and *de jure* recognition, on which the Court of Appeal had reversed the Commercial Court's judgment; based on the Foreign Secretary's statement that Her Majesty's Government recognized Mr. Juan Guaidó as President of Venezuela, the Supreme Court held that it was bound to take the same approach. Second, the Supreme Court found that the act of state doctrine was an applicable rule in common law under which English courts could not have questioned the lawfulness of Mr. Juan Guaidó's acts of appointment that had taken place in Venezuela.

However, the Supreme Court sent back to the Commercial Court an issue that was not part of the appeal, namely whether the judgments of Venezuela's Supreme Tribunal of Justice, which had quashed Mr. Juan Guaidó acts of appointment under Venezuelan Law, had to be given effect by English courts. That issue remains pending before the Commercial Court.

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IACtHR Finds Mexico Responsible for Flawed Investigation into Killing of Human Rights Defender Digna Ochoa

Sara L. Ochs, University of Louisville Brandeis School of Law

On January 19, the Inter-American Court of Human Rights announced its judgment in the case of *Digna Ochoa and Relatives v. Mexico*, concerning the October 2001 killing of human rights defender Digna Ochoa. The petitioners alleged that Ms. Ochoa's death was a result of a campaign of violence against human rights defenders in Mexico that had been ongoing since the 1990s, and that by failing to diligently investigate Ms. Ochoa's death, Mexico violated the rights of Ms. Ochoa and her family members. During the proceedings, Mexico partially recognized its responsibility based on the inadequacies of the investigation and the impact on her relatives.

The IACtHR concluded that while Mexico had opened several different lines of investigation into Ms. Ochoa's death, it violated its due diligence obligations by failing to properly collect testimony or pursue certain relevant lines of inquiry, by relying unfairly on gender stereotypes, and by failing to complete the investigation within a reasonable time. Moreover, State agents publicly denigrated Ms. Ochoa and effectively blocked her relatives from offering expert witness reports. On top of this "absolutely deficient" investigation, the Court emphasized the context of impunity for killings of human rights defenders in Mexico and the history of threats against Ms. Ochoa. Accordingly, the Court found Mexico responsible for violations of Article 4 (right to life) in relation to articles 1 (obligation to respect rights), 8 (due process) and 25 (judicial protection) of the American Convention; Article 11 (honor and dignity); and articles 8, 11, and 25 of the American Convention, in relation to Article 1 of the American Convention and Article 7(b) (prevention and punishment of violence against women) of the Convention of Belém do Pará.

The IACHR concluded by issuing recommendations that Mexico provide pecuniary and nonpecuniary reparations to Ms. Ochoa's relatives, along with necessary physical and mental health care. It further recommended that Mexico reopen the criminal investigation into Ms. Ochoa's death within a reasonable period of time to redress its investigatory errors.

CJEU Finds Austrian Residence Requirement for Kazakh National Incompatible with EU Law in Preliminary Ruling

Lisa Reinsberg, International Justice Resource Center

On January 20, the Court of Justice of the European Union (Third Chamber) announced its judgment in response to a request for a preliminary ruling concerning Austria's decision to strip a Kazakh national of long-term residency based on his short and infrequent stays in the country. The Administrative Court in Vienna (Verwaltungsgericht Wien) requested guidance concerning the interpretation of Council Directive 2003/109/EC, which requires Member States to grant third-country nationals with long-term residence permits "a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union" and indicates that long-term resident status is lost upon absence from EU territory for 12 consecutive months. The Administrative Court queried whether any presence during a 12-month period, even if just for a few days, suffices and whether Member States may impose any additional conditions for maintenance of long-term resident status.

The Court of Justice concluded that the text, context, and objective of the Directive, as well as the principle of legal certainty, support a literal interpretation of the presence requirement without additional conditions. The Court pointed to the lack of details or caveats in the Directive concerning the requirement of presence during a 12-month period. It found that the Directive's "clear" objective is to promote the integration of third-country nationals who have established long-term residency in a Member State, including through their equal treatment as compared to EU citizens. The Court also determined that the principle of legal certainty, "which is one of the general principles of EU law," meant that the Directive should be interpreted to establish "a clear, precise and predictable criterion" for the maintenance of long-term residency. Accordingly, the Court concluded that, absent evidence of a "misuse of rights," "it is sufficient for the long-term national concerned to be present, during the period of 12 consecutive months following the start of his or her absence, in the territory of the European Union, even if such presence does not exceed a few days."

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CJEU Finds European Commission Had Authority to Issue Decision Barring Romania from Complying with Arbitral Award

Lisa Reinsberg, International Justice Resource Center

On January 25, the Court of Justice of the European Union (Grand Chamber) announced its judgment in the case of *Commission v. European Food SA and Others*, which concerned the European Commission's authority to review Romania's payment of an arbitral award based on a dispute that arose prior to its accession to the European Union.

The underlying dispute concerned Romania's decision, which took effect in 2005, to prematurely revoke a tax incentive scheme. In 2013, a tribunal established under the auspices of the International Centre for the Settlement of Investment Disputes found, in the case of *Micula v. Romania*, that Romania's decision violated its bilateral investment treaty with Sweden and ordered Romania to pay approximately EUR 178 million to Swedish investors. Romania completed the payments in 2015.

That same year, the European Commission determined that the payments constituted State aid that was "incompatible with the internal market" and ordered Romania to recover the aid. The Swedish investors submitted the matter to the General Court, which issued its judgment in 2019, holding that the Commission lacked authority to make its ruling because Romania was not subject to EU law at the time of the dispute, having acceded in 2007. The Commission appealed.

The Court of Justice held that "the decisive factor for establishing the date on which the right to receive State aid was conferred on its beneficiaries by a particular measure is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the State, to grant that aid." The Court found that the 2013 arbitral award alone created that right. Since the award was granted after Romania's accession, the Commission had authority to review it. The Court noted the relevance of its *Achmea* decision, in that Romania's consent to arbitration outside the "system of judicial remedies" under EU law "lacked any force" as soon as it joined the EU. Accordingly, the Grand Chamber set aside the General Court's judgment and referred the case back to the General Court to adjudicate the remaining arguments.

Caribbean Court of Justice Rules Barbados Rape Statute Covers Same-Sex Assault

Sara L. Ochs, University of Louisville Brandeis School of Law

On February 1, the Caribbean Court of Justice (CCJ) ruled that the correct interpretation of the Barbados Sexual Offences Act allows for the prosecution of a man for the rape of another man. In *Commissioner of Police v. Stephen Alleyne*, the male defendant, Stephen Alleyne, was charged under the Barbados Sexual Offences Act for forcing sex on another man without his consent. The Magistrate Court decided that the crime of rape as set forth in article 3(1) of the Sexual Offences Act did not include anal intercourse between men, a decision that was affirmed on appeal. The Commissioner of Police then appealed to the CCJ.

In its judgment, the CCJ first turned to the language of Article 3(1) of the Act, which provides that "any person who has sexual intercourse with another person without the consent of the other person" commits rape. The Court recognized that the gender-neutral language of "any person" and "another person" used in the statute indicated that either the perpetrator or the victim of rape may be male or female. The CCJ next considered the appellee's argument that the inclusion of buggery (anal penetration with consent), as a distinct crime within the Sexual Offenses Act prohibited the interpretation of Article 3(1) as applying to the rape of a man by another man, as it would render the statute redundant. The Court rejected this argument, finding that as written, the crimes were distinct, as a man could be charged with buggery when his partner consents (thus rendering that consent legally null), but could be charged with rape when the male perpetrator engages in intercourse with a "knowing or reckless absence of consent." The Court further recognized that the constitutionality of the crime of buggery has been challenged in several courts, including in the Caribbean, but determined the issue of the constitutionality of buggery in the Sexual Offences Act was outside the scope of this case.

Upon finding that the defendant could be lawfully charged with rape under the Sexual Offenses Act, the CCJ remitted the case to the Magistrate's Court.

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ECtHR Approves Croatia's Refusal to Disclose Secret Transcripts of Former President

Lisa Reinsberg, International Justice Resource Center

On February 3, the European Court of Human Rights adopted its judgment in the case of *Šeks v. Croatia*, which concerned a request by retired Croatian politician Vladimir Šeks for access to certain presidential records from 1994 and 1995, for purposes of writing a book. Disclosure of these documents, the Office of the President concluded, would harm the independence, integrity and security of Croatia and its foreign relations. Šeks challenged this decision before the national Information Commissioner and then in Croatian courts, which dismissed his complaints. A majority of the Constitutional Court held that the denial of his information request constituted an interference with his right of access to information, but that the interference had been lawful, in furtherance of a legitimate aim, necessary, and proportionate.

The ECtHR agreed. The Court noted that Article 10 of the European Convention on Human Rights applies when denial of access to information interferes with an individual's freedom of expression, taking into account any public-interest purpose of the request, the nature of the information sought, the applicant's function, and whether the information was ready and available for disclosure. Because Šeks was a former politician writing a book about Croatia and seeking information that was apparently ready and available, his request fell within the scope of Article 10.

The Court distinguished this case from others because it "concerns classified information relating to a sensitive part of Croatia's rather recent history which … still formed part of considerable public debate." Moreover, the Court noted that "States must be afforded a wide margin of appreciation in assessing what poses a national security risk in their countries at a particular time." The Court concluded that the denial had been based in law, respected procedural guarantees, and had weighed the public interest against Šeks' interests. While noting that only the Office of the President was empowered to change the classification level, the Court emphasized that other national authorities also reviewed the request and agreed on the denial. Accordingly, the Court held that the interference had been necessary and proportionate to the aims of national security and that the national authorities' review did not exceed the State's wide margin of appreciation.

ICJ Issues Reparations Judgment in Armed Activities on the Territory of the Congo (DRC v. Uganda)

Floriane Lavaud & Michael Pizzi, Debevoise & Plimpton LLP

On February 9, the International Court of Justice (ICJ) issued a landmark decision on reparations in *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), ordering Uganda to pay USD 325 million for damages caused during its military occupation of the eastern DRC between 1998 and 2003. The award is significant not only because it is by far the largest amount of reparations ever awarded by the Court, but also for its treatment of evidence and causation in the context of armed conflict and environmental damage.

In 1999, the DRC brought claims against Uganda alleging acts of armed aggression on its territory, seeking reparations for damage to persons, property, and natural resources. In 2005, the Court issued its judgment on the merits, finding for the DRC on several of its claims. After nearly a decade of negotiations, the DRC sought the assistance of the Court to determine the amount of reparations due by Uganda.

In this judgment, the Court acknowledged the difficulty of determining the extent of damages in the midst of an armed conflict, especially given the considerable passage of time. It thus opted for a flexible approach to evidence, awarding reparations as part of a "global sum" rather than requiring that each alleged harm be particularized. The Court faced similar challenges with regard to causation and recognized a broad occupier's liability, placing the burden on Uganda to establish that a particular harm was *not* caused by its failure to meet its obligations as an occupying state.

The USD 325 million award includes USD 225 million in compensation for damage to persons, USD 40 million for damage to property, and USD 60 million for damage to natural resources. The Court ordered that this amount be paid in five yearly installments of USD 65 million starting on September 1, 2022, applying a six percent post-judgment interest should payment be delayed.

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ECOWAS Court Holds Nigeria Responsible for Killing by Soldier

In the February 15, 2022 judgment of *Mrs. Helen Joshua & Anor. v. Federal Republic of Nigeria*, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) found that Nigeria had violated the African Charter on Human and People's Rights (ACHPR) after a Nigerian soldier killed a Nigerian civilian, Solomon Andy, in 2017. Mr. Andy was accosted at his place of work by two Nigerian soldiers, one of whom fatally shot him in the back after he tried to retreat. His body was held at an army mortuary "in a badly decaying state," and the army declined to release the body to his family for burial.

The Court first considered the admissibility of the application, which was filed by Mr. Andy's mother and his estate. The Court held that Mr. Andy's mother had standing to file an application as a close relative, but found that the application of Mr. Andy's estate was inadmissible as it had not shown that it had the requisite legal personality.

The Court next determined that Nigeria was responsible for Mr. Andy's death under the rules of State responsibility. Although the killing was "outside the scope of assigned duty," the Court noted that "[a] state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders."

The Court then held that Nigeria had violated Article 4 of the ACHPR, which states that "[e]very human being shall be entitled to respect for his life and the integrity of his person" and that "[n]o one may be arbitrarily deprived of this right." The Court ruled that the shooting of Mr. Andy was arbitrary in violation of Article 4. The Court also held that Nigeria violated Article 5 of the ACHPR which states in part that "[e]very individual shall have the right to the respect of the dignity inherent in a human being." The Court stated that Nigeria's continued retention of Mr. Andy's body "is grossly humiliating and amounts to a violation of the right to dignity."

The Court ordered Nigeria to pay compensation of about $72,000 and release the body of Mr. Andy so that he could be buried.

CJEU Rejects Challenges to "Conditionality Mechanism" for Suspending Funding

Lisa Reinsberg, International Justice Resource Center

On February 16, the Court of Justice of the European Union delivered its judgments in the cases of *Hungary v. Parliament and Council* and *Poland v. Parliament and Council* (nos. C-156/21 and C-157/21, respectively). The two States had sought the annulment of the EU Regulation 2020/2092, which allows for financing or payments from the EU budget to a Member State to be suspended when there are breaches of the principles of the rule of law in that State. Ten EU Member States intervened in support of the Parliament and Council. The Court examined the cases through its expedited procedure and allocated them to the full Court.

Based on its review of the grounds for activating the so-called "conditionality mechanism," as well as the possible measures adopted as a result, the Court determined that the purpose of the Regulation is "to protect the Union budget from effects resulting, in a sufficiently direct way, from breaches of the rule of law and not to penalise those breaches as such." Moreover, the Court found that the conditionality mechanism does not circumvent the Article 7 procedure because the two procedures have different purposes and subject matter. Because the conditionality mechanism is limited to examination of situations or conduct that are relevant to the sound financial management of the EU budget, the Court found it does not exceed the powers conferred on the EU. With regard to the principle of legal certainty, the Court found that the concept and principles of "the rule of law" were sufficiently fleshed out in its case law and in national legal systems. The Court, therefore, dismissed the actions.

However, the Court specified that the conditionality mechanism may only be used when there is a genuine link between a principle of the rule of law and the financial interests of the Union, with regard to a situation or conduct that is attributable to an authority of a Member State and relevant to the proper implementation of the Union budget. Any protective measures adopted must be strictly proportionate to the impact on the EU budget and comply with strict procedural requirements.

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ECtHR Indicates Interim Measures Concerning Russia

Lisa Reinsberg, International Justice Resource Center

In the context of Russia's military invasion of Ukraine, the European Court of Human Rights adopted decisions on two interim measures requests concerning Russia, and implemented some administrative responses to manage any impact on proceedings before the Court involving either State. First, on March 1, the ECtHR announced it had granted urgent interim measures in response to a request from Ukraine, and indicated to Russia to "refrain from military attacks against civilians and civilian objects." The Court emphasized that Russia's military action "gives rise to a real and continuing risk of serious violation of the Convention rights of the civilian population" in areas under attack or siege by Russian troops. The request is connected to application number 11055/22 (*Ukraine v. Russia* (X)), the latest of numerous inter-State complaints brought by Ukraine against Russia since 2014.

On March 10, the Court announced it had applied an urgent interim measure in the case of ANO RID *Novaya Gazeta and Others v. Russia* (app. No. 11884/22). On March 3, the editor of daily newspaper *Novaya Gazeta* requested an interim measure seeking to stop Russia from interfering with the media's coverage of the armed conflict in Ukraine, in light of recent orders that the newspaper delete certain articles and other censorship of independent media. The Court, "having regard to the exceptional context in which the request has been logged," invited Russia to abstain from actions and decisions aimed at the full blocking and termination of the activities of *Novaya Gazeta*.

With regard to pending and future applications, the Court implemented measures concerning Russia and concerning Ukraine to accommodate disruptions to the postal service and the invasion's impact on the Ukrainian government's functioning. As noted above, concerning Russia's expulsion from the Council of Europe, the Court has suspended consideration of pending applications against Russia while it determines the legal consequences of the expulsion.

Special Tribunal for Lebanon Reverses Acquittals of Merhi and Oneissi

Sara L. Ochs, University of Louisville Brandeis School of Law

On March 10, the Special Tribunal for Lebanon (STL)'s Appeals Chamber issued its judgment in the Prosecutor's appeal of *Prosecutor v. Merhi and Oneissi*. In a unanimous decision, the Appeals Chamber reversed the acquittals of Hassan Habib Merhi and Hussein Hassan Oneissi and convicted both defendants of being co-perpetrators of a conspiracy aimed at committing a terrorist act, being accomplices to the felony of committing a terrorist act, and being accomplices to the felony of attempted intentional homicide.

The appeal stems from the *Ayyash et al.* (STL-11-01) case in which Messrs. Merhi and Oneissi were charged along with several other defendants for their alleged involvement in the February 14, 2005, explosion that killed then-Lebanese Prime Minister Rafik Hariri and 21 others. After conducting a trial against the defendants *in absentia*, the STL Trial Chamber issued its judgment on August 18, 2020 convicting Mr. Ayyash, but finding Messrs. Merhi and Oneissi not guilty on all charges.

The Appeals Chamber determined the Trial Chamber made several errors of fact in construing evidence related to cell phones reportedly used by the defendants in orchestrating and carrying out the February 14th attack. The Appeals Chamber also held the Trial Chamber erred in law by requiring proof of elements not required by Lebanese or STL law on the crimes of conspiracy to commit a terrorist act and accomplice liability. It further concluded that the evidence presented to the Trial Chamber was sufficient to establish beyond reasonable doubt that Messrs. Merhi and Oneissi knowingly and willingly entered into an agreement to participate in the commission of a terrorist act, namely, the assassination of Prime Minister Hariri.

The Appeals Chamber then issued arrest warrants for both defendants. Under the STL Rules of Procedure and Evidence, because Messrs. Mehri and Oneissi were convicted *in absentia*, they have the right to "accept in writing the conviction or sentence; request a retrial; accept in writ-

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Opportunities

Awards, Grants & Prizes

2022 Rosalyn Higgins Prize

The *Law & Practice of International Courts and Tribunals* is accepting submissions for the 2022 Rosalyn Higgins Prize. The annual award will recognize the author of an unpublished paper of between 8,500 and 10,000 words concerning the law and practice of the International Court of Justice. See the announcement for additional details and instructions. Submissions are due by April 30, 2022.

Conferences, Webinars & Programs

International Law Association British Branch Spring Conference 2022: April 28-29

The British Branch of the International Law Association will host a conference on International Law and Climate Change, in hybrid format, at the University of Surrey on April 28 and 29. Topics will include the role of international trade and investment law and human rights law in addressing climate change. Further information is available on the conference webpage.

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ing the conviction and request a new hearing in respect of his sentence; or accept the Trial Chamber's judgment of acquittal and request a new hearing on appeal."

ICJ Indicates Provisional Measures in *Ukraine v. Russian Federation*

On February 26, 2022, Ukraine filed an Application against Russia at the International Court of Justice ("ICJ") concerning an alleged dispute relating to the Genocide Convention. According to Ukraine, Russia claims that Ukraine committed acts of genocide in the Luhansk and Donetsk regions of Ukraine, and President Putin initiated the present "special military operation" in Ukraine purportedly to protect people in those regions from genocide. Ukraine claims that it did not commit genocide, and therefore Russia's "special military operation" "is incompatible with the [Genocide] Convention and violates Ukraine's right to be free from unlawful actions, including military attack, based on a claim of preventing and punishing genocide that is wholly unsubstantiated."

On the same day, Ukraine filed an request for provisional measures with the ICJ, seeking to "protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention." Ukraine requested the ICJ to indicate provisional measures ordering Russia to "immediately suspend" its military operations in Ukraine. Ukraine states that the ICJ has jurisdiction based on Article IX of the Genocide Convention, which permits any State party to a dispute "relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide" to submit the dispute to the ICJ.

The ICJ held hearings on the provisional measures application on March 7, and on March 16, the Court issued an order indicating the following provisional measures: (1) requiring Russia to "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine" (by a 13 to 2 vote); (2) requiring Russia to "ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction" take no steps in furtherance of the aforementioned military operations (by a 13 to 2 vote); and (3) requiring both Russia and Ukraine to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

The case, titled *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), is the second pending case filed by Ukraine against Russia at the ICJ. Ukraine filed the previous case, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation*), with the ICJ in 2017. ■

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Courts as an Arena for Societal Change: July 8-9

Leiden University is hosting the second Conference of the Research Group on Institutions for Conflict Resolution, with the theme of "Courts as an Arena for Societal Change." This conference presents an opportunity to bring together researchers and practitioners from around the world to discuss the evolving role of the judiciary in addressing difficult and contentious social and political issues. The conference will take place in person at Leiden University, the Netherlands, in the English language, and further information can be found on the conference website.

Workshop on De-formalizing the International Judiciary: August 31

The European Society of International Law (ESIL) Interest Group on International Courts and Tribunals is organizing a Workshop on De-formalizing the International Judiciary as a side-event to the ESIL 2022 Annual Conference in Utrecht. Abstracts for participation will be accepted until April 15, 2022. Further information is available in the call for papers.

Workshop: Changing Landscapes of Immigration Detention: September 1-2

The Faculty of Law at the University of A Coruña (Spain) is hosting an international workshop to discuss and reflect on the changing and mutable nature of immigration detention regimes across the globe. The workshop is planned to be in-person in the University of A Coruña (Spain), although provisions for online participation can be made. Proposals will be accepted until March 20, 2021, and more information about submitting a proposal can be found in the call for papers.

International Empirical Legal Studies Conference: September 1-2

The Empirical Legal Studies (ELS) Academy will be hosting an International Empirical Legal Studies Conference at the Vrije Universiteit in Amsterdam. The conference organizers invite proposals for pre-arranged panels, individual paper presentations, and poster presentations to be submitted by April 15, 2022. Further information can be found in the conference's call for papers.

Seeking Justice: Ideas and Practices from Asia, Africa, and the Middle East: November 30 - December 2

The Leibniz-Zentrum Moderner Orient (ZMO) in Berlin will be hosting this interdisciplinary, international conference which investigates what happens when different ideas and practices of justice encounter each other, in past and present scenarios. The conference organizers invite paper abstracts of no more than 300 words, grounded in the disciplines of history, social and cultural anthropology, Islamic Studies, political science, sociology, sociolegal studies, and related fields to be submitted by March 31, 2022. Further information is available in the call for papers.

Calls for Papers

The Italian Review of International and Comparative Law

The Italian Review of International and Comparative Law welcomes paper submissions for its forthcoming edition with the theme of "The European Union and International Arbitration." Submissions of abstracts will be accepted until April 1, 2022, and further information is available in the call for papers.

Max Planck Yearbook of United Nations Law

The Max Planck Yearbook of United Nations Law is accepting abstract submissions for its Volume 26, which will reflect on the work of the International Court of Justice, in light of its 75th anniversary. Abstract proposals should be no more than 500 words and must be submitted by April 15. If accepted, full drafts should be between 8,000 and 12,000 words and would be due by July 31. See additional details in the call for abstracts.

African Human Rights Yearbook

The African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child have announced a call for articles for inclusion in volume 6 of the African Human Rights Yearbook. The Yearbook welcomes articles focused on the African human rights system or standards or on the African Union 2022 theme of nutrition and food security, as well

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as case commentaries regarding decisions by one or more of the three organs. Abstracts are due by April 15, and invited first drafts will be due July 31. See additional details in the call for papers.

NUP Jean Monnet Working Papers

The Jean Monnet Chair of the Neapolis University Pafos (NUP) welcomes contributions by young and senior scholars for the online publication series "NUP Jean Monnet Working Papers." They accept manuscripts on topics related to economic crime, money laundering, the financing of terrorism, asset recovery, asset freezes and confiscation, financial investigations, judicial cooperation in criminal matters, etc., with emphasis on the EU law dimension of the topic examined. Submissions will be reviewed on a rolling basis, and more information is available in the call for papers.

Job Postings & Other Opportunities

Legal Officer, UN Office of Legal Affairs

This position is located within the International Trade Law Division, Office of Legal Affairs, which serves as a substantive Secretariat to the United Nations Commission on International Trade Law (UNCITRAL) and is based in Vienna. See the job posting for further details and application instructions. Applications are due March 20.

International Cooperation Adviser, International Criminal Court

The International Criminal Court seeks an International Cooperation Adviser to work under the guidance of a Senior Trial Lawyer. The duty station for this position may vary. Applications are due March 20, and additional details can be found in the posting.

Law Clerk to Judges of the Court, International Court of Justice

The International Court of Justice wishes to appoint a number of Law Clerks, each of whom will provide research and other legal assistance to one of the judges of the Court. Applications are due March 22, and further information on the position and how to apply is available in the job posting.

Assistant Professor of International Law, University of Amsterdam

The University of Amsterdam is looking for a candidate who, together with the 25 team members of the section Public International Law, will coordinate and teach courses in the Public International Law and International Trade and Investment Law LLM tracks and carry out independent and high-quality research that fits within the Amsterdam Center for International Law (ACIL). Applications will be accepted until March 28. See the job posting for further details.

Senior Legal Officer, African Court on Human and Peoples' Rights

The AfCHPR is seeking applicants for a Senior Legal Officer focused on compliance and monitoring of judicial decisions, to be based in Tanzania. The initial posting to this P3 term will be for a period of one year, which may be renewed. Applications are due March 28 and additional details are available in the posting.

Associate Legal Officer (P2), International Residual Mechanism for Criminal Tribunals

The International Residual Mechanism for Criminal Tribunals is seeking to hire an Associate Legal Officer to be located in the Office of the Prosecutor (OTP) of the International Residual Mechanism for Criminal Tribunals (IRMCT), Arusha Branch, Kigali Field Office. The incumbent will work under the direct supervision of the Tracking Team Leader. The posting is open until April 2.

Associate Legal Officer, Office of the Registrar (P2), International Residual Mechanism for Criminal Tribunals

The International Residual Mechanism for Criminal Tribunals is seeking an Associate Legal Officer to work in the Office of the Registrar, Registry, Hague Branch. The posting is open until April 6.

Associate Legal Officer (P2), UN Office of Legal Affairs

Applications are being accepted for an Associate Legal Officer position in the UN Office of Legal Affairs in New York. Applications are due April 7 and additional details are available in the posting. ■