American Society of International Law

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International Courts & Tribunals Interest Group Newsletter

Introductory Note

ICTIG is delighted to bring to you the Spring 2024 issue of our Newsletter. The beginning of 2024 been a particularly busy period for international courts and tribunals (ICTs). For example, the International Court of Justice has recently held oral hearings in the advisory proceedings on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (here). The Court also delivered two long-awaited judgments in cases between Ukraine and the Russian Federation (here and here), as well as an order on provisional measures in a case brought by South Africa against Israel on the basis of the Genocide Convention (here). On 1 March 2024, Nicaragua instituted proceedings against Germany concerning alleged violations by the latter of its obligations, including under the Genocide Convention, the Geneva Conventions, and their Additional Protocols, having also requested provisional measures (here). Lastly, the Court has updated the Rules of Court in relation to the procedure governing intervention (here). In other settings, the WTO Members have recently adopted a Ministerial Decision in Abu Dhabi, recognizing the progress made with the view to having a fully and well-functioning dispute settlement system accessible to all members by 2024 (for further details see here).

While we do our best to stay on top of these and other developments before ICTs and to bring them to you in our Newsletters, we would like to encourage our members to volunteer summaries of decisions delivered by ICTs, as well as to share their professional news and achievements. Further, please do send us ideas of topics that you would like to see addressed in ICTIG's future events and do feel free to get involved in co-hosting or co-organizing such events.

This year we have an exciting set of events coming up. We are happy to announce that we will be hosting an online discussion on reparations in the practice of ICTs and an in-person event on issues relating to sovereign immunities in recent cases before ICTs. In addition, we will be hosting a series of events on incidental proceedings before ICTs this Fall, which will cover recent developments on provisional measures, preliminary objections, and intervention.

-Massimo Lando & Vladyslav Lanovoy, Co-Chairs

INSIDE THIS ISSUE

Developments at International Courts & Tribunals

ICC Judges Issue Two Arrest Warrants Arising out of the Situation in Ukraine

On 5 March 2024, Pre-Trial Chamber II of the International Criminal Court issued warrants of arrest for two individuals, Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov, in the context of the situation in Ukraine for alleged crimes committed from at least 10 October 2022 until at least 9 March 2023. Both are high-ranking officials in the Russian armed forces. Pre-Trial Chamber II considered that there are reasonable grounds to believe that the two suspects bear responsibility for missile strikes against the civilian population and civilian objects. Further information can be found here.

Valentin Ćorić Completes His Sentence on Conditional Early Release Under the Supervision of the Mechanism

On 22 January 2024, Valentin Ćorić, one of the six convicted defendants in the *Prosecutor v. Prlić et al.* case, completed his 16-year sentence handed down by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) on 29 May 2013 and affirmed on appeal by the ICTY Appeals Chamber on 29 November 2017. Ćorić was granted conditional early release on 16 January 2019, pursuant to a Decision by the then-President of the International Residual Mechanism for Criminal Tribunals, after having served two-thirds of his sentence. Further information can be found here.

Lebanon's Special Tribunal Closes

Established by UN Security Council Resolution 1757 in 2007, the Special Tribunal for Lebanon closed on 31 December 2023. During its operation the Tribunal convicted three defendants for their role in the assassination of former Lebanese Prime Minister Rafik Hariri in 2005. For more information, see here.

Board of Register of Damage for Ukraine Elects Leadership

At its inaugural meeting in the Hague in December 2023, the Board of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (RD4U) elected its Chair and Vice-Chair, adopted its Rules of Procedure, and discussed as a matter of urgency the categories of claims that will be eligible for submission to the Register. The Board elected Robert Spano, Partner at Gibson, Dunn & Crutcher and former President of the European Court of Human Rights, as Chair, and Dr. Chiara Giorgetti, Professor at Richmond Law School, as Vice Chair. The remainder of the Board comprises Veijo Heiskanen (Finland), Yulia Kyrpa (Ukraine), Aleksandra Mężykowska (Poland), Lucy Reed (United States), and Norbert Wühler (Germany). The Register was established as a response to United Nations General Assembly Resolution ES-11/5 and currently includes 43 countries and the European Union as participants.

Armenia Joins International Criminal Court as New State Party

On 14 November 2023, the Republic of Armenia formally deposited the instrument of ratification of the Rome Statute of the ICC and the Statute entered into force on 1 February 2024. Armenia becomes the 124th State Party to join the Statute, and the 19th State from the Eastern European group to do so. Further information about Armenia's accession can be found here.

Notable Judgments & Decisions

ECtHR Upholds States' Right to Limit Strikes by Civil Servants

Dos. (Adj. Prof.) Dr. Stefan Kirchner, MJI, Government Advisor, Frankfurt/Rhein Main region, Germany

The case of *Humpert and Others v. Germany* (Application nos. 59433/18, 59477/18, 59481/18 and 59494/18) concerns the prohibition on striking for better labor conditions that applies to civil servants in Germany. The applicants are four teachers in schools in the German states of Schleswig-Holstein, Lower Saxony, and Northrhine-Westphalia. They participated in strikes during working hours. Under German law, which only allows strikes for the improvement of working conditions (e.g. salary increases) but does not allow for general strikes, civil servants (unlike other employees) are not permitted to strike at all. Due to their participation in strikes, they did not teach several lectures that they were required to teach, resulting in reprimands and adminis-

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trative fines. The applicants claimed that the prohibition imposed on civil servants was incompatible with Article 11 European Convention on Human Rights (ECHR), which protects the freedom of assembly and association. The European Court of Human Rights, however, found that "the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State in the circumstances of the present case and were shown to be proportionate to the important legitimate aims pursued" (para. 147). This conclusion was reached after the Court distinguished the situation in this case, in which the prohibition was based on well-established laws, from the more *ad hoc* prohibition in the situation that led to the case of *Enerji Yapı-Yol Sen v. Turkey*.

CJEU Issues Judgment Concerning Violence Against Women and Clarifying Conditions for Qualifying for International Protection

Craig D. Gaver, Washington, DC

On 16 January 2024, the Grand Chamber of the Court of Justice issued a Judgment interpreting Directive 2011/95/EU on standards for the qualification of women fleeing domestic violence as beneficiaries of international protection. The Judgment in WS *v. Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet*, Case Case C-621/21 was the first time that the CJEU received a preliminary reference on this discrete issue and thus forms an important ruling for women seeking protection from gender-based violence in in EU Member States.

The Court began by surveying the Geneva Refugee Convention, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention"), which entered into force for the EU in October 2023, and several implementing regulations of EU law. The petitioner, a Turkish national of Kurdish ethnicity, recounted her forcible underage marriage and subsequent domestic abuse (paras. 19-20). She later fled her home and sought international protection in Bulgaria. The Bulgarian state agency, however, declined to extend that protection based on an insufficient link between the threats of harm alleged and specific grounds under the conventions. WS made a subsequent application, adducing new evidence that her membership in a "particular social group" (i.e., women who are victims of domestic violence) put her at risk of "honour killing" (para. 25). The state agency again declined the renewed application; a Sofia administrative court stayed the proceeding and sought a reference from the Court as to whether the grounds alleged sufficed to qualify WS for protection under the various legal instruments.

The Court determined that when women are exposed to physical or mental violence (including sexual and domestic violence) in their country of origin and on account of their gender, women, as a group, may be regarded as belonging to a "particular social group" within the meaning of Directive 2011/95 (para. 57). Even if the conditions for refugee status are not met, a woman may still qualify for subsidiary protection in circumstances where there is a real risk of being killed or subjected to acts of violence inflicted by a family member or their community due to the alleged transgression of cultural, religious or traditional norms (para. 80).

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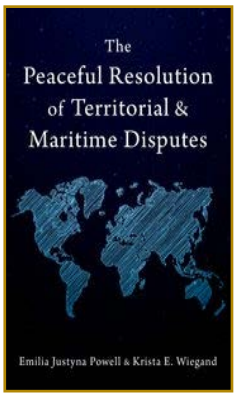
New Publications

ICTIG members have recently published articles, essays, chapters, books, and blogs, including those listed below.

Articles, Essays & Book Reviews

- Demetra Fr. Sorvatzioti, *Proportionality and Moral Blameworthiness in Ongwen's ICC Sentencing Decision*, International Criminal Law Review, Vol. 23, Issues 5-6 (Dec. 2023), *Special Issue: Lights and Shadows of the Ongwen Case at the International Criminal Court, Part 1*.

Books & Book Chapters



- Emilia Justyna Powell and Krista E. Wiegand, The Peaceful Resolution of Territorial and Maritime Disputes (OUP 2023).
- Chiara Giorgetti, Patrick Pearsall, and Hélène Ruiz-Fabri (eds.), Research Handbook on International Claims Commissions (Edward Elgar 2023).
- Priya Urs, Gravity at the International Criminal Court: Admissibility and Prosecutorial Discretion (OUP 2024) (accessible online at Oxford Academic).

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CJEU Advocate General Opines on the Effect of a Domestic Decision Granting Refugee Status in Another EU Member State

Craig D. Gaver, Washington, DC

The Treaty on the Functioning of the European Union and associated secondary regulations aim to create a common European asylum system (CEAS). Under the Dublin III Regulation, the first Member State where an individual applies for refugee status makes a determination on the sufficiency of the application. However, individuals can traverse EU Member States, and a question arises as to how other Member States should treat the determination of the first.

QY, a Syrian national, was granted refugee status in Greece in 2018. Later, she made an application for international protection in Germany. German authorities found that QY ran a serious risk of suffering inhuman or degrading treatment due to general conditions for refugees in Greece, and thus she could not be returned to that Member State. However, they rejected QY's application for refugee status in Germany on the basis that she was not at risk of persecution in Syria. She was instead granted subsidiary protection. After an administrative court rejected her initial application, QY appealed, arguing that the German authorities are bound by the refugee status previously granted by Greece.

The Federal Administrative Court (the B*undesverwaltungsgericht*) noted that no provisions of German law conferred a right to recognition of refugee status granted by another Member State. But the court also noted that QY's risk of suffering inhuman or degrading treatment precluded her return to Greece. In light of the apparent incompatibility, the court stayed the proceeding and referred the question to the CJEU as to whether the first Member State's determination prevents a second Member State from undertaking its own examination and obliges that second state to grant the applicant refugee status (para. 23).

Advocate General Medina delivered her Opinion on 25 January 2024 in the case of QY *v. Germany*, Case C-752-22. She found that the principle of mutual trust among Member States demanded a presumption that a first Member State's treatment of applicants complies with the requirements of EU and international law; but that in exceptional circumstances the presumption becomes incompatible with the the duty to interpret and apply the Dublin III Regulation in a manner consistent with fundamental rights (paras. 27-29).

The Opinion also drew a distinction between conditions governing the procedures for processing asylum and refugee requests in the first Member State, on the one hand, and the living conditions of beneficiaries of international protection in that Member State, on the other (para. 43).

According to the Advocate General's Opinion, the CEAS is "being built up gradually" and "it is for the EU legislature alone to decide, when necessary, to give binding cross-border effect to decisions granting refugee status" (para. 75). Thus, nothing in the Dublin III Regulation or other secondary regulations require a second Member State to grant a person refugee status solely on the ground that another Member State has already done so. The second State must carry out an assessment on the merits of a new application (para. 76). Although the first Member State's determination does not have a binding effect on the second Member State, the second State must take into account all material conditions, including information concerning the first application, which the first Member State must supply upon request in a "markedly shorter time frame" than under normal circumstances (para. 93).

CJEU Clarifies EU Sanctions against Russia with Respect to Flying Private Aircraft

In a judgment of December 20, 2023, the Court of Justice of the European Union stated in the case of I*slentyeva v. Council* that EU sanctions against Russia do not prohibit private pilots who are Russian citizens from flying aircraft in EU airspace, so long as the aircraft is not owned or chartered by Russian citizens and is not registered in Russia.

The applicant, Ekaterina Islentyeva, was a dual citizen of Luxembourg and Russia and a private pilot who flew aircraft owned by a Luxembourg flying club. Following Russia's annexation of Crimea in 2014, the EU imposed sanctions (Article 3d of Council Regulation No. 833/2014) (the "Regulation") prohibiting "aircraft operated by Russian air carriers . . . or [] any non-Russian registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body, to land in, take off from or overfly the territory of the Union." Luxembourg's civil aviation authority determined that this prohibited the applicant from flying private aircraft in the EU, regardless of the ownership of the aircraft. The applicant sought the annulment of the Regulation.

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The CJEU found the application inadmissible, but in doing so clarified that the Regulation did not apply to the applicant. The Court first noted that the action would be admissible only if the Regulation is "of direct concern" to the applicant. The Court further observed that the meaning of "controlled" in the Regulation was ambiguous. It then concluded that interpreting the Regulation as prohibiting flights by any aircraft operated by a Russian citizen holding a private pilot's license would be "manifestly inappropriate in the light of the objective of exerting pressure on the Russian President and his government."

The Court therefore opted to interpret the word "controlled" in the Regulation as applying to aircraft that are "economically or financially controlled" by a Russian natural or legal person, but not to aircraft that are merely piloted by a Russian citizen. As a result, the Regulation was not "of direct concern" to the applicant, and the action was therefore inadmissible.

ICJ Indicates Provisional Measures in Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*)

Massimo Lando, Assistant Professor, University of Hong Kong

The media and international law blogs have widely covered South Africa's case against Israel at the ICJ. The facts from which that case stems are as well-known as they are heart-breaking, and concern the recent military confrontation between Israel and Hamas following Hamas' October 7, 2023 attack on Israeli civilians, which has resulted in immense suffering for the people living in Gaza and its surroundings. South Africa started a case against Israel alleging violations of the 1948 Genocide Convention and requested the ICJ to indicate provisional measures. By order of 26 January 2024, the ICJ indicated provisional measures but it did not indicate that Israel implement a ceasefire, which was the most far-reaching of the measures requested by South Africa.

Whether the ICJ had *prima facie* jurisdiction over the merits seemed like a foregone conclusion: neither party had made reservations to the Convention's compromissory clause and a dispute did seem to exist concerning the interpretation or application of the Convention. The ICJ confirmed that South Africa had standing as a non-injured State, following its approach in *The Gambia v. Myanmar*. The existence of irreparable prejudice also seemed beyond serious dispute. More doubtful was whether South Africa's rights and claims were plausible, given the high threshold for genocidal intent under the Convention. However, the ICJ found those rights and claims to be plausible, again following its approach in *The Gambia v. Myanmar* and not inquiring too closely into questions of intent at the provisional measures stage, where the threshold is understandably lower than at the merits.

The ICJ indicated provisional measures that mostly restated Israel's obligations under the Convention. Significant is the measure that Israel has to ensure that humanitarian assistance reaches the Palestinian people inside Gaza, which was voted also by Israel's judge *ad hoc*.

(Ed. note: since this summary was drafted, South Africa has twice returned to the Court seeking additional provisional measures. See here for more.)

ICJ Rules on Ukraine's Claims Arising under the Terrorist Financing Convention and the ICERD

Dos. (Adj. Prof.) Dr. Stefan Kirchner, MJI, Government Advisor, Frankfurt/Rhein Main region, Germany

Russia's war of aggression has already led to a significant body of case law from different international courts. On 31 January 2024, the ICJ issued its Judgment on the Merits in the case concerning 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*). Ukraine's application in this case had been filed in 2017 in response to Russia's war against Ukraine in the Luhansk and Donetsk oblasts in the east of the country and in Crimea in the south of Ukraine. Ukraine claimed that the Russian Federation, *inter alia*, had failed to prevent the financing of terrorism in Luhansk and Donetsk oblasts and that its treatment of ethnic Ukrainians and Crimean Tatars in Crimea amounted to violations of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In its 31 January decision, the ICJ

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held that Russia indeed violated Article 9 para. 2 of the International Convention for the Suppression of the Financing of Terrorism, and Article 2 para. 1(a) and Article 5(e) of the CERD. The latter aspect of the case concerned in particular school education in parts of Ukraine occupied by the Russian Federation, an issue which has become more pressing for many Ukrainians due to the escalation of the war in 2022 and the continuing occupation of large parts of Ukraine by Russia. School education in the Ukrainian language continues to be denied and there is an ongoing campaign of Russification of the occupied parts of Ukraine, resulting in further human rights violations. As Russia has not been a party to the European Convention on Human Rights since 2022, global human rights standards such as CERD are likely to continue to play an important role in attempts to safeguard the human rights of those who live in those parts of Ukraine that continue to be illegally occupied by Russia.

ICJ Rules on Preliminary Objections in Ukraine's *Genocide* Case Against Russia

Dos. (Adj. Prof.) Dr. Stefan Kirchner, MJI, Government Advisor, Frankfurt/Rhein Main region, Germany

In the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*; 32 States intervening), the International Court of Justice on 2 February 2024 ruled on preliminary objections that had been raised by the Russian Federation. The ICJ found that it has jurisdiction in the case. The applicant, Ukraine, seeks a judgment by the ICJ to the effect that that it has not breached the Genocide Convention. This case concerns allegations by Russia prior to the February 2022 escalation of the war of aggression that has been ongoing since 2014. The ICJ found that it has jurisdiction to rule on this matter.

However, the ICJ decided that it will not rule on claims by Ukraine that conduct arising out of Russia's further invasion of Ukraine since 24 February 2022 and the recognition by Russia of claims to independence by the so-called People's Republics of Donetsk (DPR) and Luhansk (LPR) on 21 February 2022 amount to genocide. It is noteworthy that a total of eleven judges appended separate, dissenting or partially dissenting opinions to the judgment. The judgment of 2 February 2024 only concerned preliminary objections and the case itself is likely to require some time until the final decision. In light of the recent increase in allegations of genocide in different conflicts, it seems likely that the eventual final judgment by the ICJ on the merits of this case will receive significant international attention.

ICSID Tribunal Issues Final Award in Case Against Argentina

Farah El Barnachawy, PhD Candidate, Paris I Panthéon-Sorbonne

The Claimant, Orazul International España Holdings, a company incorporated in Spain brought forward this arbitration against the Republic of Argentina, the Respondent. The dispute relates to measures adopted by Argentina since 2003, which modified the electricity regulatory framework. As such, the Claimant argued that these measures, which should have been reversed in 2006, have negatively impacted its shareholding interest in Argentina and violate the Argentina-Spain bilateral investment treaty (BIT). On the other hand, the Respondent argued that the Tribunal lacked jurisdiction.

The Final Award dated 14 December 2023 is based on the Argentina-Spain BIT and the ICSID Convention. In it, the Tribunal upheld its jurisdiction to decide upon the dispute thereby rejecting the Respondent's arguments that the claims were time barred and that the Claimant had waived its right to bring any claims forward. On the merits, the Tribunal, by majority view, dismissed the entirety of the claims:

(1) Regarding fair and equitable treatment, the Tribunal held that conditions in place were characterized by an ongoing economic crisis. Thus, even if the Claimant had legitimate expectations, the claims were unfounded because the Argentine Electricity Law did not include a guarantee of regulatory stability.

(2) On unjustified and discriminatory measures, the Tribunal found that the Claimant invested during an economic crisis, tainted with a myriad of responsive emergency regulations. As such, the Respondent's measures amounted to rational policy as opposed to unreasonable or discriminatory measures that would obstruct the investment.

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(3) With respect to expropriation, the Tribunal found there was no direct expropriation. Additionally, it held that the threshold for indirect expropriation had not been met.

(4) Concerning the most favored nation provision, the Tribunal concluded that the Claimant did not benefit from the umbrella clause contained in Article II(2)(c) of the Argentina-US BIT based on Article IV(2) of the Argentina-Spain BIT. Thus, the Tribunal need not consider further claims based on a breach thereof.

Claimant-appointed arbitrator David R. Haigh, KC, dissented on the first merits claim regarding fair and equitable treatment. He stated that the issue was incorrectly framed by the Tribunal and the matter to be addressed was rather whether the Claimant had a legitimate expectation, in 2003, that the regulatory framework would be modified by mid-2006, based on the Argentine Energy Secretary's express representations that the measures were temporary. In framing the question in this manner, Arbitrator Haigh found that Argentina fell short of the fair and equitable treatment standard, as the measures were not restored.

Russian Law Requiring Backdoor to Encrypted Telegram Messages Violates Privacy, ECtHR Holds

Lisa Reinsberg, International Justice Resource Center

In the case of *Podchasov v. Russia*, the European Court of Human Rights considered Russia's Information Act, which requires that "Internet communication organisers" "ICO" store all communications data and contents for minimum periods, hand them over to law enforcement when legally required but without the need for a court order, and enable their decryption. The applicant used Telegram, a messaging app that provides the option for users to implement end-to-end encryption for "secret chats." In June 2017, Russia identified Telegram as an ICO subject to the Information Act, and the following month the Federal Security Service (FSB) ordered Telegram to facilitate the decryption of communications of six users "suspected of terrorism-related activities." Telegram refused to comply, asserting that it would have to create a backdoor weakening encryption for all users in order to provide the data of the six individuals, who used the "secret chat" function. The applicant and others unsuccessfully challenged the disclosure order in national courts before turning to the ECtHR.

In its judgment of February 13, the ECtHR reiterated that a data storage requirement constitutes an interference with Article 8 (respect for private life and correspondence). It also found that, by potentially allowing access to any user's communications, the Information Act's access and decryption obligations did as well.

The Court accepted that the Information Act pursued legitimate aims, but determined that "the extremely broad duty of retention" imposed on ICOs required "particular attention" as to the adequacy of safeguards. The Court viewed prior authorization by law enforcement as inadequate to ensure that surveillance was only carried out when necessary, given the lack of sufficiently independent supervision or notification to those affected. Recognizing that "technical solutions for securing and protecting the privacy of electronic communications" help secure other rights, the Court held that because the decryption obligation requires ICOs to create backdoors potentially compromising all users' communications, it is not proportionate to the aims pursued. As such, the Court unanimously concluded that the Information Act violates Article 8.

EACJ Overturns Serengeti Eviction Decision on Evidentiary Grounds

Lisa Reinsberg, International Justice Resource Center

In its recently published judgment in the case of *Ololosokwan Village Council et al. v. Tanzania*, the Appellate Division of the East African Court of Justice (EACJ) grappled with evidentiary standards when reconsidering the forcible eviction, in 2017, of several Maasai pastoral communities who lived and herded at the contested boundary of the Serengeti National Park. The applicants, represented by the Pan African Lawyers Union, appealed the EACJ first instance decision of September 2022 (summary here), in which the trial court held that the applicants had not proven their villages were actually outside the Park territory. The appeals judgment, adopted on November 29, 2023, addresses the applicants' contentions that, *inter alia*, the trial court failed to give adequate evidentiary weight to the affidavits and expert evidence they presented, applied an inappropriate

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standard of proof, and erroneously failed to seek information from the parties before rendering a judgment based on the absence of that information.

The EACJ found the trial court did not appropriately consider the evidence. The trial judge's general reference to the affidavits being "repetitive" was insufficient reason to disregard some of them entirely. As to the expert testimony, the EACJ saw "no compelling reason why the Court did not ask the witness to produce the passport [proving he had entered Tanzania], if the failure to produce the same was going to be one of the grounds for rejecting the Expert's evidence. In short, the Appellants were unfairly ambushed."

The EACJ reiterated that the appropriate standard of proof is the balance of probability, or preponderance of evidence. In view of the trial court's apparent expectation that the applicants convincingly or "exactly" prove their allegations, allowing the judge to decide "on the basis of absolute certainty," the Appellate Division concluded that the trial court did not use the appropriate standard of proof. Accordingly, the EACJ remitted the case back to the trial court for *de novo* consideration and awarded costs to the appellants.

Court of Arbitration for Sport finds Russian Figure Skater Kamila Valieva Committed Anti-Doping Rule Violation, Banned from International Competition for Four Years

On January 29, 2024, a Court of Arbitration for Sport (CAS) panel found that Russian figure skater Kamila Valieva had committed an Anti-Doping Rule Violation (ADVR), having tested positive for the banned substance Trimetazidine (TMZ) weeks before the 2022 Winter Olympics in Beijing. Valieva was allowed to compete even though her positive test came back days before the women's singles event in Beijing, and after a CAS Ad Hoc Division tribunal upheld a Russian Anti-Doping Agency (RUSADA) disciplinary committee's decision to lift a mandatory provisional suspension that had been imposed. The RUSADA disciplinary committee later rendered a decision finding that although she had committed an ADVR, she bore "no fault or negligence" for it. That decision was ultimately challenged before a CAS arbitral panel.

Valieva initially argued that her urine samples, which had been tested in a laboratory in Stockholm, had not been analyzed in accordance with international standards and therefore that no violation of RUSADA's anti-doping rules had been proven. After hearing evidence presented against her at a hearing in Lausanne, Switzerland, however, Valieva narrowed her appeal, arguing that the CAS did not have jurisdiction to hear her case, and that any sanctions should be limited.

With respect to her jurisdictional objection, Valieva argued that she had never accepted that the RUSADA disciplinary committee's decision could be appealed to the CAS, and never accepted the Court's jurisdiction by bringing a claim before it. The Court found that it had jurisdiction in dismissing the former argument, noting that Art. 15.2 of the Russian Anti-Doping Rules confer jurisdiction on the CAS Appeals Division, and that Valieva had expressly acknowledged this in her appearance before the CAS Ad Hoc Division.

With Valieva having accepted the finding that she committed an ADVR, the Tribunal assessed the likelihood that she had done so unintentionally in determining how to sanction her. Valieva argued that she had unintentionally ingested residue from TMZ tablets that her "grandfather" (a non-blood relative who was close with her family) took for a heart problem when she ate a strawberry cake he had prepared for her in December 2021. The Tribunal found this explanation unconvincing, but ultimately did not find that it had been proven that she ingested the TMC intentionally. Still, the Tribunal banned Valieva from participating in international competition for four years, with her ineligibility beginning on December 25, 2021, the day she tested positive for TMZ.

Tribunal Sides with Norway in Country's First ICSID Case

On December 22, 2023, an ICSID Tribunal comprised of Sir Christopher Greenwood, KC (President), Yves Fortier, KC (Claimants' appointee), and Donald McRae (Respondent's appointee) dismissed Peteris Pildegovics and SIA North Star's claim that Norway had impermissibly restricted snow crab fishing, resulting in losses to their investment. Claim-

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Member News

Dr. Chiara Giorgetti, Professor at Richmond Law School, was elected Vice Chair of the Board of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (RD4U) at its inaugural meeting in December 2023. For further information, see page 3 of this newsletter.

Prof. Freya Baetens of the University of Oxford, Faculty of Law has been awarded a Chair by the Francqui Foundation in Belgium. These prestigious Chairs encourage international inter-university scientific cooperation and exchange to enrich academic environments, advance academic excellence and interdisciplinary research, and strengthen universities' reputations. A Francqui Chair is conferred after a highly competitive process in which any scholar, anywhere in the world, within any field or discipline, can be nominated by Belgian universities based on outstanding academic merit, including the impact of one's scholarship on the world. Prof. Baetens has been presented with this Chair on the basis of her work's influence on law- and policy-making in Europe and beyond.

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ants brought their claim under the 1992 Norway-Latvia BIT and the ICSID Convention.

Norway argued, *inter alia*, that the *Monetary Gold* principle should prevent the Tribunal from hearing the case because any finding would necessarily require a determination about the rights and obligations of Latvia, the EU, and Russia. The Tribunal agreed that to the extent Claimants argued that Norway had colluded with Russia to prevent Claimants from harvesting snow crabs such that Russia's obligations would form the subject matter of the dispute before it, those claims would be inadmissible. However, the Tribunal concluded that the record did not support a finding that Norway had conspired with Russia to exercise sovereignty in a high seas area between Russia and Norway in the Barents Sea (the "Loop Hole") and therefore that Russia's rights and obligations would not necessarily form the subject matter of the dispute before it. The Tribunal further determined that Claimants' assertions about Latvian fishing licenses and the EU's rights and obligations under the Svalbard Treaty, North-East Atlantic Fisheries Commission Convention, and UN Convention on the Law of the Sea would need not form the subject matter of the Tribunal's decision and therefore did not implicate the *Monetary Gold* principle.

The Tribunal noted that because North Star began harvesting snow crab at a time when Norway did not regulate such activities in the Loop Hole, and because Norway never indicated it would grant a permit to North Star to harvest snow crab in the North Loop, Claimant had no legitimate expectation that Norway would not regulate snow crab fishing in the future. Moreover, because Claimants' harvesting operations took place almost entirely in the Russian part of the North Loop, to the extent they had an acquired right to harvest there, it could not give rise to a claim for legitimate expectations under the Norway-Latvia BIT. Similarly, the Tribunal noted that, among other reasons, because *Russia's* ban (rather than Norway's) on snow crab harvesting halted nearly all of North Star's activities, Norway's regulations could not give rise to an indirect expropriation claim.

The Tribunal also dismissed Claimants' argument that Norway violated the BIT's MFN provision by permitting Russian vessels to harvest snow crab in the Norwegian sector of the Loop Hole despite banning North Star's vessels from operating there. It concluded that although Russian-flagged vessels were permitted for a short period of time to harvest snow crab in the Norwegian sector of the North Loop, those activities did not constitute investments in Norway that could give rise to an MFN claim.

In dismissing the remainder of Claimants' claims, the Tribunal ordered Claimant to cover Norway's costs and fees (totaling more than 1.6 million EUR, plus interest). Claimants now seek annulment of the Award. ■

Opportunities

Calls for Papers

Ocean Yearbook, Volume 39 - Call for Papers

The Ocean Yearbook co-editors are seeking manuscripts for *Ocean Yearbook Volume* 39, to be published in June 2025 by Brill Nijhoff Publishers. Editorship of the *Ocean Yearbook* is a cooperative effort of the International Ocean Institute and the Marine & Environmental Law Institute at Schulich School of Law. The official annual deadline for manuscript submissions is 31 March; however, the co-editors will accept submissions until **5 July 2024**. Please see additional information in the annual Call for Papers and the Student Paper Prize announcements.

Job Postings & Other Opportunities

Associate Humanitarian Affairs Officer (P2), UN OCHA
The UN Office for the Coordination of Humanitarian Affairs (OCHA) is looking for an associate humanitarian affairs officer (P2) in New York. The job posting can be found here and the deadline to apply is **1 April 2024**.

The ICTIG Newsletter archives are available on the ICTIG page of the ASIL website. We invite submissions to the newsletter on an ongoing basis, and encourage members to contribute case summaries, news items, publications, relevant announcements and opportunities, and their own professional news for inclusion in the next issue. For summaries and news items, please limit submissions to 300 words or fewer and indicate how you would like to be credited. All submissions may be sent via email with the subject "ICTIG newsletter submission" to ictignewsletter@gmail.com.