

BRIEFLY NOTED

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JUDICIAL AND SIMILAR PROCEEDINGS

1. ***Prosecutor v. Bemba* (International Court of Justice – March 22, 2017)**

<https://www.icc-cpi.int/CourtRecords/CR2017_01420.PDF>

On March 22, 2017, Trial Chamber VII of the International Criminal Court (ICC) delivered its sentencing decision in *Prosecutor v. Bemba*. The Trial Chamber found Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido guilty of offences against the administration of justice “related to the false testimonies of defence witnesses in another case against Mr Bemba before the ICC” in October 2016. The defendants received sentences ranging from six months to two years and six months. In making its determination, the Trial Chamber “considered (1) the gravity of the offences that were the basis for conviction of the person concerned; (2) the culpable conduct of the convicted person concerned; and (3) the individual circumstances of the convicted person concerned.”

2. ***Fahimian v. Bundesrepublik Deutschland* (Court of Justice of the European Union – April 4, 2017)**

<<http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0544&lang1=en&type=TEXT&ancre=>>

On April 4, 2017, the Grand Chamber of the Court of Justice of the European Union ruled in *Fahimian v. Bundesrepublik Deutschland* that national authorities may refuse to grant a study visa to a third country national with a degree from a university subject to restrictive measures due to concerns over a potential threat to public security. The case concerned an Iranian student, Sahar Fahimian, who holds a Master of Science from an Iranian university that is the subject of restrictive measures from the EU and was denied a visa to pursue doctoral studies in Germany. Germany “justifies the refusal by the fear that the knowledge Ms Fahimian might acquire during her research could subsequently be misused in Iran (for purposes such as the collection of confidential information in western countries, internal repression, or more generally in connection with human rights violations).” The Court held that “national authorities enjoy a wide discretion in assessing the facts in order to ascertain whether, in the light of all the relevant elements of the situation of the third country national who is applying for a visa for study purposes, that person represents a threat, even if potential, to public security.” The Court noted that states must still ensure the denial of a visa under Directive 2004/114 on the conditions of admission of third country nationals for study purposes “is based on duly justified grounds and a sufficiently solid factual basis.”

3. **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), Provisional Measures (International Court of Justice – April 19, 2017)**

<<http://www.icj-cij.org/files/case-related/166/19394.pdf>>

On April 19, 2017, the International Court of Justice (ICJ) delivered its order on Ukraine’s request for provisional measures in the 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)*, rejecting Ukraine’s request for provisional measures to halt Russia’s support for rebels in eastern Ukraine and allowing measures requiring Russia to refrain from discrimination against the Crimean Tatar community. Ukraine requested provisional measures under the International Convention for the Suppression of the Financing of Terrorism (ICSFT), arguing that Russia violated the ICSFT by supplying weapons and training “to illegal armed groups that engage in acts of terrorism in Ukraine”

and asking the Court order Russia to “immediately and unconditionally cease and desist from all support.” The Court found that although the acts Ukraine refers to have resulted in significant loss of civilian life, Ukraine did not provide sufficient evidence to demonstrate the elements required to prove a violation of the ICSFT are present. Ukraine also requested provisional measures under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), arguing that Russia banned the Mejlis, “the central self-governing institution of Crimean Tatar life,” and restricted the educational rights of ethnic Ukrainians, among other alleged violations. Here the Court found that these acts fulfill the condition of plausibility under the CERD and required Russia to “[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis” and to “[e]nsure the availability of education in the Ukrainian language.”

4. Venezuela v. Helmerich & Payne International Drilling Co. (United States Supreme Court – May 1, 2017)

<https://www.supremecourt.gov/opinions/16pdf/15-423_4357.pdf>

On May 1, 2017, the U.S. Supreme Court ruled in *Venezuela v. Helmerich & Payne International Drilling Co.* that the Foreign Sovereign Immunities Act’s (FSIA) expropriation exception applies only if the property at issue was “taken in violation of international law” and that a nonfrivolous-argument standard is inconsistent with the FSIA. The case concerned a claim by an American parent company and its Venezuelan subsidiary that Venezuela had unlawfully expropriated the subsidiary’s oil rigs when it nationalized them, with Venezuela arguing that its sovereign immunity barred U.S. courts from having jurisdiction over the matter. In regard to the parent company’s claim, the District of Columbia Circuit Court “decided only whether the plaintiffs might have a nonfrivolous expropriation claim, making clear that, under its standard, a nonfrivolous argument would be sufficient to bring a case within the scope of the exception.” The Supreme Court reversed and held that “a party’s nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed ‘property taken in violation of international law.’” The Court also noted that “a court should decide the foreign sovereign’s immunity defense ‘[a]t the threshold’ of the action” and that while the parties agreed to the facts of the case in this instance, making it a purely legal question, if a decision “requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible.”

5. Chavez-Vilchez v. Raad van bestuur van de Sociale verzekeringsbank (Court of Justice of the European Union – May 10, 2017)

<<http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0133&lang1=en&type=TEXT&ancre=>>

On May 10, 2017, the Court of Justice of the European Union ruled in *Chavez-Vilchez v. Raad van bestuur van de Sociale verzekeringsbank* that a state may potentially be required to provide a third-country national with a right of residence if that individual has a minor child who is an EU citizen. The Court noted that Article 20 of the Treaty on the Functioning of the European Union “precludes national measures, including decisions refusing a right of residence to the family members of an EU citizen, which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status. In this case, if the mothers were compelled to leave the territory of the EU, that could deprive their children of the genuine enjoyment of the substance of those rights by compelling those children to leave the territory of the EU.” The Court also stated that having another parent who is an EU citizen and able to assume sole responsibility for the child in the EU may be a factor in the decision, but that is not sufficient to determine that a relationship between the parent who is not an EU citizen and the child would not require the child to leave the EU if that parent was

denied a right of residency. The Court held that states must consider in their assessment a number of factors relating to the best interest of the child, “including the age of the child, the child’s physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium.”

6. Opinion 2/15 of the Court (Court of Justice of the European Union – May 16, 2017)

[<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002\(01\)>](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002(01))

On May 16, 2017, the Court of Justice of the European Union ruled that the EU cannot conclude a free trade agreement with Singapore as it currently stands, without the participation of the member states. The European Commission submitted a request to the Court to assess whether the EU has exclusive competence allowing it to sign and conclude a trade agreement between the EU and Singapore that the parties initialed in 2013. The Court held “that the free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone, because some of the provisions envisaged fall within competences shared between the EU and the Member States. It follows that the free trade agreement with Singapore can, as it stands, be concluded only by the EU and the Member States acting together.” The Court did find that the EU has exclusive competence over a number of matters within the agreement, but that there were two areas where the EU did not have “exclusive competence, namely the field of non-direct foreign investment (‘portfolio’ investments made without any intention to influence the management and control of an undertaking) and the regime governing dispute settlement between investors and States.”

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Resolution 2349 (United Nations Security Council – March 31, 2017)

[<https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2349\(2017\)>](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2349(2017))

On March 31, 2017, the Security Council adopted Resolution 2349, through which it strongly condemned the terrorist attacks and other rights violations taking place in the Lake Chad Basin Region in Africa. This was its first resolution addressing Boko Haram’s presence in the area. The Council expressed its “full support for the conflict-affected populations of the Region including displaced and host communities who are suffering from the ongoing security crisis, humanitarian emergency, and development deficits resulting from the violence by terrorist groups.” The Council encouraged governments in the region to increase military cooperation and coordination and highlighted “the importance of strengthening cross-border judicial cooperation in identifying and prosecuting perpetrators of human rights violations and abuses.” The Council also noted its “concern about the protection needs of civilians in the Region affected by the scourge of terrorism, including those resulting from sexual exploitation and abuse, extra-judicial killings, arbitrary detention, torture, and recruitment and use of children in violation of international law” while reiterating “the primary responsibility of Member States to protect civilian populations on their territories.”

2. National Case Law on Freedom of Expression (Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights – May 16, 2017)

[<http://www.oas.org/en/iachr/expression/docs/publications/JURISPRUDENCIA_ENG.pdf>](http://www.oas.org/en/iachr/expression/docs/publications/JURISPRUDENCIA_ENG.pdf)

On May 16, 2017, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights released a report entitled “National Case Law on Freedom of Expression.” The report provides “an overview of a number of key judicial decisions adopted in the last four years by national supreme courts in Latin America and the Caribbean” and aims “to strengthen the capacity of national courts and to consolidate the role of judiciary’s as key players in protecting the rights of freedom of expression

and access to public information.” The report notes that the cases were selected because they “represent progress at the domestic level, either because they ensure the protection of the freedom of expression of the persons directly involved in the specific case, and/or because they set forth legal guidelines that incorporate and develop the inter-American standards in the national sphere.” The cases within the report were chosen from the following states: Argentina, Brazil, Canada, Colombia, Costa Rica, United States, Mexico, Panama, Dominican Republic, and Uruguay.

3. Resolution 2352 (United Nations Security Council – May 15, 2017)

[<https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2352\(2017\)>](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2352(2017))

On May 15, 2017, the Security Council adopted a resolution extending the mandate of the United Nations Interim Force for Abyei (UNISFA) until November 15, 2017. The Council decided to reduce UNISFA’s authorized troop ceiling from 5,326 to 4,791 and urged the all parties to resume direct negotiations in order to agree on a final settlement of the Abyei question. The Council also noted its regret regarding “the lack of significant progress made by both parties on the benchmarks for the Joint Border Verification and Monitoring Mechanism (JBVMM) and the unnecessary impediments imposed upon the JBVMM” and called on the governments of Sudan and South Sudan “to make timely and effective use of the JBVMM.” The Council also stated that this extension of the mandate “shall be the final such extension unless both parties demonstrate through their actions clear commitment and steadfast guarantees for implementation of the JBVMM.”