

The Year in Review

Volume 52 *International Legal Developments*
Year in Review: 2017

Article 11

January 2018

International Courts & Judicial Affairs

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Recommended Citation

Sara Ochs et al., *International Courts & Judicial Affairs*, 52 ABA/SIL YIR 163 (2018)
<https://scholar.smu.edu/yearinreview/vol52/iss1/11>

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International Courts & Judicial Affairs

Authors

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Courts & Judicial Affairs

SARA OCHS, HAYDEE DIJKSTAL, WILLIAM DUNLAP, KABIR DUGGAL,
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This Article reviews some of the most significant developments made by international courts and tribunals in 2017.

I. The International Criminal Court (“ICC”)

A. GENERAL DEVELOPMENTS

The International Criminal Court (ICC) handed down several notable decisions in 2017.

In *Prosecutor v. Bosco Ntaganda*, the Appeals Chamber on September 5² upheld a Trial Chamber VI decision from June 1,³ rejecting the Defense’s request to file a no case to answer motion.⁴ At the end of the Prosecution’s case, the Defense requested that the Chamber dismiss the case against the accused on the basis that the evidence presented by the Prosecution could not support a conviction.⁵ The Appeals Chamber’s decision upheld the Trial Chamber’s discretion in granting or declining the submission of the motion, and in doing so held that conducting a “no case to answer” procedure is not required to ensure a defendant’s fair trial rights.⁶ On June 15, the Appeals Chamber also upheld the Trial Chamber’s decision that the Court has jurisdiction over the war crimes of rape and sexual slavery of child soldiers when the alleged perpetrator and the victim are members of the same armed

1. The Committee Editor is Sara L. Ochs, Associate at Akerman, LLP. Haydee Dijkstal, International Criminal and Human Rights Lawyer, and William Dunlap, Professor of Law and Director of Foreign Programs at Quinnipiac University School of Law, authored Section I. Kabir Duggal and João Marçal Martins of the New York office of Baker & McKenzie LLP, and Emily C. Westphalen, an LLM Candidate at New York University, contributed Section II. Edwin L. Felter, Jr., Senior Judge of the Colorado Office of Administrative Courts and Adjunct Professor of Law at University of Denver, Sturm College of Law, authored Section III. The views expressed in this article are the authors’ own and do not necessarily represent the views of their law firms or organizations or their firms’ or organizations’ clients.

2. *See generally* *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 OA6, Judgment on the Appeal of Mr. Bosco Ntaganda against the “Decision on Defense Request for Leave to File a ‘No Case to Answer’ Motion,” (Sept. 5, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05424.pdf.

3. *See* *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Deference Request for Leave to File a ‘No Case to Answer’ Motion, ¶ 28 (June 1, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03545.PDF.

4. *See id.*

5. *See id.* at ¶ 10.

6. *See* *Prosecutor v. Ntaganda*, *supra* note 2, at ¶¶ 44-45.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

164 THE YEAR IN REVIEW

[VOL. 52]

group, reasoning that members of an armed group are not “categorically excluded” from protection under international law.⁷

The Trial Chamber also issued decisions allowing the admission of prior recorded witness testimony under Rule 68(2),⁸ and offered guidance on how to handle circumstances in which the Defense initiates contact with witnesses who are also victims.⁹

Also in 2017, Trial Chamber I twice decided that Laurent Gbagbo should remain in detention while tried for charges, including four counts of crimes against humanity relating to the post-election violence in Côte d’Ivoire in 2011.¹⁰ The first decision was issued on March 10, and was subsequently reversed and remanded by the Appeals Chamber on July 19.¹¹ On second review (following remand) the Trial Court again decided that continued detention was “reasonable, appropriate and necessary” to guarantee Gbagbo’s attendance at trial,¹² and The Defense’s appeal of this decision was dismissed *in limine* for non-compliance with Regulation 64, which requires the appealing party to identify with specificity the alleged errors forming the basis for appeal, and how these errors affect the appealed decision.¹³

In *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Trial Chamber VII issued sentences on March 22¹⁴ for the October 2016 convictions of five

7. See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 OA5, Judgment on the Appeal of Mr. Ntaganda against the “Second Decision on the Defense’s Challenge to the jurisdiction of the Court in Respect of Counts 6 and 9,” ¶ 2 (June 15, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF.

8. See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Prosecution Application under Rule 68(2)(c) for Admission of Prior Recorded Testimony of Witness P-0016, ¶ 31 (Feb. 24, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_00954.PDF. See also *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Defense Request for Leave to Appeal the “Decision on Prosecution Application under Rule 68(2)(c) for Admission of Prior Recorded Testimony of Witness P-0016,” ¶ 10 (Apr. 7, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_02159.PDF.

9. See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Defense Request for Leave to Appeal the “Decision on Prosecution Application under Rule 68(2)(c) for Admission of Prior Recorded Testimony of Witness P-0016,” ¶ 22-24 (Apr. 7, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_02159.PDF. *Ntaganda*, Case No. ICC-01/04-02/06.

10. See generally *Prosecutor v. Gbagbo*, *supra* note 8; *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/15, Public Redacted Version of the Decision on Mr. Gbagbo’s Detention, ¶ 74 (Sept. 25, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05849.PDF.

11. See *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/15, Public Redacted Version of the Decision on Mr. Gbagbo’s Detention, ¶ 74 (Sept. 25, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05849.PDF.

12. See *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/15 OA13, Decision on Mr. Laurent Gbagbo’s Notice of Appeal, ¶ 7 (Oct. 5, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05986.PDF.

13. See *Prosecutor v. Gombo*, Case No. ICC-01/05-01/13, Decision on Sentence Pursuant to Article 76 of the Statute, 98-99 (Mar. 22, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_01420.PDF.

14. See *Prosecutor v. Gombo*, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, 455-56 (Oct. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 165

individuals accused of offenses against the administration of justice relating to providing and/or eliciting false witness testimony in the main case against Jean-Pierre Bemba Gombo.¹⁵ The issued sentences included one additional year of imprisonment and a 300,000 Euro fine and two years and six months of imprisonment minus time served for Jean-Pierre Bemba Gombo; as well as a 30,000 Euro fine for Aimé Kilolo Musamba; two years imprisonment minus time served for Jean-Jacques Mangenda Kabongo; six months imprisonment minus time served for Fidèle Babala Wandu; and eleven months imprisonment minus time served for Narcisse Arido.¹⁶

Several reparations orders were also issued in 2017. First, in the case against Germain Katanga, who in 2014 was found guilty of one count of crimes against humanity and four counts of war crimes committed in the Democratic Republic of Congo, Trial Chamber II issued a reparations order in the amount of \$250 per victim, as well as collective reparations, both to be addressed by the Trust Fund for Victims, due to Katanga's indigence.¹⁷ Additionally, in the case against Ahmad Al Faqi Al Mahdi concerning the destruction of cultural heritage, the Court issued an order granting individual and collective reparations to the community of Timbuktu.¹⁸ Al-Mahdi was convicted of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, which highlighted the importance of protecting cultural heritage against "irreplaceable loss that negates humanity."¹⁹

On June 2, in the main trial against Jean-Pierre Bemba Gombo, Trial Chamber III appointed four experts on reparations proceedings, after rejecting an application by the Defense to suspend the reparations proceedings until appeals were concluded.²⁰ The Chamber reasoned that the Court's legal text allows reparation proceedings to be parallel to a pending appeal, and that there is no prejudice to the accused's rights from such simultaneous proceedings because a reparations order becomes effective only upon a confirmed conviction.²¹

15. See Prosecutor v. Gombo, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, 455-56 (Oct. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF. See Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 13, at 98-99.

16. See Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 13, at 98-99.

17. See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, ¶¶ 300, 313 (Mar. 24, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF.

18. See Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-236, Reparations Order, 60 (Aug. 17, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF.

19. See *id.* at ¶ 22.

20. See Prosecutor v. Gombom Case No. ICC-01/05-01/08, Public Redacted Version of "Decision Appointing Experts on Reparations," ¶¶ 4, 11 (June 2, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03698.PDF.

21. See Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision on the Defence's Request to Suspend the Reparations Proceedings, ¶¶ 14, 20 (May 5, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_02980.PDF.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

166 THE YEAR IN REVIEW

[VOL. 52]

In Libya, an additional arrest warrant was unsealed on April 24 against Al Tuhamy Mohamed Khaled, head of the Internal Security Agency for Muammar Gaddafi.²² The arrest warrant was issued on April 18, 2013, alleging four counts of crimes against humanity and three counts of war crimes committed in Libya during 2011.²³ On August 15, an additional arrest warrant was issued against Mahmoud Mustafa Busayf Al-Werfalli, a commander in the Al-Saiqa Brigade, alleging one count of the war crime of murder, relating to seven incidents in 2017 committed in or around Benghazi, during which thirty-three persons were killed.²⁴ Neither accused has yet been arrested or transferred to The Hague.

B. THE AFRICAN UNION'S DISPUTE WITH THE ICC

The African Union's efforts to encourage a mass exodus of African states from the ICC took an unexpected turn in 2017. Mere days after the AU adopted its withdrawal strategy in January,²⁵ a South African court held that the government's 2016 notice of intent to withdraw was unconstitutional and would need to be submitted to Parliament.²⁶ The Government has since cancelled the notice, and while it has said that it still intends to withdraw from the ICC, it has made no further public moves to do so.²⁷

In February, The Gambia also rescinded its earlier intention to withdraw. In 2016, then-President Yahya Jammeh had informed the United Nations of the country's intent to withdraw.²⁸ But before it became effective, the new president, Adama Barrow, reversed course, announcing on state television: "As a new government that has committed itself to the promotion of human rights . . . we reaffirm The Gambia's commitment to the principles enshrined in the Rome Statue of the International Criminal Court."²⁹

22. See Prosecutor v. Khaled, Case No. ICC-01/11-01/13, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under Seal and Ex Parte Annex, 6-7 (Apr. 18, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_03122.pdf.

23. See *id.*

24. See Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest, 16 (Aug. 15, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05031.PDF.

25. See Afr. Union, *Draft Decision on the International Criminal Court*, ¶ 8, EX.CL/1006(XXX) (Jan. 31, 2017), https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec_1_-19_xxviii_e.pdf. See generally Afr. Union, *Draft 2 Withdrawal Strategy Document* (Dec. 1, 2017), https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf.

26. See Democratic All. v. Minister of Int'l Relations & Cooperation and Others, Case No. 83145/2016, High Court of South Africa, 2 (Feb. 22, 2017), <http://saflii.org/za/cases/ZAGPPHC/2017/53.html>.

27. See Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

28. See *Gambia to Rejoin Commonwealth, ICC*, DEUTSCHE WELLE (Feb. 14, 2017), <http://www.dw.com/en/gambia-to-rejoin-commonwealth-icc/a-37547929>.

29. See *id.*

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 167

In effect, the African Union (AU) AU resolution to withdraw African states from the ICC has proven to be no more than a recommendation that “calls on member states to consider implementing its recommendations.”³⁰ To date, both Senegal and Nigeria have expressly voted against the resolution and have said that they will remain in the ICC.³¹

Burundi’s withdrawal from the ICC, announced in 2016, became effective on October 27, 2017.³² Some observers have speculated that Burundi’s main purpose in doing so was not to promote the AU’s withdrawal efforts, but instead to prevent the Court from initiating a case against President Pierre Nkurunziza—and members of his government—for alleged atrocities committed during a period of civil unrest which erupted on April 25, 2015, after he announced that he would run for a third term.³³ Such conduct is widely believed to be unconstitutional.³⁴ Nevertheless, on October 25, 2017, the next-to-last day of Burundi’s membership with the ICC, Pre-Trial Chamber III authorized the opening of an investigation into genocide, war crimes, and crimes against humanity in Burundi (and in other states when carried out by Burundi nationals) committed between April 26, 2015 and October 26, 2017; the latter being Burundi’s final day as a party to the Rome Statute.³⁵

The source of the AU’s resentment towards the ICC is the Court’s history of prosecuting African defendants nearly exclusively.³⁶ The first nine situations to be investigated by the ICC all involved incidents committed in Africa,³⁷ and the Court’s first forty-one public indictments were all brought against Africans.³⁸ As The Gambia was announcing its intent to withdraw,³⁹

30. See *Draft Decision on the International Criminal Court*, *supra* note 25, at ¶ 8.

31. See *African Union Backs Mass Withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>.

32. Beitel van der Merwe, *Burundi’s Withdrawal from the ICC*, INT’L CRIM. JUST. (Oct. 27, 2017), <https://www.icjafrika.com/single-post/2017/10/27/Burundis-withdrawal-from-the-ICC>.

33. Ismail Akwei, *Burundi is officially not a member of the International Criminal Court (ICC)*, AFRICANEWS (Oct. 27, 2016), <http://www.africanews.com/2017/10/27/burundi-is-officially-not-a-member-of-the-international-criminal-court-icc/>.

34. See Matt Cannock, *Burundi: Cynical ICC Withdrawal Will not Derail Wheels of Justice*, AMNESTY INT’L (Oct. 27, 2017), <https://www.amnesty.org/en/press-releases/2017/10/burundi-cynical-icc-withdrawal-will-not-derail-wheels-of-justice/>.

35. See Case No. ICC-01/17-X, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25 October 2017, ¶¶ 193-95 (Nov. 9, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06720.PDF.

36. See *e.g.* U.N. Secretary-General, Rome Statute of the International Criminal Court Rome, 17 July 1998 Gambia: Withdrawal, C.N.862.2016.TREATIES-XVIII.10 (Nov. 11, 2016); Siobhán O’Grady, *Gambia: The ICC Should Be Called the International Caucasian Court*, FOREIGN POL’Y (Oct. 26, 2016), <http://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>.

37. See *Situations Under Investigation*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 29, 2018).

38. See *40 Defendants*, INT’L CRIM. CT., <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (last visited Mar. 29, 2018).

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

168 THE YEAR IN REVIEW

[VOL. 52]

Sheriff Bojang, The Gambia's information minister, referred to the ICC as the "International Caucasian Court."⁴⁰ The ICC's apparent pattern was finally broken in January 2016, when it opened an investigation into allegations of war crimes and crimes against humanity in South Ossetia, Georgia.⁴¹

Defenders of the ICC have observed that only two (Kenya and Cote d'Ivoire) of the initial nine African cases were *proprio motu*, instigated by the Office of the Prosecutor on its own authority.⁴² Two were referred by the UN Security Council (Sudan and Libya) and five by member states (Congo, Uganda, Mali, and two from the Central African Republic).⁴³

Defenders also note that atrocities committed outside of Africa are not necessarily going un-investigated or unpunished by the international community.⁴⁴ Instead, recent international and hybrid *ad hoc* tribunals have been established to prosecute war crimes, crimes against humanity, and genocide committed on other continents.⁴⁵ These tribunals include the International Criminal Tribunal for the Former Yugoslavia, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Special Court of Sierra Leone, a complex arrangement of investigative bodies and reconciliation commissions in East Timor, and most recently, the Kosovo Specialist Chambers.⁴⁶

The concerns of South Africa with the ICC go well beyond the Court's substantial focus on Africa. The Court condemned South Africa on July 5, 2017, for having failed to arrest Sudanese President Omar al-Bashir when he flew to South Africa for a meeting of the African Union in June 2015.⁴⁷

39. U.N. Secretary-General, Rome Statute of the International Criminal Court Rome, 17 July 1998 Gambia: Withdrawal, C.N.862.2016.TREATIES-XVIII.10 (Nov. 11, 2016).

40. See Siobhán O'Grady, *Gambia: The ICC Should Be Called the International Caucasian Court*, FOREIGN POL'Y (Oct. 26, 2016), <http://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>.

41. See ICC-01/15, Decision on the Prosecutor's Request for Authorization of an Investigation, 26 (Jan. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF.

42. See *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 29, 2018).

43. See *id.*

44. See *International and Hybrid Criminal Courts and Tribunals*, U.N. AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> (last visited Mar. 30, 2018).

45. See *id.*

46. See *id.*; *KSC at a Glance*, KOS. SPECIALIST CHAMBERS, https://www.scp-ks.org/sites/default/files/public/content/ksc_at_a_glance_eng_1.pdf (last visited Mar. 27, 2018); *Timor-Leste: Events of 2005*, HUM. RTS. WATCH: WORLD REP. 2006 (2006), <https://www.hrw.org/world-report/2006/country-chapters/east-timor>.

47. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar al-Bashir, ¶ 2 (July 6, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF. See also Case Information Sheet: Prosecutor v. Al Bashir, INT'L CRIM. CT. (Apr. 6, 2017), <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 169

When the ICC indicted al-Bashir in 2009 and 2010 for war crimes, crimes against humanity, and genocide committed in Darfur,⁴⁸ it formally requested member states to arrest him if he came into their jurisdiction, which thus created a formal obligation for member states to comply with this request under Article 87 of the Rome Statute.⁴⁹ South Africa disregarded the request and allowed al-Bashir to attend the meeting without being arrested.⁵⁰ South Africa justified this by asserting that al-Bashir possessed head-of-state immunity and by stressing the importance of dialogue, diplomacy, and cooperation between African heads of state.⁵¹ When South Africa initially announced its intent to withdraw from the ICC, one of its explanations was that it opposed the execution of arrest warrants that would result in “regime change.”⁵²

Considering these arguments, in July 2017 the Trial Chamber held that customary international law immunities do not apply to an ICC arrest warrant, and therefore South Africa should have executed the warrant for al-Bashir’s arrest.⁵³ The Trial Chamber could have referred South Africa to the Assembly of States Parties or to the United Nations Security Council, but declined to do so.⁵⁴

South Africa is not the only state to refuse to cooperate with the ICC regarding al-Bashir. The Chamber requested submission from Jordan on its failure to arrest him in March 2017, when he travelled to Amman for the Summit of the League of Arab States.⁵⁵ The Chamber also requested Kazakhstan’s cooperation in arresting him during his anticipated travel in September,⁵⁶ but on September 7, al-Bashir abruptly cancelled the Kazakhstan trip.⁵⁷

How much further the African Union’s campaign against the ICC will go is far from clear. The AU is not unanimous regarding the decision to

48. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Case Information Sheet (April 6, 2017), <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>.

49. See Prosecutor v. Al Bashir, *supra* note 33, at ¶ 6.

50. See *id.* at ¶ 16.

51. See *id.* at ¶¶ 33, 40.

52. See Camila Domonoske, *South Africa Announces Withdrawal from International Criminal Court*, NPR (Oct. 21, 2016), <https://www.npr.org/sections/thetwo-way/2016/10/21/498817513/south-africa-announces-withdrawal-from-international-criminal-court>.

53. See Al Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir, ¶ 68.

54. See *id.* at ¶ 139.

55. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Requesting the Hashemite Kingdom of Jordan to Provide Further Information, ¶ 1 (Sept. 18, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05720.PDF.

56. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to the Republic of Kazakhstan for Cooperation in the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 4 (Aug. 31, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05369.PDF.

57. See *Sudanese President Abruptly Cancels Trip to Islamic Meeting in Kazakhstan*, SUDAN TRIB. (Sept. 7, 2017), <http://www.sudantribune.com/spip.php?article63446>.

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

170 THE YEAR IN REVIEW

[VOL. 52]

withdraw, and some states that initially voted for the withdrawal resolution now appear to be less than enthusiastic. While the judicial disapproval of South Africa's withdrawal was based on that country's constitution and not on the merits of the withdrawal,⁵⁸ the South African Government, as of November 2017, has yet to submit the question of withdrawal to Parliament. Perhaps the ICC's recent interest in alleged atrocities committed in Eurasian Georgia⁵⁹ will assuage the resentment that many African leaders have expressed in recent years.

II. The International Centre for Settlement of Investment Disputes ("ICSID")

2017 marked a year of many noteworthy developments in arbitration by the ICSID.

A. JURISDICTION AND ADMISSIBILITY

In *Vladislav Kim and others v. Republic of Uzbekistan*, the ICSID addressed an admissibility challenge on the grounds of corruption.⁶⁰ Uzbekistan alleged that an overpayment of U.S. \$8 million for acquisition of shares to the daughter of the former President of Uzbekistan, Ms. Karimova, constituted a bribe in breach of both Uzbek law and the 1997 Uzbekistan–Kazakhstan Bilateral Investment Treaty.⁶¹ The Tribunal found, however, that it was not possible to assess whether an overpayment was made, because it was not clear how the shares should be valued.⁶² Further, in rejecting the allegation of corruption, the Tribunal concluded that: (1) Uzbekistan did not prove its assertion that Ms. Karimova was a government official during the relevant period; and (2) Uzbekistan did not identify that Ms. Karimova engaged or could have engaged in any conduct by use of her position to advantage Claimants.⁶³

In *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, Claimant initiated arbitration under the 2002 China–Yemen Bilateral Investment Treaty (BIT), which limits the jurisdiction of investor-state tribunals to disputes “relating to the amount of compensation for expropriation.”⁶⁴

58. Merrit Kennedy, *Court Blocks South Africa's Withdrawal from International Criminal Court*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/516620190/court-blocks-south-africas-withdrawal-from-international-criminal-court>.

59. See generally Georgia: Situation in Georgia, INT'L CRIM. CT., <https://www.icc-cpi.int/georgia> (last visited Mar. 30, 2018).

60. See *Kim v. Republic of Uzb.*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 22 (Mar. 8, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8549.pdf>.

61. *Id.* at ¶ 23.

62. *Id.* at ¶ 24.

63. *Id.*

64. *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf>. Article 10 of the BIT reads as follows:

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 171

Yemen challenged the Tribunal's jurisdiction under Article 10 of the BIT and rejected Claimant's attempt to broaden the scope of the Tribunal's jurisdiction by reliance on the most favored nation clause (MFN).⁶⁵ In relation to the scope of its jurisdiction, the Tribunal concluded that "the Contracting Parties intended to confer a real choice, not an illusory choice, on investors from their respective countries, and that the words 'relating to the amount of compensation for expropriation' must, in context, be read to include disputes relating to whether or not an expropriation has occurred."⁶⁶ The Tribunal, however, declined to expand the scope of its jurisdiction by reliance on the MFN clause, finding that the MFN clause applied to the "treatment accorded to investors of the other Contracting party *in its territory* with respect to activities relating to their investments."⁶⁷ Therefore, the words "in its territory" are limited by the provision regarding the "treatment accorded to investors."⁶⁸ The Tribunal concluded that this limitation cannot be interpreted to expand the scope of international arbitration beyond the wording of Article 10 of the BIT.⁶⁹

B. CHALLENGES TO ARBITRATORS

In *Victor Pey Casado And President Allende Foundation v. Republic of Chile*, the Chairman of the ICSID Administrative Council dismissed the Claimants' request for the disqualification of the President of the Tribunal, Sir Franklin Berman QC, and their arbitrator, Mr. V. V. Veeder.⁷⁰ Claimants argued that there existed a conflict of interest, given that the two arbitrators in question were both part of Essex Court Chambers, and that two other lawyers, Professor Alan Boyle and Mr. Samuel Wordsworth QC,

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1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to an investment shall, as far as possible, be settled amicably through deliberations and negotiations between the parties to the dispute.
 2. If the dispute cannot be resolved by the parties through direct arrangements for amicable negotiations within six months from the date on which a request for settlement is submitted in writing, such dispute may be submitted at the choice of the investor to:
 - (a) a competent court of the Contracting Party in the territory of which the investment has been made; or
 - (b) the International Centre for the Settlement of Disputes (ICSID) which was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature at Washington DC on March 18, 1965, for arbitration.

Id. at ¶ 70.

65. *Id.* at ¶ 146.

66. *Id.* at ¶ 87.

67. *Id.* at ¶ 120 (emphasis added).

68. *See id.*

69. *See id.* at 142.

70. *See Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC, ¶ 95 (Feb. 21, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8288.pdf>.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

172 THE YEAR IN REVIEW

[VOL. 52]

who were also part of Essex Court Chambers, had represented Chile in a proceeding before the International Court of Justice (ICJ), a relationship which they failed to disclose.⁷¹ The Tribunal determined that any issues regarding Mr. Veeder's independence or impartiality should have been raised at the time that Claimants initially appointed him in 2014.⁷² In rejecting the challenge, the Chairman of the Administrative Council further noted that information regarding Essex Court Chambers' prior representation of Chile was publicly available for several years prior to Claimants' challenge.⁷³ Although the Tribunal acknowledged that the ICSID Rules do not specify time limitations for challenging an arbitrator, it determined that a challenge of an arbitrator needs to be made promptly, which is to say, it should not be made after the closing of the proceedings, but rather at the very beginning of resubmission proceedings.⁷⁴

C. MERITS

In *Eskosol S.p.A. in liquidazione v. Italian Republic*, the Tribunal dismissed Italy's application of the dismissal of all of Eskosol's claims under Rule 41(5) of the ICSID Arbitration Rules (preliminary motion to dismiss).⁷⁵ The Tribunal first noted that this Rule would not allow for the dismissal of claims based on the development of complex arguments of law, but was instead intended to dismiss only those claims that were "manifestly without legal merit."⁷⁶ Italy presented four grounds for its Rule 41(5) application, which largely concerned *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*.⁷⁷ Blusun, a Belgian company that owned eighty percent of Eskosol's shares, commenced arbitration proceedings against Italy in 2014 challenging, *inter alia*, the same measures at issue in the *Eskosol* case.⁷⁸ On December 12, 2016, the *Blusun* Tribunal rendered a favorable judgement for

71. *Id.* at ¶¶ 87-88.

72. *Id.* at ¶ 92.

73. *Id.* at ¶¶ 88.

74. *Id.* at ¶¶ 92-94.

75. See *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 173 (Mar. 20, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8961.pdf>.

76. *Id.* at ¶ 28.

77. See *id.* at ¶ 43. Italy argued the following: (i) Eskosol was not "a national of another Contracting State" under Article 25(2)(b) of the ICSID Convention;" (ii) Eskosol did "not qualify as an 'investor' under either the ECT or the ICSID Convention;" (iii) "under Article 26(3)(b)(i) and Annex 1D of the ECT, Italy [did not] consent to arbitration of a dispute previously submitted to another forum," precluding the Tribunal's jurisdiction "in light of the prior initiation of Blusun case," and; (iv) "public international law principles prohibit the prosecution of multiple claims in relation to the same prejudice, and preclude the opening of a new proceeding on a dispute that previously was submitted to another international arbitration tribunal . . . or [even] was decided by such a tribunal."

78. *Id.* at ¶¶ 21-28.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 173

Italy on the merits.⁷⁹ Italy argued that the decision of the *Blusun* case purported to create *lis pendens* as well as *res judicata*, prohibiting Eskosol from pursuing claims before this Tribunal.⁸⁰ Eskosol, on the other hand, contended that Italy's objections required complex factual assessment by the Tribunal, which failed to fall within the scope of Rule 41(5).⁸¹ While the Tribunal did not accept any of Italy's arguments for dismissal on this basis, as the arguments were not "manifest," the Tribunal did note that Italy was "free later in this case to argue" that the conclusions of the *Blusun* tribunal were "persuasive" and "should be followed by this Tribunal."⁸²

In *Supervisión y Control S.A. v. Republic of Costa Rica*, the Tribunal rejected Respondent's challenge to jurisdiction but ultimately concluded that the case was inadmissible.⁸³ The Tribunal noted that Supervisión had commenced judicial proceedings in Costa Rica with the same "fundamental basis" and sought the same relief from the Costa Rican national court as that pursued in the arbitration before the Tribunal.⁸⁴ Hence, the Tribunal concluded that the claims submitted to arbitration had already been submitted to the national courts of Costa Rica through the proceedings started by Supervisión's corporate vehicle, Riteve.⁸⁵ Therefore, all of the claims that had previously been brought before the Costa Rican Courts were deemed inadmissible before the ICSID.⁸⁶ In relation to the claims for national treatment, expropriation, and denial of justice, the applicable Costa Rica-Spain BIT required investors to notify the Contracting State of any disputes between the parties with a certain amount of detail before submitting it to arbitration.⁸⁷ The Tribunal found that Supervisión had failed to provide Costa Rica with the requisite information, and thus also denied the admissibility of those claims.⁸⁸

79. See *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award, ¶ 423 (Dec. 27, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>.

80. See *Eskosol S.p.A. in liquidazione v. Italian Republic*, *supra* note 52, at ¶ 136.

81. See *id.* at ¶ 43.

82. *Id.* at ¶¶ 169–172.

83. See *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, ¶ 358 (Jan. 18, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8230.pdf>.

84. *Id.* at ¶¶ 311–312.

85. *Id.* at ¶¶ 325–330.

86. *Id.* at ¶ 331.

87. Costa-Rica–Spain BIT, Article XI(1) reads in pertinent part as follows: "Notice of any investment-related dispute arising between one of the parties and an investor of the other Party with respect to matters governed by this Treaty shall be given in writing, including detailed information, by the investor to the Party receiving the investment. To the extent possible, the parties to the dispute shall try to settle such disputes by an amicable agreement."

88. See *Supervisión y Control S.A.*, *supra* note 61, at ¶¶ 345, 348.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

174 THE YEAR IN REVIEW

[VOL. 52]

III. The Turkish Judicial Crisis

The aftermath of the July 15, 2016, coup attempt in Turkey eliminated the judicial independence of the Turkish judiciary.⁸⁹ More than 4,400 judges, prosecutors, journalists and academics have been dismissed by the government, and many others have been imprisoned, all without any modicum of due process. The current Turkish President, Recep Tayyip Erdogan, has been in power since the early 2000s. When he was first elected, he was initially perceived as a moderate president, but since then, has become increasingly dictatorial. The alleged coup began with a few violent occurrences in the streets of Istanbul, of which President Erdogan responded to with brute force.⁹⁰ Following this response, he implicated the Turkish judiciary, prosecutors, academics, and journalists as conspirators in an alleged terrorist plot for which he imprisoned these individuals.⁹¹ It is widely believed that President Erdogan's conduct in responding to the alleged coup and suppressing legitimate opposition was done in order for him to achieve both his objectives of re-structuring the Turkish government and consolidating his power and authority.

On July 20, 2016, after suppressing the alleged coup attempt, the Turkish Government instituted a state of emergency, as it pushed ahead for a Referendum to approve amendments to the Turkish Constitution, which would radically change the structure of the government.⁹² Since then, the state of emergency has been extended numerous times, and remains in effect today, having become the “new normal” for Turkey.⁹³

Nonetheless, the Referendum, doing away with the position of Prime Minister and giving the President nearly unlimited powers, passed on April 15, 2017.⁹⁴ In constitutional terms, the Referendum changed the Turkish Government “from a parliamentary democracy to a presidential republic.” It also provided for an omnipotent President vested both with legislative authority in normal and emergency states, and with executive powers to appoint at least half of the members of the nation's highest courts without parliamentary confirmation.⁹⁵ With these new powers, the President is able

89. Kareem Shaheen, *Turkey Dismisses 4,400 Public Servants in Latest Post-Coup Attempt Purge*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/world/2017/feb/08/turkey-dismisses-4400-public-servants-erdogan-trump-phone-call>.

90. See Alev Scott, *Turkey has Defeated a Coup—and Unleashed a Violent Mob*, THE GUARDIAN (July 17, 2016), <https://www.theguardian.com/commentisfree/2016/jul/17/turkey-defeated-coup-military-turkish-army>.

91. *Id.*

92. See *Turkish Government Extends State of Emergency Rule for Another 3 Months*, REUTERS (July 17, 2017), <https://www.reuters.com/article/us-turkey-security-emergency/turkish-government-extends-state-of-emergency-rule-for-another-3-months-idUSKBN1A212S>.

93. See Okyu Didim Aydin & Edwin L. Felter, Jr., *The Importance of Judicial Independence: Its Death in Turkey*, JUDGE'S J. (forthcoming).

94. Kareem Shaheen, *Erdogan Clinches Victory in Turkish Constitutional Referendum*, THE GUARDIAN (April 16, 2017); <https://www.theguardian.com/world/2017/apr/16/erdogan-claims-victory-in-turkish-constitutional-referendum>.

95. *Id.*

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

COURTS & JUDICIAL AFFAIRS 175

to push his programs through the parliament without obtaining the approval of the Prime Minister. The President is now the acting head of his political party, which was previously forbidden, and has obtained full control over the Parliament, as it is composed of members of his political party. The Referendum has provided President Erdogan with essentially dictatorial powers, allowing him to control members of the Parliament, while remaining the only leader of the ruling party. Given that the judiciary, independent prosecutors, academics, and journalists posed the biggest threats to President Erdogan's newly obtained powers, he neutralized them by imprisoning these critics and oftentimes cutting off their communication with the outside world.⁹⁶

There has been universal condemnation of the Turkish Government's conduct by the European Judicial Community, the European Union, and the American Bar Association. The Platform of the Association of European Administrative Judges has declared that the Government's recent actions have "the independence of the judiciary is abolished" in Turkey.⁹⁷ It urges the Government of Turkey to, among other things, "release the unduly detained judges and prosecutors and to return the unduly seized assets," re-establish due process, and "annul the dissolution of the only independent judges association" in Turkey.⁹⁸

In August 2016, the American Bar Association (ABA) House of Delegates passed Resolution 10B, supporting the independence of the Turkish judiciary and the legal profession.⁹⁹ This Resolution specifically called for the Turkish Government to "immediately release each detained judge, lawyer, prosecutor, journalist and any other individual unless there is evidence establishing . . . that the individual has committed a crime."¹⁰⁰ The Resolution further demanded that, before suspending or dismissing any judge from the bench, the Turkish Government provide the judge with "a fair hearing before an impartial tribunal applying established legal principles."¹⁰¹ The Resolution also called for the Government to "adhere to international standards concerning the independence of judges."¹⁰² Such a resolution carries the authoritative weight of American lawyers and judges' condemnation of actions contrary to the Rule of Law. Further, many lawyers and judges in countries outside of the United States look to the American Bar Association for guidance and leadership in matters involving judicial independence.

^{96.} *Recep Tayyip Erdogan: Turkey's Pugnacious President*, BBC News (Apr. 17, 2017), <http://www.bbc.com/news/world-europe-13746679>.

^{97.} *See Conclusions and Report of the Platform for an Independent Judiciary in Turkey*, ASS'N EUR. ADMIN. JUDGES, (July 20, 2017), <http://www.aej.org/media/files/2017-07-20-63-TurkeyPlatform%20-%20Conclusions-1.pdf>.

^{98.} *See id.*

^{99.} ABA H.D. Res. 10B (2016) (adopted as revised), <https://www.americanbar.org/content/dam/aba/images/abanews/2016%20Annual%20Resolutions/10b.pdf>.

^{100.} *See id.*

^{101.} *See id.*

^{102.} *See id.*

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

176 THE YEAR IN REVIEW

[VOL. 52]

Murat Arslan, a former high court judge and President of the now-dissolved Turkish Association of Judges and Prosecutors, is one of the judges who was removed from office and detained by President Erdogan.¹⁰³ Judge Arslan has now been jailed for over a year, and it is reported that he is sometimes denied family visitation.¹⁰⁴ In October 2017, the Council of Europe awarded Judge Arslan the prestigious Vaclav Havel Human Rights Prize, an award that honors outstanding individuals' dedication to the defense of civil and human rights.¹⁰⁵ Judge Arslan's trial commenced on November 2, 2017, and the second session of the trial was scheduled for December 18, 2017.¹⁰⁶

The Turkish judiciary has long been an institution that has provided for checks and balances against un-checked populist governments. But, given the recent actions of the Turkish Government, and specifically, President Erdogan, it is generally believed by the European judicial community that an independent judiciary system in Turkey is now dead. The present situation in Turkey should serve as a caution to other nations, as this could happen elsewhere if protections for the rule of law, and the people's belief therein, are not strong. While the future of the judiciary in Turkey is far from certain, Judge Arslan, among many others, have vowed not to give up the fight for protecting Turkish liberty and democracy.¹⁰⁷

103. *See Imprisoned Turkish judge awarded human rights prize by Council of Europe*, TURKEY PURGE (Oct. 9, 2017), <https://turkeypurge.com/imprisoned-turkish-judge-awarded-human-rights-prize-by-council-of-europe>.

104. *See id.*

105. *See Award-winning Judge Murat Arslan Remains Behind Bars Following Court Decision*, TURKEY PURGE (Nov. 3, 2017), <https://turkeypurge.com/award-winning-judge-murat-arslan-remain-behind-bars-following-court-decision>.

106. *See id.*

107. *See Murat Arslan, Address from a Turkish Jail* (Oct. 11, 2017) (transcript available at Ass'm Eur. Admin Judges), <http://www.aej.org/media/files/2017-10-11-25-Speech%20of%20MURAT%20ASLAN.pdf>.

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