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International Courts & Judicial Affairs

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This chapter reviews some of the most significant developments made by international courts and tribunals in 2019.

I. International Criminal Court (ICC)

In 2019, the ICC made several significant jurisprudential developments.

A. Preliminary Examinations

In November, Pre-Trial Chamber (PTC) III granted the Office of the Prosecutor (OTP)'s July request for authorization to open an investigation into the situation in Bangladesh/Myanmar involving crimes against the Rohingya Muslim population.[1]

Within the Afghanistan situation, in April, PTC II unanimously rejected the OTP's request to open an investigation.[2] The PTC determined that, although there was a reasonable basis to believe crimes against humanity and war crimes were committed within the Court's jurisdiction, under Article 53(1)(c), it was in the interests of justice for the Court to avoid engaging in investigations—like that in Afghanistan—where the prospects of success are limited.[3] The OTP filed its brief appealing the PTC's decision in

* The Committee Editor is Sara L. Ochs, Teaching Fellow at Elon University School of Law. Haydee Dijkstal, Barrister at 33 Bedford Row Chambers, London, authored Section I. Paula Henin of White & Case LLP and Paola Patarroyo, International Lawyer, wrote Section II.A-C, and Katherine Maddox Davis, Associate Attorney at Gibson, Dunn & Crutcher, authored Section II.D. Kabir Duggal, Katelyn Horne, and Caroline Kelly of Arnold & Porter Kaye Scholer LLP wrote Section III. Michael Coffee, of the U.S. Department of State, Office of the Legal Adviser contributed Section IV. 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.

1. Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 58 (Nov. 14, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.
2. Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, 32 (April 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.
3. *Id.* ¶ 96.

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September.[4] The Appeals Chamber (AC) also granted a number of victims groups' applications to submit *amicus curiae* submissions in support of the appeal, but rejected the Office of the Public Counsel for the Defense's request to participate in the appeal.[5]

In September, the AC upheld the PTC's November 2018 decision ordering the prosecution to reconsider, for the second time, its decision not to open an investigation into the May 2010 attack on the Gaza Freedom Flotilla by Israeli defense forces.[6]

B. Pre-Trial Phase

The PTC addressed confirmation of charges in two cases. First, confirmation proceedings commenced in September in the case against Alfred Yekatom and Patrice-Edouard Ngaïssona, after their cases were joined,[7] concerning charges of war crimes and crimes against humanity committed in the Central African Republic between December 2013 and August 2014.[8] Second, in September, PTC II confirmed charges against Al Hassan Ag Abdoul Aziz for crimes against humanity and war crimes against the civilian population and religious and historical buildings in Mali, following July confirmation proceedings.[9]

In other pre-trial matters, the AC affirmed the PTC's decision in May that Jordan breached its obligations under the Rome Statute by not arresting Sudanese President Al-Bashir when he traveled to Jordan but reversed the decision to refer Jordan to the Assembly of States Parties and Security Council for non-cooperation.[10]

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4. Situation in the Islamic Republic of Afghanistan, ICC-02/17-74, Prosecution Appeal Brief, (Sept. 30, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05822.PDF.

5. Situation in the Islamic Republic of Afghanistan, ICC-02/17-97, Decision on the Participation of *Amici Curiae*, the Office of Public Counsel for the Defense and the Cross-Border Victims, (Oct. 24, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06256.PDF.

6. Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia, ICC-01/13-98, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", 4 (Sept. 2, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF.

7. Prosecutor v. Yekatom, ICC-01/14-01/18-87, Decision on the Joinder of the Cases Against Alfred Yekatom and Patrice-Edouard Ngaïssona and Other Related Matters, (Feb. 20, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_00948.PDF.

8. Press Release, Int'l Crim. Ct., Opening of the Confirmation of Charges Hearing in Yekatom and Ngaïssona Case: Audio-visual Materials and Photographs (Sept. 19, 2019), https://www.icc-cpi.int/Pages/item.aspx?name=pr1480.

9. Press Release, Int'l Crim. Ct., Al Hassan Case: ICC Pre-Trial Chamber I Confirms Charges of War Crimes and Crimes Against Humanity and Commits Suspect to Trial (Sept. 30, 2019), https://www.icc-cpi.int/Pages/item.aspx?name=pr1483.

10. Prosecutor v. Al Bashir, ICC-02/05-01/09-397-Corr, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 1–2 (May 6, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

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In the case of Saif Al-Islam Gaddafi, PTC I dismissed the defense's admissibility challenge, made under the principle of *non bis in idem* on grounds that his conviction in Libya involved substantially the same conduct as the ICC charges.[11] The PTC found that because Gaddafi's conviction was rendered *in abstenia*, with no final decision on the merits, he was entitled to a new trial under Libyan law, and thus, Article 17(1)(c) of the Rome Statute was not satisfied.[12] The defense appealed the decision, which remains pending.[13]

C. Trial Phase

In 2019, the Court issued two major judgments resulting in the conviction of one defendant and the acquittal of two others. On July 8, Trial Chamber (TC) VI issued its judgment in the case against Bosco Ntaganda, finding him guilty as both a direct and indirect perpetrator of eighteen counts of war crimes and crimes against humanity committed in the Ituri District of the Democratic Republic of the Congo (DRC) from 2002 to 2003.[14] On November 7, he was sentenced to thirty years imprisonment.[15]

Conversely, after the defense teams for Laurent Gbagbo and Charles Blé Goudé submitted "no case to answer" applications in January, TC I granted the applications and acquitted both defendants of all charges of crimes against humanity stemming from the 2010 and 2011 post-election violence in Côte d'Ivoire.[16] The OTP has indicated it will appeal the decision.[17] The AC ordered Gbagbo and Blé Goudé to remain in detention while it considers the OTP's appeal on its request for conditional release.[18]

11. Prosecutor v. Gaddafi, ICC-01/11-01/11-662, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', ¶¶ 31, 79 (April 5, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF.

12. *Id.* ¶ 79.

13. Prosecutor v. Gaddafi, ICC-01/11-01/11-669, Defence Appeal Brief in Support of its Appeal Against Pre-Trial Chamber I's 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi Pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' (May 20, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02875.PDF.

14. Prosecutor v. Ntaganda, CC-01/04-02/06-2359, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF.

15. Prosecutor v Ntaganda, ICC-01/04-02/06-2442, Sentencing Judgment, 117 (Nov. 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06674.PDF.

16. Press Release, Int'l Crim. Ct., ICC Trial Chamber I Acquits Laurent Gbagbo and Charles Blé Goudé from All Charges (Jan. 15, 2019), https://www.icc-cpi.int/Pages/item.aspx?name=pr1427.

17. *See* Prosecutor v. Gbagbo and Blé Goudé, ICC-02/11-01/15, Corrected Version of "Prosecution Notice of Appeal", 16 September 2019, ICC-02/11-01/15-1270 (Sept. 17, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05661.PDF.

18. Prosecutor v. Gbagbo and Ble Goude, ICC-02/11-01/15-1243, Decision on the Prosecutor's Request for Suspensive Effect of her Appeal under Article 81(3)(c)(ii) of the Statute and Directions on the Conduct of the Appeal Proceedings, 3 (Jan. 18, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_00163.PDF.

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The case against Dominic Ongwen proceeded towards closure, with closing statements scheduled to commence in March 2020.[19] In July, the AC upheld the TC's decision rejecting a series of defense motions alleging serious defects in the confirmation of charges proceedings.[20]

D. Appeal Phase

In September, Bosco Ntaganda filed a notice of appeal against his conviction, asserting fifteen grounds of appeal in eight categories.[21]

In the *Bemba et al* contempt case, the TC re-sentenced former Congolese vice-president Jean-Pierre Bemba Gombo and co-accuseds, Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo in September, after their conviction had been considered by the AC.[22] Bemba was re-sentenced to one year imprisonment and a €300,000 fine, while his co-defendants each received eleven months imprisonment, with Kilolo fined €30,000.[23]

The ICC presidency also rejected Germain Katanga's request for reconsideration of the Court's decision to allow the DRC to domestically prosecute him for separate charges not included in his ICC conviction.[24]

II. The International Court of Justice

In 2019, the International Court of Justice (Court) rendered two judgments on preliminary objections, one order on provisional measures, one advisory opinion, and one judgment on the merits.

A. Preliminary Objections

In *Certain Iranian Assets*, Iran claims that the United States has breached the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Treaty of Amity) through measures resulting in U.S. courts issuing judgments and damages awards against the Iranian State and State-owned entities

19. Prosecutor v. Ongwen, ICC-02/04-01/15-1645, Modification of Deadline Regarding Closing Briefs and Setting of Dates for Closing Statements, (Oct. 23, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06249.PDF.

20. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-1562, Judgment on the Appeal of Mr. Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ¶¶ 163–64 (July 17, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03885.PDF.

21. *See generally* Prosecutor v. Ntaganda, ICC-01/04-02/06-2396, Mr. Ntaganda's Notice of Appeal against the Judgment Pursuant to Article 74 of the Statute (Sept. 9, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05528.PDF.

22. Prosecutor v. Gombo, ICC-01/05-01/13-2312, Decision Re-sentencing Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba & Mr. Jean-Jacques Mangenda Kabongo (Sept. 17, 2019), https://www.icc-cpi.int/CourtRecords/CR2018_04355.PDF.

23. *Id.* at 50–51.

24. Prosecutor v. Katanga, ICC-01/04-01/07-3833, Decision on "Defence Application for Reconsideration of the Presidency 'Decision pursuant to article 108(1) of the Rome Statute'", 18 (June 26, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03420.PDF .

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(including Bank Markazi, the Central Bank), and related enforcement proceedings in the United States and abroad.[25]

The United States raised five preliminary objections—three to the Court's jurisdiction and two to the admissibility of Iran's claims.[26] On February 13, the Court upheld its jurisdiction over some of Iran's claims and held these claims admissible.[27]

The Court rejected the United States' first objection, which was predicated on Article XX(1)(c) and (d) of the Treaty of Amity.[28] The Court agreed with Iran that Article XX(1)—which posits that the Treaty shall not preclude measures regulating the production or traffic of military equipment and materials, or measures necessary to maintain or restore international peace and security, or to protect the parties' essential security interests—only provides for a potential defense on the merits and does not limit the Court's jurisdiction.[29]

The Court upheld the second objection, finding that Iran's claims concerning the United States' alleged violation of the sovereign immunities granted by customary international law did not relate to the interpretation or application of the Treaty and thus fell outside the scope of its compromissory clause.[30]

The Court declined to rule on the third objection, concluding that it lacked sufficient information to decide whether Bank Markazi could qualify as a "company" under the Treaty, so that Iran could invoke, on Markazi's behalf, the rights and protections afforded under Articles III, IV, and V.[31] The Court will decide this issue in its merits judgment.[32]

Lastly, the Court rejected the United States' admissibility objections based on alleged abuse of process and on the "unclean hands" doctrine.[33]

The dispute in *Ukraine v. Russia* relates to Russia's alleged violations of its obligations under the International Convention on the Suppression of the Financing of Terrorism (ICSFT) and the Convention on the Elimination of all forms of Racial Discrimination (CERD) during the events in eastern Ukraine and Crimea that began in the spring of 2014.[34] On November 8, the Court rejected all of Russia's objections—four of which were to the

25. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, ¶¶ 18-27 (Feb. 13, 2019), https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf.
26. *Id.* ¶¶ 28, 34, 38, 48, 81, 100.
27. *Id.* ¶ 126.
28. *Id.* ¶¶ 45–47.
29. *Id.* ¶¶ 42–44.
30. *Id.* ¶ 80.
31. Certain Iranian Assets, 2019 I.C.J. 7, ¶ 97.
32. *Id.*
33. *Id.* ¶¶ 113–15, 122–25.
34. 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 (Ukr. v. Russ.), Preliminary Objections, ¶ 23 (Nov. 8, 2019), https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-00-EN.pdf.

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Court's jurisdiction and one to the admissibility of Ukraine's claims under the CERD.[35]

The Court rejected Russia's two objections to its jurisdiction *ratione materiae*, finding that the dispute concerns the interpretation or application of the ICSFT and CERD and thus fell within the scope of their respective compromissory clauses.[36] It found that while, state financing of acts of terrorism falls outside the scope of the ICSFT, the ICSFT requires all state parties to take measures and cooperate to prevent and suppress the financing of terrorism by individuals, whether in their private or official capacity as state agents.[37] Any questions regarding the parties' mental states in allegedly failing to comply could not affect this conclusion and was a merits issue.[38] The Court also rejected Russia's contention that Ukraine had failed to formulate claims under the CERD, as the measures challenged could affect the enjoyment of CERD rights.[39]

The Court further rejected Russia's objections based on the alleged non-fulfillment of the procedural preconditions provided in Article 24 of the ICSFT and Article 22 of the CERD, respectively.[40] Importantly, the Court found that Article 22 of the CERD imposes alternative, not cumulative, procedural preconditions.[41] Thus, it was sufficient that the Parties' negotiations had become futile or deadlocked by the time Ukraine filed its application to the Court, and Ukraine was not required to also submit the dispute to the CERD Committee prior to seizing the Court.[42]

Lastly, the Court rejected Russia's admissibility objection that Ukraine had not exhausted local remedies under the CERD prior to seizing the Court.[43] Because Ukraine's CERD claims were brought on its own behalf (alleging a general pattern of conduct by Russia) and not on behalf of any of its nationals, the exhaustion of local remedies requirement did not apply.[44]

B. Provisional Measures

On June 14, the Court rejected the UAE's request for provisional measures against Qatar.[45] The dispute concerns the UAE's alleged

35. *Id.* ¶ 134.
36. *Id.* ¶ 64.
37. *Id.* ¶¶ 56–64.
38. *Id.* ¶ 63.
39. *Id.* ¶ 96.
40. 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, *supra* note 34, at ¶¶ 77, 113.
41. *Id.* ¶¶ 110–13.
42. *Id.* ¶¶ 106–13, 116–21.
43. *Id.* ¶¶ 130, 132.
44. *Id.*
45. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Order, 2019 I.C.J. 172, ¶ 32 (June 14, 2019), https://www.icj-cij.org/files/case-related/172/172-20190614-ORD-01-00-EN.pdf.

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violations of the rights of Qatari citizens in breach of the CERD.[46] In 2018, the Court had indicated provisional measures, ordering the UAE to: (i) ensure the reunification of Qatari families separated after the UAE's measures; (ii) allow Qatari students to complete their education in the UAE or obtain their educational records; and (iii) grant affected Qataris access to the judicial organs of the UAE (2018 Order).[47] The 2018 Order also indicated that both Parties shall refrain from actions aggravating, extending or making more difficult to resolve the dispute before the Court.[48]

The UAE's 2019 request asked the Court to order Qatar to immediately: (i) withdraw the Communication it submitted on March 8, 2018, to the CERD Committee against the UAE; (ii) desist from allegedly hampering the UAE's attempts to assist Qatari citizens pursuant to the 2018 Order; (iii) stop its national bodies and State-owned, controlled and funded media outlets from allegedly disseminating false accusations regarding the UAE and the issues in dispute before the Court, and (iv) refrain from any other actions, which might aggravate, extend or complicate the dispute before the Court.[49]

The Court rejected the UAE's request finding that: (i) the withdrawal of the Communication to the CERD Committee was not a plausible right under the CERD, but rather concerned the interpretation of the CERD's compromissory clause and the permissibility of CERD Committee proceedings when the Court is seized of the same matter (a question the Court did not answer at this stage);[50] (ii) the alleged obstacles to the implementation of the 2018 Order also did not concern plausible rights under the CERD, but rather compliance with the 2018 Order (which would be assessed in the merits judgment);[51] and (iii) the Court may only indicate non-aggravation measures when indicating provisional measures to preserve specific rights.[52]

C. Advisory Opinion

On February 25, at the request of the UN General Assembly, the Court rendered an advisory opinion concluding that the process of decolonization of Mauritius initiated by the UK was not lawfully completed when Mauritius

46. *Id.* ¶ 1.
47. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Order, ¶ 79 (July 23, 2018), https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-00-EN.pdf.
48. *Id.*
49. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Order, 2019 I.C.J. 172, ¶ 12 (June 14, 2019), https://www.icj-cij.org/files/case-related/172/172-20190614-ORD-01-00-EN.pdf.
50. *Id.* ¶ 25.
51. *Id.* ¶ 26.
52. *Id.* ¶ 28.

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acceded to independence in 1968.[53] Because the detachment of the Chagos Archipelago from Mauritius was not based on the freely expressed and genuine will of its people, it violated Mauritius' right to territorial integrity, which was a corollary of its people's right to self-determination under customary international law between 1965 and 1968.[54]

The continued administration of the Chagos Archipelago by the UK was a wrongful act of a continuing character, entailing international responsibility.[55] Accordingly, the UK must bring an end to its administration of the Chagos Archipelago as rapidly as possible, enabling Mauritius to complete its territorial decolonization in a manner consistent with the right of peoples to self-determination.[56] While the modalities to ensure the completion of the decolonization of Mauritius fall within the remit of the UN's General Assembly,[57] the right to self-determination is an *erga-omnes* obligation, thus all Member States must cooperate with the UN to put those modalities into effect.[58]

D. Merits

On July 17, 2019, in *India v. Pakistan*, the ICJ found Pakistan in violation of Article 36 of the Vienna Convention on Consular Relations (Vienna Convention).[59] The matter is better known as the Jadhav Case, named for Kulbhushan Sudhir Jadhav, an Indian citizen on Pakistan's death row.[60] Pakistan is now under the ICJ's order to review and reconsider Jadhav's conviction.[61]

Pakistani officials arrested Jadhav in March 2016 in Balochistan, either a Pakistani province bordering Iran (per the Pakistani narrative) or somewhere in Iran (per the Indian narrative).[62] Jadhav was charged with terrorism and espionage and confessed to these crimes in July 2016.[63] During the subsequent investigation, Pakistan made India's access to Jadhav contingent on India providing Pakistan with pertinent evidence.[64] India responded that the contingency was unlawful and that no evidence existed.[65] Represented

53. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ¶ 174 (Feb. 25, 2019), https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf.
54. *Id.* ¶¶ 160–61, 173.
55. *Id.* ¶ 177.
56. *Id.* ¶ 178.
57. *Id.* ¶ 179.
58. *Id.* ¶ 180.
59. Jadhav Case (India v. Pak.), Judgment, ¶ 149 (July 19, 2019), https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf [hereinafter Jadhav Judgment].
60. *Id.* ¶ 21, 29.
61. *Id.* ¶ 149.
62. *Id.* ¶ 21 (while both parties agree that Jadhav confessed, they dispute whether the confession was recorded or made under force).
63. *Id.* ¶ 24.
64. *Id.* ¶ 27.
65. Jadhav Judgment, at ¶ 27.

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by Pakistani-appointed counsel and isolated from contact with India, Jadhav was convicted and sentenced to death by a Pakistani military court in 2017.[66] India subsequently filed the Jadhav case before the ICJ, winning preliminary measures in which the ICJ directed Pakistan to delay execution until it ruled on the merits.[67]

India alleged that Pakistan violated the Vienna Convention by refusing to inform Jadhav of his consular rights, by waiting three weeks to inform the Indian consulate of the arrest, and by refusing to allow India to provide Jadhav with legal counsel.[68] Claiming entitlement to *restitutio in integrum* (full restoration), India petitioned the ICJ to nullify Jadhav's sentence and to return Jadhav to India; or, alternatively, to annul the military court's decision and order a retrial before a Pakistani civilian court, in which Jadhav would be provided with consular access and Indian counsel, and his prior confession would be excluded.[69] The ICJ denied both requests, but ordered that Pakistan review and reconsider Jadhav's conviction and sentence "by the means of its own choosing," and stay execution for the duration of review.[70] Each of the decision's eight subparts were unanimous, but for the dissenting vote of Pakistan's ad hoc judge.[71]

In reaching its decision, the ICJ first found that it had jurisdiction to address the dispute, over Pakistan's three objections.[72] First, Pakistan accused India of abuse of process under the Vienna Convention, asserting that India withheld "highly material facts" in its request for provisional measures and that India failed to pursue other available dispute mechanisms.[73] The Court rejected this interpretation.[74] Second, Pakistan contended that Jadhav's nationality was unproven by India, and that India's failure to assist Pakistan's criminal investigation and purportedly sending Jadhav into Pakistan with a false passport violated the counter-terrorism obligations of a 2001 Security Council resolution.[75] The Court found "no room for doubt" regarding Jadhav's citizenship and determined that any issue of compliance with other laws concerned merits, not jurisdiction.[76] Third, Pakistan contended that India's purported "unclean hands" negated

66. *Id.* ¶ 29.
67. Jadhav Case (India v. Pak.), Request for the Indication of Provisional Measures for Protection, 2017 I.C.J. 241, ¶ 20 (May 18, 2017), https://www.icj-cij.org/files/case-related/168/19424.pdf.
68. Jadhav Judgment, at ¶¶ 18, 19.
69. *Id.* ¶ 18.
70. *Id.* ¶ 149.
71. *Id.*
72. *Id.* ¶¶ 38, 66.
73. *Id.* ¶¶ 40-50.
74. Jadhav Judgment, at ¶ 50.
75. *Id.* ¶ 52.
76. *Id.* ¶ 56–58; Abdulqawi A. Yusuf, President of the Int'l. Ct. of Justice, Address to U.N. Gen. Assembly, 4-5 (Oct. 30, 2019), https://www.icj-cij.org/files/press-releases/0/000-20191030-STA-01-00-EN.pdf [hereinafter Yusuf Address].

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its obligations, though the Court ruled that nothing excepted Pakistan's responsibilities.[77]

Turning to the merits, the Court denied Pakistan's theory that Article 36 of the Vienna Convention did not apply to suspected spies.[78] The Court found no exclusion of persons from the consular rights articulated in the Vienna Convention.[79] Pakistan also argued that a 2008 bilateral agreement between India and Pakistan overrode consular obligations.[80] The Court disagreed, finding the Vienna Convention allowed only for agreements consistent with its terms.[81] Moreover, the Court found nothing in the 2008 agreement that intended to displace the Vienna Convention.[82]

Considering the language of Article 36 itself, the Court addressed Pakistan's allegation that the special circumstances surrounding Jadhav's suspected espionage suspended Article 36 obligations.[83] The Court held that because Pakistan did not even attempt compliance, Pakistan breached its obligation.[84] Pakistan contended that its three-week delay in notifying India of Jadhav's arrest did not run afoul of its obligations to inform India of the arrest "without delay" because, purportedly, Jadhav possessed a falsified Indian passport.[85] The Court determined that even a defendant's possession of a questionable Indian passport should have triggered consular notification.[86] Pakistan's reasoning for denying the Indian consulate access to Jadhav was likewise rebuked.[87] The Court quoted Article 36, section 1(c), stating, "[c]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him," and found the provision required Pakistan to provide Jadhav with consular access.[88]

The Court dismissed Pakistan's contention that its Vienna Convention obligations were negated by Indian acts which allegedly violated other realms of international law.[89] The Court determined that "there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations."[90]

The ICJ's findings on the merits came as expected. The prescribed remedies fell short for some jurists, who recall *Avena and Other Mexican*

77. Jadhav Judgment, at ¶¶ 59–65.
78. *Id.* ¶¶ 68–98.
79. *Id.* ¶ 89.
80. *Id.* ¶¶ 91–92.
81. *Id.* ¶ 96.
82. *Id.*
83. *Id.* ¶ 102.
84. Jadhav Judgment, at ¶ 102.
85. *Id.* ¶¶ 103–12.
86. *Id.* ¶ 112.
87. *Id.* ¶¶ 114–19.
88. *Id.* ¶¶ 116–19.
89. *Id.* ¶¶ 121–124.
90. Jadhav Judgment, at ¶ 123.

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Nationals, where, despite finding the United States in violation of Article 36 for more than fifty convicted Mexican nationals, the ICJ prescribed only "relief by way of review and reconsideration," rather than reversal and retrial, even for those on death row.[91] The remedy fell flat, particularly for Mexican nationals in Texas, some of whom were executed—a further affront, given Mexico does not practice capital punishment.[92] Here, recognizing the limits of pooled sovereignty, the Court reasoned that because its jurisdiction covered only Vienna Convention violations, it could not reach so far into a domestic criminal system as to reverse a court's holding.[93]

Three months later, ICJ President Abdulqawi Yusuf expounded on the decision in his annual address to the U.N. General Assembly.[94] In "the crux of the Court's ruling," he explained, "the Court found that the appropriate remedy was effective review and reconsideration of the conviction and sentence of Mr. Jadhav."[95] President Yusuf clarified that the mandated review and reconsideration required that Pakistan give "full weight" to the effect of its Vienna Convention violations and "guarantee that . . . the possible prejudice caused by the violation[s] are fully examined."[96] He noted that "while the Court left the choice of means to provide effective review and reconsideration to Pakistan, it noted that effective review and reconsideration presupposes the existence of a procedure that is suitable for this purpose,"[97] and, to the extent an effective procedure did not exist, the judgment called for Pakistan to "enact[ ] appropriate legislation."[98]

President Yusuf further noted Pakistan's post-decision report that Jadhav was "immediately informed of his rights under the Vienna Convention" after the decision was announced, and that India's Pakistani consulate was invited to visit Jadhav in August 2019.[99] The world awaits Pakistan's review and reconsideration.

III. Investor-State Developments

The year 2019 marked many noteworthy developments in arbitration made by the International Center for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) pursuant to UNCITRAL Arbitration Rules.

91. *See generally*, Avena and Other Mexican Nationals (Mex. V. U.S.), Judgement, 2004 I.C.J. Rep. 12, ¶ 12, 138 (March 31).
92. *See generally*, Oona A. Hathaway, Sabria McElroy, & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 1, 52 (2012).
93. Jadhav Judgement, at ¶ 135.
94. *See generally*, Yusuf Address, *supra* note 76, at 1.
95. *Id.* at 5.
96. *Id.*
97. *Id.*
98. *Id.*; Jadhav Judgement, at ¶ 146.
99. Yusuf Address, *supra* note 76, at 5.

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A. Jurisdiction

In *Ballantine v. Dominican Republic*, the Permanent Court of Arbitration issued a landmark award interpreting the nationality requirement of the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA),[100] which requires tribunals to assess the "dominant and effective" nationality of dual nationals when establishing jurisdiction *ratione personae*.[101] In interpreting the relevant provision of DR-CAFTA, the Tribunal determined that a claimant must satisfy the "dominant and effective" nationality requirement both at the time of the alleged breach and at the time that the claim was submitted to arbitration.[102] The Tribunal further observed that the "dominant and effective" nationality requirement is "rooted" in customary international law,[103] which has identified the following relative factors to determine a dual-national claimant's "dominant and effective" nationality, including: the claimants' habitual residence; their personal attachments; and the center of their economic, social, and family lives.[104] In *Ballantine*, the Tribunal found that the Claimants, who were dual U.S. and Dominican nationals, were permanent residents of the Dominican Republic based on their economic, social, and family lives in the Dominican Republic and presented themselves as Dominicans.[105] As a result, the Tribunal determined that the Claimants had Dominican "dominant and effective" nationalities, such that the Tribunal did not have jurisdiction over their claims against the Dominican Republic.[106]

In *Doutremepuich v. Republic of Mauritius*, the Tribunal likewise issued an award dismissing the Claimants' claims for lack of jurisdiction.[107] The Claimants had submitted claims under the 1973 France-Mauritius Bilateral Investment Treaty (BIT) in March 2018.[108] Mauritius asserted that the Claimants did not have a qualifying investment under the treaty.[109] The Tribunal agreed, concluding—based upon the "full circumstances of [the] case"[110]—that while the Claimants had created investment vehicles, they had not completed the process of making a qualifying investment before the

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100. *See generally* Ballantine v. The Dominican Republic, PCA Case No. 2016-17, Final Award, ¶ 530 (Sept. 19, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10818.pdf (noting that "this is a case of first impression related to dual-nationality provisions in the context of DR-CAFTA").
101. *See id.* ¶ 529 (referring to art. 10.28 of DR-CAFTA).
102. *Id.* ¶ 527.
103. *Id.* ¶ 531.
104. *Id.* ¶ 547.
105. *See id.* ¶¶ 566, 576, 594.
106. *Id.* ¶ 637(a).
107. *See generally* Doutremepuich v. Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction (Aug. 23, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10817.pdf.
108. *Id.* ¶ 9.
109. *Id.* ¶ 74.
110. *Id.* ¶ 120.

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government had decided not to approve the project.[111] The Tribunal also upheld Mauritius's objection that there was no consent to arbitrate the claims under the BIT.[112] The Claimants attempted to rely on the Most-Favored Nation ("MFN") clause to import an arbitration clause from the Finland-Mauritius BIT, but the tribunal determined that the MFN clause could not be used to create consent to arbitration.[113] The Tribunal observed that this result was consistent with previous cases, because "where the Basic Treaty does not contain consent to arbitrate investor-State disputes at all, the Tribunal cannot imagine any circumstances in which the *ejusdem generis* rule would be met."[114]

B. Motions

In *Trapote v. Venezuela*, the Secretary General of the PCA, Mr. Hugo Siblesz, considered Venezuela's challenge of the Claimant's appointed arbitrator, Mr. Oscar Garibaldi.[115] Venezuela based its challenge on Mr. Garibaldi's past involvement as counsel in several cases against Venezuela and his lack of disclosure of these cases.[116] In particular, Venezuela alleged that Mr. Garibaldi stated on his website that "the height of [his] career as lead counsel" was "the representation of subsidiaries of ExxonMobil Corporation in an International Centre for Settlement of Investment Disputes (ICSID) arbitration against the Bolivarian Republic of Venezuela and in an ICC arbitration against Petróleos de Venezuela, S.A."[117] These facts, according to Venezuela, demonstrated that he had an unfavorable view of the country.[118] Mr. Siblesz noted that Mr. Garibaldi's lack of disclosure did not, in and of itself, raise justifiable doubts of his independence or impartiality, although he noted that it would have been desirable if Mr. Garibaldi had provided a disclosure.[119] But Mr. Siblesz concluded that the magnitude and frequency of Mr. Garibaldi's representation against Venezuela would raise justifiable doubts about Mr. Garibaldi's independence and impartiality, and upheld Venezuela's challenge.[120]

Mr. Siblesz also considered Germany's challenge of the entire arbitral tribunal in *Vattenfall AB v. Germany*.[121] Germany argued that the Tribunal

111. *See id.* ¶¶ 143, 147.
112. *See id.* ¶¶ 188, 215.
113. *See Doutremepuich*, ¶ 236.
114. *See id.* ¶ 229.
115. Trapote v. The Bolivarian Republic of Venezuela, PCA Case No. AA737, Decision on the Challenge of Arbitrator Oscar Garibaldi (July 19, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10734.pdf.
116. *Id.* ¶ 16.
117. *Id.* ¶ 17.
118. *Id.* ¶ 16.
119. *Id.* ¶ 52.
120. *Id.* § 4.
121. Vattenfall AB v. Fed. Republic of Ger., PCA Case No. IR-2019/1, ICSID Case No. ARB/12/12, Recommendation Pursuant to Request by ICSID dated 24 January 2019 on the

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lacked independence and impartiality because the Tribunal asked the parties to provide answers to certain questions which, according to Germany, constituted an "illicit attempt by the Tribunal to assist the Claimants by directing the Claimants to remedy certain defects in their case, identifying how such defects should be remedied, and permitting the Claimants to submit additional evidence and expert testimony at a very late stage in the proceedings."[122] Despite these arguments, Mr. Siblesz concluded Germany could not prove that the Tribunal's intent was to aid the Claimants rather than to "complete gaps in the evidentiary record," and that Germany's arguments did "not provide a basis for speculation as to a biased motive."[123] Therefore, Mr. Siblezs rejected Germany's challenge.[124]

C. Merits

This year, several tribunals addressed the issue of whether a State had frustrated an investor's legitimate expectations, thus violating the State's obligation to provide fair and equitable treatment. In *SolEs v. Spain*, SolEs, a German company, brought a claim alleging that Spain had violated its obligations under the Energy Charter Treaty (ECT).[125] SolEs operated two photovoltaic (PV) plants in Spain, which had been receiving feed-in tariffs (FITs) until Spain replaced these FITs with a new renumeration scheme based on the economic returns of the PV plants.[126] SolEs argued that Spain's actions violated the fair and equitable treatment (FET) provision of the ECT by frustrating SolEs's legitimate expectations.[127] The ICSID tribunal endorsed the position that, in assessing legitimate expectations, the investor should be judged against the objective standard of a "hypothetical prudent investor."[128] Considering all relevant circumstances, the Tribunal concluded that a prudent investor had a reasonable expectation that it would receive stable FITs, which was an essential element of the regulatory regime on which claimant relied in making its investment.[129] Accordingly, the Tribunal concluded that Spain had violated the FET obligations in the ECT.[130]

In *Glencore v. Columbia*, Glencore, a Swiss company, alleged that Colombia had violated the FET provision of the Colombia-Switzerland

Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal, ¶ 113 (Mar. 4, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10404.pdf.

122. *Id.* ¶ 54.

123. *Id.* ¶ 66.

124. *Id.* ¶ 97.

125. SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, ¶¶ 1–3 (July 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf.

126. *Id.* ¶¶ 114–31.

127. *Id.* ¶¶ 279–82.

128. *Id.* ¶ 331.

129. *Id.* ¶¶ 443–44, 462.

130. *Id.* ¶ 463.

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BIT.[131] The dispute arose from Glencore's investment in a mining operation in Colombia, including a contract with Colombia's state-owned mining company.[132] The *Controloría* of Colombia, charged with fiscal control of public funds, found that Glencore's subsidiary, Prodeco, had incorrectly calculated the royalties it should have paid under the mining contract, and fined Prodeco USD 19.1 million.[133] In considering Glencore's claim that Colombia had frustrated its legitimate expectations by breaching the terms of the mining contract, the ICSID tribunal noted that "a mere contractual breach by the State will not *per se* result in a violation of the international law FET standard," but that an additional element, such as an act of *puissance publique* (sovereign authority), was required.[134] The Tribunal ultimately concluded that while the application of the fiscal liability regime to Prodeco was not a frustration of legitimate expectations, the *Controloría*'s finding of damage caused by Prodeco violated Glencore's legitimate expectation that the fiscal liability regime would be applied reasonably.[135]

IV. Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

On July 2, 2019, the Hague Conference on Private International Law adopted the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Convention).[136] Once in force,[137] the Convention will require each Contracting State to recognize and enforce judgments issued by a court of another Contracting State.[138] For this obligation to arise, the subject matter of the judgment must fall within the scope of the Convention, one of the jurisdictional bases identified in the Convention must be satisfied, and the judgment must either be effective or enforceable in the state of origin.[139] The Convention also provides grounds for refusing to recognize or enforce a foreign judgment.[140] Moreover, the Convention does not prevent the recognition or enforcement of a foreign judgment pursuant to domestic law.[141] The Convention increases the recognition and enforcement of foreign judgments globally.

131. Glencore Int'l A.G. v. Rep. of Colom., ICSID Case No. ARB/16/6, Award (Aug. 27, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf.
132. *Id.* ¶¶ 135, 143–97.
133. *Id.* ¶¶ 487–506, 1602.
134. *Id.* ¶ 1378.
135. *Id.* ¶¶ 1538–40.
136. *See generally* Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019 [hereinafter Convention].
137. *Id.* at art. 28(1). (noting that the Convention will enter into force after the deposit of the second instrument of ratification, acceptance, approval or accession).
138. *Id.* at art. 4(1).
139. *Id.* at art. 1, 4, 5.
140. *Id.* at art. 7.
141. *Id.* at art 15. (This might prove useful should persons affected by a foreign judgment, or a court, believe such domestic law to be preferable to the rules established by the Convention.

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A. Scope of the Convention

The scope of the Convention, as identified in Article 1, extends only to "civil or commercial matters."[142] Although the Convention lacks a definition of "civil or commercial," the negotiators identified certain matters that are not to be considered "civil or commercial" and excluded other matters even if they are civil or commercial in nature. For instance, Article 1 provides a non-exhaustive list of matters (i.e., revenue, customs, and administrative matters) that are excluded from the scope of the Convention.[143] In addition, the Convention does not extend to arbitral awards.[144] Moreover, Article 2 of the Convention excludes a number of additional matters that might otherwise be considered "civil or commercial," including: status and legal capacity of natural persons; maintenance obligations; other family law matters; wills and succession; insolvency, composition, resolution of financial institutions and analogous matters; carriage of passengers and goods; transboundary marine pollution, marine pollution in areas beyond natural jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average; liability for nuclear damage; the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; the validity of entries in public registers; defamation; privacy; intellectual property; activities of armed forces; law enforcement activities; certain antitrust matters; and sovereign debt restructuring through unilateral State measures.[145]

B. Jurisdictional Bases

The obligation to recognize or enforce a judgment will only arise with respect to a judgment that results from a proceeding in which at least one of several enumerated jurisdictional bases has been satisfied.[146] In particular, pursuant to Article 5(1) of the Convention, the obligation arises where:

> (a) the person against whom recognition or enforcement is sought was habitually resident in the State of the court that issued the judgment at the time the person became a party to the proceedings in that court;

But a judgment that ruled on rights *in rem* in immovable property shall be recognized only if the property is located within the state of the court that issued the judgment.); *Id.* at art. 6.

142. *See e.g.*, Hague Conference on Private International Law, Annotated Checklist of Issues to be Discussed by the Working Group on Recognition and Enforcement of Judgments, ¶ 5 (Jan. 2013) (noting that the negotiators intentionally excluded a definition of these terms).

143. Hague Conference on Private International Law: Twenty-Second Session Recognition and Enforcement of Foreign Judgments, Convention: Revised Draft Explanatory Report, Prel. Doc. No. 1 (June 18-July 2, 2019), https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf (explaining the purpose of the Conventions art. 1 exclusions).

144. Convention, *supra* note 136, at art. 2(3).

145. *Id.* at art 2(1).

146. *Id.* at art. 5.

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(b) the natural person against whom recognition or enforcement is sought had a principle place of business in the State of the court that issued the judgment at the time the person became a party to the proceedings and the claim on which the judgment is based arose out of the activities of that business;
(c) the person against whom recognition or enforcement is sought brought the claim, other than a counterclaim, upon which the judgment is based;
(d) the defendant maintained a branch, agency or other establishment without separate legal personality in the State of the court that issued the judgment at the time the person became a party to the proceedings and the claim on which the judgment is based arose out of the activities of that branch, activity or establishment;
(e) the defendant expressly consented to the jurisdiction of the court that issued the judgment;
(f) the defendant argued on the merits before the court that issued the judgment without contesting the jurisdiction of that court within the applicable timeframe;[147]
(g) the judgment ruled on a contractual obligation and was issued by a court in the State in which performance of the obligation took place, or should have taken place, in accordance with the agreement of the parties or, in the absence of such agreement on the place of performance, the law applicable to the contract;[148]
(h) the judgment ruled on a lease of immovable property and was issued by a court of the State in which the property is situated;
(i) the judgment ruled against a defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of the court that issued the judgment, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
(j) the judgment ruled on a non-contractual obligation involving death, physical injury, damage to or loss of tangible property, and the act or omission occurred in the State of the court that issued the judgment;
(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing;[149]
(l) the judgment ruled on a counterclaim either (i) in favor of the counterclaimant provided that the counterclaim arouse out of the same transaction or occurrence as the claim, or (ii) against the

147. *Id.* at art. 5(1)(f) (This basis does not apply where "it is evident that an objection to jurisdiction or to the exercise of jurisdiction would have succeeded.").
148. *Id.* at art. 5(1)(g) (This basis does not apply where "the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.").
149. *See id.* at art. 5(1)(k) (providing additional limitations).

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counterclaimant unless the rules of the court that issued the judgment required that the counterclaim be filed in order to avoid preclusion; or (m) the judgment was issued by a court designated by a non-exclusive choice of court agreement.[150]

C. Refusal Grounds

Article 7 identifies several grounds upon which a court may refuse to recognize or enforce a foreign judgment under the Convention.[151] These grounds include: (i) relevant documentation pertaining to the underlying proceeding was not properly notified to the defendant; (ii) the judgment was obtained by fraud; (iii) recognition and enforcement would be manifestly incompatible with public policy; (iv) the initial court proceedings were contrary to an agreement, or designation in a trust instrument, under which the dispute was to be determined by a different court; (v) the judgment is inconsistent with a judgment issued in a dispute between the same parties by a court of the State being asked to recognize or enforce the foreign judgment; or (vi) the judgment is inconsistent with an earlier judgment issued by a court of a third State involving the same parties and subject matter, provided that the earlier judgment may be recognized in the State being asked to recognize or enforce the newer judgment.[152]

150. *See* Convention, *supra* note 136, at art. 5(1) (providing an entire list).
151. *Id.* at art. 7(1).
152. *Id.*

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