

2016

International Human Rights

Noor Ahmad

Del Atwood

Jeffrey L. Bleich

Cindy Galway Buys

Nicholas J. Leddy

Recommended Citation

Noor Ahmad et al., *International Human Rights*, 50 ABA/SIL YIR 471 (2016)
<https://scholar.smu.edu/til/vol50/iss0/33>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Human Rights

NOOR AHMAD, HON. DEL ATWOOD, JEFFREY L. BLEICH, PROF.
CINDY GALWAY BUYS, AND NICHOLAS J. LEDDY*

This section analyzes key developments in the field of international human rights in 2015, including the Guantánamo Bay detention facility, the International Criminal Court (ICC), and the Iran nuclear deal, as well as case law on religious freedom in Canada and discrimination on the basis of race and national origin in the United States.

I. Developments at the Guantánamo Bay Detention Facility¹

President Obama continued his efforts to reduce the detainee population at the Guantánamo Bay, Cuba detention facility during 2015, with the long-term goal of closing the facility during his presidency. At its peak, Guantánamo Bay housed 775 detainees accused of various terrorism-related crimes.² One hundred twenty-seven detainees remained at Guantánamo Bay at the beginning of 2015.³ As of this writing at the end of November 2015, that number decreased to 107.⁴ This year, both the U.S. Court of Military Commission Review⁵ and the U.S. Court of Appeals for the District of Columbia Circuit⁶ cited *ex post facto* concerns in reversing detainees' convictions, under the theory that, at the time of the alleged incidents, the international laws of war did not proscribe either providing material support to terrorists or inchoate conspiracy to commit war crimes.

* Edited by Nicholas J. Leddy; contributions by Noor Ahmad, Hon. Del Atwood, Jeffrey L. Bleich, Prof. Cindy Galway Buys, and Nicholas J. Leddy. Authors from each section are noted accordingly. Views expressed in each section belong to the authors themselves.

1. This section is authored by Prof. Cindy Galway Buys, Professor of Law and Director of International Law Programs at Southern Illinois University School of Law.

2. See *The Guantanamo Docket*, N.Y. TIMES (Jan. 21, 2016), <http://projects.nytimes.com/guantanamo>.

3. Helene Cooper, *Obama Nears Goal for Guantanamo With Faster Pace of Releases*, N.Y. TIMES, Jan. 6, 2015, A13, available at http://www.nytimes.com/2015/01/06/us/obama-nears-goal-for-guantanamo-with-faster-pace-of-releases.html?ref=topics&_r=0.

4. *The Guantanamo Docket*, *supra* note 2.

5. Hicks v. United States, 94 F.Supp.3d 1241, 1248 (C.M.C.R. 2015).

6. Al Bahlul v. United States, 792 F.3d 1, 22 (D.C. Cir. 2015).

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

472 THE YEAR IN REVIEW

A. TRANSFER AND RELEASE OF CURRENT AND FORMER DETAINEES

In mid-January, the United States transferred five Yemeni men out of Guantánamo following a determination that they did not present a security threat.⁷ Four went to Oman and one to Estonia. Yemenis comprise the largest national group among the detainees, but are not being returned to Yemen because of the ongoing conflict in Yemen and because of congressional opposition to the return of detainees to Yemen.⁸

In May, a court in Alberta, Canada, ruled that former Guantánamo detainee Omar Khadr may be released on bail while contesting his conviction for war crimes in the United States.⁹ Khadr, a Canadian citizen who is now twenty-eight, was arrested and taken into custody in Afghanistan in 2002, at the age of fifteen.¹⁰ He was subjected to “enhanced interrogation” and spent eight years at Guantánamo Bay before pleading guilty to five counts and being sentenced by a U.S. military commission to eight years in prison.¹¹ He was transferred to a Canadian prison in 2012.¹²

From June through September, eight detainees were released. In June, the United States transferred six “lower-level detainees” to Oman.¹³ All six men were Yemeni nationals and had been detained at Guantánamo since 2002. In September, the U.S. government repatriated Abdul Rahman Shalabi to Saudi Arabia.¹⁴ Several other detainees identified him as one of Osama Bin Laden’s bodyguards.¹⁵ Also in September, the U.S. government repatriated Younis Abdurrahman Chekkouri to Morocco after his nearly thirteen-year detention at Guantánamo Bay.¹⁶

At the end of October, the U.S. government released Shaker Aamer, a Saudi citizen who resided in the United Kingdom prior to his arrest and detention at Guantánamo

7. Helene Cooper, *U.S. Moves Five Yemenis From Guantanamo*, N.Y. TIMES, Jan. 15, 2015, A14, available at <http://www.nytimes.com/2015/01/15/world/middleeast/us-moves-five-yemenis-from-guantamo.html?ref=topics>.

8. Adam Goldman, *Pentagon transfers 5 Yemenis being held at Guantanamo Bay to UAE*, WASH. POST (Nov. 15, 2015), https://www.washingtonpost.com/world/national-security/pentagon-transfers-five-yemenis-held-at-guantanamo-to-uae/2015/11/15/eb6df128-8bc9-11e5-ae1f-af46b7df8483_story.html.

9. Daniel Schwartz, *Omar Khadr's odds of winning U.S. appeal look good, legal expert says*, CBC NEWS (May 8, 2015), <http://www.cbc.ca/news/canada/omar-khadr-s-odds-of-winning-u-s-appeal-look-good-legal-expert-says-1.3065931>.

10. *Id.*

11. *Key events in Omar Khadr case*, CBC NEWS (May 7, 2015), <http://www.cbc.ca/news/canada/key-events-in-the-omar-khadr-case-1.1153759>.

12. *Id.*

13. Charlie Savage, *6 Guantanamo Detainees From Yemen Are Transferred to Oman*, N.Y. TIMES, June 14, 2015, A12, available at <http://www.nytimes.com/2015/06/14/world/middleeast/6-guantanamo-detainees-from-yemen-are-transferred-to-oman.html?ref=topics>.

14. Adam Goldman, *Once deemed too dangerous to release, Saudi detainee at Guantanamo Bay prison has been repatriated*, WASH. POST (Sept. 22, 2015), https://www.washingtonpost.com/world/national-security/saudi-detainee-at-guantanamo-bay-prison-has-been-repatriated/2015/09/22/b28c28cc-6156-11e5-b38e-06883aacba64_story.html.

15. *Id.*

16. Adam Goldman, *Moroccan detained at Guantanamo Bay for more than 13 years is repatriated*, WASH. POST (Sept. 17, 2015), https://www.washingtonpost.com/world/national-security/moroccan-detainee-held-at-guantanamo-bay-for-more-13-years-is-repatriated/2015/09/17/e8dbe316-5d4a-11e5-b38e-06883aacba64_story.html.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL HUMAN RIGHTS 473

Bay.¹⁷ He, too, had been held at the detention center for thirteen years prior to his return to England. He was captured by the Northern Alliance in Afghanistan in 2002, turned over to U.S. authorities, and taken to Guantánamo Bay.¹⁸ The U.S. government accused him of performing recruitment and finance work for Al Qaeda while in London and later in Afghanistan.¹⁹

In mid-November, the Department of Defense announced the transfer to the United Arab Emirates (UAE) of five Yemeni nationals who had been at Guantánamo Bay since 2002.²⁰ The men were arrested in 2001 by Pakistani and Afghan forces and turned over to the United States.²¹ They also had been held at Guantánamo Bay for more than a decade without charges. After extensive review, the U.S. government determined that the men no longer posed a security threat.²²

B. CONVICTIONS OVERTURNED

In February, the U.S. Court of Military Commission Review overturned the conviction of Australian David Hicks, who was convicted of providing material support to Al Qaeda after attending training at a camp in Afghanistan in 2001.²³ Hicks was captured by the Afghan Northern Alliance in 2001 and turned over to the U.S. authorities, which sent him to Guantánamo Bay.²⁴ He remained there until 2007, when he was transferred to Australia to serve the remainder of his sentence. He was one of the first people charged and convicted under the 2006 Military Commissions Act.²⁵ His conviction was ultimately overturned, however, because it was determined that the crime of providing material support to terrorists did not exist at the time of his alleged offense.²⁶

Using a similar rationale, the U.S. Court of Appeals for the District of Columbia Circuit issued its latest ruling in *Al Bahlul v. United States*, holding that Congress cannot declare an offense to be an international war crime when the international law of war concededly does not.²⁷ In 2014, the court had vacated Al Bahlul's conviction for providing material support for terrorist activities because that activity was not a war crime prior to 2001; thus, Al Bahlul's conviction based on that charge violated the Constitution's Ex Post Facto clause.²⁸ This time, the court vacated Al Bahlul's conviction for inchoate

17. Charlie Savage & Steven Erlanger, *Shaker Aamer Is Released From Guantanamo Prison After 13 Years*, N.Y. TIMES, Oct. 31, 2015, A14, available at <http://www.nytimes.com/2015/10/31/world/shaker-aamer-released-guantanamo-bay-cuba.html?ref=topics&r=0>.

18. *Id.*

19. *Id.*

20. Press Release, U.S. Dep't of Def., Detainee Transfers Announced (Nov. 16, 2015), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/628980/detainee-transfers-announced>; *The Guantanamo Docket*, N.Y. TIMES (Jan. 26, 2016), <http://projects.nytimes.com/guantanamo>.

21. Goldman, *supra* note 8.

22. U.S. Dep't of Def., *supra* note 20.

23. *Hicks*, 94 F.Supp.3d at 1243.

24. Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, N.Y. TIMES, Dec. 29, 2007, A7, available at <http://www.nytimes.com/2007/12/29/world/asia/29hicks.html?ref=topics>.

25. *Hicks*, 94 F.Supp.3d at 1243; Matt Apuzzo, *Guantanamo Conviction of Australian Overturned*, N.Y. TIMES, Feb. 18, 2015, A15, available at <http://www.nytimes.com/2015/02/19/us/guantanamo-conviction-of-australian-is-overturned.html?ref=topics>

26. *Hicks*, 94 F.Supp.3d at 1248.

27. *Al Bahlul*, 792 F.3d at 22.

28. *Id.*

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

474 THE YEAR IN REVIEW

conspiracy to commit war crimes because it was not a crime under international law at the time of the allegations.²⁹ These decisions call into question several other convictions based on similar charges.

C. OTHER LEGAL ISSUES: HUMAN RIGHTS ABUSES AND REPARATIONS

Retired U.S. Supreme Court Justice John Paul Stevens suggested in a speech that at least some of the detainees at Guantánamo Bay should be entitled to reparations, likening the situation to the reparations for Japanese-Americans who were detained during World War II.³⁰ Britain has already paid reparations to several detainees.

In June, the Inter-American Commission on Human Rights (IACHR) published a report entitled *Towards the Closure of Guantanamo*, which addresses the human rights situation of persons detained at the U.S. Naval Base in Guantánamo Bay.³¹ The report concludes that the main human rights violations at the Guantánamo Bay detention facility are: indefinite detention; the use of torture and other cruel, inhuman, or degrading treatment; limited or no access to judicial protection; lack of due process; a discriminatory detention regime; and the lack of an adequate defense.³² The IACHR once again called on the United States to close the facility.

II. Developments at the International Criminal Court³³

Despite some setbacks, the International Criminal Court (ICC) saw significant progress in numerous investigations and cases in 2015. In the past year, “the Office of the Prosecutor (OTP) opened a preliminary examination of the situation in Palestine; continued eight preliminary examinations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, Ukraine, and Iraq; and concluded preliminary examinations involving the Central African Republic and the Union of the Comoros (aka “Gaza Freedom Flotilla” incident).”³⁴ “As of September 15, 2015, the ICC was seized of twenty criminal cases in nine situations before the court: Kenya, Central African Republic (CAR I and II), Ivory Coast, Darfur, Libya, Mali, Democratic Republic of Congo, and Uganda.”³⁵ Highlights of these preliminary examinations and cases are summarized below.

29. *Hicks*, 94 F.Supp.3d at 1248.

30. Mark Berman, *John Paul Stevens says some Guantanamo detainees should be given reparations*, WASH. POST (May 5, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/05/05/john-paul-stevens-says-some-guantanamo-bay-detainees-should-be-given-reparations/>.

31. Inter-American Comm’n on Human Rights, *Towards the Closure of Guantanamo*, June 3, 2015, OAS/Ser.L/V/II, Doc. 20/15 (2015).

32. *Id.* at 9, 18, 103.

33. This section is authored by Nicholas J. Leddy. He is an Assistant District Attorney in the Public Corruption Unit of the Manhattan District Attorney’s Office, and Vice Chair of Publications for the ABA’s International Human Rights Committee. Mr. Leddy was a law clerk in the ICC’s Office of the Prosecutor in 2007.

34. Report on the activities of the International Criminal Court, ICC-ASP/14/29 at ¶2 (Nov. 13, 2015).

35. *Id.* ¶ 3.

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

INTERNATIONAL HUMAN RIGHTS 475

A. KENYA

One of the most significant developments of 2015 was the termination of proceedings against Kenyan President Uhuru Kenyatta after the OTP withdrew the charges against him.³⁶ The OTP's decision was based largely on: (i) witnesses having died or becoming too scared to testify, (ii) key witnesses materially changing their accounts of crucial meetings, and (iii) the alleged non-cooperation of the Government of Kenya in the investigation.³⁷

B. PALESTINE

After depositing its instrument of accession to the Rome Statute in early January, on April 1 Palestine became the 123rd state to join the ICC.³⁸ Palestine made a formal declaration under Article 12(3) of the Rome Statute, accepting ICC jurisdiction for crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."³⁹ The OTP opened a preliminary examination of the situation in Palestine in order to establish whether there is a reasonable basis to proceed with an investigation pursuant to factors listed in Article 53(1) of the Rome Statute, such as jurisdiction, admissibility, and the interests of justice.⁴⁰

C. UNION OF COMOROS (AKA "GAZA FREEDOM FLOTILLA")

On July 16, Pre-Trial Chamber I (PTC I) issued an unusual decision requesting the OTP to reconsider its decision not to initiate an investigation into the situation referred by the Union of Comoros, known as the "Gaza Freedom Flotilla" incident.⁴¹ In sum, PTC I found that the OTP committed several errors when concluding that the alleged attack on six boats resulting in the deaths of nine civilians did not meet the gravity

36. Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on the withdrawal of charges against Mr Kenyatta, ¶ 13 (Mar. 13, 2015), https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/tcVb/Pages/1005.aspx.

37. *Id.* ¶ 13; Press Release, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta (Dec. 5, 2014), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx.

38. Press Release, International Criminal Court, ICC Welcomes Palestine as a new State Party (Apr. 1, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx.

39. Press Release, International Criminal Court, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, (Jan. 5, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx.

40. Rome Statute of the International Criminal Court art. 53(1), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]; Press Release, Office of the Prosecutor of the International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, (Jan. 16, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

41. Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, at 3 (July 16, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

476 THE YEAR IN REVIEW

threshold embodied in the Rome Statute.⁴² The Appeals Chamber denied the OTP's request to appeal this decision.⁴³

D. DEMOCRATIC REPUBLIC OF CONGO (DRC)

The trial against militia leader Bosco Ntaganda (aka "the Terminator") began on September 2 before Trial Chamber VI.⁴⁴ This case revolves around two attacks in the Banyali-Kilo and Walendu-Djatsi districts in 2002-03 and represents "the first time a defendant is facing charges of sexual and gender-based violence for crimes against child soldiers under their command."⁴⁵ "At least 1,120 victims are participating in the case through two legal representatives."⁴⁶

On February 27, the Appeals Chamber confirmed Trial Chamber II's decision acquitting Mathieu Ngudjolo Chui of all charges, including war crimes and crimes against humanity.⁴⁷ Germain Katanga, who was originally Ngudjolo's co-defendant, was granted early release from ICC custody after serving eight years of his twelve-year sentence for war crimes and crimes against humanity, on the basis that Katanga "had demonstrated good behavior and regretted his crimes."⁴⁸ Katanga's scheduled release date is January 18, 2016.⁴⁹

E. UGANDA

Dominic Ongwen, former commander in the Lord's Resistance Army (LRA), was the first defendant in the Uganda situation to appear before the ICC.⁵⁰ Ongwen's trial is

42. *Id.* ¶ 30.

43. Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13 OA, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation," at 3 (Nov. 6, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2152672.pdf>.

44. Press Release, Coalition for the International Criminal Court, Trial of Congolese militia leader to open at ICC (Aug. 28, 2015), http://www.coalitionfortheicc.org/documents/CICCP_R_Ntaganda_TrialOpening_Sepr2015_ENG.pdf.

45. *Id.*

46. *Id.*

47. Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12 A, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute," ¶ 296 (Apr. 7, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1957802.pdf>.

48. Hague Court Frees Congolese War Criminal, N.Y. TIMES (Nov. 13, 2015), http://www.nytimes.com/2015/11/14/world/africa/hague-court-frees-congolese-war-criminal.html?_r=0.

49. Prosecutor v. Germain Katanga, Case No. ICC-01/04/01/07, Decision on the review concerning reduction of sentence of Germain Katanga, 3 (Nov. 13, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2145522.pdf>.

50. Press Release, International Criminal Court, Dominic Ongwen makes first appearance before the ICC, (Jan. 26, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1085.aspx.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL HUMAN RIGHTS 477

scheduled to start on January 21, 2016.⁵¹ The ICC also terminated proceedings against Okot Odhiambo, following forensic confirmation of his death.⁵²

F. GEORGIA

On October 13, the OTP requested authorization from the Pre-Trial Chamber to initiate an investigation into the alleged war crimes and crimes against humanity in the August 2008 armed conflict in Georgia.⁵³ The preliminary examination thus far has revealed a reasonable basis to believe that South Ossetian forces committed the war crimes of murder and destruction of property in the context of forcible displacement of ethnic Georgians, as well as the crimes against humanity of murder, forcible transfer, and persecution.⁵⁴ The preliminary examination also revealed a reasonable basis to believe that both Georgian armed forces and South Ossetian forces committed the war crime of attacking personnel or objects involved in a peacekeeping mission.⁵⁵

G. IVORY COAST

In March, Trial Chamber I joined the cases of former Ivorian President Laurent Gbagbo and one of his ministers, Charles Blé Goudé, because their crimes generally involve the same incidents, although their level of participation differs.⁵⁶ Their trial is scheduled to start in January 2016. The Appeals Chamber confirmed the admissibility of the case against former First Lady Simone Gbagbo, who is not in ICC custody, agreeing that the criminal proceedings against her in the Ivory Coast were not sufficiently investigating and prosecuting the crimes against humanity charged at the ICC.⁵⁷

51. Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/ICC-02_04-01_15/Pages/default.aspx.

52. Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo, Case No. ICC-02/04-01/05, Decision terminating proceedings against Okot Odhiambo, ¶ 4 (Sept. 10, 2015), https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/court%20records/chambers/pre%20trial%20chamber%20ii/Pages/431.aspx.

53. OFFICE OF THE PROSECUTOR, Situation in Georgia: Summary of the Prosecution's Request for authorisation of an investigation pursuant to article 15, at 2 (Oct. 13, 2015), https://www.icc-cpi.int/iccdocs/otp/Art_15_Application_Summary-ENG.pdf.

54. *Id.* at 4-5.

55. *Id.* at 4.

56. Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on Prosecution request to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters, ¶ 68 (Mar. 11, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1939590.pdf>.

57. Prosecutor v. Simone Gbagbo, Case No. ICC-02/11-01/12 OA, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo," ¶ 2 (May 27, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1976613.pdf>.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

478 THE YEAR IN REVIEW

H. MALI

In September, Ahmad Al Faqi Al Mahdi made his initial appearance before the ICC.⁵⁸ He is the first ICC defendant to be charged with destruction of cultural property as a war crime, based on his alleged role in intentionally directing attacks against several UNESCO-protected mosques and mausoleums during the 2012 occupation of Timbuktu by Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine.⁵⁹

I. CENTRAL AFRICAN REPUBLIC (CAR)

The second trial in the CAR situation began in September, against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido, stemming from their alleged offenses against the administration of justice in the case against Bemba, between the end of 2011 and November 2013, including bribing witnesses and instructing them “to provide false testimony, presenting false evidence, and giving false testimony in the courtroom.”⁶⁰ The defendants include members of Bemba’s former defense team and a defense witness.⁶¹

J. UKRAINE

In September, the ICC received a second declaration from Ukraine under Rome Statute article 12(3) accepting the court’s jurisdiction for crimes committed within its borders—this time expanding the ICC’s jurisdiction from February 20, 2014, onward with an “infinite duration.”⁶² This action effectively expanded the temporal jurisdiction of the court in the Ukraine from the beginning of the first declaration, November 21, 2013, through the foreseeable future. Notably, this new jurisdiction includes the July 17, 2014 crash of Malaysia Airlines flight MH17, which “killed all 298 people on board.”⁶³

K. DARFUR, SUDAN

Sudanese President Omar Hassan al-Bashir cut his visit to South Africa short and managed to flee the country, despite a South African High Court’s order to bar Bashir

58. Press Release, International Criminal Court, Ahmad Al Faqi Madi makes first appearance before the ICC, (Sept. 30, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1157.aspx.

59. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Arrest warrant against Ahmad Al Faqi Al Mahdi, (Sept. 18, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2068383.pdf>.

60. Press Release, International Criminal Court, Bemba, Kilolo et al. trial opens at International Criminal Court, (Sept. 29, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1155.aspx.

61. Press Release, International Criminal Court, Bemba, Kilolo et al. case: Pre-Trial Chamber II commits five suspects to trial, (Nov. 11, 2014), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1062.aspx.

62. Paylo Kilimkin, Minister of Foreign Affairs of Ukraine, Declaration Lodged Under Article 12(3) of the Rome Statute, (Sept. 8, 2015), https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

63. Press Release, Coalition for the International Criminal Court, Ukraine expands acceptance of ICC jurisdiction, (Sept. 8, 2014), [http://www.coalitionfortheicc.org/documents/CICCP_R_Ukraine_Art12\(3\)_Sept2015_ENG.pdf](http://www.coalitionfortheicc.org/documents/CICCP_R_Ukraine_Art12(3)_Sept2015_ENG.pdf).

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL HUMAN RIGHTS 479

from leaving the country and despite an open ICC arrest warrant for war crimes, genocide, and crimes against humanity.⁶⁴ Bashir was in South Africa for an African Union (AU) meeting.⁶⁵ This incident occurred even after ICC Pre-Trial Chamber II informed the UN Security Council of Sudan's non-cooperation in the arrest and surrender of Bashir.⁶⁶

III. Iran Nuclear Deal Shows the Strength of Diplomacy⁶⁷

Signed on July 2015, the Joint Comprehensive Plan of Action (JCPOA) is the groundbreaking international agreement on Iran's nuclear program between Iran, the P5 (China, France, Russia, the United Kingdom, and the United States), and the European Union. The UN Security Council endorsed this agreement through the adoption of Resolution 2231, marking a historic milestone in United States and Iranian relations.⁶⁸ This international endorsement of an agreement has come to fruition after over a decade of tireless negotiations. The JCPOA outlines the way in which Iran will limit its nuclear ability through transparent monitoring in exchange for oil and financial sanctions relief. This agreement sets out the framework Iran adopted for reducing its nuclear capacity, the monitoring mechanisms, and the sanctions relief Iran will experience as a result of successful compliance.

A. IRAN AGREES TO DRAMATICALLY REDUCE ITS NUCLEAR CAPACITY

Iran's potential to produce an atomic bomb is curbed by the agreed-upon terms of the JCPOA. Atomic bombs are produced through a uranium enrichment process and by irradiating uranium to produce plutonium. In order to reach atomic bomb level, enrichment must be at ninety percent. Under the JCPOA, Iran agreed to reduce its enrichment process from its current twenty percent to 3.7 percent and to cap its stockpile to 300kg for the next fifteen years.⁶⁹ Iran also will reduce the number of centrifuges from 19,500 to 6,100, of which only 5,000 will continue spinning. Fordow, which houses about 2,100 centrifuges, will be transformed into a physics, technology, and science center. Iran also has agreed to not build any new enrichment facilities in the next fifteen years,

64. Alex Whiting, *Omar al Bashir has left the building (and the Country)*, LAWFARE (June 16, 2015), <https://www.lawfareblog.com/omar-al-bashir-has-left-building-and-country>.

65. *Id.*

66. Press Release, International Criminal Court, Pre-Trial Chamber II informs the United Nations Security Council about Sudan's non-cooperation in the arrest and surrender of Omar Al Bashir, (Mar. 9, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1094.aspx.

67. This section is authored by Noor Ahmad. She is a Staff Attorney in the Criminal Defense Division of the Legal Aid Society in New York City.

68. S.C. Res. 2231, Annex A, U.N. Doc. S/RES/2231, (July 20, 2015); Press Release, United Nations, Security Council Adopting Resolution 2231, (July 20, 2015), <http://www.un.org/press/en/2015/sc11974.doc.htm> [hereinafter Security Council].

69. Press Release, The White House, Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA), (July 14, 2015), at 3, <https://www.whitehouse.gov/the-press-office/2015/07/14/key-excerpts-joint-comprehensive-plan-action-jcpoa> [hereinafter Key Excerpts].

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

480 THE YEAR IN REVIEW

effectively curbing plutonium production.⁷⁰ Additionally, Iran has agreed to rebuild and redesign its heavy water reactor facility Arak, while agreeing to operate it for the support of peaceful nuclear research only, and without the ability to produce weapons-grade plutonium.⁷¹ In addition to the redesign effort, Iran agreed to ship all spent fuel out of the country.⁷²

B. MONITORING IRAN'S COMPLIANCE WITH THE AGREEMENT

A comprehensive and systematic framework has been established to ensure transparency and an effective, mutual commitment to the agreement. Inspection and monitoring of Iran's facilities will be conducted through a three-tier approach: Iran's Comprehensive Safeguards Agreement (CSA), which is currently implemented with the International Atomic Energy Agency (IAEA); the Additional Protocol (AP) to Iran's CSA; and additional verification measures under the newly finalized JCPOA.⁷³

Under the existing CSA, Iran has agreed to declare to the IAEA its existing nuclear material and activities associated with it. The AP requires additional information and access to facilities. The verification protocols under the JCPOA provide further accountability in relation to the recent terms, including daily access to all declared sites for fifteen years. This also includes the IAEA's use of modern technology to monitor enrichment levels. Additional measures include longer-term monitoring of uranium stock and centrifuge capacity-building. Both the CSA and JCPOA provide mechanisms for the IAEA to gain access to undeclared sites as needed, as well as a means to ascertain information.⁷⁴ In combination, these sweeping provisions are the most rigorous to date, providing the international community with access to every part of Iran's nuclear supply chain, and go far beyond the normal safeguards under the National Proliferation Treaty (NPT).⁷⁵ With an eye to future implementation, a joint commission was created under the JCPOA composed of the eight member-participants to the agreement (the United States, the United Kingdom, France, Germany, Russia, China, Iran, and the European Union). Working groups focused on different aspects of the agreement will be established, but more significantly, the commission's role will include dispute resolution as a means to effectively manage the implementation and monitoring.⁷⁶

70. Press Release, The White House, Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program (Apr. 2, 2015), at 2, <https://www.whitehouse.gov/the-press-office/2015/04/02/parameters-joint-comprehensive-plan-action-regarding-islamic-republic-ir>.

71. M.S., *What you need to know about Iran's nuclear deal*, THE ECONOMIST (July 15, 2015), <http://www.economist.com/blogs/economist-explains/2015/07/economist-explains-11>.

72. The Joint Comprehensive Plan of Action, "Annex I – Nuclear Related Measures," ¶ 11 (July 14, 2015), <https://medium.com/the-iran-deal/nuclear-related-measures-5d866a5f2b74#qhpgozxb2> [hereinafter Annex I].

73. *Id.* ¶ 64.

74. *Id.*

75. The Joint Comprehensive Plan of Action, "Annex IV – Join Commission," ¶ 6.1.1 (July 14, 2015), <https://medium.com/the-iran-deal/nuclear-related-measures-5d866a5f2b74#qhpgozxb2>.

76. Annex I, *supra* note 72, ¶ 5.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL HUMAN RIGHTS 481

C. THE EXCHANGE: SANCTIONS RELIEF

In exchange for Iran's commitment to limit its nuclear-related activity, sanctions that have economically crippled the nation will be lifted or suspended. Once it is verified that Iran has executed key steps under the JCPOA, all UN sanctions and the most economically damaging sanctions of the United States and the European Union will be lifted.⁷⁷ The UN resolution 2231 would in effect nullify six previous resolutions, but has a "snapback" mechanism, which would restore resolutions in the event of noncompliance.⁷⁸ The United States has agreed to end the application of sanctions affecting Iran's energy and financial sectors.⁷⁹ In terms of relief, Iran is looking at the hugely significant potential of gaining access to billions of U.S. dollars in frozen oil revenues. Sanctions relief would also allow banks in Iran to begin to reconnect with the global economy.⁸⁰ Additionally, sanctions will be lifted against third-party entities engaged in business with Iran, including the automotive and insurance industries. The end to European Union sanctions would lift the oil embargo imposed in 2012. It would also lift sanctions on shipping and precious metals and remove asset freezes on major financial institutions.⁸¹ After ten years of negotiations, the JCPOA is a powerful example of the international community's commitment to a diplomatic solution in a region where great stability is needed.

IV. In Religious Freedom Case, Canada Allows Wearing of a Veil During Government Proceedings⁸²

The tension between public policy and the duty to accommodate cultural diversity erupted into full view in the months prior to the October 2015 Canadian Federal election in a series of administrative-law cases involving a female Muslim citizenship applicant.⁸³ Zunera Ishaq was born in Pakistan of Sunni heritage. Her devoutly held religious beliefs obligated her to wear a niqab, a veil that typically covers most of the wearer's face. Ishaq immigrated to Canada and eventually became a permanent resident in 2008. She later applied for Canadian citizenship, and her application was approved by a judge of the Citizenship Court on December 30, 2013.⁸⁴ An approved application, however, does not confer citizenship, as the Citizenship Act requires one further step: an approved applicant must take a public loyalty oath.⁸⁵

Two years prior to the approval of Ishaq's application, Citizenship and Immigration Canada had put into effect an operational bulletin required to be followed by staff and Citizenship Court judges in conducting oath-taking ceremonies. This bulletin stated:

77. Key Excerpts, *supra* note 69 at 5-6.

78. Security Council, *supra* note 68.

79. The Joint Comprehensive Plan of Action, "Annex II – Sanctions-Related Commitments," ¶ 4.1.1 (July 14, 2015), <https://medium.com/the-iran-deal/sanctions-related-commitments-2879873e59#zdu76hut> [hereinafter Annex II].

80. Sergio Peçanha, *Understanding the Deal with Iran*, N.Y. TIMES (Nov. 24, 2013), http://www.nytimes.com/interactive/2013/11/24/world/middleeast/Understanding-the-Deal-With-Iran.html?_r=0.

81. Annex II, *supra* note 79, ¶¶ 4.1.1, 4.5.1.

82. This section is authored by Del Atwood. He is a judge of the Provincial Court of Nova Scotia.

83. *Ishaq v. Canada (Minister of Citizenship and Immigration)*, [2015] F.C. 156, 161 (Can. Fed. Ct.).

84. *Id.*

85. Citizenship Act, R.S.C. 1985, c. C-29, § 3(1)(c).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

482 THE YEAR IN REVIEW

It is the responsibility of the presiding official and the clerk of the ceremony to ensure that all candidates are seen taking the Oath of Citizenship.

To facilitate the witnessing of the oath taking by CIC officials, all candidates for citizenship are to be seated together, as close to the presiding official as possible.

For larger ceremonies (50 or more candidates), additional CIC officials will be required to assist in the witnessing of the oath. The CIC officials will need to observe the taking of the oath by walking the aisles.

*Candidates wearing face coverings are required to remove their face coverings for the oath taking portion of the ceremony.*⁸⁶

Ishaq had willingly removed her niqab during a private application-approval interview, but was not willing to do so for the public oath-taking ceremony. She applied to the Federal Court of Canada in order to challenge the policy that would have required her to take the citizenship oath while unveiled.

The application was heard on October 16, 2014; three months later, Justice Keith Boswell decided that the face-covering-removal policy was illegal, not based on freedom-of-expression or religious-liberty constitutional review grounds, but on more everyday administrative-law principles.⁸⁷ The judge found that the policy conflicted with regulations enacted under the Citizenship Act, which required Citizenship Court judges “to administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof.”⁸⁸

The minister of Citizenship and Immigration appealed immediately to the Federal Court of Appeal, which quite promptly affirmed the original decision in very brief reasoning.⁸⁹ The minister appealed to the Supreme Court of Canada and sought, unsuccessfully, a stay of the Federal Court’s judgment pending the hearing of the appeal.⁹⁰ Somewhat surprisingly, neither the Federal Court nor the Court of Appeal dealt with Canada’s conventional obligations in relation to minority or religious rights.⁹¹

Both the appeal and the application for stay were heard when the 2015 Canadian Federal election was in full swing. The governing Conservatives made the niqab a wedge issue during the endgame of the campaign. Several political commentators in Canada have offered the view that this strategy had a significant impact on the electoral defeat of the Conservative government; this is because secularist (and, to some extent, anti-niqab) Quebec shifted significant support from the New Democratic Party (NDP) to the Liberal party due to the NDP’s support of Ishaq’s cause, thereby turning a three-way race among

86. *Ishaq*, [2015] F.C. at 172 (emphasis added). This bulletin has been removed from the Citizenship and Immigration Canada list of operational bulletins. This information is available on the website for the Government of Canada’s Department of Citizenship and Immigration, Update to the Instructions Related to the Oath of Citizenship as a Result of Recent Decision by Federal Court, available at <http://www.cic.gc.ca/english/resources/tools/updates/2015/2015-02-27.asp> (last accessed Nov. 27, 2015).

87. *Id.*

88. Citizenship Regulations (Citizenship Act), SOR/93-246, § 17(1)(b) (Can.).

89. *Canada (Minister of Citizenship and Immigration) v. Ishaq*, [2015] F.C.A. 194, ¶¶ 4-6 (Can. Fed. Ct. App.).

90. *Canada (Minister of Citizenship and Immigration) v. Ishaq*, [2015] F.C.A. 212, ¶ 4 (Can. Fed. Ct. App.).

91. *See, e.g.*, International Covenant on Civil and Political Rights art. 27, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966).

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

INTERNATIONAL HUMAN RIGHTS 483

the Conservatives, the Liberals, and the NDP into a Liberal runaway.⁹² As a result, the new government stood by an election promise of now–Prime Minister Justin Trudeau, made during the campaign, not to appeal the decision of the Federal Court, and filed a notice of appeal discontinuance within a month of the new ministry having been sworn in.⁹³

Although the issue might now have been settled in citizenship ceremonies, the niqab remains a live human-and-religious-rights issue in Canadian courts and courts around the world. Judges in Canada continue to grapple with the question of whether face coverings ought to be removed by witnesses when giving evidence. In 2012, the Supreme Court of Canada established an analytical framework to be applied by trial judges in deciding whether to order the removal of face coverings.⁹⁴ Couching its words in terms suggesting that the judgment was seeking to strike a balance between competing fair-trial and freedom-of-religion interests, the court was criticized in one scholarly article as having “legitimated anti-Muslim stereotypes and reiterated rape myths.”⁹⁵ This case sets an important precedent for the treatment of religious veils in government proceedings—an increasingly contentious issue in many countries—as states try to balance religious freedom with public policy and due process concerns.

V. California Recognizes Historic Mistreatment of Chinese Residents: *In Re Admission of Hong Yen Chang*⁹⁶

In an unprecedented order, the California Supreme Court this year granted Hong Yen Chang posthumous admission to the state bar, retroactively making him the first Chinese lawyer licensed in California. In 1890, the court denied Chang bar membership solely on account of his being Chinese. The court’s decision 125 years later candidly confronted its role in this historic injustice, acknowledging Chang’s “rightful place among the ranks of persons deemed qualified to serve”⁹⁷ as California lawyers. Beyond correcting past errors, however, the decision offered a powerful message to members of other nations seeking justice in California’s courts. In an increasingly globalized legal community, it reaffirmed the essential wisdom of the U.S. Constitution’s requirement to extend bar membership to noncitizens. Moreover, it demonstrated the principle that American courts are a welcome forum to people from all over the world.

A. *IN RE HONG YEN CHANG* (1890)

Hong Yen Chang was born in Guangdong Province, China, and lost his father at age ten. He was brought to the United States on an educational mission at age thirteen and

92. See, e.g., Thomas Homer-Dixon, *Harper wanted the niqab to divide and conquer – but that has backfired*, GLOBE AND MAIL (Oct. 16, 2015), <http://www.theglobeandmail.com/globe-debate/harper-wanted-the-niqab-to-divide-and-conquer-but-that-has-backfired/article26844199/>.

93. Discontinuance of the application for leave to appeal, *Isbaq*, [2015] F.C.A. 212, (No. 36619).

94. *R. v. N.S.*, [2012] 3 S.C.R. 726, 728 (Can.).

95. Lori Chambers & Jen Roth, *Prejudice Unveiled: The Niqab in Court*, 29 CAN. J.L. & SOC. 381 (2014).

96. This section is authored by Jeffrey L. Bleich. Mr. Bleich is a partner at Munger, Tolles & Olson LLP, and formerly served as United States Ambassador to Australia, Special Counsel to President Obama, and President of the State Bar of California.

97. *In re Hong Yen Chang II*, 344 P.3d 288, 292 (2015).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

484 THE YEAR IN REVIEW

lived with American families,⁹⁸ demonstrated great intelligence, and eventually graduated from Columbia Law School.⁹⁹ New York State initially denied his application to be the first Chinese person to join the bar because Chang was not a U.S. citizen.¹⁰⁰ A sympathetic state court judge granted him a naturalization certificate, however, and the New York legislature enacted a law “for the relief of Hong Yen Chang,” permitting him to reapply to the New York bar.¹⁰¹ In 1888, he was admitted to practice in New York.

Chang moved to California in 1890 and applied for admission to the California bar. Yet, despite his already being a member of the New York bar, his application was denied. In a published decision, *In re Hong Yen Chang*, the California Supreme Court held that Chang was ineligible for the California bar.¹⁰² The court acknowledged that Chang was admitted to practice in New York, that his moral character was “duly vouched for,” and that he was otherwise qualified for admission.¹⁰³ The court relied on the federal Chinese Exclusion Act that expressly forbade Chinese nationals from naturalizing, noting that California law forbid noncitizens from joining the bar.¹⁰⁴ Indeed, an entire article of the California Constitution (entitled “Chinese”) declared their presence “dangerous . . . to the well-being . . . of the State” and imposed a set of onerous legal disabilities, including prohibiting Chinese workers from working for private corporations or on public works projects and directing the Legislature to authorize localities to remove Chinese immigrants from their communities.¹⁰⁵ The court thus disregarded Chang’s naturalization certificate, granted by a New York judge just two years earlier, as “issued without authority of law” and therefore “void.”¹⁰⁶ Because Chang, “a person of Mongolian nativity,” could not become a citizen, the court concluded, he could not practice law in this state.¹⁰⁷ The decision, and the laws supporting it, remained in effect for the remainder of Chang’s lifetime.¹⁰⁸ He died in 1926, having achieved a distinguished career in diplomacy and finance, but never permitted to practice law in the state.¹⁰⁹

98. THOMAS EDWARD LA FARGUE, CHINA’S FIRST HUNDRED: EDUCATIONAL MISSION STUDENTS IN THE UNITED STATES, 1872-1881 173 (Wash. State Univ. Press 1987).

99. See LANI AH TYE FARKAS, BURY MY BONES IN AMERICA: THE SAGA OF A CHINESE FAMILY IN CALIFORNIA, 1852-1996, FROM SAN FRANCISCO TO THE SIERRA GOLD MINES 87-90 (Carl Mautz Publishing 1998) [hereinafter *Bury My Bones*].

100. *In re Hong Yen Chang II*, 344 P.3d at 288.

101. *Id.*

102. *In re Hong Yen Chang*, 24 P. 156, 157 (1890).

103. *Id.*

104. *Id.*

105. CAL. CONST. art. XIX §§ 2-4 (repealed Nov. 4, 1952); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 35-36 (1998) (describing discriminatory immigration measures aimed at Chinese immigrants).

106. *Hong Yen Chang*, 24 P. at 157.

107. *Id.*

108. See *BURY MY BONES*, *supra* note 99, at 93.

109. See *id.* at 91.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL HUMAN RIGHTS 485

B. *IN RE HONG YEN CHANG* (2015)

The legal bases of the 1890 decision bearing Chang's name slowly eroded in the decades that followed.¹¹⁰ In 1943, Congress repealed the Chinese Exclusion Act.¹¹¹ Three decades later, the California Supreme Court ruled that excluding noncitizens from the bar violated equal protection.¹¹² The court explained that, "[i]n the light of modern decisions safeguarding the rights of those among us who are not citizens of the United States, the exclusion [of noncitizens from the bar] appears constitutionally indefensible."¹¹³ The next year, the U.S. Supreme Court adopted that same principle, holding that states cannot constitutionally ban noncitizens from the legal profession.¹¹⁴

Yet Chang's exclusion from the California bar remained as a notorious reminder of the nation's discriminatory past. In 2014, the UC Davis Law School's Asian Pacific American Law Students Association (APALSA) and its faculty advisor Professor Gabriel "Jack" Chin set out to change that through an unusual motion filed with the California Supreme Court. Represented by the UC Davis School of Law's California Supreme Court Clinic and later Munger, Tolles & Olson, APALSA asked the court to posthumously admit Chang to the bar.¹¹⁵

In an extraordinary published opinion issued in March 2015, the court agreed. Its nine-page, unanimous decision not only granted Chang posthumous admission to the bar,¹¹⁶ but also provided "a candid reckoning with a sordid chapter of our state and national history."¹¹⁷ The court's opinion laid bare the systematic discrimination against Chinese immigrants,¹¹⁸ before pronouncing that "it is past time to acknowledge that the discriminatory exclusion of Chang from the State Bar of California was a grievous wrong."¹¹⁹ The court recognized the impact of its prior decision on "countless others who, like Chang, aspired to become a lawyer only to have their dream deferred on account of their race, alienage, or nationality;" and mourned the "loss to our communities and to society as a whole . . . [of] the full talents of its people and the important benefits of a diverse legal profession."¹²⁰ Recognizing that it could not "undo history," the court nevertheless sought to "acknowledge it" and "accord a full measure of recognition to Chang's groundbreaking efforts to become the first lawyer of Chinese descent in the United States."¹²¹ The court admitted that its 1890 decision was not simply the result of faithful judicial application of laws thought lawful at the time, but was a "grievous wrong" from its inception.

110. *In re Hong Yen Chang II*, 344 P.3d at 291.

111. *Id.*

112. *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1275 (1972).

113. *Id.* at 1266.

114. *In re Griffiths*, 413 U.S. 717, 733 (1973).

115. *Mot. for Posthumous Admission of Hong Yen Chang to the State Bar*, *In re Hong Yen Chang*, 344 P.3d 288 (2015) (No. S223736).

116. *In re Hong Yen Chang II*, 344 P.3d at 292.

117. *Id.* at 289.

118. *Id.* at 291.

119. *Id.*

120. *Id.* at 291-92.

121. *Id.* at 292.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

486 THE YEAR IN REVIEW

The Court's decision this year made headlines not only in California, but also around the globe. In part, this is due to the unusually blunt manner in which the Court confronted past discrimination and human interest elements relating to Chang's life. But the interest of international observers also reflects an appreciation for some of the most ennobling aspects of American law. In a world in which there will be increased competition regarding forum selection, the court's decision demonstrates a rare willingness of courts to openly criticize their own government and themselves, to welcome citizens of other nations to their courts, and to do what justice requires even at the risk of embarrassment. The great interest in Chang's case reflects the truth that past discrimination against foreign nationals in this country has not been forgotten. By acknowledging and making amends for that past, the court took a crucial step toward ensuring that California courts are attractive to all people, including those from other nations. In doing so, the court's opinion does more than right a historic wrong; it positions U.S. courts to communities around the world as a place where today every litigant can expect equal protection and fair treatment regardless of national origin.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW