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International Courts

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This article reports on selected developments during 2014 before the International Court of Justice, the Inter-American Court of Human Rights, and various international criminal courts and tribunals.

I. International Court of Justice

During 2014, the International Court of Justice ("ICJ") issued judgments in two contentious cases and one order regarding a request for preliminary measures. Five new cases were filed with the ICJ in 2014: two maritime delimitation cases and three cases on nuclear disarmament.

A. *Maritime Dispute* (Peru v. Chile)

On January 27, 2014, the ICJ issued its judgment in the Maritime Dispute between Peru and Chile.[1] Peru had asked the ICJ "to determine the course of the boundary between the maritime zones of the two States in accordance with international law . . . and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile's exclusive economic zone or continental shelf."[2] Chile asked the ICJ to dismiss Peru's claims and to declare that "the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement" following a stated boundary and that Peru was not entitled to any maritime zone south of that area.[3] In a complex opinion, the ICJ examined the claims and agreed upon a single maritime boundary between Chile and Peru.[4] The ICJ defined the course of the maritime boundary between Chile and Peru without fixing its precise

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1. Maritime Dispute (Peru v. Chile), Judgment (Jan. 27, 2014), *available at* http://www.icj-cij.org/docket/files/137/17930.pdf.

2. *Id.* at 11, ¶ 13.

3. *Id.* at 12, ¶ 14.

4. *Id.* at 67-68, ¶¶ 196-98. *See also* Press Release, I.C.J., Maritime Dispute (Peru v. Chile) (Jan. 27, 2014), *available at* http://www.icj-cij.org/docket/files/137/17928.pdf (ICJ press release summarizing the judgment).

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geographical coordinates.[5] The judgment states that the ICJ expects Chile and Peru to determine those coordinates in accordance with the judgment and "in the spirit of good neighbourliness."[6]

President Peter Tomka of Slovakia,[7] Vice-President Bernardo Sepúlveda-Amor of Mexico,[8] Judge Leonid Skotnikov of the Russian Federation,[9] Judge Joan E. Donoghue of the United States,[10] Judge Giorgio Gaja of Italy,[11] and Judge *ad hoc* Gilbert Guillaume of France[12] appended separate declarations to the judgment. Judge Hisashi Owada of Japan[13] added a separate opinion and Judge *ad hoc* Orrego Vicuña added a separate opinion partly concurring and partly dissenting.[14] Judge Julia Sebutinde of Uganda added a dissenting opinion[15] and Judges Xue Hanqin of China, Giorgio Gaja of Italy, Dalveer Bhandari of India, and Judge *ad hoc* Orrego Vicuña issued a joint dissenting opinion.[16]

B. *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening)

On March 31, 2014, the ICJ issued its judgment on Whaling in the Antarctic.[17] In 2010, Australia had filed an action against Japan complaining that the Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II') violated the International Convention for the Regulation of Whaling and other international obligations to preserve marine mammals and the marine environment.[18] New Zealand intervened as a non-party in 2012, without objection from Australia or Japan.[19] Australia asked the ICJ to order Japan to stop its whaling activities in the Southern Ocean, in particular by ordering Japan to "(a) observe the zero catch limit in relation to the killing of whales for commercial purposes; (b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary; and (c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships."[20] Australia also asked the ICJ to declare that Japan's whaling program was "not a

5. Maritime Dispute (Peru v. Chile), Judgment (Jan. 27, 2014), *available at* http://www.icj-cij.org/docket/files/137/17930.pdf.
6. *Id.* at 67, ¶ 197.
7. *Id.* (Declaration of President Tomka), *available at* http://www.icj-cij.org/docket/files/137/17938.pdf.
8. *Id.* (Declaration of Judge Sepúlveda-Amor), *available at* http://www.icj-cij.org/docket/files/137/17940.pdf.
9. *Id.* (Declaration of Judge Skotnikov), *available at* http://www.icj-cij.org/docket/files/137/17944.pdf.
10. *Id.* (Declaration of Judge Donoghue), *available at* http://www.icj-cij.org/docket/files/137/17948.pdf.
11. *Id.* (Declaration of Judge Gaja), *available at* http://www.icj-cij.org/docket/files/137/17950.pdf.
12. *Id.* (Declaration of Judge *ad hoc* Guillaume), *available at* http://www.icj-cij.org/docket/files/137/17954.pdf.
13. *Id.* (Separate Opinion of Judge Owada), *available at* http://www.icj-cij.org/docket/files/137/17942.pdf.
14. *Id.* (Separate Opinion of Judge *ad hoc* Orrego Vicuña), *available at* http://www.icj-cij.org/docket/files/137/17956.pdf.
15. *Id.* (Dissenting Opinion of Judge Sebutinde), *available at* http://www.icj-cij.org/docket/files/137/17952.pdf.
16. *Id.* (Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña), *available at* http://www.icj-cij.org/docket/files/137/17946.pdf.
17. Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment (March 31, 2014), *available at* http://www.icj-cij.org/docket/files/148/18136.pdf.
18. *Id.* at 9, ¶ 1.
19. *Id.* at 11, ¶ 12.
20. *Id.* at 14, ¶ 24.

program for purposes of scientific research" allowed under the International Convention for the Regulation of Whaling.[21] Japan, for its part, asked the ICJ to find either (1) that it lacked jurisdiction over Australia's claim and that New Zealand's permission to intervene should lapse, or (2) that Australia's claims against Japan should be rejected.[22]

The ICJ found unanimously that it had jurisdiction[23] and found by a vote of 12-4 that Japan's killing of whales was not "for the purposes of scientific research" allowed under the International Convention for the Regulation of Whaling.[24] Observing that Japan's whaling program was on going, the ICJ ordered Japan to "revoke any extant authorization, permit[,] or license to kill, take[,] or treat whales in relation to JARPA II" and to refrain from granting any further permits.[25]

Judge Kenneth Keith of New Zealand issued a separate declaration.[26] Judge Antônio Augusto Cançado Trindade of Brazil,[27] Judge Christopher Greenwood of the United Kingdom,[28] Judge Xue Hanqin of China,[29] Judge Julia Sebutinde of Uganda,[30] Judge Dalveer Bhandari of India,[31] and Judge *ad hoc* Hillary Charlesworth issued separate opinions.[32] Judge Hisashi Owada of Japan,[33] Judge Ronny Abraham of France,[34] Judge Mohammed Bennouna of Morocco[35] and Judge Abdulqawi Ahmed Yusuf of Somalia[36] issued dissenting opinions.

C. *Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia)

The Democratic Republic of Timor-Leste instituted proceedings against Australia in December 2013, alleging that Australian agents had raided the offices of legal advisers to Timor-Leste and seized documents and data from their offices in the Australian Capital

21. *Id.*

22. *Id.* at 16, ¶ 25.

23. *Id.* at 22, ¶ 41.

24. *See id.* at 69, ¶ 242, and at 71-72, ¶ 247.

25. *Id.* at 70, ¶ 245, and at 71-72, ¶ 247.

26. *Id.* (Declaration of Judge Keith), *available at* http://www.icj-cij.org/docket/files/148/18142.pdf.

27. *Id.* (Separate Opinion of Judge Cançado Trindade), *available at* http://www.icj-cij.org/docket/files/148/18146.pdf.

28. *Id.* (Separate Opinion of Judge Greenwood), *available at* http://www.icj-cij.org/docket/files/148/18150.pdf.

29. *Id.* (Separate Opinion of Judge Xue), *available at* http://www.icj-cij.org/docket/files/148/18152.pdf.

30. *Id.* (Separate Opinion of Judge Sebutinde), *available at* http://www.icj-cij.org/docket/files/148/18154.pdf.

31. *Id.* (Separate Opinion of Judge Bhandari), *available at* http://www.icj-cij.org/docket/files/148/18156.pdf.

32. *Id.* (Separate Opinion of Judge *ad hoc* Charlesworth), *available at* http://www.icj-cij.org/docket/files/148/18158.pdf.

33. *Id.* (Dissenting Opinion of Judge Owada), *available at* http://www.icj-cij.org/docket/files/148/18138.pdf.

34. *Id.* (Dissenting Opinion of Judge Abraham), *available at* http://www.icj-cij.org/docket/files/148/18141.pdf (opinion available only in French).

35. *Id.* (Dissenting Opinion of Judge Bennouna), *available at* http://www.icj-cij.org/docket/files/148/18144.pdf.

36. *Id.* (Dissenting Opinion of Judge Yusuf), *available at* http://www.icj-cij.org/docket/files/148/18148.pdf.

Territory.[37] The documents and data seized under the Australian Security Intelligence Organisation Act related to a pending arbitration between Timor-Leste and Australia under the Timor Sea Treaty.[38] Timor-Leste claimed that the seizure and continued detention of documents and data relating to the pending arbitration violated its sovereignty and asked for an apology as well as the immediate return of the material seized and destruction of any copies made.[39] Timor-Leste also requested the indication of specific preliminary measures including a request that Australia immediately seal the documents and data and immediately delivery all copies to the ICJ or to the offices the legal advisors to Timor-Leste.[40] Australia, for its part, asked the ICJ to deny the request for preliminary measures and to stay the case brought by Timor-Leste until the arbitral tribunal reached a decision in the *Arbitration under the Timor Sea Treaty*.[41]

Under Article 41 of the Statute of the International Court of Justice, the ICJ may indicate provisional measures before ruling on the merits as a way to preserve the respective rights claimed by parties to a case.[42] The rights claimed must have a link to the subject of the proceedings before the ICJ.[43]

Timor-Leste claimed that it sought to protect sovereign rights in the material seized and that as a general principle of law, "confidentiality of communications between legal counsel and client is covered by legal professional privilege . . . ."[44] Australia argued that even assuming the material seized from the lawyers did belong to Timor-Leste, "there is no general principle of immunity or inviolability of State papers and property, and therefore the rights asserted by Timor-Leste are not plausible."[45] But the Attorney-General of Australia also offered a written undertaking to the ICJ that none of the material seized would be made available to any part of the Australian Government except for "national security purposes (which include potential law enforcement referrals and prosecutions)."[46]

It was not disputed that at least some of the material seized related to the pending arbitration between Timor-Leste and Australia (the Timor Sea Treaty Arbitration), and the ICJ noted at least a plausible right for Timor-Leste "to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers . . . ."[47] The ICJ also found that if the contents of the documents were to be disclosed, then that "breach of confidentiality might not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.[48] The ICJ did find "a significant contribution in mitigating the risk of irreparable prejudice" was

37. Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Austl.), Order on the Request for the Indication of Provisional Measures, at 2 ¶ 1 (Mar. 3. 2014), *available at* http://www.icj-cij.org/docket/files/156/18078.pdf.
38. *Id.*
39. *Id.* ¶ 2.
40. *Id.* at 3-4, ¶¶ 5-6.
41. *See id.* at 5, ¶ 16.
42. *Id.* at 6, ¶ 22.
43. *Id.* ¶ 23.
44. *Id.* ¶ 24.
45. *Id.* ¶ 25.
46. *Id.* at 12, ¶ 45.
47. *Id.* at 7, ¶¶ 27-28.
48. *Id.* at 11, ¶ 42.

the written undertaking of the Australian Attorney-General to keep the seized material from Australian government representatives participating the Timor Sea Treaty Arbitration.[49] Yet the ICJ found that even with that undertaking, there was "still an imminent risk of irreparable prejudice" that justified the indication of preliminary measures "to protect Timor-Leste's rights pending the Court's decision on the merits of the case."[50]

Noting that it had the power to fashion an indication of preliminary measures that might differ from the preliminary measures requested by the parties,[51] and noting oral assurances to the ICJ that the Attorney-General of Australia would not disclose any of the seized material "without prior consultation with the Court,"[52] the ICJ found by a vote of 12-4 that Australia should "keep the seized documents and electronic data and any copies thereof under seal until further decision of the Court."[53] The ICJ also found by a vote of 15-1 that Australia should be ordered "not to interfere in any way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court."[54]

Judge Antônio Augusto Cançado Trindade of Brazil[55] and Judge Joan E. Donoghue of the United States[56] appended separate opinions to the court's order of preliminary measures. Judge Kenneth Keith of New Zealand,[57] Judge Christopher Greenwood of the United Kingdom,[58] and Judge Ian Callinan (chosen as an *ad hoc* judge by Australia)[59] appended dissenting opinions.

D. Five New Cases Filed with the ICJ in 2014

Five new cases were filed before the ICJ in 2014. One case involved a *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya)[60] while another case involved a *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica v. Nicaragua).[61] And the

49. *Id.* at 12, ¶¶ 46-47.

50. *Id.* at 13, ¶ 48.

51. *Id.* at 13, ¶ 49.

52. *Id.* at 13, ¶ 50.

53. *Id.* at 13, ¶ 51, and at 15, ¶¶ 55(1)-55(2).

54. *Id.* at 13-14, ¶ 52, and at 15 ¶ 55(3).

55. *Id.* (Separate Opinion of Judge Cançado Trindade), *available at* http://www.icj-cij.org/docket/files/156/18082.pdf.

56. *Id.* (Separate Opinion of Judge Donoghue), *available at* http://www.icj-cij.org/docket/files/156/18086.pdf.

57. *Id.* (Dissenting Opinion of Judge Keith), *available at* http://www.icj-cij.org/docket/files/156/18080.pdf.

58. *Id.* (Dissenting Opinion of Judge Greenwood), *available at* http://www.icj-cij.org/docket/files/156/18084.pdf.

59. *Id.* (Dissenting Opinion of Judge *ad hoc* Callinan), *available at* http://www.icj-cij.org/docket/files/156/18088.pdf.

60. Dispute Concerning Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Application Instituting Proceedings (Aug. 28, 2014), *available at* http://www.icj-cij.org/docket/files/161/18362.pdf.

61. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.), Application Instituting Proceedings (Feb. 25, 2014), *available at* http://www.icj-cij.org/docket/files/157/18344.pdf.

Marshall Islands filed separate cases against the United Kingdom,[62] Pakistan,[63] and India[64] on *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. These new filings brought to fourteen the number of cases that were pending before the ICJ at the end of 2014.[65]

II. Inter-American Court of Human Rights

The Inter-American Court of Human Rights ("IACHR" or Court) issued sixteen decisions or judgments in 2014. It also issued an advisory opinion on migrant children, its first advisory opinion in five years, and received a request for another advisory opinion regarding the right to strike and form labor organizations. This section summarizes some of the developments at the Court during 2014.

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62. Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament (Marsh. Is. v. U.K.), Application Instituting Proceedings (April 24, 2014), *available at* http://www.icj-cij.org/docket/files/160/18296.pdf.

63. Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament (Marsh. Is. v. Pak.), Application Instituting Proceedings (April 24, 2014), *available at* http://www.icj-cij.org/docket/files/159/18294.pdf.

64. Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament (Marsh. Is. v. India), Application Instituting Proceedings (April 24, 2014), *available at* http://www.icj-cij.org/docket/files/158/18292.pdf.

65. The fourteen contentious cases pending at the end of 2014 were:

1. Maritime Delimitation in the Indian Ocean (Som. v. Kenya);
2. Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.);
3. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.);
4. Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India);
5. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.);
6. Seizure and Detention of Certain Documents and Data (Timor-Leste v. Aust.);
7. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.);
8. Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicar. v. Colom.);
9. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile);
10. Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica);
11. Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.);
12. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda);
13. Gabcíkovo-Nagymaros Project (Hung. v. Slovk.); and
14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.).

On February 3, 2015, the ICJ issued its judgment in the case involving the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.). *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat v. Serb), Judgment (Feb. 3, 2015), *available at* http://www.icj-cij.org/docket/files/118/18422.pdf.

A. Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, OC-21/14

On August 19, 2014, the IACHR issued an Advisory Opinion under Article 64 of the American Convention on Human Rights addressing the human rights of migrant children. In 2011, the Applicant States of Argentina, Brazil, Paraguay, and Uruguay asked the Court for an Advisory Opinion to "determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents in light of the interpretation of Articles 1(1), 2, 4(1), 5, 7, 8, 11, 17, 19, 22(7), 22(8), 25, and 29 of the American Convention on Human Rights; Articles 1, 6, 8, 25, and 27 of the American Declaration of the Rights and Duties of Man; and Article 13 of the Inter-American Convention to Prevent and Punish Torture."[66] In making the request, the Applicant States pointed out that approximately 25 million persons have migrated from Latin America and the Caribbean to North America and Europe and another 6 million have migrated to other parts of Latin America. Many of these migrants have an irregular immigration status and many are children. As such, they are a particularly vulnerable group in need of protection. Accordingly, the Applicant States requested that the Court "clearly define precise standards, principles and obligations that States must comply with in relation to the human rights of migrants, especially in relation to the rights of migrant children and children born to migrant parents . . . ."[67]

The Court received written submissions from several Member States and many regional, national, and international organizations, including the U.N. High Commissioner for Refugees. The Court held public hearings in October 2013. Based on these hearings and submissions, the Court found the following facts:

> In 2013, there were 231,522,215 migrants worldwide and, of these, 61,617,229 corresponded to the Americas.[68] Meanwhile, of the total number of migrants on our continent, 6,817,466 were under 19 years of age.[69] According to data from the end of 2013, around 806,000 persons on the American continent were refugees or persons in similar situations as that of refugees[70] . . . Although children usually travel with their parents, members of their extended family, or other adults, currently, a growing and significant number are migrating autonomously and unaccompanied.[71]

66. Inst. for Pub. Policy in Human Rights, *Request for an Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights* (April 6, 2011), *available at* http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf.

67. *Id.*

68. *See* U.N. Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2013 Revision-Migrants by Age and Sex*, U.N. database, POP/DB/MIG/Stock/Rev.2013/Age (Dec. 2013).

69. *See id.*

70. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, ¶ 34 (Aug. 19, 2014) (citing U.N. High Commissioner for Refugees (UNHCR), *War's Human Cost, Global Trends 2013*, at 12), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf.

71. *Id.* ¶ 35 (citing Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, UN Doc. A/HRC/11/7, ¶ 19 (May 14, 2009)).

The Court further stated that children migrate internationally for many reasons: for economic or educational opportunities, for family reunification, to escape environmental degradation, domestic abuse, extreme poverty, organized crime, child trafficking, or the effects of natural disasters.[72] Thus, international migration is a complex phenomenon and a human rights approach to immigration policies is needed, especially when children are involved.[73] But the Court also reaffirmed that "in the exercise of their authority to establish immigration policies, States may establish mechanisms to control the entry into and departure from their territory of persons who are not their nationals, provided that these policies are compatible with the norms for the protection of human rights established in the American Convention."[74]

After dealing with matters of jurisdiction and general interpretation, the Court divided its Advisory Opinion into chapters dealing with different aspects of migration. Chapters VII to XII deal with immigration procedures for migrants in an irregular status where international protection may not be required. The remaining chapters deal with the right of non-refoulement or to seek and receive asylum.

In Chapter VII, the Court states that the right to seek and receive asylum "entails certain specific obligations on the part of the host State, which include: (i) to allow children to request asylum or refugee status, which consequently means they may not be rejected at the border without an adequate and individualized analysis of their requests with due guarantees by the respective procedure; (ii) not to return children to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk; and (iii) to grant international protection when children qualify for this and to grant the benefit of this recognition to other members of the family, based on the principle of family unity."[75] These obligations mean that "border authorities should not prevent the entry of foreign children into national territory, even when they are alone, should not require them to produce documentation that they may not have, and should proceed to direct them immediately to personnel who are able to assess their needs for protection based on an approach in which their condition as children prevails."[76] The initial assessment should take place in a way that is sensitive to the child's gender, age, culture, language skills, and related characteristics.[77] The remainder of this Chapter continues to set forth the specifics of the assessment the receiving State must conduct and how the State should evaluate the need for protection.

Chapter VIII concerns the guarantees of due process applicable in immigration proceedings involving children.[78] The Court identifies several due process guarantees that must be observed in immigration and asylum proceedings involving children:

> (i) the right to be notified of the existence of proceedings and of the decision adopted during the immigration proceedings; (ii) the right that immigration proceedings are conducted by a specialized official or judge; (iii) the right of the child to be heard and

72. *Id.* ¶ 35.
73. *See id.* ¶ 41.
74. *See id.* ¶ 39 (internal citations omitted).
75. *See id.* ¶ 81.
76. *Id.* ¶ 83.
77. *Id.* ¶ 85.
78. Chapter VIII of the Advisory Opinion begins at paragraph 108.

> to participate in the different stages of the proceedings; (iv) the right to be assisted without charge by a translator or interpreter; (v) effective access to communication with consular authorities and to consular assistance; (vi) the right to be assisted by a legal representative and to communicate freely with the representative; (vii) the obligation to appoint a guardian in the case of unaccompanied or separated children; (viii) the right that the decision adopted has assessed the child's best interest and is duly reasoned; (ix) the right to appeal the decision before a higher court with suspensive effect, and (x) reasonable time for the duration of the proceedings.[79]

In Chapter IX, the Court rejects the detention of migrant children, finding that "the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order . . . [and] is arbitrary and consequently contrary to both the Convention and the American Declaration."[80] When a child is accompanying his or her parents and the child's best interest requires keeping the family together, the requirement not to deprive the child of liberty extends to the parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.[81] The Court finds that a State has an obligation to design, adopt and implement alternative measures to closed detention centers under these circumstances.[82]

Chapter X addresses alternative measures to detention. In this regard, the Court stresses that "solutions based on the family and the community should be given priority over institutionalization."[83] Chapter XI continues this theme by considering basic conditions that must be met for living quarters for migrant children.[84] The Court recognizes that where it is not possible to place the child in a family or community environment, a State may place the child in a center or shelter accommodation for a short period necessary to resolve the child's immigration status.[85] Such accommodation is subject to the principles that unaccompanied children should be lodged separately from adults, children with family members have a right to family unity, children have a right to open accommodation allowing entry and exit, and have a right to material conditions that include lodging, education, maintenance, health care and legal assistance.[86]

Chapter XII addresses guarantees of due process when liberty is deprived. Here the Court discusses due process guarantees similar to those in Chapter VIII above referring to due process guarantees in immigration proceedings.[87]

In Chapter XIII, the Court affirms that the right of non-refoulement applies to child migrants, i.e., the right not to be returned to a country where the child's life or freedom would be threatened or the right to seek and receive asylum. The Court also emphasizes that in the context of the Inter-American human rights system, the obligation not to re-

79. Advisory Opinion, *supra* note 70, ¶ 116.
80. *Id.* ¶ 154.
81. *Id.* ¶ 158.
82. *Id.*
83. *Id.* ¶ 167.
84. *Id.* ¶ 171.
85. *Id.* ¶ 173.
86. *Id.* ¶ 174.
87. *Id.* ¶¶ 190, 209.

turn a child to a country where the child is likely to face harm is broader than the obligation of non-refoulement under international refugee law.[88]

Chapter XIV describes the procedures to ensure the right of children to seek and receive asylum, which only conclude when a durable solution has been achieved. The Court summarizes the requirements to effectively ensure the right recognized in Articles 22(7) of the American Convention and XXVII of the American Declaration as follows. States must adapt the asylum or refugee proceedings to provide children with meaningful access to the procedures, which entails: not impeding entry to the country; access to the authorities responsible for granting asylum or refugee status or other procedures for the protection; priority processing of requests for asylum made by children; availability of professionals who can examine the child to determine her or his state of health; conducting an examination and interview endeavoring not to cause further trauma or revictimization; having available a place to accommodate the applicant, if they do not have one; issuing an identity document to avoid return; studying the case with sufficient flexibility as regards the evidence; assigning an independent and trained guardian in the case of unaccompanied or separated children; if refugee status is granted, proceed to carry out family reunification procedures, if necessary in view of the best interest of the child; and lastly, seeking a durable solution, such as voluntary repatriation, resettlement or social integration, in accordance with the determination of the best interest of the child.[89]

Finally, Chapter XV refers to the situation of children whose parents are faced with expulsion or deportation for migratory reasons. Here, the Court deals with two conflicting rights: the right of the State to implement its immigration policy and the right to family unity.[90] It states that in balancing these rights, an assessment must be made as to "whether the measure: is established by law, and complies with the requirements of (a) suitability; (b) necessity, and (c) proportionality; in other words, it must be necessary in a democratic society."[91]

The Court's Advisory Opinion should provide guidance to government entities designing and implementing procedures for dealing with migrant children. It also should provide guidance to advocates for migrant children as they seek to protect the human rights of these children.

B. Request for Advisory Opinion

On April 28, 2014, Panama submitted a request for an advisory opinion asking that the Court "interpret and determine the scope of Article 1(2) of the Convention in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of this instrument, as well as of the right to strike and to establish federations and confederations recognized in Article 8 of the Protocol of San Salvador."[92] In accordance with Rule 73 of the Court's Rules, interested parties were invited to submit observations on the request. The comment period closed on January 30, 2015.

88. *Id.* ¶¶ 217, 231.
89. *Id.* ¶ 261.
90. *Id.* ¶ 275.
91. *Id.*
92. Inter-Am. Court of Human Rights, Request for an Advisory Opinion Submitted by Panama, http://www.corteidh.or.cr/index.php/en/observaciones-14-11-14 (last visited March 25, 2015).

C. Case Law of the Inter-American Court of Human Rights

1. *Matter of Rueda*

In this matter, the Inter-American Commission of Human Rights asked the Court to order Colombia to take provisional measures to protect the life and personal integrity of human rights defender, Daniel Rueda.[93] Mr. Rueda is a founding member and director of the Inter-Church Justice and Peace Commission (CIJP).[94] In Colombia, human rights defenders continue to face serious abuses to their rights by parties to the conflict in Colombia with a view towards silencing them. The Commission has received information about harassment of and attacks on members of CIJP since 2002, which continue to today.[95] Recently, the place where Mr. Rueda lives and where part of his family works has been attacked by pellets which impacted the security window panes.[96] Although members of CIJP, including Mr. Rueda, have been under precautionary measures ordered by the Commission in 2003, there was a notable increase in the threat in 2013 and the first part of 2014.[97] Accordingly, pursuant to Article 63(2) of the American Convention and Article 27 of the Rules of Procedure for the Court, the Commission requested that the Court order Colombia to take additional protective measures in light of the extreme gravity and urgency of the situation.[98]

The State of Colombia responded that efforts have been made to protect the life and personal integrity of the members of CIJP, including Mr. Rueda, and that the State has proposed a meeting with the relevant parties to discuss an individualized protection scheme.[99] Thus, the State considers that the matter can be adequately dealt with in the context of the precautionary measures ordered by the Commission and there is no need for additional protective measures to be ordered by the Court.[100]

Based on the information provided by the Commission, the Acting President of the Court determined that "Mr. Rueda faces a situation of extreme gravity and urgency, since his life and personal integrity are threatened and at risk."[101] The Acting President found that the collective protection measures provided for the members of CIJP were insufficient to protect Mr. Rueda individually in his work. Accordingly, the Acting President ordered urgent measures to protect Mr. Rueda and ordered Colombia to report back within ten days regarding the risk faced by Mr. Rueda and the individualized protective measures it has taken to protect him.[102]

93. Order of the Acting President: Request for Provisional Measures regarding Colombia in the Matter of Daniel Rueda, ¶ 1 (Inter-Am. Ct. H.R. May 2, 2014), *available at* http://www.corteidh.or.cr/docs/medidas/rueda_se_01_ing.pdf .

94. *Id.*

95. *Id.* ¶ 2.

96. *Id.* ¶ 1.

97. *Id.* ¶ 2.

98. *Id.* ¶ 4,

99. *Id.* ¶ 7.

100. *See id.*

101. *Id.* ¶ 18.

102. *Id.* ¶ 22.

2. *Véliz Franco v. Guatemala*

In *Véliz Franco v. Guatemala*, Rosa Elvira Franco Sandoval de Véliz (Rosa), the Center for Justice and International Law, and the Network against Violence against Women in Guatemala brought a complaint against the Government of Guatemala for the failure to effectively investigate the murder of Rosa's child, María Isabel Véliz Franco (Maria).[103] Maria, aged 15, disappeared on December 17, 2001 in the City of Guatemala and was found dead the next day.[104] The investigation was filled with irregularities and inadequacies including gross delays, conflicting police jurisdictions, failure to take Rosa's concerns seriously, and a failure to fully investigate possible sexual violence.[105]

The Court established that the duty to protect the rights of children is particularly strong.[106] And the State failed to protect this right when no serious search efforts were established.[107] In addition, given the increasing frequency of violence against women, Guatemala should have promptly and seriously investigated the obvious signs of sexual violence.[108] The Court stressed that when crimes against women routinely go unpunished, a precedent is set that violence can be accepted and tolerated.[109] As such, a State must adopt rules or implement the necessary measures to enable authorities to conduct an investigation with due diligence.[110]

The Court found that Guatemala violated Maria's right to life (Article 4.1), right to personal integrity (Article 5.1), rights of the child (Article 19.1), and guarantee of rights without discrimination (Article 1.1) under the American Convention on Human Rights.[111] The State also violated the obligation to act with due diligence to prevent and investigate violence against women (Article 7b) under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.[112]

The Court also found that Guatemala violated the rights of Maria's family, including her mother, brothers, and grandparents.[113] As to these people, Guatemala violated the right to due process (Article 8.1), judicial protection (Article 25.1), equal protection (Article 24), and failure to implement and ensure protections (Article 1.1 and 2) under the American Convention on Human Rights.[114] And with regard to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, the Court found that Guatemala failed to investigate and sanction violence against women (Article 7.b and 7.c).[115]

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103. Veliz Franco y Otros v. Guatemala: Resumen Oficial Emitido por la Corte Interamericana, 1 (Inter-Am. Ct. H.R. May 19, 2014), *available at* http://www.corteidh.or.cr/docs/casos/articulos/resumen_277_esp.pdf.
104. *Id.*
105. *Id.* at 2.
106. *Id.* at 3.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 1.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

As far as reparations, the Court ordered that Guatemala shall: (a) conduct an investigation effectively and, if appropriate, prosecute and punish those responsible for the humiliation and deprivation of the life of María; (b) publish in the official newspaper of Guatemala and in a newspaper of national circulation, the official summary judgment and publish it in full on official websites of the judiciary, prosecutors and the National Police; (c) publicly apologize; (d) develop a plan to strengthen the National Institute of Forensic Science; (e) implement the law against femicide and other forms of violence against women, adopted in 2008; (f) implement programs and courses for civil servants; (g) provide medical or psychological care to Rosa Elvira Franco Sandoval; (h) pay the amounts set as compensation for pecuniary and non-pecuniary damages as well as reimbursement of costs and expenses, (i) submit a report on measures being taken to comply with the judgment.[116]

3. *Liakat Ali Alibux v. Suriname*

The Inter-American Commission submitted the case of Liakat Ali Alibux to the Court on January 29, 2012 against Suriname.[117] The case pertains to the investigation and criminal proceedings brought against Mr. Alibux, the former Minister of Finance and former Minister of Natural Resources, who, on November 5, 2003, was convicted of forgery pursuant to the Indictment of Political Office Holders Act (IPOHA).[118] After an investigation, the Commission concluded that the State was responsible for violating Mr. Alibux's right to appeal, freedom from ex post facto laws, freedom of movement, and right to judicial protection.[119] The Commission recommended that the State nullify the criminal proceedings and provide reparations to Mr. Alibux. The Commission alleges that Suriname has violated Articles 8, 9, 22, and 25 of the American Convention.[120]

After rejecting Suriname's argument that Mr. Alibux had failed to exhaust all domestic remedies,[121] the Court turned to the merits of the dispute as follows. Acting in his capacity as the Minister of Finance, between June and July 2000, Mr. Alibux purchased land in Paramaribo for the Ministry of Regional Development.[122] Mr. Alibux resigned his position in August 2000. In 2001, Suriname authorities began an investigation of Mr. Alibux and three others in connection with an alleged forgery of a proposal letter to the Council of Ministers relating to the purchase of the property.[123] The Prosecutor General sought an indictment of Mr. Alibux in August 2001, which he amended and resubmitted in January 2002.[124] In January 2002, the National Assembly agreed to the Prosecutor General's request that Mr. Alibux be indicted under the IPOHA.[125] Before the Suriname High Court of Justice, Mr. Alibux argued, inter alia, that the indictment was improper because the Prosecutor General had attempted to indict him for acts that took placed prior to the

116. *Id.* at 4.
117. Case of Liakat Ali Alibux v. Suriname, Judgment on Preliminary Objections, Merits, Reparations and Costs, ¶ 1 (Inter-Am Ct. H.R. Jan. 30, 2014), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_276_eng.pdf.
118. *Id.*
119. *Id.* ¶ 2.
120. *Id.* ¶ 3.
121. *Id.* ¶ 22.
122. *Id.* ¶ 33.
123. *Id.* ¶ 34.
124. *Id.* ¶¶ 35, 39.
125. *Id.* ¶ 40.

IPOHA taking effect in October 2001.[126] The High Court ruled that it did not have constitutional jurisdiction to assess the validity of the acts of the National Parliament under the IPOHA.[127] Thereafter, it found Mr. Alibux guilty of one count of forgery on November 5, 2003.[128]

The Court first found that Mr. Alibux's right under Article 9 of the Convention had not been violated.[129] Article 9 prohibits the conviction of a person based on an act or omission that was not considered a criminal offense at the time it occurred.[130] Although the IPOHA was not in effect when the relevant conduct took place, the IPOHA was adopted to implement Article 140 of the Suriname Constitution, which set forth the procedures for trying public officials for wrongdoing.[131] Forgery was also a crime under Article 278 of the Penal Code of 1910, so Mr. Alibux had sufficient notice that his behavior could entail criminal responsibility.[132] The Court further held that the ban on ex post facto laws applies to substantive criminal laws, not laws setting forth procedures, as was the case with the IPOHA.[133]

The Court next turned to Mr. Alibux's right to a fair trial, including the right to appeal, under Article 8 of the Convention.[134] The Court stated that it is compatible for a State to subject high ranking officials to a procedure different from the ordinary criminal procedure.[135] But the State must still guarantee a right of appeal. In this case, the High Court of Justice prosecuted and convicted Mr. Alibux and there was no appeal to another body.[136] Accordingly, Suriname violated Article 8 of the Convention.[137] As a result of this decision, the Court determined that it was not necessary to make a separate determination of whether Mr. Alibux's right to judicial protection under Article 25 of the Convention had been violated.[138]

With respect to the last claim, Mr. Alibux claimed that the State had violated his right to freedom of movement under Article 22 of the American Convention by preventing him from taking a four-day trip out of the country in January 2003.[139] The Court held that Suriname violated Mr. Alibux's right to freedom of movement because the State's ability to detain him under the circumstances was not clearly established by law.[140]

The Court declined to ask the State to nullify the proceedings and declined to order reparations as it did not find a violation of Article 9 of the American Convention.[141] The Court also declined to order the State to provide guarantees of nonrepetition, as Suriname

126. *Id.* ¶ 42.
127. *Id.* ¶ 46.
128. *Id.* ¶ 47.
129. *Id.* ¶ 76.
130. *Id.* ¶ 59.
131. *Id.* ¶ 73.
132. *Id.*
133. *Id.* ¶ 74.
134. *Id.* ¶ 83.
135. *Id.* ¶ 102.
136. *Id.* ¶ 103.
137. *Id.* ¶ 106.
138. *Id.* ¶¶ 119, 125.
139. *Id.* ¶ 130.
140. *Id.* ¶ 136.
141. *Id.* ¶ 145.

had already amended the law to address the right of appeal.[142] The Court did order Suriname to publish the judgment,[143] to pay Mr. Alibux US$10,000 in non-pecuniary damages,[144] and to pay Mr. Alibux's costs and expenses.[145]

D. Status of Dominican Republic before the IACHR

On November 4, 2014, the Constitutional Court of the Dominican Republic issued judgment TC/0256/14 declaring unconstitutional the instrument it deposited accepting the jurisdiction of the Inter-American Court of Human Rights.[146] The Dominican Republic had deposited that instrument with the Organization of American States on March 25, 1999 and had participated in a number of proceedings before the Court since that date. The Inter-American Commission of Human Rights has denied the legal effect of the judgment declaring it to be contrary to international law.[147] Thus, the continued participation of the Dominican Republic before the Inter-American Court remains in doubt.

III. International Criminal Tribunals

A. International Criminal Court (ICC)

The ICC continued to investigate or conduct judicial proceedings in eight separate situations involving twenty-one potential or actual cases involving the Central African Republic, Cote d'Ivoire, Darfur (Sudan), Democratic Republic of the Congo, Kenya, Libya, Uganda and Mali.[148] The Prosecutor is also conducting preliminary reviews in ten additional situations involving Afghanistan, Central African Republic, Colombia, Comoros ("Gaza Freedom Flotilla" incident), Georgia, Guinea, Honduras, Iraq, Nigeria and Ukraine.[149]

Of particular significance as to the ICC, however, was the action taken on September 5, 2014 to indefinitely adjourn the prosecution of the case against Kenyan President Uhuru Kenyatta due to problems obtaining information necessary for the prosecution of the case.[150]

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142. *Id.* ¶ 151.

143. *Id.* ¶ 147.

144. *Id.* ¶ 157.

145. *Id.* ¶ 166. Judge Alberto Pérez filed a separate opinion with respect to the issue of the exhaustion of domestic remedies, Judge Eduardo Vio Grossi filed a dissenting opinion on the same issue, and Judge Eduardo Ferrar Mac-Gregor Poisot filed a concurring opinion.

146. Press Release, Inter-Am. Comm'n on Human Rights, IACHR Condemns Judgment of the Constitutional Court of the Dominican Republic (Nov. 6, 2014), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp

147. *See id.*

148. Report of the Inter. Crim. Ct. on its Activities in 2013/2014, U.N. Doc. A/69/321 (Sept. 18, 2014), *available at* http://www.icc-cpi.int/iccdocs/presidency/ICC-Rep-UNGA-30-10-2014-Eng.pdf.

149. *Id.*

150. *See, e.g.*, Patrick Gathara, *Did Kenya Get Justice at the ICC?*, Al Jazeera (Dec. 7, 2014), http://www.aljazeera.com/indepth/opinion/2014/12/did-kenya-get-justice-at-icc-20141275483778787O.html.

B. International Criminal Tribunal for Rwanda (ICTR)

The Appeals Chamber of the ICTR rendered six judgments concerning eight persons in the Ndindiliyimana et. al.,[151] and Bizimungu[152] cases. Additionally, on September 29, 2014, the Appeals Chamber delivered a further three judgments concerning four persons in the Karemera & Ngirumpatse,[153] Nizeyimana,[154] and Nzabonimana[155] cases. In each of the judgments, the Appeals Chamber affirmed, at least in part, the convictions of each accused.

C. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The Appeals Chamber of the ICTY rendered two judgments affecting five accused during 2014. These included judgments in the cases of Sainovic et al.[156] and Djordjevic.[157] In each case, the Appeals Chamber affirmed, at least in part, convictions of all accused persons in each case. Significantly, in the case of Djordjevic, the ICTY Appeals Chamber reversed the Trial Chamber and found the Accused guilty of the crime of persecutions through sexual assaults as a crime against humanity (Count 5), pursuant to the third category of joint criminal enterprise, in relation to the sexual assaults of Witness K20 and the other two young women in Beleg, Witness K14, and the Kosovo Albanian girl in a convoy.[158]

Four cases continue in some phase of trial at the ICTY, including those of Radovan Karadzic, where the final arguments have been presented and a judgment is being drafted, Ratko Mladic and Goran Hadzic, still in the trial phase, and the case of Vojislav Seselj. In the last of these cases, Seselj, the case was due for judgment when one of the three assigned judges to the case, Frederick Harhoff, was recused following his delivery of a memo

151. Ndindiliyimana v. Prosecutor, Case No. ICTR-00-56-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Feb. 11, 2014), *available at* http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-00-56/appeals-chamber-judgements/en/140211.pdf.

152. Bizimungu v. Prosecutor, Case No. ICTR-00-56B-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber June 30, 2014), *available at* http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-00-56/appeals-chamber-judgements/en/140630.pdf.

153. Karemera v. Prosecutor, Case No. ICTR-98-44-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-98-44a/appeals-chamber-judgements/en/050523.pdf.

154. Nizeyimana v. Prosecutor, Case No. ICTR-00-55C-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* http://41.220.139.198/Portals/0/Case%5CEnglish%5CNizeyimana%5CJudgment%5C140929-Appeal%20Judgement.pdf.

155. Nzabonimana v. Prosecutor, Case No. ICTR-98-44D-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-98-44d/appeals-chamber-judgements/en/140929.pdf.

156. Prosecutor v. Šainovic, Case No. IT-05-87-A, Judgement (Inter. Crim. Trib. for the Former Yugoslavia Appeals Chamber Jan. 23, 2014), *available at* http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf.

157. Prosecutor v. Djordjevic, Case No. IT-05-87/1-A, Judgement (Inter. Crim. Trib. for the Former Yugoslavia Appeals Chamber Jan. 27, 2014), *available at* http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf.

158. *Id.* at 380.

sent by email that was determined to reflect a bias that precluded his remaining on the case.[159]

D. Extraordinary Chambers in the Courts of Cambodia (ECCC)

The ECCC rendered its judgment in Case 002/01, *Prosecutor v. Nuon and Khieu* on August 7, 2014.[160] Both were convicted and sentenced to life in prison for crimes against humanity, extermination, political persecution, and other inhumane acts for their roles in the 1970s regime that plunged Cambodia into turmoil and killed about 1.7 million people. Each has appealed their conviction.

E. Special Tribunal for Lebanon (STL)

The STL commenced trial of five accused, all being tried in absentia, for offenses charged in connection with the February 14, 2005 assassination of Rafik Hariri and the deaths of twenty-one others. Trial commenced on January 16, 2014 against four of the five accused. In February 2014, the case of the fifth Accused, Merhi, was joined to the trial of *Prosecutor v Ayyash*, et al. Proceedings are ongoing against all five accused.

159. Prosecutor v. Šeselj, Case No. IT-03-67-T, Decision on Continuation of Proceedings (Inter. Crim. Trib. for the Former Yugoslavia Dec. 13, 2013), *available at* http://www.icty.org/x/cases/seselj/tdec/en/131213.pdf.

160. Prosecutor v. Nuon & Khieu, Case No. 002/01, Judgment of the Trial Chamber (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf.

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