ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

In Absentia Proceedings Before the ICC: the Good, the Bad, and the Ugly

- Shweta Shukla (V B.A.LL.B.)

In absentia proceedings have always been a controversial topic for international courts and tribunals. First, due to the requirement to balance the rights of the accused and the interests of the victims, which cannot be effectively done if either is absent. Second, due to the nature of 'in absentia' - one being where the accused appears before the forum initially and then refuses to appear later, and the other being where the accused never appears before the forum. Naturally, the latter of the two makes the matter even more controversial, or as some would argue, even illegal.

This came to light for the first time in the recent decision of the International Criminal Court (ICC) permitting the confirmation of charges hearing against Joesph Kony, founder of the Lord's Resistance Army (LRA).

Rule 125 (1) of the Rules of Procedure and Evidence requires 'good cause' to hold *in absentia* proceedings against any accused before the ICC. In absentia proceedings are also permitted in similar circumstances under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) for 'justified reasons.' Before this standard is applied, other conditions must be satisfied: all reasonable steps must have been taken to secure the person, give them notice of their charges, and inform them that an *in absentia* hearing will be held.

Unfortunately, there is no definition of 'good cause.' Thus, the decision is discretionary. However, as agreed by the the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR), the interests of justice must be balanced against potential prejudice caused to a suspect. The scope of this article is only to assess the 'balancing act' and not to comment on the prior conditions deemed satisfied by the Court.

In the present case, the Prosecutor advanced the following reasons to show 'good cause' before the Court:

- Mr. Kony has been at large for 17 years already, proceeding *in absentia* will demonstrate that judicial proceedings will not be

News at a Glance

In its annual report, Reporters Without Borders (RSF) revealed that 45 journalists were killed in line with their work in 2023, marking the lowest total since 2002. The report also revealed that 54 journalists were held hostage, 84 remain missing and 521 are currently detained. The report identified varying trends contributing to these numbers, such as journalist security, especially in conflict zones where media professionals are better trained and equipped. For more information, see here.

Amnesty International released a report alleging the targeted use of Pegasus spyware against prominent Indian journalists, rekindling apprehensions about government surveillance and press freedom in the country, following the 2021 Pegasus project disclosures that sent shockwaves through India. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

thwarted by attempts to evade justice;

- A confirmation hearing in absentia would enhance the Court's proceedings by intensifying efforts by States and other stakeholders to apprehend Mr Kony, publicly airing evidence, and facilitating his expeditious committal for trial; and
- The victims would have the opportunity to present their views and concerns at the hearing making the hearing a 'meaningful milestone' for victims (something the Office for Public Counsel for Victims agreed with).

The Office of Public Counsel for the Defence (OPCD) countered these reasons by stating that they seem to be based on the International Criminal Tribunal for the Former Yugoslavia's (ICTY) Rule 61 practice and are not relevant to the present decision because the latter is not intended to create a 'historical record' but rather to 'protect the rights of the Defence' by determining whether there is sufficient evidence to proceed to trial. Even if the reasons relied on by the Prosecution were found to be relevant, the OPCD also submitted that the Prosecution's claims remain unsubstantiated.

Regardless of how the ICC interprets ICTY jurisprudence, the crux of the present case seems to be the balancing of interests. In international criminal law, courts deal with crimes of a scale measured in human suffering, not seen in other legal contexts. For this reason, a human element must be included in the analysis - they are a search for truth. In Colozza v. Italy, the ECtHR held that "the impossibility of holding a trial by default may paralyze the conduct of criminal proceedings, in that it may lead, for example to dispersal of evidence, expiry of time limits for prosecution or a miscarriage of justice." This holds particularly important in the present case, given that the other leaders of the LRA have died and only one has ever been convicted, despite many concerns regarding his fitness to stand trial and the actual 'justice' served as a result. The Court stated that an *in absentia* proceeding may be the only way for the victims of Mr Kony's alleged crimes to voice their views and concerns. Critics must understand that this is all that the decision purports to do - recognize

News at a Glance

The UN Office of the High Commissioner for Human Rights released a report detailing the "further and rapid deterioration" of human rights in the occupied West Bank and East Jerusalem since October 7. The report stressed that escalating violence puts civilian populations at risk and urged Israel and other authorities to take necessary action to stem the violence. Specifically, the report mostly focused on Israeli military violence and mass arrests, settler violence and Israeli policies enabling them, and the forced displacement of Palestinian communities. For more information, see here.

The Republic of Azerbaijan declared two French embassy employees as "personea-non-gratae." The Ministry of Foreign Affairs stated that the employees engaged in actions "incompatible with their diplomatic status," and in contraction to the 1961 Vienna Convention on Diplomatic Relations. The two employees have 48 hours to leave the country. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 ILS Law College, Pune 15 December 2023 - 31 December 2023

the victims and their struggles that have long been ignored.

Given that the Rome Statute does not allow *in absentia* proceedings to be held beyond the confirmation of charges hearing, this decision seems most appropriate and may even provide much-needed relief to the international community and the victims.

Rising Tensions: Ethnic Strife and Armed Conflict in Nagorno-Karabakh

- Abha Dalal (V B.A.LL.B.)

Armenia and Azerbaijan proclaimed independence from the Soviet Union on September 23 1991 and 18 October 1991 respectively. There are predominantly Armenians in Nagorno Karabakh. Ethnic Armenians living in Nagorno Karabakh demanded the transfer of Nagorno Karabakh's autonomous region from Soviet Azerbaijan to Armenia in 1988. After fighting had ceased in this area, a ceasefire was established in 1994. The Armenian forces controlled this territory and seven adjacent districts. The Azerbaijani undertook a large-scale operation along the entire Line of Contact between the armed forces of the Nagorno Karabakh Republic and Azerbaijan in September 2016. This ended when the Presidents of Russia, Armenia, and Azerbaijan signed the Trilateral Statement in November 2020, marking a ceasefire in the area.

In September 2022, however, tensions proliferated. When residents or military, intentionally or unintentionally, crossed the line to the other side, they were detained. In December 2022, a blockade was set up along the Lachin corridor. It prevented the evacuation of patients from hospitals to Armenia's healthcare facilities and the import of essentials needed for Nagorno Karabakh. Armenia considers that the blockade at Lachin Corridor breaches Article 2 (1) (a), (b) and (e), Article 5 (d) (i) and (ii), and Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

In September 2023, Azerbaijan initiated measures to counter terrorism locally, leading to the fleeing of over 100,000 Armenian people from Nagorno-Karabakh to Armenia. The International Court of

News at a Glance

Niger's military leader announced that it had suspended all cooperation with the International Organization of Francophone Nations (OIF) to sever ties with former colonial ruler France. According to the OIF, programs "directly benefiting civilian populations, and those contributing to the restoration of democracy" would be maintained. For more information, see here.

The World Health Organization (WHO) announced that the last functioning hospital in northern Gaza has now become minimally operational due to lack of fuel, staff, and supplies. The WHO reported that all injured patients who are unable to be relocated are now "waiting to die." For more information, see here.

The European Court of Human Rights (ECHR) ruled in a 5-2 vote that a Polish court violated a woman's right to private and family life by forcing her to travel abroad to receive an abortion due to a fetal anomaly. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

Justice (ICJ) has recently ordered the Republic of Azerbaijan to ensure that people who have left or remained in Nagorno Karabakh territory post-19 September 2023, are safely returned without any obstacles.

Armenia claimed seven violations of CERD: hate speech, policy of ethnic cleansing, condoning atrocities against Armenians, denial of other individual rights, daily discrimination against Armenians, destruction of Armenian cultural heritage, failure to take necessary measures to eliminate racial discrimination, and failure to provide Armenians with equal treatment. Armenia cited European Court of Human Rights (ECtHR) cases like Makuchyan and Minasyan v. Azerbaijan and Hungary and Mirgadirov v. Azerbaijan and Turkey to certify that Azerbaijan has a history of torturing Armenians in areas under its control. Both Armenia and Azerbaijan have emphasized in their applications that the alleged racial discrimination was based on the other party's ethnic origin, regardless of nationality. This approach is an attempt to avoid Qatar's defeat in Qatar v. UAE, where the Court refused to grant jurisdiction because the UAE's sanctions were based on Qataris' nationality rather than their national/ethnic origin as defined by CERD Article 1. Therefore, as per CERD, Azerbaijan should safeguard and respect records related to identity, registration, and private property affecting the Armenian population. Such documents must be taken into account in Azerbaijan's legal and administrative processes.

Furthermore, the ICJ ordered Azerbaijan to submit a report explaining the steps taken for implementing the provisional measures as mandated and guarantees given by its representative on behalf of his Government in proceedings before the European Court of Justice within eight weeks from the date of the order i.e. 17 November 2023. Karabakh Armenians face escalating risks amid growing regional tensions. Despite diplomatic efforts, Azerbaijan's military buildup near southern Armenia intensifies concerns. Resolving this precarious situation demands urgent international engagement and sustained diplomacy to protect stability in the region.

News at a Glance

The UN Security Council passed a UAE-sponsored resolution by a 13-0 vote calling for an increase in humanitarian aid to Gaza, with both the US and Russia abstaining. The resolution reportedly called for "steps toward a sustainable cessation of hostilities" in the ongoing Israel-Hamas War instead of an immediate ceasefire. For more information, see here.

The EU Court of Justice ruled that a chamber of the Polish Supreme Court, the Extraordinary Review and Public Affairs Chamber, "does not constitute a 'court or tribunal' for the purposes of EU law." The Extraordinary Review Chamber was held to "not have the status of an independent and impartial tribunal" due to the process by which its judges are appointed. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

The ITLOS and Mauritius v. the Maldives

- Devansh Bhatt (IV B.A.LL.B.)

Mauritius achieved independence from the United Kingdom (UK) in 1968. Meanwhile, it went through the bifurcation of the Chagos Islands, which the UK gave to the United States to build a military base over the bifurcated region. The area included the island of Diego Garcia. The British, by force, displaced around 2000 citizens of the Chagos Islands, who were since involved in a legal battle to attain their land and rights over the disputed region. The dispute over the Chagos Islands, involving Mauritius, the Maldives, and the United Kingdom, has endured since 1992. The territory, now designated as the British Indian Ocean Territory, marks the UK's ultimate colonial outpost and its sole remaining holding in Africa.

In an advisory opinion given by the International Court of Justice (ICJ) in 2019, the British presence over the Chagos Islands was declared illegal and it was held that the territory was rightfully a part of Mauritius. This opinion of ICJ was not acknowledged by the UK as it continued its military presence over the region. Mauritius, asserting its claim to the archipelago, sought the intervention of the International Tribunal for the Law of the Sea (ITLOS) to establish a new maritime boundary with the neighbouring Maldives. The contested area is a fish-abundant stretch of the Indian Ocean deemed economically valuable by both nations.

Mauritius claimed delimitation over the maritime territories within 200 nautical miles of its coast. This included a territory upon which both the parties had their claim according to the continental shelf entitlement which extends beyond the 200 nautical miles of their coasts. Concerning the delineation of the claimed maritime territory, ITLOS used the "three-stage" method. This method includes calculating an equidistant line from the base point of the boundary of the parties, which can be altered and adjusted according to varying circumstances while maintaining the proportionality of the distance between the baselines of both parties. According to the UN Convention on Law of the Sea (UNCLOS), countries which have ocean borders can extend their jurisdiction to the maritime territory of 230 nautical miles from

News at a Glance

The UK Supreme Court unanimously ruled that an "inventor" under the Patents Act 1977 must be a "natural person" and not artificial intelligence (AI). The Supreme Court heard the landmark appeal, Thaler v Comptroller-General of Patents, Designs and Trade Marks [2023], after it was initially dismissed in the High Court and Court of Appeal in 2021. For more information, see here.

The EU reached a new migration agreement that aims to overhaul migration and asylum processes as well as costs and regulations. The agreement also looks to limit the number of individuals entering the bloc. Included are proposals to better screening regulations, develop a common database to detect unauthorized movements, streamline asylum processes, establish a mechanism to ensure balance among member states' responsibilities and to ensure that the EU is ready for any future crises. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

their coasts. However, both parties refused to accept the point from which this distance should be measured.

While pronouncing the judgement, the tribunal split the disputed area nearly down the middle, with the Maldives getting a slighter larger share. This was the first time in history that an international tribunal pronounced a judgement upon the maritime dispute between two States comprised of a group of islands. As the sea levels keep on rising due to climate change, there is a possibility for more maritime boundary disputes soon. This decision is certain to provide guiding principles for future maritime boundary disputes and the legal method to determine the base points and measuring points for the maritime boundaries of a State and its jurisdiction upon the maritime territory.

The Race to the Moon and International Law

- Chhaya Bhatia (IV B.A.LL.B.)

India has created history through its Chandrayaan-3 lunar mission, making us the first country to land on the moon's South Pole. This endeavour has placed us on the map in terms of space exploration. The race to the moon was spearheaded during the Cold War, with the US and USSR competing to get there first. It has only gained traction since. As quoted by Neil Armstrong, it indeed was, "one large leap for mankind."

Have you ever wondered what laws govern the activities of the States on the moon and their claims of sovereignty? For answers, we turn to the Moon Agreement, also known as *corpus juris spatialis*. The UNGA adopted it in 1979 via a resolution. The primary aim of the Moon Agreement is peaceful lunar exploration, which is accomplished by giving ascendancy to exploration over exploitation. The Agreement condemns space actors from commercializing their lunar activities.

The Moon Agreement is struggling to preserve its relevance in the 21st century, with many countries opting for the Artemis Accords instead, a non-binding multilateral agreement to regulate commercial activities in space, including the moon. It evolved from NASA's Artemis Program, which proposes to land the first woman and the first person of colour on the moon by 2024. The Artemis Accords

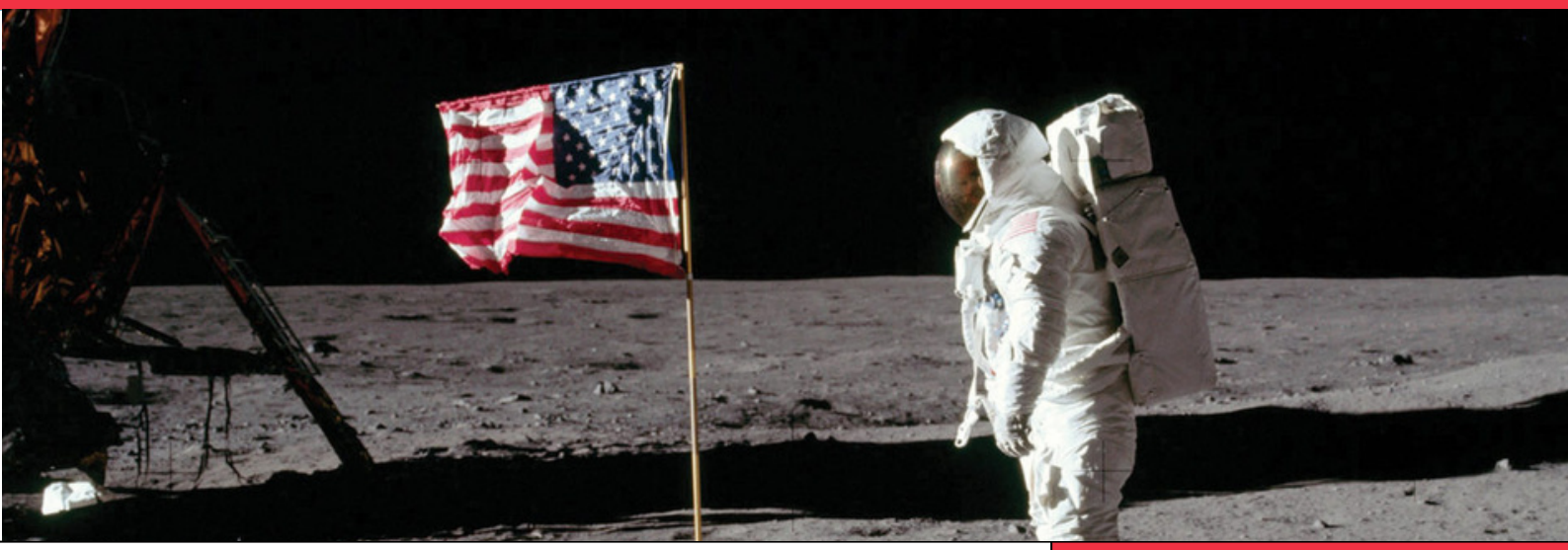
News at a Glance

Former Russian military intelligence officer Igor Salikov arrived in the Netherlands to testify as a witness at the International Criminal Court (ICC) regarding Russian war crimes. Salikov is a former intelligence officer who took part in operations conducted by the Russian Main Directorate of the General Staff of the Armed Forces of the Russian Federation (GRU) in Eastern Ukraine between 2014 and 2015. In 2022, he was one of the commanders in the private military company Redut during the full-scale Russian invasion of Ukraine. For more information, see here.

Chad declared four Sudanese diplomats "persona non grata" and ordered them to leave the country within 72 hours in response to a statement from Yasser Al-Atta, which alleged the United Arab Emirates (UAE) had been interfering with the ongoing Sudanese conflict through Central Africa and Chad. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023



emphasize commercial activities and collaboration among like-minded nations. The space policies of many countries like Angola, Bulgaria, and Germany align with this objective. India signed the Accords in June 2023, in a bid to prop up its own Gaganyaan mission.

Article 4(1) of the Moon Agreement expressly states that the exploration and use of the moon shall be the province of all mankind and emphasizes the Benefits Declaration. It has been affirmed that impetus shall be given to the interests of present and future generations, pointing towards sustainability. The Accords are at odds with these principles. If commercial actors start mining lunar resources, it will not sit pliantly with the common heritage principle. The Artemis Accords enable a framework to mine resources on the moon in the upcoming decade. This is incompatible with the Moon Agreement, which proscribes commercial exploitation on the moon.

The major conflict between the two is the commercialization of space activities. The Moon Agreement is rooted in the common heritage principle and doubles down on the idea that lunar activities should represent an opportunity for all of mankind. The Accords, on the other hand, mandate that activities on the moon should pursue commercial goals and involve private entities. Furthermore, the commitment to transparency concerning sharing scientific data is not intended to apply to private sector operations, as mentioned under Section 8 of the Accords, giving them considerable leeway. Additionally, the Accords lack an enforcement mechanism for non-State actors who have their own intentions.

The most intelligible difference between the Accords and the Moon Agreement may be the glaring silence of the Accords vis-à-vis the Moon Agreement. It is noteworthy that the Artemis Accords, in the preamble, affirm the importance of the other four space treaties, namely the Outer Space Treaty, the Rescue and Return Agreement, the Liability Convention, and the Registration Convention, but leave out the Moon Agreement.

Saudi Arabia has withdrawn from the Moon Agreement. This withdrawal comes after they

News at a Glance

China's government announced that it has mediated a short-term ceasefire to the conflict between the Myanmar junta and armed groups from ethnic minorities in the northern regions near the Chinese border. None of the parties to the conflict have commented on the mediated ceasefire. For more information, see here.

The Turkish Parliament's Foreign Affairs Committee approved Sweden's NATO membership. This is the first step in Türkiye's process to full approval, which entails submission to the General Assembly of the Turkish Parliament, followed by ratification from the President. Upon successful ratification, Hungary will be the final NATO member to approve Sweden's bid to join the alliance. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

signed the Accords. Saudi Arabia has not explained the pullout. This may indicate its maturity and readiness as an important space actor. Such reasoning is apposite to Saudi Arabia's general approach to treaties, which is based more on pragmatism than legal principles. This indicates that States may prefer the commercialization of space. India is in a predicament. Being a signatory to the Moon Agreement, its simultaneous signing of the Artemis Accords may violate its obligations as a signatory to the former. However, Australia and Mexico, who are both parties to the Moon Agreement, have signed the Accords, and claim that there is no disharmony between the two. If India wishes to adopt a stance of non-exploitation of the moon, it may do so by ratifying the Moon Agreement. This may offer India a chance to spearhead the development of an international agreement for the responsible use of space. Ultimately, India has to decide whether it is pertinent in the national interest to withdraw from the Moon Agreement, or whether it can reconcile its supposedly 'competing' international obligations.

Who Gets to Keep the Esequiba?

- Shreya Basu (III B.A.LL.B.)

The deployment of a British warship to the coast of Guyana has come as a surprise and Venezuela expressed its dissent publicly. This is especially after Venezuela and Guyana had signed an agreement for peaceful negotiations over their claims to the Esequiba region as interest in it increased due to its recently discovered oil resources.

Border disputes between Venezuela and Guyana trace back to 1841 when Venezuela had raised contentions that the border, which includes Esequiba, created by the British Empire was an encroachment on Venezuelan soil, and is thus, illegitimate. The land was awarded in favour of British Guyana by the Paris Arbitral Award in 1899, which was wholly contested by Venezuela. Both countries signed the Geneva Agreement of 1966 to resolve the dispute. However, this failed and Guyana filed the matter before the International Court of Justice (ICJ) in 2018.

The matter was further aggravated by a vote on a Venezuelan

News at a Glance

The Indian government issued an advisory to all social media platforms operating within the country in response to escalating concerns around the detrimental impact of deepfakes. The primary objective of the advisory is to ensure strict adherence to the existing Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, and to proactively combat the dissemination of misinformation fueled by artificial intelligence. For more information, see here.

South Africa asked the ICJ for an urgent order declaring that Israel was in breach of its obligations under the 1948 Genocide Convention in its crackdown against the Palestinian group Hamas in Gaza. It asked the court to issue provisional, or short-term, measures ordering Israel to stop its military campaign in Gaza, which it said were "necessary in this case to protect against further, severe and irreparable harm to the rights of the Palestinian people." For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

Referendum showing that public support stands with the government's claim on Esequiba. Guyana responded by requesting the ICJ to put a halt to the referendum to prevent the escalation of the situation until the Court reached a final decision. Guyana's arguments mainly stemmed from its right to Esequiba from the Arbitral Award of 1899 itself, with further support from subsequent judgements in 2020 and 2023.

Venezuela, however, ignored the Court's order given on 1 December 2023, contending that the Court does not have jurisdiction over the dispute. After the referendum, the Venezuelan President immediately issued measures his government would undertake for the effective implementation of the referendum's outcome. Venezuela, in its arguments, has rejected the ICJ's jurisdiction and raised questions on the timing of Guyana's request, the bindingness of the referendum, and the distinction in provisions between the protection of the parties' rights and those for de-escalation.

Guyana's request for interim protection measures under Article 73 of the ICJ Rules was argued to be untimely by Venezuela, and therefore inadmissible. Venezuela claimed that Guyana had been aware of the nature of the referendum two years prior to the voting date, which is difficult to prove. Venezuela also referenced the Arbitral Award of 1989 as a precedent to limit court proceedings to the validity of the 1899 Arbitral Award. Additionally, according to this precedent, the ICJ cannot grant any party's requests for interim measures. Articles 26 and 27 of the Vienna Convention on Law of Treaties (VCLT) additionally state that the arbitral award is binding. Thus, the Venezuelan Supreme Court ruling might prove insufficient for the bindingness of the referendum.

Guyana referred the matter to the UN Security Council (UNSC) per Article 94 of the UN Charter. Guyana also asked the UNSC to strongly warn Venezuela of the consequences of its breach of the ICJ order. Before its agreement for peaceful talks with Venezuela, Guyana reportedly began implementing precautionary measures, which included receiving military troops from Brazil.

Ultimately, the solution to the

News at a Glance

The UN Interim Force in Lebanon (UNIFIL) reported an injury sustained by one of its peacekeeper's during a patrol mission. The peacekeeper was reportedly attacked by local villagers in a Tabyeh, an area in southern Lebanon. UNIFIL claimed that the attack on a peacekeeper was a clear violation of Resolution 1701, which was adopted by the UN Security in 2006 to help the Lebanese government exert control over its territory and deescalate hostilities following Hezbollah's attack on Israel in July 2006. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

dispute might not be reached as, even if the Court upheld the validity of the 1899 Arbitral Award, tensions might persist if Venezuela refuses to accept the ICJ's jurisdiction. There is also a high risk of escalation to a military clash despite the agreement as evidenced by Guyana's 'precautionary measures.'

Beyond Borders: Evaluating the IGC-BBNJ Treaty's Impact on Global Ocean Stewardship

- Soumik Ghosh (III B.A.LL.B.)

The Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (IGC-BBNJ) concluded in June 2023 after nearly two decades of complex negotiations between various stakeholders seeking to establish the first global framework governing biodiversity in marine areas beyond national jurisdiction. While this historic treaty marks significant progress, diverse perspectives emerged throughout negotiations that warrant further examination to strengthen ocean stewardship ambitions.

Some environmental organizations argued that the agreed provisions, particularly regarding the establishment and enforcement of new marine protected areas (MPAs), deemed crucial to safeguard vulnerable ecosystems, need to be more stringent. They advocated for larger, more restrictive MPAs covering wider spatial areas to fulfil conservation objectives.

Europêche, a European industry body, raised concerns about the treaty addressing marine biodiversity beyond national jurisdiction (BBNJ). They argued that fisheries knowledge has been overlooked, leading to a biased perception, favouring the creation of a global network of MPAs and environmental impact guidelines. Europêche contends that high-seas fisheries are already rigorously regulated through various existing frameworks like Regional Fisheries Management Organizations (RFMOs), the UN Fish Stocks Agreement, the Agreement on Port State Measures (PSMA), the North Pacific Fisheries Commission (NPFC), and various others. They expressed worries that the BBNJ negotiations may pose a risk to the current fisheries governance system by potentially undermining existing instruments and introducing ambiguity in interpretation. Europêche called

News at a Glance

Hong Kong's government told the UN Human Rights Council in a report that Hong Kong has taken a "major turn from chaos to governance" since the implementation of the National Security Law. The report was published by the Hong Kong government after three weeks of public consultation in June. According to the report, the National Security Law ended violence in Hong Kong and allowed Hong Kong to enter a stage of stability and prosperity. In addition, the report said that rights and freedoms of Hong Kong residents have also been protected more effectively in a safer environment. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

for explicit language in the BBNJ Agreement, increased involvement of fisheries experts, and exclusion of fisheries from the agreement.

Critiques further highlighted issues surrounding the treaty's laborious development timeline, bringing efficiency concerns around repeated delays across intersessional conferences. Specific technical contents faced criticism such as the perceived shortcomings in environmental impact assessment (EIA) prerequisites applicable to activities carried out beyond territorial waters. The prevailing argument here is that the minimum standard for EIAs as outlined under Part IV of the agreement is insufficient or not stringent enough. There was scepticism towards provisions governing access and benefit-sharing of genetic resources extracted from marine areas and protections for fragile deep-sea ecosystems facing mining threats due to conflicting regulations with different EIA benchmarks specified, such as with the International Seabed Mining Authority. Additionally, the treaty does not address the fundamental and pressing issue of trash i.e. littering of wastes such as plastic in the high seas.

While a momentous accomplishment, open dialogue and cooperative problem-solving through collaboration of the world's research communities remains paramount. The IGC-BBNJ process' significance lies in setting norms around high seas biodiversity however, given the magnitude and the scope of this treaty, expectations need to be balanced and every step in its implementation should be wary and considerate of all the stakeholders involved. Environmental concerns should take precedence. Clear codification of regulatory gaps should take the helm, along with clear economic planning of the proposed MPAs that are to be implemented under this treaty. It should also be ensured that the sharing of resources happens in a transparent setting with special emphasis on intellectual property i.e. genetic resources.

News at a Glance

Tokyo's High Court found the government of Japan not liable for damages related to the 2011 Fukushima nuclear disaster and associated mass evacuations, leaving responsibility solely with plant operator the Tokyo Electric Power Co. (TEPCO). The ruling also reduced the damages amounts of a previous court order from $414,400 to $165,000 for 44 of 47 petitioners. The decision mirrors a previous ruling in 2022 which found that the government "was highly unlikely to been able to prevent the flooding" that damaged the plant. Ultimately, the court held that more stringent regulatory actions would have been insufficient to prevent the disaster since the size, direction and scale of the tsunami exceeded estimations for such an event. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

The Ongwen Decision: A Need to Review Mental Incapacity as a Defense at the International Criminal Court

- Sana Kulkarni (III B.A.LL.B.)

The International Criminal Court (ICC) case against former child soldier and the Ugandan Lord's Resistance Army commander Dominic Ongwen ended in a guilty verdict. The Trial Chamber found Mr. Ongwen guilty of most charges and rejected the insanity defence raised under Article 31(1)(a) of the Rome Statute. The court did not consider whether his capacity was destroyed by mental illness, as Ongwen did not suffer from mental illness during the conduct relevant to the charges. The Ongwen decision enlists an intensive legal framework for defendants regarding how mental health affects the constraint on defence, especially in cases where mental illness only limits and does not ruin decision-making, a requirement essential for an insanity acquittal.

An accused must be allowed to participate in the trial with considerations such as fairness, humanity, and respect for the honour of the process. This was later on adopted in the Statute under article 64(8)(a) which made it essential for the Trial Chamber to "satisfy" itself that an accused "understands the nature of the charges" before proceeding to trial. Rule 135(4) of the Rules of Procedure and Evidence of the ICC holds that if the Trial Chamber is "satisfied the accused is unfit to stand trial" the trial must be adjourned sine die.

The Rome Statute however unsatisfactorily deals with the precise scope of the protection of rights under the "unfitness to plead" procedure. The rights of a defendant are listed in Article 67 of the Statute but the Trial Chamber may go beyond and identify further rights as done in Strugar. The rights stated in Strugar entail that the defendant must have the capacity to plead and understand the nature of the charges and the details of the evidence to instruct counsel and testify.

The ICC's outlook towards mental health defences seems vague, and innumerable difficulties such as the high standard set in the Rome Statute to prove insanity and the particular challenges of international forensic evaluation will be faced by the defendants.

Upcoming Activities

Call for Papers: The Biological Weapons Convention at 50 – Perspectives on the Past, Present and Future

The Department of Public Law and Public International Law of the Justus-Liebig University Gießen in the context of CBWNet are accepting paper proposals for an edited volume to celebrate the 50th anniversary of the Biological Weapons Convention. The edited volume, provisionally titled, The Biological Weapons Convention at 50: Perspectives on the Past, Present and Future will examine selected issues pertaining to the past, present, and future of the Biological Weapons Convention. Submissions should be sent by 29 February 2024. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

Psychiatric illnesses exist on a wide spectrum, but ICC's binary viewpoint towards mental illness is not capable of capturing that distinction. The doctrine of diminished capacity lets a defendant avoid criminal liability by proving that his mental capacity was so diminished that he could not have had the mindset required to commit the crime he is charged with may, however, aid in better consideration of the uncertainties in victim-perpetrator cases.

Cosmic Clash: Ambiguous Legal Perspectives on the Militarization of Outer Space

- Anuradha Lawankar (II B.A.LL.B.)

In October this year, the First Committee (Disarmament and International Security) opened its thematic debate on preventing an arms race in outer space, highlighting the escalating competition for dominance. This competition includes space communications, intelligence, and the early stages of anti-satellite weapons development. Countries hold different views, some advocating political commitments to mitigate the risk, while others propose legally binding agreements.

The 1967 Outer Space Treaty (OST) is the key document of international space law and establishes the fundamental principle that outer space should remain open for exploration and peaceful use by all States. Other such instruments include the 1968 Salvage and Return Treaty, the 1972 Liability Convention, the 1976 Registration Convention, and the 1979 Moon Agreement.

The international community supports the use of outer space for "peaceful" purposes, but the lack of a clear definition has led to different interpretations. The US interprets "peaceful" as "non-aggressive," allowing military use in space, while Russia has interpreted it as "non-military," prohibiting all military activities in space. This clash raises fundamental questions about the current legal framework for the use of space and, critically, the legal parameters governing an attack on military installations in space.

An early commentary by Oscar Schachter promoted the concept of viewing space as the "Common Heritage of Mankind (CHOM)," emphasizing the need for shared principles that transcend national interests to ensure security. Key

Upcoming Activities

Call for Papers: Austrian Review of International and European Law

The Austrian Review of International and European Law (ARIEL) has issued a Call for Papers and invites all interested persons to submit contributions for volume 28 (2023) of the ARIEL. The ARIEL is an annual publication that provides a scholarly forum to discuss issues of public international law and European law, with particular emphasis on topics being of special interest to Austria. The issue will focus on implications arising from the increase in inter-state complaints / proceedings on obligations which are owed to both states and individuals. For more information, see here.

ILS Centre for International Law Newsletter

Special Issue No. VII Pages 14 | ILS Law College, Pune | 15 December 2023 - 31 December 2023

areas of interest include military applications, launch technologies, space debris management, dual-use technologies, and commercial space activities.

The 1960 Space Conference's opposition to the militarization of celestial bodies laid the foundation for the OST, with Article IV banning weapons of mass destruction in Earth orbit. Article III of the OST incorporates the UN Charter, which prohibits the threat and use of force but allows for self-defence and Security Council-authorized force. Unlike Antarctica and the deep sea, the infinite nature of outer space and the lack of consensus on its delimitation pose problems in establishing general principles in international law.

Existing space laws are plagued by ambiguities, particularly regarding intercontinental ballistic missiles and dual-use technologies, which add to these problems. Limited oversight of military satellite launches leads to concerns about space debris, which calls for better space law enforcement. While the Partial Test Ban Treaty and the OST aim to regulate space weapons, gaps remain that fuel debates about the potential weaponization or militarization of space along the continuum of research, development, testing, and use.

The distinctive features of outer space as a potential battlefield require a reassessment of the thresholds set out in Article 2(4) of the UN Charter, which prohibits the threat or use of force, and Article 51, which deals with lawful self-defence. At present, it is a paradoxical situation that the temporary militarization of space, specifically for intelligence gathering, is considered acceptable as a preventive measure against comprehensive militarization.

Upcoming Activities

Special Issue of Narratives, Frontier Technologies & the Law for the Law, Technology and Humans Journal

For this Special Journal Issue for 'Law, Technology and Humans,' the journal seeks high-quality scholarly perspectives and theoretical investigations into the relationship or correlation between Narratives, Frontier Technologies, and the Law. Full papers for accepted proposals are to be delivered by 31 July 2024 to allow for a pre-read conference. The conference will likely be held in a hybrid format at Maastricht University, Faculty of Law, in Sept/Oct 2024. For more information, see here.

Editor:
Shweta Shukla (V B.A.LL.B.)