

Hague Case Law: Latest Developments

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International Court of Justice

(1) *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*

On 2 February 2017, the International Court of Justice (ICJ) delivered its Judgment on the preliminary objections raised by Kenya in the case concerning Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*). The Court rejected objections raised by Kenya which referred to Kenya's reservation to the compulsory jurisdiction of the ICJ of 1963 as well as the Memorandum of Understanding (MOU) between the two countries signed in 2009 and found that it has jurisdiction to entertain Somalia's application and that the application is admissible.

In August 2014, Somalia approached the Court, requesting it to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles. As basis for the Court's jurisdiction, Somalia invoked the declarations recognizing the Court's jurisdiction as compulsory made by the two States. Kenya, however, raised two preliminary objections.

In its first objection, Kenya argued that the Court lacks jurisdiction as a result of one of the reservations to its declaration accepting the compulsory jurisdiction of the Court, which excludes disputes in regard to which the parties have agreed 'to have recourse to some other method or methods of settlement'. Kenya asserted that

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the MOU constitutes an agreement to have recourse to another method of settlement. It added that the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS) on dispute settlement also amount to an agreement on the method of settlement. The Court first considered whether the MOU falls within the scope of Kenya's reservation. Having examined the legal status of that instrument under international law, it concluded that it is a valid treaty which entered into force upon signature and which is binding on the Parties under international law. The Court then proceeded to interpret the MOU and noted, *inter alia*, that the provision in question relates solely to the continental shelf, and not to the whole maritime boundary between the Parties, which suggests that it did not create a dispute settlement procedure for the determination of that boundary. The Court concluded that the MOU does not constitute an agreement by the Parties 'to have recourse to some other method or methods of settlement'. Therefore, it does not fall within the scope of Kenya's reservation to its declaration recognizing the Court's jurisdiction.

In its second preliminary objection Kenya contended that the Application is inadmissible, first, because the Parties had agreed in the MOU to negotiate delimitation of the disputed boundary, and to do so only after completion of the review by the Commission on the Limits of the Continental Shelf (CLCS) of the Parties' submissions. The Court having previously found that the MOU did not contain such an agreement, also rejected this aspect of Kenya's second preliminary objection. Second, Kenya argued that Somalia's withdrawal of its consent to the consideration by the CLCS of Kenya's submission was in breach of the MOU and gave rise to significant costs and delays. Kenya also contended that a State 'seeking relief before the Court must come with clean hands' and that Somalia has not done so. The Court observed that the fact that an applicant may have breached a treaty at issue in the case does not per se affect the admissibility of its application. Moreover, the Court noted that Somalia is neither relying on the MOU as an instrument conferring jurisdiction on the Court nor as a source of substantive law governing the merits of this case. Thus, Somalia's objection to CLCS consideration of Kenya's submission does not render the Application inadmissible. In light of the foregoing, the Court found that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia on 28 August 2014 and that the Application is admissible.

(2) *Ukraine v. Russian Federation*

On 9 March 2017, the public hearings on the request for the indication of provisional measures submitted by Ukraine in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* were concluded. Ukraine requested that the Court order, amongst others, the following provisional measures of protection: that the Russian Federation shall (i) refrain from any action which might aggravate or extend the dispute before the Court or make this dispute more difficult

to resolve; (ii) exercise appropriate control over its border to prevent and halt further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine; (iii) refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control; (iv) cease and desist from acts of political, cultural and linguistic suppression against the Crimean Tatar people and ethnic Ukrainian people in Crimea; (v) take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred.

The Court's decision on the request for the indication of provisional measures will be delivered at a public sitting.

International Criminal Court

(1) *Bemba et al. Case*

On 22 March 2017, Trial Chamber VII of the International Criminal Court (ICC) delivered its decision on sentencing in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*. In the Chamber's judgment of 19 October 2016 convicted persons were found guilty of various offences against the administration of justice. In its decision on sentencing, the Chamber considered (1) the gravity of the offences that were the basis for conviction of the person concerned; (2) the culpable conduct of the convicted person concerned; and (3) the individual circumstances of the convicted person concerned, such as their good behaviour throughout the trial, co-operation with the Court, family circumstances, absence of prior convictions. The imposed penalties range between 6 months' imprisonment in the case of Fidèle Babala Wandu, and 2 years and 6 months' imprisonment in the case of Aimé Kilolo Musamba.

(2) *Katanga Case*

On 24 March 2017, Trial Chamber II of the ICC issued an *Order awarding individual and collective reparations to the victims of crimes committed by Germain Katanga on 24 February 2003* during an attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC). On 7 March 2014, Mr Katanga was found guilty as an accessory on one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging). On 23 May 2014, he was sentenced to 12 years' imprisonment. His sentence was later reduced and was completed on 18 January 2016.

The Chamber individually analysed the requests for reparation by 341 applicants and found that 297 of them presented sufficient evidence to be considered victims of

Mr Katanga's crimes and therefore eligible for reparations in the case against him. The Chamber assessed the extent of the physical, material and psychological harm suffered by the victims at a total monetary value of approximately USD 3,752,620. In deciding what reparations to award, the Chamber relied in particular on the preferences and needs expressed by the victims. In the Order of 24 March, the judges awarded 297 victims with a symbolic compensation of USD 250 per victim. The Chamber stressed that this symbolic amount, while not intended to compensate for the entirety of the harm, does provide meaningful relief to the victims for the harm they have suffered. The Chamber also awarded specific collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support.

Because of Mr Katanga's indigence, the Trust Fund for Victims (TFV) was invited to consider using its resources for the reparations and to present an implementation plan by 27 June 2017. The Defence may contact the TFV if Mr Katanga wishes to contribute by means of a letter of apology, a public apology or a reconciliation ceremony.

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