

Hague Case Law: Latest Developments

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International Court of Justice

(1) *Jadhav Case (India v. Pakistan)*

On 18 May 2017 the International Court of Justice (ICJ) unanimously adopted its Order indicating provisional measures to the Islamic Republic of Pakistan. India filed its Request for the indication of provisional measures on 8 May 2017, the same day that it initiated proceedings against Pakistan in a dispute concerning alleged violations of Article 36 of the Vienna Convention on Consular Relations of 24 April 1963 with respect to an Indian national, Mr. Kulbhushan Sudhir Jadhav, sentenced to death (on 10 April 2017) by a Court Martial in Pakistan.

The Court established that it has *prima facie* jurisdiction under Article I of the Optional Protocol to the Vienna Convention. It further considered that the rights alleged by India are plausible, and that a link exists between the rights claimed by India and the provisional measures being sought.

The Court then examined whether there is a risk of irreparable prejudice and urgency. It considered that the mere fact that Mr. Jadhav is under a death sentence and might therefore be executed is sufficient to demonstrate the existence of a risk of irreparable prejudice to the rights claimed by India. The Court further observed that Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the month of August 2017. This means that there is a risk that an

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execution could take place at any moment thereafter, before the Court has given its final decision in the case. The Court also noted that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court was satisfied that there is urgency in the present case.

The Court concluded by indicating that Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in the implementation of the present Order.

(2) *Ukraine v. Russian Federation*

On 19 April 2017, the ICJ delivered its Order 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 (ICSFT) and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (*Ukraine v. Russian Federation*).

The Court first indicated that it is fully aware of the context in which the present case has been brought before it, in particular the fighting taking place in large parts of eastern Ukraine and the destruction, on 17 July 2014, of Malaysia Airlines Flight MH17 while it was flying over Ukrainian territory en route between Amsterdam and Kuala Lumpur, which have claimed a large number of lives. Nevertheless, the case before the Court is limited in scope. In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT. With regard to the events in Crimea, Ukraine's claim is based solely upon the CERD, and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination made by the latter.

The Court established it has *prima facie* jurisdiction based on Article 24, paragraph 1, of the ICSFT and Article 22 of the CERD. The Court further noted that, for the purposes of the request for the indication of provisional measures, Ukraine invokes its rights and the respective obligations of the Russian Federation under Article 18 of the ICSFT and Articles 2 and 5 of the CERD.

Article 18 ICSFT provides in substance that States Parties are obliged to cooperate to prevent the financing of terrorism. Consequently, for the purposes of a request for the indication of provisional measures, a State Party to the Convention may avail itself of the rights under Article 18 only if it is plausible that the acts complained of constitute acts of terrorism. The Court observed that the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the elements set out in Article 2 ICSFT, such as intention and knowledge, as well as the element of purpose, are present. The Court is of the view that, at this stage of the proceedings, Ukraine has not put before it evidence which affords a sufficient basis to find it plausible that these elements are present. Therefore, the Court concluded that the conditions required for the

indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met.

Articles 2 and 5 of the CERD are intended to protect individuals from racial discrimination. Consequently, for the purposes of a request for the indication of provisional measures, a State Party to the CERD may avail itself of the rights under Articles 2 and 5 only if it is plausible that the acts complained of constitute acts of racial discrimination under the Convention. The Court established that some of the acts complained of by Ukraine fulfil this condition of plausibility. This is the case with respect to the banning of the Mejlis and the alleged restrictions on the educational rights of ethnic Ukrainians.

The Court recalled that there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice. The Court noted that certain rights in question in these proceedings, in particular the political, civil, economic, social and cultural rights guaranteed by Article 5 of the CERD, are of such a nature that prejudice to them is capable of causing irreparable harm. The Court was of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable. In this regard, the Court took note of recent reports by the Office of the United Nations High Commissioner for Human Rights concerning the human rights situation in Ukraine, and of the report of the Organization for Security and Co-operation in Europe's (OSCE) Human Rights Assessment Mission on Crimea. The Court considered that these reports show, *prima facie*, that there have been limitations on the ability of the Crimean Tatars to choose their representative institutions, and restrictions in terms of the availability of Ukrainian-language education in Crimean schools. The Court concluded from this that there is an imminent risk that the acts complained of could lead to irreparable prejudice to the rights invoked by Ukraine.

The Court indicated the following measures: With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the CERD, refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis; Ensure the availability of education in the Ukrainian language; Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

International Criminal Court

(1) *Al Bashir Case*

On 6 July 2017, Pre-Trial Chamber II of the International Criminal Court (ICC) delivered its decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir.

The Chamber considered that, for the purposes of the situation in Darfur, Sudan is in an analogous situation to those of States Parties to the Statute as a result of the

United Nations Security Council's (UNSC) resolution, under Chapter VII of the UN Charter, triggering the Court's jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court. By way of consequence, given that Article 27(2) of the Statute is applicable to Sudan, the immunities of Omar Al-Bashir as Head of State under customary international law do not apply *vis-à-vis* States Parties to the Rome Statute for the execution of the Court's request of his arrest and surrender for crimes under the jurisdiction of the Court allegedly committed in Darfur (Sudan). The Chamber therefore found that States Parties to the Rome Statute are under the duty to execute the warrants of arrest issued by the Court, and to implement the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court.

The Chamber concluded that, by not arresting Omar Al-Bashir while he was on its territory between 13 and 15 June 2015, South Africa failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al-Bashir.

Nevertheless, the Chamber considered, bearing in mind its discretionary power, that a referral of South Africa's non-compliance to the Assembly of States Parties (ASP) and/or the UNSC was not warranted. For this finding, the Chamber considered of significance that South Africa was the first State Party to seek from the Court a final legal determination on the extent of its obligations to execute a request for arrest and surrender of Omar Al-Bashir. In addition, the Chamber was not convinced that a referral to the ASP and/or the UNSC would be warranted in order to achieve cooperation from South Africa, in the light of the fact that South Africa's domestic courts have already found South Africa to be in breach of its obligations under its domestic legal framework and that any remaining issue concerning South Africa's obligations under the Statute was resolved by the Chamber in the decision.

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