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JUDICIAL AND SIMILAR PROCEEDINGS

1. Pre-Trial Chamber Rejects Opening an Investigation in Afghanistan (International Criminal Court – April 12, 2019)

< https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33>

On April 12, 2019, Pre-Trial Chamber II of the International Criminal Court (ICC) unanimously rejected the Prosecutor's request to open an investigation into alleged crimes against humanity and war crimes in Afghanistan, determining that "an investigation into the situation in Afghanistan at this stage would not serve the interests of justice." The Prosecution's request for an investigation concerns potential crimes that have taken place in the context of the armed conflict currently taking place in Afghanistan, including crimes against humanity by the Taliban and their affiliated Haqqani Network; war crimes by the Afghan National Security Forces; and war crimes by U.S. armed forces in Afghanistan, as well as the CIA in secret detention facilities between 2003–2004. The Chamber found that the request establishes a reasonable basis to believe that crimes under the jurisdiction of the ICC have been committed in Afghanistan and that the requirements of gravity and complementarity have been met. However, the Chamber determined that opening an investigation would not serve the interests of justice due to the elapsed time since opening the preliminary examination, the political changes that have taken place in Afghanistan since then, the lack of cooperation with Afghanistan authorities concerning the investigation, and the need for the Court to prioritize matters with a better chance of success.

2. Switzerland v. Nigeria (International Tribunal for the Law of the Sea – July 6, 2019)

<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_27/Orders/C27_Order_06.07.2019_rev.pdf>

On July 6, 2019, the International Tribunal for the Law of the Sea (ITLOS) issued a provisional measures order in the *M/T "San Padre Pio" Case (Switzerland v. Nigeria)*. In a press release issued by ITLOS, the Tribunal summarized the facts of the case by stating that on January 23, 2018, the Nigerian Navy seized the *MT "San Padre Pio,"* a motor tanker flying the Swiss flag while it was "engaged in one of several ship-to-ship transfers of gasoil" (para. 30) in Nigeria's exclusive economic zone. The ship was moved to Port Harcourt in Nigeria and the sixteen crew members were charged with "conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product onboard" (para. 33). In its application, Switzerland requested that the Court prescribe provisional measures finding that Nigeria should "immediately take all measures necessary to ensure that all restrictions on the liberty, security and movement of the *"San Padre Pio,"* along with her crew and cargo, and allow them to leave Nigeria and that all Nigerian court and administrative proceedings regarding the matter should be suspended. By a vote of seventeen to four, the Tribunal prescribed the following provisional measures pursuant to Article 290, paragraph 5 of the UN Convention on the Law of the Sea: "(a) Switzerland shall post a bond or other financial security, in the amount of US$ 14,000,000, with Nigeria in the form of a bank guarantee, as indicated in paragraphs 139 and 140; (b) Switzerland shall undertake to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio,"* its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22–23 January 2018 do not constitute a violation of the Convention. Switzerland and Nigeria shall cooperate in good faith in the implementation of such undertaking; [and] (c) upon the posting of the bond or other financial security referred to in (a) above and the issuance of the undertaking referred to in (b) above, Nigeria shall immediately release the *M/T "San Padre Pio,"* its cargo and

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the Master and the three officers and shall ensure that the *M/T "San Padre Pio,"* its cargo and the Master and the three officers are allowed to leave the territory and maritime areas under the jurisdiction of Nigeria."

3. Romeo Castaño v. Belgium (European Court of Human Rights – July 8, 2019)

<https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-194320%22]}> (judgment in French)

<https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6454699-8498086%22]}> (press release in English)

On July 9, 2019, the Second Section of the European Court of Human Rights (ECtHR) released its judgment in the *Romeo Castaño v. Belgium* case. The ECtHR held unanimously that Belgium had not upheld its obligations under Article 2 of the European Convention on Human Rights (ECHR) when it decided not to execute European Arrest Warrants (EAWs) issued by Spanish authorities seeking surrender of an individual who had been charged with terrorism and murder and who was located in Belgium. In 1981, Colonel Ramón Romeo was murdered by an ETA commando. In 2013, one of the suspects, N.J.E., was arrested in Belgium pursuant to EAWs issued by Spain. Belgium did not execute the EAWs due to concerns that the suspect would have been subjected to human rights violations in violation of ECHR Article 3. This concern was based upon a Report issued in 2011 by the European Committee for the Prevention of Torture in which the Committee criticized the Spanish legal system for issues of, *inter alia*, incommunicado detention and torture and other forms of ill treatment. Spanish authorities issued another EAW in 2015 and Belgium again refused to execute on similar grounds, citing the UN Human Rights Committee's Concluding Observations on the Sixth Periodic Report of Spain issued in 2015, which again raised issues of incommunicado detention. The children of Colonel Romeo filed an Application with the ECtHR alleging violations of ECHR Article 6, but the ECtHR Second Section decided to focus on violations of Article 2. The Court held that the Belgian authorities' refusal to execute the EAWs was not legitimate because Belgium relied on findings set forth in international reports but did not conduct an individual assessment of the case at hand. The Court found that Belgium must give a sufficient factual basis for such a refusal, noting that the EU Framework Decision on the European Arrest Warrant and the Surrender Procedures Between States and the Belgian law implementing it would have permitted Belgian authorities to request additional information regarding the proposed detention conditions for the suspect to determine if such conditions would have violated ECHR Article 3.

4. R (National Council for Civil Liberties) v. Secretary of State for the Home Department, Secretary of State for Foreign and Commonwealth Affairs, and National Union of Journalists (High Court of England and Wales (Queen's Bench Division) – July 29, 2019)

<https://www.judiciary.uk/wp-content/uploads/2019/07/Liberty-judgment-Final.pdf>

On July 29, 2019, the High Court of England and Wales Queen's Bench Division ruled against civil liberties group Liberty in its challenge to the "bulk hacking" powers granted to the U.K. government in the 2016 Investigatory Powers Act IPA, which allow intelligence agencies to conduct mass surveillance of electronic devices and to extract and store information. Liberty argued that such powers were "too wide" and "lack the 'minimum safeguards' established by the European Court of Human Rights for secret surveillance regimes." However, the Court determined that Parliament had considered the risks of allowing "bulk" powers and consequently included "a suite of inter-locking safeguards against the possible abuse of power, including the creation of the office of the Investigatory Powers Commissioner." The Court consequently did not agree with Liberty that the 2016 Act "does not contain sufficient safeguards against the risk of abuse of power" and found that it was not incompatible with the European Convention on Human Rights as alleged.

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5. The Chief Prosecutor v. Md. Abdus Samad Musa (International Crimes Tribunal (Bangladesh) – August 27, 2019)

<https://www.ict-bd.org/ict1/Judgment%202019/August/SAMAD.pdf>

On August 27, 2019, a three-member panel of the Bangladesh International Crimes Tribunal rendered its judgment against Md Abdus Samad Musa for crimes against humanity and war crimes that he committed during the 1971 Liberation War as a member of the Razakar Bahini group. In particular, the Tribunal found him guilty of crimes against humanity as provided for in section 3(2)(a), (g), and (h) of the International Crimes (Tribunals) Act of 1973.

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Recommendation on Bridging the Protection Gap for Refugees and Migrants in the Mediterranean (Council of Europe – June 2019)

<https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>

In June 2019, the Council of Europe released its Recommendation regarding the "protection of refugees, asylum-seekers and migrants travelling by sea," titled "Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean." The Recommendation sets forth that "states have clear obligations to aid any person found in distress at sea, to rescue people in distress and to ensure that their rights—including the right to life and to protection from *refoulement*—are upheld." The Council of Europe Commissioner for Human Rights put forward this Recommendation regarding "how to help member states make these rights practical and effective." The Recommendation noted that Council of Europe members have "adopted tougher and more restrictive laws and measures to handle the attempted crossing of refugees and migrants via the Central Mediterranean route" and that the Recommendation "aims at identifying the deficiencies of this approach, and at helping member states to reframe their response according to human rights standards." The Recommendation focuses on five main areas of action: "ensuring effective search and rescue coordination; guaranteeing the safe and timely disembarkation of rescued people; co-operating effectively with NGOs; preventing human rights violations while co-operating with third countries; and providing accessible safe and legal routes to Europe."

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