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Michail Vagias

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## THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

There are many variables of territoriality available to national courts under contemporary international law. Does the same apply to the International Criminal Court? And, if so, what are the limits to the teleological expansion of the Court's territorial jurisdiction as regards, for example, the partial commission of a crime in State not Party territory, crimes committed over the internet or crimes committed in occupied territories?

Michail Vagias' analysis of the law and procedure surrounding the territorial jurisdiction of the Court examines issues such as the application of localization theories of territoriality and the means of interpretation for Article 12(2)(a); the principle of legality (*nullum crimen sine lege*) and human rights law for the interpretation of jurisdictional provisions; *compétence de la compétence*; crimes committed over the internet; and the procedure for jurisdictional objections.

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# THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

MICHAIL VAGIAS

Foreword by

JOHN DUGARD



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# CONTENTS

<i>Foreword: John Dugard</i>	page ix
<i>Acknowledgements</i>	xii
<i>Table of cases</i>	xiv
<i>Table of treaties and selected other instruments</i>	xxxix
<i>List of selected acronyms and abbreviations</i>	xxxvi
<b>1 Introduction</b>	<b>1</b>
1.1 Objective	6
1.2 Structure and approach	9
<b>2 Definitions and State territorial jurisdiction</b>	<b>12</b>
2.1 Introduction	12
2.2 The territorial jurisdiction of the International Criminal Court	12
2.3 The <i>Lotus</i> Case: territorial jurisdiction in international law	13
2.4 Territoriality and territorial fictions	13
2.4.1 Subjective territoriality	16
2.4.2 Objective territoriality/ubiquity	17
2.4.2.1 Scope; defining constituent elements; intent, modes of participation, attempt and preparatory acts	17
2.4.2.2 Ubiquity	22
2.4.2.3 The effects doctrine	24
2.5 Jurisdictional rule of reason in international law and the International Criminal Court	31
<b>3 The preparatory works of Article 12(2)(a)</b>	<b>37</b>
3.1 Purpose of the chapter; sources; caveats; structure	37
3.2 The International Law Commission's work on the Statute of an International Criminal Court; territorial jurisdiction	41
3.3 The Ad Hoc Committee (1995) and the Preparatory Committee (1996–1998)	47
3.4 Negotiations at the Rome Conference	51
3.5 Conclusions	59

<b>4</b>	<b>Instruments of interpretation of the Rome Statute and Article 12(2)(a)</b>	<b>61</b>
4.1	Introduction	61
4.2	Interpretation of the Rome Statute in accordance with the Vienna Convention on the Law of Treaties; contextual and teleological interpretation	61
4.3	Interpretation of the Rome Statute in accordance with the Statute's rules of interpretation	64
4.3.1	Interpretation of Article 12(2)(a) of the Rome Statute in accordance with Article 21(3)	64
4.3.2	Interpretation of Article 12(2)(a) of the Rome Statute in accordance with the principle of legality	67
4.4	Interpretation of the Rome Statute in accordance with the legal nature of the provision	73
4.5	Conclusion	74
<b>5</b>	<b>'The conduct in question'</b>	<b>79</b>
5.1	Introduction	79
5.1.1	The problem: post-Rome negotiations in the 2008–2009 Aggression Working Group	79
5.1.2	The doctrinal conditions	82
5.1.2.1	State territory as connecting link	83
5.1.2.2	The inherent power of the Court to decide on its jurisdiction ( <i>compétence de la compétence/ kompetenz kompetenz</i> )	83
5.1.2.3	Interpretation of ICC jurisdiction, delegation of authority and limitations	85
5.1.2.4	The usefulness of international law rules	89
5.1.2.5	The usefulness of national law	90
5.2	'Conduct in question' as conduct, including act or omission	91
5.3	'Conduct in question' as 'crimes in question'	96
5.4	Interim conclusion	100
5.5	Localization of criminal activity	101
5.5.1	Delimiting the Court's territorial jurisdiction on the basis of consequences or ubiquity and the application of rules and principles of international law	102
5.5.2	Delimiting the Court's territorial jurisdiction on the basis of consequences or ubiquity and the application of general principles of law	111
5.5.3	Delimiting the Court's territorial jurisdiction on the basis of consequences or ubiquity and the application of human rights rules	124
5.6	Localization of crimes committed over the internet	130

CONTENTS vii

5.6.1	Cybercrimes and crimes committed through the internet as Rome Statute crimes	135
5.6.2	Searching for the minimum common denominator for the localization of online criminal activity	139
5.6.2.1	Treaty law: the 2001 Cybercrime Convention	140
5.6.2.2	EU instruments	142
5.6.2.3	National law	143
5.6.3	Conclusion	151
5.6.4	The territorial jurisdiction of the International Criminal Court over incitement to commit genocide through online activity	153
5.7	Conclusion	158
<b>6</b>	<b>The effects doctrine</b>	<b>162</b>
6.1	The problem and the structure of the argument: between policy and law	162
6.2	Should the Court adopt the effects doctrine of jurisdiction? The policy approach	163
6.3	Can the Court adopt the effects doctrine? The legal implications	171
6.3.1	Criminal jurisdiction: the form of liability	172
6.3.1.1	National legislation	172
6.3.1.2	The <i>Nippon</i> Case	178
6.3.1.3	Conclusion	180
6.3.2	Territorial jurisdiction	183
6.3.3	Over-regulation and jurisdictional conflicts	185
6.3.4	<i>Pacta tertiis</i> : violation of sovereignty of States not Parties	187
6.3.5	Practical aspects: collection of evidence	188
6.3.6	Delimiting effects: qualifications	190
6.3.7	Jurisdictional reasonableness and the ICC Statute: cases, situations and <i>Mbarushimana</i>	196
6.4	Effects, cases and situations	201
6.5	Conclusion	205
<b>7</b>	<b>Belligerent occupation and ICC territorial jurisdiction</b>	<b>209</b>
7.1	Introduction	209
7.2	The problem	210
7.3	Basic principles and rules	212
7.4	The application of Article 12(2)(a) in State Party territories occupied by another State Party	214
7.5	The application of Article 12(2)(a) in State Party territories occupied by a State not Party	220

7.6	The application of Article 12(2)(a) in the territory of a State not Party occupied by a State Party	224
7.6.1	‘[W]ithin the territory’ meaning ‘under their control’ in Article 12(2)(a) Rome Statute? The effect of Article 21(3) Rome Statute; The policy argument	224
7.6.2	‘[W]ithin the territory’ meaning ‘under their control’ in Article 12(2)(a) Rome Statute? The effect of Article 21(3) Rome Statute; The legal argument	230
7.6.2.1	An example	230
7.6.2.2	The main issue	232
7.7	Conclusions	241
<b>8</b>	<b>Challenges to the territorial jurisdiction of the Court</b>	<b>243</b>
8.1	Challenges to the jurisdiction of the Court; definitions	243
8.2	Challenges to the jurisdiction of the Court; the general procedural framework	249
8.2.1	Standing to file a challenge to the Court’s jurisdiction and participate in the proceedings	250
8.2.2	The form of the challenge, page and time limits	254
8.2.2.1	The earliest opportunity/the identification of a case	255
8.2.2.2	The commencement of the trial	259
8.2.2.3	Scheduling orders	262
8.2.2.4	Page limits	263
8.2.3	Burden and standard of proof	263
8.2.4	Suspension of investigation	266
8.3	Challenges to the jurisdiction of the Court <i>ratione loci</i>	269
8.4	Procedural stages	270
8.4.1	Pre-Trial Chamber	270
8.4.2	Trial Chamber	274
8.4.3	Appeals Chamber	274
8.5	Concluding remarks	281
<b>9</b>	<b>Concluding remarks</b>	<b>282</b>
	<i>Bibliography</i>	287
	<i>Index</i>	329



Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## FOREWORD

The International Criminal Court (ICC) has been in existence for over a decade. Hopes that it would end impunity and secure international criminal justice have not been met. To a large extent this is due to the limited jurisdictional powers conferred upon the Court. In terms of the Rome Statute the Court has jurisdiction only over crimes where ‘conduct in question occurred’ in the territory of a State Party or where the person accused of the crime is a national of a State Party. Suggestions made at the Rome Conference that adopted the Statute that the Court should have universal jurisdiction, which would have given the Court competence to try a person for any international crime irrespective of where the crime was committed or by whom it was committed, were not accepted. A type of universal jurisdiction was introduced to allow the Security Council, acting under Chapter VII of the UN Charter, to refer a situation in which international crimes appear to have been committed to the Prosecutor of the Court for investigation and possible prosecution. But as this is a political decision subject to the veto of the permanent members of the Security Council it is a very narrow basis for jurisdiction, as appears from the fact that it has been invoked only twice in ten years, in the cases of Darfur and Libya. In effect, this jurisdictional structure means that the ICC has jurisdiction only over international crimes committed in the territory of State Parties, by the nationals of State Parties or in the territory of non-State Parties that do not have the support of one member of the Security Council. States that are not committed to ending impunity for international crimes and that are not parties to the Rome Statute – of which there are some seventy in the world – are therefore beyond the reach of the ICC.

The Rome Statute was a treaty that was hastily drafted and agreed to at a brief moment in time of idealism and enthusiasm for international criminal justice. States committed to the ideal of an international criminal court and an effective non-governmental organisation (NGO) community were acutely aware of the necessity of reaching agreement on

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978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

a statute for an international criminal court in the six weeks set aside for the conference in Rome, lest this opportunity be lost forever. The result is an imperfect treaty that is unlikely to be amended substantially. The task of persuading some 120 states to agree to an amendment expanding jurisdiction is remote.

This means that the only way to expand the reach of international criminal justice is to expand the jurisdictional provisions of the Rome Statute by means of interpretation. This requires the Prosecutor and the Court itself to construe these provisions as generously as possible within the framework of the law. Unfortunately, this has not occurred to date. Successive Prosecutors have preferred to avoid questions of jurisdiction by investigating situations referred to the Court by State Parties involving crimes committed in their own territories or situations referred to the Court by the Security Council. The Court, too, has been largely deferential to the interests of States in not extending the jurisdiction of the Court.

This state of affairs presents a challenge to scholars to suggest ways in which the jurisdictional reach of the ICC may be expanded to advance the cause of the suppression of impunity, to which the Rome Statute is committed. Michail Vagias has met this challenge in his study on the territorial jurisdiction of the ICC which, in a scholarly and carefully researched manner, presents a vision for a Court with wider powers that might be achieved by means of creative interpretation, within the legitimate parameters of treaty interpretation, with no amendment to the Rome Statute.

The first part of Vagias' study is designed to show that the ICC has an inherent power to determine its own jurisdiction. This is done by a careful consideration of the rules of jurisdiction, the history of the drafting of the Rome Statute and the principles of treaty interpretation in the context of national and international jurisprudence and scholarly writings. Vagias then turns to his central thesis, that a teleological interpretation of Article 12(2)(a) of the Court's Statute, dealing with territorial jurisdiction, would allow the Court to exercise jurisdiction over crimes whose effect is felt in the territory of a State Party. In reaching this conclusion, he is guided by the laws and judicial decisions of States, particularly the United States in the enforcement of its anti-trust laws, which permit their courts to exercise civil and criminal jurisdiction over economic crimes, such as price-fixing and cartel agreements, that are planned and executed abroad but whose effect is felt in the forum State. Vagias argues that there is a greater moral justification for extending the reach of international criminal law to include the effects of war crimes, crimes against humanity and genocide than there is to do so in the case of economic crimes. There can

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## FOREWORD

xi

be no comparison, he argues, between the effects of the murder or torture of thousands of individuals committed in a foreign state and the effects of price-fixing committed in a foreign state. Vagias' proposal would, for example, give the ICC jurisdiction over a situation in which a massacre occurred in a State not Party to the Rome Statute that resulted in an exodus of refugees to a neighbouring State party to the Rome Statute that required the latter State to take measures to accommodate and care for the refugees. Suggestions that this would introduce universal jurisdiction through the back door are unfounded, as the application of the effects doctrine to international crime would still require some tangible connection between the crime and the State Party's territory.

Another situation that Vagias addresses is the question of jurisdiction over international crimes committed in occupied States. Here, he examines situations in which the occupied State is a Party to the Rome Statute, and where the occupying State either is or is not a Party to the Statute. Few will disagree with his conclusion that in such cases the Court will have jurisdiction over crimes committed in the occupied territory. The situation in which international crimes are committed in a non-State Party is less clear, as Vagias concedes. This section contains an insightful examination of the nature and consequences of belligerent occupation in the context of the territorial jurisdiction of the ICC.

Disappointment has been expressed over the failure of the ICC to achieve more than it has done in its first decade of operation. It should, however, be remembered that the ICC is still, relatively, an institutional infant seeking to find its way in life and to establish the bounds of its possibilities. What it needs at present is not dismissive criticism but constructive suggestions as to how it might improve its performance. Vagias makes proposals in this study which go to the root of the Court's possibilities in respect of jurisdiction. They may be bold but they are carefully reasoned, comply with accepted rules of treaty interpretation and enjoy support from both national and international jurisprudence. If followed, they would result in an expanded jurisdiction for the Court. They would also serve to deter non-State Parties from actions involving international crimes whose effects might be felt in neighbouring States Party to the Rome Statute. This book contains an innovative and creative message that could advance the principal concerns of the ICC. It is in the best traditions of constructive scholarship.

JOHN DUGARD  
*The Hague*

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978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

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Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

---

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xiii

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*Michail Vagias*

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978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

### Permanent Court of International Justice

*Case Concerning Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Rep. Ser. A, No. 7; 200

*Case Concerning Legality of Use of Force* (*Serbia and Montenegro v. Belgium*) (Preliminary Objections) (Separate Opinion of Judge Kreća) [2004] ICJ Rep. 279; 200

*The Case of the S.S. Lotus* (*France v. Turkey*) [1927] PCIJ Rep. Ser. A, No. 10; 13, 17–18, 31, 86, 102–103, 108, 111, 159, 164, 204

### International Court of Justice

*Advisory Opinion on Certain Expenses of the United Nations* (Article 17 paragraph 2 of the Charter) [1962] ICJ Rep. 151; 39

*Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations* [1948] ICJ Rep. 57; 39

*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion* [1980] ICJ Rep. 89; 8, 36, 86, 88

*Application of the Convention of 1902 Governing the Guardianship of Infants* (*Netherlands v. Sweden*) (Separate Opinion of Judge Spender) [1958] ICJ Rep. 121; 91

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) [2007] ICJ Rep. 43; 105, 153

*Application of the International Convention on Elimination of All Forms of Racial Discrimination* (*Georgia v. Russia*) (Provisional measures Order) [2008] ICJ Rep. 24; 209, 238–240

*Armed Activities in Territory of Congo* (*Democratic Republic of the Congo v. Uganda*) (Merits) [2005] ICJ Rep. 168; 215, 222, 239

*Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) (Judgment) [2002] ICJ Rep. 3; 24, 29, 102, 105, 170, 216

*Barcelona Traction Case* (*Belgium v. Spain*) (Judgment) [1970] ICJ Rep. 3; 186

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

XV

- Case Concerning Certain Criminal Proceedings in France (Democratic Republic of the Congo v. France)* (Pleadings) [2003] ICJ Rep. 4; 33
- Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJ Rep. 14; 35, 265
- Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) [2008] ICJ Rep. 177; 37, 90–91
- Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Rep. 4; 39
- Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* [2012] ICJ Rep. 1; 71, 74, 126, 244
- Legal Consequences for States of Continued Presence of South Africa in Namibia (Southwest Africa)* (Advisory Opinion) [1971] ICJ Rep. 16; 211
- Legal Consequences of Construction of Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 136; 213, 224, 239
- Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep. 66; 73, 86
- Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Judgment) [1995] ICJ Rep. 6; 38
- Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep. 161; 35, 89
- Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (Judgment) [1952] ICJ Rep. 212; 91
- Trial of Pakistani Prisoners of War (Pakistan v. India)* (Request for Indication of Provisional Measures) [1973] ICJ Rep. 328; 170

**International Criminal Tribunal for the Former Yugoslavia**

- ICTY, *Prosecutor v. Radoslav Brđanin* (Judgment) IT-99-36-T (1 September 2004); 153
- ICTY, *Prosecutor v. Zejnil Delalić et al. (Celebici)* (Judgment) IT-96-21-T (16 November 1998); 71, 75, 99
- ICTY, *Prosecutor v. Miroslav Deronjić* (Judgment) IT-02-61 (30 March 2004) (Dissenting Opinion of Judge Schomburg); 122
- ICTY, *Prosecutor v. Drazen Erdemović* (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997); 90, 122
- ICTY, *Prosecutor v. Anto Furundžija* (Judgement) IT-95-17/1-T (10 December 1998); 121
- ICTY, *Prosecutor v. Dragoljub Kunarac et al.* (Judgment) IT-96-23-T (22 February 2001); 123
- ICTY, *Prosecutor v. Zoran Kupreškić* (Judgment) IT-95-16-T (14 January 2000); 119
- ICTY, *Prosecutor v. Milan Milutinović et al.* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003); 248

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

xvi

## TABLE OF CASES

ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojsa Pavković, Vladimir Lazarević and Sreten Lukić* (Decision on Dragoljub Ojdanić's Motion to Prohibit Witness Proofing) IT-05-87-T (12 December 2006); 115

ICTY, *Prosecutor v. Duško Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-I (2 October 1995); 77, 83, 117

ICTY, *Prosecutor v. Duško Tadić* (Judgment) IT-94-1-A (15 July 1999); 39, 77, 117

**International Criminal Tribunal for Rwanda**

*Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998); 153–7

*Prosecutor v. Simon Bikindi* (Judgement and Sentence) ICTR-01-72-T (2 December 2008); 153

*Prosecutor v. Callixte Kalimanzira* (Judgment) ICTR-05-88-T (22 June 2009); 153–5

*Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgment) ICTR-99-52-A (28 November 2007), (the Media Appeal); 153–4, 156

*Prosecutor v. Georges Ruggiu* (Judgement and Sentence) ICTR-97-21-1 (1 June 2000); 156

**International Criminal Court**

*Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09-3 (4 March 2009); 64, 68–69, 80, 89, 96, 109, 212, 250

*Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09-139 (12 December 2011); 171, 223

*Prosecutor v. Jean-Pierre Bemba Gombo* (Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008) ICC-01/05-01/08-15-tEng (10 June 2008); 282

*Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-14-tENG (17 July 2008); 283

*Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on Application for Interim Release) ICC-01/05-01/08 (20 August 2008); 66

*Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Adjourning the Hearing pursuant to Article 67(7)(c)(ii) of the Rome Statute) ICC-01/05-01/08 (3 March 2009); 62–63, 77, 80, 205

*Prosecutor v. Jean-Pierre Bemba Gombo* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009); 264, 283



Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xvii

- Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Admissibility and Abuse of Process Challenges) ICC-01-05/01-08 (24 June 2010); 260–261
- Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’) ICC-01/05–01/08–817 (OA 3) (9 July 2010); 278
- Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on Libya’s Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi pursuant to Article 95 of the Rome Statute and Related Defence Request to refer Libya to the UN Security Council) ICC-01/11–01/11-354 (14 June 2013); 258–259
- Prosecutor v. Laurent Koudou Gbagbo* (Decision Requesting Observations from the Parties on the Schedule of the Confirmation of Charges Hearing) ICC-02/11–01/11–107 (4 May 2012); 262
- Prosecutor v. Laurent Koudou Gbagbo* (Decision on the Conduct of the Proceedings Following the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 of the Rome Statute) ICC-02/11–01/11–153 (15 June 2012); 249, 273
- Prosecutor v. Laurent Koudou Gbagbo* (Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo’ (ICC-02/11–01/11-129)) ICC-02/11–01/11–212 (15 August 2012); 201, 243–4, 246
- Prosecutor v. Laurent Koudou Gbagbo* (Directions on the Submissions of Observations) ICC-02/11–01/11–236 (31 August 2012); 279–280
- Prosecutor v. Laurent Koudou Gbagbo* (Decision on Observations Submitted by the Republic of Côte d’Ivoire) ICC-02/11–01/11–254 (1 October 2012); 263
- Prosecutor v. Laurent Koudou Gbagbo* (Decision on Observations Submitted by OPCV on Behalf of Victims) ICC-02/11–01/11–256 (5 October 2012); 279
- Prosecutor v. Laurent Koudou Gbagbo* (Judgment on the Appeal of Mr Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings) ICC-02/11-01/11 (OA 2) (12 December 2012); 62–3, 66–7, 85, 93, 97, 165, 243–4, 246, 251, 257, 275–7
- Prosecutor v. Ahmad Muhammad Harun and Ali Kushayb* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05–01/07–1-Corr. (27 April 2007); 272
- Prosecutor v. Germain Katanga* (Judgment on the Appeal of Mr Germain Katanga Against the Decision of the Pre-Trial Chamber I Entitled ‘Decision on the Defence Request Concerning Languages’) ICC-01/04–01/07 (OA 3) (27 May 2008); 38
- Prosecutor v. Germain Katanga and Mathieu Ngundjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04–01/07–717 (30 September 2008); 65–66, 90, 99, 215

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

xviii

## TABLE OF CASES

- Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) ICC-01/04–01/07 (16 June 2009); 110, 268
- Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04–01/07 (OA 8) (25 September 2009); 260
- Prosecutor v. Uhuru Muigai Kenyatta et al.* (Decision on the Prosecutor's Application for Summonses to Appear for Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) ICC-01/09–02/11–1 (18 July 2012); 252
- Prosecutor v. Joseph Kony et al.* (Decision on the Admissibility of the Case under Article 19(1) of the Statute) ICC-02/04–01/05 (10 March 2009); 251
- Le Procureur c. Lubanga Dyilo* (Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chambre Préliminaire du 7 et 16 février 2007) ICC-01/04-01/06-836 (22 Février 2007); 219
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58) ICC-01/04–01/06–8–Corr. (10 February 2006); 250
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58) ICC-01/04–01/06–37 (10 February 2006); 216
- Prosecutor v. Thomas Lubanga Dyilo* (Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence) ICC-01/04–01/06–108 (19 May 2006); 66
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, Appeals Chamber) ICC-01/04–01/06–176 (3 July 2006); 279
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Application to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence') ICC-01/04–01/06–568 (13 October 2006); 269
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Practices of Witness Familiarization and Witness Proofing) ICC-01/04–01/06 (8 November 2006); 114, 123
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04–01/06 1–772 (OA 4) (14 December 2006); 12, 66, 199, 238, 245, 257
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04–01/06-803-tEN (29 January 2007); 36, 63, 65, 69, 90, 138, 209, 215–19, 222
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Decision sur la demande

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xix

- de mise en liberte provisoire de Thomas Lubanga Dyilo') ICC-01/04-01/06-824 (13 February 2007); 66
- Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Admissibility of the Appeal of Mr Thomas Lubanga Dyilo against the Decision of the Pre-Trial Chamber I entitled 'Decision sur la Confirmation des Charges of 29 January 2007') ICC-01/04-01/06 (OA 8) (13 June 2007); 62
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008) ICC-01/04-01/06 (OA 9, OA 10) (11 July 2008); 63
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the Release of Thomas Lubanga Dyilo') ICC-01/04-01/06 (OA 12) (21 October 2008); 67
- Prosecutor v. Thomas Lubanga Dyilo* (Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts May be Subjected to Change in Accordance with Regulation 55(2) of the Regulations of the Court, Appeals Chamber) ICC-01/04-01/06 (8 December 2009); 238
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court') ICC-01/04-01/06 (OA 15, OA 16) (8 December 2009); 38
- Prosecutor v. Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012); 220
- Prosecutor v. Callixte Mbarushimana* (Defence Request for Disclosure) ICC-01/04-01/10-29 (14 December 2010); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Request for an Order for State Cooperation pursuant to Article 57(3)(b) ICC-01/04-01/10-76 (14 March 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Request to Convene a Status Conference) ICC-01/04-01/10-153 (15 May 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Second Defence Request to Convene a Status Conference for the Purpose of Obtaining Cooperation from the Democratic Republic of the Congo) ICC-01/04-01/10-219 (7 June 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Request for Reclassification) ICC-01/04-01/10-284 (14 July 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Challenge to the Jurisdiction of the Court) ICC-01/04-01/10-290 (19 July 2011); 272-3
- Prosecutor v. Callixte Mbarushimana* (Order to the Prosecutor Requesting Observations on the 'Defence Challenge to the Jurisdiction of the Court') ICC-01/04-01/10-297 (20 July 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Request for Leave to Reply to the Prosecution's Response to the Defence Challenge to the Jurisdiction of the Court

- and Defence Request to Adduce Oral Testimony) ICC-01/04-01/10-323 (1 August 2011); 203, 269
- Prosecutor v. Callixte Mbarushimana* (Decision on the Schedule of the Confirmation Hearing) ICC-01/04-01/10-356 (12 August 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Defence Request for the Compliance of the Democratic Republic of the Congo with ICC-01/04-01/10-56-Conf-Exp) ICC-01/04-01/10-123 (27 April 2011); 273
- Prosecutor v. Callixte Mbarushimana* (Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana) ICC-01/04-01/10-1 (11 October 2010); 197, 200, 204, 269
- Prosecutor v. Callixte Mbarushimana* (Decision on the 'Defence Challenge to the Jurisdiction of the Court') ICC-01/04-01/10-451 (26 October 2011); 63, 75, 84, 96, 196-7, 199-200, 203, 243-4, 254, 264-5, 270, 272, 275, 283
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) ICC-01/09-02/11-1 (8 March 2011); 252
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the 'Prosecution's Application Requesting Disclosure after a Final Resolution of the Government of Kenya's Admissibility Challenge' and Establishing a Calendar for Disclosure Between the Parties) ICC-01/09-02/11-64 (20 April 2011); 267, 269
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the 'Request for an Oral Hearing pursuant to Rule 156(3)') ICC-01/09-02/11-251 (17 August 2011); 279
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing) ICC-01/09-02/11-272 (30 August 2011); 262-3
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Schedule of the Confirmation of Charges Hearing) ICC-01/09-02/11-321 (13 September 2011); 249, 273
- Prosecutor v. Francis Kirimi Muthaura et al.* (Submissions on Jurisdiction on Behalf of Uhuru Kenyatta) ICC-01/09-02/11-339 (19 September 2011); 272
- Prosecutor v. Francis Kirimi Muthaura et al.* (Transcript, Confirmation of Charges Hearing) (Transcript) ICC-01/09-02/11-T-4-ENG ET (21 September 2011); 254, 273
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute), Dissenting Opinion by Judge Hans-Peter Kaul, ICC-01/09-02/11-382-Red (26 January 2012); 247-8, 265
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red (26 January 2012); 243, 245, 248, 265
- Prosecutor v. Francis Kirimi Muthaura et al.* (Directions on the Submission of Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence) ICC-01/09-02/11-394 (2 February 2012); 279

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xxi

- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the ‘Observations on the Directions on the Submission of Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence’) ICC-01/09–02/11–400 (OA 4) (20 February 2012); 281
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Request of Mr Kenyatta and Mr Muthaura for Suspensive Effect) ICC-01/09–02/11–401 (29 February 2012); 278
- Prosecutor v. Francis Kirimi Muthaura et al.* (Decision on the Appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the Decision of Pre-Trial Chamber II of 23 January 2012 Entitled ‘Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute’) ICC-01/09–02/11–425 (OA 4) (24 May 2012); 62, 85, 93, 196, 243, 246, 248, 265–6, 278
- Prosecutor v. William Samoei Ruto et al.* (Decision on the Prosecutor’s Application for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) ICC-01/09–01/11–01 (8 March 2011); 265
- Prosecutor v. William Samoei Ruto et al.* (Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) ICC-01/09–01/11–1 (18 July 2011); 252
- Prosecutor v. William Samoei Ruto et al.* (Decision on the Schedule for the Confirmation of Charges Hearing) ICC-01/09–01/11 (25 August 2011); 263, 273
- Prosecutor v. William Samoei Ruto et al.* (Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber’s Decision on Admissibility’) ICC-01/09–01/11–234 (28 July 2011); 275
- Prosecutor v. William Samoei Ruto et al.* (Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute’) ICC-01/09–01/11 (OA 11–307) (30 August 2011); 168, 186, 199, 250, 253, 256, 258–9
- Prosecutor v. William Samoei Ruto et al.* (Defence Challenge to Jurisdiction, Defence for Mr Ruto and Mr Sang) ICC-01/09–01/11–305 (30 August 2011); 272
- Prosecutor v. William Samoei Ruto et al.* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09–01/11–373 (23 January 2012); 243
- Prosecutor v. William Samoei Ruto et al.* (Directions on the Submission of Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence) ICC-01/09–01/11–383 (2 February 2012); 279
- Prosecutor v. William Samoei Ruto et al.* (Decision on the ‘Observations on the Directions on the Submission of Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence’) ICC-01/09–01/11–390 (20 February 2012); 280

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

xxii

## TABLE OF CASES

- Prosecutor v. William Samoei Ruto et al.* (Decision on the Appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute’) ICC-01/09–01/11–414 (OA 3, OA 4) (24 May 2012); 62, 85, 93, 196, 243, 247
- Situation in the Central African Republic* (Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III) ICC-01/05 (19 January 2005); 97
- Situation in the Republic of Côte d’Ivoire* (Judge Fernández de Gurmendi’s Separate and Partly Dissenting Opinion to the Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire) ICC-02/11–15 (3 October 2011); 271
- Situation in the Republic of Côte d’Ivoire* (Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire) ICC-02/11–14 (3 October 2011); 264, 270–2
- Situation in Darfur* (Decision on Victim Participation in the Appeal of the Office of the Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the Appeals of the Prosecutor and the Office of the Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007) ICC-02/05–138 (18 June 2008); 280
- Situation in the Democratic Republic of the Congo* (Decision Assigning the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I) ICC-01/04 (5 July 2004); 97
- Situation in the Democratic Republic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) ICC-01/04–101-tEN-Corr. (17 January 2006); 250
- Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’) ICC-04–01–169-US-Exp (13 July 2006); 76–7, 84, 88, 165
- Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04–168 (13 July 2006); 35
- Situation in the Democratic Republic of the Congo* (Decision Requesting Clarification on the Prosecutor’s Application under Article 58) ICC-01/04–575 (6 September 2010); 203, 272
- Situation in the Democratic Republic of the Congo* (Prosecution’s Application under Article 58) ICC-01/04–573-US-Exp (20 August 2010); 197
- Situation in the Republic of Kenya* (Decision Requesting Clarification and Additional Information) ICC-01/09–15 (18 February 2010); 272
- Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09–19 (31 March 2010); 37, 66, 84, 96–8, 100, 168, 203, 264, 271–2

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xxiii

*Situation in Uganda* (Decision Assigning the Situation in Uganda to Pre-Trial Chamber II) ICC-02/04 (5 July 2004); 97

*Situation in Uganda* (Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005) ICC-02/04–01/05 (9 March 2006); 84

**International Tribunal of the Law of the Sea**

*M/V Saiga Case (No. 2) (St Vincent v. Guinea)* (Judgment), *International Law Reports* 120 (1999) 143; 8

**European Court of Justice**

Case T-9/04, *AC Treuhand v. Commission* [2008] ECR I-1501; 177

Case C-366, *Air Transport Association of America and Others*, Opinion of Advocate-General Kokott, 6 October 2011; 31

Joined Cases C-628/10 P and C-14/11 P, *Alliance One International, Inc. and Standard Commercial Tobacco Co., Inc. v. European Commission and European Commission v. Alliance One International, Inc. and Others* [2012] 5 CMLR 14; 177

Case T-279/02, *Degussa v. Commission* [2006] ECR II-897; 177

Case C-266/06, *Evonik Degussa v. Commission* [2008] ECR I-00081; 177

Case T-102/96, *Gencor Ltd v. Commission of the European Communities* [1999] ECR II-753; 29, 183, 194

Case T-204/03, *Haladjian Frères SA v. Commission* [2006] ECR-II-3779; 34, 195

Case 48/69, *Imperial Chemical Industries Ltd v. Commission* ('Dyestuffs') [1972] ECR; 29

Case C-106/11, *M. J. Bakker v. Minister van Financiën* [2012] ECR NYP; 34

Case T-1/89, *Rhône-Poulenc SA v. Commission* [1991] ECR II-867; 177

Case C-17/10, *Toshiba Corporation and others v. Úřad pro ochranu hospodářské soutěže* [2012] ECR NYP; 177

Cases C-89, 104, 114, 116, 117, 125–129/85, *Wood Pulp Cases*, *A. Alstrom Osaakeyhtio et al. v. Commission* (Joined Cases) [1988] ECR; 29

**European Court of Human Rights**

*Al-Adsani v. United Kingdom* (App. No. 35763/97) ECHR 21 November 2001; 181

*Al-Saadoon and Mufdhi v. UK* (App. No. 61498/08) ECHR 30 June 2009 (Admissibility Decision); 225

*Aquilina v. Malta* (App. No. 25642/94) ECHR 29 April 1999; 127

*Banković et al. v. Belgium et al.* (App. No. 52207/99) ECHR 2001-XII 335; 234

*Behrami and Behrami v. France* (App. No. 71412/01) and *Saramati v. France, Germany and Norway* (App. No. 78166/01) ECHR 2 May 2007; 234

*C. R. v. United Kingdom*, 21 EHRR 363, 22 November 1995; 125



- Coëme et al. v. Belgium* (App. Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 2000-VII ECHR 75 (Judgment of 22 June 2000); 21, 72, 126
- Cyprus v. Turkey* (App. No. 25781/94) ECHR, Grand Chamber, 10 May 2001; 222
- Demopoulos et al. v. Turkey* (App. No. 46113–99) ECHR, Grand Chamber, 1 March 2010 (Admissibility Decision); 222
- Ilascu v. Moldova and Russia* (App. No. 48787/99) 8 July 2004, ECHR 2004-VII; 234
- Ireland v. United Kingdom* (App. No. 5310/71) ECHR 18 January 1978; 127
- Issa et al. v. Turkey* (App. No. 31821/96) ECHR 16 November 2004; 234
- Isaak v. Turkey* (App. No. 44587/98) ECHR 24 June 2008; 234
- Jorgić v. Germany* (App. No. 74613/01) ECHR 12 July 2007; 72, 126
- Kononov v. Latvia* (App. No. 36376/04) ECHR 17 May 2010; 125
- K.U. v. Finland* (App. No. 2872/02) (Merits and Just Satisfaction) ECHR 2 December 2008; 140
- Loizidou v. Turkey* (App. No. 15318/89) ECHR 23 March 1995; 234
- Öcalan v. Turkey* (App. No. 46221/99) ECHR 12 May 2005; 234
- Ould Dah v. France* (App. No. 13113/03) ECHR 17 March 2009; 125
- Pad and Others v. Turkey* (App. No. 60167/00) ECHR 28 June 2007; 234
- Ramirez Sanchez v. France* (App. No. 28780/95) ECHR 24 June 1996; 234
- Saddam Hussein v. Albania et al.* (App. No. 23276/04) ECHR 14 March 2006 (Admissibility Decision); 225
- Sawoniuk v. United Kingdom* (App. No. 63716/00) ECHR 2001-III, 29 May 2001; 71, 128
- Sigurjonsson v. Iceland* (App. No. 16130/90) Ser. A No. 264; 38
- Sokurenko and Strygun v. Ukraine* (App. Nos. 29458/04, 29465/04) ECHR (Judgment of 20 July 2006); 72, 126
- Sunday Times v. United Kingdom* (App. No. 65387/74) ECHR 26 April 1979, 2 EHRR 245; 125
- Vondas and others v. Greece* (App. No. 43588/06) ECHR 5 February 2009; 236
- Women on Waves et al. v. Portugal* (App. No. 31276/05) ECHR 3 February 2009; 234
- Young, James and Webster v. United Kingdom* (App. No 7601/76; 7806/77) (1981) ECHR Ser. A No. 44; 38
- Z. et al. v. UK* (App. No. 29392/95) ECHR 10 May 2001; 124
- Zand v. Austria* (App. No. 7360/76) ECHR Report of the Commission, 12 October 1978; 126

### European Commission of Human Rights

- G. v. Switzerland* (App. No. 16875/90) ECHR, Commission Decision of 10 October 1990; 127
- Kübli v. Switzerland* (App. No. 17495/90) ECHR, Commission Decision of 2 December 1992; 127



Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

XXV

*R v. Federal Republic of Germany* (App. No. 11506/85) ECHR, Commission Decision of 10 October 1986; 127

*X. v. Austria* (App. No. 4161/69) *Yearbook of the European Commission on Human Rights* (1970); 127

### Inter-American Court of Human Rights

Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants* (concurring opinion of Judge A. A. Cançado Trindade) OC-18/03 (17 September 2003); 165

Inter-American Court of Human Rights, *Fairen Garbi and Solis Corrales* (Preliminary Objections), Judgment (Ser. C) No. 2 (26 June 1987); 63

Inter-American Court of Human Rights, *Ivcher-Bronstein v. Peru*, Judgment (Ser. C) No. 74 (6 February 2001); 126

Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*, Merits, Judgment (Ser. C) No. 33 (17 September 1997); 126

### Inter-American Commission of Human Rights

Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99 (29 September 1999); 234, 237

*Sergio Euden Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), Views of 29 July 1981, 68 ILR 29; 234

### International Military Tribunals

International Military Tribunal (Nuremberg), *Judgment and Sentences* (1 October 1946), reprint. in *American Journal of International Law*, 41 (1947); 87

*US v. Lothar Eisentrager*, 14 *L. Rep. of Trials of War Crim.* (US Military Commission 1948); 3

### Domestic courts

#### *Australia*

*Dow Jones v. Gutnick*, 210 CLR 575 (2002); 134, 150

#### *Belgium*

*Bertchmann v. Société Anonyme des Charbonnages d'Argenteau*, Cour de Cassation [Cass.] [Court of Cassation] 22 ILR 207, 208 (1958) (Belg.); 19

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

xxvi

## TABLE OF CASES

*Erdal v. Council of Ministers*, Arbitragehof [Constitutional Court], Decision No. 73/2005, Oxford Reports on International Law in Domestic Courts, ILDC 9 (BE 2005) (20 April 2005) (Belg.); 70, 74

*Canada*

*Citron v. Zündel*, 175 DLR 512 (1999); 147  
*Libman v. The Queen*, [1985] 2 SCR 178; 34, 106  
*Mugesera v. Canada (Minister of Citizenship and Immigration)* Supreme Court of Canada, 2005 SCC 39, [2005] 2 SCR 9 (28 June 2005); 153–4  
*R. v. Deutsch* [1986] SCR 2; 21  
*R. v. Finta, Canada*, [1989] 82 ILR 425, Judgment (High Court of Justice); 70  
*R. v. Finta*, [1992] 98 ILR 520, Judgment (Can. Ont. CA); 70–1  
*R. v. Finta*, [1994] 104 ILR 284, Judgment (SCC); 70, 164  
*United States v. Lépine* [1994] 1 SCR 286; 34

*Cyprus*

*Tomko v. Republic of Cyprus per the Department of Population Register and Immigration of the Ministry of Interior*, Case No. 709/2006 (Judgment) 20 June 2007 (Supreme Court of Cyprus), reported in Oxford Reports on International Law, ILDC 834 (CY 2007); 222

*France*

Cour d'Appel de Paris, Judgment of 17 March 2004, 11ème Chambre, Chambre des Appels Correctionnels, No. 03/01520; 148, 149  
*In Re Feld and Newman*, Cour de Cassation, 25 May 1967, 48 ILR 88; 18  
*LICRA et Union des 'Etudiants Juifs de France v. Yahoo! Inc. et Yahoo!.Fr*, Tribunal de Grande Instance de Paris, Ordonnance de référé du 22 mai 2000; 148  
*LICRA et Union des 'Etudiants Juifs de France v. Yahoo! Inc. et Yahoo!.Fr*, Tribunal de Grande Instance de Paris, Ordonnance de référé du 20 novembre 2000; 134, 148  
*Timothy K. et Yahoo! c. Ministère Public*, Judgement of 17 March 2004 11ème Chambre, Chambre des Appels Correctionnels, No. 03/01520; 148, 149  
*Ministère Public c. Weiler*, Case No. 0718523043, Trib. Gr. Inst. Paris, 17ème Chambre, 3 March 2011; 150  
Tribunal de Grande Instance de Paris, Judgement of 11 February 2003, 17ème Chambre, Chambre de la Presse, No. 0104305259; 148

*Germany*

Control Commission Court of Appeal in Germany (British Zone), *Director of Prosecutions v. Hobbs*, 17 ILR 138 (27 April 1950); 22

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xxvii

*In re Jorgić*, Federal Republic of Germany, Federal Constitutional Court (BVerfG),  
12 December 2000, 135 ILR 152; 34, 36

*In re Töben*, Decision of the District Court of Mannheim, Urt. v. 10.11.1999 – 5 KLs  
503 Js 9551/99 (1999); 146, 149

*In re Töben*, Decision of the Federal Court Court of Justice (BGH), Urt. v. 12.12.2000 –  
1 StR 184/00, reported in 54(8) NJW (2001); 133, 146

*India*

*Mobarik Ali Ahmed v. State of Bombay*, AIR 1957, SC 857; 14

*Israel*

Cr. A. 4596/05, *The State of Israel v. Ze'ev Rosenstein*, Appeal Judgment (30 November  
2005), reported in Oxford Reports on International Law in Domestic Courts,  
*International Law of Domestic Courts* (IL 2005) 159; 34

*Italy*

*In re Condorelli*, 19 ILR 1952 (5 July 1952); 229

*Lozano v. Italy*, Case No. 33171/2008. Appeal Judgment, reported in Oxford Reports in  
International Law, ILDC 1085 (IT 2008) (Court of Cassation, It.) (Rapporteur Felur  
P. Palchetti); 239

*In re Moshe*, Italian Court of Cassation, Judgment No. 4741, Section V (Pen.)  
(27 December 2000); 150

*In re Scarpato*, 18 ILR 625, 626–627 (1951) (Court of Cassation, Italy); 214

*Japan*

*Chin Chi-Huo (alias Ken Honda) v. Japan*, 26 ILR 704 (1958-II) (1 June 1955); 214

*Kenya*

*Musisi v. Republic* [1969] EA 493, (1969), 48 ILR 91 (HCK) (Kenya); 22

*Netherlands*

Appeal in Cassation on the Interests of the Law, Supreme Court of the Netherlands  
(18 September 2001); 70

*R. Wijngaarde and R.A. Hoost v. Desire Delano Bouterse*, Court of Appeal of Amsterdam  
(20 November 2000), *Netherlands Yearbook of International Law*, 32 (2001); 70

*Namibia*

*S v. Mwinga*, [1994] NACH 10; 20

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

xxviii

## TABLE OF CASES

*New Zealand**R. v. Misić*, [2001] 3 New Zealand Law Reports 1 (CA); 138*Solicitor-General v. Reid* [1997] 3 NZLR 617, 631–632 (1997) (CA) (NZ); 34, 106*Singapore**Lim Siong Khee v. Public Prosecutor*, [2001] SGDC 32 (Singapore District Court); 138*Public Prosecutor v. Muhammad Nuzaihan bin Kamal Luddin*, [2000] SLR 34 (High Court of Singapore); 136*Public Prosecutor v. Taw Cheng Kong*, 2 SLR 410, Singapore Court of Appeal (1998); 31*South Africa**American Soda Ash Corp. & CHC Global (Pty) Ltd v. Competition Commission of South Africa et al.*, Case 12/CAC/DEC01, Appeal to Competition Appeal Court (25 October 2002), reported in *Oxford Reports on International Law in Domestic Courts*, *International Law in Domestic Courts* (ZA 2002) 493; 30, 195*Spain**In re Augusto Pinochet*, Audiencia Nacional, 119 ILR 331; 105*Switzerland**Evgeny Adamov v. Federal Office of Justice* (Judgment) Federal Tribunal (Switz.), ATF 132 II 81, ILDC 339 (CH 2005), 22 December 2005; 36*Nović v. Public Prosecutor of the Canton of Basel-Stadt*, Cour de Cassation [Cass.] [Court of Cassation], 22 ILR 515 (1955); 19*United Kingdom of Great Britain and Northern Ireland**County Council of Fermanagh v. Farrendon*, 2 ILR 109, 109–110 (1933); 14*Norris v. Government of the United States and Others*, [2008] UKHL 16; 174*R. v. Duncan Wallace Smith* [1996] (No. 2), 2Cr. App. R 1; 15*R. v. Governor of Brixton Prison, ex parte Levin*, [1997] QB 65 (Court of Appeals); 133*R. v. Latif*, *R. v. Shahzad*, [1996] 1WLR 104 347 1 All ER 353; 20*R. v. Smith (Wallace Duncan)* (No. 4), [2004] 2 Cr. App. R 17; 15, 150–1*R. v. Sheppard and Whittle*, [2010] EWCA Crim. 65 (Court of Appeal, Criminal Division, England) (29 January 2010); 133, 150–1, 158*R. v. Whittle*, *R. v. Brammar*, *R. v. Allyson*, [2008] EWCA Crim. 2560; 174

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Frontmatter

[More information](#)

## TABLE OF CASES

xxix

*Rio Tinto Zinc Corp'n v. Westinghouse*, [1978] AC 547; 173*Somchai Liangsiripraesert v. US*, (1990) 29 ILM 1390; 14, 20, 33, 182, 207*United States**Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3rd Cir., 2011); 193*Autocephalous Greek-Orthodox Church of Cyprus and Republic of Cyprus v. Goldberg et al.*, 917 F.2d 278, 293 (7th Cir. 24 October 1990); 222*Centerprise International Ltd v. Micron et al. (in re Dynamic Random Access Memory Antitrust Litigation)*, F.Suppl. 2d, 2006 WL 515629 (ND Cal., 2006); 193*F. Hoffman-LaRoche et al. v. Empargan SA*, 542 US 155 (2004); 190–1, 194

H R Rep. No. 97–686 (1982), reprint. 1982 USCCAN 2487; 193

*Hartford Fire Ins. Co. v. California*, 509 US 764, 796 (1993); 27–8, 179, 191, 193*In re Grand Jury Subpoena Duces Tecum Addressed to Canadian Int'l Paper Co.* 72 F.Suppl. 1013 (SDNY, 1947); 27*Kruman et al. v. Christie's International et al.*, 284 F.3d 384, 390 (2nd Cir., 2002); 25, 28, 182*Laker Airways Ltd v. Sabena*, 731 F.2d 909, 923 (DC Cir., 1984); 30, 184*Mannington Mills v. Congoleum Corporation*, 595 F.2d 1287, 1297–8 (3rd Cir., 1979); 27*Minn-Chem., Inc. et al. v. Agrium, Inc. et al.*, 683 F.3d 845 (7th Cir., 2012); 190–1, 193–4*Minnesota v. Granite Gate Resorts, Inc.* (1997) 568 NW 2d 715 (Minn. Ct. App.); 146*National Bank of Canada v. Interbank Card Association*, 666 F.2d 6, 8 (2nd Cir., 1981); 28*Re Lo Dolce*, 106 F.Suppl. 455 (1952); 217*State v. Hall*, 114 NC 909, 19 SE 602 (1894); 14*Strassheim v. Daily*, 221 US 280, 285 (1911); 14, 17, 178*Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir., 1976); 27*United Phosphorus Ltd v. Angus Chemical Co.*, 131 F.Suppl. 2d 1003 (ND Ill., 2001); 193*United States v. Aluminium Company of America (ALCOA) et al.*, 148 F.2d 416, 443 (2nd Cir., 1945); 25, 28, 184, 190–2*United States v. Anderson*, 326 F.3d 1319 (11th Cir., 2003); 191*United States v. AU Optronics Corporation et al. (In re TFT–LCD (Flat Panel) Antitrust Litigation)*, F.Suppl. 2d, 2011 WL 1464858 (ND Cal. 2011); 180, 191–2*United States v. AU Optronics Corporation et al.* (United States' Sentencing Memorandum) Case No. CR-09–0110 SI, United States District Court (ND Cal., San Francisco Division, 20 September 2012); 191*United States v. Davis*, 905 F.2d 245 (9th Cir., 1990); 20, 128, 182*United States v. Hsuan Bin Chen et al.*, F.Suppl. 2d, 2011 WL 332713 (ND Cal., 2011); 180, 191–2*United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir., 2004); 191, 193–4

*United States v. Nippon Paper Industries Co. Ltd et al.*, 109 F.3d 1 (1st Cir., 1997); 166, 178–9, 191–2, 206  
*United States v. Nippon Paper Industries Co. Ltd, et al.*, 118 S. Ct. 1116 (1998); 180  
*United States v. Nippon Paper Industries Co. Ltd*, 62 F.Suppl. 2d 173 (D. Mass., 1999); 179  
*US v. Caicedo*, 47 F.3d 370, 372 (9th Circ., 1995); 128  
*US v. Ian Norris*, 753 F.Suppl. 2d 492 (ED Pa., 2010); 174  
*US v. Imperial Chemical Industries*, 105 F.Suppl. 215 (1952); 26  
*US v. Kahn*, 35 F.3d 426 (9th Circ., 1994); 128  
*US v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Circ., 1998); 128  
*US v. List (The Hostages Case)*, 8 Law Reports of Trials of Major War Criminals (1949); 214  
*US v. Peterson*, 812 F.2d 486, 493 (9th Cir., 1987); 20, 128  
*US v. The Watchmakers of Switzerland Information Center*, 133 F.Suppl. 40 (SDNY, 1955), *reargument*, 134 F.Suppl. 710 (SDNY, 1955), *dismissed* [1963] *Trade Cases* (CCH) 600 (SDNY, 1962); 26  
*US v. Yousef*, 327 F.3d 56, 112 (2nd Cir., 2003); 20, 86, 128  
*Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LLP*, 540 US 398 (2004); 172  
*Westinghouse Electric Corp. Uranium Contracts Litigation, Subpoena Duces Tecum*, 563 F.2d. 992 (10th Circ., 1977); 26  
*Westinghouse Electric Corp. v. Rio Algom Ltd*, 617 F.2d 1248 (7th Circ., 1980); 26  
*Westinghouse Electric Corp. v. Rio Algom Ltd*, 480 F.Suppl. 1138 (1979); 30  
*Yahoo! Inc. v. LICRA and UEJF*, 169 F. Suppl. 2d 1181, 1192, 1194 (ND Cal., 2001); 149  
*Yahoo! v. LICRA*, 433 F.3d 1199 (CA 9th Circ., 2006); 149

*Zimbabwe*

*S. v. Mharapara*, 1985 (2) ZLR 211 (SC) 84 ILR 1, 17 Supreme Court of Zimbabwe, Judgment of 17 October 1985; 31, 182, 184