INT'L LAW IN BRIEF

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Resolutions, Declarations, and Other Documents

John Bellinger - Remarks at the Law of the Sea Institute: United States and the Law of the Sea Convention (Nov. 3, 2008)

Click here for document. *(Approximately 5 pages)*

In a speech before the Law of the Sea Institute, John Bellinger identified a variety of reasons why the U.S. should join the Law of the Sea Convention. He remarked that his experience and work on the Convention have led him to the clear conclusion "that joining the Convention is the right thing to do."

Before addressing the biggest criticisms against joining the Convention, Bellinger listed "several important benefits" that the U.S. would realize if it decided to join: 1) U.S. **national security interest** would be advanced because accession "guarantees our military and commercial vessels – both ships and aircraft – navigational rights and freedoms throughout the world's oceans, including the right of innocent passage through and over foreign territorial seas and international straits;" 2) U.S. **economic interest** would benefit since the Convention "would codify U.S. sovereign rights over all the resources in the ocean, and on and under the ocean floor, in a 200-nautical mile Exclusive Economic Zone off our coastline;" 3) **marine environment protection**, which Bellinger calls the "principal benefit of the Convention," is also covered in the treaty. In addition to these "substantive provisions," the U.S. would be able to assert its influence in this area as a Member State rather

than continuing its limited role in the Law of the Sea developments because it has still failed to adopt the treaty.

Bellinger also mentioned that the 1994 Implementing Agreement removed “the main stumbling block to accession.” Currently, the hotly contested deep seabed mining chapter, which included provisions that required that certain technologies be transferred between Member States and which also gave the U.S. an “insufficient...influence in decision-making,” has been changed to benefit the U.S. interests.

Before concluding that the U.S. must “take its seat at the table with the other parties to the Convention as they make decisions affecting the world’s oceans” as soon as possible, Bellinger addressed some of the biggest criticisms. One issue that has been brought up on numerous occasions is the dispute settlement process set forth by the treaty. According to Bellinger, however, the “opponents’ concerns about dispute settlement and other aspects of the Convention are either unfounded or overblown.”

It will be interesting to see whether the Law of the Sea Treaty will gain support with the next administration. Will it continue to be “LOST” somewhere in the Senate or will Bellinger’s hopes come true? Bellinger notes that “[i]n their efforts to block accession, opponents of the Convention have relied on arguments and assertions that were – to be blunt – inaccurate, outdated, or incomplete. As many of you know, opponents invariably refer to the Convention using the acronym “LOST” – Law of the Sea Treaty – in contrast to proponents’ preference to highlight its many benefits by referring to it as “LOTS” – Law of the Sea."

Amnesty International – Israel and the Occupied Palestinian Territories (OPT): Briefing to the Committee Against Torture (September 2008)

Click here for document. *(Approximately 29 pages)*

Amnesty International (AI) submitted a report in anticipation of the upcoming fourth periodic report by Israel to the Committee against Torture on its implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention). In this report, AI expressed “concerns about Israel’s failure to implement the Convention against Torture particularly in the Occupied Palestinian Territories (OPT), and the intensification of measures amounting to cruel, inhuman or degrading treatment or punishment against Palestinians through indefinite administrative detention without trial, prolonged incommunicado detention, demolitions of homes, gross restrictions on freedom of movement, and denial of necessary medical care.” In addition, the report criticized the continued policy by the government to send asylum-seekers and migrants to states where they may be subject to torture.

According to the report, Israel has persistently made the claim that the Convention and other human rights treaty obligations do not apply in the OPT, a claim AI states has been “rejected by all the UN treaty bodies and by the International Court of Justice.” In fact, according to AI, “Israeli authorities continue to deny the people of the OPT the human rights enshrined in the treaties Israel has ratified.”

The AI report enumerated various acts allegedly practiced by the Israeli authorities that are in violation of the Convention, including: torture of Palestinian detainees (Articles 1 and 2), use of torture against non-detainees (Articles 1, 2, 12, 13, 14 and 16), prolonged and indefinite detention of Palestinians under the Unlawful Combatants Law (Article 16), failure to proscribe torture (Article 4), the continued failure to prosecute those who have committed acts prohibited by the Convention (Articles 6, 13 and 14), demolition of Palestinian homes (Article 16), restriction on freedom of movement (Article 16), denial of access to medical care (Article 16) and forcible returns of individuals to countries known to use torture (Article 3).

The Israeli report which the AI criticizes in this brief is a response by the Israeli government to the Committee against Torture 2001 recommendations, but according to AI “at least 10 of the Committee’s 11 recommendations – namely those contained in lines 7(a) to 7(g) and 7(i) to 7(k) of the document – have not been implemented. On the contrary, the Israeli authorities have intensified actions criticised by the Committee.”

Judicial and Similar Proceedings

Ioan Micula et al. v. Romania (ICSID Sep. 24, 2008)

Click here for document. *(Approximately 50 pages)*

Two individuals and three corporate claimants filed a request for arbitration on July 28, 2005 with the International Centre for Settlement of Investment Disputes (ICSID), invoking provisions of the Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (BIT) seeking, *inter alia* "reinstitution of the legal framework as in force at the time of the approval of the Government Emergency Ordinance no. 24/1998 [business incentives ordinance], alternatively adequate compensation for the losses suffered up to the amount of EUR 450,000,000, plus lost profits and any further losses suffered by Claimants as a consequence of Respondent's actions described above." They also asked the Tribunal for costs and expanses, including costs of the proceedings, with interest.

The source of the dispute is the creation of several investment incentives by the Romanian government for the development of specific regions in Romania that were declared "disfavored," and the subsequent "partial withdrawal or amendment of those incentives." The Claimants allege that said incentives were revoked or limited over a period of time resulting in losses for the Claimants. The Respondent replied that the revocation/limitation of the incentives was necessary because they were in conflict with European law "and consequently Romania had to make amendments to [them]." Furthermore, Romania challenged the allegation that the Claimants had suffered actual loss and declared that their "claims [were] hypothetical and thus inadmissible." The most notable argument made by Romania, however, did not focus on the investment itself or the provisions of the BIT but rather on the nationality of one the Claimants. Romania argued that one of the Claimants, a former citizen of Romania, had failed to establish the diversity of nationality requirement under Article 25 of the ICSID Convention.

The tribunal reviewed the evidence presented by both sides on this issue and held that Romania had failed to demonstrate that "there was convincing and decisive evidence that [Claimant's] acquisition of Swedish nationality was fraudulent or at least resulted from a material error." Furthermore, the tribunal held that the *Nottebohm* test of genuine connection (Nottebohm (Lichtenstein v. Guatemala), 18 November 1953, [1955] ICJ Reports 111)), which is used to determine the effective nationality of a party, was not applicable here, and that in cases where a party has only one nationality "the test...is higher than in the cases of dual nationality and the use of the test should be limited to exceptional circumstances."

As to the hypothetical nature of the harm suffered, the tribunal held that while at this juncture it was not necessary "to establish...whether the incentives as such are considered investments capable of expropriation,...investments do include income expectations and such income will of necessity be less if an investor is deprived of incentives." In sum, the tribunal dismissed all the objections by Romania.

EM v. Secretary of State for the Home Department (House of Lords Oct. 22, 2008)

Click here for document. *(Approximately 29 pages)*

The House of Lords upheld the appeal of a mother who challenged her removal to Lebanon based on Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), claiming that such removal would result in the "flagrant denial of her right to family life." In particular, the House of Lords held that the removal of a foreign national from the United Kingdom was in violation with the United Kingdom's obligations under Article 8 of the ECHR, if such removal amounted to a flagrant breach of the person's right to respect for family life by effectively denying or nullifying that right in the receiving country.

The issue in this case was whether the plaintiff, a mother living with her son in the U.K., had the right to remain in the U.K. because "she and her son would run a real risk of a flagrant denial of the right to respect for their family life guaranteed to her by [the ECHR]" if they were removed to Lebanon. According to the facts of the case, the plaintiff came to the U.K. as a fugitive from Shari'a law, which prescribes that a child's custody passes by force of law to his father or another male member of his family as soon as the child reaches the age of seven. There is no legal way for a mother to retain custody of the child "because the law dictates that a mother has no right to the custody of her child after that age." While she might be able to obtain visitation rights, and even this is doubtful, "under no circumstances would his custody remain with her."

In finding in favor of the plaintiff and grating her leave to appeal, the House of Lords analogized this case to that of political dissidents from Uzbekistan, who claimed that their right to a fair trial would be denied if they were extradited. While the House of Lords was sympathetic to similarly situated plaintiffs and through its holding broadened the applicability of Article 8 of the ECHR, it held that in the end "[e]verything depends on the extent to which responsibility can be placed on the Contracting States." Other potential plaintiffs must remember that

Contracting States "did not undertake to guarantee to men and women throughout the world the enjoyment without discrimination of the rights set out in the Convention or in any other international human rights instrument. Nor did they undertake to alleviate religious and cultural differences between their own laws and the family law of an alien's country of origin, however extreme their effects might seem to be on a family relationship."

To ascertain U.K. obligations under Article 8, the House of Lords reviewed the jurisprudence of the European Court of Human Rights regarding the removal of individuals claiming certain violation of their ECHR rights in the receiving country. This analysis led to the discussion of the landmark decision *Soering v United Kingdom* (1989), wherein the Strasbourg court determined the standard of proof required ("real risk") in cases alleging potential violation of Article 3 ECHR(right not to be subjected to torture or to inhuman or degrading treatment or punishment) in extradition cases. The difficulty of applying the *Soering* test to the facts in the case lay mostly in the violation alleged, Article 8: "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for existing extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment...The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown."

While the House of Lords was hesitant to question the sensibleness of Shari'a law with respect to child custody, a law "which prevails in many countries, reflecting... the religious and cultural tradition of those countries," it nonetheless held that "article 8 rights would be flagrantly violated if she were removed to Lebanon."

Al Haramain Islamic Foundation, Inc. et al. v. U.S. et al. (D. Or. Nov. 6, 2008)

Click here for document. *(Approximately 29 pages)*

Al Haramain Islamic Foundation, Inc. (AHIF-Oregon) and Multicultural Association of Southern Oregon (MCASO) brought suit against the United States Department of the Treasury, the Office of Foreign Assets Control (OFAC), the United States Department of Justice, and individuals working for said agencies, challenging AHIF-Oregon's designation as a terrorist organization and the resultant freezing of its assets.

The Plaintiffs' allegations are centered around the President's actions under the International Emergency Economic Powers Act (IEEPA), which gives the President authority to declare a national emergency to "deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States" (50 U.S.C. § 1701(a)). A threat is defined as any threat to "the national security, foreign policy, or economy of the United States." Once a national emergency has been declared, the President may "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." While such further action by the President requires no prior notice or an opportunity to be heard, the President is mandated to report to Congress regarding the reasons for such declaration.

In the aftermath of 9/11, President Bush declared a national emergency and authorized the Secretary of the Treasury to block donations of funds, goods or services "to or for the benefit of" 27 individuals and entities listed in the annex to the executive order. He subsequently reported to Congress giving reasons for his declaration and "delegated authority to the Secretary of Treasury to designate other foreign groups or individuals who have committed or pose a risk of committing acts of terrorism, or who are 'owned or controlled by, or...act for or on behalf of those' entities designated by the President or those subsequently designated by the Secretary of Treasury." In addition, President Bush also "delegated authority to the Secretary of Treasury to designate entities who 'assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons' designated by the President or by the Secretary of Treasury, or for being 'otherwise associated' with a designated entity." The President also empowered the "Secretary of the Treasury to issue regulations to implement the executive order and to redelegate those functions if necessary." According to OFAC regulations, once an entity has been designated under the designation process described, the entity "may seek a license to engage in any transaction involving blocked property...and an 'administrative reconsideration' of its designation."

The Oregon District Court held that OFAC redesignation of AHIF-Oregon was rational and supported by the administrative record. Furthermore, the OFAC's administrative record keeping and the decision to keep classified record secret did not violate either the Administrative Procedures Act or the Due Process clause. Furthermore, the Court held that the International IEEPA authorizes the government to sanction AHIF-Oregon. The most interesting part of the decision, however, is the Court's holding that the Plaintiffs' due process right was violated because adequate notice prior to designating the agency was not given and "that the blocking order constitute[d] a seizure for purposes of the Fourth Amendment and, unless the government's actions were reasonable," was in violation of Plaintiff's Fourth Amendment rights.

Yasin Muhammed Basardh v. Gates (D.C. Cir. Nov. 4, 2008)

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The D.C. Circuit Court held that Yasin Muhammed Basardh, a detainee at Guantanamo Bay, lost his ability to pursue the legality of his detention in two separate courts. According to the decision, "there is a high probability that a consequence of Boumediene's striking down the legislative bar against habeas jurisdiction is that the direct judicial review provision of the Detainee Treatment Act [DTA] fell as well." The Court tried to reconcile its conclusion with the clear statement by the Supreme Court that both venues "remain intact" by adding that "[w]hatever the Court intended by this remark, it could not have meant to decide whether the direct review provision fell [since] [n]one of the parties argued the point, the issue was not before the Court, the *Boumediene* opinion cited none of the cases dealing with severability and the Court did not purport to engage in severability analysis."

Basardh sought review of the determination by the Combatant Status Review Tribunal that he is an enemy combatant by initiating two different actions to challenge the Tribunal's determination: one in the form of a petition for a writ of habeas corpus in the District Court and a petition for direct review pursuant to DTA § 1005(e)(2). The present holding limits Basardh's options and allows him only one avenue to pursue his habeas challenge: U.S. District Court. The language of the opinion seems rather hesitant but the conclusion is clear: "Now that *Boumediene* has restored habeas jurisdiction, the original reasons for direct review have vanished. Since the direct review provision can no longer 'function in a *manner* consistent with the intent of Congress,' *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in original), it too must fall."

While the decision only grants the government's motion to hold the case in abeyance pending the conclusion of Basardh's habeas proceedings, it still has precedential authority.

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