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INT'L LAW IN BRIEF

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Resolutions, Declarations, and Other Documents

- [U.S.-Russia Statement on Nuclear Arms \(April 1, 2009\)](#)

[Click here](#) for document (approximately 2 pages)

The Russian President Dmitry Medvedev and U.S. President Barack Obama issued a joint statement on nuclear arms, resolving “to work together to strengthen strategic stability, international security, and jointly meet contemporary global challenges, while also addressing disagreements openly and honestly in a spirit of mutual respect and acknowledgment of each others perspective.”

The statement discusses broad goals aimed at overcoming disagreements, especially with respect to missile deployment, an issue that has led to much controversy between the two governments.

Their concluding remarks appear very hopeful and aspirational, especially given recent press statements by the Russian government criticizing the U.S. decision to deploy missiles in Poland and the Czech Republic:

We, the leaders of Russia and the United States, are ready to move beyond Cold War mentalities and chart a fresh start in relations between our two countries. In just a few months we have worked hard to establish a new tone in our relations. Now it is time to get down to business and translate our warm words into actual achievements of benefit to Russia, the United States, and all those around the world interested in peace and prosperity.

Time will tell whether the goals set in the statement will in fact lead to more cooperation.

Healthcare Across EU Borders: A Safe Framework (European Committee of the U.K. House of Lords, Feb. 24, 2009)

[Click here](#) for document (approximately 57 pages)

The European Union Committee of the U.K. House of Lords, which reviews EU related documents in anticipation of significant policy changes in Brussels, has issued a report analyzing the recent European Commission proposal for a health care directive. According to the Committee, the report is meant to “examine[] the proposal and consider[] that it is a justified and necessary attempt to codify ten years of European Court of Justice case law.”

In general, the Committee applauded the European Commission's proposal for a directive on patients' rights to cross-border healthcare, stating that “the main rationale for the Directive should be to clarify the application of treaty provisions to health services.” It did, however, caution that any formal legislation had to be carefully monitored once adopted.

International Tribunal for the Law of the Sea Amends Articles 113 and 114 of the Rules of the Tribunal (March 17, 2009)

[Click here](#) for text of the amended Rules (approximately 1 page); [click here](#) for Guidelines (approximately 6 pages)

The International Tribunal for the Law of the Sea has amended articles 113, paragraph 3, and 114, paragraphs 1 and 3, of the Rules of the Tribunal. The amendments will allow the Tribunal “to determine in cases of prompt release of vessels and crews that a bond or other financial security be posted with the Registrar of the Tribunal or with the detaining State.” According to the Tribunal, the primary reason for the amendments “is to facilitate the implementation of the Tribunal's decisions in prompt release proceedings.”

Articles 113, paragraph 3, and 114, paragraphs 1 and 3, as amended, read as follows:

Article 113, paragraph 3:

“Unless the parties agree otherwise, the Tribunal shall determine whether the bond or other financial security shall be posted with the Registrar or with the detaining State.”

Article 114, paragraph 1:

“If the bond or other financial security has been posted with the Registrar, the detaining State shall be promptly notified thereof.”

Article 114, paragraph 3:

“The bond or other financial security shall be endorsed or transmitted, to the extent that it is not required to satisfy the final judgment, award or decision, to the party at whose request the bond or other financial security is issued.”

To facilitate the application of the new language, the Tribunal adopted Guidelines dealing with the posting of a bond or other financial security with the Registrar.

Judicial and Similar Proceedings

Basardh v. Bush (D.D.C. March 31, 2009)

[Click here](#) for District Court decision (approximately 1 page); [click here](#) for the earlier Court of Appeals for the District of Columbia Circuit decision (approximately 9 pages)

United States District Court for the District of Columbia granted the *habeas corpus* petition filed by Yasin Muhammed Basardh, a national of Yemen currently detained in Guantanamo Bay, and ordered the government “to take all necessary and appropriate diplomatic steps to facilitate the release of [the] petitioner.”

On November 4, 2008, the Court of Appeals for the District of Columbia Circuit granted the government’s motion to hold Basardh’s petition, seeking direct review of the Combatant Status Review Tribunal’s determination of his enemy combatant status, filed pursuant to Detainee Treatment Act § 1005(e)(2), in abeyance pending the conclusion of Basardh’s habeas proceedings in the district court. The Court of Appeals held that “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 fell as well.”

El-Shifa Pharmaceutical Industries Co. v. U.S. (D.C. Cir. March 27, 2009)

[Click here](#) for document (approximately 26 pages)

The Court of Appeals for the District of Columbia Circuit affirmed the district court’s dismissal of the pharmaceutical company’s claims stemming from a 1998 missile strike ordered by then President Clinton on the suspicion that the plant was “connected to the terrorist activities of Osama bin Laden.” The Court held that the claim presented a nonjusticiable political question.

According to the decision, the facts are as follows: In August 1998, a terrorist network led by Osama bin Laden bombed two American embassies in Kenya and Tanzania. As a response, President Clinton ordered a missile strike against the plaintiffs’ pharmaceutical plant in Sudan. The plaintiffs sued the United States, “challenging several allegedly defamatory statements made by senior executive branch officials justifying the strike as well as the government’s failure to compensate them for the destruction of the plant.” While the President, supported by high ranking officials, justified his actions, plaintiffs claimed that “the Clinton Administration was wrong on all counts about its justifications for striking the plant.” Eventually the Administration “learned that their initial justifications for the attack were false, at which time the Clinton Administration officials offered a new explanation that portrayed Idris, the actual owner of the plant, as a friend and supporter of terrorists.”

Plaintiffs lodged several unsuccessful suits against the government, seeking at least \$50 million in damages for the government’s actions. First, they commenced an action in the United States Court of Federal Claims “seeking \$50 million as just compensation under the Takings Clause of the Constitution.” However, the court dismissed the suit as nonjusticiable under the political question doctrine and the United States Court of Appeals for the Federal Circuit affirmed. In addition, plaintiffs filed an administrative claim with the Central Intelligence Agency (CIA) under the Federal Tort Claims Act (FTCA), “seeking compensation for the destruction of the plant as well as a retraction of the allegedly defamatory statements about El-Shifa and Idris.” The CIA denied the plaintiffs’ claim, whereupon plaintiffs commenced this case against the United States under the FTCA “seeking at least \$50 million in damages for the government’s alleged negligence and trespass in carrying out the attack.” In addition to the FTCA action, plaintiffs also “sought declaratory judgments that the statements linking them to ‘Osama bin Laden, international terrorist organizations and the production of chemical weapons’ were false and

that the government's refusal to compensate them for the attack violated the law of nations." The government filed a motion to dismiss and the district court agreed, holding that the court "lack[ed] . . . subject matter jurisdiction," to hear the case and that the claim "likely present[ed] a nonjusticiable political question." The plaintiffs then filed this appeal, "challeng[ing] only the dismissal of their claims for equitable relief for defamation and under the law of nations."

The Court sided with the government, holding that "courts are not a forum for second-guessing the merits of foreign policy and national security decisions textually committed to the political branches." And while "plaintiffs attempt to distance their law of nations and defamation claims from the nonjusticiable question of why the President ordered the missile strike, both claims nonetheless present questions '*inextricably intertwined*' with the underlying decision to attack the El-Shifa pharmaceutical plant" (italics added).

King v. Cessna Aircraft (11th Cir. March 27, 2009)

[Click here](#) for document (approximately 19 pages)

The plaintiffs are personal representatives of individuals killed as a result of an airplane accident that occurred in Italy in 2001. All but the King family (King plaintiffs), personal representatives of Jessica King, a U.S. citizen, are Europeans. King plaintiffs filed a complaint against Cessna Aircraft Company (Cessna) in the Southern District of Florida. The 69 European plaintiffs also instituted an action against Cessna, and the two cases were eventually consolidated.

In 2005, the district court granted in part Cessna's motion to dismiss the European plaintiffs' complaint on *forum non conveniens* grounds, denied the motion to dismiss with respect to the King plaintiffs, but stayed that case pending resolution of Italian disputes relating to the European plaintiffs. All plaintiffs appealed. The Court of Appeals vacated the lower court's decision and remanded, "instruct[ing] the district court to consider whether, knowing 'it could not avoid dual proceedings by staying the King case, it might have dismissed all of the plaintiffs, including King, or allowed all of the plaintiffs to proceed here, or perhaps pursued some other avenue.'" The lower court again dismissed the European plaintiffs and allowed the King plaintiffs to proceed "for the reasons it previously gave."

On this second appeal, the European Plaintiffs argued that "majority of them are from countries having bilateral treaties with the United States that accord them 'no less favorable' access to U.S. courts to redress injuries caused by American actors." However, the Court of Appeals rejected this broad interpretation of treaty language, holding instead that "the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience."

Commission v. Greece (E.C.J. March 26, 2009)

[Click here](#) for document (approximately 5 pages)

The European Court of Justice held the Greek Civil and Military Pensions Code, differentiating between men and women with respect to pensionable age and minimum length of service required for benefits, incompatible with community law.

The Commission filed a case with the Court seeking a declaration that the Greek Civil and Military Pensions Code was in violation of the principle of equal treatment because it created a legal environment less favorable to men than to women.

Greece did not dispute the differential treatment created by the Code, but instead argued that the Greek pension system was a statutory social security scheme, which was beyond the scope of the Treaty. Furthermore, Greece argued that the Code attempted to "compensate for the disadvantages suffered by women because of the shorter duration of their working life."

The Court sided with the Commission, holding that all Member States had to ensure that men and women receive equal pay for equal work. The Court defined the term "pay" to include any wage or salary received by a

worker directly or indirectly, including benefits paid under a pension scheme. While the Court did not rule out governmental programs meant to offset the disadvantages faced by female workers, the pension scheme at hand, although seemingly meant to assist women, disfavored men in similar situations.

Gottfried Heinrich (E.C.J. March 10, 2009)

[Click here](#) for document (approximately 5 pages)

The European Court of Justice held that a Commission regulation, not published in the Official Journal of the European Union, has “no binding force in so far as it seeks to impose obligations on individuals.”

The facts of the case are as follows. Mr. Heinrich was not allowed to board an airplane because his carry-on baggage included tennis racquets. Austrian authorities refusing Mr. Heinrich access to the plane found that the “articles [were] prohibited by an unpublished annex to a civil aviation security regulation.” Mr. Heinrich sued the government “seeking a declaration that the measures taken against him were illegal.” The Austrian court, which sided with Mr. Heinrich, holding that “it is impossible for individuals to comply with that regulation, since the annex thereto has not been published in the *Official Journal of the European Union*,” referred two questions to the ECJ:

1. “Do documents within the meaning of Article 2(3) of [Regulation No 1049/2001] include acts which are required to be published in the Official Journal of the European Union pursuant to Article 254 EC?”
2. “Do regulations or parts thereof have binding force if, contrary to the requirement of Article 254(2) EC, they are not published in the Official Journal of the European Union?”

The Court decided to examine only the second question and stated that “under Article 254(2) EC, regulations of the Council and of the Commission are published in the *Official Journal of the European Union* and enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.” Clearly, the Court argued, Article 254(2) mandates that “a Community regulation cannot take effect in law unless it has been published in the *Official Journal of the European Union*.” Since the Regulation annex in question was not published in the *Official Journal of the European Union*, “the measures adapting the list of prohibited goods, in so far as they are set out in that annex, cannot be enforced against individuals.”

Ould Dah v. France (Eu. Ct. H.R. March 30, 2009)

[Click here](#) for decision (in French) (approximately 13 pages); [click here](#) for press statement in English (approximately 2 pages)

In its recent decision to dismiss the case of Ould Dah on the basis that it was manifestly ill-founded, the European Court of Human Rights “reiterated that the prohibition of torture occupied a prominent place in international law and that the prohibition was binding.”

The case centers on the conviction of Ould Dah, a Mauritanian army officer, for acts of torture committed between 1990 and 1991 against prisoners held in Mauritania. Mr. Dah argued that by imposing the sentence amounting to 10 years of imprisonment for alleged acts of torture, France had violated Article 7 of the European Convention on Human Rights (no penalty without law) because he benefited from an amnesty law passed in Mauritania in 1993. The plaintiff also claimed that he could not foresee being prosecuted in France for acts that had taken place in Mauritania. Finally, according to the plaintiff, “torture had not been classified under French law as an autonomous offence at the relevant time and that the provisions of the new Criminal Code had been applied to him retrospectively.”

The Court dismissed the plaintiff’s arguments, “observ[ing] that at the material time the United Nations Convention against Torture of 1984 had already come into force and had been incorporated into French law.” Furthermore, “‘absolute necessity’ of prohibiting and penalising torture thus justified, in the exercise of universal jurisdiction (i.e. the right of States to prosecute the perpetrators of acts of torture committed outside their own jurisdiction), not only that the French courts declared that they had jurisdiction to try the case, but also that they would apply French law. Otherwise, application of the Mauritanian amnesty law, which served merely to grant impunity to the perpetrators of torture, would deprive the universal jurisdiction provided for by the United Nations

Convention of 1984 of its substance.”

As to the claim that torture was not classified as a separate offence at the time the misconduct occurred, the Court found this formality “not decisive: the applicant could in any event be accused and convicted of such acts, particularly as the French courts had not imposed a heavier penalty than the maximum one prescribed by law at the time.”

For these reasons the Court concluded that “the applicant could . . . have reasonably foreseen the risk of being prosecuted and convicted for the acts of torture committed by him between 1990 and 1991” and dismissed his application as manifestly ill-founded.

Briefly Noted

Tribunal for Lebanon Appoints Officials, Adopts Rules (March 25, 2009)

[Click here](#) for United Nations press release (approximately 2 pages)

The United Nations-backed Tribunal for Lebanon announced on March 25, 2009, that it has appointed its main officials and adopted rules of procedures and evidence. The Tribunal, created to try those accused of killing former Lebanese Prime Minister Rafiq Hariri and 22 other individuals, is an independent body located in The Hague.

European Court of Human Rights Documentary

[Click here](#) for clip (approximately 15 minutes long)

For those interested in learning more about the work of the European Court of Human Rights, a film entitled “The Conscience of Europe” intended to describe the Court’s practices and activities, has been made available for the general public.

According to the Court, “[t]he documentary lasts about 15 minutes and may thus be watched in the context of school curricula, for example as part of civics lessons, or by anyone who wishes to know more about the Court, which has monitored compliance with human-rights standards in Europe for the past 50 years.”

The film is available in English, French, and German.

Albania and Croatia Join NATO (April 1, 2009)

[Click here](#) for U.S. Department of State press release (approximately 1 page)

According to the U.S. Department of State press release, Deputy Secretary Steinberg accepted Albania’s and Croatia’s instruments of accession to the North Atlantic Treaty for which the United States is the depositary government.

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