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# INT'L LAW IN BRIEF

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## Resolutions, Declarations, and Other Documents

**Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-led Naval Force (EUNAVFOR) (Mar. 6, 2009)**

[Click here for document](#) (approximately 13 pages)

On March 6, 2009 the European Union and the Government of Kenya signed an Agreement on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the

European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer.

The Agreement, which specifies the types of conditions that must be present before an individual can be transferred to the Kenyan authorities, including adherence to all relevant human rights instruments and guarantees, is the consequence of a November 10, 2008 Joint Action on a European Union military operation to contribute to the prevention and repression of acts of piracy and armed robbery of the coast of Somalia. The November Joint Action was the result of a United Nations Security Council Resolution adopted on June 2, 2008, and “calling upon States to cooperate in determining jurisdiction, and in investigation and prosecution of persons responsible for acts of piracy and armed robbery of the coast of Somalia” (Resolution 1816, which was affirmed by Resolution 1846).

### **Basel Committee on Banking Supervision Final Guidance on Due Diligence and Transparency Regarding Cover Payment Messages Related to Cross-Border Wire Transfers (May 12, 2009)**

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

The Basel Committee on Banking Supervision recently issued a paper on the processing of cross-border wire transfers. According to the Bank for International Settlements official announcement, “[t]his paper provides guidance for situations in which one or more intermediary banks are located in a jurisdiction other than where the bank of the originator and the bank of the beneficiary are located.” The purpose of the report is to “describe[] the supervisory expectations for the information that must be included in payment messages related to cover payments, the various mechanisms that must be used to ensure that complete and accurate information has been included in such messages, and the use that should be made of the information for anti-money laundering and combating the financing of terrorism purposes.”

## **Judicial and Similar Proceedings**

### **Prosecutor v. Mile Mrkšić & Veselin Šljivančanin (I.C.T.Y. May 5, 2009)**

[Click here](#) for decision (approximately 202 pages)

The ICTY Appeals Chamber recently reviewed the appeal of a Trial Chamber decision against Veselin Šljivančanin, a former senior officer of the Yugoslav People’s Army (JNA), and Mile Mrkšić, a JNA colonel. Four of the 21 grounds of appeal were brought by the Prosecution; one of these grounds was sustained, two were granted in part, and one was dismissed. Mrkšić filed eleven and Šljivančanin filed six grounds of appeal, all of which were dismissed by the Appeals Chamber. The Appeals Chamber reversed Šljivančanin’s prior acquittal under Article 5 of the ICTY Statute, finding him guilty of aiding and abetting the murder of prisoners of war, and increased his sentence from five to 17 years imprisonment. The Appeals Chamber also affirmed his guilty verdict for aiding and abetting torture. In the case of Mrkšić, the Appeals Chamber reaffirmed his guilty verdict and the resulting 20- year sentence for aiding and abetting the murder, torture, and the inhumane treatment of prisoners.

According to the facts as summarized in the decision, on November 20, 1991, JNA forces, overseen by the two defendants, loaded buses with individuals from a hospital and transported them to a location where they were severely beaten for several hours. In its judgment rendered in September 2007, the Trial Chamber found that Mrkšić, who “knew that the TOs [Members of the Territorial Defense] and paramilitaries had repeatedly and systematically beaten, tortured and abused the prisoners during the afternoon and was aware of the ‘considerable likelihood’ that the prisoners would be gravely injured and murdered,” nonetheless left “the prisoners at the[ir] mercy”. The Prosecution argued that through his conduct Mrkšić “failed to act effectively to ensure that the prisoners were properly protected” and was therefore guilty of war crimes. The Trial Chamber found Šljivančanin guilty of aiding and abetting torture by failing to secure sufficient JNA guards and ensuring that these prevented the Serb forces from beating the prisoners.

According to the Appeals Chamber, the Trial Chamber’s acquittal of Šljivančanin for aiding and abetting the murder of 194 people was an error. The Appeals Chamber held that “upon learning of the order to withdraw the JNA troops from Mr. Mrkšić ... the only reasonable inference is that Mr. Šljivančanin was aware that the TOs and paramilitaries would likely kill the prisoners of war and that if he failed to act, his omission would assist in the murder of the prisoners.” Furthermore, the Appeals Chamber noted that “Geneva Convention III invests all

agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of their position as agents of that Detaining Power.” As a result, “Šljivančanin was under a duty to protect the prisoners of war ... and his responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed.”

Because the crimes that took place were considered to be extremely cruel and brutal towards prisoners of war, the Appeals Chamber found that the initial five- year sentence was inadequate and increased it to 15 years.

According to the ICTY’s website, “[s]ince its establishment the Tribunal has indicted 161 persons for serious violations of humanitarian law committed on the territory of the former Yugoslavia between 1991 and 2001. Proceedings against 119 have been concluded.”

### **Bernardus Henricus Funnekotter v. Zimbabwe (ICSID Apr. 22, 2009)**

[Click here](#) for decision (approximately 52 pages)

The International Centre for Settlement of Investment Disputes (ICSID) issued an award in *Funnekotter et al. v. Zimbabwe*, finding that Zimbabwe breached its obligations under Article 6(c) of the Netherlands-Zimbabwe Bilateral Investment Treaty (BIT), and ordered Zimbabwe to pay the Claimants € 8,220,000 plus interest in way of compensation for lands expropriated by the Zimbabwean government.

Claimants, Dutch nationals and owners of large commercial farms in Zimbabwe, alleged that “they were deprived of their properties sometime between 2001 and 2003 through invasion of their farms by settlers and veterans of the 1980 war for Zimbabwean independence and/or through various orders taken by the Government of Zimbabwe under the Land Acquisition Act of 1992.” The expropriation of their lands, the Claimants argued, was formalized in 2005 through an amendment to the Zimbabwe Constitution. Claimants never received compensation for the lands taken.

Zimbabwe did not deny the expropriation of the farms. However, it did argue that the land expropriation, which was both *de facto* (settlers were allegedly allowed to claim Claimants’ lands) and *de jure* (laws were passed legalizing the taking by the government of Claimants’ farms), did not amount to breach of Article 6 of the BIT .

Article 6 mandates that “[n]either Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

...

(c) the measures are accompanied by provision of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any free convertible currency accepted by the claimants. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.

The Tribunal, noting that the violation of one of the Article 6 provisions amounts to violation of Article 6 in totality, held that Zimbabwe was in violation by failing to compensate the Claimants for their property. And while the Tribunal acknowledged the difficult situation Zimbabwe was facing in the years the expropriations took place, such conditions did “not exonerate Contracting Parties from their obligations under Article 6 in case of national emergency or riot. It only provides in such a case for further guarantee of equal treatment with nationals of the Contracting Party or nationals of Third Parties.”

The Claimants asked the Tribunal to also consider the lawfulness of the expropriation in order to calculate the amount of damages. Here, the Claimants noted precedent (from the Permanent Court of International Justice and Iran-United States Claims Tribunal) as support for their argument that unlawful expropriation should be distinguished from lawful takings, and that in cases where property is taken unlawfully, a higher award should be given. The Tribunal found that distinctions between lawful and unlawful takings only mattered in cases where there is a possibility of restitution, an alternative both parties here had rejected.

After ruling that Zimbabwe was in breach and that it had to pay compensation, the Tribunal turned to determining the right method of valuation. In the end, the Tribunal held that the “[g]enuine value [of the farms] must be determined on the basis of the market value of the whole farm at the time of expropriation.” Also, with respect to

damages, the Tribunal found that “Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country. It evaluate[d] the damages suffered in this respect for each Claimant at € 20,000”, not the € 40,000 asked for by the Claimants. Rejecting the Claimants’ argument that an additional sum ought to be paid for moral damages, the Tribunal found that these were “already compensated by the allocation of a disturbance indemnity.” Finally, the Tribunal awarded compound interest on the award.

### **K.H. and Others v. Slovakia (Eur. Ct. H.R. Apr. 28, 2009)**

[Click here](#) for Slovakia case (approximately 14 pages)

Recently, the European Court for Human Rights held that Slovakia violated Article 8 (right to respect for private and family life) and Article 6 § 1 (access to courts) of the European Convention on Human Rights (Convention), by refusing the Applicants’ request to make photocopies of their medical records, thus limiting the Applicants’ and their legal representatives’ effective access to the courts. The Court did not find a violation of Article 13 (right to an effective remedy) in combination with Article 8.

According to the facts summarized in the decision, the Applicants are eight female Slovakian nationals of Roma ethnic origin, who during their pregnancies and deliveries had visited gynecological obstetrics departments in two hospitals in Slovakia. Since their visits to the hospitals, where all women delivered through caesarean section, none has been able to become pregnant. The Applicants are suspecting that the infertility may be the result of involuntary sterilization performed on them during their deliveries. The women were asked to sign documents prior to the delivery or on discharge. However, the women were not sure as to the content of these documents.

At some point, the Applicants and other Roma women sought and received legal aid from an NGO. The NGO’s attorneys were granted power of attorney to obtain and review copies of the women’s medical records to find the cause of their infertility. The women hoped to use these copies in future litigation and also to ensure that in case of destruction additional copies were available. In two different litigations, applicants were either outright refused the copying of their files, or were allowed to make notes about files being reviewed, without the ability to make photocopies.

Several attempts to obtain the copies were unsuccessful. The hospital, and later the Ministry of Health claimed that Section 16(6) of the Health Care Act 1994 did not allow patients to authorize third parties to review medical records. Eventually, all but one of the Applicants were able to copy their records.

The Court first affirmed that “[t]he complaint in issue concerns the exercise by the applicants of their right of effective access to information concerning their health and reproductive status. As such it is linked to their private and family lives within the meaning of Article 8.” The Court added that “in addition to the primarily negative undertakings in Article 8 of the Convention, there may be positive obligations inherent in effective respect for one’s private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned.” While the hospitals could require individuals to pay for their documents, patients were not “obliged to specifically justify a request to be provided with a copy of their personal data files. It is rather for the authorities to show that there are compelling reasons for refusing this facility.” The Court concluded that the State had not put forward a justification strong enough to overcome the patients’ rights to access to their medical records.

With respect to the Article 6 violation, the Court explained that by rejecting the Applicants’ request to copy the files and then use them in possible litigation, the State prevented them “from effectively seeking redress before a court or render[ing] the seeking of such judicial protection difficult without appropriate justification.”

## **Briefly Noted**

**European Commission Imposes a fine of \$1.45B on Intel Corporation for violating EC Treaty Antitrust Rules (European Commission, May 13, 2009)**

[Click here](#) for EC press release (approximately 4 pages)

On May 13, 2009 the European Commission imposed a fine of \$1.45B on Intel Corporation for violation of the EC Treaty Article 82, dealing with antitrust rules relating to the abuse of a dominant market position. According to the Commission, Intel was engaged in “illegal anticompetitive practices to exclude competitors from the market for computer chips.” In addition to imposing the huge fine, the Commission has ordered that Intel immediately “cease the illegal practices...to the extent that they are still ongoing.” According to the EU Competition Commissioner Neelie, the fine, which is larger than the one imposed against Microsoft last year, is not excessive: “Given that Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for over five years, the size of the fine should come as no surprise.”

Intel has stated that it will appeal the decision within 60 days.

### **United States Elected to the Human Rights Council (May 13, 2009)**

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

The United Nations General Assembly elected 18 states to serve on the Human Rights Council. The term, which starts next month, will be for three years. Of the 18 states, five will be on the Council for the first time, including Belgium, Hungary, Kyrgyzstan, Norway and the United States.

This is a big leap for the United States, which until recently had boycotted the Council, a relatively new UN body created by the General Assembly in 2006 “as the United Nations principal political human rights body.” The Council replaced the Commission on Human Rights, a UN body that many regarded as incompetent and ineffective.

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