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## **Resolutions, Declarations, and Other Documents**

### **Review of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Council of the European Union - July 6, 2009)**

[Click here](#) for document (approximately 35 pages)

The Council of the European Union, Committee on Civil Matters, has published a summary of all European Court of Justice case law relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The list, which includes a short synopsis of each relevant case, is organized by corresponding Brussels Convention Article and Brussels I Regulation, starting with Article 1/Regulation 1.

The Brussels Convention and the Brussels I Regulation are rules regulating the jurisdiction in international legal disputes that are of civil or commercial nature and involve residents of a European Union (EU) member state.

### **Implementation of Judgments of the European Court of Human Rights – Progress Report (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights – August 31, 2009)**

[Click here](#) for document (approximately 22 pages)

The Rapporteur of the Committee on Legal Affairs and Human Rights (Committee), a body meant to promote “the rule of law and defend[ ] human rights in the Parliamentary Assembly” of the Council of Europe, has issued a progress report detailing “the non-implementation and/or delay in implementation” of judgments handed down by the European Court of Human Rights (Court). The report notes that the non-execution of the Court’s judgments “is far graver and more widespread than previous reports have disclosed.”

Article 46(1) of the European Convention on Human Rights (Convention) dictates that all contracting parties will abide by the final judgments of the Court. Thus, even though the Court serves as the legal venue to adjudicate disputes between nationals and the state parties, “the ultimate responsibility for ensuring the rights and freedoms guaranteed in the Convention rests with the state parties.” While Article 46(2) of the Convention authorizes the Committee of Ministers – made up of the forty-seven Foreign Ministers of its member states – to supervise the implementation of the Court’s judgments, the Parliamentary Assembly “often exercise[s] an instrumental function in guaranteeing the execution of Court judgments,” and has so far adopted six reports and resolutions and five recommendations on the implementations of the Court’s judgments. The present progress report is meant to give background information regarding the upcoming Parliamentary Assembly’s seventh report on the enforcement of judgments, with a specific focus on contracting members known for failing to enforce the Court’s judgments.

The report also identifies national parliaments as one of the primary national organs capable of ensuring that the Court’s judgments are executed more effectively. National parliaments, the report states, are the most obvious bodies that could ensure “the compatibility of draft laws, existing legislation and administrative practice with Convention standards.” The report adds that

[t]he high percentage of repetitive or “clone” judgments delivered by the Court underlines the urgent need to reinforce domestic procedures to ensure the effective implementation of Strasbourg judgments. The obligation to abide by a final judgment of the Court is a collective duty upon all state organs, and state parties with strong implementation records are regularly characterised by active involvement of parliamentary actors. National parliaments have a prominent role to fulfil in not only strengthening domestic mechanisms for the execution of the Court’s judgments, but in actively contributing to the implementation process. Parliaments, more effectively than the Committee of Ministers, can identify the social or political problems underlying an infringement held by the Court, and initiate effective remedial measures to prevent the recurrence of similar infringements.

The report also lists three major Convention violations “which raise prevalent implementation issues”:

“i. deaths or ill-treatment which took place under the responsibility of state forces and lack of an effective investigation thereof; ii. excessive length of judicial proceedings; and iii. non-enforcement of domestic judicial decisions.”

For more information about the report or the Committees work, please refer to the Parliamentary Assembly’s official website at <http://www.assembly.coe.int>.

## Judicial and Similar Proceedings

### United States Court of Appeals for the Second Circuit

#### **Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. et al. (October 2, 2009)**

[Click here](#) for Second Circuit decision (approximately 68 pages); [click here](#) for district court decision (approximately 111 pages)

The United States Court of Appeals for the Second Circuit upheld the lower court’s grant of summary judgment in favor of Talisman Energy, Inc., a Canadian oil corporation doing business in Sudan, finding that the Sudanese plaintiffs “failed to establish Talisman’s purposeful complicity in human rights abuses” as required under the Alien Tort Statute (ATS). The district court had dismissed the suit, holding “that to establish accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, inter alia, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct.”

The plaintiffs had commenced suit in United States District Court for the Southern District of New York, alleging that they were victims of human rights abuses committed by the Sudanese government and that Talisman “aided and abetted or conspired with the government to advance those abuses that facilitated the development of Sudanese oil concessions by Talisman affiliates.” The Second Circuit, recognizing that while the “standard for aiding and abetting liability under the ATS” has been recognized as a possible theory under the ATS by a prior panel in the case of *Khulumani v. Barclay National Bank Ltd.* (2d Cir. 2007), the same panel failed to determine the proper “standard for pleading such liability.” The court was thus faced with an “unusual circumstance” to decide what this standard should be.

The Second Circuit—agreeing with Judge Katzmann, who had issued a concurring opinion in *Khulumani*—noted that the “scope of the ATS’s jurisdictional grant should be determined by reference to international law.” Judge Katzman had suggested that the proper international instrument to be applied is the Rome Statute, which provides that

a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.

Applying this rule, the Second Circuit noted that “the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.” It then analyzed the alleged acts perpetrated by Talisman and concluded that “plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan.” As a result, the Second Circuit affirmed the district court’s dismissal.

### International Centre for Settlement of Investment Disputes

#### **M.C.I. Power Group and New Turbine Inc. v. Republic of Ecuador- Decision on Annulment (October 19, 2009)**

[Click here](#) for decision in English (approximately 41 pages); [click here](#) for decision in Spanish (approximately 43

pages)

An *ad hoc* committee, established pursuant to Rule 52(2) of the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (Committee), decided to reject the application for annulment of the ICSID award in *M.C.I. Power Group and New Turbine Inc. v. Republic of Ecuador*. The Committee concluded that the applicant M.C.I. Power Group and New Turbine Inc. (MCI) had failed to establish a violation under ICSID Convention Article 52, which sets out the grounds for annulment of ICSID awards. According to the Committee, the Applicant failed to demonstrate that the tribunal's decision was "a manifest excess of powers" (Article 52(1)(b)) or that the tribunal "failed to state reasons" for its decision (Article 52(1)(e)).

The facts of the case are as follows. MCI, an American company, entered into an agreement with a state-owned electrical company in Ecuador (INECEL) for the sale of electricity. The agreement was signed on November 17, 1995, almost two years before the United States and Ecuador signed a bilateral investment treaty (BIT). In April 1996, MCI's subsidiary stopped providing electricity. A month later, INECEL unilaterally terminated the agreement and consequently MCI's subsidiary commenced suit in the Ecuadorian courts for breach of contract, asking for damages of almost \$25 million. The domestic proceedings ended in 2000, when the Superior Court of Justice of Quito held that it lacked jurisdiction to hear the case. In 2002, MCI commenced arbitration proceedings against Ecuador relying on the 1997 U.S.-Ecuador BIT, claiming that Ecuador had breached its obligations under that treaty.

The ICSID tribunal hearing the case decided that the BIT could not be applied retroactively and that MCI had "failed to prove violation of the standards of fair and equitable treatment, including the obligation to act in good faith, or the standards of non-discriminatory or non-arbitrary treatment that the BIT requires of Ecuador as a State party." The tribunal ordered that each party bear its own costs and share in the expenses incurred by the tribunal. Disagreeing with the tribunal's conclusions, MCI commenced the annulment proceedings.

In considering MCI's claims, the Committee took note of its limited authority, which is "restricted to assessing the legitimacy of the award and not its correctness." It then analyzed each of MCI's claims relating to excess of powers, failure to state reasons, and damages.

#### *Excess of Powers*

MCI alleged that the tribunal had "failed to apply the proper law of the dispute by improperly refusing jurisdiction over the accounts receivable claim under the BIT." In particular, MCI complained that the tribunal's decision to treat the non-payment of the invoices by INECEL as a onetime event that occurred prior to the BIT entering into force, and thus outside of the tribunal's jurisdiction, was incorrect. MCI argued that the violation, which it understood to be the continual non-payment of invoices, continued up to the date on which the BIT entered into force and well thereafter.

The Committee noted that "[f]ailure to apply the proper law is not an independent ground for annulment under Article 52 . . . *Ad hoc* committee decisions however recognize that a tribunal's failure to apply the applicable law may constitute a manifest excess of powers pursuant to Article 52(1)(b)." While the Committee agreed that reasonable minds could disagree regarding the interpretation of the non-retroactivity of the BIT, the tribunal's decision did not amount to "manifest excess of powers" because, in the Committee's opinion, "[a]n egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations."

#### *Failure to State Reasons*

MCI also challenged the tribunal's analysis of the non-payment of invoices, arguing that the tribunal "failed to state reasons for the Award by forgetting to address the question whether Ecuador breached the BIT by continuously refusing to pay the US\$ 24.2 million outstanding accounts receivable owed to them whether on a continuous basis or only after the entry into force of the Treaty." This, MCI argued, was "an issue of sufficient importance affecting the outcome of the Award."

The Committee recognized that the tribunal never expressly stated that the nonpayment of debt constitutes a continued violation of the BIT but that such a finding could "be deduced from the Tribunal's reasoning." Furthermore, the tribunal's decision that it did not have temporal jurisdiction over the case applied to all of MCI's claims.

#### *Damages*

The Committee ordered that each party pay its own costs and share the costs incurred in connection with the

annulment proceeding.

## International Court of Justice

### Application Instituting Proceedings by the Republic of Honduras against the Federative Republic of Brazil (October 28, 2009)

[Click here](#) for press release (approximately 2 pages) (actual application is not available at this time)

According to the press release, on October 28, 2009, Honduras filed with the International Court of Justice (ICJ) an "Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil," declaring that the "dispute between the Republic of Honduras and the Federative Republic of Brazil relates to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State, a principle incorporated in the Charter of the United Nations."

Notably, according to the press release, the application alleges that "[Mr. José Manuel Zelaya Rosales and] an indeterminate number of Honduran citizens,' who have been taking refuge in the Brazilian Embassy in Honduras since 21 September 2009, 'are using [its] premises . . . as a platform for political propaganda and thereby threatening the peace and internal public order of Honduras, at a time when the Honduran Government is making preparations for the presidential elections which are due to take place on 29 November 2009.'" Furthermore, the press release quotes the application as stating that "[t]he Brazilian diplomatic staff stationed in Tegucigalpa are allowing Mr. Zelaya and his group to use the facilities, services, infrastructure and other resources in order to evade justice in Honduras."

As a result, the press release indicates that the application makes the following requests:

- Honduras respectfully requests the Court to adjudge and declare that it has jurisdiction to adjudicate the dispute between Honduras and Brazil and that the Application of Honduras is admissible.
- Honduras respectfully requests the Court to adjudge and declare that Brazil does not have the right to allow the premises of its Mission in Tegucigalpa to be used to promote manifestly illegal activities by Honduran citizens who have been staying within it for some time now and that it shall cease to do so. Just as Brazil rightly demands that the Honduran authorities guarantee the security and inviolability of the Mission premises, Honduras demands that Brazil's diplomatic staff stationed in Tegucigalpa devote themselves exclusively to the proper functions of the Mission and not to actions constituting interference in the domestic affairs of another State.
- While the primary purpose of this Application is to secure a declaration that Brazil has breached its obligations under Article 2 (7) of the Charter and those under the 1961 Vienna Convention on Diplomatic Relations, the Government of Honduras reserves the right to claim reparation for any damage resulting from the actions of Brazil, of its Mission, and of the Honduran persons sheltered by it in the Mission.
- Pursuant to Article 31 of the Statute of the Court and Article 35, paragraph 1, of the Rules of Court, the Republic of Honduras gives notice of its intent to exercise the power to choose a judge ad hoc.
- Honduras reserves the right to amend and supplement the terms of the present Application.
- Honduras reserves the right to file a request for the indication of provisional measures should Brazil not immediately put an end to the disturbance caused to internal order in Honduras.

The ICJ application is yet another development in the recent political crisis in Honduras, which began with the *de facto* removal of President Manuel Zelaya on June 28, 2009.

## European Court of Human Rights

### Case of Varnava and Others v. Turkey (September 18, 2009)

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

The Grand Chamber of the European Court of Human Rights (Court) recently issued its decision in a number of

joined disappearance cases, finding that Turkey violated Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), and Article 5 (right to liberty and security of person) of the European Convention on Human Rights (Convention) for the failure to properly investigate the 1974 disappearance of nine Cypriot men, thus causing pain and suffering to their families. The Court ordered Turkey to pay each applicant €12,000 for non-pecuniary damages and €8,000 for their costs and expenses.

The initial case began in January 1995, when the family members of the nine missing men filed their applications with the European Commission of Human Rights under former Article 25 of the Convention. The applicants alleged that family members had disappeared while in Turkish military custody. In 1999, the applications were transferred to the Court.

The government of Turkey disagreed with the Court's jurisdiction, claiming that it "had only recognised the competence of the Commission to receive individual petitions as from 28 January 1987," thirteen years after the individuals allegedly disappeared. Furthermore, Turkey argued that sufficient time had lapsed between the alleged disappearance and the filing of the applications that the cases should be time barred.

### *Temporal Jurisdiction*

The Court recognized the general principle of law that "the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party." Consequently, the Court had to determine the exact time at which the alleged violation took place, focusing both on the individual application and the scope of the Convention.

According to the Court, because Turkey ratified the Convention in 1954 but accepted the right of individual petition in 1987, only facts that took place after 1987 could be examined by the Court. But the Court also pointed out that all applicants alleged violations that took place after 1987, mainly that their loved ones continued to be missing. Furthermore, relying on the legal precedent of the Inter-American Court of Human Rights and the United Nations Human Rights Committee, the Court held that,

as found in *Šilih v. Slovenia* concerning the procedural obligation under Article 2 to investigate unlawful or suspicious deaths, the procedural obligation under Article 2 arising from disappearances operates independently of the substantive obligation. It notes that the Inter-American Court, and to some extent the Human Rights Committee, apply the same approach to the procedural aspect of . . . examining allegations of denial of justice or judicial protection even where the disappearance occurred before recognition of its jurisdiction.

In particular, the Court distinguished between the obligation to investigate a death and the obligation to investigate a disappearance:

A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred . . . This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation . . . This is so, even where death may, eventually, be presumed.

For these reasons, the Court rejected Turkey's argument that the Court lacked temporal jurisdiction.

### *Violations of the Convention*

With respect to Article 2 violations, the Court held that even though an independent mission was established by the United Nations to assist with the large number of disappeared persons, this investigation did not meet the requirements of Article 2. As a result, Turkey, by failing to investigate the cases on its own merit, violated Article 2.

The Court also rejected Turkey's argument that the applicants had not met their burden of proof to show that the missing individuals were in Turkish custody:

[P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact . . . Thus, where the events in issue lie wholly, or in

large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries, death or disappearances occurring during such detention. The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

With respect to Article 3, the Court held that the indifference of the Turkish authorities, which lasted for several decades, had resulted in anxiety and suffering on the part of the missing men's relatives. This in turn rose to the requisite level of severity, amounting to breach of Article 3.

Finally, the Court found that Turkey had violated Article 5 with respect to two individuals who had been, unlike the other seven, included on the International Committee of the Red Cross lists as detainees. Since Turkey has failed to acknowledge their detention and investigate their whereabouts, it continued to be in violation of Article 5 of the Convention.

For more information about the case, please refer to the original decision.

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