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DEVELOPMENTS IN INTERNATIONAL LAW, PREPARED BY THE ATTORNEY EDITOR OF INTERNATIONAL LEGAL MATERIALS
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Resolutions, Declarations, and Other Documents

United Nations Security Council Resolution 1909 (Jan. 21, 2010)

[Click here](#) for document (approximately 3 pages)

The United Nations Security Council adopted resolution 1909, renewing the mandate of the United Nations Mission in Nepal (UNMIN) until May 15, 2010. The resolution applauds the parties on the political progress achieved so far, including the formation of a framework to fulfill the timely implementation of the new democratic constitution of Nepal, which is scheduled to be promulgated by May 28, 2010.

UNMIN was established by resolution 1740 in 2007 in response to a letter sent to the UN Secretary General by the then Seven-Party Alliance Government and the Communist Party of Nepal (Maoist), asking for UN assistance "in creating a free and fair atmosphere for the election of the Constituent Assembly and the entire peace process."

Judicial and Similar Proceedings

US Supreme Court

Noriega v. Pastrana (Jan. 26, 2010)

[Click here](#) for the dissenting opinion (approximately 14 pages)

Recently, the U.S. Supreme Court denied a petition for *writ of certiorari* in *Noriega v. Pastrana*, thus rejecting the invitation to determine the validity of the Military Commissions Act (MCA) §5(a), which precludes the invoking of the Geneva Conventions and its Protocols as a source of right in *habeas corpus* or other civil proceedings. The petition was filed by Manuel Antonio Noriega, a former head of the Panamanian Defense Forces, who invoked the Geneva Conventions to prevent his extradition to France.

In 1988, Noriega, who was captured upon the U.S.'s invasion of Panama, was indicted by a grand jury and convicted for numerous federal narcotics offenses; he was sentenced to thirty years imprisonment. He was also designated a prisoner of war (POW) entitled to Geneva Convention protections.

In 2007, a federal court approved France's extradition request of Noriega for money laundering charges. Noriega filed a *habeas corpus* petition alleging that the U.S. violated the Geneva Conventions and its Protocols when it approved France's request. As a POW, Noriega claimed, he was entitled to repatriation after release from U.S. custody. The district court stayed his extradition pending an appeal on the issue of whether Noriega could invoke the Geneva Convention protections.

The 11th Circuit agreed with the lower court's designation of Noriega as a POW, but it interpreted MCA §5(a) as precluding Noriega from invoking the Geneva Conventions.

Noriega filed a petition for *certiorari*, asking the Supreme Court to determine whether the MCA provision was constitutional. Noriega essentially argued that if MCA §5(a) prohibits individuals from raising claims based on the Geneva Conventions in *habeas corpus* actions, then the MCA provision is unconstitutional because it violates the Supremacy Clause, which dictates that treaties are the supreme law of the land. Furthermore, if the MCA provision precludes him from filing his *habeas corpus* petition, it is unconstitutional under *Boumediene* "because

it 'effectively works a suspension of the writ.'"

The majority of the Supreme Court denied *certiorari*, with Justices Clarence Thomas and Antonin Scalia dissenting. In their dissent, the Justices stressed that the Court has a duty to interpret the law especially "in cases that present an opportunity to decide the constitutionality or enforceability of federal statutes in a manner 'insulated from the pressures of the moment,' and in time to guide courts and the political branches in resolving difficult questions concerning the proper 'exercise of governmental power.'" This case, the Justices noted, "would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since *Boumediene*." They stressed the importance of determining the validity of MCA §5(a):

A decision upholding MCA §5(a) would obviate the need for detainees, the Government, and federal courts to struggle (as they did here) with Geneva Convention claims in habeas corpus proceedings. And, it would give the political branches a clearer sense of the constitutional limits to which new legislative or policy initiatives must adhere. The latter benefit would also follow if we were to invalidate MCA §5(a).

European Court of Human Rights

Z.N.S. v. Turkey (Jan. 19, 2010)

[Click here](#) for document (approximately 15 pages)

The European Court of Human Rights held that Turkey's attempt to deport an Iranian national, who had converted to Christianity, to Iran would be in violation of Article 3 (freedom from torture or to inhuman or degrading treatment or punishment) of the European Convention for Human Rights.

The applicant, Z.N.S., first entered Turkey illegally in 2002. She applied for refugee status to the United Nations High Commissioner for Refugees (UNHCR); before receiving an answer, she was deported to Iran, where she claims she was imprisoned for nine months and subject to ill-treatment. The applicant reentered Turkey in 2005 and converted to Protestantism. She was arrested and taken into custody by Turkish authorities in 2008 on suspicion of having violated her visa. Shortly thereafter, deportation proceedings against her were initiated.

The applicant complained on numerous occasions about the poor conditions of the detention facility that she was kept in and the lack of proper medical care. Despite her repeated requests to be released, and the eventual grant of refugee status by the UNHCR on religious beliefs, the applicant was ordered by the Ministry of the Interior to remain in the custody of Turkish authorities. The applicant filed her application with the Court invoking Articles 2 (right to life) and 3 of the Convention. She claimed that her possible deportation to Iran would expose her to a real risk of death or ill-treatment, that her detention was unlawful, and that the conditions of the detention center were poor.

The Court, relying on the UNHCR's decision to grant applicant refugee status, concluded that she faced real risk of persecution in Iran for her religious beliefs if she were to be deported. The Court observed that "[w]hen the UNHCR interviewed the applicant, it had the opportunity to test the credibility of her fears and the veracity of her account of the circumstances in her home country. Following this interview, it found that the applicant risked being subjected to persecution in her country of origin." This evidence substantiated the applicant's claim.

With respect to the applicant's allegations regarding the conditions in the detention center, the Court relied on an earlier judgment, *Abdolkhani & Karimnia v. Turkey*, wherein it ruled that this specific center was in poor condition, and that detainees had no real possibility of being released. This, the Court ruled, amounted to a violation of the applicant's Article 5 rights (right to liberty and security of person).

The Court awarded applicant twenty thousand euros in non-pecuniary damages.

International Criminal Court

Prosecutor v. Lubanga, Redacted Second Decision on Disclosure by the Defence and Decision on Whether the Prosecution May Contact Defence Witnesses (Jan. 20, 2010)

[Click here](#) for document (approximately 36 pages)

The Trial Chamber I of the International Criminal Court issued a decision clarifying the disclosure of evidence requirements, including the ability of the prosecution to contact defense witnesses and obtain photographs of those witnesses.

With respect to the issue whether the prosecution could contact defense witnesses, the Chamber relied on its previous ruling that a witness' consent is authoritative, unless the court rules otherwise. This approach, the Chamber stressed, ensures that both sides have ample information to prepare for trial. However, the Chamber warned that, while the need to have open access to witnesses is in theory recognized, in practice it may be difficult to effectuate. Security and logistical concerns may arise, requiring additional safeguards:

The prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU [Victims and Witnesses Unit]. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet.

Regarding the prosecution's request to view photographs of witnesses presented by the defense, the Chamber noted Rule 78 of the ICC Rules, which allows the prosecution to inspect any "books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the trial." However, the Chamber rejected the prosecution's request to broaden this rule to include photographs of defense witnesses. In this respect, the Chamber stressed the rights of the accused, including the right to remain silent and the right to not incriminate oneself. Both these rights, the Chamber warned, would be implicated if the defense were required to show photographs of its witnesses. The requested photographs could serve to undermine the evidence of the defense and as such impair trial preparations.

Finally, the Chamber also ruled on the prosecution's request that the defense be ordered to "disclose or permit inspection of any materials ('the totality of the evidence') it intends to introduce at trial, no later than three weeks in advance of its case," and also inform the prosecution seven days prior to a witness' appearance as to the subject matter of the testimony. The Chamber acknowledged that in a previous decision it had ordered that the prosecution disclose all evidence three months before the start of trial, and that the defense had no such disclosure requirement. To ensure fairness and proportionality, the Chamber thus ruled in operative para. 64:

[T]he Chamber is of the view that the obligation on the accused to reveal the documents and other materials that are to be relied on by his witnesses pursuant to Rule 78 of the Rules should be implemented in conformity with the current approach voluntarily adopted by the defence, coupled with the secondary disclosure requirements that have been imposed on the prosecution and those contained in Regulation 52 of the Regulations of the Registry. This will secure a fair and proportionate result for both parties, together with effective trial management.

Briefly Noted

President of the Special Tribunal for Lebanon Signs Three Practice Directions (Jan. 15, 2010)

[Click here](#) for press release (approximately 1 page)

The President of the Special Tribunal for Lebanon (STL), Antonio Cassese, pursuant to Rule 32(E) of the tribunal's Rules of Procedure and Evidence, has signed three Practice Directions meant to regulate "several procedural aspects of the work of the Tribunal and its proceedings."

According to the press release, the *Practice Direction on Filings of Documents before the Special Tribunal for Lebanon* clarifies filing requirements during STL proceedings. The *Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for taking Witness Statements for Admission in Court under Rule 155* sets out the requirements on depositions and the collection of witness statements. Finally, the *Practice Direction for Video-Conference Links* lists numerous "practical arrangements" on deposition and evidence testimony done via video conference.

ADDITIONAL ANNOUNCEMENTS

NOMINATIONS SOUGHT FOR INTERNATIONAL LEGAL MATERIALS (ILM) EDITORIAL ADVISORY COMMITTEE

Deadline February 28, 2010

The ILM Editorial Advisory Committee meets bi-monthly in Washington, D.C. at ASIL headquarters to select international legal documents that will be published in the next issue of ILM. Documents submitted for consideration include, among others, UN Security Council resolutions, treaties, and case law from a wide array of international tribunals. For more information about ILM and its content, please visit <http://www.asil.org/ilm.cfm>.

We welcome applications by ASIL members for one opening on the current committee. Interested candidates are encouraged to apply by sending a curriculum vitae and a brief expression of interest to Djurdja Lazic, ILM Managing Editor, at ilm.eac@asil.org, by February 28, 2010.

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