BRIEFLY NOTED*
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Resolutions, Declarations, and Other Documents

1. U.S. National Action Plan on Women, Peace, and Security (Dec. 2011)
<http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security>

The White House released its first National Action Plan on Women, Peace, and Security meant ''to empower half the world's population as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity.''

The Action Plan is the result of more than a decade of work that commenced with the adoption of United Nations Security Council Resolution 1325, which urged the UN and its Member States to ensure increased representation of women in all aspects of peace and security.

On December 19, 2011, President Obama signed an Executive Order instituting a National Action Plan on Women, Peace, and Security and providing the concrete steps the U.S. government should take ''to accelerate, institutionalize, and better coordinate our efforts to advance women's inclusion in peace negotiations, peacebuilding activities, and conflict prevention; to protect women from sexual and gender-based violence; and to ensure equal access to relief and recovery assistance, in areas of conflict and insecurity.''

2. Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action and Other Documents (Nov. 28 - Dec. 11, 2011)
<http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform>

The Conference of the Parties ("COP") to the United Nations Framework Convention on Climate Change ("UNFCCC"), which takes place every year to assess climate change challenges and address greenhouse gas emissions, has concluded with several important decisions. According to the UNFCCC website, ''the negotiations advanced . . . the implementation of the Convention and the Kyoto Protocol, the Bali Action Plan, and the Cancun Agreements.'' The parties also adopted decisions to launch the Green Climate Fund and to establish an Ad Hoc Working Group on the Durban Platform for Enhanced Action.

Many observers found the concluding documents ''encouraging.'' For example, the Durban Platform for Enhanced Action provides for the establishment of an Ad Hoc Working Group, which will develop a new ''protocol, another legal instrument or an agreed outcome with legal force" under the UNFCCC. This new ''outcome with legal force'' will then establish a framework, applicable to all parties, for the reduction of greenhouse gas. According to the Durban Platform, the ''new'' and binding legal document must be completed and adopted by 2015.

Another important development is the parties' decision that the second commitment period under the Kyoto Protocol, an international agreement that requires its signatories to, *inter alia*, reduce greenhouse gas emissions to specific levels, be extended. The second commitment period will begin on January 1, 2013. The continued support of the Kyoto Protocol is especially noteworthy as many countries, most recently Canada, have become wary of, and, in Canada's instance, have withdrawn from the treaty. Canada's Prime Minister, Peter Kent, issued a statement on December 12, 2011, expressing his government's position on the Protocol: ''It is now clear that Kyoto is not the path forward for a global solution to climate change; instead, it is an impediment.'' He faulted the major polluters, such as the United States and China, who are not parties to the Protocol, for its ineffectiveness: ''And here's the kicker: global emissions would keep rising because Kyoto doesn't cover the major emitters, like the United States and China, which is why Kyoto doesn't work.''

* As a service to our readers we include, when available, an internet address to these documents or to their sources. Web addresses change frequently, but are correct as of the date of ILM's publication.

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3. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (Nov. 23, 2011)
<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/17/docs/A-HRC-S-17-2-Add1>

The Independent International Commission of Inquiry on Syria, established by the UN Human Rights Council to investigate alleged human rights violations in Syria since March 2011, has issued its report. The report concluded that Syrian military and security forces have committed human rights violations, including crimes against humanity, since the beginning of the protests in March 2011. In its summary, the Commission expressed regret that the Syrian government failed to ''to engage in dialogue and to grant the commission access to the country.''

The Commission met with regional organizations (including the League of Arab States and the Organization of Islamic Cooperation), non-governmental organizations, journalists, and experts, and interviewed 223 victims and witnesses of alleged human rights violations to prepare the report. The evidence collected pointed to ''patterns of summary execution, arbitrary arrest, enforced disappearance, torture, including sexual violence, as well as violations of children's rights.''

In a separate UN press release, the UN High Commissioner for Human Rights, Navi Pillay, has reportedly stated that ''the deteriorating situation in Syria is now close to a civil war and the death toll from the nine-month crackdown by the country's security forces against protesters has passed at least 4,000.''

4. Report of the Bahrain Independent Commission of Inquiry (Nov. 23, 2011)
<http://files.bici.org.bh/BICIreportEN>

The Bahrain Independent Commission of Inquiry, established by King Hamad bin Isa Al Khalifa through Royal Order No. 28 (July 1, 2011) to report on alleged human rights violations that occurred in Bahrain in February and March 2011, has issued its report.

According to the 489-page report, the Commission received 8,110 complaints of various human rights violations. The Commission also met with, and examined the reports received from, national and international organizations and the media. To facilitate its reporting, the Commission categorized the alleged violations into several different groups, including: deaths, torture, physical mistreatment, psychological and sexual abuse, rapes, arbitrary arrests and detention, disappearances or missing persons, unfair trials, media censorship, etc. While the report expressly states that the Commission was not tasked with determining ''which side is responsible for what outcomes,'' the Commission did conclude that ''there is no doubt that what occurred in February/March, and subsequently, was the result of an escalating process in which both the Government and the opposition have their share of responsibility in allowing events to unfold as they did.''

Significantly, the Commission found that a systematic pattern of behavior existed with respect to how security forces, and other government agencies, dealt with detainees. According to the report, ''[m]any detainees were subjected to torture and other forms of physical and psychological abuse while in custody.'' Finally, the Commission also noted the lack of accountability of security forces, which in turn has ''led to a culture of impunity, whereby security officials have few incentives to avoid mistreatment of prisoners or to take action to prevent mistreatment by other officials.''

The Commission's recommendations were both violation-specific and general. In general, the Commission recommended that a national reconciliation commission be established to address the human rights violations committed by government actors and resulting ''in the deaths, torture and mistreatment of civilians.'' The aim of the reconciliation program would be ''to bring[ ] legal and disciplinary action against . . . individuals, including those in the chain of command, military and civilian, who are found to be responsible under international standards of superior responsibility.''

The five Commission members, who began their work in July 2011, were selected by King Hamad and include Professor M. Cherif Bassiouni (Chair), Judge Philippe Kirsch QC, Professor Sir Nigel Simon Rodley, Dr. Mahnoush H. Arsanjani, and Dr. Badria A. Al Awadhi.

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JUDICIAL AND SIMILAR PROCEEDINGS

1. Othman v. United Kingdom (Eur. Ct. H.R. Jan. 17, 2012)

<*http://www.echr.coe.int/ECHR/EN/hudoc*>

The European Court of Human Rights has ruled that the United Kingdom would violate the applicant's Article 6 right to a fair trial if it were to deport him to Jordan, where he is wanted on terrorism charges. According to the Court's press release, this marks ''the first time that the Court has found that an expulsion would be in violation of Article 6, which reflects the international consensus that the use of evidence obtained through torture makes a fair trial impossible.''

The applicant is originally from Jordan but is currently detained in England for his suspected involvement with al-Qaeda. He arrived in the United Kingdom in 1993, where he obtained refugee status. In 2002, the applicant was detained under the U.K. Anti-Terrorism, Crime and Security Act, and after the Act was repealed in 2005, he was released on bail and made subject to a control order under the Prevention of Terrorism Act, which he appealed. During the appeal, he was also served with a notice of deportation to Jordan. (The applicant was convicted in Jordan *in absentia* for his alleged involvement in two terrorist conspiracies in 1999 and 2000. According to Jordanian authorities, he had incited his followers to plant bombs in Jordan.) The applicant appealed the deportation order, claiming that the deportation would put him at risk of torture, lengthy detention, and grossly unfair trial. The U.K. Special Immigration Appeals Commission dismissed his appeal, concluding that he would not be tortured nor experience ill-treatment because United Kingdom and Jordan concluded a series of assurances to guarantee the applicant's human rights. The Court of Appeal partially granted his appeal, finding that there was a risk that the applicant's Article 6 rights would be violated by reliance in the courts of Jordan on testimony obtained from two witnesses through torture. On appeal, the House of Lords sided with the Special Immigration Appeals Commission, holding that the existing diplomatic assurances would protect the applicant's Convention rights, including his right to a fair trial. The applicant then took his claim to the European Court of Human Rights.

The European Court of Human Rights first concluded that the diplomatic assurances between the United Kingdom and Jordan were in good faith, comprehensive, and sufficiently effective to ensure that the applicant would not be at risk of ill-treatment in Jordan, thus satisfying Article 3 guarantees against torture and ill-treatment, including return to a country where there is a risk of such treatment. As a result, the Court found that there was no violation of Article 3.

With respect to the applicant's claim under Article 5 (protection against lengthy pre-trial detention), the Court concluded that Jordan's intention to try him within fifty days of his detention would not be in violation of Article 5.

However, regarding the applicant's Article 6 claim, the European Court held that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. The Court emphasized that ''in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6" because ''flagrant denial of justice" is a stringent test of unfairness. Thus, the applicant must demonstrate more than just ''mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself.'' According to the Court, ''[w]hat is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.'' Put differently, the applicant has to provide ''evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice.''

Applying this test, the Court concluded that a flagrant denial of justice would arise ''when evidence obtained by torture is admitted in criminal proceedings" against the applicant. The Court found that the applicant demonstrated that there is a real risk that two individuals were tortured into providing evidence against him. This evidence, the Court ruled, if admitted, would have probative value and may be determinative in

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the final verdict. As a result, and without assurances from Jordan that the evidence obtained by torture will not be used, the Court concluded that the applicant's deportation to Jordan to be retried would amount to flagrant denial of justice in violation of Article 6.

2. V.C. v. Slovakia (Eur. Ct. H.R. Nov. 8, 2011)
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Slovakia%20%7C%20V.C.&sessionid=82753710&skin=hudoc-en>

The European Court of Human Rights has ruled that the forced sterilization of the applicant in a public hospital was in violation of Article 3 (freedom from torture or inhuman or degrading treatment or punishment) and Article 8 (right to private and family life) of the European Convention on Human Rights.

The applicant is of Roma ethnic origin and was sterilized after giving birth to her second child. The hospital allegedly asked the applicant to sign a consent form prior to the procedure and during her labor. According to the applicant, the hospital staff told her that rejecting the procedure could lead to her death and/or the death of her future child. The applicant, fearing for her safety, signed the form. She suffered complications later on in her life and sought redress in Slovakian courts. After exhausting domestic remedies, the applicant brought the case before the European Court.

The Slovakian government rejected all of applicant's allegations, claiming that the procedure was in the applicant's best interest ("a life-saving procedure") and that she consented to the sterilization. The government outright rejected the claim, supported by independent reports, that its hospitals followed an existing practice aimed at sterilizing women of Roma ethnic group.

The European Court agreed with the applicant. It first noted that sterilization ''constitutes a major interference with a person's reproductive health status," and the procedure ''grossly interfered with the applicant's physical integrity," thus reaching the threshold of severity required by Article 3 of the Convention. Furthermore, while certain emergency medical treatments would not require prior consent (e.g., when a person's life is in danger), sterilization is not ''generally considered a life-saving surgery.'' Therefore, actual consent is required. Since the applicant's consent was not voluntary, the procedure that followed was thus a violation of her rights.

The Court also found that the Slovak government failed to fulfill its positive obligations under Article 8 of the Convention by failing to ensure that sufficient measures were in place to allow the applicant ''to effectively enjoy her right to respect her private and family life.''

The Court ordered Slovakia to pay the applicant EUR 31,000 for non-pecuniary damage and EUR 12,000 for costs and expenses.

The dissent by Judge Mijovic is worth noting. She disagreed with the majority's decision not to address the applicant's discrimination claim under Article 14 of the Convention. She pointed out that the applicant's ethnicity was noted on her hospital file and that her subsequent mistreatment (sterilization) was a direct result of her ''special'' status. In her opinion, ''the applicant was 'marked out' and observed as a patient who had to be sterilised just because of her origin.''

3. S.H. and Others v. Austria (Eur. Ct. H.R. Nov. 3, 2011)
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=894729&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

The Grand Chamber of the European Court of Human Rights has ruled that Austria's law prohibiting the use of ova from donors and sperm from donors for *in vitro* but not *in vivo* fertilization did not violate the applicants' Article 8 right to private and family life of the European Convention on Human Rights.

The applicants, two couples unable to successfully conceive children but for the medical techniques outlawed in Austria, claimed that the legislation in question constituted a direct interference with their Convention rights. According to the applicants, the legislation was outdated as there has been immense development and advancement with respect to artificial procreation, and the interference was both unnecessary in a

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democratic society and disproportionate. Furthermore, the applicants argued that because of the special importance of the right to found a family and the right to procreation, states enjoyed no margin of appreciation at all in regulating these issues.

The Grand Chamber concluded that the government interference would be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being in accordance with the law, as pursuing a legitimate aim, and as being necessary in a democratic society to achieve the aim or aims concerned. Since the prohibition was provided for by law and it pursued a legitimate aim (i.e. ''the protection of health or morals and the protection of the rights and freedom of others"), the Chamber had to determine whether it was ''necessary in a democratic society.''

The Grand Chamber concluded that in cases where there ''is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin [of appreciation afforded to states] will be wider.'' While the Chamber conceded that ''there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilisation, which reflects an emerging European consensus," this consensus is not based ''on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State.''

Applying the wide margin of appreciation to Austria's law, the Grand Chamber concluded that there was no breach of Article 8 of the Convention. Notably, the Chamber stressed that despite its ruling in favor of Austria, member states should keep this ''continuously evolving'' and developing area in ''science and law'' under review to ensure compliance with the Convention.

4. Spyridon Roussalis v. Romania (ICSID Dec. 7, 2011)
<http://www.globalarbitrationreview.com/cdn/files/gar/_news/Spyridon_Roussalis_v_Romania_Final_Award>

An International Centre for Settlement of Investment Disputes ("ICSID") tribunal has dismissed an investor's claims against Romania as unfounded and ordered him to pay Romania more than eight million dollars in costs and legal fees.

The ICSID claim was brought by Spyridon Roussalis, a Greek investor who purchased shares in a large frozen food warehousing facility from the Romanian government's privatization authority (''AVAS''). At the time of the purchase, the parties agreed that the claimant would make a $1.4 million post-purchase investment within two years of the purchase. In case the claimant failed to fulfill his obligations under the agreement, the Romanian government could enforce a share pledge and recover his shares. According to the claimant, he made the required investment of $1.4 million (a claim Romania disputed), but Romania nonetheless tried to enforce the share pledge. This, he argued, amounted to expropriation and was in breach of the fair and equitable treatment standard under the Romania-Greece Bilateral Investment Treaty (''BIT''). He also alleged that domestic criminal proceedings against him violated Article 6 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the European Convention.

Romania counterclaimed, asking the Tribunal to instead declare that the claimant failed to meet his post-investment obligation and to order him to tender back the shares he purchased from Romania or to pay compensation. While the Tribunal dismissed the investor's claims as unfounded and ordered him to pay 60% of Romania's costs and legal fees, it declined to adjudicate Romania's counterclaim arising out of the claimant's failure to make the $1.4 million investment, with Professor Michael Reisman dissenting with respect to this latter part of the decision.

In its discussion on whether it had jurisdiction to hear Romania's counterclaim, the Tribunal referred to both Article 46 of the ICSID Convention and Rule 40 of the ICSID Rules. Article 46 provides that ''[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that

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they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.'' Rule 40 is similar: ''Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.'' Romania argued that these provisions governed the relationship between Romania and Greece and their respective nationals with respect to BIT arbitrations. Furthermore, no ICSID precedent ''require[ed] an explicit *authorization* in the BIT as a precondition for asserting a counterclaim.''

However, reading these two provisions together, the Tribunal concluded the contrary. According to the majority, the Tribunal had to determine whether the parties to the arbitration ''consented to have the State's counterclaims arbitrated.''

Applying this test to the BIT, the Tribunal concluded that the language of the BIT limited dispute resolution only to obligations owed by the host state to the investor, but not the other way around: ''Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor.''

Professor Reisman disagreed. In his view, ''when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.'' This, he added, was favorable to both the investor and the host state. Furthermore, rejecting a counterclaim could have negative implications in that the host state may decide to pursue its claims before its national tribunals, an outcome the investor wanted to avoid by filing a claim before a neutral tribunal. This in turn could lead to a new arbitration if the domestic decision is unfair to the investor. According to Professor Reisman, ''[a]side from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.''

5. Joined Cases C-411/10 and C-493/10, N. S. v. Secretary of State for the Home & M. E. et al. v. Refugee Applications Commissioner et al. (ECJ Dec. 21, 2011)
<http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd9338ebd0135943b7aa9ac601c698bf92.e34KaxiLc3qMb40Rch0SaxqTbN10?text=&docid=117187&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=407180>

The European Court of Justice recently issued an important decision in two joined cases dealing with the interpretation and application of EU law and regulations relating to asylum applicants. The Court concluded that asylum seekers may not be transferred to a Member State where substantial grounds exist that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. The Court also ruled that EU law prohibits the conclusive presumption that Member States in fact observe the fundamental rights of the European Union.

Case C-411/10 concerns an Afghan national who entered Greece, where he was allegedly detained and eventually expelled to Turkey. He never sought asylum in Greece. He subsequently arrived to the United Kingdom, where he lodged an asylum application. The UK authorities, pursuant to Article 17 of Regulation No. 343/2003 ("Dublin II Regulation"), which establishes the criteria and the mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, informed Greece of the applicant's whereabouts and asked Greece to take charge as required by the Regulation. Greece never responded, and the UK authorities, again relying on the Dublin II Regulation, ordered the applicant removed to Greece. He appealed this decision all the way to the Court of Appeal, which referred several questions to the European Court of Justice regarding the application of the Dublin II Regulation.

Case C-493/10 concerns five asylum applicants originally from Afghanistan, Algeria, and Iran. They entered the EU separately through Greece, where each was arrested for illegal entry. After leaving Greece, they travelled to Ireland, where they claimed asylum. While only two disclosed their previous presence in Greece,

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the Eurodac system—the EU database of fingerprints of asylum applicants and illegal immigrants—confirmed that all five had previously entered Greece, but that none had claimed asylum there. All five resist returning to Greece, arguing that the procedures and conditions for asylum seekers in Greece are inadequate. They claimed that Ireland, as required by Article 3(2) the Dublin II Regulation, was responsible for examining and deciding their asylum claims. The applicants did not claim that their transfer to Greece would violate Article 3 of the European Convention on Human Rights because of a risk of *refoulement*, ill treatment, or suspension of asylum claims.

Significantly, the Court concluded ''to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.''

6. Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece) (ICJ Dec. 5, 2011)
<http://www.icj-cij.org/docket/files/142/16827>

The International Court of Justice (''ICJ'') has found, fifteen votes to one, that Greece breached its obligation under Article 11, paragraph 1, of the 1995 Interim Accord by objecting to the admission of the former Yugoslav Republic of Macedonia (''FYROM'') to NATO. The Court stopped short from ordering Greece, as FYROM had requested in its application, to refrain from any future conduct that violates its obligation under the Accord.

In 2008, FYROM instituted proceedings against Greece because of a dispute regarding the interpretation and implementation of the Interim Accord, which was signed by the two countries in 1995 to deal with an ongoing dispute regarding the use of the name ''Republic of Macedonia.'' FYROM, prior to the dispute with Greece about the usage of the name, was part of the former Yugoslavia and known as the ''Socialist Republic of Macedonia.'' After its independence in 1991, it changed its name, through a constitutional amendment, to ''Republic of Macedonia.'' As a newly established and independent state, FYROM sought recognition and membership in numerous international and regional organizations, including the United Nations. In 1993, Greece objected to FYROM's application for UN membership, and later European Community membership, on the basis of the applicant's name (i.e., Republic of Macedonia). Greece argued that ''Macedonia'' referred to a geographical territory in ''south-east Europe that included an important part of the territory and population'' of Greece and other third states. Greece promised to revoke its objection to FYROM's membership once the name dispute was settled.

In 1993, the Security Council adopted Resolution 817, urging the parties to settle their differences and recommending FYROM's UN membership, noting that it would be ''provisionally referred to for all purposes within the United Nations as "the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name.'' FYROM was admitted to the UN but the dispute continued. In 1995, unable to reach an agreement on the usage of the name, the parties signed the Interim Accord promising continued efforts to reach an agreement. Notably, Greece also agreed that it would not ''object to the application by or the membership of [FYROM] in international, multilateral and regional organizations and institutions of which [Greece] is a member,'' unless FYROM is ''referred to in [any] such organization or institution differently'' than provided in Security Council Resolution 817. The parties agreed to submit any dispute regarding the interpretation and the implementation of the Interim Accord to the ICJ. The Court was expressly excluded from resolving the actual name dispute.

FYROM referred to diplomatic correspondence by Greece before and after a 2008 meeting of NATO member states in Bucharest where FYROM's NATO candidacy was considered, and to statements by senior officials of the Greek government, as evidence of Greece's intention to oppose the extension of an invitation

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to FYROM to join NATO unless the name issue was resolved.

Greece objected to the Court's jurisdiction for several reasons, including the parties' express agreement not to adjudicate the name dispute before the ICJ. The Court, siding with FYROM, however, concluded that the application did not request a settlement of the name dispute but rather concerned Greece's violation of the Interim Accord, thus falling within the limited subject matter jurisdiction.

One of the most interesting parts of the decision is the Court's interpretation of the ''limitation clause,'' which would allow Greece to object to FYROM's membership in NATO if FYROM ''is to be referred to in such organization or institution differently than in paragraph 2 of the United Nations Security Council resolution 817 (1993).'' Greece argued that FYROM referred to itself by its constitutional name (i.e., Republic of Macedonia), a claim FYROM did not dispute. In fact, FYROM agreed that it had done so all along and that this was a well-established ''practice,'' which was also incorporated in Resolution 817. What Resolution 817 required, FYROM argued, was that the organization in question, not FYROM itself, use the provisional designation provided for in the resolution. The Court sided with FYROM and concluded that the Interim Accord does not allow Greece ''to object to the Applicant's admission to an organization based on the prospect that the Applicant is to refer to itself in such organization with its constitutional name.''

7. Prosecutor v. Callixte Mbarushimana (ICC Dec. 16, 2011)
<http://www.icc-cpi.int/iccdocs/doc/doc1286409>

On December 16, 2011, the Pre-Trial Chamber I of the International Criminal Court decided to not confirm the charges against Callixte Mbarushimana. He was released from the Court's custody on December 23, 2011.

Mbarushimana, arrested by the French authorities in 2010 and transferred to The Hague in 2011, was charged with five counts of crimes against humanity and eight counts of war crimes for his alleged role as the Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* (''FDLR''). The Prosecution alleged that, in 2009, the FDLR attacked civilians and created a ''humanitarian catastrophe'' in the Kivu provinces of the Democratic Republic of Congo (''DRC'') in order to bring attention to the group's political demands. These attacks, the Prosecution argued, resulted in the commission of several war crimes and crimes against humanity. Furthermore, according to the Prosecution, ''a significant part of the strategy of attacking the civilian population consisted in publicly denying any responsibility of the FDLR for the losses entailed by those attacks, in some instances blaming other armed parties to the conflict.'' The systematic denial was meant to ''prevent[ ] the FDLR's leaders from being labeled as mass murderers, on the one hand, and at exploiting the international attention on the FDLR and its political agenda triggered by the attacks, on the other.'' Mbarushimana was personally responsible, the Prosecution argued, because his public denials of the alleged crimes ''intentionally contributed . . . to the commission of the war crimes and crimes against humanity.''

Mbarushimana claimed that the evidence provided by the Prosecution did not support its claims that the attacks were carried out by the FDLR. Furthermore, if civilians were killed during the attacks, these casualties were ''the "collateral damage' of operations aimed at engaging the stronghold of the FARDC [DRC governmental *Forces Armées de la République Démocratique du Congo*], who located their troops among the civilian population.'' Finally, civilian deaths caused by FDLR soldiers ''were not authorised by the FDLR leadership, namely by President Murwanashyaka and Commander Mudacumura.''

Before addressing the merits of the request to confirm the charges, the Chamber criticized both parties' conduct throughout the proceedings, which, the Chamber noted, resulted in unnecessary delays. The Chamber reminded the parties that the ''Court is meant to become a beacon for litigation in international criminal law. For these reasons, it invites both parties to critically assess their conduct throughout these proceedings, with the hope that such critical assessment will allow them to learn important lessons for their future engagements before this Court.''

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The Chamber then went on to discuss the merits of the case. Referring to Article 61(7) of the ICC Statute, the Chamber noted that its task at this stage of the proceedings was to ''determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.'' This test, the Chamber added, is meant to ensure that only those individuals ''against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought'' are prosecuted, thus protecting innocent persons from being wrongfully tried, while also ensuring judicial economy by eliminating unsubstantiated trials.

At the outset of its determination, the Chamber openly criticized the Prosecution for its presentation of evidence, which the Chamber found incoherent and unreliable. In fact, the Chamber observed that it was unable to ''properly assess, let alone satisfy itself to the required threshold, whether any of the war crimes charged by the Prosecution were committed by the FDLR in . . . [several] villages.'' Where the evidence was sufficient to warrant review, the Chamber nonetheless found that the Prosecution failed to reach the evidentiary threshold required by the ICC Statute. The same determination was made with respect to the alleged crimes against humanity committed by Mbarushimana.

Presiding Judge Sanji Mmasenono Monageng dissented with the majority's decision. She concluded that sufficient evidence existed ''to establish to the required threshold'' that the FDLR leadership issued the order to create a humanitarian catastrophe. According to Judge Monageng, the majority's finding was based on an ''incorrect application of the standard of "substantial grounds to believe.''

8. Laurent Koudou Gbagbo Warrant of Arrest (ICC Nov. 23, 2011)
<http://www.icc-cpi.int/iccdocs/doc/doc1276751>

Former President of Côte d'Ivoire, Laurent Koudou Gbagbo, has been transferred to the International Criminal Court (''ICC''), where he is being held at the ICC detention center in the Netherlands.

On November 23, 2011, Pre-Trial Chamber III issued an arrest warrant for his alleged individual criminal responsibility for crimes against humanity (including murder, rape and other forms of sexual violence, persecution and other inhuman acts) allegedly committed in Côte d'Ivoire between December 2010 and April 2011. On November 29, 2011, national authorities of Côte d'Ivoire surrendered Gbagbo to the ICC.

Less than two months before Gbagbo's arrest and surrender to the tribunal, Pre-Trial Chamber III granted the Prosecutor's request to open an investigation into the situation in Côte d'Ivoire to investigate alleged crimes against humanity and war crimes allegedly committed by pro-Gbagbo and pro-Ouattara forces. Reviewing the Prosecutor's request, the Pre-Trial Chamber III concluded that there are reasonable grounds to believe that pro-Gbagbo forces attacked civilians in the aftermath of the presidential elections in Côte d'Ivoire.

While Côte d'Ivoire is not party to the Rome Statute, it accepted the Court's jurisdiction on April 18, 2003, and reaffirmed it on two subsequent occasions.

9. Prosecutor v. Mladic (ICTY Dec. 2, 2011)
<http://www.icty.org/x/cases/mladic/tdec/en/111202>

Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (''ICTY'') has granted the Prosecution's request, under Rule 73 *bis* (D) of the Rules of Procedure and Evidence, to limit its presentation of evidence to 106 instead of 196 crimes in the case against Ratko Mladic. The request was granted ''in the interest of a fair and expeditious trial.''

The Prosecution filed the request on August 25, 2011, stating that the ''selected crimes reasonably reflect the criminal conduct of the Accused, are representative of the totality of the crimes charged, and establish a basis for conviction on all eleven counts of the indictment.'' Thus, instead of focusing on 140 crimes in twenty-three municipalities, the Prosecution will focus on sixty-six crimes in fifteen municipalities; regarding the Srebrenica massacre, the Prosecution will focus on twenty instead of twenty-two killing sites; with respect to the Sarajevo siege, the Prosecution will only present evidence with respect to six sniping incidents and eight shelling incidents, as opposed to the original sixteen sniping and eighteen shelling incidents.

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The reduction also means that the Prosecution will not be able to present evidence of the crimes removed from the indictment unless such evidence is necessary to establish an element of a count in the indictment, and only if the Prosecution provides prior notice and explanation.

Ratko Mladic, the highest ranking Bosnian Serb military figure during the war in Bosnia and Herzegovina, was arrested in May 2011, almost sixteen years after he was initially indicted by the ICTY. Mladic is facing charges of genocide, crimes against humanity, and war crimes for his role in the ethnic cleansing campaigns between 1992–1995 that led to the killing of over 7,000 Bosnian Muslim men in Srebrenica and other violent crimes in Sarajevo and elsewhere in Bosnia (amended indictment).

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