

INTERNATIONAL DECISIONS

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Dismissal of U.S. preliminary objection to ICJ jurisdiction based on compromissory clause in bilateral commerce treaty between Iran and United States—use of force matters not per se excluded from reach of 1955 Treaty—meaning of “freedom of commerce”

OIL PLATFORMS (Iran v. United States), Preliminary Objection, Judgment.
International Court of Justice, December 12, 1996.

On November 2, 1992, the Government of the Islamic Republic of Iran (Iran) filed an Application before the International Court of Justice alleging fundamental breaches by the United States of America of the Treaty of Amity, Economic Relations, and Consular Rights (Treaty) between Iran and the United States.¹ According to Iran, these breaches arose out of the U.S. Navy's attack on and destruction of three offshore oil production complexes, owned and operated by the National Iranian Oil Co. in the Persian Gulf, on October 19, 1987, and April 18, 1988. Iran asked the Court to declare that the United States had violated the Treaty and that the United States had incurred international responsibility for the attacks, for which it must make appropriate reparation. The United States sought to dismiss the case and argued that the Court lacked jurisdiction mainly because matters relating to the use of force are not justiciable under or governed by the Treaty. In its Judgment of December 12, 1996, the Court, by a vote of fourteen to two (Vice-President Schwebel and Judge Oda dissenting), rejected the preliminary objection raised by the United States and upheld the Court's jurisdiction. The case will thus proceed to the merits.²

Iran sought to base the Court's jurisdiction on the compromissory, or dispute resolution, clause of Article XXI(2) of the Treaty. Article XXI(2) reads: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

In its preliminary objection to the Court's jurisdiction, the United States maintained that Iran's Application bore no relation to the Treaty, adverting to (1) the inapplicability of the Treaty in the event of the use of force, and (2) the narrow scope of the various provisions of the Treaty on which Iran relied.

With regard to the conditions laid down by Article XXI(2) of the Treaty, the Court was satisfied that a dispute had arisen between Iran and the United States, that it had been impossible to adjust by diplomacy, and that the parties had not agreed to settle it by some alternative means. However, the Court noted that the parties differed on whether their dispute with respect to the lawfulness of the U.S. military actions against the Iranian

¹ Aug. 15, 1955, 8 UST 899, 284 UNTS 93 (entered into force June 16, 1957). The Treaty regulates the conditions of residence of nationals of one of the parties on the territory of the other (Art. II); the status of companies and access to the courts and arbitration (Art. III); safeguards for the nationals and companies of each of the parties, as well as their properties and enterprises (Art. IV); the conditions for the purchase and sale of real property and protection of intellectual property (Art. V); the tax system (Art. VI); the system of transfers (Art. VII); customs duties and other import restrictions (Arts. VIII–IX); freedom of commerce and navigation (Arts. X–XI); and the rights and duties of consuls (Arts. XII–XIX).

² In his Order of December 16, 1996, the President of the Court fixed June 23, 1997, as the time limit for the filing of the Counter-Memorial of the United States.

oil platforms was a dispute “as to the interpretation or application” of the Treaty. The Court stated that in such a case it must ascertain whether the violations of the treaty pleaded by the applicant do or do not fall within the provisions of that treaty and whether, as a consequence, the dispute is one that the Court has jurisdiction *ratione materiae* to entertain pursuant to the treaty’s compromissory clause. In other words, it is not enough for the Court merely to note that the applicant maintains that a dispute “as to the interpretation or application” of the treaty invoked exists and that the respondent denies it.³

The Court first addressed the argument of the United States that the ICJ lacked jurisdiction because Iran’s claims raised issues relating only to the use of force (i.e., naval combat operations), which do not fall within the wholly commercial and consular provisions of the Treaty. The United States claimed that its use of armed force was in reaction to a long series of attacks mounted from the oil platforms by Iranian military forces against American and neutral vessels engaged in peaceful commerce in the Persian Gulf. Article XX(1)(d) of the Treaty provides that it will not preclude the application of measures necessary to fulfill the obligations of a party regarding the maintenance or restoration of international peace and security, or necessary to protect a party’s essential security interests. Referring to its Judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,⁴ in which it had interpreted an identical “exclusion clause,” the Court found that the text of Article XX(1)(d) must be understood as affording only a defense on the merits should the occasion arise, rather than as excluding from its jurisdiction the test of the lawfulness of certain national security measures. According to the Court, any action by one of the parties to the Treaty that is incompatible with the various obligations that it imposes is unlawful, regardless of the means (forcible or nonforcible) by which that action is brought about. Therefore, matters relating to the use of force are not per se excluded from the reach of the Treaty.⁵

The Court next considered whether there existed between Iran and the United States a dispute as to the interpretation or application of Articles I, IV(1) and X(1) of the Treaty, which had been invoked by Iran, and whether such a dispute would fall within the scope of the compromissory clause of Article XXI(2) of the Treaty.

First, Iran alleged that the United States had breached Article I, which provides that “[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran.” Referring to the customary rules of interpretation expressed in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, the Court stated that it follows from the object and purpose of Article I of the Treaty and its application in practice by the parties, that this provision must be regarded as fixing an objective of peace and friendship, constituting a precondition for the harmonious development of the parties’ commercial, financial and consular relations. The other Treaty provisions are to be interpreted and applied in the light of this objective, but Article I does not by itself generate legal rights and obligations and it cannot, taken in isolation, constitute a basis for the Court’s jurisdiction. The Court thus rejected both Iran’s argument, according to which Article I imposes actual obligations that can provide an independent basis of jurisdiction to evaluate the lawfulness of the U.S. military actions, and the U.S. argument, according to which Article I constitutes only a statement of aspiration devoid of any standard.⁶

Second, Iran claimed that the United States was in breach of Article IV(1) of the Treaty, which requires each party to accord fair and equitable treatment to the other

³ Preliminary Objection, Judgment, para. 16 [hereinafter slip op.].

⁴ 1986 ICJ REP. 14, 116, para. 222, & 136, para. 271 (June 27).

⁵ Slip op., paras. 20–21.

⁶ *Id.*, paras. 28, 31.

party's nationals and companies and to their property and enterprises, to refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests, and to assure that their lawful contractual rights are afforded effective means of enforcement in conformity with applicable law. The United States argued that the actions allegedly committed by it did not concern Iranian nationals or companies within the territory of the United States and that Article IV does not embody a wholesale warranty by each party to avoid all injury to the other party's nationals and companies, wherever they may be. The Court rejected the latter interpretation and found that Article IV(1) does not include any territorial limitation; rather, it offers a general guarantee. However, the Court also determined that Article IV(1) concerns the treatment by each party of the other party's nationals and companies in the exercise of their private or professional activities, and that this provision does not lay down any norms applicable to the U.S. military actions against Iran so as to support jurisdiction in this particular case.⁷

Third, Iran invoked Article X(1) of the Treaty, which provides that there shall be freedom of commerce and navigation between the territories of the parties to the Treaty. In the absence of a claim by Iran that any military action had affected its freedom of navigation, the Court thus had to determine whether the actions of the United States complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by Article X(1).

The United States argued that the word "commerce" in Article X(1) is confined to maritime commerce between the United States and Iran and applies solely to the actual sale or exchange of goods. However, the Court found that the Treaty contains indications of the parties' intention to deal with trade and commerce in general. Moreover, it found that the word "commerce" is not restricted, in ordinary usage or legal language, to the immediate act of purchase and sale. It also covers ancillary activities integrally related to trade and commerce, including industry (production) and the transport business. Although the Court admitted that, on the basis of the material before it at the jurisdictional stage of the proceedings, it was unable to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil, it noted that the destruction of goods to be exported, or any act capable of affecting their transport and storage, could adversely affect freedom of commerce (in this case, the export trade in Iranian oil), which is guaranteed by Article X(1) of the Treaty. In support of its findings on this point, the Court referred to the intent of firm and enduring peace and sincere friendship embodied in Article I.⁸ Consequently, the Court determined that a dispute existed between Iran and the United States as to the interpretation and application of Article X(1), and that it has jurisdiction, within the scope and on the basis of the compromissory clause of Article XXI(2), to entertain the claims made by Iran under Article X(1).⁹

This is the first case in the history of the Court in which the applicant relied exclusively on a compromissory clause of a bilateral treaty to establish ICJ jurisdiction. The decision raises the question of what the proper standard of proof and judicial methodology is in the jurisdictional phase of such a case.¹⁰ The well-known and generally applicable standard introduced by the Permanent Court in *Factory at Chorzów* (Jurisdiction) was that it

⁷ *Id.*, paras. 35-36.

⁸ *Id.*, paras. 41-52.

⁹ *Id.*, para. 53.

¹⁰ Obviously, this question is different from that of the *burden* of proof: there, the Court's dictum applies that "it is the litigant seeking to establish a fact who bears the burden of proving it." See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 437, para. 101 (Nov. 26).

will affirm its jurisdiction only if the force of the arguments militating in favor of jurisdiction is preponderant and that, in case of doubt, it will decline jurisdiction.¹¹ But how strictly will the Court administer the test of preponderance in each particular case? And most important, how much doubt is required for the Court to decline jurisdiction after considering the intention of the parties to submit themselves to the Court's jurisdiction?¹² The answer depends on the circumstances of each case, which the jurisprudence of the Court demonstrates.¹³ That jurisprudence is not entirely clear or constant and offers different lines of holdings, as is explained by Judges Shahabuddeen and Higgins in their separate opinions. There have been cases in which the Court determined definitively at the jurisdictional stage whether the treaty provisions relied on by the applicant truly applied to the alleged circumstances; there have been other cases where the Court required, on a purely provisional basis, that there be a reasonable or relevant connection between a treaty's compromissory clause and the applicant's claim, or some serious, rational (i.e., reasonably arguable) or sufficiently plausible juridical basis for the claim under the treaty invoked.¹⁴

Seen in a broader context, this decision, as well as other recent ones rendered by the "Bedjaoui Court," seems to indicate that the ICJ needs much "doubt" before it will decline jurisdiction. In its Judgment (Jurisdiction and Admissibility) of December 20, 1988, in *Border and Transborder Armed Actions (Nicaragua v. Honduras)*,¹⁵ the Court pointed out that the existence of jurisdiction in a given case is not a question of fact, but one of law to be resolved in the light of the relevant facts. In this case, was the force of Iran's arguments militating in favor of jurisdiction (based on the existence of a dispute as to the application or interpretation of certain treaty provisions) really preponderant? It cannot be said that the Court proffered extensive reasoning for its finding that the various conditions embodied in Article XXI(2) of the Treaty were supported in fact and in law.¹⁶ Yet it could be argued that the compromissory clause of the bilateral Treaty—which, unlike that of some treaties, is not limited to disputes as to the interpretation or application of only some provisions but extends to "any dispute . . . as to the interpretation or application of the present Treaty"—called for especially strict scrutiny by the Court.¹⁷ One is left with the impression that it may indeed benefit an applicant to claim the existence of a dispute "as to the interpretation or application" of any number of broad provisions of some treaty containing a compromissory clause. As this instance

¹¹ *Factory at Chorzów (Ger. v. Pol.) (Claim for Indemnity) (Jurisdiction)*, 1927 PCIJ (ser. A) No. 9, at 32 (July 26).

¹² It is unclear why the ICJ relied heavily on the intention of the United States, as expressed in various documents, in accepting that party's objection to the jurisdictional basis of Article I of the Treaty, but rejected its objections in relation to Article X, given that the essence of the U.S. objections to both provisions was that the Treaty was never intended to govern the use-of-force issues raised by Iran's Application. Arguably, the Court's statement that "at no time did the United States regard Article I as having the meaning now given to it by the Applicant," slip op., para. 29, applies equally to Article X of the Treaty.

¹³ For an exposé on the issue of standard of proof, see Judge Shahabuddeen's dissenting opinion in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Jurisdiction and Admissibility, 1995 ICJ REP. 6, 62–65 (Feb. 15). Judge Higgins points to the marked uncertainty in the practice of the Court on this issue and offers her own interpretation of the Court's case law in her separate opinion.

¹⁴ See slip op., Separate Opinion of Judge Higgins, paras. 9–26, for a summary of these different lines of holding.

¹⁵ 1988 ICJ REP. 69, 75–76, para. 16 (Dec. 20).

¹⁶ Judge Oda points out in his dissenting opinion that the record before the Court does not show that there had been prior diplomatic negotiations between Iran and the United States in the five-year period from the first attack until the filing of the Application by Iran, and that, on this basis alone, Iran's Application could have been dismissed. Arguably, therefore, the issue to be decided by the Court was one of the admissibility of Iran's Application (in addition to one of jurisdiction).

¹⁷ See also slip op., Dissenting Opinion of Judge Oda, para. 16. This goes far beyond the test proposed by Judge Shahabuddeen in his separate opinion: that the Court simply determine whether the construction of the treaty relied on by the applicant is an "arguable" one.

demonstrates, it is very difficult for the respondent to upset jurisdiction in such circumstances and instill the necessary "doubt" in the mind of the ICJ. This situation, in turn, may create considerable friction with the fundamental notion of the requisite consent of the parties that appear before the Court, as Judge Oda points out in his dissenting opinion.

The Court did not proffer extensive reasoning to support its dismissal of Article IV(1) of the Treaty as a basis for its jurisdiction, as Judge Parra-Aranguren highlights in his separate opinion. In the Court's view, the provisions of Article IV(1) set a "fair and equitable" standard for the way that the natural persons and legal entities of one party are to be treated, in the exercise of their private or professional activities, by the other party, and they do not cover the military actions carried out in this case by the United States *against Iran*. As Judge Parra-Aranguren points out, it is unclear from the Court's reasoning why it denied the National Iranian Oil Co., which is a juridical person different from Iran and the owner of the damaged oil platforms that were the target of the attack by the United States, the right to profit from the general guarantee status that the Court assigned to Article IV(1).

The decision also raises the issue of the value as a precedent of prior decisions of the Court, having regard to the Court's frequent reference, despite the absence of a rule of *stare decisis*, to its jurisprudence and that of its predecessor, as well as its exclusive reliance on precedent to explain some of its findings in this case. Most interestingly, it relied on its Judgment in *United States Diplomatic and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran)*¹⁸ in holding that the Treaty was still in force, according Iran the benefit of a judgment in a prior unrelated case successfully brought against it by the respondent in the present case. Also, the Court relied on its Judgment in *Military and Paramilitary Activities in and against Nicaragua* in interpreting the national security/exclusion clause of Article XX(1)(d) of the Treaty.¹⁹ There is a subtle difference between, on the one hand, simple reference to prior case law as a further justification or clarification of a judicial finding on a particular point of law (using that case law as a subsidiary means in accordance with Article 38(1)(d) of the ICJ Statute), and, on the other, reliance on precedent as an exclusive basis for finding law without offering other legal sources. The decision embodies various examples that come close to the latter approach.

This ICJ Judgment concerns only jurisdiction. The United States will have a chance to demonstrate that it did not breach, or was justified in breaching, the Treaty when the Court deals with the merits of the case. Although a preliminary holding on jurisdiction cannot decide or prejudge the merits, some of the Court's far-reaching and definitive statements on the interpretation of Article X(1) of the Treaty may create serious disadvantages for the United States when defending its actions at the merits stage.²⁰ In addition, the decision might affect similar friendship, commerce and navigation treaties, in that the United States and other nations may henceforth be reluctant to negotiate dispute resolution clauses similar to the one found in this Treaty for fear of being haled into the ICJ on politically motivated claims arguably lodged under the pretext of the

¹⁸ 1980 ICJ REP. 3 (May 24).

¹⁹ 1986 ICJ REP. 14 (June 27). However, Vice-President Schwebel argues in his dissenting opinion that the Court was free in the present proceedings objectively to apply the terms of Article XX of the Treaty, given the peculiar history of the 1986 precedent, the U.S. position and the Court's responsibilities in this case.

²⁰ In the final paragraphs of his separate opinion, Judge Shahabuddeen points out that if the Court renders a definitive interpretation of the Treaty in deciding on its jurisdiction, it is difficult to see why that interpretation should not govern at the merits stage. However, the Court is still required at the merits phase to make an independent evaluation of exactly what the facts are and how any defenses of the respondent relate to the possible breaches of the law applicable to the dispute. In fairness to the applicant, the Court must equally guard itself against attempts by the respondent to raise a merits-related objection to jurisdiction and thus preclude further proceedings simply by raising it *in limine litis*.

violation of a trivial provision of a commerce treaty containing a compromissory clause.²¹ At the same time, the decision might encourage states to exercise diplomatic protection by raising claims before the ICJ under similar treaties on behalf of their citizens and corporations that have been injured by other states, perhaps even in connection with alleged state-sponsored terrorist activities.

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International Criminal Tribunal for the former Yugoslavia—humanitarian law—1949 Geneva Conventions—laws or customs of war—role of Croatia in the conflict in Bosnia and Herzegovina

PROSECUTOR V. RAJIĆ, REVIEW OF THE INDICTMENT PURSUANT TO RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE. No. IT-95-12-R61.

International Criminal Tribunal for the former Yugoslavia, September 13, 1996.

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia (Tribunal) charged Bosnian Croat Ivica Rajić with grave breaches of the Geneva Conventions for the Protection of Victims of War of 1949 (Geneva Conventions), as recognized in Article 2 of the Tribunal's Statute (Statute),¹ and violations of the laws or customs of war, as recognized in Article 3 of the Statute, for his role in the attack on the village of Stupni Do in the Republic of Bosnia and Herzegovina. The indictment was confirmed on August 29, 1995, and warrants of arrest were signed and sent between August 29 and December 6, 1995, to the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Croatia. On March 6, 1996, the prosecutor was ordered to report on his efforts to effect service of the indictment. The confirming judge subsequently ordered that the indictment against the accused be submitted to the full trial chamber for review under Rule 61 of the Tribunal's Rules of Procedure and Evidence (Rules), the so-called Procedure in Case of Failure to Execute a Warrant (Rule 61 procedure).²

At issue in this review was whether the acts with which the accused is charged fall within the trial chamber's subject matter jurisdiction. On September 13, 1996, Trial Chamber II of the Tribunal issued its decision. It concluded that it had subject matter jurisdiction regarding the crimes charged under Article 2 because there was prima facie evidence both that the crimes had occurred within the context of an international armed conflict by virtue of Croatia's direct military involvement in the conflict and its control over the Bosnian Croat forces, and that the civilians and property were protected within the meaning of the Geneva Conventions. The trial chamber also concluded that it had subject matter jurisdiction regarding the crimes charged under Article 3, that there were reasonable grounds for believing that the accused had committed the crimes charged, and that the failure to effect personal service of the indictment and to execute the warrants of arrest against the accused was due to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the Tribunal. A separate opinion by Judge Sidhwa on the treatment of evidence was attached.³

²¹ See slip op., Dissenting Opinion of Judge Oda, para. 26. According to the most senior ICJ judge, obtaining access to the ICJ on this basis would constitute "nothing short of an abuse of treaty interpretation."

¹ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [Tribunal], Statute, UN Doc. S/25704, annex (1993), 32 ILM 1192 (1993).

² Tribunal, Rules of Procedure and Evidence, Feb. 11, 1994, 33 ILM 484 (1994), as amended (June 7, 1996). The Rules were again amended after the trial chamber's decision, on December 3, 1996.

³ Judge Sidhwa, although agreeing with the decision of the trial chamber as set out in the judgment, addressed issues not discussed in the judgment, such as the relationship between confirmation of the indictment under Rule 47 and Rule 61 proceedings, and the prosecution's position that supporting materials presented during a Rule 61 proceeding—with the exception of the oral testimony of witnesses presented by it in open court—are confidential.

The accused was charged with ordering the attack of October 23, 1993, on Stupni Do in the Republic of Bosnia and Herzegovina. The attack was allegedly carried out by the Croatian Defense Council (HVO), which is considered to be the military forces of the self-proclaimed Croatian Community of Herceg-Bosna, acting under the accused's control. He was charged with six counts: (1) the willful killing of civilians, a grave breach of the Geneva Conventions as recognized by Article 2(a) of the Statute (Count I); (2) the destruction of property, a grave breach of the Geneva Conventions as recognized by Article 2(d) of the Statute (Count II); (3) the deliberate attack on the civilian population and the wanton destruction and devastation of the village, a violation of the laws or customs of war as recognized by Article 3 of the Statute (Count III); and (4), alternatively, command responsibility for these crimes (Counts IV-VI).

In its consideration of these charges, the trial chamber first dealt with some preliminary issues, such as the purpose and nature of Rule 61 proceedings, which allow the prosecutor to present the indictment against an accused in open court, as well as the evidence supporting the indictment and additional evidence. Of particular relevance was the trial chamber's differentiation between the Rule 61 procedure and a trial *in absentia*, noting that there is no finding of guilt in the former but, rather, only a determination of whether there are "reasonable grounds"⁴ for believing that the accused committed the crimes charged. The trial chamber pointed out that, in making this determination, it considers whether the acts with which the accused is charged, if proven beyond a reasonable doubt at trial, are crimes falling within its subject matter jurisdiction and whether the charges against the accused are factually well-founded. The trial chamber also emphasized that no penalty is imposed as a result of a Rule 61 procedure; the only consequences are the public airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of arrest. After some additional preliminary matters, the trial chamber turned to whether it had subject matter jurisdiction regarding the offenses alleged against the accused.

In considering the charges under Article 2 of the Statute, the trial chamber referred to the finding in the appeals chamber's decision in the jurisdictional phase of *Prosecutor v. Tadić (Decision on Jurisdiction)*⁵ that Article 2 encompasses the grave breaches provisions of the Geneva Conventions and that there are two prerequisites for its application: there must be an international armed conflict; and the crime must be directed against persons or property protected under the relevant Geneva Convention. Addressing the first requirement, the trial chamber referred to the holding in the *Decision on Jurisdiction* that, unless the "direct involvement" of the Federal Republic of Yugoslavia was established in the conflict between the Bosnian government forces and the Bosnian Serb forces in Bosnia and Herzegovina, as well as in the conflict between the Croatian Government and the Croatian Serb forces in Krajina, the conflicts were to be regarded as internal.⁶ Finding the conflict between the HVO and the Bosnian Government analogous to these conflicts, the trial chamber determined that this conflict should also be treated as internal unless the direct involvement of a foreign state was established. The trial chamber considered the direct military activities of Croatian forces, as well as Croatia's control over the Bosnian Croat forces.

Regarding the direct military activities of the Republic of Croatia's armed forces, the trial chamber examined the evidence for purposes of the application of the grave breaches provisions of the Fourth Geneva Convention, the Convention Relative to the

⁴ Rule 61(C), Rules of Procedure and Evidence, *supra* note 2.

⁵ *Prosecutor v. Tadić, Appeal on Jurisdiction*, No. IT-94-1-AR72, at 44-46 (Oct. 2, 1995), 35 ILM 32 (1996) [hereinafter *Decision on Jurisdiction*].

⁶ *Id.*, para. 72.

Protection of Civilian Persons in Time of War.⁷ The chamber found that the evidence supplied by the prosecutor presented reasonable grounds for believing that members of the Croatian Army were present in the territory of Bosnia and Herzegovina in substantial numbers and were involved, both directly and through their relations with Herceg-Bosna and the HVO, in clashes with Bosnian government forces in central and southern Bosnia. Moreover, there was "no doubt" that elements of the Croatian Army were located on the territory of Bosnia at least from 1992 to March 1994, and that they were there at the behest of the Croatian Government.⁸ The chamber noted that the material presented to it, including reports and resolutions by the United Nations Secretary-General, the Security Council and the General Assembly, as well as statements by the United Nations Protection Force and other witnesses, suggested that, contrary to Croatia's claims, Croatian troops were not just stationed in border areas but were involved in hostilities against Bosnian government forces in central and southern Bosnia. In the trial chamber's view, these materials constituted prima facie evidence that units of the Croatian Army were present in central Bosnia between late 1992 and March 1994, that these troops had been sent to Bosnia by the Croatian Government, and that they fought alongside the Bosnian Croat forces against the Bosnian government forces. There was thus sufficient evidence to conclude,

for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.⁹

Although finding this conclusion sufficient to meet the international armed conflict requirement of the Fourth Geneva Convention, the trial chamber, for purposes of the issue of protected persons, considered the prosecutor's second argument for internationality: that Croatia's control over Herceg-Bosna rendered the conflict between the Bosnian Government and Herceg-Bosna international. According to the prosecutor, Croatia exerted sufficient political and military control over the Bosnian Croat forces that the latter could be regarded as agents or an extension of Croatia. The chamber agreed and concluded that the agency relationship between Croatia and the Bosnian Croats, if proven at trial, would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international.

In reaching this conclusion, the trial chamber distinguished the test for agency developed in the context of state responsibility, particularly by the International Law Commission in its draft articles on state responsibility and by the International Court of Justice (ICJ) in the *Nicaragua* case.¹⁰ In *Nicaragua* the ICJ held that, for the rebel *contras* to be considered agents of the United States Government to an extent that would make it liable for violations of international humanitarian law committed by them, the relevant test was whether their relationship "was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."¹¹

In distinguishing this test for agency, the trial chamber noted significant differences between the situation before it and that addressed in *Nicaragua*: First, the ICJ's decision

⁷ Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁸ No. IT-95-12-R61, para. 13 [hereinafter Decision].

⁹ *Id.*, para. 21.

¹⁰ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (June 27).

¹¹ *Id.*, para. 109.

was a final determination of U.S. responsibility for the acts of the contras, whereas Rule 61 proceedings are preliminary in nature and may be revised at trial. Second, the ICJ was considering state responsibility for violations of international humanitarian law and therefore focused on U.S. operational control over the contras, whereas the chamber was not considering Croatia's liability for acts committed by Bosnian Croats but merely whether the Bosnian Croats could be considered agents of Croatia for the purpose of establishing subject matter jurisdiction regarding acts alleged to violate the grave breaches provisions of the Geneva Conventions, for which specific operational control was not of paramount importance. Because the Tribunal's subject matter jurisdiction depends on the applicability of international humanitarian law, including the grave breaches provisions of the Geneva Conventions, implicit in the latter argument is the conclusion that the level of a foreign state's involvement sufficient to establish the applicability of international humanitarian law governing international armed conflicts to the conduct of its local allies need not reach the level of control necessary to establish that state's responsibility for their actions.

After thus distinguishing the agency test in *Nicaragua*, the trial chamber, without elaborating on what it believed to be the appropriate test, concluded that there were reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia and Herzegovina from the autumn of 1992 to the spring of 1993. The chamber stated:

It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.¹²

On this last point, the chamber referred to the 1993 agreement between officials of Croatia and the Republic of Bosnia and Herzegovina concerning ways to end the fighting between the Bosnian Croats and the Bosnian Government, as well as the Croatian Foreign Minister's assurances on the conclusion of the Dayton Agreement that Croatia would take all steps necessary to ensure that "personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [*sic*] and comply with the provisions" of certain portions of the Dayton Accords.¹³ The chamber construed this evidence as indicating that Croatia had conceded, both implicitly and explicitly, its military and political control and influence over the Bosnian Croats. Overall, the trial chamber concluded that there were reasonable grounds for determining that, for the purposes of this proceeding, the Bosnian Croats could be regarded as agents of Croatia with respect to discrete acts that were alleged to be violations of the grave breaches provisions of the Geneva Conventions.

Having found that the attack on Stupni Do fulfilled the first requirement for the application of Article 2 of the Statute, the trial chamber turned to the second requirement: that the alleged crimes must be committed against persons or property protected under the relevant Geneva Convention. Article 4 of the Fourth Geneva Convention provides, *inter alia*: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not

¹² Decision, para. 26.

¹³ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (Nov. 29, 1995), in *General Framework Agreement for Peace in Bosnia and Herzegovina*, UN Doc. A/50/790-S/1995/999, at 126-30 (1995) [hereinafter *Dayton Agreement*], *quoted in* Decision, para. 31.

nationals." The trial chamber considered that under this definition Bosnian civilians qualified as "protected persons" if they were "in any manner whatsoever . . . in the hands of a Party to the conflict . . . of which they are not nationals."¹⁴ According to the prosecutor, the HVO forces under the accused's command were controlled to such an extent by Croatia that Bosnian persons who were attacked by these forces could be regarded as in the hands of Croatia. The trial chamber had already found that Herceg-Bosna and the HVO could be regarded as agents of Croatia for purposes of the application of the grave breaches regime. It went on to consider whether this level of control was also sufficient to meet the protected person requirement of the Fourth Geneva Convention.

In doing so, the trial chamber referred to the suggestion in the International Committee of the Red Cross's *Commentary* that the requirement should be interpreted to provide broad coverage and that the expression "in the hands of" does not necessarily connote being held in enemy hands directly as a prisoner but simply in territory under the control of a party to the conflict.¹⁵ In view of the considerable evidence that the Bosnian Croats controlled the territory surrounding Stupni Do and its finding of reasonable grounds for believing that Croatia controlled the Bosnian Croats, the chamber found that Croatia could be regarded as being in control of this area. Thus, "although the residents of Stupni Do were not directly or physically 'in the hands of' Croatia, they can be treated as being constructively 'in the hands of' Croatia, a country of which they were not nationals."¹⁶ Consequently, for purposes of the grave breaches provisions, the civilian residents of Stupni Do were protected persons vis-à-vis the Bosnian Croats because the latter were controlled by Croatia. Again, the trial chamber qualified this holding as only for the purpose of establishing subject matter jurisdiction with respect to the offenses allegedly committed by the accused.

As for protected property, Article 53 of the Fourth Geneva Convention provides that "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." The prosecutor had argued that the property of Stupni Do was protected because, in overrunning the village and bringing it under their control, the HVO forces, who could be considered part of Croatia, brought Bosnian property under the control of the opposing side in an international conflict.

The trial chamber noted that Article 53 defines protected property in terms of prohibitions placed on an "Occupying Power." Thus, an occupation is necessary for civilian property to be protected against destruction under the Fourth Geneva Convention. For the meaning of the term "occupation," the chamber looked to Article 2 of the Convention, which states that "[t]he Convention shall also apply to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance"; and Article 6, which provides that the Convention "shall apply from the outset of any conflict or occupation mentioned in Article 2." To determine whether the degree of control exercised by the HVO forces over the village of Stupni Do was sufficient to amount to an occupation as defined by Article 53, the trial chamber again turned to the *Commentary* on the Convention, as well as other commentators, and found support for granting broad coverage to the term "occupation." The *Commentary* states: "The relations between the civilian population of a territory and troops advancing into that territory, whether

¹⁴ Decision, para. 34.

¹⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 47 (Oscar M. Uhler ed., 1958) [hereinafter COMMENTARY].

¹⁶ Decision, para. 37.

fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation."¹⁷

On the basis of this support and its holdings regarding control of Stupni Do and the nature of the conflict, the trial chamber concluded that the property of Stupni Do had become protected property for the purposes of the grave breaches provisions of the Fourth Geneva Convention. Again, the chamber observed that this holding was only for the purpose of establishing subject matter jurisdiction as regards the offenses allegedly committed by the accused. It thus concluded that it had subject matter jurisdiction under Article 2 of the Statute with regard to Counts I, II, IV and V of the indictment.

The trial chamber also concluded, after a brief analysis, that it had subject matter jurisdiction regarding violations of the laws or customs of war charged under Article 3 of the Statute, specifically the wanton destruction of Stupni Do and the attack on its civilian population. Regarding wanton destruction of the village, Article 3(b) of the Statute grants the Tribunal jurisdiction with respect to the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." The *Decision on Jurisdiction* had held that the prohibitions listed in Article 3 are definitely applicable in case of international armed conflict. Since the trial chamber had already concluded that there was sufficient evidence that the conflict at issue was international, it found that it had jurisdiction.

As for the attack on Stupni Do's civilian population, the trial chamber noted that the offense of an attack on a civilian population is not specifically included in Article 3, but that the appeals chamber had concluded that the list in Article 3 is enumerative rather than exhaustive and that the Tribunal has jurisdiction over violations of the laws or customs of war other than those listed.¹⁸ Thus, the trial chamber had to decide whether such attacks constitute a violation of the laws or customs of war covered by Article 3 of the Statute. First, it noted the appeals chamber's finding that civilians are protected during internal armed conflicts.¹⁹ It also noted that the Tribunal's Trial Chamber I had specifically examined whether an attack on a civilian population constitutes a violation of the laws or customs of war in the *Martić Rule 61 Decision*²⁰ and had concluded that it does. It observed, in addition, that the other conditions identified in the *Decision on Jurisdiction* for engaging the Tribunal's jurisdiction under Article 3 had been met; i.e., that the violation was serious because it undermined important values, had serious consequences for the victims, and involved the individual criminal responsibility of the perpetrator.²¹ Agreeing with the analysis in the *Martić Rule 61 Decision*, the trial chamber held that the Tribunal had jurisdiction under Article 3 of the Statute with respect to the charge of an attack against a civilian population, and thus that it had subject matter jurisdiction with regard to Counts III and VI.

The trial chamber then considered whether there were reasonable grounds to believe that the accused had committed the crimes charged in the indictment. The chamber had before it evidence submitted by the prosecutor that the population of Stupni Do numbered 250, most of whom were Muslim, and that on the morning of October 23, 1993, HVO soldiers under the command of the accused attacked the village. According to the chamber, HVO soldiers went from house to house searching for residents of the village and, on finding them, "forced them out of the shelters and terrorised them."²²

¹⁷ COMMENTARY, *supra* note 15, at 60.

¹⁸ Decision on Jurisdiction, paras. 87–89.

¹⁹ *Id.*, para. 119.

²⁰ Prosecutor v. Martić, Review of the Indictment Pursuant to Rule 61, No. IT-95-11-R61 (Mar. 8, 1996).

²¹ Decision, para. 48 (citing *id.*, paras. 8, 10, 19, 20, in turn citing Decision on Jurisdiction).

²² Decision, para. 52.

According to official records, by the time the attack ended, thirty-seven residents of Stupni Do had been killed and nearly all of the sixty homes in the village had been virtually destroyed. The chamber found that the evidence indicated that the village had been destroyed, that its destruction had not been necessary to fulfill any legitimate military objectives, that the civilian population was the target of the attack, and that the offense appeared to have been planned in advance. Accordingly, the evidence provided the trial chamber with a reasonable basis for finding, as charged in the indictment, that there was wanton destruction of the village of Stupni Do, willful killing of its civilian residents, destruction of property, and a deliberate attack on the civilian population as a whole, all of which were unjustified by military necessity.

As for the accused's involvement in the attack, the trial chamber noted that there was significant evidence, including his own statements, connecting the accused with the attack on Stupni Do. There was proof that the accused knew about and ordered the attack and that HVO troops in the area recognized the accused's authority.

Finally, the trial chamber considered whether the failure to apprehend the accused had resulted from failure by a state or states to cooperate with the Tribunal. Although warrants of arrest had been sent to the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Croatia, and an advertisement of the indictment and request for publication were submitted to the Republics of Bosnia and Herzegovina and Croatia, personal service of the indictment had not been effected and the arrest warrants had not been executed. Moreover, domestic judicial documents of Bosnia and Herzegovina from August 21, 1995, indicate that the accused had been in custody since July 3, 1995. The trial chamber did not have any information about the outcome of these domestic proceedings but understood that the accused had since been released, although whether before or after service of the arrest warrant on the Federation of Bosnia and Herzegovina it did not know. The chamber believed that the accused had been in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. It had received a power of attorney appointing a Croatian lawyer as his representative in this proceeding, which the accused had signed while he was in the Federation of Bosnia and Herzegovina.

The trial chamber noted that both the Republic of Croatia and the Federation of Bosnia and Herzegovina are bound to cooperate with the Tribunal, the former in accordance with Article 29 of the Statute, and the latter pursuant to the Dayton Peace Agreement.²³ Despite the presence of the accused on their territory, neither one had served the indictment or executed the arrest warrants. The trial chamber also found, in accordance with the side letter to the Dayton Peace Agreement quoted above,²⁴ as well as Annex 1-A to the Agreement, which requires cooperation with the Tribunal, that the failure of the Federation of Bosnia and Herzegovina to comply also implied the failure of the Republic of Croatia. The failure to effect personal service of the indictment and to execute the arrest warrants against the accused could thus be attributed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the Tribunal, and the chamber so certified for the purpose of notifying the Security Council pursuant to Rule 61(E).

²³ Article X of Annex 1-A of the Dayton Agreement, *supra* note 13, provides that the Federation of Bosnia and Herzegovina undertakes to "cooperate fully with all entities involved in implementation of this peace agreement . . . including the International Tribunal for the former Yugoslavia." On the relationship between the Agreement and the Tribunal, see Paul C. Szasz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 AJIL 301, 313-14 (1996); see also John R. W. D. Jones, *The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia*, 7 EUR. J. INT'L L. 226 (1996).

²⁴ See text at note 13 *supra*.

On the basis of the evidence presented by the prosecutor, the trial chamber was satisfied that there were reasonable grounds to confirm all counts of the indictment against the accused and to issue an international arrest warrant against him to be sent to all states, as well as the multinational military Implementation Force deployed on the territory of Bosnia and Herzegovina.

* * * *

Proceedings before the Tribunal can be divided into three phases. The first phase is the confirmation of the indictment in which, pursuant to Article 19 of the Statute and Rule 47, a judge takes notice of a case and determines whether the evidence presented provides reasonable grounds for believing that the suspect has committed the alleged crime or crimes. In the second phase, which is undertaken in accordance with Rule 61 and occurs only if all attempts to execute arrest warrants and issue advertisements to secure the accused's presence before the Tribunal have failed, the judge who confirmed the indictment, together with the other two members of his or her trial chamber, reconfirms the indictment after a public hearing held to ensure that there are reasonable grounds for believing that the accused committed the crime or crimes charged. As discussed in the decision, the dual purposes of this procedure are to publicize the nature of the crimes alleged to have been committed by the accused and the prima facie case against him, and, if so indicated, to issue an international arrest warrant, increasing the likelihood of trial. In the third phase, the trial of the accused, a new trial chamber, after giving both parties the opportunity to present evidence in court, determines in accordance with Articles 20 and 23 of the Statute and Rule 87 whether the evidence establishes guilt beyond a reasonable doubt. Provision is also made for appellate proceedings. Several noteworthy aspects of this decision arise from the trial chamber's discussion of subject matter jurisdiction in this context.

The first such aspect concerns the trial chamber's finding of internationality based on the second test—the relationship between the Republic of Croatia and the Bosnian Croat forces—and specifically the two arguments by which the chamber distinguished the test for agency enunciated by the ICJ in *Nicaragua*. The first argument, that the Court in *Nicaragua* was making a final determination, whereas Rule 61 proceedings are temporary and can be revised at trial, may be correct in theory but may be less compelling in practice. As pointed out by Judge Sidhwa in his separate opinion, a Rule 61 procedure arises because the Tribunal is unable, after a considerable lapse of time and expenditure of effort, to bring the accused to trial. Therefore, the possibility of actually having a trial is greatly diminished. Absent a fundamental shift in the status quo, the Rule 61 proceedings will probably be the last word on the matter. Additionally, although such proceedings are not a trial and the resultant findings are not in theory applicable to a trial, that does not necessarily mean that a more flexible standard for all aspects of the case, including the test for agency, should be utilized.

The second argument used by the trial chamber to distinguish the agency test developed in *Nicaragua* was that, because the Court was considering agency for purposes of state responsibility, the issue of operational control was much more important in that context. Nevertheless, the trial chamber placed strong emphasis on Croatia's control over the HVO and political and military institutions in Herceg-Bosna. It is also noteworthy that, in determining if the requirement of internationality was met by means of the second test (agency), the chamber relied in part on evidence going to the first test—actual involvement of the Republic of Croatia in the conflict in Bosnia and Herzegovina. The chamber found, first, that Croatia had assisted the Bosnian Croats in “much the

same manner" as the United States had the contras,²⁵ which the ICJ said was insufficient to find agency for purposes of state responsibility; and, second, that Croatia had inserted its own forces into the conflict, which seemingly has more to do with intervention (the first test for internationality) than agency.

The statement that different standards of agency are relevant for determining subject matter jurisdiction with respect to the application of rules regarding international armed conflict and for determining state responsibility is significant in itself. Further clarification of the jurisdictional standard, however, would have been welcome. One can only hope that the two standards do not come into conflict when the ICJ considers the responsibility of the Federal Republic of Yugoslavia for acts committed in Bosnia and Herzegovina in the *Genocide* case.²⁶ The trial chamber apparently attempted to qualify the importance of its finding by noting that it was "solely" for the purpose of determining subject matter jurisdiction. Nevertheless, this purpose is extremely important in and of itself. Moreover, the finding of agency was not, in fact, solely for the purpose of establishing subject matter jurisdiction: in finding that the failure of the Federation of Bosnia and Herzegovina to comply with its obligation to cooperate with the Tribunal implied a failure on the part of Croatia, a finding of agency was used for purposes of state responsibility.

The trial chamber concluded that, since Croatia could be considered in control of Stupni Do and its residents were constructively in the hands of Croatia, a party to the conflict of which they were not nationals, they were protected persons under the Fourth Geneva Convention. This enabled the chamber to conclude that atrocities committed by the Bosnian Croat forces against Bosnian civilians could be considered grave breaches. However, the decision did not clarify whether the reverse would also be true: that atrocities committed by Bosnian government forces against Bosnian Croat civilians could also be considered grave breaches. The Bosnian Croats are nationals of Bosnia and Herzegovina and are therefore not protected persons unless they can be construed as having Croatian nationality. Such a lack of reciprocity was at the heart of the appeals chamber's *reductio ad absurdum* argument in rejecting the prosecution's position in the *Tadić* case that the Security Council had definitively classified the conflict in the former Yugoslavia as international.²⁷ However, as one commentator suggested, such an "absurd" outcome need not result because it is realistic that (in this context) Bosnian Croat civilians would also qualify as protected persons.²⁸

The trial chamber noted that its determination on the issue of "protected persons" was only for purposes of establishing subject matter jurisdiction regarding the offenses allegedly committed by the accused. This caveat is particularly understandable, given the above-mentioned position of the appeals chamber and the fact that the determination was made in the context of Rule 61 proceedings, which rely on evidence presented by only one party and have a different purpose and utilize a different standard from that of the trial phase.

Another aspect of this decision that deserves comment is the trial chamber's conclusion, in its discussion of protected property, that control equals occupation and that this occurs almost immediately. This finding seems to make the phrasing in the Fourth Geneva Convention relating to protected persons—"in the hands of a party to the conflict or Occupying Power"—redundant. If "in the hands of" is figurative, as the chamber suggested, so that

²⁵ Decision, para. 26.

²⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.).

²⁷ Decision on Jurisdiction, para. 76.

²⁸ George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AJIL 64, 66-67 (1996).

it refers to territory controlled by the party, and if control equals occupation, which begins almost immediately, then there is no reason for the Convention to include both "in the hands of" a party to the conflict and "Occupying Power." On the basis of the traditional rules of treaty interpretation, one could find support for the position that the terms "occupation" and "in the hands of a party to the conflict," and thus occupation and assertion of control, are distinct, and that only the former is relevant to protected property. Article 53 of the Fourth Geneva Convention refers only to the occupying power; no mention is made of being in the hands of a party to the conflict. Articles 2 and 6 of the Convention do not necessarily establish the contrary because they are general in nature and are applicable once a state of occupation occurs.²⁹ Additionally, the traditional interpretation of the term "occupation" seems to suggest that, although control is crucial, the law of occupation does not apply until actual control is established, which occurs after the invasion; thus, occupied territory does not include areas that are still embattled and not subject to permanent occupational authority.³⁰ Nevertheless, the recognition that civilian property is protected from the beginning of hostilities, albeit made within the context of Rule 61 proceedings, is a significant development in the attempt to protect civilians from the consequences of war.

Once the trial chamber had determined that the Bosnian Croat forces, under a test of agency distinct from the test in *Nicaragua*, were controlled by Croatia, it seems to have used this determination to settle the remaining issues of protected persons and protected property—in effect seemingly merging the various standards into one, when in fact control for purposes of establishing internationality appears to be different from control for purposes of determining protected persons, which in turn is clearly distinct from the standard for determining protected property. According to the chamber's reasoning, in the context of the Rule 61 phase, once it is determined that the conflict is international in character, given the broad interpretation of protected persons and property, civilian persons and property seem almost always to be protected, albeit only for purposes of subject matter jurisdiction.

Two final observations can be made in this regard. First, despite the trial chamber's qualifications, findings for the purpose of subject matter jurisdiction are extremely important, not only for this case and other cases before the Tribunal, but also for the application of the grave breaches regime to other conflicts to which the Geneva Conventions are applicable. Second, although, strictly speaking, these findings are applicable only to the Rule 61 phase, time alone will tell whether they remain so.

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European Convention on Human Rights—continuing violation—effective control exercised by Turkey over territory of Northern Cyprus—attribution of human rights violations to controlling power—effect of nonrecognition as a state

LOIZIDOU v. TURKEY (Merits). No. 40/1993/435/514.
European Court of Human Rights, December 18, 1996.

In its first judgment concerning human rights violations in Northern Cyprus, the European Court of Human Rights (the Court) found Turkey responsible for such acts because it exercises effective overall control over that territory. Refusing to rule on the legality of the presence of Turkish troops in the area, the Court referred to the almost-universal nonrecognition of the "Turkish Republic of Northern Cyprus" ("TRNC"),

²⁹ For the pertinent clauses of Articles 2 and 6, see the discussion of Article 53 of the Convention at p. 527 *supra*.

³⁰ See Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 209, 244 (Dieter Fleck ed., 1995).

and held that the applicant's right to enjoy her property had been violated continuously (Ryssdal, President, and Wildhaber, J., concurring; Baka, Bernhardt, Gölcüklü, Jambrek, Lopes Rocha and Pettiti, JJ., dissenting). The Court's scanty reasoning reveals the considerable disagreement on the relevant points of law among the members of the Grand Chamber.

The case originated in an application by a Greek Cypriot woman who owned property in Northern Cyprus. She stated that, since the occupation of Northern Cyprus on June 20, 1974, Turkish troops had prevented her from returning to her land, where she had planned to build flats, including one as a home for her family. On May 19, 1989, she was arrested by Turkish troops and subsequently detained for about ten hours by the Turkish Cypriot police force because she had crossed the cease-fire line in a march organized by a women's group to assert the right of Greek Cypriot refugees to return to their homes. In its decision on the preliminary objections raised by Turkey, the Court had declared the application admissible despite the territorial limitation contained in Turkey's declaration accepting the Court's jurisdiction, and had joined the question of its competence *ratione temporis* to the merits.¹

The first question before the Court was whether it had jurisdiction *ratione temporis* to examine the case. The answer would have been negative had the complaint exclusively concerned facts that had taken place before January 22, 1990, the day on which the Republic of Turkey recognized the Court's jurisdiction in accordance with Article 46 of the European Convention on Human Rights (the Convention). This recognition was limited to "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the deposit of the . . . [d]eclaration."² On that point, Turkey argued that the applicant had lost ownership of her property by virtue of the Constitution of the "TRNC" of May 7, 1985, which provided in Article 159 that abandoned property became property of the "TRNC." The Court rejected this argument by pointing out that treaty interpretation had to take into account any relevant rule of international law applicable between the parties.³ It referred to resolutions of the United Nations Security Council and the Committee of Ministers of the Council of Europe, and statements by the European Communities and the Commonwealth Heads of Government,⁴ that had pronounced the establishment of the "TRNC" legally invalid and called upon all states not to recognize this act. Consequently, the Court felt unable to attribute legal validity to Article 159 of the "TRNC Constitution" for the purpose of determining at what time the applicant had lost her property. It added that its nonrecognition would not have any detrimental effect on the inhabitants of the territory concerned, so that general international law did not call for an exception to the rule that the acts of an authority established in violation of international law must not be recognized. Since Turkey had not advanced evidence of any other act by which the property had been taken, the Court concluded that the applicant was still owner of the land in question. Therefore, it found that the alleged interference with her property rights concerned a continuing violation, and Turkey's objection *ratione temporis* had to fail.

¹ 310 Eur. Ct. H.R. (ser. A) (1995) [hereinafter Preliminary Objections Judgment]; see also the note on this case by Juliane Kokott & Beate Rudolf, 90 AJIL 98 (1996).

² Quoted in No. 40/1993/435/514, para. 24 [hereinafter Decision]. The Court, *id.*, para. 34, considered that there should have been a comma after the words "such facts," because otherwise the sentence did not make sense.

³ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(3)(c), 1155 UNTS 331.

⁴ SC Res. 541, UN SCOR, 38th Sess., Res. & Dec. at 15, UN Doc. S/INF/39 (1983); and Res. 550, UN SCOR, 39th Sess., Res. & Dec. at 12, UN Doc. S/INF/40 (1984); Committee of Ministers Res. (Nov. 24, 1983), discussed in Explanatory Memorandum, Eur. Parl. Ass., 35th Sess., Doc. No. 5165, para. 1 (1984). For the Council statement of November 16, 1983, and the Commonwealth Heads of Government press communiqué of November 29, 1983, see Decision, paras. 22, 23.

The Court then turned to the question whether the applicant's right to peaceful enjoyment of her property (Article 1 of Protocol No. 1 to the Convention⁵) had been infringed. It considered, first, whether the continuous denial of access to the applicant's property was imputable to Turkey and, second, whether this constituted an interference with her property rights. Regarding the question of imputability, the Court reaffirmed its view espoused in the decision on the preliminary objections that effective control over an area outside a state's national territory, exercised directly or through a subordinate authority, entails that state's responsibility. The Court stated that it was not required to establish whether Turkey was in actual control of the actions of the "TRNC" authorities, but that effective overall control of the territory would be sufficient. The Court deduced such control from the large number of Turkish troops stationed in Northern Cyprus. In the Court's view, this "obvious" control entailed Turkey's responsibility for the policies and actions of the "TRNC." The Court's finding was independent of the determination whether Turkey's military intervention on the island had been lawful under international law. Instead, the Court pointed to the fact that the "TRNC" was not recognized as a state by the international community, implicitly rejecting the dissenters' view that it should examine whether the "TRNC" was an independent state under international law.⁶

Having thus found that the impugned acts were attributable to Turkey, the Court considered whether the denial of access constituted a violation of the applicant's right to the peaceful enjoyment of her property. The Court stated that the situation complained of did not merely concern physical access to property, and that the case therefore did not require an answer to the question whether freedom of movement is a corollary of the right to peaceful enjoyment of property.⁷ Rather, Article 1 of Protocol No. 1 was applicable, since the applicant had been refused access to her property for over sixteen years, which amounted to preventing her from enjoying the possession of that land. Without further elaboration, the Court held that there was interference with the applicant's right because she had effectively lost control of her property and the ability to use it. It rejected as inconclusive the justification put forward by Turkey that the need to rehouse Turkish Cypriot refugees in the north of the island had necessitated interference with the applicant's property. Nor did the Court consider it relevant that property rights were a subject of the ongoing intercommunal talks, which according to Turkey's submission would have been undermined by a judicial decision. The Court concluded by finding a continuing violation of the applicant's right to the peaceful enjoyment of her property.

However, it found no violation of her right to respect for her home (Article 8), stating that the mere intention to build a family residence on the land in question did not suffice to make it a "home" in the sense of that provision. Given the sensitive nature of the case and the fact that the question of compensation pursuant to Article 50 of the Convention had not been discussed during the proceedings, the Court finally held that the issue was not ready for decision and, accordingly, reserved the question.

* * * *

The decision and the accompanying dissenting opinions reveal the difficulties encountered in applying the concept of a "continuing violation." This concept, which is also applied by other human rights bodies, extends jurisdiction to cases that originated before

⁵ Protocol No. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. TS No. 9.

⁶ See the dissenting opinions of Judge Pettiti, and of Judge Gölcüklü, para. 3.

⁷ This had been the Commission's approach in the case. See Comm'n Rep., paras. 98-99, reprinted in Preliminary Objections Judgment, note 1 *supra*, at 45.

the entry into force of the declaration of acceptance (the "critical date"), but that produced legal effects after that date. The European Commission of Human Rights (the Commission) first recognized the concept in the *De Becker* case by holding that it has jurisdiction *ratione temporis* when the applicant complains not of the lasting effects of an act that occurred at a given point in time, but rather of a "legal provision giving rise to a permanent situation."⁸ In a subsequent decision, however, the Commission did not refer to the legal nature of the impugned act but merely to the permanence of the legal situation created.⁹ If, in contrast, the disadvantages complained of are of a factual nature and result from a decision taken at a specific time, there is no continuing violation.¹⁰

Thus, instantaneous acts of a state are characterized by the fact that they are completed once the addressee has performed the required action or has abstained from a specific action in a defined situation. The only lasting effect of such instantaneous acts is the legal situation thus brought about. Conversely, in cases of continuing violations, the state's act has a more specific lasting legal effect, in that the addressee is required to perform a certain act repeatedly or to abstain from a certain action for a certain time period or permanently.¹¹ Because of that inherent temporal element in the state's act, the individual's freedom of action is restricted continuously. Being attributable to the state, that restriction in itself constitutes a violation.¹² Consequently, it is that violation, not the act committed before the critical date, that is subjected to international scrutiny by recognizing the Commission's and the Court's jurisdiction *ratione temporis* for continuing violations.

A second category of continuing violation encompasses cases concerning the right to free enjoyment of property. Both the Commission and the Court found that occupying an applicant's land without assuming title, or announcing an intended expropriation, or taking other steps hindering the applicant from using that land, could be regarded as a continuing violation.¹³ This group of cases has to be distinguished from those involving the taking of property or other rights *in rem* in the legally prescribed procedure, which is an "instantaneous act and does not produce a continuing situation of 'deprivation of rights'."¹⁴ Here, the decisive criterion is that the violation itself has a temporal element; an infringement of property rights occurs only if the act of the state, which does not purport to have a legal effect, lasts for a considerable amount of time. In these cases, the Commission and the Court may even take into account facts that took place before the critical date.¹⁵ Consequently, and in contrast to the first category of continuing

⁸ *De Becker v. Belgium*, App. No. 214/56, [1958] 2 Y.B. EUR. CONV. ON H.R. 214, 234. The applicant had lost certain civil and political rights as a legal consequence of a criminal conviction for collaboration with the enemy. This holding was affirmed in *X. v. Belgium*, App. No. 8701/79, 18 Eur. Comm'n H.R. Dec. & Rep. 250, 253 (1980). See also *X. v. United Kingdom*, App. No. 7202/75, 7 Eur. Comm'n H.R. Dec. & Rep. 102, 102-03 (1977).

⁹ *X. v. Switzerland*, App. No. 7031/75, 6 Eur. Comm'n H.R. Dec. & Rep. 124, 126 (1977) (deportation order prohibiting reentry into a country).

¹⁰ *X. & Y. v. Portugal*, App. Nos. 8560/79 & 8613/79, 16 Eur. Comm'n H.R. Dec. & Rep. 209, 212 (1979) (exclusion from advancement in military career resulting from assignment to reserve corps).

¹¹ For a similar interpretation, see the ILC's commentary to draft Article 24, THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 220 (Ralf Günther Wetzel & Dietrich Rauschnig eds., 1978).

¹² For this view, see the dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 2.

¹³ See the Court's *obiter dicta* in *Papamichadopoulos v. Greece*, 260-B Eur. Ct. H.R. (ser. A) para. 40 (1993); and in *Agrotexim v. Greece*, 330-A Eur. Ct. H.R. (ser. A) para. 58 (1995); and the holding of the Commission in *Agrotexim*, App. No. 14807/89, 13 HUM. RTS. L.J. 318, 320 (1992).

¹⁴ See, e.g., *A., B. & Co. A.F. v. Federal Republic of Germany*, App. No. 7742/76, 14 Eur. Comm'n H.R. Dec. & Rep. 146 (1978); *Mayer, Weidlich, Fullbrecht, Hasenkamp & Golf v. Germany*, App. Nos. 18890/91, 19048/91, 19049/91, 19342/91 & 19549/92, translated in 23 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 386, 390 (1996); and *Szechenyi v. Hungary*, App. No. 21344/93 (June 30, 1993).

¹⁵ Similarly, the Court held that, in determining the length of detention or of criminal proceedings, it must take into account the state of the proceedings before the critical date. See *Yagci & Sargin v. Turkey*, 319-A Eur. Ct. H.R. (ser. A) para. 40 (1995); *Mansur v. Turkey*, 319-B Eur. Ct. H.R. (ser. A) para. 44 (1995); *Mitap & Müftüoğlu v. Turkey*, No. 6/1995/512/595-596, para. 28 (Mar. 25, 1996). The Commission applied the same rule in the case of *Ventura v. Italy*, App. No. 7438/76, 12 Eur. Comm'n H.R. Dec. & Rep. 38, 46 (1978).

violations, the proper question here is not whether there are any lasting legal effects of the state's acts, but whether sustaining a certain situation constitutes a violation.

In *Loizidou*, the Court considered the denial of access to the applicant's property to be such a violation. It referred to the "fact that the applicant has been refused access to the land since 1974," without naming instances in which she had actually tried to enter Northern Cyprus, such as the demonstration in 1989. Thus, the "refusal of access" does not seem to be an act of a state, directed against the applicant but, rather, a result of the division of Cyprus itself. For some of the dissenting judges, in contrast, the closing of the border in 1974 was an instantaneous act, since it changed the legal and factual situation at that point in time.¹⁶ Both approaches are flawed because they focus on the deprivation of access to the property. However, even if the applicant had been able to travel to her land, she could not have enjoyed her property, because the local authorities would not have recognized her claim, but would have relied on the "TRNC" Constitution of 1985 instead. It is the continued application of that Constitution in Northern Cyprus, which is internally operative despite international nonrecognition, that in fact prevented the applicant from enjoying her property and thus infringed her rights. Thus, the particular problem raised by the *Loizidou* case is that the continuing violation of property is brought about by a legal act, but that its legal effects cannot be taken into account, so that it cannot be regarded as the relevant instantaneous act. By focusing on the refusal of access, the decision becomes vulnerable to the criticism that it is not only Turkish troops, but also UN forces guarding the border that make it impossible for Greek Cypriots to travel to their property in the north. Hence, Turkey alone could not be held responsible for the violation.¹⁷

As regards imputability—which in the Court's view was restricted to the denial of access to the applicant's land—it is striking that the Court did not examine in detail whether Turkey actually exercised effective control over Northern Cyprus. In its judgment on the preliminary objections, it had limited its finding to holding that the impugned acts were *capable* of falling within Turkish jurisdiction, and had reserved the determination of actual responsibility to the decision on the merits.¹⁸ Yet, in the final judgment, the Court merely stated that the presence of a large contingent of Turkish troops clearly indicated effective Turkish control over the territory. It did not even consider whether the "TRNC" government had ceased to be a subordinate authority, and whether it would be internationally responsible for its acts. This approach confirms the analysis of the preliminary objections decision that effective control due to military presence can be presumed unless there is clear evidence to the contrary. When, in that context, the Court referred to the fact that the "TRNC" was not recognized internationally, it weighed the evidence before it and concluded that the presumption could not be rebutted in view of overwhelming state practice.

The central argument in the judgment is the consideration that the member states of the Council of Europe are obliged under international law not to recognize acts of the "TRNC." Both the determination of a continuing violation and the imputability of the alleged violations hinge on that consideration. The decisive question in the case, therefore, was whether the Court should make its own determination as to whether the "TRNC" could be regarded as a state under international law and whether, in consequence, the legal effects of the internal acts of the "TRNC" were to be respected and these acts attributed to it. A positive answer to that question not only would have put the Court in conflict with the prevailing legal opinion of the international community,

¹⁶ Dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 2; dissenting opinions of Judges Pettiti and Baka; and dissenting opinion of Judge Gölcüklü, para. 4.

¹⁷ See the dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 3; and the dissenting opinion of Judge Gölcüklü, para. 4.

¹⁸ Preliminary Objections Judgment, note 1 *supra*, para. 64.

but also would have rendered the territory of Northern Cyprus a zone outside the scope of the Court's human rights jurisdiction.

To avoid these pitfalls, the Court ingeniously relied on the obligation under international law neither to recognize the "TRNC" nor to attribute legal effects to its acts. This obligation does not stem from resolutions of the UN Security Council since they were not taken under Chapter VII of the UN Charter and are therefore not binding. The Court seems to have treated these resolutions and nonbinding declarations of other international bodies as proof of an *opinio juris* underlying the almost-universal state practice not to recognize the "TRNC." From that perspective, the existence of a special rule of customary international law dealing with the matter rendered superfluous the consideration of whether the establishment of the "TRNC" had been legal under general international law.

The decision on the existence of a continuing violation should not be misunderstood as opening the door to the reconsideration of the property transfers that took place before the democratic revolutions in Communist states or during the war in the territory of the former Yugoslavia. The facts of the present case differ considerably from the situation in the respective member states of the Council of Europe.¹⁹ The Court found a continuing violation because international law required it not to take into account the expropriation under the Constitution of the "TRNC." If, however, an expropriation is effected by a state that is recognized at the time, it would have to be regarded as an instantaneous act without continuing legal effect.

The case raises the fundamental question whether an international tribunal should show judicial restraint in opening the door to a new category of cases. Should the Court refrain from doing so if its judgment entails the possibility that thousands of similar complaints will be lodged with the Convention organs and threaten the effectiveness of human rights protection within the Council of Europe?²⁰ The result would be to leave the resolution of the problem entirely to the political sphere. However, national constitutional courts faced with similar situations have developed means of coping with them. These include the selection and decision of exemplary cases, which highlight the applicable legal principles for resolving the other cases. By deciding on the merits in *Loizidou*, the Court opted for the latter approach. Thus, it not only did justice to the individual applicant, but also underlined that the refugees' property rights are not negotiable. In doing so, the Court emphasized that the member states' obligation to respect human rights is absolute, and cannot be subordinated to considerations of political expediency.

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Treaties—Extradition Treaty between United States and United Kingdom—extradition to Hong Kong for alleged bribery by Hong Kong citizen—effect of Hong Kong's reversion to China and possible application of Chinese law providing for execution after July 1, 1997—role of U.S. judiciary in extradition process

LUI v. UNITED STATES. 110 F.3d 103.
U.S. Court of Appeals, 1st Cir., March 20, 1997.

Appellant, the United States, appealed a decision of the United States District Court for the District of Massachusetts¹ granting a writ of habeas corpus to the appellee, Lui Kin-

¹⁹ But see the dissenting opinion of Judge Baka; and the dissenting opinion of Judge Jambrek, para. 8.

²⁰ See, for an affirmative answer, the dissenting opinion of Judge Jambrek, para. 8.

¹ Lui Kin-Hong v. United States, 957 F.Supp. 1280 (D. Mass. 1997).

Hong, preventing his extradition to the Crown Colony of Hong Kong pursuant to the Extradition Treaty and Supplementary Treaty between the United States and the United Kingdom.² The court of appeals (per Lynch, J.) reversed the judgment of the district court and ordered that the appellee continue to be held without bail, subject to extradition to Hong Kong,³ notwithstanding the likelihood that he would be tried and punished by the People's Republic of China as a result of the colony's reversion to China on July 1, 1997.⁴

The court of appeals first rejected appellee's argument that the U.S. Senate could not have intended to permit extradition for trial and punishment in the People's Republic of China, a country with which the United States has no extradition treaty. The court reasoned that the Senate was aware of the impending reversion of Hong Kong to China when it approved the 1985 Supplementary Treaty with the United Kingdom, and could have addressed that issue had it chosen to do so. The court also noted that the President of the United States had signed a new treaty with the incoming government of Hong Kong, the Hong Kong Special Administrative Region (HKSAR),⁵ providing for post-reversion extradition and had submitted it to the Senate for its advice and consent.⁶ Finally, the court took notice of those provisions of the Joint Declaration between China and the United Kingdom⁷ providing for the HKSAR to enjoy a "high degree of autonomy except in foreign and defence affairs"⁸ and stipulating that the HKSAR "will be vested with . . . independent judicial power, including that of final adjudication," and that the "laws currently in force in Hong Kong will remain basically unchanged."⁹ The Joint Declaration declares that these "basic policies" are to "remain unchanged for 50 years."¹⁰

In support of its opinion, the court articulated three principles that should guide the courts in interpreting extradition treaties. The first principle is that the executive branch's construction of a treaty is entitled to great weight, at least in part because the executive branch wrote and negotiated the operative documents.¹¹ The court opined that "the judicial officer's inquiry is limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered."¹² The second principle articulated by the court is that extradition treaties are to be construed liberally in favor of enforcement

² Extradition Treaty, June 8, 1972, UK-U.S., 28 UST 227, 109 UNTS 167 [hereinafter Treaty]; and Supplementary Treaty to the Extradition Treaty, June 25, 1985, TIAS No. 12,050 [hereinafter Supplementary Treaty].

³ On December 19, 1995, pursuant to 18 U.S.C.A. §3184 (West Supp. 1996), the United States Attorney's office filed an extradition complaint in the District Court for the District of Massachusetts setting forth the United Kingdom's extradition request on behalf of Hong Kong. In response, Magistrate Judge Karol issued a warrant for appellee's arrest. On December 20, 1995, U.S. marshals, at the request of the United Kingdom, arrested appellee as he disembarked from a plane at Boston's Logan Airport. Since that time, appellee has been detained awaiting completion of his extradition proceedings.

⁴ The reversion of Hong Kong to the People's Republic of China will occur pursuant to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, with Annexes, Beijing, December 19, 1984, ratified and entered into force on May 27, 1985, 23 ILM 1366 (1984) [hereinafter Joint Declaration].

⁵ The court of appeals did not address the complex issues related to the entry of the United States into a treaty with a not yet existent entity, and one that is not itself an entity independent of legal and political control by the People's Republic of China.

⁶ See Agreement for the Surrender of Fugitive Offenders, Dec. 20, 1996, U.S.-Hong Kong, S. TREATY DOC. NO. 105-3 (1997). On March 3, 1997, this treaty was submitted to the Senate for its advice and consent. See 143 CONG. REC. S1846 (daily ed. Mar. 3, 1997).

⁷ Joint Declaration, *supra* note 4.

⁸ *Id.*, Art. 3(12).

⁹ *Id.*, Art. 3(3).

¹⁰ *Id.*, Art. 3(12).

¹¹ See *United States v. Howard*, 996 F.2d 1320, 1330 n.6 (1st Cir. 1993) (judicial deference to Executive on interpreting treaties stems at least in part from the fact that the Executive is the branch that most likely wrote and negotiated the treaty).

¹² 110 F.3d 103, 110.

in the interest of justice and international relationships.¹³ The third principle is the rule of noninquiry. Under this rule, courts refrain from inquiring into the fairness of the judicial system of a country requesting extradition.¹⁴ The rule of noninquiry arose out of concerns about institutional competence and separation of powers,¹⁵ and the court reasoned that the executive branch is the more appropriate body to address concerns regarding the fairness of the forum to which the appellee would be extradited.

The court next turned to the actual language of the extradition treaties and rejected the district court's conclusion that at least four provisions of the treaties prohibit appellee's extradition to Hong Kong if that entity is unable to try and punish him. The district court had concluded that, since those provisions make reference to the substantive law of the country trying and punishing the appellee, extraditing him would require reference to the substantive law of China, a country with which the United States has no extradition treaty.¹⁶ As the district court reasoned, appellee "cannot be extradited to a sovereign that is not able to try and to punish him, any more than he could be extradited to a non-signatory nation."¹⁷

The court of appeals found that, notwithstanding the above-mentioned four provisions, appellee was *currently* within the literal terms of the extradition treaties between the United States and the United Kingdom, and that the Extradition Treaty, *on its face*, required appellee's extradition to Hong Kong.¹⁸ Moreover, the court characterized the possibility of his being tried and punished by a nonparty as a contingent political event, reasoning that (1) the new extradition treaty with the HKSAR could be ratified by July 1, 1997, or (2) the U.S. Government could choose to extend the current treaties by executive agreement. The court further reasoned that the indicia of nonjusticiable political questions include such contingent political events. The court concluded that principles of reciprocity mitigated against construing the treaties as having a cutoff date before July 1, 1997, since the United States may wish to seek extradition of individuals from Hong Kong until July 1, 1997.

Finally, the court upheld the determination of the magistrate judge that there was probable cause to believe that appellee had violated Hong Kong law on eight of the nine charges of the warrant.

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¹³ See generally *Howard*, 996 F.2d at 1330-31 (treaties should be construed liberally so as to effect equality and reciprocity between the parties).

¹⁴ See *id.* at 1329 (in habeas corpus proceedings, rule of noninquiry arose from rationale that existence of extradition treaty indicates that executive and legislative branches consider treaty partner's justice system sufficiently fair for extradited persons to stand trial).

¹⁵ *Id.*

¹⁶ The four provisions in question are (1) the "warrant" provision, requiring that a warrant be presented to the requested country specifying under which laws of the requesting nation appellee would be tried and punished (Treaty, *supra* note 2, Art. VII(3) & (5)); (2) the "dual criminality" requirement, which requires the extraditable offense to fit the description of an extraditable offense or a felony under the laws of both signatories (Treaty, Art. III); (3) the "political offense" provision, which requires the court to inquire into the reasons and motives for the extradition request of the requesting sovereign (Supplementary Treaty, *supra* note 2, Art. 3(a)); and (4) the "specialty" provisions, which provide that the appellee can be tried only for the crimes for which he was extradited, and that the appellee cannot be extradited to a third-party sovereign (Treaty, Art. XII). Surprisingly, appellee did not claim that the reversion of Hong Kong to the United Kingdom constitutes "extradition" to China in violation of Article XII.

¹⁷ *Lui Kin-Hong*, 957 F.Supp. at 1287.

¹⁸ The Supplementary Treaty applies to Hong Kong by its terms and the Treaty applies to the United Kingdom and "any territory for the international relations of which the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting Parties embodied in an Exchange of Notes." Treaty, *supra* note 2, Art. II(1)(a). The Treaty was made explicitly applicable to Hong Kong by an exchange of diplomatic notes on October 21, 1976. 28 UST at 238-41.

The decision by the court of appeals appears to have avoided directly addressing several of the troubling issues presented by the appellee's inevitable trial and punishment by the HKSAR of the People's Republic of China. As the district court had noted, four provisions of the treaties in question make direct or indirect reference to the laws of the country that will try and punish the appellee. In this case, there is a distinct possibility that those laws will not be the same as the laws of Hong Kong as currently constituted. As the district court stated, "The Treaty is exclusively between the signatories. Hong Kong reverts to China on July 1, 1997. The terms of the Treaty do not."¹⁹ Moreover, the "specialty" provisions of the Treaty reflect an assurance from the United Kingdom to the United States that it, and only it, will try and punish the appellee for the crime in question. The court of appeals characterized the scenario in which China will try and punish appellee without an extradition treaty in force as a "contingent political event,"²⁰ and therefore as insufficient to override the court's reliance on the present enforceability of the Treaty. This characterization of appellee's trial and punishment by China without a valid extradition treaty seems peculiar, given the equally "contingent" likelihood of his being tried and punished pursuant to a valid extradition treaty. Which "contingent" political event in fact materializes has significant consequences for the appellee since, under Chinese criminal law, he could be subject to the death penalty for his alleged crime of bribery.

Nevertheless, after July 1, 1997, the contingency issue raised immediately above could be rendered moot if the Senate either approves or expressly declines to approve the treaty between the HKSAR and the United States. However, the court's reference to the possibility of extending the existing Treaty by executive agreement is curious. That Treaty is with the United Kingdom, whose authority in Hong Kong terminates upon Hong Kong's reversion to China. Moreover, the court acknowledged in a footnote that the alternative of an executive agreement arguably would infringe upon the Senate's prerogative to give its advice and consent, but stated that "it is hardly an appropriate judicial task to attempt to resolve a hypothetical and not ripe dispute between the legislature and the executive."²¹ If that is so, it is unclear what justifies the court's reliance on the possibility of such an executive agreement in its opinion.

This case raises several troubling issues that transcend the issues of immediate concern to the appellee. A question remains as to what extent the United States can, or should, consistently with principles of international law and its own domestic extradition policies, continue to recognize the separate existence of Hong Kong for purposes of extradition, while simultaneously recognizing the sovereignty of China over the HKSAR. The underlying validity of the treaty between the HKSAR and the United States itself seems to be contingent on the presumed good faith of the Government of the People's Republic of China in respecting the independent judicial system and laws of Hong Kong. Yet China's troublesome political relations with the United States, as well as its dismal human rights record, are themselves among the reasons why there is no extradition treaty between the two countries. Moreover, China's recent actions with respect to Hong Kong do not necessarily give the United States any reason to expect the People's Republic of China fully to honor its pledge in the Joint Declaration to respect the independent judicial power and legal system of the HKSAR.²²

¹⁹ 957 F.Supp. at 1288.

²⁰ 110 F.3d at 111.

²¹ *Id.* n.14.

²² See, e.g., U.S. DEP'T OF STATE, COUNTRY REP. ON HUM. RTS. PRACTICES 1201-11 (1997) (documenting concerns expressed over steps taken by China to limit civil rights in the future government); *Reversion and Rights*, MAINICHI DAILY NEWS (Japan), Feb. 18, 1997, at 2 ("signs are emerging clouding Beijing's promise to maintain Hong Kong's present system for the coming 50 years"); Kenji Yuasa, *Domestic, foreign-policy menu provides no easy meal for Chinese leadership*, NIKKEI WKLY. (Japan), Feb. 24, 1997, at 24 (critics see a Beijing-

Finally, the opinion of the court of appeals correctly observes, in justification of its decision, that the United States frequently has enforceable extradition treaties with countries whose regime changes. Principles of reciprocity may make this reality necessary, but it may be reasonable to require the executive branch to determine anew whether the public policies of the United States with respect to extradition treaties are being served by the continuing enforceability of such treaties.

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appointed committee vote to rewrite Hong Kong's Bill of Rights as a signal that China will curb civil liberties in the territory).

Editor's Note: Subsequent to the preparation of this report, the court of appeals denied a request for rehearing en banc. 1997 U.S. App. LEXIS 7587 (Apr. 17, 1997) (Stahl, J., dissenting). On May 12, 1997, the Supreme Court denied an application for stay of mandate pending a petition for certiorari. 1997 U.S. LEXIS 3073 (May 12, 1997) (Breyer & Stevens, JJ., dissenting).

In *Regina v. Secretary of State for the Home Department, Ex parte Launder* (May 21, 1997), the British House of Lords upheld the decision of the Home Secretary to issue a warrant of extradition for the return of Ewan Quayle Launder to Hong Kong. This case will be the subject of a case note in the October issue.