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# WORLD LAW BULLETIN

## August 2004

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## **WORLD LAW BULLETIN**

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## AFRICA

### ZIMBABWE – Deterioration of Rule of Law

In the recent past the government of Zimbabwe has severely restricted the right to public assembly, shut down newspapers, expanded police authority to detain suspects without charges, put the main opposition leader on trial for treason in the process and expropriated private and commercial farms. The rule of law has deteriorated, further increasing lawlessness that is politically motivated. The government is using the criminal justice system to punish those opposed to it. For those arrested, this means torture and in some cases death.

These abuses of civil rights have been chronicled by numerous human rights organizations such as Amnesty International, but disputed by the government, blaming the turmoil on what it describes as “treachery by the opposition, unethical media reporting and biased and unwelcome meddling activities of its former colonial ruler, Great Britain.” Elections are scheduled in Zimbabwe next March 2005. There is the fear that in the period leading to and during the elections there will be more violence and death of members of opposition groups as well as of those in the media. (Craig Timberg, *Mugabe Said To Use Law and a Political Tool: Dissidents Face Zimbabwe’s Justice System*, THE WASHINGTON POST, July 18, 2004.)

(Charles Mwalimu, 7-0637)

## AMERICAS

### BRITISH VIRGIN ISLANDS – Implementation of Money Laundering Provisions Significantly Delayed

In response to international criticism, the British Virgin Islands enacted legislation altering its bearer share regime in 2003 through the International Business Companies (Amendment) Act 2004. The Act addresses a number of areas and aims to reduce the possibility of money laundering in the Islands through requiring more information from companies incorporated in the BVI. Bearer shares are generally negotiable instruments that bestow ownership of the company on whoever physically possesses the shares, resulting in the considerable potential for misuse. The Act mandates that only a person holding a general license under the Banks and Trust Companies Act 1990 (an authorized custodian) or a non-BVI resident who has received approval from the BVI Financial Services Commission (a recognized custodian) can hold bearer shares and do so on behalf of the owner. Information such as the full name of the beneficial owner of the shares and any other person having an interest in the shares, or a statement that no other person has an interest in the shares, must also be provided to the custodian. Companies were initially granted a two-year grace period to implement the requirements relating to bearer shares or face having them disabled with the risk that the company would be wound up. Based on the recommendation of a private sector panel, this period has been considerably extended to December 31, 2010. (*British Virgin Islands: Bearer Shares Deadline Extended Until 2010*, INTERNATIONAL MONEY MARKETING, July 14, 2004, at 22.)

(Clare Feikert, 7-5262)

### **CANADA – Five Provinces Considering Proportional Representation**

Although Canada has always been like the United States in that it elects its federal representatives on the basis of majority votes in single member districts, it has long been unlike the United States in that its legislature has long had representatives of more than two political parties. At the present time, the Liberals, Conservatives, New Democrats, and Bloc Quebecois are all represented by at least 19 seats in the 308-seat House of Commons. However, the majority vote in single-member district system has rewarded the governing Liberals with a percentage of seats well in excess of their percentage of the popular vote. The New Democrats, by contrast, have well less than half the seats they would have under a proportional representation system. Consequently, many New Democrats recently hoped to get the Liberals to accept a proportional representation system in return for their joining the Liberals in a coalition government. However, since the June 2004 election, the Prime Minister has formed a minority government and his party seems unlikely to agree to changing the electoral system. Thus, the focus has now shifted to the provinces. At the present time, no less than five of Canada's ten provinces are considering changes to their own provincial electoral systems. In British Columbia, the government has convened a Citizen's Assembly to decide whether a referendum on proportional representation should be held in 2005. (Noah Love, *Five Provinces Mulling Changing to Proportional Representation*, CANADIAN PRESS, July 10, 2004.)

Ontario, Quebec, New Brunswick, and Prince Edward Island are also weighing reforms. Quebec may well be the most likely to emerge first from this group since all three of the parties represented in its National Assembly have indicated that they favor of some form of proportional representation.  
(Stephen F. Clarke, 7-7121)

### **MEXICO – Court Ruling on Genocide Case and Appeal**

On July 24, 2004, federal court Judge César Flores dismissed the genocide charges case, known as "*halconazo*," against former Mexican President Luis Echeverría Alvarez and eleven additional former officers of President Echeverría's government, among them the former Secretary of the Interior and the former Attorney General. Judge Flores ruled that these persons could not be prosecuted for the slaying of student protesters on June 10, 1971, during the so-called "Dirty War," because the statute of limitations had run out. Ignacio Carrillo Prieto, head of the Special Prosecutor's Office of Social and Political Movements of the Past (FEMOSPP), had requested Judge Flores to issue an arrest warrant against the accused based on the above charges. Three days later, FEMOSPP appealed the decision, which will be reviewed by the appropriate Circuit Unitary Tribunal (*Tribunal Unitario de Circuito*). FEMOSPP plans to exhaust all the available appeals, including the one to the Supreme Court of Justice of the Nation. (Francisco Gómez, et al., *Fiscalía Pierde Primer Round por 'Halconazo'*, EL UNIVERSAL, July 25, 2004, and Jorge Medellín, *Apela la Fiscalía Decisión de Juez*, EL UNIVERSAL, July 28, 2004, at <http://www.eluniversal.com.mx>.)  
(Norma C. Gutiérrez, 7-4314)

## ASIA

### CHINA – Draft Enterprise Income Tax Law

It was reported in late June 2004 that the Ministry of Finance had completed drafting of a new enterprise income tax law. After being deliberated on by the State Council, the draft law will be submitted to the Standing Committee of the National People's Congress for a first reading, probably no later than October 2004.

A key feature of the law is its anti-tax evasion provisions; in particular, it contains a special chapter to target the problem of use of overseas tax havens. The law will restrict the practice of establishing counterfeit foreign-invested companies in the havens and using them to transfer income and profit, so as to evade taxes. At present domestic companies use the Cayman Islands, the British Virgin Islands, and other tax havens for tax avoidance purposes, either by incorporating there and then remitting their investments back to China as foreign investors, thereby enjoying the favorable treatment extended to foreign invested enterprises, or by remitting their profits to the tax havens, incorporating there, and then sending the money back to China as new investments and entering into joint venture agreements with the original enterprise, which also then enables them to enjoy the preferential treatment.

Other features of the law include, among others, the following. Tax rates for Chinese and foreign capital enterprises will be unified, and the new rate will reportedly be between 25 and 30 percent (in contrast to the current income tax rates of 33 percent for domestic enterprises and 15-24 percent for foreign-invested enterprises). The problem of tax dilution is addressed by a stipulation that if an enterprise's proprietary capital falls below a certain percentage, the interest borrowed on its borrowed capital (mainly bank loans) is not deductible before taxation. The law will also set out certain principles to restrict various tax-evasion transactions between related enterprises. (*China Drafts New Tax Law To Thwart Enterprises' Use of Overseas Tax Havens*, CAIJING SHIBAO, June 26, 2004, translated in FBIS; *China's New Enterprise Income Tax Law To Block Tax Mitigation*, Asia Pulse, July 21, 2004, Lexis/Nexis, News Library, 90days File.)  
(Wendy Zeldin, 7-9832)

### CHINA – Money Laundering

In March 2004, the People's Republic of China (PRC) established a working group to draft a law on money laundering and the group is now in the process of studying a framework draft. It has reportedly decided to include the corruption and economic crimes as part of the law. According to the head of the drafting team, Yu Guangyuan, the Criminal Law prescribes only four kinds of crimes — drug trafficking, smuggling, terrorist activities, and organized crime — that can entail the crime of money laundering. In Yu's view, the narrow scope of the existing legislation, making it difficult to crack down on illegal income generated by such activities as embezzlement and bribery, was a key reason for the continued rise of graft in China. In the past three years, the PRC has reportedly had at least 600 billion yuan (about US\$73 billion), of which more than 500 billion yuan (about US\$60 billion) was gained through corruption, laundered to other countries. (*HK Paper Cites Mainland Expert on Need To Expand Scope of Money Laundering Laws*, HONG KONG SUNDAY MORNING POST, July 18, 2004, & *China To Include Corruption in New Money Laundering Law*, XINHUA, July 19, 2004, both via FBIS.)

In the meantime, under the administration of the People's Bank of China, an anti-money laundering monitoring and analysis center has been established to conform to international practice; some 84 countries and regions have reportedly already set up anti-money laundering departments. The center's primary tasks are to collect information on dubious trades, analyze the information, submit the results to judicial and law enforcement departments, and exchange information with foreign counterparts. Founding of the center is also in fulfillment of China's commitments in connection with the U.N. Convention Against Trans-National Organized Crime, which it joined in August 2003, and the U.N. Convention Against Corruption, which it signed in December 2003. (*China Drafting Special Law To Fight Money Laundering*, CHINA DAILY, Internet version, July 16, 2004, FBIS.)

(Wendy Zeldin, 7-9832)

### **CHINA – Telecommunications Law**

Drafting of a telecommunications law, which began twenty-four years ago, has now been completed. The draft text was to be submitted to the Legal Affairs Office of the State Council for review at the end of July. The drafting process was reportedly accelerated due to the appointment of the former head of the Policy and Law Department of the Ministry of Information Industry (MII) as MII Vice-Minister. The legislation is likely to cover value-added telecom services like short text messaging, deregulation of the fixed-line market, and enforcement of inter-operability rules requiring different carriers to cooperate with each other. The inter-connectivity issue was reportedly the single most difficult aspect of the law's drafting process, since the major carriers are reluctant to forfeit market share and the smaller ones complain of unfair competition. The draft law also would seek to establish an equitable billing system for basic services. At present the MII sets fixed-line and mobile-phone service prices; the law would provide for market forces to gradually replace state price regulation. Apparently China will not follow the U.S. example and establish an independent regulator like the U.S. Federal Communications Commission. (*SCMP: Drafting of Telecommunications Law Completed, Ready for Review*, Hong Kong SOUTH CHINA MORNING POST, Internet version, July 21, 2004, FBIS.)

(Wendy Zeldin, 7-9832)

### **INDIA – Constitutional Validity of 2003 Amendment of Representation of the People Act**

Two former Members of the Parliament, Kuldip Nayar and Inderjit, filed petitions in the Supreme Court of India challenging the constitutional validity of the Representation of the People (Amendment) Act, 2003, which dispensed with the domicile requirement and introduced an open ballot system. According to the petitioners, federalism is a basic structure of the Constitution and the impugned amendment, being contrary to the basic structure, was unconstitutional and liable to be struck down.

The court referred the petitions to the Chief Justice for posting before a larger bench in view of the important question of law involved. Simultaneously, the judges allowed the Election Commission to proceed with the elections to fill sixty-five vacancies in the Council of States (Rajya Sabha), and ordered that the election of candidates who contested from states to which they did not belong would be subject to the final orders of the Court on these writ petitions.

According to the petitioners, article 84(c) of the Constitution deals with qualification for membership in Parliament either prescribed therein or under any law made by Parliament. Thus, to be elected to the Council of States, a member candidate should ordinarily be a resident of the state concerned. However, they argued, the amendment to the Act in 2003 had done away with the requirement and the Parliament had thereby sought to change the basic structure of the Constitution. (THE HINDU, July 13, 2004, at <http://www.hindu.com/2004/07/13/stories/2004071301520700.htm>.)  
(Krishan Nehra, 7-7103)

### **INDONESIA – Revision of Regional Autonomy Law Discussed**

The revision of Indonesia's Regional Autonomy Law and Centre-Regional Fiscal Balance Law (Law 22 & Law 25, 1999) was the subject of discussion by members of the Regional Representative Council, who urged the People's Representative Council to postpone making changes. The regional representatives will be formally appointed to their Council in October 2004, and they argued that any revision of laws on local government, particularly the provisions on election of regional heads, should wait until that time. A representative from North Sulawesi further stated that leaders and members of the Regional Representative Council were the ones who should revise the two laws, rather than the People's Representative Council, and that the current revision effort was rushed through the procedure, with committee meetings held without the required quorum. On the other side, the argument has been made that if the revision is postponed, there will be difficulty in the election of regional heads, due to take place in the near future. (*DPD Members Request That Revision of Regional Autonomy Law Be Postponed*, TEMP INTERAKTIF, June 30, 2004, Lexis/Nexis, Asiapc library, Curnws file.)  
(Constance A. Johnson, 7-9829)

### **JAPAN – Conditions For Sting Operations**

On July 12, 2004, for the first time, Japan's Supreme Court specified conditions of legal sting operations under article 197 of the Code of Criminal Procedure. In 1953, the Supreme Court ruled a sting operation "not illegal" but did not specify circumstances under which it may be allowed. Some scholars have written that a sting operation is illegal because it actually induces a crime to happen.

Three conditions were specified in the ruling, which was issued in a case of illegal possession of cannabis for purposes of sale. A sting operation is permitted: (1) when investigations concern drugs or other crimes and where no victims are involved at the scene of the crime, (2) when it is hard to uncover a suspect by regular investigation, and (3) when the suspect is believed to be intent on committing a crime. (*Court Discloses Conditions for Sting Operations by Police*, JAPAN TODAY, July 15, 2004, available at <http://www.japantoday.com/e/?content=news&id=305620>.)  
(Sayuri Umeda, 7-0075)

### **JAPAN – Employers Obligated To Keep Workers Until Age 65**

Since public pensions will be allowed for people sixty-five years old or older in the near future, the government set measures to secure jobs for workers under sixty-five, obliging employers to keep employing them until they reach that age. The Law Concerning Stability of the Employment of the Aged was amended by the Diet in June 2004 (Law No. 103 of 2004).

When the Law was previously amended in 2000, it provided that employers who set the mandatory retirement age lower than sixty-five must try to implement measures to secure jobs for aged workers. The 2004 amendment obliges employers to implement measures to secure jobs for the older workers by either setting the mandatory retirement age at sixty-five years old, keeping the older workers employed after retirement until they reach sixty-five or abolishing the mandatory retirement age system. If a labor union and an employer reach an agreement, other arrangements can be allowed. (Ministry of Health, Labor and Welfare, *Koreisha to no koyo no antei to ni mansuru horitsu no ichibu wo kaisei suru horitsuan no gaiyo* (Summary of the Amendment of the Law Concerning Stability of Employment of the Aged), available at <http://www.mhlw.go.jp/houdou/2004/02/h0210-1a.html>.) (Sayuri Umeda, 7-0075)

### **KOREA, SOUTH – Supreme Court Says Conscientious Objectors Were Guilty**

In May 2004 the Seoul Southern District Court dismissed the prosecution's request to imprison a twenty-two-year-old Jehovah's Witness for violating the Korean Military Service Law in refusing mandatory military conscription. This was the first case in which a Korean court had acquitted a conscientious objector. In other such cases, conscientious objectors were sentenced to imprisonment.

The Supreme Court of the Republic of Korea subsequently resolved the social confusion that has been brought about by conflicting lower court decisions on conscientious objector cases. On July 15, 2004, the Court upheld a lower court's decision, with one minority opinion, to sentence a twenty-three-year-old conscientious objector who is a Jehovah's Witness to a one-and-a-half-year prison term. Lower courts that are looking at 220 similar cases will follow the Supreme Court decision.

On the other hand, the Constitutional Court is deliberating a petition, submitted by the Seoul Southern District Court in January 2002, on whether article 88 of the Military Service Law, which provides punishment for refusal to join the military, is unconstitutional. (Choi Jae-hyuk, *Supreme Court Rules Conscientious Objectors Guilty of Breaking Law*, CHOSUN Ilbo, July 15, 2004, available at <http://english.chosun.com/w21data/html/news/200407/200407150035.html>.) (Sayuri Umeda: 7-0075)

### **PAKISTAN – Proposal to Amend Hudood Laws**

On July 18, 2004, Prime Minister Shujaat Hussain announced that the Government of Pakistan has proposed amending the controversial Islamic Hudood laws, which deal with rape and adultery. These laws were introduced by the then Martial Law Administrator Zia-ul-Haq as part of an Islamization process in the country. Women's groups and civil rights activists have denounced these laws as anti-Islamic. One provision in them requires a woman who is the victim of rape to produce two male witnesses to prove the charge against the defendant.

The Prime Minister chose to make the announcement at a convention of the Ulemas (clergy) and the Mashaikh (Muslim scholars), promising to take their views into consideration before finalizing the proposed amendments. The announcement of these proposals at the gathering is significant, since the religious parties and groups are opposed to any changes in the Hudood laws. Successive governments have been reluctant thus far to remedy the situation that

has resulted from various Islamic laws. For instance, within a few months after he took control of the government in an October 1999 coup, General Pervez Musharraf announced his proposal for changes in the procedure for registration of cases under the blasphemy law. However, he retreated from the proposal in the wake of the furor it caused among the fundamentalists. (THE HINDU, International Section, July 13, 2004, at <http://www.hindu.com/2004/07/13/stories/2004071303841100.htm>.) (Krishan Nehra, 7-7103)

### **SINGAPORE – Draft Bills on Intellectual Property Rights**

The Intellectual Property Office of Singapore has made available online two draft bills, the Copyright (Amendment) Bill 2004 and the Broadcasting (Amendment) Bill 2004, for public viewing. A third related bill, the draft Designs (Amendment) Bill 2004, will be published online in August. The bills are the second set of proposed changes to Singapore's intellectual property law. In June, the parliament passed four other intellectual property-related bills, concerning patents, trademarks, and a new protection regime for new plant varieties. The reforms are prompted in part by the need to meet commitments under the United States-Singapore Free Trade Agreement, which entered into effect this year.

Proposed provisions of the copyright bill will address, among others, the issue of online music piracy. At present, Internet users who illegally download songs are subject only to civil legal action (that is, the owners must pursue legal measures against them); offenders will be liable for criminal sanctions only if they copy the music onto compact discs and distribute them. Under the draft bill, illegal downloading of works such as songs will be deemed a criminal offense if three criteria apply: the piracy is carried out willfully, it is done on a commercial scale, and it has a major impact, e.g., loss of revenue, on the copyright owners. (Suryani Omar, *Beefing Up Copyright Laws May Boost R&D Sector*, THE STRAITS TIMES, July 27, 2004, Lexis/Nexis, Asiapc Library, Allasi File.) (Wendy Zeldin, 7-9832)

### **SINGAPORE – Stricter Targets for Efficient Fossil Fuel Use**

The Environment Minister announced on July 29, 2004, a scheme to implement higher standards for the efficient use of fossil fuels. The new targets are to be met chiefly through the switch by power stations from the use of oil to cleaner fuels like natural gas. In addition, a (voluntary) energy-labeling scheme administered by the Singapore Environment Council, which at present covers only refrigerators and air conditioners, will be extended to other household appliances. The labels enable customers to tell how energy-efficient a product is. The government will work with large industrial and commercial energy users to conduct energy audits and implement conservation measures. It will also further promote the use of fuel-efficient and "greener" cars.

According to the Minister, Singapore has reduced the growth rate of carbon emissions, improving its carbon efficiency by fifteen percent since 1990, and seeks another ten percent improvement over eight years. However, Singapore is not a party to the Kyoto Protocol. The Minister explained that, as a small city-state, the country did not have the natural resources to rely on alternatives such as hydropower and geothermal energy and the nature of its climate made use of solar and wind energy problematic. Nor could Singapore practice the burden sharing carried out by some countries in Europe, which can offset increased emissions by

corresponding reductions in other nations. According to the World Bank's Little Green Data Book 2003, Singapore has the second highest rate of energy usage per person after the United States, and some critics have contended that the government may paint too rosy a picture of the country's energy efficiency. (Radha Basu, *Tougher Targets Set for Efficient Use of Fossil Fuels*, THE STRAITS TIMES INTERACTIVE, July 29, 2004, at <http://STRAITSTIMES.ASIA1.COM.SG/STORYPRINTFRIENDLY/0,1887,263898,00.HTML>; Leong Sze Hian, *S'pore Should Reduce Its Energy Usage*, THE BUSINESS TIMES, May 15, 2003, and Teh Peijing, *What's Source of Government's Energy Figures*, THE STRAITS TIMES, Jan. 16, 2002, at 27, both via Lexis/Nexis, Asiapc Library, Allasi File; and in general the Singapore Ministry of the Environment, at <http://app.env.gov.sg/home.asp?id=M1>.) (Wendy Zeldin, 7-9832)

### **SRI LANKA – Immigration Law Violates Constitution**

The bail application of Thilanga Sumathipala, a business tycoon who was detained for violation of the provisions of the Immigrants and Emigrants Act, came up for a hearing before the Appeals Court in Sri Lanka. The panel of judges granted the application for bail while declaring the provisions of the above Act, which bar grant of bail to such suspects, to be in violation of the human rights provisions of the Sri Lanka Constitution. The Decision was issued on June 18, 2004.

The head of the panel of three judges, with whom the other two judges also agreed, stated that “it is unreasonable to detain Mr. Sumathipala unnecessarily.” The court observed that “the country's Constitution guarantees basic human rights but the Immigration Act violates these rights.” While delivering its verdict on the application for bail, the court also stated that the “Act should be changed according to the Constitution because the country's Constitution is supreme over other rules and regulations.” In ordering the release of the business tycoon on a cash bail of LKR250,000 (about US\$2,425) and on three personal bails, the court further ordered that the applicant's passport be impounded and instructed him to appear before the Criminal Investigation Department (CID) on every second Sunday of the month. (COLOMBO PAGE, June 19, 2004, at <http://www.colombopage.com/archive/June19115046RA.htm>.) (Krishan Nehra, 7-7103)

### **TAIWAN – Criminal Procedure Code Amended**

On June 23, 2004, revisions to Taiwan's Criminal Procedure Code were issued that require more completeness in certain legal documents. The law now requires that a judgment of conviction specify the facts and the rationale for the conviction, except that if a judgment of conviction pronounces sentence of less than one year in prison, confinement, a fine, or an exemption from penalty, it may merely specify the sentence and list the facts of the case, including the evidence, reasons for not admitting any evidence that is favorable to the defendant, and the applicable articles of the law. The rules already in the Code for the contents of a summary judgment are to be applied to a judgment of conviction in a summary trial. The full texts of the articles of the law must be included in a judgment of conviction.

In addition, the amendment repeals provisions that had been in the Code that permitted a court or judge to gather evidence before the first court hearing in certain cases. (GAZETTE OF

THE OFFICE OF THE PRESIDENT, June 23, 2004, *available in* Global Legal Information Network, <http://www.loc.gov/law/glin>.)  
(Constance A. Johnson, 7-9829)

### **TAIWAN – Labor Pension Law**

On June 30, 2004, President Chen Shuibian promulgated a new Labor Pension Law. The Law will not take effect until one year after promulgation. It will broaden the contribution base by making it easier for employees to join the pension system. According to its provisions, employers must set aside six percent of employees' monthly salaries (an increase of two percent) for an individual retirement labor pension fund, and employees will have the option of making a tax-deductible allocation of six percent of their compensation to their IRAs. When accessed, benefits will be taxed as income. Although companies have been required to allocate from two to fifteen percent of an employee's monthly salary for pension payments, poor compliance and regulatory obstacles reportedly have left more than ninety percent of Taiwan's eight million strong labor force without benefits.

Under the new system, employees may continue to contribute to their retirement funds even if they change employment and will draw a monthly pension or take a lump sum payment upon retirement. Large companies (those with more than 200 employees, affecting about 700,000 of the employed) can establish corporate pension schemes, which are based for the most part on insurance contracts; small companies can pay into the "labor pension scheme," a government-controlled pool of assets. The Council of Labor Affairs is reviewing a bill that would allow the large companies to hire insurance companies to manage their pension funds, subject to employees' consent. Otherwise, a committee of authoritative financial professionals (not yet established) is to oversee the funds. The law requires companies that fail to set aside funds for their employees to begin to make up the shortfall within five years. (*Taiwan Plans To Allow Insurance Firms To Manage Pension Funds*, TAIPEI TIMES, Internet version, July 22, 2004, via FBIS; Kathrin Hille, *Taiwan's Retirement Industry To Expand*, FINANCIAL TIMES, June 21, 2004; *Labor Council To Help Employers Cope with Pension Rules*, CHINA POST, June 13, 2004; *New Pension System Is Good for Taiwan*, TAIWAN NEWS, June 10, 2004, all via LEXIS/NEXIS, News Library, 90days File.)

(Wendy Zeldin, 7-9832)

### **TAIWAN – Tax Break for Foreign Enterprise R&D**

The Ministry of Economic Affairs and the Ministry of Finance made a joint decision on July 13, 2004, to allow foreign enterprises with facilities in Taiwan to deduct their research and development (R&D) spending from taxable business income. The measure is designed to encourage foreign enterprises to establish R&D institutions on the island. Those that have not opened fixed facilities in Taiwan will not be eligible for the incentives stipulated in the Statute for Promotion of Industrial Upgrading on R&D spending in Taiwan and spending outside Taiwan. The incentive reportedly will be granted "only to spending on innovative technologies that help existing manufacturing methods and products make vital improvements." (*Taiwan Limits R&D Tax Break to Foreign Enterprises Operating Facilities in Taiwan*, TAIWAN ECONOMIC NEWS, July 14, 2004, LEXIS/NEXIS, News Library, 90days File.)

(Wendy Zeldin, 7-9832)

### **VIETNAM – Decree on Beliefs and Religions**

On July 12, 2004, the Presidential Office announced the promulgation of the Decree on Beliefs and Religions, which was signed into law by the Chairman of Vietnam's National Assembly on June 18 and enters into effect on November 15. The Decree reiterates the government's extant prohibition against religious groups not recognized by the government and the requirement of government approval for the establishment, separation, or merger of religious organizations. Clergy of state-sponsored religions must obtain permission from the district people's committee before preaching or holding religious ceremonies outside their home churches. The Decree also stipulates that all annual religious activities must be registered with the local officials; any additional ones require government approval. At present Vietnam recognizes six government-sanctioned religions: Buddhism, Catholicism, Protestantism, Islam, Hoa Hao, and Cao Dai. (*Vietnam Adopts National Decree To Govern Religious Activities*, ASSOCIATED PRESS WORLDSTREAM, July 13, 2004, Lexis/Nexis, News Library, 90days File; *Vietnam Promulgates Law on Religious Freedom*, BBC MONITORING INTERNATIONAL REPORTS, July 14, 2004, Lexis/Nexis, Asiapc Library, Allasi File.) (Wendy Zeldin, 7-9832)

### **VIETNAM – Value-Added Tax Decree Amended**

It was reported on July 26, 2004, that Decree No. 158/2003/ND-CP, on the implementation of the Law on Value-Added Tax and the revised Law on Value-Added Tax, has been amended by a new decree, under which a zero export tariff will be applied to export goods and services, including subcontracted goods. "Export services" will include services provided directly to foreign organizations and individuals and used outside Vietnam as well as those for export processing enterprises. "Export goods" are goods exported to foreign countries, export processing zones, and export processing enterprises. The decree provides that the zero export tariff rate will not apply to international transport, goods and services provided directly to international transport, services that organize overseas tours, credits and financial investments, and unprocessed export minerals. The decree will take effect fifteen days after its publication in the official gazette. (*Amendments to Value-Added Tax*, VIETNAM NEWS AGENCY, July 26, 2004, available at <http://www.vnagency.com.vn>, last reviewed July 29, 2004). (Wendy Zeldin, 7-9832)

## **EUROPE**

### **AUSTRIA – Tax Reform**

A tax reform enacted on June 4, 2004 (Steuerreformgesetz 2005, *Bundesgesetzblatt I* No. 57/2004), aims at attracting foreign investment by reducing individual and corporate income taxes. The most prominent feature of the reform is a reduction of the corporate tax rate from thirty-four percent to twenty-five percent. In addition, favorable schemes for calculating profits improve the tax burden on holding companies. The individual tax rate was lowered slightly through reductions in the rate for lower incomes as well as the lower portions of higher incomes, while the highest tax rate for income portions over €50,870 (about US\$61,390) per year remains at fifty percent. Most of the reforms will become effective for tax years beginning on or after January 1, 2005. (Edith Palmer, 7-9860)

**BULGARIA – Softer Punishments for Juvenile Delinquents**

The Juvenile Delinquency Act adopted by the Parliament on July 15, 2004, provides for increasing the involvement of parents and local communities in juvenile affairs. The Act decreases the number of crimes that entail punishment in the form of imprisonment and provides for softer alternative punishments, such as home confinement, restrictions on visits to night clubs and other places of entertainment, and bans on contacts with persons who have a bad influence on the juvenile. Newly created local commissions in charge of anti-social behavior of teenagers will monitor the observance of these measures. Community service programs aimed at correction through labor are introduced. Their duration is limited to forty hours. The Law imposes fines in the amounts of US\$30 to \$650 for parents whose negligence led to the child's criminal behavior. For felonies, minors will be sent to correction institutions for a term not exceeding three years. The Act establishes that the participation of a defense attorney in all cases related to minors is mandatory. (STANDART (Bulgarian daily newspaper), July 16, 2004, *available at* <http://site.securities.com>.) (Peter Roudik, 7-9861)

**DENMARK – Special International Crimes Office**

The Special International Crimes Office (SICO) was established on June 1, 2002, to investigate and prosecute serious crimes committed abroad, including genocide, crimes against humanity, and war crimes. Collaboration is to be established with authorities in other countries in order to ensure that no safe haven can be found in Denmark for perpetrators of these crimes.

According to the Danish Penal Code, jurisdiction is restricted to (a) Danish citizens and persons living in Denmark subject to the principle of double criminality (section 7, paragraph 2, no. 1) and (b) crimes covered by universal jurisdiction, e.g., war crimes (section 8, no. 5).

SICO is part of the Danish Prosecution Service, which is headed by the Director of Public Prosecutions. The political responsibility for the Prosecution Service rests with the Minister of Justice. The SICO staff includes the Director and Deputy Director, four prosecutors, nine investigators and two administrative employees. (Special submission by Andreas Laursen, Prosecutor, Special International Crimes Office, Copenhagen, Denmark. For follow-up questions, contact Kersi Shroff, 7-7850.)

**ENGLAND – Animal Welfare Laws**

The Department for Environment, Food and Rural Affairs (DEFRA) has published a draft bill designed to improve and strengthen animal welfare laws and consolidate the existing legislation. One of the main aspects of the bill is the introduction of a duty of care for owners of pet and companion animals, to maintain their pets' welfare through adequate accommodation, nutrition, and treatment. A duty of care for owners to care and maintain farm animals is already in existence. Pet shops, pet fairs, and the cropping of tails of dogs (referred to by DEFRA as permitted mutilations) will be regulated. The bill makes provision for the introduction of secondary legislation and codes of practice, for example, a code on tethering animals, to ensure that the law will be flexible and adapt to the prevailing standards of animal welfare. The bill is currently undergoing pre-legislative scrutiny in a House of Commons

Committee. (DEFRA, LAUNCH OF THE DRAFT ANIMAL WELFARE BILL, 2004, cm. 6252, available at <http://www.official-documents.co.uk/document/cm62/6252/6252.pdf>, last reviewed July 26, 2004; DEFRA, Draft Animal Welfare Bill, July 21, 2004, available at <http://www.defra.gov.uk/animalh/welfare/bill/index.htm>, last reviewed, July 26, 2004.) (Clare Feikert, 7-5262)

### **ESTONIA – Prescription of Generic Drugs Favored by Government**

The Social Affairs Ministry issued a regulation under which doctors must indicate their reasons in writing if they prescribe a brand name drug and specify in a patient's medical records why a specific drug is necessary. The Ministry's spokesman explained that the new regulation was needed as pharmacies often are unable to offer patients cheaper drugs with the same active ingredients because the doctor has written "Do not replace" on the prescription. Authorities believe that doctors were often putting the remark on the prescription out of habit, rather than for a valid reason. The regulation requires that doctors write prescriptions for the active ingredients they see as proper for the patient, instead of prescribing a particular drug. It is expected that the person buying the drug will be able to make the final choice regarding the product, based on the pharmacist's recommendations and the price of various products containing the same active ingredients. (BNS DAILY NEWS SERVICE, July 20, 2004, available at <http://www.securities.com>.) (Peter Roudik, 7-9861)

### **FRANCE – Home Use of Morning-After Pill Authorized**

On July 23, 2004, the Minister of Health signed a decree authorizing the home use of the morning-after pill by women seeking to terminate pregnancies in the first five weeks after conception. Until now the pill has been available only in clinics or hospitals. The Minister stated that "as time has passed we have come to the conclusion that hospitalization is not necessary medically speaking."

Women will now be able to obtain the medicine from their doctors, but will have to take it in the doctor's presence during an office visit. Some 220,000 abortions are performed every year in France, a third of them via the drug Mifegyne (also called RU 486). Surgical abortions can be performed within up to twelve weeks of pregnancy. (*Les femmes pourront désormais avorter chez leur médecin*, LE MONDE, July 23, 2004, at <http://www.lemonde.fr>.) (Nicole Atwill, 7-2832)

### **FRANCE – New Bioethics Law Bans Reproductive and Therapeutic Cloning**

On July 9, 2004, after three years of debate, the French Parliament finally adopted a new bioethics law revising the three bioethics Laws passed in 1994. These laws were originally scheduled to be revised after five years. The text of the new law is quite different from when it was first introduced under the socialist government of Lionel Jospin. The original text was more far-reaching. Only the conservative parties voted in favor of the new legislation.

The new law bans cloning aimed at reproducing human beings. Human cloning is a "crime against humanity and the human species" punishable by imprisonment for up to thirty years and a fine of €7.5 million (approximately US\$9.3 million). Therapeutic cloning – creating stem cells to replace damaged organs and tissue – is also prohibited and is punishable

by imprisonment for up to seven years and a fine of €100,000 (approximately US\$120,000). The Health Minister told the daily newspaper *Le Monde* that “the protection of the embryo is a clear objective of the Civil Code and that the government did not want scientists to be able to create in vitro embryos for research purposes.”

However, the law suspended for five years a ban on stem cell research on “spare” human embryos produced by in-vitro fertilization, not through cloning, to give the government time to study the ethical and medical ramifications of such research, which reportedly could lead to treatments for such illnesses as Alzheimer’s disease, diabetes, and heart disease.

The law creates a bio-medicine agency, to commence operations on January 1, 2005, to further study the issue of therapeutic cloning. The agency will also be responsible for authorizing research into genetics, prenatal diagnostics, and embryology. The law also expands the list of persons who can donate organs during their lifetime and allows for the harvesting of organs from deceased persons who “did not make known while alive their objection to such procedure.”

The law is not yet applicable and has not yet been published in the official gazette, as the Socialist faction has asked the Constitutional Council to review the constitutionality of some of the law’s provisions. (Text of Law No. 313 (2004), Assemblée Nationale’s website, at <http://www.assembleenationale.fr/12/ta/>, and *Après trois années de débat, la révision de la loi sur la bioéthique est adoptée par le parlement*, LE MONDE, July 9, 2004, Lexis/Nexis, News Library, Monde File.)

(Nicole Atwill, 7-2832)

### **GERMANY – Product Safety and Occupational Safety Rules Combined**

Germany enacted the Act on the Safety of Technical Equipment and Consumer Products on January 1, 2004 (BUNDESGESETZBLATT II at 2), that became effective on May 1, 2004. The Act transposes several European Union requirements into German law, among them those contained in Directive 2001/95/EC of December 3, 2001, on general product safety (OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES L11/4). The new German Act replaces separate regulatory systems on the safety of consumer products and on the occupational safety of tools and other work-related equipment. Under the new Act, these regulatory frameworks are now combined under one rubric. In addition, the Act enhances product safety by requiring disclosure of known defects, recalls of defective products, and the creation of consumer protection agencies in the German states. Some of these concepts were fashioned after American models. (*Recht & Gesetz*, 38 ELEKTRONIK PRAXIS, May 7, 2004, Lexis/Nexis, News Library, 90days File)

(Edith Palmer, 7-9860)

### **IRELAND – Anti-Smoking Ban Rebellion**

Ireland’s anti-smoking ban, effective at the end of May (see 6-7 W.L.B. 2004), sparked a minor rebellion among pub owners beginning on July 7, 2004, according to news reports.

A pub owner in Galway began the fight, and although he has since given up, a number of pub owners are refusing to comply with the regulations. The president of the

Vintners Federation of Ireland reports that pubs are reporting a fourteen to fifteen percent drop in business after the ban and blames the drop on the ban, coupled with taxes and industry price increases. The Justice Minister is instructing local superintendents to object to license renewals for recalcitrant owners. (*Smoking Ban Rebels Turn Up the Heat*, IRELAND ONLINE, July 9, 2004, at <http://212.2.162.45/news/iestory.asp?j=235540152022&p=z3554xy5z536&n=23554015283>, last reviewed July 14, 2004; *Smoking Ban Police to Raid Defiant Pub*, *id.*, July 7, 2004, at <http://breakingnews.iol.ie/news/iestory.asp?j=36153191958&p=36y53y9zzy6&n=36153`92279>, last reviewed July 14, 2004.)  
(Diana Frazier Miller, 7-0693)

### **IRELAND – Firearms Offenses Under Consideration**

The Irish Government, the Oireachtas, has begun the process of initiating legislation that will impose stricter sentences for those charged with the illegal discharge and/or possession of a firearm. The Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, has decided to take action after a recent poll taken showed that illegal possession of firearms rose by thirteen percent in the last year (i.e., an increase from seventy-eight to eighty-eight incidents compared with the same time period of the previous year and that the discharge of firearms was up by seventy-one percent (a rise from seventeen to forty-five offenses). It is envisioned that the new legislation will be included in the Criminal Justice Bill, which will be debated in the Oireachtas when it resumes in autumn, and the minimum mandatory sentence imposed will be set at ten years. The legislation will be “carefully framed” to ensure that there are no loopholes and that the measures passed by the Oireachtas are implemented by the judiciary. The increase in the number of guns available is being attributed in part to the thirty years of paramilitary activities on the island. (*Armed Criminals Face More Jail Time As Gun Use Rises*, THE IRISH INDEPENDENT, Jul. 27, 2004, available at [http://www.unison.ie/irish\\_independent/stories.php?ca=9&si=1222597&issue\\_id=1119](http://www.unison.ie/irish_independent/stories.php?ca=9&si=1222597&issue_id=1119), last reviewed July 28, 2004.)  
(Jacqueline Taaffe; for follow-up contact Kersi Shroff, 7-7850)

### **IRELAND – Status of Airports**

Ireland’s House (*Dail*) has approved a government proposal to dissolve Ireland’s state company Aer Rianta and instead create three independent airports at Shannon, Cork, and Dublin. The Senate (*Seanad*) is scheduled to debate the measure but the Senate leader has sought a postponement of that debate.

The State Airports Bill would remove Shannon and Cork from regulation, with the goal of strengthening their weaker financial position. However, this provision appears to conflict with the Aviation Regulation Act 2001, which requires regulation of all airports handling more than one million passengers each year. The President of the Services Industrial Professional and Technical Union (SIPTU) charges that the bill is ideologically driven and will benefit Ryanair (a small no-frills airline) at the expense of workers and consumers. (The June 24, 2004, Dail parliamentary debates are located at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20040624.xml&Dail=29>; *Seanad To Grill Brennan On Aer Rianta Bill Flaws*, THE POST.IE, July 11, 2004, at <http://www.sbpost.ie/web/DocumentView/did-218837874-pageUrl--2FThe-Newspaper-2FSundays-Paper-2FIreland-2FAllIreland.asp>; *Irish Government Publishes Bill on Aer Rianta Break-Up*, MORNINGSTAR.COM, DOW JONES NEWS WIRE, June 22, 2004.  
(Diana Frazier Miller, 7-0693)

**MALTA – Further Consultation on “Eco-Tax” Law**

The introduction of a new eco-tax designed to influence consumption and help cover the cost of a sustainable waste management system has been delayed. A bill on the Eco-Contribution Tax was first announced in Malta's 2003 budget and upset many groups, due to the lack of consultation. Business are disturbed by the increase in costs associated with the bill, as well as the impact on consumers, as these costs will eventually be passed on to them. The Alternattiva Demokratika (Green Party) has expressed disappointment not only over the lack of consultation over the tax and unwillingness of the government to disclose important documents, but also the lack of incentives contained in the bill to encourage business to move to environmentally friendly practices. The Green Party accuses the government of using the eco-tax to solve financial problems caused by its past mismanagement. In a rare display of unity, trade unions and employers organizations have joined together to request that the government delay the introduction of the tax. As a result of these factors, the bill has gone back to the cabinet for further debate and consultation. (Mandy Kirby, *Social Partners Disagree Over Maltese Eco-Contribution Tax*, WORLD MARKET ANALYSIS, July 22, 2004; *AD reacts to 'pseudo' eco tax*, MALTAMEDIA NEWS, July 24, 2004, at [http://www.maltamedia.com/news/2004/gp/article\\_2708.shtml](http://www.maltamedia.com/news/2004/gp/article_2708.shtml), last reviewed July 27, 2004.) (Clare Feikert, 7-5262)

**MOLDOVA – New Rules of Financial Disclosure**

Amendments to the Law on the Information and Security Service (ISS), the former KGB and now the leading Moldovan law enforcement agency and special service, were approved by the parliament and will enter into force within ten days after their publication. These amendments expand the right of the ISS to obtain business documents and commercial secrets of legal entities operating in Moldova submitted to tax and other public controlling bodies. According to the amendments, the ISS is allowed to obtain any information it perceives necessary on any business transaction or a client of any Moldovan financial institution. The ISS justified its efforts to propose and initiate the expansion of its rights by the necessity to fight money laundering and financing of terrorist activities. (INFOTAG, July 8, 2004, available at <http://site.securities.com>.) (Peter Roudik, 7-9861)

**THE NETHERLANDS – Air Marshal Experiment**

Under an agreement reached between the government, KLM, and Martinair, for a trial period of six months officers of the Royal Netherlands Military Constabulary will function as air marshals on certain flights. The specially trained marshals will be armed and are authorized to act in case of terrorist activities taking place during the flight. No information will be provided as to which flights will have marshals aboard and only the captain will be informed about their presence. The experiment, which will be evaluated after six months, will be paid for by the government. (Government Press Release, July 2, 2004, at <http://www.regering.nl>.) (Karel Wennink, 7-9864)

**THE NETHERLANDS – Replacement of Representatives**

Two-thirds of the Second Chamber have agreed on a constitutional amendment that will make it possible for a member of Parliament and the municipal council to be temporarily replaced during pregnancy or illness. Those members that will be replaced will be temporarily dismissed in order to give their replacement full voting rights. At present during the absence of a representative their voting right are unused and the voters will have their voice lost. In first instance the period will be sixteen weeks, however a sick person can extend this period two times with sixteen weeks. (NRC-HANDELSBLAD, June 18, 2004, at <http://www.nrc.nl/binnenland>.)  
(Karel Wennink, 7-9864)

**RUSSIAN FEDERATION – New Rules for Accreditation of Journalists**

The Russian Ministry of Foreign Affairs issued a new directive that regulates the stay and work of foreign journalists in Russia. The Directive has been in force since July 1, 2004. It shortens the duration of the journalist's visa, which cannot be issued for a period longer than one year and can be extended only upon the Ministry's consent. The Directive establishes that all journalists willing to cover events in Chechnya or other "hot spots," areas of military and ethnic conflicts or emergencies, should be subordinated to the Ministry of the Interior (police). They need a special accreditation, which the Ministry of the Interior allows for a period of no more than six months. The accreditation application must be accompanied by proof of insurance and copies of such documents as identification issued by the employer, personal passport, and permit to use satellite means of communication in the area of coverage. Journalists working in Chechnya and other conflict zones must always have with them their passport, employer's ID, accreditation papers, and insurance documents. Accreditation of those who are found without these documents will be terminated. The Directive also regulates the content of information journalists can report. They are prohibited from disclosing the names of military and law enforcement units, their location, movements, quantity of personnel, and equipment. Release of personal information about the officers and other government officials is outlawed. (RIA NOVOSTI (Russian State Information Agency), July 6, 2004, at <http://www.rian.ru>.)  
(Peter Roudik, 7-9861)

**SERBIA AND MONTENEGRO – Statehood Symbols**

On July 12, 2004, the Montenegrin legislature adopted laws on state symbols and on the national holiday. The Law on the National Holiday declares as National Day July 13, the day in 1878 on which the Berlin Congress recognized Montenegro as the twenty-seventh independent state in the world and in 1941 when the Montenegrins staged an uprising against the Nazi occupiers and sided with the partisan communist movement. According to the new law, the red, blue, and white flag, similar to the flag of Serbia, will be replaced by a red flag with a golden coat-of-arms depicting a two-headed eagle under a royal crown and carrying a shield with engraved crosses and a lion. This coat of arms belonged to the Petrovic dynasty and was accepted as the national emblem. Parliament selected the popular song "Oh Bright Dawn" as the national anthem. (BBC NEWS MONITORING, July 12, 2004, at <http://news.bbc.co.uk>.)  
(Peter Roudik, 7-9861)

**UKRAINE – Rights of Deportees Restored**

On May 18, 2004, President Leonid Kuchma of Ukraine signed the Law on Rights of People Forcefully Removed During World War II. The Law applies to members of large ethnic groups (Greeks, Germans, Crimean Tatars) who were falsely accused by Soviet authorities of collaborating with Nazi occupiers and exiled to Central Asia. About 500,000 people were deported in 1944. They were allowed to return home to the Black Sea Peninsula of Crimea during the last years of communism, and now about 350,000 live in Crimea again. They comprise almost twenty percent of the Crimean population and suffer from high unemployment and poor housing. The Law provides for rights of deportees and their children equal to those of other Ukrainian citizens in regard to land, housing, and employment. The Law specifically bans discrimination in education, religion, and culture. A simplified procedure to obtain Ukrainian citizenship for former deportees is introduced. (26 VIDOMOSTI VERKHOVNOI RADY [Ukrainian official gazette], Item 361, 2004.)

(Peter Roudik, 7-9861)

**UNITED KINGDOM – No Code for Political Advertising**

The Electoral Commission, an independent body set up by the British government in 2000, has recently finished a consultation concerning the introduction of a statutory code on political advertising. It concluded that a number of factors make such a code unsustainable, including the right to free speech now enshrined in national law through the Human Rights Act 1998; the problem of obtaining the significant resources it would take to have an independent adjudicatory body to enforce the code; lack of political advertisers' support for the code; the subjective nature of political advertising, which makes it inappropriate to regulate regarding misleading and untruthful content; and the lack of a sufficient deterrent for breach of the code.

The Electoral Commission has recommended that political advertisers continue to abide by the existing principle of "responsibility to consumers and society." Political advertising to influence voters during elections and referendums has been exempt from the British Code of Advertising, Sales Promotion, and Direct Marketing since 1998, and while a recommendation was made at this time that political parties themselves adopt a code, it has not been acted upon. (Electoral Commission, *Political Advertising Report and Recommendations*, June 2004, available at <http://www.electoralcommission.gov.uk/about-us/politicaladvertising.cfm>, reviewed July 28, 2004.)

(Clare Feikert, 7-5262)

**UNITED KINGDOM – Strict Enforcement of Firearms Laws**

A new firearms law, introduced in January 2004, requires the imposition of a statutory minimum sentence of five years' imprisonment on any person found to have purchased, acquired, or been in possession of a prohibited firearm, unless exceptional circumstances are present that justify a reduction in the sentence. A judge has strictly interpreted this new provision and sentenced David Walker to the minimum five years of imprisonment for possession of a prohibited firearm, despite the fact that Walker accidentally discharged the gun while it was in his trouser pocket, causing severe personal injury. The judge did find that Walker's shooting himself was an exceptional circumstance that was capable of reducing the sentence. However, the judge found that the reduction could not be justified due to the risk

posed to the public of the gun discharging at any point and also found that Walker had failed to turn the gun over to police during a firearms amnesty that occurred prior to the commencement of the new legislation. (Adam Fresco, *Prison for Drunk Who Shot Off Testicles*, TIMES (London), July 14, at 13; *Man Jailed After Shooting Himself*, BBC NEWS, July 13, 2004, available at [http://news.bbc.co.uk/1/hi/england/south\\_yorkshire/3891311.stm](http://news.bbc.co.uk/1/hi/england/south_yorkshire/3891311.stm), last reviewed July 27, 2004; Criminal Justice Act 2003, c. 37 (Eng.), Firearms Act 1968, c. 27 (Eng.)) (Clare Feikert, 7-5262)

## NEAR EAST

### ISRAEL – Barrier in West Bank: Ruling on Legality

Nine days before the issuance of an advisory opinion on the subject by the International Court of Justice, Israel's High Court of Justice issued a landmark ruling on the legality of construction by Israel of a barrier in certain areas in the West Bank. The High Court held that the region is under belligerent occupation and that humanitarian provisions of the fourth Geneva Convention Regarding Protection of Civilians at Time of War, 1949, apply. It determined that international law recognizes the needs of a local population under belligerent occupation as well as the security needs from the perspective of the responsible military commander. It further held that the decision of Israel's military commander to build the barrier in the path in question was based on military and not on political considerations.

The High Court recognized the harm caused to Palestinian residents by the construction, but held that it does not negate the Israeli military's authority to order it. Accordingly, it ruled, the legality of the path selected for the barrier depends on whether it is proportional. Based on a three-prong test, the Court found that the harm caused to most petitioners was not proportional to the military benefit, and it therefore voided most of the decrees for military seizure and ordered the respondents to re-examine the path of the barrier. (See H.C. 2056/04 Beit Surik Village Association et al. v. State of Israel and Chief IDF Commander in the West Bank, Israeli court system website, available at <http://www.court.gov.il>, last reviewed June 30, 2004; for an in-depth analysis, see Law Library of Congress Report to Congress, *Israel's Construction of a Barrier in the West Bank: Legal Ramifications*, updated July 2004.) (See below, item on International Court of Justice ruling, in the "International Law and Organizations" section.) (Ruth Levush, 7-9847)

### ISRAEL – Decree on Non-Extension of Life of Person in Non-Reversible Coma

The Tel Aviv district court issued a decree to stop the provision of medical care extending the life of a patient in an irreversible coma even in the absence of a living will. The court held that there is a presumption that a patient wants to continue living unless it has been proved otherwise "beyond any doubt." In the case at hand, the court recognized the patient's intent not to have his life extended by heroic measures based on the testimony of his wife and children indicating repeated statements by him to that effect. (See *John Doe v. Medical Center "Asaf Harofe"*, Nevo legal database, available at [www.nevo.co.il](http://www.nevo.co.il), by subscription.) (Ruth Levush, 7-9847)

**ISRAEL – Marriage Proposal by Married Man Is Legal Contract**

In a reversal of a ruling dating from the 1960s, the Israeli Supreme Court held that an agreement to marry, even if one of the parties was married at the time of its conclusion, does not contradict public policy and therefore is not void as such. The Court held that notions of morality and public policy have changed since the 1960s. First, it held, the social approach to the dissolution of marriage has changed. Second, the protection of the institution of marriage will not be achieved by sacrificing the rights of the victim in the case of a breach of marriage contract. Third, it is not recognition of the validity of such a contract that weakened the man's marriage, but the weakened marriage that brought about the contract; providing immunity from lawsuits to the married man who was involved in an extra-marital relationship and proposed marriage does not contribute to strengthening the institution of marriage. Fourth, the duty to fulfill obligations is also based on public policy. Based on the above, the Court reversed the decision of the lower court and recognized the breach of contract of marriage giving rise to a right of compensation. (Civil Appeal 5258/98 *John v. Doe*, Nevo legal database, available at [www.nevo.co.il](http://www.nevo.co.il), by subscription.) (Ruth Levush, 7-9847)

**SOUTH PACIFIC****AUSTRALIA – Bail Limited for Suspected Terrorists**

On June 25, 2004, Australia's Parliament passed the Anti-Terrorism Act 2004, which amends existing laws on terrorist acts and membership in a terrorist organization. It provides that there will be no presumption of bail for persons charged with federal terrorism offenses. Bail will be granted only in exceptional circumstances. Other provisions require those convicted of terrorist offenses to serve at least three-quarters of their sentence before being eligible for parole and extend the period a person suspected of a terrorist offense can be held and questioned before being charged. (Australia, Anti-Terrorism Act 2004 (No. 104, 2004) available at <http://scaleplus.law.gov.au>; Attorney General Philip Ruddock, *Media Release 111/2004*, available at <http://www.law.gov.au/ag>.) (Donald DeGlopper, 7-9831)

**AUSTRALIA – National Water Plan**

A June 25, 2004, regular meeting of the heads of Australia's federal and state governments (the Council of Australian Governments) agreed on a National Water Initiative. The Australian Constitution gives control of water to the states rather than the federal government, which has impeded attempts to arrive at solutions to a national problem. The Initiative applies primarily to Australia's largest river system, the Murray-Darling, which flows through four of the country's six states. Excessive use of water for irrigation has produced very serious environmental problems, including salinization of land, which threatens the country's most productive agricultural regions.

Under the new initiative, water allocations to farmers will be reduced and the farmers will be compensated for their losses by state and federal governments. Water rights will be recognized as property, and a national water-trading market will be established under the supervision of a new National Water Commission. The goal is to restore the river system to sustainable levels of flow by the year 2010. (*Prime Minister of Australia, John Howard, Media Release on COAG Meeting of 25 June, 2004*, available at <http://www.pm.gov.au/news/>

[media releases/media Release941.htm](http://www.theaustralian.news.com.au/); *The Australian*, June 26, 2004, available at [http://www.theaustralian.news.com.au/.](http://www.theaustralian.news.com.au/))  
(Donald DeGlopper, 7-9831)

### **NEW ZEALAND – Proposal for Jury Reform**

The Government of New Zealand has introduced an omnibus Criminal Procedure Bill that would significantly change the jury system in that country (Bill 158-1, 47<sup>th</sup> Parl. 1<sup>st</sup> Sess. June 29, 2004). The bill, which has received a first reading and has been sent to a committee, would introduce eleven to one majority verdicts in criminal cases to address the “problem of ‘rogue jurors’” who refuse to participate honestly in jury deliberations (Explanatory Note, New Zealand parliamentary website at <http://www.knowledge-basket.co.nz/gpprint/docs/bills/20041581.txt>.) The government believes that majority verdicts would make jury tampering by bribery and intimidation by gangs or organized criminals more difficult. The bill also provides for all trials to be before a judge sitting alone without a jury when there is evidence of juror intimidation or when a trial is expected to be complex and last for more than a month. An exception to the latter rule would allow lengthy jury trials to continue in murder and sexual violation cases.

Additional provisions of the criminal procedure bill would make evading jury service more difficult and end the requirement that jurors stay overnight in a hotel while they are deliberating. The bill would not amend the current law by requiring employers to continue paying the wages of an employee who is serving as a juror, as had been recommended.  
(Stephen Clarke, 7-7121)

## **INTERNATIONAL LAW AND ORGANIZATIONS**

### **CENTRAL AND WEST AFRICA – Trade Agreements Background**

Efforts at regional and sub-regional integration through trade agreements in Africa can be traced to the immediate post-colonial period. The Economic Community of West African States (ECOWAS) and Communauté Economique et Monétaire de l’Afrique Centrale (CEMAC) reflect these cooperative efforts.

The ECOWAS treaty was signed on May 25, 1975, at Lagos, Nigeria. It has sixteen member countries in West Africa and Cape Verde. Other than petroleum exports by Nigeria to the United States and uranium from Niger to France, ECOWAS remains of marginal interest to countries in the West.

CEMAC is a Central African trade organization that goes back to 1959 as Africa’s oldest regional trade agreement. It consists of six members whose treaty was updated in 1994, recreating the entity effective 1999. CEMAC is faced with growing pains and has not achieved much in terms of trade benefits to its members and the surrounding region. (V. Essien, *Regional Trade Agreements in Africa: An Historical and Bibliographical Account of ECOWAS and CEMAC* (2004), unpublished paper distributed at the July 2004 AALL Annual Convention, Boston, Mass.)  
(Charles Mwalimu, 7-0637)

**EUROPEAN COURT OF JUSTICE/FRANCE – Indirect TV Advertising for Alcoholic Beverages**

The Law on the Campaign Against Smoking and Alcoholism (“Loi Evin”) bans direct or indirect television advertising for alcoholic beverages in France. Indirect advertising relates, for example, to advertising on posters around a stadium that will then be picked up by television cameras. A code of conduct drawn up by the French authorities and the French television companies sets out detailed rules for the application of the ban. It distinguishes between broadcasts of multinational events transmitted in a large number of countries and bi-national sporting events, whose retransmission is specially aimed at the French audience. In regard to the latter events, French broadcasters are required to use all available means to prevent the appearance on their channel of advertising for alcoholic beverages.

Two cases relating to these rules were referred to the European Court of Justice (ECJ). In the first case, the European Commission argued that the rules were incompatible with the freedom to provide services guaranteed by the European Community Treaty, as they create obstacles to the retransmission in France of sporting events. The second case was originally brought before the French courts by alcohol producer Bacardi France, which was refused advertising space in a number of foreign football clubs because they may have been featured on French TV. The Cour de Cassation (France’s highest judicial court) asked the ECJ whether the rules were contrary to the provisions of Community law, in particular the EC Treaty and the Television Without Frontiers Directive.

The Court found that the Television Without Frontiers Directive did not apply in this case, since indirect advertising for alcoholic beverages resulting from posters visible during the retransmission of a sporting event does not constitute a separate broadcast announcement to promote goods or services within the meaning of the Directive. It further found that although the rules constitute a restriction on the freedom to provide services under the EC treaty, such restriction is justified by the aim of protecting public health. (Case C-262/02 and Case C-429/02, European Court of Justice’s website, at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>.)  
(Nicole Atwill, 7-2832)

**INTERNATIONAL COURT OF JUSTICE – Advisory Opinion on West Bank Barrier**

On July 9, 2004, the International Court of Justice (ICJ) rendered an advisory opinion on the legal consequences of the construction by Israel of a barrier in the West Bank. The Court rejected claims that it lacked jurisdiction and that even if it had jurisdiction it should have used its discretionary power to refrain from adjudication. The Court determined that the West Bank was under belligerent occupation since the 1967 war and therefore subject to the application of both international humanitarian law as well as international human rights law. The Court further determined that by constructing the barrier Israel violated international law by depriving Palestinian residents in the West Bank of their rights to freedom of movement, work, health, education and an adequate standard of living. The Court rejected Israel’s reliance on the exception of military exigencies and further held that Israel could not rely on the right to self-defense in claiming that the barrier saves Israeli lives from terrorist attacks originating from the West Bank. According to the ICJ, the right to self-defense applies only in a case of armed attack by one State against another, and does not apply in a case of non-state perpetrators of terrorism. The Court held that Israel should tear down the barrier and pay compensation to

the local residents. The Court also determined the legal consequences for other States, declaring that all States are under an obligation not to recognize or to render aid or assistance to the construction or the maintenance of the barrier and must ensure Israel's compliance with international humanitarian law.

Judge Buergenthal, the only American on the Court, objected to the majority opinion. He stated in a dissenting opinion that "the Court did not have before it the requisite factual bases for its sweeping findings." He also objected to the Court's determination that Israel cannot claim self-defense against non-state actors. (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Decision by the ICJ, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>, last visited on July 14, 2004; for an in-depth analysis, see Law Library of Congress Report to Congress, *Israel's Construction of a Barrier in the West Bank: Legal Ramifications*, updated in July 2004.) (*See also above*, in the "Near East" section.)

(Ruth Levush, 7-9847)

#### **MALTA/UNITED NATIONS – Compliance with U.N. Convention on Discrimination**

The United Nations Committee on Elimination of Discrimination Against Women has urged the Maltese government to incorporate the Convention on the Elimination of All Forms of Discrimination Against Women into its national law. Malta ratified the Convention in 1991, but treaties in Malta are not self-executing and require legislation to create enforceable rights. Malta also maintains an extensive set of reservations to the Convention. A representative from the Maltese Ministry for the Family and Social Solidarity has stated that the government does not intend to implement the legislation into its national law. Malta has pointed to the European Convention on Human Rights as an alternative source that is already part of domestic legislation that individuals can use to enforce their rights. The Committee suggested that Malta should adopt special temporary measures to increase women's participation in the national and European Parliament. (Committee on Elimination of All Forms of Discrimination Against Women, *Women's Anti-Discrimination Committee Presses Latvia, Malta on Treaty Alliance*, July 19, 2004, at <http://www.un.org/News/Press/docs/2004/wom1460.doc.htm>, last reviewed July 27, 2004.)

(Clare Feikert, 7-5262)

#### **MEXICO/UNITED STATES – Food Aid Agreement**

On July 22, 2004, Mexico and the United States signed an agreement that will allow Mexican Consulates in the United States to make known the availability of food aid programs to benefit Mexican legal residents in the U.S. The signing officers, the Mexican Secretary of Foreign Relations and the U.S. Secretary of Agriculture, expressed both nations' desire to improve the living conditions of Mexican workers living in the U.S., through fifteen food aid programs, such as food coupons, supplemental food for women and children, and aid to pay the rent in rural areas. (Jorge Carreño, *Firman EU y Mexico Acuerdo Alimentario*, EL UNIVERSAL, July 23, 2004, at <http://www.eluniversal.com>.)

(Norma C. Gutiérrez, 7-4314)

## **MEXICO/UNITED STATES – Joint Declaration To Improve Working Conditions for Mexican Workers**

On July 21, 2004, U.S. Secretary of Labor Elaine L. Chao and the Secretary for Foreign Affairs of Mexico, Luis Ernesto Derbez, signed a Joint Declaration to improve compliance with and awareness of workplace laws and regulations protecting Mexican workers in the United States. "Hispanics are an integral part of the American workforce, and Mexican workers comprise the largest segment of the Hispanic workforce in America. This administration is committed to ensuring that they are safe on the job and fully and fairly compensated for their work," said Chao. "These agreements will build on this administration's unprecedented joint outreach program with the Mexican Embassy and its consulates in the United States."

Consistent with the Joint Declaration, two Letters of Agreement were signed the same day. They highlight specific efforts to be undertaken jointly between the U.S. Department of Labor's (DOL) Wage and Hour Division, the Occupational Safety and Health Administration (OSHA), and the Mexican Embassy and the forty-five consulates in the United States. These specific initiatives build on existing joint efforts.

One of the priorities of the Wage and Hour Division is to increase worker protections in the low-wage industries that often employ high numbers of Hispanic workers. "Through the end of the first half of the fiscal year, the Wage and Hour Division collected just over \$18.3 million in back wages for nearly 31,000 workers in key low-wage industries that typically employ large numbers of Hispanic workers," said Victoria A. Lipnic, Assistant Secretary for DOL's Employment Standards Administration, who signed the Wage and Hour Division Letter of Agreement for the United States. The Wage and Hour Division Letter of Agreement builds on ongoing cooperative efforts with the Mexican Consulate, including Houston's Justice and Equality in the Workplace Program and other similar regional initiatives launched in recent years in Dallas, Las Vegas, and Los Angeles.

The Letter of Agreement signed by Assistant Secretary for OSHA John Henshaw reinforces the Department of Labor's continuing efforts to ensure safe and healthy working conditions for workers from Mexico. (Official website of the Department of Foreign Affairs of Mexico, at <http://portal.sre.gob.mx/usa/index.php?option=news&task=viewarticle&sid=84>.) (Gustavo Guerra, 7-7104)

## **UNITED NATIONS – Internally Displaced Persons**

The plight of internally displaced persons, that is, those who have been evicted from their homes but have not crossed international borders, has been the subject of intense debate at the United Nations. On July 21, 2004, the U.N. announced the creation of a new office designed to deal with the particular problems and issues facing such persons. Statistics reveal that the number of internally displaced persons worldwide is about fifty million. Half of this number is comprised of those who have been displaced because of conflicts; the other half consists of those who have been displaced by natural disasters. In comparison, the number of refugees is thirteen to fifteen million. For the next eighteen months, the office will address the problems encountered by internally displaced persons in Sudan, Uganda, Liberia, Burundi and Colombia. (*U.N. Creates New Coordination Office for Displaced Persons*, U.N. WIRE, July 21, 2004, [http://www.unwire.org/News/328\\_426\\_26064.asp](http://www.unwire.org/News/328_426_26064.asp).) (Theresa Papademetriou, 7-9857)

### **WTO – Doha Development Agenda**

Director-General Supachai Panitchpakdi called on World Trade Organization (WTO) member governments on July 19, 2004, to make every effort over the next two weeks to strike a deal on a framework accord in the Doha Development Agenda, which paves the way for the elimination of all forms of farm export subsidies, thereby enhancing trading opportunities for all countries and more equitable rules for global trade (*see* the WTO website, at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm), for an explanation of the Agenda). Panitchpakdi made the statement as delegations began talks on a draft decision for the General Council's meeting on July 30, 2004.

Drawing on months of negotiations and recent converging positions among the WTO's 147 member governments, the text was characterized by the meeting's chairpersons as "a first draft whose purpose is to provide a basis for further negotiation among members." The text includes frameworks in key areas such as agriculture and industrial market access. These form the first of three steps towards final agreement. Once adopted, the frameworks would focus negotiations on fuller "modalities," which would include completed formulas for tariff reductions that would then be applied to detailed commitments on thousands of products as well as new or revised rules. (WTO website, at [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm).)

(Karla Walker, 7-4332)

### **WTO – Panel Report On Argentina-U.S. Anti-Dumping Dispute**

The WTO, on July 16, 2004, released the report of the panel that examined the dispute over sunset reviews by the United States of anti-dumping measures on oil country tubular goods from Argentina. The original anti-dumping investigation on oil country tubular goods from Argentina that gave rise to the sunset reviews at issue in these dispute settlement proceedings was initiated in 1994, before the establishment of the WTO, and was completed in 1995, following the entry into force of the Marrakesh Agreement Establishing the WTO. The investigation was carried out under pre-WTO U.S. laws and regulations. (WTO website, at [http://www.wto.org/english/news\\_e/news04\\_e/sp\\_draft\\_text\\_16july04\\_e.htm](http://www.wto.org/english/news_e/news04_e/sp_draft_text_16july04_e.htm).)

(Karla Walker, 7-4332)

### **WTO – Procurement Agreement Extended to Ten New EU Member States**

The WTO's Government Procurement Agreement (GPA) was extended on May 1, 2004, to cover the ten new member states of the European Union: the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia.

The WTO Committee on Government Procurement approved the necessary modifications to the EU schedules extending coverage of the GPA to the new member States of the European Union on April 23, 2004. The GPA is now legally binding for those countries. The extended GPA coverage offers new procurement opportunities to suppliers of goods and services in the ten new EU countries as well as in the other GPA member states.

The GPA contains a framework of rights and obligations concerning legislation, procedures, and practices in the area of government procurement aimed at ensuring that

members do not discriminate against the supplies and suppliers of other members in their government contracts. Its rules apply to procurement by government entities that are listed for each member in an appendix to the Agreement. Under the recent decision of the GPA Committee, the covered entities of the new EU Member States have been included in the appendix through the “European Communities” listing as the WTO member representing the (now twenty-five) EU Member States. Thus, the membership of the GPA now consists of Canada; the European Communities; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the United States. (WTO website, at [http://www.wto.org/english/tratop\\_e/gproc\\_e/over\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/over_e.htm).) (Karla Walker, 7-4332)

## RECENT DEVELOPMENTS IN THE EUROPEAN UNION

Prepared by Theresa Papademetriou, Senior Legal Specialist, Western Law Division

### Agreement on the Constitutional Treaty<sup>1</sup>

In June 2004, the Draft Treaty Establishing a Constitution for Europe was approved by the Intergovernmental Conference. The Constitution now must be translated into all the official languages and then signed by the European Council (Heads of State and Government) sometime in the fall of 2004. Then the twenty-five EU Members must ratify it in accordance with their constitutional provisions calling for either parliamentary approval and/or a referendum.

### Agreement with the United States on the Processing and Transfer of Passenger Name Records (PNR) by Air Carriers to the Department of Homeland Security, Bureau of Customs and Border Protection<sup>2</sup>

In February 2004, following an authorization by the Council, the European Commission, on behalf of the Community, began negotiations with the United States regarding the processing and transfer of PNR data by airlines to the Department of Homeland Security (DHS). The Agreement was approved on May 17, 2004, without the prior opinion of the Parliament. As required by the 1995 Privacy Directive, the Commission, on the same date, recognized that the DHS provided an adequate level of protection of PNR data transferred from the EU to the U.S. through airlines. Based on the agreement, the DHS acquires the right to have electronic access to the PNR data from the airline reservation/departure control system located within the EU. The DHS must process the data received and handle the information according to the standards imposed by U.S. law and the Constitution, provided that it does not discriminate on the basis of nationality and country of residence. Both parties to the Agreement retain the right to review its implementation on a regular basis.

### Cargo Security Initiative and Security of the Olympics in Greece<sup>3</sup>

The port of Piraeus in Greece joined the list of the twenty largest container seaports that participate in the Cargo Security Initiative, a program initiated by the United States in 2002 in its effort to fight terrorism. Based on an agreement between the U.S. government and Greece, the U.S. Department of Homeland Security has sent officers to work with Greek officials to ensure that U.S. bound containers are free from terrorist weapons and hazardous materials.

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<sup>1</sup> *European Constitution*, EUROPA website, [http://europa.eu.int/futurum/index\\_en.htm](http://europa.eu.int/futurum/index_en.htm).

<sup>2</sup> OJ L 183/83 (May 20, 2004).

<sup>3</sup> *Cargo Security Initiative Established at World's 20 Largest Seaports*, State Department website, at <http://usinfo.state.gov/xarchives/display.html?p=washfileenglish&y=2004&m=July&x=200407271531471ACnosnh0J0.7696955&t=xarchives/xarchitem.html>.

### **Draft Council Regulation on Special Conditions for Trade with the Northern Part of Cyprus<sup>4</sup>**

Since Cyprus became an EU Member on May 1, 2004, EU legislation applies to its entire territory, except the northern part occupied by Turkey. EU law is suspended in that area, which is treated as a third country. Therefore, trade with the northern part of Cyprus follows the rules that apply to such countries. The proposed regulation deals only with trade issues and its main objective is to revive the economically underdeveloped area. Specifically, it offers a preferential regime in the form of a tariff quota system for products originating in that area and entering the Customs territory of the Community. It includes rules regarding the documents that would certify the origin of goods. The Turkish Cypriot Chamber of Commerce would issue such documents.

### **Enforcement of Anti-Discrimination Directives<sup>5</sup>**

The Racial Equality Directive and the Employment Framework Directive, adopted in 2000, prohibit discrimination based on racial or ethnic origin, age, disability, religion, or sexual orientation. The European Commission has now initiated infringement proceedings before the European Court of Justice against several Member States, including Austria, Germany, Greece, Finland, and Luxembourg, for not transposing the two Anti-Discrimination Directives into national law by the deadlines of July 19, 2003, and December 2003 respectively. Specifically, these Members failed either to introduce or amend their domestic legislation on equality. The Members have a two-month deadline to respond to a “Reasoned Opinion” issued by the Commission. The next step is referral to the European Court of Justice if they fail to respond adequately within the time limit.

### **Implementation of the Savings Taxation Directive<sup>6</sup>**

The Council of the European Union has set the application date of the Savings Taxation Directive, which was adopted in June 2003 as part of a package of three EU measures to fight harmful tax competition. Members are required to apply the Directive as of July 1, 2005. Pursuant to its provisions, each Member must share information with the other Members as to the interest paid to individual savers resident in the other Member States. Three Members, Belgium, Luxembourg and Austria, are permitted to apply a withholding tax rate of fifteen percent until 2007, twenty percent until 2010, and thirty-five percent as of July 1, 2011. Moreover, the European Commission has engaged in talks with a number of third countries, such as Switzerland, Liechtenstein, Monaco, Andorra, and San Marino, with the objective of signing agreements to ensure taxation of savings interest income paid to EU residents.

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<sup>4</sup> COM (2004) 466 final (Brussels, July 7, 2004).

<sup>5</sup> *Background Note on Procedures to Enforce EU Anti-Discrimination Law*, EUROPA website, July 19, 2004, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/189&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>6</sup> *Savings Taxation*, EUROPA website, July 19, 2004, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/958&format=HTML&aged=0&language=EN&guiLanguage=en>.

### **Third Money Laundering Directive<sup>7</sup>**

The EU has been actively engaged in the fight against money laundering since 1991, when it adopted its first anti-laundering directive, which was modeled on the forty Recommendations of the Financial Action Task Force (FATF) on money laundering. A second directive followed in 2001. Members had to transpose it into national law by June 15, 2003. Its scope was wider than the first; it extended the concept of criminal actions and also included, in addition to financial institutions, accountants, lawyers, casinos, art dealers, and estate agents among those that had to comply with the money laundering provisions. The third Directive is based on the revised forty FATF Recommendations that were adopted in June 2003. The new Recommendations have broader implications, since they explicitly cover the financing of terrorism. Similarly, the draft directive defines money laundering to include not only concealing or disguising the proceeds of serious crimes, but also the financing of terrorism through money acquired through legal means or through illegal activities. The draft directive extends the anti-money laundering obligations to companies and trusts and life insurance intermediaries. It now covers all persons dealing in goods or providing services for cash payments of €15,000 (about US\$18,048) or more. There is also a more stringent approach to the “know your customer procedure.”

### **Transfer of Certain Data to the International Criminal Police Organization (Interpol)<sup>8</sup>**

The EU Council of Ministers recently adopted a common position on transferring data to Interpol as part of the EU’s efforts to combat serious and organized crime including terrorism. The objective is to assist Interpol authorities in identifying persons who have used or intend to use stolen passports from EU citizens in order to enter the Community and commit terrorist acts. The European Police Office (Europol) had been authorized to have access and search directly data in the database of the Schengen Information System (SIS) with regard to lost or stolen objects including passports and other documents. The national police authorities will be obliged to transfer all present and future passport data to the Interpol database. The transfer will be based on reciprocity and upon ensuring that the handling and processing of such data meets the legal standards as provided in the 1995 Privacy Directive.

### **Visa Information System<sup>9</sup>**

A system for the exchange of visa data between EU Members, called “the Visa Information System,” was established by the Council of Ministers in June 2004. The new system, once in place, will assist the proper national authorities to enter, update, and review visa data electronically. It consists of the Central Visa Information System (CS-VIS), an interface in each Member State called the National Interface (NI-VIS), and the communication infrastructure between the two. The European Commission will develop the overall system, whereas the Member States will plan the national infrastructures. The Commission must provide progress reports to the Parliament and the Council. Denmark has been given a six-month period to decide whether it intends to be bound by this system.

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<sup>7</sup> COM (2004) 262 final (June 30, 2004).

<sup>8</sup> COM (2004) 427 final (June 8, 2004).

<sup>9</sup> *Supra* note 2, L 213/5 (June 8, 2004).

**Working Hours for Doctors in Training**<sup>10</sup>

The prolonged working hours of young doctors in training caught the attention of the European Parliament, which intensely debated the merits of the 2000 Working Time Directive. According to its provisions, as of August 1, 2004, doctors in training will be subjected to the following timetable: from 2004-2007, the maximum working hours allowed are fifty-eight per week; from 2007-2009, it will be fifty-six; and for the following three years it will be fifty-two.

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<sup>10</sup> *Working Time Directive: Working Limits for Doctors in Training*, European Parliament UK Office website, at <http://www.europarl.org.uk/news/infocus>.

## IRAQ: PRESENT LEGAL SYSTEM

Prepared by Issam M. Saliba, Legal Specialist, Eastern Law Division

### Executive Summary

*Present day Iraq does not reflect the rich contribution it made to human civilization, nor the significant role it played in the history of legal development. In the second century after the death of the Prophet Mohammed, Iraq became home to the Hanafi School of Islamic law that is still the most influential among the Sunni Muslims in the world today. Following World War I, Iraq adopted new laws incorporating elements of Islamic law and the laws of continental Europe. These laws, some of which were modified following the occupation of Iraq in 2003, still constitute the foundation of the Iraqi legal system.*

### I. Historical Framework

#### A. Iraq and Early Written Laws

Iraq encompasses the region that was once known as Mesopotamia, a Greek word meaning the land between the two rivers. The legal history of Iraq is a very rich one, starting several thousand years before the advent of Christianity. Archeological discoveries in Iraq have confirmed the existence of written laws dating back to the years 3000 B.C. The famous Hammurabi Code was not the first law in that land. It was certainly, however, the most comprehensive and complete code that was found, almost in its entirety, carved on a stone discovered early in the 20<sup>th</sup> century.

#### B. Iraq As Legal Center for Islamic Law

Iraq is the home of the first schools of Islamic thought in Kufa and Basra that led to the development of the Islamic law based on the *Shari'a*. The Hanafi School of Islamic law claims the most adherents in the Islamic world today and dates back to the Kufian School. During the rule of the Abbasid dynasty of the Islamic state (8<sup>th</sup>-13<sup>th</sup> centuries CE), Iraq played a major role, not only in the formulation and interpretation of the Islamic legal tradition, but also in the establishment of the office of *Qadi*, the judge responsible for the application of Islamic law. It was in Iraq where the Islamic state first created the office of Qadi al-Qudat, meaning the Judge of Judges or Supreme Judge, whose authority included advising the Caliph, the head of the Islamic state, on all matters related to the judiciary.

Islamic law is based on the *Shari'a*, which consists of the teachings of the Koran and the traditions of the Prophet Mohammed. Muslims consider the *Shari'a* to be sacred and divine and the path through which human beings can reach ultimate salvation. No human individual or other earthly authority can change, add, alter, or amend the *Shari'a*. God manifested his will to mankind through direct revelation and guidance to the Prophet Mohammed, and access to the will of God has been closed since the death of the Prophet, whom Muslims believe to be the last and final messenger sent by God.

Islamic law has grown and developed through the work of pious Islamic thinkers whose main objective was to discover the will of God from its original sources, namely, the

Koran and the traditions of the Prophet. The historical development of Islamic law went through three stages. In the first stage the influence of Islamic thought on the law was minimal and limited to the specific reforms introduced by the Koran. In the second stage, the Muslim scholars started to scrutinize the law under the ethical and moral dictates of the Islamic religion. In the third and final stage, religious, moral, ethical, and legal rules became elements of a single Islamic legal system. In all of these stages, the schools of Islamic thought of Iraq played a very significant role.

### **C. Islamic Law and Modern Constitutional Principles**

It is useful to examine the relationship that exists between Islamic law and the state to determine the place of constitutional law in the Islamic legal system. Islamic political theory was shaped by the concept of *Umma* and its historical manifestations, especially during the early periods of Islamic expansions.

#### **1. The Concept of *Umma***

*Umma* has several meanings: a nation, a community, or a people. In its Islamic and historical context, *Umma* is the community of all those who believe in the oneness of God and the teachings of the Prophet Mohammed. Its purpose is to defend the word revealed to the Prophet and enforce the divine commands. The members of the *Umma* are tied together by the strength of their faith, not by their tribal, family, or other connections, as was the case in pre-Islamic Arab societies. All Muslims within the *Umma* are equal in the eyes of God.

The Koran speaks to the believers, saying you are the best *Umma* given to mankind, and the most pious among you is the most exalted before God. A tradition attributed to the Prophet quotes him as saying that there is no preference of an Arab over a foreigner, except on the basis of piety. The *Umma* was not a separate and distinct religious or civil entity within the state; the *Umma* was itself the state. In 622 CE, when the Prophet left his city of birth, Mecca, and immigrated with a limited number of his followers to the town of Yathreb (later renamed Medina, a shortening for *Medinat al-Nabi* or the city of the Prophet), the manifestation of the *Umma* came into historical reality, with the Prophet holding absolute temporal and spiritual authorities over the new community or state.

#### **2. Church and State**

The Islamic religion and the Islamic state grew up together. They are manifestations of the same historical reality that is often expressed in saying that Islam is a religion and a state at the same time. Therefore, the separation between religion and state is an idea that is totally alien to Islamic thought. Moreover, in Islam there is no organized church and no priesthood. In fact, the Muslim specialists, scholars, or theologians who influenced and shaped Islamic thought were private individuals who did not even have any official position within the Islamic state. The great Islamic jurists after whom the four schools of law in the Sunni branch of Islam have been named, Abu Hanifa, Malek, Al-Shafi'i, and Ibn Hanbal, are the most striking examples of this phenomenon.

Islamic law has evolved through the work of these jurists and their many disciples over a long period of time. Despite disagreement among the various schools on certain issues of law, they came to accommodate and accept each other through a natural and gradual process

of interaction that was left undisturbed by the political authority of the state. The basic tenets of the Shia's schools of Islam do not differ much from the other schools, except with respect to the role of the Imam. The Shia's consider that the succession of the Prophet in managing the affairs of the *Umma* belongs to Imam Ali, the cousin and son-in-law of the Prophet, and to Imam Ali's descendants.

### 3. Power to Legislate

Islamic law was, as previously mentioned, the outgrowth of the work of individual jurists without the interference of the state or the sanction of a recognized religious institution. Two questions therefore arise. What was the nature of the jurists' work in the development of Islamic law and what role did the Islamic ruler play with respect to this law?

#### a. Nature of the Jurists' Work

One of the five pillars of Islam is the profession that there is no God but God and that Mohammed is the messenger of God. This means that the teachings of the Prophet Mohammed were not his own, but rather the commands of God. The role of the Islamic jurist was to understand and identify the rules and duties that these teachings from God had imposed upon the believers. These rules and duties were not limited to legal duties per se, but included ethical, ritual, and other duties as well. It has long been settled in the orthodoxy of Islamic thought that all rules and duties governing Muslim life should exclusively find their source in the divine will of the Almighty God.

#### b. Legislation by the Ruler

Since Islamic law is to be founded exclusively on the divine will, no earthly authority has the power to legislate or impose its own law. For Muslims, the words of the Koran are the direct and very words of God, and they constitute the original source of Islamic law. In addition to the Koran, the orthodoxy of Islamic thought has accepted the traditions of the Prophet, including his sayings, direct actions, and formal or tacit approval, as being divinely inspired and representing another source of the divine will.

After the death of the Prophet in 632 CE, Islamic legal theory needed to address the continuity of the Islamic State beyond the person of the Prophet. The companions of the Prophet, those who emigrated with him from Mecca and those who joined him in Medina, swiftly agreed to select a ruler to manage the affairs of the newly established state. His title was Caliph, the English word for *Khalifat* or *Khalifat Rasoul Al-Lah*, meaning the successor of the messenger of God.

Islamic orthodoxy is also well established to the effect that the role of the Caliph, or the ruler of the Islamic state, is to enforce, not formulate, the rules of Islamic law. The functions of the Caliph in managing the affairs of the state and enforcing the rules of Islamic law are strictly temporal and do not include a doctrinal dimension. The ruler, like any other member of the community, is subject to these rules of Islamic law.

When the institution of the Caliphate lost its real power during the extended period of the Abbasid rule, the Caliph became only a religious symbol or a symbol of the lost unity of the Islamic state. This dilution of power kept the actual role of the ruler outside the effective

sphere of influencing the law. Legal matters became by then the exclusive responsibility of the schools of jurisprudence that came into existence as a result of the hard work of private, independent specialists in Islamic law.

## II. Legal System in Iraq Under Ottoman Rule

Iraq became a part of the Ottoman Empire in the year 1534, when Suleiman the Magnificent conquered Baghdad. Islamic law, as applied in the Ottoman Empire, became the law of Iraq. Iraq continued to be ruled by the Ottoman Empire until the end of World War I. At the end of that war, Iraq became an independent monarchy under colonial British mandate.

## III. Constitutional Framework in Present-Day Iraq

### A. Constitution of 1925

In 1923, the British prepared a draft constitution for Iraq that was presented to the Iraqi National Assembly in 1924, where it was adopted with minor changes. This first constitution, known as the Iraqi Organic Law, was officially promulgated in 1925, establishing a hereditary constitutional monarchy in Iraq with popular parliamentary representation. The British mandate ended officially in 1932, and Iraq became a member of the League of Nations, the predecessor of the present United Nations. The main features of the first constitution may be summarized as follows:

#### 1. Equality before the Law

The constitution guaranteed protection of the law to all Iraqis, irrespective of the differences of race, religion, or language.<sup>1</sup>

#### 2. Personal Freedom

The constitution guaranteed the personal freedom of all Iraqi residents against interference and aggression. It specifically provided that no resident be arrested, detained, forced to change residence, subjected to restrictions, or forced to serve in the military forces except in accordance with the law. It further provided that torture and expelling Iraqis outside the kingdom of Iraq were absolutely forbidden.<sup>2</sup>

#### 3. Private Ownership

The rights of private ownership were to be protected under the constitution. No forced restrictions, attachment of personal or real property, or confiscation of such property was to be allowed, except in accordance with the law. Forced unpaid labor and the confiscation of movable or immovable property were to be absolutely prohibited. No appropriation of property was to be allowed, except when in the public interest, and even then only if conducted in the manner and under the circumstances prescribed by law and after just compensation.<sup>3</sup>

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<sup>1</sup> 1925 Constitution, art. 6. Text available through Geocities.com, at <http://www.geocities.com/dagtho/iraqiconst19250321.html>.

<sup>2</sup> *Id.* art. 7.

<sup>3</sup> *Id.* art. 10.

#### 4. Freedom of Speech

Iraqis were to have freedom of opinion, press, assembly, and formation of and participation in associations within the bounds of the law.<sup>4</sup>

#### 5. Freedom of religion

The constitution named Islam as the official religion of the state and provided that its worship rituals, in accordance with its various denominations, as are customary in Iraq, will be respected without any infringements. It further guaranteed to all the inhabitants of Iraq the freedom of belief and the freedom to practice their worship rituals in accordance with their traditions, provided such traditions were not against security, public order, or public morals.<sup>5</sup>

#### 6. Privacy

The constitution also provided privacy protection for all postal, telegraphic, and telephonic communications that were to be kept secret and protected against surveillance and interception, except in the manner and under the circumstances prescribed by law.

### B. The Constitution of 1958

In 1958, a military coup took place, overthrowing the monarchy as a corrupt remnant of the colonial imperial powers and declaring Iraq to be a popular republic. Shortly afterwards, the military authority of the revolution issued an interim constitution to replace the 1925 Monarchical Constitution. This second Constitution of 1958 was intended to be temporary until a new National Assembly, elected by the people, approved a new permanent constitution. The interim constitution also guaranteed, in more general terms and with slight modification, the same basic freedoms as the first constitution.

### C. The Constitution of 1970

In 1970 a new interim constitution was promulgated and again contained many of the basic rights guarantees for all Iraqis.<sup>6</sup> However, the Constitution of 1970 gave the Revolutionary Command Council, a non-elected body, supreme power as the representative of the will of the people of Iraq. The implementation of this constitution ended in 2003, with the occupation of Iraq by the coalition forces led by the United States. At present, Iraq is governed in accordance with a transitional law called the “Law of Administration for the State of Iraq for the Transitional Period,” in preparation for the election of a representative government that will prepare for the adoption of a permanent constitution.

The Coalition Provisional Authority (CPA) that governed Iraq directly after its occupation by the American and coalition forces from early 2003 until June 28, 2004, decreed

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<sup>4</sup> *Id.* art. 12.

<sup>5</sup> *Id.* art. 13.

<sup>6</sup> Translated in Gisbert H. Flanz & Fouad Fahmy-Shafik, *Iraq, in 10A CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: HISTORIC CONSTITUTIONS* 13 (Feb. 1974).

that the laws in force in Iraq as of April 16, 2003, will continue to apply insofar as they do not prevent the CPA from fulfilling its obligations and do not contradict any orders or regulations issued by the CPA.

#### **IV. Civil Code**

The Iraqi Civil Code was prepared by the late Egyptian Jurist, Abd al Razzak al Sanhoury, and approved by the Iraqi legislature in 1951. The law divides general rights into two main categories. The rights emanating from obligations owed (rights in personam) and the rights attached to a specific property, real or movable (rights in rem). The first category is generally known as obligations. There are five sources of obligations: contracts, unilateral volition, unlawful acts or tort, enrichment without cause, and the law.

##### **A. Contracts**

The freedom to enter into contract within the limits of the law is a basic principle in the Iraqi legal system. Contracts are either defined or undefined. Those defined by law are the contracts of sale, gift, partnership, loan and annuities, settlement of disputes, lease, loan for use, craftsman and manufacturing, public utility, employment, agency or representation, deposit or trust, life annuities, insurance, and guarantee or surety.

Article 25 of the Iraqi Civil Code gives the parties to a contract the right to choose the law they want to apply to their contract. If they do not make a choice, the law of the state where the act takes place applies. The will of the parties to a contract can create any type of obligation, as long as it does not contravene the public mores or the obligatory provisions of the law. This principle is well established in Islamic law and expressed by the quotation confirming that the “contract is the law of the parties.”

##### **B. Unilateral Volition**

A unilateral promise does not bind the promisor except as provided for in the law. The provisions applicable to contracts apply to a unilateral promise except those requiring the existence of exchanged promises as a necessary condition to create the obligation.<sup>7</sup> The one who unilaterally promises to give valuable consideration to whomever performs a specific act is legally obligated to give such consideration upon performance, even if the performer acted irrespective of the promise.

The promisor may revoke his promise if he did not set a term. Such a revocation will not affect the right of the one who performed the act prior to the revocation of the promise. A lawsuit to collect on the promise will be extinguished, however, if not brought within six months of the date that the revocation was announced.<sup>8</sup>

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<sup>7</sup> Art. 184 of the Civil Code.

<sup>8</sup> *Id.* art. 185.

### C. Unlawful Acts

Unlawful acts that give rise to civil obligations may be defined as acts that cause injury to the interests of a person other than the actor and are not permissible under the law. Acts that ordinarily are legally permissible will also be considered unlawful when committed for unlawful purposes, for harming others, or when the benefit to the actor resulting from the act is insignificant in comparison with the harm caused to others.<sup>9</sup>

### V. Commercial Laws

Article 1 of the Interim Constitution of 1970, which was in force until the end of Saddam Hussein's regime, provides that the establishment of a socialist system is an essential goal of the state of Iraq. Article 12 provides that the state assumes the responsibility for planning, directing, and leading the national economy in order to establish a socialist system based on scientific and revolutionary criteria and realize Arab economic unity.

The constitution also provides in article 13 that the people own the natural resources and the essential means of production. Article 16 stipulates that private ownership is a social function to be exercised within the parameters of the objectives of society and state planning in accordance with the law.<sup>10</sup> Article 18 prohibits ownership of real estate by non-Iraqis. Within these limits, Iraq has enacted several laws relating to the conduct of trade and commerce, including a commercial code, private and public sector company laws, and a commercial agency law.

#### A. Code of Commerce

The most recent Iraqi Code of Commerce was enacted in 1984 as Law Number 30. It proclaims the basic tenets and scope of the law to be organizing of economic activities among the socialist, mixed, and private sectors in accordance with the requirements of the development plan, making the role of the mixed and private sectors complementary to the activities of the socialist sector, and giving the legal relation prominence over the contractual relation.

#### 1. Commercial Activities

Article 5 of the Code of Commerce defines the activities that are considered commercial unless proven otherwise. They include the purchase or renting of properties, movable or non-movable, for re-rent or re-sale; the supply of goods and services; the import and export of goods and services; industrial activities extraction of raw materials; publishing, printing, photography, and advertising; construction undertakings; the services of hotels, restaurants, theatres, tourist offices, and other entertainment activities; banks operations; and the use of negotiable instruments, among others.

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<sup>9</sup> *Id.* art. 7.

<sup>10</sup> *Id.* art. 16.

## **2. Merchants or Traders**

Articles 7 to 37 define who is a merchant or trader and what are his duties. A merchant is any person, natural or juristic, for whom commercial activities are his profession. The duties of a merchant include registration in the commercial register, keeping commercial records, and adopting a commercial name.

## **3. Commercial Instruments**

Articles 39 to 185 of the Code deal with commercial papers and discuss in detail the bill of exchange, the promissory note, and the check. Articles 186 to 238 address three specific commercial contracts, the commercial mortgage, the deposit in public depot, and the current account. Articles 239 to 293 describe the requirements and conditions of the following bank operations: money deposits, lease of safe deposit boxes, banking transfers, lines of credit, documentary lines of credit, discounts, and letter of guarantee. Articles 294 to 330 discuss in detail the international sales contract.

### **B. Company Laws**

Iraq has enacted two company laws, allowing for the establishment of private sector companies, public sector companies, and mixed companies.

#### **1. Private Sector and Mixed Companies**

Law No. 21 of 1997 regulates the formation, functioning, and dissolution of private sector or mixed companies in Iraq. Article 6 allows the creation of four types of companies:

##### **a. Stock Company**

The formation of the stock company will consist of no fewer than five people, and the shareholders will share subscriptions in a public offering. Their liability for the debt of the company will be limited to the nominal amount of the share to which they subscribed.

##### **b. Limited Liability Company**

The formation of the limited liability company will consist of no fewer than two people and no more than twenty-five, who subscribe to the shares and become liable for the debts to the extent of the nominal values of their subscribed shares. Under the Coalition Provisional Authority Order 29 of 2004, CPA/ORD/29 February 2004/64, article 6 was amended to reflect that a limited liability company can be formed with only one owner.

##### **c. Partnership Company**

A partnership company consists of at least two but no more than ten people, each of whom owns a part of the partnership and all of whom are jointly and personally liable for all the partnership obligations.

#### **d. Sole Enterprise**

A sole enterprise is a company owned by one person who is liable personally for all the company's obligations.

### **2. Public Sector Companies**

Law No. 22 of 1997 regulates the formation, functioning, and dissolution of companies that are owned totally by the government. Such companies, however, form one economic entity, which has juristic personality, enjoys financial and administrative independence, and functions on a purely commercial basis.

### **3. Foreign Corporations**

Under article 12 of Law No. 21 of 1997, ownership of companies is limited to Iraqi citizens and Arab nationals, and no juristic entity is allowed to become a partner in a company unless the entity itself is of Iraqi nationality. Paragraph 13 of CPA Order 29 of February 2004 amended this article and provided that a juridical or natural person, foreign or domestic, has the right to acquire membership in Iraqi companies whether as a founder, shareholder, or partner. Foreign corporations may open a branch or a representative office if they must carry out business activities in Iraq pursuant to a contract concluded between such corporations and the Iraqi governmental entity or with certain mixed Iraqi companies.

### **C. Commercial Agencies**

Law No. 51 of 2000 regulates commercial agencies' activities carried out in Iraq by an Iraqi agent who is acting on behalf of a natural or juristic person who is from outside Iraq. Article 2 requires the agent to obtain a special permit allowing him to act as a commercial agent. It further requires the registration of commercial agencies in a special registry.

The public sector entities in Iraq are not allowed to deal with commercial agents under any pretenses and should deal directly with the companies themselves (article 14 of Law No. 51 of 2000).

### **D. Intellectual Property Laws**

Iraq enacted several laws to protect intellectual property. Law No. 21 of 1957, as amended, protects trademarks; Law No. 65 of 1970 protects patents and industrial designs; and Law No. 3 of 1971 protects copyrights.

In order for a trademark to be protected, it must be registered in the special registry at the Ministry of Commerce. Anyone has the right to request the registration of a trademark. If more than one person requests the registration of the same or similar trademarks, the registrar may halt the registration until all the requesters agree or the court issues an order determining the person in whose name the trademark will be registered (article 8).

A trademark is considered the property of the person who requests its registration, and no claim against him will be accepted after its use for a continuous period of five years

from the date it was duly registered (article 3). The validity of the registration continues in effect for a period of fifteen years, which is renewable.

## **VI. Family Law**

### **A. Marriage and Divorce**

The codified Islamic family law called Personal Status Law provides that its provisions should apply to all Iraqis except those exempted by law. Those exempted are the Christians, Jews, and other religious minorities. The Hanafi School of Islamic law that originated in Iraq is followed by most Muslim Sunnis. It differs in certain details from other Sunni schools. It also differs from the Jaafari school, which is the school followed by the great majority of the Muslim Shias.

In 1959, Iraq codified an Islamic family law based mainly on the Hanafi and Jaafari schools. This law has certain provisions that are considered pro-women's rights. It requires that both the man and woman be 18 years of age to enter into a marriage contract. However, a person under age 18 may obtain the permission of the court to marry, provided that the person is physically fit to do so, is at least 15 years old, and has the consent of his guardian. The consent of the guardian should not be unreasonably withheld. The law has a specific provision that if the marriage is compulsory, the marriage contract will be void or voidable.

While the law does not make polygamy completely illegal, it does require the husband to obtain the court's permission if he is to marry another wife. The court has discretion to refuse permission if it determines that the husband has no sufficient financial means of support, that there is no legitimate reason for a second marriage, or that there is a fear that the husband may not be able to maintain just treatment for his wives.

The law also requires the contract of marriage to be duly registered with the court. The wife has the right to file for divorce if the husband violates any lawful condition included in the marriage contract or if the situation becomes such that it is impossible for the couple to live together. The court may refer the case for reconciliation before acting on the request for divorce. The husband, however, has the right to divorce his wife without the interference of the court if he chooses to do so.

The husband's impotence, detention for a certain period of time, affliction with a serious illness, or abandonment of his wife without a reason for a specified period constitutes a legitimate basis upon which a wife may file for divorce. Another basis upon which a wife may file for divorce is if the husband fails to provide for her maintenance. The wife may also file for divorce if the marriage has not been consummated, provided she is willing to return to the husband the dower and any expenses he incurred because of the marriage. With respect to the custody of children, Iraqi law gives the mother the right to keep the children until the age of ten, a period that may be extended until age fifteen, when the children may choose for themselves whether to continue living with the mother or not.

### **B. Inheritance**

The Islamic Personal Status Law generally follows the Islamic law of inheritance, as was applied prior to the promulgation of the Personal Status Law of 1959. However, this law

introduced some variations taken from various Islamic schools. With respect to the rights of women, the Iraqi law adopted the Jaafari Shia School position under which the daughter of a deceased who left no sons is eligible to receive the totality of the estate without having to compete with a male agnate. This applies to all Iraqis who are Muslims, regardless of whether they are Shias or Sunnis. The new law gave also the testator the right to bequeath up to a third of his estate to whomever he chooses without any limitation as to whether the beneficiary is an heir or not. This is also taken from the Jaafari Shia School, but applies to all Muslims in Iraq.

## VII. Criminal Laws

Following the occupation of the district (*Wilayat*) of Baghdad by the British forces during World War I, the British Military Authorities promulgated the Baghdad Penal and Criminal Procedure Codes to replace the Ottoman ones. These Codes kept their original appellation even after they became applicable to the rest of Iraq, as a result of the expansion of the British occupation. Although these codes were supposed to be temporary,<sup>11</sup> they were in force until they were replaced by the enactment of the Penal Code No. 111 of 1969 and the Criminal Procedure Code No. 23 of 1971. In 1979, Iraq issued Law No. 159, entitled the Law of the Public Prosecutor, replacing the relevant articles in the Criminal Procedure Code.

### A. Penal Code

Under the Iraqi Penal Code, the occurrence and consequences of a criminal offense will be determined in accordance with the law in force at the time the offense was committed. However, a subsequent law will be applied if it is more favorable to the accused or convicted person.<sup>12</sup> The provisions of the Penal Code are applicable to offenses committed in Iraq or to offenses whose consequences affect or are intended to have effects in Iraq.<sup>13</sup> However, an Iraqi who commits an offense outside Iraq will be subject to the Iraqi Penal Code if the offense is a felony or misdemeanor and if it is punishable in the land where it was committed.<sup>14</sup> The criminal acts are classified as either ordinary or political.

#### 1. Political Offenses

A political offense is defined as one that is committed with a political motive or that violates the political rights of the public or the individual. If the court finds the crime to be political it will so indicate. The death penalty will be replaced by life imprisonment for political offenses.<sup>15</sup>

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<sup>11</sup> The Baghdad penal code stated the following in its explanatory memorandum: “‘The Baghdad Penal Code’ has been prepared as a temporary and provisional law for use in the Courts which have been established by the British Military Authorities in the Baghdad *Wilayet*.”

<sup>12</sup> Art. 2 of the Iraqi Penal Code (Penal Code) No. 111 of 1969.

<sup>13</sup> *Id.* art. 6.

<sup>14</sup> *Id.* art. 10.

<sup>15</sup> *Id.* arts. 20–22.

## 2. Ordinary Offenses

Ordinary offenses are divided into three categories depending on the severity of the offense. The punishment provided for the offense determines its category.

### a. Felonies

A felony is a crime punishable by death, life imprisonment, or five to fifteen years' imprisonment.

### b. Misdemeanors

A misdemeanor is an offense that is punishable by hard or ordinary detention for three months to five years.

### c. Infractions

An infraction is an offense that is punishable by either ordinary detention for a period of twenty-four hours to three months, or a fine not to exceed 30 *dinars*. (One Iraqi *dinar* (IQD)=US\$3.20 in August 1990; IQD=US\$.0006849 in August 2004.)

## 3. Justifications for Commission of an Act

Under certain conditions, actions that are normally considered criminal offenses will not be recognized as such. The penal code identifies three situations where this is the case; if the person committing the act is performing a duty prescribed by law, exercising a legal right, or acting in self-defense, then no offense will be attributed to him.<sup>16</sup>

## B. Criminal Procedure Code

The Criminal Procedure Code, as supplemented by the Public Prosecutor Code, addresses several issues, such as investigations, indictments, trials, and judgments.

### 1. Investigations

Investigations of criminal offenses are conducted under the overall supervision of an investigating judge. Within the scope of their competent authority, police officers, police station commanders, and commissioners are considered to be the law enforcement agents, charged with discovering crimes and receiving information and complaints.

The *Mukhtar*<sup>17</sup> is available on the local level to receive notification of crimes and apprehend suspects.

The manager of a railway station, his deputy, and the train master; the manager of a seaport or airport; the pilot of an aircraft; and the captain of a ship are considered to be the law

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<sup>16</sup> *Id.* arts. 39-46.

<sup>17</sup> The *Mukhtar* is the lowest administrative authority in the town or the neighborhood.

enforcement agents with respect to any crimes committed within their respective places of work. The heads of the departments in the government or the heads of any official or semi-official agencies are responsible for crimes committed within their departments.

## 2. Searches

Searches of the person or a residence are not allowed except as permitted by law. Such searches are to be undertaken by the investigating judge or based on a warrant issued by him.<sup>18</sup> No female can be searched except by a female appointed for this purpose.<sup>19</sup>

## 3. Arrests

The investigating judge may order the arrest, for a period not to exceed fifteen days at a time, of a person accused of committing an offense punishable by more than three years' detention or imprisonment. If the offense is punishable by death, the accused is to be arrested and his arrest renewed as long as it is necessary to conduct the investigation. The totality of the arrest period is not to exceed one-fourth of the maximum punishment period for the offense and is not to extend beyond six months. If the arrest must extend beyond six months, the investigating judge must bring the matter before the felony court seeking permission for such an extension.<sup>20</sup>

## VIII. Judicial Organization

All three constitutions provided for the independence of the judiciary; however, they left the organization of the courts to be dealt with by the legislature. The regime of Saddam Hussein issued several laws relating to the judiciary. It created courts dealing with civil, criminal, administrative, and personal status matters, in addition to special courts dealing with cases that were considered related to the security of the State. The substance of the Iraqi law is a combination of Islamic, Ottoman, and European laws. Personal status matters, such as marriage and inheritance, are subject to the religious laws, and certain religious communities have their own laws and court system.

Iraq has enacted Law No. 160 of 1979, entitled the Law of Judicial Organization, in which article 2 states that the judiciary will be independently accountable to no one but the law.<sup>21</sup> The judiciary is divided into three levels. The Court of Cassation is the highest judicial authority and, as such, it exercises judicial supervision over all other courts except when the law provides otherwise.<sup>22</sup> The Court of Cassation consists of a President or Chief Justice, five deputy chiefs, and no less than thirty judges and is organized into the following chambers or formations:<sup>23</sup>

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<sup>18</sup> Art. 72 of the Criminal Procedure Code No. 23 of 1971.

<sup>19</sup> *Id.* art. 80.

<sup>20</sup> *Id.* art. 109.

<sup>21</sup> Published in the Iraqi official gazette No. 2746, dated Dec. 17, 1979.

<sup>22</sup> Art. 12 of Law No. 160/79.

<sup>23</sup> *Id.* art. 13.

- The full court
- The general assembly
- The civil chamber
- The chamber of personal status

These chambers are formed at the beginning of each year. In essence, the judiciary in Iraq is modeled after the European court systems. The court of first instance is the court of the first level, the courts of appeal are the courts of the second level, and the Court of Cassation is the highest level. The courts have jurisdiction in civil, commercial, criminal, and personal status cases. A number of non-Muslim communities have their own courts with respect to certain personal status matters. With regard to territorial jurisdiction, there is a court of first instance in each locality and a court of appeal in each district. Iraq is divided into a number of judicial districts. The territorial jurisdiction of the Court of Cassation covers all of the Iraqi territory, and it has its seat in the capital city of Baghdad

### **A. Filing a Claim**

A claim should always start at the first level and be filed in a court of first instance. The courts of appeal review the decisions rendered by the courts of first instance existing within their district if the losing party chooses to appeal the decision within the time limit prescribed by law. The court of appeal has the full capacity to review the facts and the proper application of the law. A claimant appellant may contest the decision rendered against him based on errors in the ascertainment of the facts and the errors in the application of the law.

### **B. Court of Last Resort**

The Court of Cassation is the court of last resort. Its jurisdiction is limited to reviewing the proper application of the law based on the facts ascertained by the court of appeal. The Court of Cassation does not normally review the facts, except when it orders a retrial and acts as an appellate court itself. As a matter of internal judicial organization, the courts are organized into civil courts that deal with civil and commercial disputes and criminal courts that deal with violations of the Penal Code. Under the former regime, Iraq had also established special courts to deal with matters relating to the security of the State.

The judges are appointed by the President of the Republic through the Ministry of Justice. To be considered for appointment, a candidate must be a graduate from an accredited law school. Judges can be promoted from within the judiciary and can be transferred from one location to another.

### **Conclusion**

Despite many years of dictatorial governance and manipulation of its laws and public institutions, the basic legal structure in Iraq is still foundationally sound to support legal reforms consistent with principles of liberal democracy and a free market economy. While a legal system is a necessary condition to implement democracy and free trade, it is not, of and by itself, a sufficient condition to ensure results.