# INTERNATIONAL & COMPARATIVE LAW QUARTERLY



**VOLUME 61** 

PART 3

**JULY 2012** 

Merris Amos

Myriam Hunter-Henin

#### **ARTICLES**

The Dialogue Between United Kingdom Courts and the European

Court of Human Rights

State Liability for Judicial Decisions in European Union and

International Law Arwel Davies

Why the French Don't Like the *Burqa: Laïcité*, National Identity and Religious Freedom

The Duty to Give Reasons for Administrative Decisions in

International Law Jarrod Hepburn

The Continuing Myth of Euro-Scepticism? The German Federal

Constitutional Court Two Years After *LISBON*Beke Zwingmann

#### SHORTER ARTICLE

Is There a Right to Detain Civilians by Foreign Armed Forces During

a Non-International Armed Conflict?

Peter Rowe

Current Developments and Book Reviews—see back cover



## International and Comparative Law Quarterly

#### EDITORIAL ADVISORY BOARD

GUIDO ALPA
JEAN-BERNARD AUBY
JOOST BLOM
MARISE CREMONA
MARTIN DAVIES
CHRISTOF HEYNS

ERIK JAYME
CAMPBELL MCLACHLAN
DONALD MCRAE
FRANCISCO ORREGO VICUÑA
MUTHUCUMARASWAMY SORNARAJAH
GILLIAN TRIGGS

### British Institute of International and Comparative Law

President: Dame Rosalyn Higgins DBE QC

Vice Presidents: The Rt Hon the Lord Collins of Mapesbury, The Rt Hon Sir David Edward KCMG QC LLD frse and Sir Christopher Greenwood KCMG QC

#### DIRECTOR

PROFESSOR ROBERT McCorquodale

#### BOARD OF TRUSTEES

Chairman of the Board of Trustees: SIR FRANKLIN BERMAN KCMG QC

CLARE ALGAR
THE HON SIR WILLIAM BLAIR
GARY B BORN
SUSAN BRIGHT
LORD JUSTICE STANLEY BURTON
IAN HOBBS FCA, CEDR ACC
SIR FRANCIS JACOBS, KCMG, QC
ADAM JOHNSON
PROFESSOR ROSA LASTRA LLB MA LLM PHD

ALEXANDER LAYTON QC
PAUL LOMAS
PROFESSOR DAWN OLIVER MA PHD FBA
KEITH RUDDOCK
PROFESSOR MALCOLM N SHAW QC
THE HON MR JUSTICE SINGH
PROFESSOR STEPHEN WEATHERILL
DAME JULIET WHELDON DCB QC

Advisors to the Board of Trustees The Rt Hon Dame Mary Arden DBE Martin Paisner CBE

# International and Comparative Law Quarterly

#### 2012

#### BOARD OF EDITORS

General Editors

Professor Catherine Redgwell, University College London
Professor Robert McCorquodale, Director of BIICL

Professor Ian Cram, University of Leeds Professor Malcolm Evans, University of Bristol Professor James Fawcett, University of Nottingham Professor Paula Giliker, University of Bristol Professor Christine Gray, University of Cambridge Professor Joanne Scott, University College London

Publications Editor
Anna Riddell

#### **EDITORS OF CURRENT DEVELOPMENTS SECTION**

Public International Law
Professor Dominic McGoldrick, University of Liverpool
Sarah Williams, University of New South Wales

European Union Law Professor Joe McMahon, University College Dublin

Decisions of International Courts and Tribunals Professor Craig Barker, University of Sussex

Private International Law
Professor Peter McEleavy, University of Dundee

#### BOOK REVIEW EDITORS

Thérèse O'Donnell, University of Strathclyde Dr Andrew Lang, London School of Economics Dr Francesco Giglio, University of Manchester

#### INSTRUCTIONS FOR CONTRIBUTORS

The ICLQ welcomes the submission of contributions for consideration by the Board of Editors with a view to publication. To submit an article please send it by email to the Publications editor, Anna Riddell: a.riddell@biicl.org.

The Board of Editors will only consider material which complies with the following:

- The submission should be an original, unpublished work not currently under consideration for publication elsewhere. Please note that our exclusive submission policy means you cannot submit your work to another journal until you have received a decision from us. If you would like to do so, you must withdraw your article from consideration by the ICLQ.
- 2. The ICLQ publishes articles that deal with public international law, private international law, comparative law, human rights law and European Union law. It particularly encourages the submission of innovative and original articles whose theme or content illuminate several of these subject areas. Articles which do no more than rehearse familiar and well-known material, or which are concerned only with national law in a non-comparative way, should not be submitted.
- 3. Long articles should not exceed 12,000 words, excluding footnotes. A submission of less than 6,000 words may be considered for the 'Shorter Articles, Comments and Notes' section, which may secure earlier publication. Please include the word count (including footnotes) in the email when submitting your article, and indicate if you intend it for the 'Shorter Articles, Comments and Notes' section.
- 4. Footnotes should be numbered consecutively through the article and be in the form normally used by the ICLQ. Please see the Style Guide for further information. Footnoting should not be excessive.
- A short (50–100 words) abstract of the article should be supplied. We reserve the right to edit
  abstracts for length and style. Please also supply a minimum of 5 keywords for your article to
  enable digital searching.
- Authors should state their present academic or professional affiliation and indicate any professional or personal involvement in the subject matter of the article.
- 7. It is preferred that submissions are sent as email attachments in Microsoft Word format to a.riddell@biicl.org. Please enter only your surname in the Subject line of the email. Alternatively, the manuscript, typed, double-spaced, on one side of A4 paper, may be sent by post to BIICL, and should be accompanied by the text on CD in Microsoft Word.

For the ICLQ Style Guide, please visit www.journals.cambridge.org/iclq/ifc. In all matters not included in this Guide, the ICLQ follows the OSCOLA citation system for house style; please visit www.law.ox.ac.uk for details.

#### SUBSCRIPTIONS

Subscriptions, orders, and enquiries should be sent to the British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WCIB 5JP, telephone 020 7862 5151. The subscription to the *ICLQ* for 2012 is £212, \$423, air mail postage extra. There may be other subscription rates available; for a complete listing please visit journals.cambridge.org/ICLQ. Back issues of all volumes are now available at the current cover price (casebound extra).

The views expressed in the contributions to this journal are those of their author(s) and do not necessarily reflect the views either of the board of editors of the journal or of the British Institute of International and Comparative Law (BIICL). BIICL is a registered charity and an independent research institute committed to supporting high standards of scholarship in all aspects of international and comparative law.

The ICLQ has been selected for coverage in Thomson Reuters' products and services. The journal will be indexed and abstracted in the Social Sciences Citation Index, the Journals Citation Reports/Social Sciences Edition and Current Contents/Social and Behavioral Sciences

#### PERMISSIONS

For all matters concerning rights and permissions please contact Linda Nicol, Cambridge University Press, Shaftesbury Road, Cambridge, CB2 8RU

© 2012

British Institute of International and Comparative Law

Printed in the United Kingdom by Bell and Bain Ltd, Glasgow

This journal issue has been printed on FSC-certified paper and cover board. FSC is an independent, non-governmental, not-for-profit organization established to promote the responsible management of the world's forests. Please see www.fsc.org for information.

## International and Comparative Law Quarterly

Volume 61 July 2012 Part 3 ARTICLES THE DIALOGUE BETWEEN UNITED KINGDOM COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS Merris Amos 557 STATE LIABILITY FOR JUDICIAL DECISIONS IN EUROPEAN UNION AND Arwel Davies INTERNATIONAL LAW 585 WHY THE FRENCH DON'T LIKE THE BUROA: LAÏCITÉ, NATIONAL IDENTITY AND RELIGIOUS FREEDOM Myriam Hunter-Henin 613 THE DUTY TO GIVE REASONS FOR ADMINISTRATIVE DECISIONS IN INTERNATIONAL LAW THE CONTINUING MYTH OF EURO-SCEPTICISM? THE GERMAN FEDERAL CONSTITUTIONAL COURT TWO YEARS AFTER LISBON Beke Zwingmann 665 SHORTER ARTICLE Is There a Right to Detain Civilians by Foreign Armed Forces DURING A NON-INTERNATIONAL ARMED CONFLICT? Peter Rowe 697 **CURRENT DEVELOPMENTS: PUBLIC** INTERNATIONAL LAW KILLINGS AT SREBRENICA, EFFECTIVE CONTROL, AND THE POWER TO PREVENT Unlawful Conduct Tom Dannenbaum 713 WATERED-DOWN RIGHTS ON THE HIGH SEAS: HIRSI JAMAA AND OTHERS V ITALY (2012) Mariagiulia Giuffré 728 THE RENAISSANCE OF NON-REFOULEMENT? THE OTHMAN (ABU QATADA) Decision of the European Court of Christopher Michaelsen **Human Rights** 750

## CURRENT DEVELOPMENTS: INTERNATIONAL COURTS AND TRIBUNALS

I. African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights V Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures 25 March	
2011 Eleni Polymenopoulou	767
II. International Court of Justice, Application of The Interim Accord	
OF 13 SEPTEMBER 1995 (THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA	
V Greece) Judgment of 5 December 2011 Filippo Fontanelli and	77.
Eirik Bjorge	775
BOOK REVIEW	
When International Law Works: Realistic Idealism after 9/11 and	
THE GLOBAL RECESSION TAI-HENG CHENG (Chester Brown)	785
Books Received	789