



THE ASPEN INSTITUTE

JUSTICE AND SOCIETY PROGRAM

INTERNATIONAL HUMAN RIGHTS LAW UPDATE

Spring 2000

I U.S. Court Cases:

(A) Doe, et al. v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. Aug. 31, 2000). Fifteen citizens of Myanmar (formerly known as Burma) brought suit under the Alien Torts Claim Act, 28 U.S.C. 1350 ("ATCA"), against Unocal Corporation ("Unocal"), a multinational corporation based in the United States, and a co-venturer in the Yadana gas pipeline project with the Burmese government. The plaintiffs alleged violations of international law, including torture, rape, murder, forced labor and forced relocation, perpetrated by the Burmese military while providing security for the benefit of the project. The court found that the defendants had not acted under color of law because they had not "participated in or influenced" the military's unlawful conduct, nor had they "conspired" with the military to violate international law or controlled the military's decision to commit tortious acts. The court found that the defendants had not sought to employ forced labor and the fact that they knew of and benefited from the military's use of such labor failed to establish their liability under international law. The court granted the defendants' motion for summary judgment on all federal claims and refused to exercise pendent jurisdiction over any claims based on California state law. The case is on appeal to the 9th Circuit.

(B) United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. Apr. 13, 2000). Duarte-Acero and three others were lured by the Drug Enforcement Agency ("the DEA") across the Colombian border into Ecuador where they were arrested and indicted for having abducted and shot two DEA agents in Cartagena, Colombia. Duarte-Acero asked the district court to dismiss the indictment, claiming he had already been convicted and sentenced in Colombia for the alleged conduct, and that Article 14(7) of the International Covenant and Civil and Political Rights (the "ICCPR") bars his prosecution. Article 14(7) provides that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." The district court denied his motion. The 11th Circuit ruled that the ICCPR's clear language indicates that its provisions govern the relationship between an individual and his state, not the relationship between sovereigns. More specifically, Article 14(7) bars successive prosecution for the same offense not for the same actions or conduct. The 11th Circuit interpreted this provision to bar only successive prosecution under the same law and criminal procedure.

(C) United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) (en banc). A Mexican citizen arrested at the border for possession of marijuana with intent to distribute challenged his conviction and sought suppression of evidence obtained in a post-arrest interrogation on the ground that the police did not inform him of his right, under Article 36 of Vienna Consular Convention (the "Convention"), to consular notification. Without addressing the issue of whether Article 36 creates individually enforceable rights, the 9th Circuit held that Article 36 cannot provide a ground for the suppression of evidence obtained as the result of a post-arrest interrogation. In reaching this conclusion, the court relied in part on the State Department's interpretation of the Convention. The State

Department noted that it enforced the Convention by investigating reports of violations and apologizing to foreign governments, where necessary. It also expressed concern that the introduction of judicial enforcement mechanisms might lead to conflict between the executive and judicial branches. In a pamphlet entitled "Consular Notification and Access," the State Department has published instructions for law enforcement and other officials regarding the rights of foreign nationals in the United States and the right of consular officials to assist them. The pamphlet is available at http://www.state.gov/www/global/legalaffairs/ca_notification/ca_prolim.html

II Refugee Issues:

(A) Ma v. Reno, 208 F.3d 815 (9th Cir. Apr. 10, 2000). Kim Ho Ma's family fled Cambodia in 1979 when Ma was two years old, and entered the United States in 1985 as refugees. Ma was subsequently granted lawful permanent resident status. He was convicted in 1996 of first-degree manslaughter and sentenced to 38 months in prison. Following his release the Immigration and Naturalization Service (the "INS") sought his removal from the United States. Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1231, permits the INS to take into custody aliens subject to removal. However, because the United States has no repatriation agreement with Cambodia, the INS could not remove him within the 90-day period during which it has authority to do so. The INS kept Ma in indefinite detention until September 29, 1999, when the district court granted his petition for a writ of habeas corpus and ordered his release. The INS appealed the decision, arguing that its authority to "detain beyond the removal period" entails the power to detain indefinitely aliens who cannot be removed in the reasonably foreseeable future. The court held that the Act permits the INS to hold aliens only for a limited "reasonable time" beyond the statutory removal period. If there is no reasonable likelihood that the aliens can return to their country of origin within the removal period, the INS must release them subject to the supervisory authority provided in the Act. In adopting this interpretation the court: (1) avoided the constitutional question of whether the INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment; (2) refused to assume that Congress intended to permit indefinite detention absent clear language to that effect; (3) read an implicit "reasonable time" limitation into the statute and (4) invoked the rule of statutory construction which requires that Congressional legislation be construed to avoid violating international law. Noting the "clear international prohibition" against prolonged and arbitrary detention embodied in Article 9 of the International Covenant on Civil and Political Rights, the court concluded that "construing the statute to authorize the indefinite detention of removable aliens might violate international law."

(B) Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999). Kestutis Zadvydas, a stateless person born in 1948 in a displaced persons camp, came to the United States in 1956 and has lived here since as a resident alien. He was twice convicted of robbery and the Immigration and Naturalization Service (the "INS") initiated deportation proceedings. He evaded the INS until 1992, when he was convicted on drug charges. While awaiting trial Zadvydas jumped bail. He turned himself in to

the authorities in 1992 and the INS reinitiated deportation proceedings. However, the INS's attempts to deport Zadvydas to Germany, where he was born, to Lithuania, where his parents were born, or to the Dominican Republic, where his wife is a citizen, were unsuccessful. Considering him a threat to the community and a threat to flee, the INS held him in indefinite detention. Zadvydas petitioned for a writ of habeas corpus, alleging that his continued detention violated due process and international law. The district court ordered him released, finding that the INS could not keep Zadvydas "permanently incarcerated." The court of appeals rejected the district court's determination that the detention would be permanent because: (1) under INS regulations, Zadvydas is entitled to automatic review of his detention every six months to determine whether he still poses a threat to the community or a risk of flight, and (2) Zadvydas still might be eligible for citizenship in _ and hence deportation to _ Germany, Lithuania, or Russia. The court reversed the district court's judgment holding that the INS could continue to detain him while continuing good faith efforts to effectuate his deportation and conducting periodic review of his eligibility for release. The U.S. Supreme Court has agreed to hear the two cases (*Ma v. Reno* and *Zadvydas v. Underdown*) regarding indefinite detention of immigrants who cannot be removed.

(C) *In re R-A-*, Interim Decision No. 3403 (BIA, June 11, 1999) (en banc). R-A-, a Guatemalan woman, sought asylum citing the appalling abuse she suffered, and continues to fear, from her husband. R-A- fled Guatemala when the authorities informed her that they do not interfere in domestic disputes and could not afford her protection. The Board of Immigration Appeals (the "Board") reversed an immigration judge's decision granting her asylum and held that she had failed to establish membership in a "particular social group" for asylum purposes. The Board said that "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination" do not constitute a persecuted group within the meaning of the statute. The Board expressed the hope that the INS might grant R-A discretionary humanitarian relief but found that asylum law provides her no remedy. Five of the 15 Board members who heard the appeal dissented.

On December 7, 2000, the Department of Justice issued proposed regulations on gender based asylum claims. In one of her last acts as Attorney General, Janet Reno voided the Board's ruling on R-A, directing the INS to wait until the proposed regulations are finalized and to reconsider her case at that time.

III United Nations:

(A) Judgments of the International Criminal Tribunal for Rwanda: i) *Barayagwiza v. Prosecutor*, No. ICTR-97-19-AR72. The Appeals Chamber on November 4, 1999 dismissed with prejudice the case of a suspect accused of a major role in the genocide, Jean Bosco Barayagwiza, based on pre-trial violations of his due process rights. The Chamber determined that the Rwanda Tribunal's prosecutor had violated the 90-day limit for submitting an indictment and notifying the accused of the charges against him. Barayagwiza was released from custody and transferred to the authorities in Cameroon, who had initially detained him. In the wake of this decision Rwanda suspended all cooperation with the Tribunal to protest Barayagwiza's release. The Appeals Chamber reviewed the case and, based on new facts, held that its original remedy had been disproportionate to the prosecutor's errors. While confirming that Barayagwiza's rights had been infringed, the Chamber proposed that, if found not guilty, he should receive

financial compensation. If guilty, Barayagwiza will be entitled to a reduction of sentence to take into account the infringements of his rights. The Rwanda government subsequently re-established full cooperation with the Tribunal.

ii) *The Musema Case*, No. ICTR-96-13. Alfred Musema was the civilian director of a public enterprise, the Gisovu Tea Factory (the "Tea Factory"). He was charged with individual liability for the crimes of genocide or complicity in genocide; conspiracy to commit genocide; crimes against humanity, including murder, extermination, rape and other inhumane acts; and serious violations of Common Article 3 to the Geneva Conventions, and of Protocol II to the Geneva Conventions. The Trial Chamber held that Musema's status as a civilian was not a bar to his liability as a supervisor. Although the Trial Chamber found no evidence that Musema had participated in a conspiracy to commit genocide, it found that Musema had contributed to the widespread and systematic perpetration of criminal acts against Tutsis and that he exercised de jure control over the employees of the Tea Factory. Accordingly, the Trial Chamber found Musema criminally liable under both Articles 6(1) and 6(3) for genocide and also found him criminally responsible for crimes against humanity, including extermination and rape, for having ordered and participated in attacks on Tutsi civilians. Musema was sentenced to life imprisonment.

iii) *The Kayishema and Ruzindana Case*, No. ICTR-95-1-T, May 21, 1999. The Trial Chamber found Clement Kayishema, the Prefect of the Kibuye Prefecture, and Obed Ruzindana, a commercial trader in Kigali, criminally responsible individually and as superiors for their role in four massacres in the Kibuye Prefecture. The victims were primarily Tutsi men, women, and children; in each attack thousands were killed. The Trial Chamber considered the sheer number of killings in which Kayishema and Ruzindana were involved conclusive evidence of their intent to destroy the Tutsi group in whole or in part. The Chamber found it improper to convict Kayishema and Ruzindana for crimes against humanity based on murder and extermination because these crimes are fully covered under the counts of genocide for which they had already been adjudicated guilty. It determined that the crime against humanity for committing "other inhumane acts" entails its own culpable conduct and mens rea, and should not be used by the prosecution as an all-encompassing catch-all category. The Trial Chamber found that the indictment did not sufficiently particularize the nature of the acts alleged to constitute "other inhumane acts" to justify conviction on those counts. Kayishema was sentenced to life imprisonment, and Ruzindana was sentenced to 25 years in prison (the latter having been involved in only one of the four attacks).

(B) Judgment of the International Criminal Tribunal for the Former Yugoslavia: 1) *The Aleksovski Case* No. IT-95-14/1, March 24, 2000. Zlatko Aleksovski was the civilian commander of the Kaonik prison where hundreds of Bosnian Muslims were detained and inhumanely treated. The Appeals Chamber affirmed the Trial Chamber's finding that Aleksovski's civilian status did not prevent him from being held liable as a "superior." The Trial Chamber however, erred in finding that Aleksovski could not be found responsible because he did not participate directly in the mistreatment of the prisoners. Even if Aleksovski did not order violent acts against detainees his knowledge of them, and his failure to prevent them, were sufficient for a finding that he was individually responsible for acts committed by the soldiers. The Appeals Chamber found that the Statute does not require a showing of discriminatory intent or motive as an element of the offence of outrages upon personal dignity. Finding that the Trial Chamber had not given adequate consideration to the seriousness of his offenses and to the significance

of his superior responsibility, the Appeals Chamber increased Aleksovski's sentence from two and a half to seven years imprisonment.

IV European Human Rights Law:

(A) Kreil v. Germany, European Court of Justice (the "Court") (January 11, 2000). Tanja Kreil brought an action in the German Administrative Court after her application for admission to the Bundeswehr was rejected on the ground that women are barred by law from serving in positions in the German army that involve the use of arms. The German court referred to the European Court the question of whether the law prohibiting women from serving in such positions violates a directive of the Council of the European Union on equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions (the "Directive"). The Court held that the Directive applies to employment in the armed services. The Member States may be exempted from the Directive for those activities where, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor. However derogations from individual rights must be interpreted strictly. The Court then specified that the question in this case is whether the measures taken have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim. The Court found that the exclusion of women from all armed units in the Bundeswehr could not be reconciled with the principle of proportionality. The Court further found that the total exclusion of women from all military posts involving the use of arms could not be justified based on an intention to protect women. The Court concluded that the Directive precludes the application of a law excluding women from all military posts involving the use of arms.

(B) ÖZDEP v. Turkey, European Court of Human Rights (the "Court") (December 8, 1999). The Freedom and Democracy Party ("ÖZDEP") was founded in October 1992. Its program included calls for recognition of the right to self-determination of oppressed peoples and for the unification of the Kurdish and Turkish peoples. In January, 1993, the Principal State Counsel (the "Counsel") applied to the Turkish Constitutional Court to have ÖZDEP dissolved on the grounds that it violated principles of the Turkish constitution and laws regulating political parties. Specifically, the Counsel alleged that the party's program sought to undermine the territorial integrity and secular nature of the state, and the unity of the nation. While proceedings were still pending before the Constitutional Court, the members of ÖZDEP dissolved the party. The Constitutional Court nonetheless took up the matter and ordered ÖZDEP dissolved. ÖZDEP applied to the European Commission on Human Rights (the "Commission"). The Commission found that there had been a violation of Article 11, which protects freedom of association, and referred the case to the Court. The Court rejected the preliminary objection of Turkey that ÖZDEP, because of its voluntary dissolution, could not complain that its rights had been violated. The Court noted that the members of ÖZDEP had dissolved the party in order to avoid a ban on their rights as individuals to become leaders in other political parties. The Court then found that the Government, by dissolving ÖZDEP, had interfered with its members' rights to freedom of association, a breach of Article 11 unless prescribed by law, in pursuit of legitimate aims, and "necessary in a democratic society". The Court found that the Government's actions were taken in pursuit of the legitimate aim of protecting territorial integrity and preserving national security. However, considering Article 11 in connection with Article 10, which protects freedom of

expression, and finding nothing in ÖZDEP's program that advocated violence, political uprising or any other rejection of democratic principles, the Court concluded that ÖZDEP was penalized solely for exercising its freedom of expression. Accordingly, the Court found the dissolution of ÖZDEP disproportionate to the aim pursued and unnecessary in a democratic society. The Court assessed monetary damages against Turkey plus costs, expenses and interest.

(C) Lustig-Prean and Beckett v. The United Kingdom, and Smith and Grady v. The United Kingdom, European Court of Human Rights (the "Court") (September 27, 1999). Jeanette Smith and Graeme Grady, British nationals, submitted applications against the United Kingdom complaining that investigations into their homosexuality and their discharge from the Royal Air Force on the ground that they are homosexuals, violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). Article 8 protects the individual's right to privacy against interference by public authorities. Duncan Lustig-Prean and John Beckett submitted similar applications based on their discharge from the Royal Navy on the same grounds. The United Kingdom acknowledged that in both cases there had been interference with privacy but argued that it was justified by the need to ensure the operational effectiveness of the armed forces. Under the law established by the Court, such interference is considered "necessary in a democratic society" only if it answers a pressing social need and is proportionate to the legitimate aim pursued. The Court found that the U.K. had failed to provide weighty and convincing reasons for its policy banning homosexuals from the armed forces that might justify the discharges. The Court concluded that the Government had violated Article 8, both in conducting intrusive investigations into the Applicants' personal lives and in discharging them on the basis of their homosexuality.

V Inter-American Human Rights Law:

(A) Advisory Opinion on the Right to Consular Notification, OC-16/99, Inter-American Court of Human Rights (the "Court") (October 1, 1999). Mexico sought an advisory opinion from the Court concerning the minimum judicial guarantees and the requirement of due process when a court sentences to death a foreign national whom the host state has not informed of his/her right to communicate with and seek assistance from the consular authorities of their own state, as provided in Article 36 of the Vienna Convention on Consular Relations (the "Convention"). The Court concluded that Article 36 endows a foreign national with individual rights that are the counterpart to the host state's obligations to other signatories of the Convention. Compliance with Article 36 is required, even if the sending state does not file a protest. The Court further held that: (1) Article 36 applies with equal force to all cases in which a national of a sending state is deprived of his freedom and not only when the national could be subject to the death penalty; (2) that the words "without delay" in Article 36 means that notification must be prompt, before an accused makes a statement to the authorities, and (3) an individual's right to information conferred in Article 36 amplifies the minimum guarantees to due process of law established in Article 14 of the International Covenant on Civil and Political Rights.

(B) The Constitutional Court v. Peru, Inter-American Commission on Human Rights, Case Ref: CDH-11.760/018; i) Case of Ivcher-Bronstein, Inter-American Court of Human Rights (the "Court") (September 24, 1999). Baruch Ivcher-Bronstein was a naturalized citizen of Peru and was the majority shareholder of Channel 2, a national television station. In 1997, Channel 2 aired a program reporting acts of torture

committed by members of the Peruvian Intelligence Service. The Government responded by passing a law allowing it to cancel the citizenship of naturalized citizens. Ivcher-Bronstein was effectively denaturalized and, as a consequence, he lost control over Channel 2. He submitted an application to the Commission alleging violations of his rights to a fair trial, freedom of expression, nationality, private property, and judicial protection under the Inter-American Convention on Human Rights (the "Convention"). In December, 1998 the Commission recommended that Peru: immediately restore Ivcher-Bronstein's citizenship; cease persecuting Ivcher-Bronstein and limiting his freedom of expression; re-establish Ivcher-Bronstein's control over Channel 2; indemnify him for false accusations by Government officials; and adopt legislative and administrative rules to prevent future revocations of citizenship. The Commission then submitted the case to the Court which held Peru in violation of the Convention. Following the resignation of President Fujimori, the Government restored Ivcher-Bronstein's citizenship and his control of Channel 2. ii) Constitutional Court Case. While Ivcher-Bronstein's case was pending, another case against Peru was filed with the Commission. The Peruvian Congress had dismissed three of the seven justices on the Constitutional Court for holding unconstitutional a new law permitting the re-election of the president to a third consecutive five-year term. The three dismissed justices submitted their case to the Court claiming violations of their right to a fair trial, political rights, and the right to judicial protection, rights recognized in the Convention. Peru acting in response to a series of decisions finding it in violation of the Convention submitted a withdrawal of its declaration recognizing the Court's jurisdiction to hear contentious cases filed against it. The withdrawal was to be effective immediately and to apply to all cases in which the Government had not already answered the application. The Commission found that withdrawal is not permissible under the Convention. Although Article 78 of the Convention permits withdrawal from the Convention as a whole, the Convention does not provide for a party, having accepted the Court's jurisdiction to withdraw from it. With the change in leadership following Fujimori's resignation, the three justices have returned to the court.

(C) Case of Villagran Morales and Others, Inter-American Court of Human Rights (the "Court") (December 3, 1999). Two Guatemalan human rights organizations notified the Inter-American Commission of violations against young people living on the streets of Guatemala. The complaint alleged governmental abduction, torture and murder of four people, three of whom were minors. Attempts to prosecute the Guatemalan police officers implicated by witnesses were dismissed on procedural grounds and for lack of evidence. In its first decision involving the rights of children, the Court found that Guatemala, a party to the UN Convention of the Rights of the Child, had failed to protect the victims, violating their rights to life, liberty and personal safety. In addition, the Court found that Guatemala had violated the Inter-American Convention to Prevent and Punish Torture, which provides that governments must prevent and punish torture, establish effective measures against torture, and requires official investigation of allegations of torture. The Court ordered Guatemala to investigate the murders and to punish those responsible for the miscarriage of justice.

VI Foreign Court Cases

(A) Nulyarimma v. Thompson, Federal Court of Australia (the "Court") (September 1, 1999). The Court heard two cases involving claims by members of the Aboriginal community that certain Australian ministers and members of parliament engaged in genocide in connection with the government's Native Title Amendment Act of 1998. The requested arrests of the officials

was denied. In the second case, brought on behalf of the Arabunna People, two government ministers and the Australian government were alleged to have committed genocide in failing to apply to the UNESCO World Heritage Committee for the inclusion of the lands of the Arabunna people on the World Heritage List. The Court, while recognizing that "[m]any of us non-indigenous Australians have much to regret, in relation to the manner in which our forebears treated indigenous people," the Court expressed skepticism that the plaintiffs in these two cases could show that the defendants possessed the requisite genocidal intent with respect to Australia's Aboriginal peoples. In addition, the Court noted that while genocide is a crime recognized under international law, absent appropriate legislation, the crime is not cognizable in an Australian court. In so deciding, the Court declared a general policy that in the realm of criminal law, customary international law is not self-executing as binding domestic law in the absence of legislation. Merkel, J., filed a separate opinion, holding that customary international law can be adopted as Australian domestic law without legislation, subject to the legislature's power to abrogate, vary, or confirm the operation of the common law of Australia in that regard. Consequently, genocide is an offence under Australian common law. In both cases under consideration, however, Judge Merkel agreed that the plaintiffs had not established that the defendants had engaged in conduct constituting the crime of genocide. With respect to the second case, which was civil in nature, Judge Merkel noted that under Australian law there is no recognized civil cause of action for genocide.

(B) The Government of South Africa v. Grootboom, et al. (October 4, 2000) The respondents are a group of 800 adults and children who having lived in appalling conditions in the Western Cape, moved out and illegally squatted on private property. They were evicted, their possessions were destroyed, and they were left homeless. They brought suit claiming their constitutional rights had not been protected by national, provincial and local authorities. Section 6 (1) of the South African Constitution states that "Everyone has the right to have access to adequate housing and (2) the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right." In a landmark decision on the enforcement of the socio-economic rights expressly included in the constitution, the Constitutional Court interpreted Section 26 to require "the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing. The programme must include reasonable measures...to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations." In reaching the decision the Court paid close attention to the relevant international law as expressed in the Covenant on Economic, Social and Cultural Rights.

International Human Rights Law Update

Edited by: D.A. Jeremy Telman



THE ASPEN INSTITUTE
Justice and Society Program

Alice H. Henkin, Director
45 Rockefeller Plaza
7th Floor

New York, NY 10111
Telephone: 212/218-5010
Fax: 212/218-5012

E-mail: justice@aspeninstitute.org

This document is available on the Internet at:
<http://www.aspeninstitute.org/justice/pdfs/jspring2000.pdf>