INTERNATIONAL LAW

Case studies 1

Case 1

Filartiga v. Pena-Irala

Filartiga v. Pena-Irala , 630 F.2d 876 (2d Cir. 1980), 30 June 1980, on remand , 577 F.Supp. 860 (E.D.N.Y. 1984), 10 January 1984.

Summary:

The suit was brought by an alien residing in the United States against a former official of Paraguay then visiting the United States. The complaint alleged torture of the plaintiff's brother (see below) leading to his death. The court of appeals ruled that deliberate torture perpetrated by a person invested with official authority was a violation of customary law supporting the jurisdiction of the district courts over "a civil action by an alien for a tort only, committed in violation of the law of nations." (see 28 U.S.C. § 1350) The court further declared that "indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind" (at 890).

The court found that torture perpetrated by a person invested with official authority violates universally accepted human rights norms, regardless of the nationality of the parties. Whenever an alleged torturer is found and served with process by an alien within US territory, 28 U.S.C. § 1350 applies and provides federal jurisdiction.

Case 2

Ng Extradition (Can.)

File No. 21990.

Summary

Ng was charged in the State of California with several offences, including twelve counts of murder. If found guilty, he could receive the death penalty. Before trial, Ng escaped from prison and fled to Canada where he was arrested. The extradition judge allowed the U.S.'s application for his extradition and committed him to custody. The Minister of Justice of Canada then ordered his extradition pursuant to s. 25 of the *Extradition Act* without seeking assurances from the U.S., under Art. 6 of the Extradition Treaty between the two countries, that the death penalty would not be imposed, or if imposed, not carried out. The Governor General in Council, in accordance with s. 53 of the *Supreme Court Act*, later referred two questions to this Court. These questions raised the same issues considered in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 000.

The questions and this Court's answers are:

Question 1:Would the surrender by Canada of an extradition fugitive to the United States of America, to stand trial for wilful and deliberate murder for which the penalty upon conviction may be death, constitute a breach of the fugitive's rights guaranteed under the *Canadian Charter of Rights and Freedoms*?

Answer:No. Lamer C.J. and Sopinka and Cory JJ. dissenting would answer yes.

Question 2:Did the Minister of Justice, in deciding pursuant to Article 6 of the *Extradition Treaty between Canada and the United States of America*, to surrender the fugitive Charles Chitat Ng without seeking assurances from the United States of America that the death penalty would not be imposed on the said Charles Chitat Ng or, if imposed, that it would not be executed, commit any of the errors of law and jurisdiction alleged in the Statement of Claim filed in the Federal Court of Canada (Trial Division) by the said Charles Chitat Ng

on October 30, 1989, having regard to the said Statement of Claim, the reasons given by the Minister of Justice for the said decision and to any other material which the Court, in its discretion, may receive and consider?

Answer:No. Lamer C.J. and Sopinka and Cory JJ. dissenting would answer yes.

Case 3

Commonwealth of Dominica *v.* Switzerland

THE HAGUE, 12 June 2006. The case brought by the Commonwealth of Dominica against Switzerland, on 26 April 2006, before the International Court of Justice (ICJ), principal judicial organ of the United Nations, has been removed from the Court's List at the request of Dominica.

By letter of 15 May 2006, received in the Registry by facsimile on 24 May 2006 under cover of two letters from the Permanent Representative of the Commonwealth of Dominica to the United Nations, and the original of which reached the Registry on 6 June 2006, the Prime Minister of the Commonwealth of Dominica informed the Court that his Government "d[id] not wish to go on with the proceedings instituted against Switzerland" and requested the Court to make an Order "officially recording [their] unconditional discontinuance" and "directing the removal of the case from the General List".

By letter of 24 May 2006, received in the Registry by facsimile the same day, the Ambassador of Switzerland in The Hague advised the Court that he had duly informed the competent Swiss authorities of the discontinuance notified by the Prime Minister of Dominica.

The Court, on 9 June 2006, made an Order, in which, after noting that the Government of the Swiss Confederation had not taken any step in the proceedings in the case, recorded the discontinuance by the Commonwealth of Dominica of the case instituted by the Application filed on 26 April 2006 and ordered that it be removed from the List.

The dispute submitted by Dominica to the Court concerned alleged violations of the Vienna Convention on Diplomatic Relations and other rules and instruments of international law in relation to a diplomatic envoy of Dominica to the United Nations in Geneva.

Case 4

Nicaragua v. Colombia

THE HAGUE, 15 November 2006. The public hearings in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia) will open on Monday 4 June 2007 before the International Court of Justice (ICJ), the principal judicial organ of the United Nations.

The detailed schedule for the hearings, which will be concerned solely with the preliminary objections raised by Colombia regarding the jurisdiction of the Court, will be published at a later date.

History of the proceedings

On 6 December 2001 Nicaragua instituted proceedings against Colombia with regard to "legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

In its Application, Nicaragua requested the Court to adjudge and declare:

> "First, that . . . Nicaragua has sovereignty over the islands of Providencia, San Andres and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueño keys (in so far as they are capable of appropriation);

Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary."

Nicaragua further indicated that it "reserve[d] the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andres and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title". It also "reserve[d] the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua".

As a basis for the Court's jurisdiction, Nicaragua invoked inter alia Article XXXI of the American Treaty on Pacific Settlement ("Pact of Bogotá"), signed on 30 April 1948, to which both Nicaragua and Colombia are parties.

By an Order of 26 February 2002 the Court, taking into account the views expressed by the Parties, fixed 28 April 2003 as the time-limit for the filing of a Memorial by Nicaragua and 28 June 2004 as the time-limit for the filing of a Counter-Memorial by Colombia. The Memorial was filed within the time-limit thus fixed.

On 21 July 2003, within the time-limit prescribed in Article 79, paragraph 1, of the Rules of Court, Colombia submitted preliminary objections to the jurisdiction of the Court. It maintained, inter alia, that Article XXXI of the Pact of Bogotá did not provide a sufficient basis for the Court to entertain the case and stated its view that, in any event, the dispute had already been settled and was ended.

By an Order of 24 September 2003 the Court fixed 26 January 2004 as the time-limit for Nicaragua to present a written statement on the preliminary objections. The written statement was filed within the time-limit as so fixed.

Case 5

Democratic Republic of the Congo v. Belgium

History of the proceedings and submissions of the Parties (paras. 1-12):

The Court recalls that on 17 October 2000 the Democratic Republic of the Congo (hereinafter "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations". In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

The Court further recalls that on the same day, the Congo also filed a request for the indication of a provisional measure; and that by an Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by

Belgium, addressing both issues of jurisdiction and admissibility and the merits. After the pleadings had been filed within the time-limits as subsequently extended, public hearings were held from 15 to 19 October 2001.

At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the Congo,

> "In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> 1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
>
> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> 3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> 4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

> "For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.
>
> If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

Case 6

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

Petitioner Geovanni Hernandez-Montiel, a native and citi- zen of Mexico, was a gay man who dressed and behaved as a woman. In Mexico, Hernandez-Montiel was harassed and persecuted by his family, school officials, and the Mexican police. He was expelled from school, and thrown out of his parents' home.

On two occasions, Hernandez-Montiel was sexually assaulted by Mexican police. Once an officer grabbed him off the street, threw him into a police car, drove him to an unin- habited area and forced him to perform oral sex on him. The officer threatened to beat and imprison Hernandez-Montiel if he reported the incident. A few weeks later, the same officer and officers in another car forced Hernandez-Montiel and a friend into their cars, drove them to a remote area, stripped the boys and raped them. The officers then threatened to shoot the boys if they did not start running. The boys were stranded in an abandoned area.

A few months after these assaults, Hernandez-Montiel was attacked with a knife by a group of young men calling him names relating to his sexual orientation. He was hospitalized for a week.

Hernandez-Montiel fled to the United States, where he was arrested and returned to Mexico. His sister forced Hernandez- Montiel out of her house when the counseling program she enrolled him in failed to "cure" him of his homosexuality. Hernandez-Montiel re-entered the United States without inspection and applied for asylum and withholding of deporta- tion.

At his asylum hearing, Hernandez-Montiel presented the testimony of Thomas Davies, an expert in Latin American history and culture. Davies testified that gay men with "female" sexual identities in Mexico are heavily persecuted by the police and other groups within the society and are likely to become scapegoats for Mexico's economic and political problems. Professor Davies specifically noted that Hernandez-Montiel was a homosexual who has taken on a primarily `female' sexual role. Based on his expert knowl- edge, review of Hernandez-Montiel's case, and interaction with Hernandez-Montiel, Davies opined that Hernandez-
Montiel would face persecution if he were forced to return to Mexico.

The immigration judge (IJ) found Hernandez-Montiel's tes- timony credible, but denied Hernandez-Montiel asylum on both statutory and discretionary grounds. The IJ found that Hernandez-Montiel had failed to demonstrate persecution on account of a particular social group, classifying his social group as homosexual males who wish to dress as women. The IJ found Hernandez-Montiel's female gender identity not to be immutable.

The Board of Immigration Appeals (BIA) dismissed Hernandez-Montiel's appeal from the IJ's decision. The BIA agreed that Hernandez-Montiel gave credible testimony, but found that Hernandez-Montiel did not meet his burden of establishing that the abuse he suffered was because of his membership in a particular social group, which the BIA clas- sified as homosexual males who dress as females. Concluding that the tenor of Hernandez-Montiel's claim was that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual, the BIA found that Hernandez-Montiel failed to show that his decision to dress as a female was an immutable characteristic. The BIA denied Hernandez-Montiel's request for voluntary departure.

Hernandez-Montiel petitioned for a review of the BIA's decision.

Case 7

INS v. Elias-Zacarias, 502 U.S. 478 (1992).

Respondent, a native of Guatemala, was apprehended for entering the United States without inspection. In his deportation proceedings, the Board of Immigration Appeals determined that he was ineligible for a discretionary grant of asylum. In reversing that determination, the Court of Appeals ruled that a guerrilla organization's acts of conscription constitute persecution on account of political opinion, and that respondent therefore had a well-founded fear of such persecution.

Held:

A guerrilla organization's attempt to coerce a person into performing military service does not necessarily constitute "persecution on account of . . . political opinion" under 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42). Even one who supports the political aims of a guerrilla movement might resist military combat, and thus become the object of such coercion. Moreover, persecution on account of political opinion is not established by the fact that the coercing guerrillas had "political" motives. In order to satisfy 101(a)(42), the persecution must be on account of the victim's political opinion, not the persecutor's. Since respondent did not produce evidence so compelling that no reasonable factfinder could fail to find the requisite fear of persecution on account of political opinion, the Court of Appeals had no proper basis to set aside the BIA's determination. See 8 U.S.C. 1105a(a)(4); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 . Pp. 3-6.

Summary:

Respondent Elias-Zacarias, a native of Guatemala, was apprehended in July, 1987, for entering the United States without inspection. In deportation proceedings brought by petitioner Immigration and Naturalization Service (INS), Elias-Zacarias conceded his deportability, but requested asylum and withholding of deportation.

The Immigration Judge summarized Elias-Zacarias' testimony as follows:

"[A]round the end of January in 1987 [when Elias-Zacarias was 18], two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there. . . . [T]he guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why, and told them that they would be back, and that they should think it over about joining them. [502 U.S. 478, 480]

"[Elias-Zacarias] did not want to join the guerrillas, because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the end of March 1987. . . . because he was afraid that the guerrillas would return."

The Immigration Judge understood from this testimony that Elias-Zacarias' request for asylum and for withholding of deportation was "based on this one attempted recruitment by the guerrillas." She concluded that Elias-Zacarias had failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and was not eligible for asylum. See 8 U.S.C. 1101(a)(42), 1158(a). She further concluded that he did not qualify for withholding of deportation.

The Board of Immigration Appeals (BIA) summarily dismissed Elias-Zacarias' appeal on procedural grounds. Elias-Zacarias then moved the BIA to reopen his deportation hearing so that he could submit new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family's home in continued efforts to recruit him. The BIA denied reopening on the ground that, even with new evidence, Elias-Zacarias had failed to make a prima facie showing of eligibility for asylum, and had failed to show that the results of his deportation hearing would be changed.

The Court of Appeals for the Ninth Circuit, treating the BIA's denial of the motion to reopen as an affirmance on the merits of the Immigration Judge's ruling, reversed. 921 F.2d 844 (1990). The court ruled that acts of conscription by a nongovernmental group constitute persecution on account of political opinion, and determined that Elias-Zacarias had a "well-founded fear" of such conscription. Id., at 850-852. We granted certiorari. 500 U.S. 915 (1991). [502 U.S. 478, 481]

Case 8

Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs, 74 F.3d 1308 (D.C. Cir. 1996).

Facts:

This case arises out of disagreements over the procedures used for handling the tremendous flow of immigrants out of Vietnam that has continued ever since the North Vietnamese took over South Vietnam in 1975. From June 1979 through June 1988, Hong Kong (and other nations in the region) granted presumptive refugee status to Vietnamese immigrants on the condition that the United States and other western countries would help resettle them. But in 1988, following an increase in the number of economic immigrants, Hong Kong changed its policies, determining that it would detain all new arrivals and screen them for actual refugee status. The countries concerned soon formed the Comprehensive Plan of Action, which provides that those screened out as non-refugees should return to Vietnam, where they can then apply for immigrant visas.

In April 1993, the United States Consulate in Hong Kong stopped processing immigrant visa applications on orders from the United States State Department. In February 1994, plaintiffs Legal Assistance for Vietnamese Asylum Seekers (LAVAS), Thua Van Le, Em Van Vo, Thu Hoa Thi Dang, and Truc Hoa Thi Vo filed suit against the State Department and various officials, claiming individually and on behalf of the class of screened-out Vietnamese told to return to Vietnam that the State Department's policy change violated the Immigration and Nationality Act (INA), 8 U.S.C. ßß 1151- 1156, the regulations promulgated thereunder, the Administrative Procedure Act, and the United States Constitution. The four individual plaintiffs comprise two pairs, each consisting of one Vietnamese refugee and that refugee's United States sponsor. The District Court granted summary judgment for the State Department in April 1994. (For a more detailed summary of the factual background up to this point, see our prior opinion in LAVAS, 45 F.3d at 470- 71.)

On appeal by LAVAS, we held in February 1995 that the State Department's refusal to process appellants' applications at the United States Consulate in Hong Kong violated the INA. See id. at 470-74. Judge Randolph dissented on the merits, but also on the grounds that we should have remanded the case to the District Court to determine whether the dispute had become moot because the alien appellants might have already obtained relief at the time of the decision. See id. at 474-76 (Randolph, J., dissenting). In March 1995, the

State Department filed a petition for rehearing and suggestion for rehearing in banc, claiming for the first time in the litigation that the case was mooted as to Thua Van Le and Thu Hoa Thi Dang on July 21, 1994, when Dang was found eligible for an immigration visa, and as to Em Van Vo and Truc Hoa Thi Vo on November 30, 1994, when Truc Hoa Thi Vo was preliminarily determined to be ineligible for an immigrant visa. The appellants concede that the individual claims of Thua Van Le and Thu Hoa Thi Dang have become moot, but claim that these individuals and LAVAS may remain as class representatives. They do contest the mootness of the Vos' individual claims.

In May 1995, because resolution of the mootness issue might require the evaluation of new evidence, we remanded the case to the District Court for a determination. On September 11, 1995, the District Court declared the case moot and issued a memorandum opinion, relying primarily on its view that the only claim for relief was that Truc Hoa Thi Vo's application be processed in Hong Kong instead of in Vietnam:

The application of detained plaintiff Truc Hoa Thi Vo was ... processed at the United States Consulate in Hong Kong and was denied on November 30, 1994. Ms. Vo has one year from the date of denial of her immigrant visa application to supply the Consulate with additional documentation to support her application, or her application will be canceled.

Plaintiffs contend that the current status of Ms. Vo's application is such that her case cannot be moot, since the Consulate has not yet made a "final" determination to grant or deny her immigrant visa application, but has made only an "initial" determination to deny her application. Defendants argue that Ms. Vo has obtained the relief she sought- namely, that her immigrant visa application be processed by the United States Consulate in Hong Kong, rather than after a forced repatriation to Vietnam. The Court agrees with defendants. Ms. Vo has obtained the specific relief she sought and has had her application processed by the United States Consulate in Hong Kong. Plaintiffs are correct that the Consulate has not yet finally determined whether Ms. Vo's immigrant visa application will be granted or denied, but the relief Ms. Vo sought from this Court-the processing of her application in Hong Kong instead of Vietnam-has been achieved. (The Court has, of course, no power to review a final determination of the Consulate as to the merits of Ms. Vo's immigrant visa application.) Ms. Vo's claims, and those of her citizen-sponsor, Em Van Vo, are therefore moot. Mem. Op. at 3-4. We subsequently ordered additional briefing on the issue of mootness, which issue we now consider as a prelude to ruling on the request for rehearing.