BRIEFLY NOTED
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Judicial and Similar Proceedings

1. Karácsony and Others v. Hungary (European Court of Human Rights – May 17, 2016)

<http://hudoc.echr.coe.int/eng-press?i=001-162831>

On May 17, 2016, the European Court of Human Rights ruled that Hungary violated the freedom of expression of members of parliament when it fined them for their conduct in parliament. The case concerned the fines imposed on several Hungarian members of parliament (MPs), who had protested bills by placing signs and banners near members who supported the proposed legislations and used a megaphone to present their views during the parliamentary sessions. The Court noted that while freedom of expression and parliamentary debate are "of fundamental importance in a democratic society, [they are] not absolute in nature," and found "that the Convention established a close nexus between an effective political democracy and the effective operation of Parliament." The Court further noted that "[t]he exercise of free speech in Parliament had to yield on occasions to the legitimate interests of protecting the orderly conduct of parliamentary business as well as the protection of the rights of other members of parliament," while stressing that parliamentary discipline "should not be abused for the purpose of suppressing the freedom of expression of MPs." The Court accepted that the fines had been imposed because of "the time, place and manner" in which the MPs had expressed their views and emphasized that any sanction had to satisfy the proportionality requirement inherent in Article 10, including its procedural aspect. Noting that "[a]t the relevant time the domestic legislation had not provided for a fined MP to be involved in the relevant procedure, notably by being heard" and that "two of the proposals had not contained any relevant reasons why the applicants' actions had been considered gravely offensive to parliamentary order," the Court ruled that the MPs had not been afforded any procedural safeguards. Therefore, the Court concluded that "the impugned interference with the applicants' right to freedom of expression had not been proportionate to the legitimate aims pursued because it had not been accompanied by adequate procedural safeguards" and thus violated Article 10 (freedom of expression) of the European Convention on Human Rights.

2. Biao v. Denmark (European Court of Human Rights – May 24, 2016)

<http://hudoc.echr.coe.int/eng?i=001-163115>

On May 24, 2016, the Grand Chamber of the European Court of Human Rights issued its judgment in *Biao v. Denmark*, ruling that Danish immigration laws on family reunion were discriminatory. The complaint centered on the refusal of Danish immigration authorities to grant a married couple a residence permit for family reunion on the grounds that they did not comply with a provision of the Danish "Aliens Act" requiring that they not have stronger ties with another country (the so-called "attachment requirement"). The applicants claimed that this refusal constituted a violation of their right to respect for private and family life under Article 8 of the European Convention on Human Rights. Additionally, the applicants claimed that an amendment to the Aliens Act lifting the attachment requirement for those who had held Danish citizenship for at least twenty-eight years (the "28-year rule") resulted in discrimination between natural-born Danish citizens and those of foreign origin who had acquired citizenship, in contravention of Article 14 of the Convention (prohibition of discrimination), when read in conjunction with Article 8. The Grand Chamber reasoned that Denmark's justification for the 28-year rule (controlling immigration and improving integration) was largely based on "rather speculative arguments." In the Court's view, whether integration would be successful could not be determined solely by the amount of time an individual had been a citizen. The Court held that there had been a violation of Article 14 of the Convention, when read in conjunction with Article 8, and that it was therefore unnecessary to examine the application separately under Article 8. In particular, the Court found that Denmark "had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule."

3. Affum v. Préfet du Pas de Calais (Court of Justice of the European Union – June 7, 2016)
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0047>

On June 7, 2016, the Court of Justice of the European Union ruled in *Affum v. Préfet du Pas de Calais* that non-EU citizens cannot be imprisoned for illegally crossing an internal Schengen area border before the return procedure has been completed. French police officers intercepted Sélina Affum, a citizen of Ghana, at the entry to the Channel Tunnel when she was travelling on board a bus from Belgium to London. There, she was taken into custody on grounds of her illegal entry into France and French authorities requested that Belgium readmit Affum into its territory. The Court noted that the Return Directive applied to this situation and that it "establishes common standards and procedures applicable in Member States for removing illegally staying nationals of non-EU countries from their territory." The Directive requires that a decision be made regarding the return of the non-EU national, which triggers a period for voluntary return and is followed by forced removal if necessary. It allows detention of persons for up to eighteen months only to address a "risk of the removal being compromised." French laws allow a prison penalty of one year for non-EU citizens who have entered France illegally. The Court noted that "illegal entry is one of the factual circumstances that may result in an illegal stay within the meaning of the Return Directive," which triggers the procedures set out in it. It further ruled that "the Return Directive precludes any legislation of a Member State which lays down a sentence of imprisonment for an illegal stay of a national of a non-EU country in respect of whom the return procedure established by that directive has not yet been completed." The Court also stressed that "the fact that Ms Affum was the subject of a procedure for readmission into the Member State from which she came (Belgium) does not render the directive inapplicable to her case," rather, it "has the effect of transferring the obligation to apply the return procedure to the Member State responsible for taking the national back (in this instance, Belgium)." Finally, the Court noted that the applicability of the directive to this case was not affected by the facts that Affum was merely transiting through France or that she was arrested when she tried to leave the Schengen area.

4. RJR Nabisco v. European Community (U.S. Supreme Court – June 20, 2016)
<http://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf>

On June 20, 2016, the United States Supreme Court delivered its opinion in *RJR Nabisco v. European Community*, where it applied the presumption against extraterritoriality to the Racketeer Influenced and Corrupt Organizations Act (RICO), holding that RICO applies to acts conducted outside the United States only where the statutes that criminalize the underlying acts allow for it. The case tracks the Court's extraterritoriality jurisprudence in *Morrison v. National Australia Bank* and *Kiobel v. Royal Dutch Petroleum*. The European Community and twenty-six of its member states, relying on a right of action under RICO to file suit, claimed that RJR Nabisco and related entities participated in a global money-laundering scheme in which drug traffickers smuggled narcotics into Europe and sold them for euros that were subsequently used to pay for large shipments of RJR cigarettes into Europe. These activities, the plaintiffs argued, were harmful in various ways, including lost tax revenue and increased law enforcement costs. The Court viewed the issue of RICO's extraterritoriality as a twofold question: First, whether the Act's substantive provisions apply to conduct that occurs in foreign states. Second, whether the Act's private right of action applies to injuries suffered in foreign states. As to the first, the Court held that some of RICO's substantive provisions apply extraterritorially but only to the extent that the predicates alleged in a given case themselves apply extraterritorially. The Court reasoned that Congress gave a clear, affirmative indication that RICO's substantive provisions apply extraterritorially by incorporating predicates that apply to at least some foreign conduct. The Court was careful to warn, however, that "[a]lthough a number of RICO predicates have extraterritorial effect, many do not [and the] inclusion of *some* extraterritorial predicates does not mean that *all* RICO predicates extend to foreign conduct." As to the second question, the Court held that RICO's private right of action does not overcome the presumption against territoriality. Its reasoning was based partly on the logic of *Kiobel*, which interpreted a strictly jurisdictional statute independent of conduct governed by the substantive law. Moreover, the Court averred that permitting recovery for foreign injuries in a civil RICO case presents a danger of "international friction" too

great to bear without clearer direction from Congress. Thus, a private RICO plaintiff must allege and prove a *domestic* injury to business or property; the Act does not allow recovery for foreign injuries.

5. Prosecutor v. Jean-Pierre Bemba Gomba (Sentencing Decision) (International Criminal Court – June 21, 2016)
<http://www.icc-cpi.int/CourtRecords/CR2016_04476.Pdf>

On June 21, 2016, the International Criminal Court sentenced Jean-Pierre Bemba Gombo to eighteen years' imprisonment. The sentence follows Bemba's March 21, 2016 conviction on two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). In the trial's guilt phase, the Court found that Bemba effectively acted as a military commander and knew that the soldiers under his effective authority and control were committing or about to commit the charged crimes. In determining Bemba's sentence, the Court balanced the gravity of the crimes; the gravity of Bemba's culpable conduct; and his individual circumstances, including aggravating and mitigating circumstances. The Court found that the crimes and Bemba's culpable conduct were of serious gravity, that the crime of rape was committed against "particularly defenceless victims," and that the crimes of rape and pillage were committed with "particular cruelty." Bemba received a separate sentence for each crime. However, the Court determined that the highest sentence imposed (eighteen years for rape) reflected "the totality of Mr. Bemba's culpability" and that the sentences were to run concurrently. Additionally, the Court ordered that time already served in detention, since May 24, 2008, be deducted from the eighteen-year sentence. The sentence may be appealed on the grounds of disproportion between the crime and the sentence. Reparations to victims under Article 75 of the Rome Statute will be addressed in a subsequent phase of the proceedings.

6. R (on the Application of Bancoult (No 2)) v. Secretary of State for Foreign and Commonwealth Affairs (U.K. Supreme Court – June 29, 2016)
<https://www.supremecourt.uk/cases/docs/uksc-2015-0021-judgment.pdf>

On June 29, 2016, in *R (on the application of Bancoult (No 2)) v. Secretary of State for Foreign and Commonwealth Affairs*, the U.K. Supreme Court dismissed a challenge brought by Chagos Islanders against the House of Lords decision from 2008 regarding their expulsion from their homes in the British Indian Ocean Territories (BIOT). The U.K. granted the U.S. permission to build a military base on the largest of the Chagos Islands, Diego Garcia, in 1966, and issued an ordinance that made it unlawful for the islanders to remain on Diego Garcia. They were subsequently resettled. In 2000, the Divisional Court ruled that the ordinance expelling the Chagossians was unlawful. A study on the feasibility of resettling the islanders in the BIOT was concluded in 2002 and found that resettlement would be cost prohibitive and life conditions there precarious, which led to a 2004 order reaffirming the prohibition of settlement on the Chagos Islands. After a challenge to the 2004 order failed before the House of Lords in 2008, the current lawsuit argued that the Foreign Secretary breached his duty of candor in public law proceedings and failed to disclose information to the House of Lords relating to the 2008 decision, and that four new pieces of evidence justify setting aside the 2008 decision. The Court acknowledged that it "has inherent jurisdiction to correct injustice caused by an unfair procedure which leads to an earlier judgment or is revealed by the discovery of fresh evidence," and analyzed whether the prompt disclosure of the documents would have led to a successful challenge in the 2008 proceedings. It concluded "that there is no probability, likelihood, prospect or real possibility that a court would have seen, or would now see, anything which could, would or should have caused the respondent to doubt the conclusions of the [] report, or made it irrational or otherwise unjustifiable to act on them." The Court also dismissed the four new articles evidence, finding that none provided a basis for setting aside the previous judgment. Finally, the Court noted that the results of a new feasibility study in 2014/2015, which found that resettlement could be achieved, now allow any Chagossian "to mount a fresh challenge to the failure to abrogate the 2004 orders in the light of the 2014-15 study's findings, as an alternative to further lengthy litigation."

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Statement by France, Germany, United Kingdom, United States and the High Representative of the European Union for Foreign Affairs and Security Policy on Post-JCPOA Business with Iran (May 19, 2016)

<https://eeas.europa.eu/headquarters/headquarters-homepage/2788_en>

On May 19, 2016, France, Germany, the United Kingdom, the United States, and the High Representative of the European Union for Foreign Affairs and Security issued a joint statement on implementation of sanctions relief for Iran. The statement recalls the implementation in January 2016 of the Joint Comprehensive Plan of Action (JCPOA). The JCPOA, negotiated between Iran, the "P5+1" (the five permanent members of the United Nations Security Council plus Germany), and the European Union, lifted economic and financial sanctions against Iran in exchange for Iran's agreement to curtail its nuclear program and renounce its intention to develop nuclear weapons. Some U.S. domestic sanctions remain in place against Iran. The joint statement comes in response to concerns that private entities—particularly in Europe—have hesitated to resume business with Iran for fear of violating the remaining sanctions, leading to a perceived disparity among Iranians in the equity of the JCPOA nuclear deal. The May 19th statement reiterates that private entities can and should avail themselves of opportunities to resume business with Iran that have become available since implementation of the JCPOA. The states that issued the statement noted that "it is in [their] interest and the interest of the international community to ensure that the JCPOA works for all participants, including by delivering benefit to the Iranian people." The statement also adds that private reasons regarding why companies have so far refrained from resuming business in Iran are outside of the control of the negotiating powers, claiming "[t]here are factors within Iran's control that have influenced companies' decision-making and hindered Iran's economic progress. For Iran to realize the economic improvement it desires, it will also have to take steps to create an environment conducive to international investment."

2. "They Came to Destroy": ISIS Crimes Against the Yazidis (UN Commission of Inquiry on Syria - June 16, 2016)

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf>

On June 16, 2016, the Independent International Commission of Inquiry on the Syrian Arab Republic released a report concluding that the Islamic State of Iraq and Al-Sham (ISIS) has committed genocide, crimes against humanity, and war crimes against the Yazidis. According to the report, ISIS has engaged in "killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born . . .; and the transfer of Yazidi children from their own families." The Commission's report is based on interviews with survivors, religious leaders, smugglers, activists, lawyers, medical personnel, and journalists, along with documentary material used for corroboration. The report notes that "[t]he public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis." The Commission—established in August 2011 to "investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic"—has called on the UN Security Council to refer the situation in Syria to the International Criminal Court or to establish an ad-hoc tribunal with appropriate jurisdiction to try these crimes. The report underscores that ISIS still holds over 3,200 Yazidi women and children, making the genocide an on-going phenomenon.

3. Colombia-FARC Ceasefire Agreement (June 23, 2016)

<http://es.presidencia.gov.co/noticia/160623-Comunicado-Conjunto-No-76>

On June 23, 2016, Colombian President Juan Manuel Santos signed a ceasefire agreement with Timoleón Jiménez, the commander of the Revolutionary Armed Forces of Colombia (FARC). United Nations Secretary-General Ban Ki-moon and presidents from six Latin American countries attended the ceremony in Havana, Cuba. In a statement, the Secretary-General expressed support for the negotiating process initiated in 2012 and recognized that "the Colombian peace process validates the perseverance of all those around the world

who work to end violent conflict." The ceasefire agreement details a plan for the bilateral cessation of violence and the process of complete FARC disarmament. The agreement holds that rebels will lay down their arms in temporary zones within 180 days following an official peace accord. UN monitors will collect weapons in twenty-three transitional zones across the country. In a statement, Santos recognized the agreement as "an end to the armed conflict" and expressed his hopes of signing an official peace accord in the month of July. The official accord will be put to a nationwide referendum. A UN report found that in 2015 armed violence between government forces and FARC reached its lowest level in over fifty years of conflict. The ceasefire agreement is regarded as the final step to a peace accord and is preceded by a December 2015 agreement to establish a transitional justice tribunal.

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