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BRIEFLY NOTED

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Judicial and Similar Proceedings

1. U.S. v. Aybar-Ulloa (United States Court of Appeals for the First Circuit – January 25, 2021)

<http://media.ca1.uscourts.gov/pdf.opinions/15-2377P2-01A.pdf>

This was a rehearing of a panel appeal involving the defendant foreign national found with cocaine on a stateless vessel in international waters. The vessel was stopped and boarded by a U.S. ship. As a result, the U.S. assumed jurisdiction over the case, and the defendant was charged under the Maritime Drug Law Enforcement Act (MDLEA), which applies to vessels subject to the jurisdiction of the U.S., which, in turn, applies to vessels without nationality. Before the panel, the defendant argued that (1) Congressional power to criminalize and punish conduct under the high seas should be restricted to the limits imposed by international law on a state's right to criminally prosecute conduct on the high seas, and (2) that the U.S. exceeded those limitations by prosecuting him in this case. The panel, focusing only on the defendant's second argument, rejected it based on precedent and convicted him. The First Circuit granted the defendant's petition for a rehearing on banc because the precedent cited by the panel was lacking in reasoning and applicability to the case at hand, and because "the question of the United States' jurisdiction over persons on vessels on the high seas recurs in this circuit." The conviction was affirmed. The Court held that the ship was rendered stateless when its master failed to claim its nationality when requested by the U.S. Coast Guard officers (this was undisputed by the defendant). Because it was stateless, it could be stopped and boarded by any nation's warship under UNCLOS and be therefore subject to the exercise of jurisdiction by any nation as though the vessel were that nation's own. Such jurisdiction includes jurisdiction over the conduct occurring on the ship, in this case drug trafficking. The Court stated, "[t]wo centuries of case law [to the effect that a flag state has jurisdiction over the conduct of a ship and activity aboard it] strongly suggest that the same territorial principles apply to conduct aboard a stateless vessel." With regard to whether international law prohibits the U.S.'s prosecutorial authority, the Court co-opted the defendant's argument that the U.N. Drug Trafficking Convention does not explicitly address the possibility of states exercising jurisdiction over people engaging in drug trafficking on stateless vessels by holding that the Convention neither prohibits such jurisdiction. The Court then referred to a number of other international and bilateral law instruments in support of this conclusion, including UNCLOS, which remains silent on the issue. The Court rejected the defendant's argument that a negative inference should be inferred in the case of UNCLOS because "other articles of UNCLOS do contain express grants of authority to penalize persons found on certain vessels." The Court did so because cases involving stateless vessels are obviously different and because, in the Court's view, if UNCLOS contained a rule precluding the extension of domestic jurisdiction over stateless vessels, "it is unlikely that subsequent instruments mentioning stateless vessels could avoid it or that their drafters would have been unaware of it. Instead, it appears that in the decades since UNCLOS was concluded, the relevant international organizations and actors have resolved to leave the issue to the judgment of states."

Judge Barron's concurrence agrees with the majority's conclusion, but arrives at it through different reasoning. He believes that, although the prevailing view is that an intervening country acquires territorial jurisdiction over a stateless vessel, it does not acquire the same jurisdiction over the occupants. He does not see any clear judicial precedent for that conclusion, nor any support within relevant academic commentary. Instead, he believes that the MDLEA itself provides the basis for the exercise of jurisdiction over the individuals on the vessel, irrespective of whether the U.S. authorities have boarded the vessel or interacted with its crew: ". . . the MDLEA, by its terms, appears to make the bare fact that a foreign national engages in drug trafficking while on a stateless vessel in international waters a trigger for subjecting the foreign national to the reach of our domestic criminal laws."

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2. G v. G (United Kingdom Supreme Court – March 19, 2021)

<https://www.bailii.org/uk/cases/UKSC/2021/9.pdf>

The case of *G v. G* concerns the interplay between the Convention on the Civil Aspects of International Child Abduction (Hague Convention) and the principle of non-refoulement under international asylum law. The parties in the case are the divorced parents to a minor child, habitually resident in South Africa. The mother unlawfully took the child to England after being subjected to death threats and violence by her family upon coming out as a lesbian. The father applied for an order of return under the Hague Convention before the High Court, which held that the application should be stayed pending the mother's asylum claim in England. On appeal, the Court of Appeal held that the High Court was not barred from determining the father's application or making an order for return. The mother appealed to the Supreme Court to determine: (1) whether a child listed as a dependent on a parent's asylum claim has protection from refoulement; (2) whether a return order can be made where a child has protection from refoulement; and (3) whether the High Court can stay the Hague Convention application pending the asylum determination, given the Convention's requirement for a prompt determination of applications.

The Supreme Court held (via Lord Stephens, the only author, with which the other judges agreed) that a child who can "objectively be understood" as an applicant for asylum (because his or her parent is an applicant) cannot be returned before a final determination of the asylum claim. A failure on the part of a child to make an application in his or her own right cannot be regarded as a choice made by the child. The Court's decision rested on UK asylum law, which derives from a "patchwork" of domestic legislation, EU law, and international law and holds that a refugee as a right not to be refouled, subject to limited exceptions. Though the High Court can decide whether a return order is appropriate in such a case, it cannot implement the order until the asylum claim is determined. It can also set aside the order if the asylum application is granted. The asylum claim is not determined until the conclusion of any appeal, including where the asylum-seeker as a right of in-country appeal. The Court then noted various measures to take to ensure that the asylum application and Hague Convention application are determined promptly.

3. Situation in the Democratic Republic of the Congo (The Prosecutor v. Bosco Ntaganda – Confirmation of Conviction and Sentence) (International Criminal Court Appeals Chamber – March 30, 2021)

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-2666-Red> (Conviction)

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-2667-Red> (Sentencing judgment)

On March 30, 2021, the Appeals Chamber of the International Criminal Court confirmed the conviction and sentencing to 30 years' imprisonment of Bosco Ntaganda. The sentence is the longest sentence imposed to date by the Court. On July 8, 2019, Trial Chamber VI of the International Criminal Court found Bosco Ntaganda guilty of eighteen counts of war crimes and crimes against humanity, committed from 2002 to 2003 in Ituri, Democratic Republic of the Congo (DRC). The case relates to his position as the former Deputy Chief of Staff and commander of operations of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) and his role in the non-international armed conflict taking place in the DRC at that time. The Appeals Chamber rejected Ntaganda's claims, including that his right to a fair trial had been violated and several claims relating to the Trial Chamber's assessment of the evidence against him. In relation to the sentence imposed, the Appellate Chamber rejected Ntaganda's contention, among others, that his own experience in the Rwandan genocide should diminish his culpability.

4. Repubblika v. Il-Prim Ministru (Court of Justice of the European Union – April 20, 2021)

<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-896/19>

On Tuesday, April 20, the Court of Justice of the European Union (CJEU) ruled in Case C-896/19, *Repubblika v. Il-Prim Ministru* that Malta's system for appointing judges did not contradict EU law. As reported by JURIST, the ruling went before the national court when Repubblika, an association created to promote the rule of law in Malta, had challenged the procedure, which was provided by the Constitution of Malta. The process in the Maltese Constitution stated that judiciary members are appointed by the president acting

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under the advisement of the prime minister. However, appointees must satisfy certain conditions and are subject to background checks or other examinations by the Judicial Appointments Committee, whose purpose is to assess candidates and provide feedback to the prime minister. The national court brought this to the CJEU to decide whether this system was constitutional under EU law, specifically under Article 19 (1) of the Treaty on European Union, in light of Article 47 of the EU Charter of Fundamental Rights, which states that member states must provide conditions for a fair, independent, and impartial trial to ensure true justice. The court reached the conclusion that this practice was not prohibited by EU law because, in order to guarantee conditions of judicial independence and impartiality, procedures must exist to ensure that appointees are free from influence from the legislature and/or executive with regard to judiciary proceedings. The Court found that power of the prime minister to submit a candidate that was not suggested by the Judicial Appointments Committee was not contrary to EU law because of various safeguarding measures included in the Constitution. The Court held: "Inasmuch as the Prime Minister exercises that power only in quite exceptional circumstances and adheres to strict and effective compliance with that obligation to state reasons, that power is not such as to give rise to legitimate doubts concerning the independence of the candidates selected" (para. 71). Therefore, the Court concluded that the national provisions at issue do not give rise to any legitimate uncertainties, or doubts of independence, regarding the chosen judiciary candidates.

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text (June 2021)

<https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf>

A group of legal experts, in a collaborative effort to confront environmental destruction, have proposed an amendment to the ICC Rome Statute that would add the crime of 'ecocide' to the Court's jurisdiction. The proposal defines 'ecocide' as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." As reported by JURIST, the legal experts believe that the policies and precedents that are currently in place to address similar issues are "inadequate." While the ICC maintains a history of delivering sentencing and legal precedents in war crimes cases, this amendment could alter the concept of accountability and extend it to the pressing issue of human contributions to climate change. If an ICC member state issues a recommendation for the proposal of the amendment to go forward, a vote will be taken on whether to execute the amendment. To succeed, two-thirds of the total vote are required.

2. Protocol 15 to the European Convention on Human Rights (Council of Europe – August 1, 2021)

<https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf>

On August 1, 2021, Protocol 15 to the European Convention on Human Rights entered into force for all Council of Europe member states, following Italy's April 12, 2021, ratification. The three-page Protocol adds to and amends the Convention in a number of ways. For example, it adds a new recital to the Convention's Preamble, affirming the principle of subsidiarity and the margin of appreciation doctrine. It also introduces a new paragraph 2 in Article 21 (criteria for office), stating that candidates for the Court must be less than 65 years old at the time the list of candidates is requested by the Parliamentary Assembly. Article 3 of the Protocol eliminates a state party's power to object to a Chamber's relinquishment of jurisdiction to the Grand Chamber, under Article 30. With regard to case admissibility criteria in Article 35, the Protocol reduces from six to four months the period which must pass after a final decision has been taken at domestic level before the Court can take a case. The Protocol also alters Article 35(3)(b) so that the Court can declare an application inadmissible if the applicant "has not suffered a significant disadvantage," regardless of whether a domestic authority has considered the case.

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