© 2020 by The American Society of International Law
DOI:10.1017/ilm.2020.58

BRIEFLY NOTED

(Not reproduced in *International Legal Materials*)

Judicial and Similar Proceedings

1. Mitchell v. U.S. (U.S. Court of Appeals for the 9th Circuit – August 23, 2020)

<https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/23/20-99010.pdf>

On August 23, 2020, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Mitchell v. U.S.*, denying a certificate of appealability to the petitioner who sought a motion to vacate his conviction and sentence of death. The petitioner, Lezmond Mitchell, argued that his conviction and sentence must be vacated in light of an August 12, 2020, report by the Inter-American Commission on Human Rights that concluded that Mr. Mitchell's trial and sentence were a violation of his rights under the American Declaration on the Rights and Duties of Man. Mr. Mitchell, the only Native American on federal death row, argued that the IACHR report created rights binding on the U.S. "'(1) because they are derived directly from the OAS Charter, a treaty within the meaning of the U.S. Constitution; and (2) because they are derived, through the OAS Charter, from the American Declaration, a statement of human rights norms the United States has not only adopted, but helped to draft.'" The Ninth Circuit concluded that Mr. Mitchell's motion to vacate "did not make 'a substantial showing of the denial of a constitutional right'" under 28 U.S.C. § 2253(c)(2) and denied his motion. In its reasoning, the Court explained that "reasonable jurists would not find debatable the district court's conclusion that the IACHR's decision is not binding in federal court." It agreed with the District Court's conclusion that IACHR rulings are not binding on the U.S. because the OAS Charter is "not self-executing" and there is no U.S. statute which implements it. Moreover, the District Court correctly determined that because the American Declaration is not a treaty, it creates no binding legal obligations, nor does the "IACHR's governing statute, the Statute of Inter-American Commission on Human Rights . . . give the IACHR power to make binding rulings with respect to nations, like the United States, that have not ratified the American Convention." The Ninth Circuit thus joins the other federal courts of appeals that have addressed this issue by concluding that neither the American Declaration, nor the IACHR's recommendations related thereto, is a source of binding obligations for the United States under international law. *Cf. Cardenas v. Stephens*, 820 F.3d 197, 203 (5th Cir. 2016); *Tamayo v. Stephens*, 740 F.3d 991, 997–98 (5th Cir. 2014); *Flores-Nova v. Attorney Gen. of U.S.*, 652 F.3d 488, 493 (3d Cir. 2011); *Igartua v. United States*, 626 F.3d 592, 603 n. 11 (1st Cir. 2010); *In re Hicks*, 375 F.3d 1237, 1241 n. 2 (11th Cir. 2004); *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *Roach v. Aiken*, 781 F.2d 379, 381 (4th Cir. 1986).

2. Indigenous Peoples of Brazil (Articulação dos Povos Indígenas do Brasil) v. Brazil (Federal Supreme Court of Brazil – August 5, 2020)

<http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDestaque_en_us/anexo/STFdecisionindigenouspeoplesCovid.pdf> (Summary in English)

On August 5, 2020, the Plenary of the Brazilian Federal Supreme Court voted in favor of an injunction that requires "the federal government to adopt measures to contain the spread of Covid-19 in the indigenous communities." The Federal Supreme Court website lists the measures included in the injunction: "the creation of sanitary barriers and a situation room, the removal of invaders and the presentation of a confrontation plan." The purpose of the sanitary barrier is to ensure isolation of indigenous people in order to prevent further spread; the purpose of the situation room is to ensure full cooperation among all relevant actors, "including indigenous representatives," in addressing the problem. The "removal of invaders" is elaborated on in more detail in a related press release from August 3, 2020; the phrase refers to those who are illegally using indigenous land and causing environmental destruction. While the ratified injunction does not call for the immediate removal of these invaders, it established "the need for action protocols . . . so that, later, the removal of the invaders would occur." A JURIST article notes that this ratification comes shortly after "President Jair Bolsonaro vetoed portions of a bill formulated to protect indigenous groups during the

https://doi.org/10.1017/ilm.2020.58 Published online by Cambridge University Press

pandemic . . . argu[ing] that the provisions were unconstitutional as they created expenses without generating revenue."

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. **Joint Statement on Intention to Intervene in The Gambia v. Myanmar (Canada and the Kingdom of the Netherlands – September 2, 2020)**

<https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice>

On September 2, 2020, the Honourable François-Philippe Champagne, Minister of Foreign Affairs of Canada, and Stef Blok, Minister of Foreign Affairs of the Kingdom of the Netherlands issued a joint statement regarding their intention to intervene into The Gambia v. Myanmar case before the International Court of Justice. The statement, available in full here, states that "In bringing this application to the ICJ, The Gambia took a laudable step towards ending impunity for those committing atrocities in Myanmar and upholding this pledge. Canada and the Netherlands consider it our obligation to support these efforts which are of concern to all of humanity."

2. **EU-U.S. Joint Statement on EU Court Decision in Schrems II (U.S. Secretary of Commerce, Wilbur Ross, and the European Commissioner for Justice, Didier Reynders – August 10, 2020)**

<https://www.commerce.gov/news/press-releases/2020/08/joint-press-statement-us-secretary-commerce-wilbur-ross-and-european>

A joint press statement has been issued by the U.S. Secretary of Commerce, Wilbur Ross, and the European Commissioner for Justice, Didier Reynders, on the initiation of a discussion on how to enhance the EU-U.S. Privacy Shield framework to comply with the judgment of the Court of Justice of the EU in *Schrems II* on July 16, 2020, which declared the framework invalid. The statement includes the following: "The European Union and the United States recognize the vital importance of data protection and the significance of cross-border data transfers to our citizens and economies. We share a commitment to privacy and the rule of law, and to further deepening our economic relationship, and have collaborated on these matters for several decades."

3. **Good Practice Paper on Statelessness Determination Procedures (UN High Commissioner for Refugees – July 2020)**

<https://www.refworld.org/pdfid/5f203d0e4.pdf>

The UN Refugee Agency has published a Good Practice Paper on Statelessness Determination Procedures, as part of a greater initiative to publish a series of such papers to assist states and achieve its goal of ending statelessness by 2024. The paper provides an overview of existing statelessness determination procedures, noting that "[o]nly about twenty States worldwide have established dedicated [statelessness determination procedures" and that several states, including the United States, pledged in 2011 to establish procedures. Following that overview, the Paper goes into detail on key elements to include in statelessness determination procedures, such as accessibility of the procedures, procedural guarantees, and evidentiary standards. The Paper then provides details on a number of states that already have such procedures, as examples for other states wishing to establish statelessness determination procedures in their domestic legal frameworks.

https://doi.org/10.1017/ilm.2020.58 Published online by Cambridge University Press