DOI:10.1017/ilm.2020.41

# BRIEFLY NOTED

(Not reproduced in *International Legal Materials*)

## Judicial and Similar Proceedings

### 1. N.D. and N.T. v. Spain (European Court of Human Rights)

<http://hudoc.echr.coe.int/eng?i=001-201353>

On February 13, 2020, the Grand Chamber of the European Court of Human Rights (ECtHR) announced its decision in *N.D. and N.T. v. Spain*. According to a press release from the Court, the case concerned two individuals (one from Mali and the other from Côte d'Ivoire) who were immediately returned to Morocco from Spain after unlawfully entering the autonomous Spanish city of Melilla on the North African coast. The individuals argued that their return to Morocco violated ECHR Articles 4 of Protocol 4 (prohibition of collective expulsion) and Article 13 (right to an affective remedy). The ECtHR disagreed, basing its decision on the fact that the two applicants unlawfully entered Melilla. The Court stated that because the two individuals had chosen not to make use of lawful channels for entry, their immediate return to Morocco without individual assessment of their cases for asylum "was thus a consequence of their own conduct" (para. 231). Because the Court found no violation of article 4, it could not make a finding with respect to article 13.

Judge Pejchal's concurred, but noted that he felt that, under Article 37, the case should be struck off the Court's list of cases, owing to the fact that the applicants should have tried to resolve their root cause issues in their home countries, using the Banjul Charter before the African Court of Human and Peoples Rights. Judge Koskelo's, partially dissenting, indicated her disagreement with the majority's broad interpretation of the term "expulsion" and expressed her concern that states will not be able to turn away or remove anyone without granting them access to an individualized procedure.

### 2. Hernandez et al v. Mesa (United States Supreme Court)

<https://www.supremecourt.gov/opinions/19pdf/17-1678_m6io.pdf>

On February 25, 2020, the U.S. Supreme Court ruled 5-4 that foreign nationals cannot file civil rights claims in American courts. *Hernandez et al v. Mesa* involved the killing of a fifteen-year-old Mexican national on Mexican soil at the Texas border by Jesus Mesa, a U.S. Border Patrol Agent. The deceased's family sued for damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, under which the Supreme Court allowed a Fourth Amendment claim for damages, despite a lack of authorization for such a suit under federal law. Though Bivens has since been expanded upon, the Supreme Court declined to extend it to claims based on cross-border shootings, a context which was, to the Court, "different . . . from previous Bivens cases" and presents a "risk of disruptive intrusion by the Judiciary into the functioning of other branches." Additional factors cited by the Court as counseling against expanding Bivens as argued, included: (1) the impingement on foreign relations; (2) undermining border security; and (3) Congress's repeated declination to "authorize the award of damages against federal officials for injury inflicted outside U.S. borders." The Court amalgamated its concerns under the larger umbrella of respecting the separation of powers and underscored that it is for Congress to determine whether damages in such cases are appropriate.

### 3. The Prosecutor v. Saif Al-Islam Gaddafi - Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I on Admissibility (International Criminal Court)

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-695>

On March 9, 2020, the Appeals Chamber of the International Criminal Court (ICC) unanimously dismissed Saif Al-Islam Gaddafi's appeal against Pre-Trial Chamber I's decision on admissibility of April 5, 2019. According to a press release from the ICC, the appeal concerned the finality of a judgment rendered against Mr. Gaddafi *in absentia* in 2015 before a Libyan court. The Pre-Trial Chamber rightly (according to the Appeals Chamber) found that because the judgment was rendered *in absentia*, it cannot be considered

final under Libyan law. Therefore, the case is admissible at the ICC. Judge Eboe-Osuji and Judge Bossa wrote a joint concurring opinion focused on the issue of "complementarity" between national courts and the ICC.

**4. Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala – Preliminary Objections (International Centre for Settlement of Investment Disputes)**

<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/43>

On March 13, 2020, the International Centre for Settlement of Investment Disputes (ICSID) rejected all three of the respondent's preliminary objections in *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*. They released the full text of their decision on April 10, 2020. The claimants in the case allege that Guatemala has negatively impacted their Guatemalan company, Exmingua and that Guatemala has breached several provisions of the Dominican Republic-Central America Free Trade Agreement. The Republic of Guatemala raised three preliminary objections: First, that claimants are inappropriately interpreting the Agreement as permitting compensation for "losses sustained directly by Exmingua"; second, the claimants did not comply with the notice requirements necessary to bring a Most-Favored-Nation Treatment claim; and third, that the Court does not have jurisdiction because the event relevant to the claimants' claim for damages happened outside of the time frame noted in the Agreement.

In its rejection of the first claim, the Court stated that the wording of the agreement had to be taken at face value and that "the particular terms adopted are not consistent with barring a claimant from pursuing 'on its own behalf' a claim for losses it 'incurred,' just because those losses may have been incurred indirectly rather than directly." Regarding the second objection, in their Notice of Arbitration, the claimants brought a Most-Favored-Nation Treatment claim based on a court case that had not been decided at the time they submitted their Notice of Intent. Article 10.16.2 states that claimants have to include all the claims they are submitting in their original notice, but Article 10.16.2 does not address what happens if new information comes to light after the original notice is sent. For more context, the Court turned to Article 10.16.4 which "expressly allows for the possibility that an additional claim may be 'asserted for the first time after such notice of arbitration,' without requiring a repetition of the notice of intent and notice of arbitration process." Lastly, regarding the third objection, the Court concluded "that they [the claimants] are not pursuing any full protection and security claim for events prior to the agreed 'critical date' of 9 November 2015 . . . clear[ing] the initial hurdle for the Preliminary Objections stage, which is focused on the Claimants' allegations [as opposed to a "factual investigation" that may bring to light information that does undermine the Court's jurisdiction.]." Professor Zachary Douglas QC issued a partial dissenting opinion, taking issue with the Court's judgment regarding the first objection.

**5. Servotronics, Inc. v. The Boeing Co. (United States Court of Appeals for the Fourth Circuit)**

<https://www.ca4.uscourts.gov/opinions/182454.P.pdf>

On March 30, 2020, the U.S. Court of Appeals for the Fourth Circuit issued its judgment on appeal in *Servotronics, Inc. v. The Boeing Co*. Servotronics, the appellant in the case, sought under 28 U.S.C. 1872 to obtain testimony from employees of Boeing, the appellee, who are residents in South Carolina, for use in an arbitration taking place in the United Kingdom. The district court ruled that the arbitral panel was not a "foreign tribunal" under section 1782, a statute which provides for "assistance to foreign and international tribunals and to litigants before such tribunals." This meant that the District Court could not grant the appellant's application to obtain the testimony of the employees. The Court of Appeals reversed. In its reasoning, the Court explained that the statute "manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts*, but before all foreign and international *tribunals*." In its view, the policy behind section 1782 "was intended to contribute to the orderly resolution of disputes both in the United States and abroad, elevating the importance of the rule of law and encouraging a spirit of comity between foreign countries and the United States." The case was remanded to the District Court for decision in line with the appellate judgment.

https://doi.org/10.1017/ilm.2020.41 Published online by Cambridge University Press

### 6. Joined Cases CACV 541, 542 & 583/2019 (Hong Kong Court of Appeals)

<https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127372&QS=%24%28mask%29&TP=JU>

On April 9, 2020, the High Court of the Hong Kong Special Administrative Region Court of Appeal released its decision in Cases CACV 541, 542 & 583/2019 (jointly heard). A press summary from the Court states that it upheld the constitutionality of the Emergency Regulations Ordinance (ERO) as well as section 3(1)(b) of the Prohibition on Face Covering Regulation (PFCR) "relating to unauthorized assembly." It ruled that sections 3 (1)(c) and (d) and section 5 (which address public meeting, public procession, and police powers, respectively) were unconstitutional. The Court of First Instance (CFI) took issue with the ERO that the PFCR was created under, ruling that the ERO was incompatible with Hong Kong's Basic Law. It also found that restrictions within sections 3 and 5 of the PFCR restricted citizens' "fundamental rights . . . beyond what was reasonably necessary for the furtherance of" those sections' goals. In response to the CFI's decision, the respondents (the Secretary of Justice and Chief Executive in Council, in all three cases) appealed and the applicants cross-appealed.

The Court of Appeal (CA) found that the ERO was compatible with Hong Kong's Basic Law, because it "does not confer on the Chief-Executive-in-Council (CEIC) general legislative power to make primary legislation." The Legislative Council has primary legislative authority; however, it can delegate legislative powers to the CEIC (through an enabling ordinance) that allows the CEIC to pass subordinate legislation (i.e., emergency regulations). Section 3(1)(b) of the PFCR relates to the use of face masks at unauthorized assemblies. The Court reviewed what qualifies as an unauthorized assembly, who qualifies as a "person 'at an unauthorized assembly,'" and the relationship of this section of the PFCR to the previously established Public Order Ordinance (POO); it found that section 3(1)(b) passed the proportionality test, reversing the CFI's decision and that "the further restrictions on the lawful public assembly or public procession under sections 3(1)(c) and (d)" were unnecessary given authorities' power to control lawful assemblies and disband unlawful assemblies. Regarding section 5, it found that the Police Force Ordinance and the POO already gave police the necessary amount of authority to require a person to remove a facial covering, and that the wider powers given in section 5 were not proportional to its aims. Additionally, the CA upheld the CFI's rulings that the Hong Kong Bill of Rights Ordinance did not impliedly repeal the ERO and "that the ERO did not fall foul of the 'prescribed by law' requirement." Lastly, respondents asked the CA to affirm the CFI's rejection of the argument that general wording within the ERO made it impermissible for "the Government to adopt measures that infringe the fundamental rights of an individual" (This argument would make the PFCR illegal.). The CA refused, stating that the general wording was intended to allow restrictions of individual rights if necessary. Based on the arguments above, the CA accepted the respondents' appeals relating to the constitutionality of the ERO and sections 3 and 5 of the PFCR. It rejected the appeals on all other grounds.

## RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

### 1. Country Reports on Human Rights Practices 2019 (United States Department of State)

<https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/>

The U.S. Department of State published its 2019 Country Reports on Human Rights Practices on March 11, 2020. In an accompanying statement by Assistant Secretary for Democracy, Human Rights, and Labor, Robert A. Destro, remarked that the reports "look beyond law, policy, or statements of intent and examine what a government actually did to protect human rights during the year and to promote accountability for violence - violations and abuse." Specifically, the reports are comprised of seven sections: (1) Respect for the Integrity of the Person; (2) Respect for Civil Liberties; (3) Freedom to Participate in the Political Process; (4) Corruption and Lack of Transparency in Government; (5) Governmental Attitude Regarding International and Non-governmental Investigation of Alleged Abuses of Human Rights; (6) Discrimination, Societal Abuses, and Trafficking in Persons; and (7) Worker Rights. The 2019 reports cover 199 countries and territories and

https://doi.org/10.1017/ilm.2020.41 Published online by Cambridge University Press

focus on "internationally recognized human rights," such as the Universal Declaration of Human Rights. The Department of State is required by law to produce these reports annually.

**2. Human Rights Guidelines on Algorithms and Automation (Council of Europe)**

<https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809e1154>

On April 8, 2020, the Council of Europe published a set of human rights guidelines on algorithms and automation. According to a press release from the Council of Europe, the guidelines are aimed at ensuring that state governments do not breach human rights in their "use, development or procurement of algorithmic systems." The guidelines also emphasize the importance of creating effective and transparent legal systems and regulatory frameworks that "prevent, detect, prohibit and remedy human rights violations" by the public and private sectors. The guidelines constitute an appendix in a recommendation adopted by the Committee of Ministers at a meeting of the Ministers' Deputies.

**3. Resolution 1/2020 Pandemic and Human Rights in the Americas (Inter-American Commission on Human Rights)**

<https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

On April 10, 2020, the Inter-American Commission on Human Rights adopted the above resolution in response to COVID-19. According to a press release from the Organization of American States (OAS), the resolution is one of the principal outcomes of the Rapid and Integrated Response Coordination Unit for the COVID-19 pandemic (SACROI COVID-19), instituted on March 27, 2020. The resolution calls on members of the Organization of American States to adopt a human rights-respecting approach in the implementation of any "strategy, policy, or state measure aimed at addressing the COVID-19 pandemic and its consequences." In addition to setting out relevant human rights standards, the resolution includes a number of recommendations to assist states in the above.

https://doi.org/10.1017/ilm.2020.41 Published online by Cambridge University Press