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CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UNESCO

On April 7, 2017, the Department of State announced that it had renewed the Charter of the U.S. National Commission for the UN Educational, Scientific, and Cultural Organization (“UNESCO”). The State Department media note making the announcement is excerpted below and available at <https://www.state.gov/r/pa/prs/ps/2017/04/269546.htm>.

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The Department of State has renewed the Charter of the U.S. National Commission for the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The purpose of the Commission is to provide expert advice to the U.S. Department of State on issues related to education, science, communications and culture; the formulation and implementation of U.S. policy towards UNESCO; and international cooperation at UNESCO. The Commission also serves as a focal point for UNESCO programs involving American citizens, and assists in publicizing U.S. engagement with UNESCO.

The objective of the Commission is to bring to the Department a source of expertise, knowledge, and insight on these issues. The Commission includes representatives of American organizations and institutions having an interest in education, science, communications and culture, including professional associations, educational institutions, and non-governmental organizations (NGOs), as well as representatives of federal, state and local governments, and at-large individuals. The Commission shall meet at least annually.

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On October 12, 2017, the State Department announced that the United States was withdrawing from UNESCO. The press statement making the announcement is excerpted below and available at

<https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm>.

* * * *

On October 12, 2017, the Department of State notified UNESCO Director-General Irina Bokova of the U.S. decision to withdraw from the organization and to seek to establish a permanent observer mission to UNESCO. This decision was not taken lightly, and reflects U.S. concerns with mounting arrears at UNESCO, the need for fundamental reform in the organization, and continuing anti-Israel bias at UNESCO.

The United States indicated to the Director General its desire to remain engaged with UNESCO as a non-member observer state in order to contribute U.S. views, perspectives and expertise on some of the important issues undertaken by the organization, including the protection of world heritage, advocating for press freedoms, and promoting scientific collaboration and education.

Pursuant to Article II(6) of the UNESCO Constitution, U.S. withdrawal will take effect on December 31, 2018. The United States will remain a full member of UNESCO until that time.

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On October 12, 2017, the U.S. Mission to the UN released a statement by Ambassador Nikki Haley on the U.S. withdrawal, which is excerpted below and available at <https://usun.state.gov/remarks/8009>.

* * * *

In July, when UNESCO made its latest outrageous and politically based decision, designating the Old City of Hebron and the Tomb of the Patriarchs as part of Palestinian territory, the United States clearly stated that this decision would negatively affect our evaluation of our level of engagement with the organization. The United States will continue to evaluate all agencies within the United Nations system through the same lens.

“The purpose of UNESCO is a good one. Unfortunately, its extreme politicization has become a chronic embarrassment. The Tomb of the Patriarchs decision was just the latest in a long line of foolish actions, which includes keeping Syrian dictator Bashar al-Assad on a UNESCO human rights committee even after his murderous crackdown on peaceful protestors. Just as we said in 1984 when President Reagan withdrew from UNESCO, U.S. taxpayers should no longer be on the hook to pay for policies that are hostile to our values and make a mockery of justice and common sense,” said Ambassador Nikki Haley.

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2. Responsibility of International Organizations

Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, addressed the Sixth Committee on October 13, 2017 on the topic of “Responsibility of International Organizations.” Mr. Simonoff’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8016>.

* * * *

The United States wishes to reiterate its thanks to the International Law Commission for its work on this topic. We also thank the Secretary-General, and in particular the Office of Legal Affairs, for preparing two reports in advance of this session. The Secretary-General’s report A/72/81, which contains a compilation of decisions of international courts and tribunals, and his report A/72/80, which contains comments and information received from governments and international organizations, once again highlight the great diversity in character, structure, and functions of international organizations, as well as the varying opinions among states on the principles that should govern the responsibility of international organizations, and how those principles should apply, especially as between an international organization and its members.

We reiterate our view, particularly in light of the scarcity of practice in this area, that many of the rules contained in the Draft Articles fall into the category of progressive development rather than codification of the law, a point that the General Commentary introducing the Draft Articles expressly recognizes. Indeed, we agree with the Commission’s assessment that the provisions of the present Draft Articles do not reflect the current law in this area to the same degree as the corresponding provisions on state responsibility. This is an important assessment to keep in mind when considering whether these Draft Articles—many of which contain similar or identical phrasing to the corresponding Articles on State responsibility—adequately reflect the differences between international organizations and states. In this connection, we again highlight our view that the principles contained in some of the Draft Articles—such as those addressing countermeasures and self-defense—likely do not apply generally to international organizations in the same way that they apply to states.

In light of these considerations, and in light of the significant differences of opinion that remain regarding which principles should govern and how they should operate, the United States continues to hold the view that the Draft Articles should not be transformed into a Convention.

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3. Rule of Law

Minister Counselor Simonoff also addressed the Sixth Committee on October 5, 2017 at a meeting on “Rule of Law Intervention.” His remarks are excerpted below and available at <https://usun.state.gov/remarks/8021>.

* * * *

The United States would like to thank the Secretary-General for both of his reports on this agenda item. We also thank the Deputy Secretary-General for her briefing at the Sixth Committee. We deeply value the efforts of the Rule of Law Coordination and Resource Group and the work of the Rule of Law Unit in particular. As the Secretary-General's report demonstrates, the United Nations continues to provide many Member States with valuable assistance on an array of rule of law activities.

Rule of law is at the heart of the UN Charter. Indeed, the UN Charter represents the pinnacle of our international legal system. The Charter was designed in part "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." The Charter speaks of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small." The Charter includes among its purposes the peaceful resolution of disputes "in conformity with the principles of justice and international law."

Among the General Assembly's functions, as set out in the Charter, is making recommendations for the purpose of "encouraging the progressive development of international law and its codification." And of course in the Sixth Committee, when we consider, debate and build on the important work of the International Law Commission and other items, we breathe life into these words of the Charter. So fundamental to the UN Charter is the rule of law at the international level that the International Court of Justice was identified in the UN Charter as one of the principal organs of the United Nations. The rule of law demands that all people, in all corners of the world, whether stateless or not, receive the benefits conferred by the UN Charter.

Rule of law at the domestic level entails, among other things, the possibility of subjecting decisions of the government to judicial review. It means when a court rules against the government, even regarding controversial governmental actions, that the government respects and abides by that ruling. Rule of law means honoring the applicable domestic constitutional framework whenever a governmental decision is challenged. Rule of law at the domestic level requires an honest, fair and just judiciary. Rule of law functions best with an independent and impartial judiciary. Judges must not be swayed by political pressure, must not be susceptible to bribes or other corrupt influences. In order for populations to accept judicial decisions, judges need to be exemplars of the utmost integrity, and must be model citizens, devoted to the rule of law.

Regarding this session's subtopic, "Ways and means to further disseminate international law to strengthen the rule of law": We appreciate, as noted earlier, the valuable work of the Rule of Law Coordination and Resource Group and the Rule of Law Unit. We also commend the work of private legal associations for their efforts to disseminate international law, such as the American Bar Association and the American Society of International Law, to name two American groups which make a significant contribution to education and assistance in the international legal field, not to mention the numerous US law schools with strong and robust international law programs.

The United States also wishes to commend the excellent work of the Office of Legal Affairs in disseminating international law to strengthen the rule of law. The Under Secretary General for Legal Affairs and the Assistant Secretary General for Legal Affairs engage in

important outreach through the delivery of addresses and briefings on the latest developments in international law, both at meetings and venues in New York and in other academic and governmental settings in other countries. We value the important work of the Codification Division in disseminating international law to a broad audience well beyond the halls of the United Nations Headquarters in New York and Geneva, and in particular the successful efforts of those who work on the program of assistance. In addition, we are also grateful for the crucial work of the Treaty Section, whose web site, in particular, provides timely information to the entire world about each and every treaty action and notification. I could go on to sing the praises of OLA and its efforts to disseminate international law, from the Office of the Legal Counsel's work to negotiate and implement new instruments advancing international criminal justice to the General Legal Division's work to facilitate domestic prosecutions, to the Division for Oceans and the Law of the Sea's tireless efforts to advance international understanding of the law of the sea. Suffice it to say that the Office of Legal Affairs plays a vital role in disseminating and strengthening the rule of law at the international level.

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4. UN Role in Advancing International Law

Emily Pierce, Counselor for the U.S. Mission to the United Nations addressed the Sixth Committee on October 16, 2017 at a meeting on the United Nations Program of Assistance in the Teaching, Study, and Wider Appreciation of International Law. Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8047>.

* * * *

The United States thanks the Secretary-General for his report on the United Nations Program of Assistance in the Teaching, Study, Dissemination, and Wider Appreciation of International Law. The Program of Assistance, which was established in 1965, continues to make an indispensable contribution to the education of students and practitioners in international law—some of whom sit with us today in the Sixth Committee—and merits our continuing, strong support.

The United States is pleased to participate on the Advisory Committee of the United Nations program of Assistance, which made important progress in enhancing its impact and broadening its accessibility around the world. We were impressed by the number of applicants for the International Law Fellowship Program—450 for 21 fellowships—and for the United Nations Regional Courses in International Law—463 for about 80 spots. We thank the UN Program of Assistance for doing all it can to provide as many scholarships as possible within existing resources to accommodate the greatest number of students for these courses. We also thank those countries and organizations that have made in-kind and financial contributions to make these courses a reality.

We appreciate the Program of Assistance's efforts to reach those practitioners and students of international law who are not able to participate in the courses, in particular through the 54 new lectures that were recorded for the Lecture Series of the United Nations Audiovisual

Library of International Law. The United States highlights the work done to translate these lectures, as well as to do off-site recordings in order to promote broader geographical and linguistic representation. We also recognize the efforts underway to make the Audiovisual Library available via podcast, which should contribute greatly to increased access in developing countries.

Particularly in the context of a heightened focus on the rule of law, it is clear that knowledge of international law is a key component to furthering the rule of law at the national and international levels. Through a firm understanding of international law, new generations of lawyers, judges and diplomats gain a deeper appreciation of the complex instruments that govern so many aspects of this interconnected world. The Program of Assistance is one of the many important tools that help to strengthen the rule of law.

The United States recognizes the significant role of the Office of Legal Affairs, in particular the Codification Division, in implementing the Program of Assistance. We very much appreciate the ways the Codification Division has been able to keep important programs going in the face of limited resources, including with respect to desktop publishing and the International Law Handbook, and we encourage it to continue its commendable efforts to secure voluntary contributions to fund that work. There is no question that the Program of Assistance activities are valuable and well-run and worthy of support. We believe it is important that this excellent program thrives for years to come.

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5. Administration of Justice at the UN

On October 9, 2017, Ms. Pierce addressed the Sixth Committee meeting on “Administration of Justice at the United Nations.” Her remarks are excerpted below and available at <https://usun.state.gov/remarks/8024>.

* * * *

We would like to thank the Secretary-General, the Internal Justice Council, and the Office of the United Nations Ombudsman and Mediation Services for their reports. I wanted to follow up on the three areas we highlighted in our statement last year: 1) accountability; 2) efficiency; and 3) transparency.

With respect to accountability, we were pleased to see the progress made through the Secretary-General’s revised bulletin on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations. We note the IJC’s report that there still exists a substantial fear of retaliation among staff. In this light, we reiterate that this issue may merit further exploration, as there are many, and often subtle, ways retaliation can manifest itself. We would also be interested in more information from the Secretary-General about the system of referrals in light of the recommendations of the IJC. We note the Secretariat’s report that during the reporting period there were no findings on the accountability of managers.

With respect to efficiency, we welcome the Secretary-General's reporting that the Management Evaluation Unit's work to conduct management reviews of administration decisions appears to have resulted in a decrease in the amount of litigation pursued at the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. We also acknowledge the significant contribution of the activities of the Office of the United Nations Ombudsman and Mediation Services to the prevention of disputes and the informal resolution of disputes. In addition, we recognize the Investigations Division of OIOS's report that measures have been put in place to maintain a downward trajectory in the average length of time of investigations. We agree with the Secretary-General that informal resolution of disputes as early as possible should be encouraged, but recognize that deadlines are there to ensure prompt resolution of disputes. We therefore reiterate that care should be taken to ensure that requests for deadline extensions are not abused.

We also appreciate the efforts that have been made to improve transparency, including through outreach missions by the Office of Staff Legal Assistance and the United Nations Dispute Tribunal to help inform staff and managers about the internal justice system. We support the IJC's recommendations that we should consider what additional practical steps could be taken to enhance knowledge and understanding of the system, in particular regarding the availability of staff legal assistance. We also support harmonizing and consolidating the rules, regulations and administrative issuances with a view toward reducing redundancies and eliminating contradictions, as a means to help make the entire process more transparent to staff. In this regard, we welcome the work already underway by the Office of Human Resources and Management. We also support the IJC's recommendation regarding enhancing staff access to documentation and information, in particular that where feasible, the Management Evaluation Unit should provide complaining parties with documents and other information relied upon by the Unit in deciding to sustain the decisions of line managers.

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6. Committees of the UN

a. *Charter Committee*

Ms. Pierce also addressed the Sixth Committee on October 10, 2017 at a meeting on the report of the "Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization." Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8023>.

* * * *

We welcome consideration of the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and this opportunity to provide a few observations on the Committee's recent work. The United States would first like to highlight the positive movement in the work of the Charter Committee, which was achieved through the redoubling of efforts of Committee members to work together. Second, we would

like to discuss areas where there is a critical need to extend such honest efforts, in particular toward improving the Committee's productivity and rationalization of its work.

First, building upon the momentum from the 2016 meeting of the Charter Committee, members first met for an informal intersessional discussion on February 2 to discuss the proposals of the Non-Aligned Movement and Ghana. We were encouraged by the constructive tone taken by those who participated in the discussions. Through such discussions, Charter Committee members built a basis upon which delegations came together during the 2017 Committee session to finalize the NAM proposal, based on consensus, to hold an annual, thematic debate in the Special Committee to discuss the means for the peaceful settlement of disputes. We look forward to the first such debate on the exchange of information on state practices regarding the use of negotiation and enquiry. In addition, we thank our fellow Committee members for the positive spirit with which we approached the negotiations, allowing us to take a positive step forward.

We believe that there is more progress to be made by Committee members. It made good practical sense that, during the Charter Committee session in 2016, Committee members agreed to biennialize the consideration of the "third country effects of sanctions" item on the Committee agenda. Biennialization reflects a better, albeit imperfect, balance between the views of those who believe that the issue is no longer appropriate for Committee consideration and those who believe that the issue should be kept on the Special Committee's agenda in the event of changed circumstances in the future. The United States encourages Committee members to continue to build further still on the momentum from the 2017 session to make additional progress, specifically as it relates to improving efficiency and productivity of the Committee, including by giving serious consideration to such steps as biennial meetings or shortened sessions. The Committee needs to do its job by recognizing that these steps are reasonable and make good practical sense.

With regard to items on the Committee's agenda concerning international peace and security, the United States continues to believe that the Committee should not pursue activities in this area that would be duplicative or inconsistent with the roles of the principal organs of the United Nations as set forth in the Charter. This includes consideration of a further revised working paper calling for a new, open-ended working group "to study the proper implementation of the Charter ... with respect to the functional relationship of its organs." It also includes consideration of another revised, longstanding working paper that similarly calls *inter alia* for a Charter Committee legal study of General Assembly functions and powers.

In the area of sanctions—despite the progress through biennialization—we note once again that positive developments have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. With respect to the matter of third states affected by the application of sanctions, as stated in the Secretary-General's report A/72/136, "...the need to explore practical and effective measures of assistance to third states affected by sanctions has been reduced accordingly. In fact, no official appeals by third states to monitor or evaluate unintended adverse impacts on non-targeted countries have been conveyed to the Department of Economic and Social Affairs since 2003." Such being the case, we believe that the Special Committee—with an eye both on the current reality of the situation and the need to stay current in terms of the matters it considers—should decide in the future that this issue no longer merits discussion in the Committee.

On the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, we have consistently stated that the United States does not support the proposal.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, we continue to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items they should be practical, non-political, and not duplicate efforts elsewhere in the United Nations. In this regard, we refer to the proposals made to have the Committee request the Secretariat to update the 1992 Handbook on the Peaceful Settlement of Disputes between States, and to establish a website also dedicated to the peaceful settlement of disputes. We are of the view that such new, labor-intensive exercises would not be the best use of scarce Secretariat resources, and at the end of the day would not, in any event, offer much value-added given the wealth of relevant websites and other online tools that much such information so much readily available than in the past.

As we have noted in this Committee, and the Special Committee before, if a proposal such as that of Ghana is aimed at strengthening peacebuilding and related cooperation between the UN and regional organizations could give value-added by helping to fill gaps, then it should be seriously considered by the Committee.

Finally, we welcome the Secretary-General's report A/72/184, regarding the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council. We commend the Secretary-General's ongoing efforts to reduce the backlog in preparing these works. Both publications provide a useful resource on the practice of the United Nations organs, and we much appreciate the Secretariat's hard work on them.

* * * *

b. *Committee on Relations with the Host Country*

On November 2, 2017, Mr. Simonoff addressed the Sixth Committee on the report of the Committee on Relations with the Host Country. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8071>.

* * * *

Mr. Chairman, the United States is proud to serve as host country to the United Nations. We recognize that we are both providing an important service to the UN community as well as fulfilling our many responsibilities.

The Committee on Relations with the Host Country is a valuable forum in which to discuss relevant issues relating to the presence of this large, diverse, and dynamic diplomatic community in New York City, one of the largest, most diverse and most dynamic cities in the world. The Committee's meetings provide the United States with an opportunity to listen to, understand and address the concerns of the UN community.

The United States greatly values the cooperation and the constructive spirit of the members of the Committee in its work and the assistance provided by the United Nations Secretariat in this regard. We also appreciate the interest and participation in meetings of

numerous observer delegations. The ability of delegations that are not members of the Committee to participate in the Committee's meetings has helped make the Committee's deliberations open and more representative of the UN diplomatic community.

The Host Country Section of the U.S. Mission has worked hard to assist Member States during the past year. For example, between January 1, 2017 and November 1, 2017 more than 4,400 visas were issued to members of the UN diplomatic community. We look forward to continued collaboration and positive interactions with all of our colleagues in the UN community.

Mr. Chairman, the United States would like to express particular appreciation for the efforts of the Chairman of the Committee on Relations with the Host Country, Ambassador Kornelios Korneliou as well as Legal Adviser to the Cyprus mission, Vasiliki Krasa. We also wish to thank the United Nations Legal Counsel, Miguel Serpa Soares and Assistant Secretary-General for Legal Affairs, Stephen Mathias, for their assistance and guidance in the Committee's work. We wish to recognize the efforts of Mr. Surya Sinha, Secretary of the Committee. We also express our appreciation for the many valuable services provided to the United Nations diplomatic community by our colleagues in New York City government and its component municipal agencies.

Mr. Chairman, regarding the statement of the Russian Federation, the United States conferred privileges and immunities on the Russian property in Upper Brookville, New York, pursuant to an arrangement dating back decades. This arrangement does not fall within U.S. obligations under the UN Headquarters Agreement—or the Vienna Convention on Diplomatic Relations, to the extent that convention's provisions are incorporated implicitly through provisions of the Headquarters Agreement.

The United States has never considered this property to be part of the "premises" of the mission. "Premises of the mission" is a very narrowly defined term. Under Art. 1(i) of the Vienna Convention on Diplomatic Relations, the premises of the mission "are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of mission." Premises away from the mission are exceptional. Under Article 12 of the Vienna Convention, "The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established." The United States did not give express consent to the Russian Federation establishing offices in Upper Brookville.

Although the property is owned by the Russian Federation, this does not make it part of the "premises" of the Russian Mission. It is not the case that all property owned by the Russian Federation in the New York area and used by staff of the Russian Mission for recreational purposes or for receptions is considered "premises" of the mission.

In conclusion, this property did not fall within the provisions of the Headquarters Agreement or the Vienna Convention.

This matter should be left to the United States and the Russian Federation to handle bilaterally so that they can reach a mutually satisfactory resolution of the issue.

Some delegations raised restrictions on private non-official travel of members of certain Missions. Such restrictions do not violate Headquarters Agreement because the restrictions at issue do not interfere with travel for UN official business. Consistent with the UN Headquarters Agreement, the United States provides Mission members and delegations with unimpeded access to the Headquarters District. The United States is not required to permit all of these individuals

to travel to other parts of the United States unless they do so for official UN meetings or official UN business. Travel to unofficial events or for recreational purposes is not required by the Headquarters Agreement or any other international agreement.

In closing, let me reiterate how proud the United States is to be the Host Country to the United Nations. We look forward to continuing to work closely with all of you in resolving issues that may arise during the coming year.

* * * *

7. UN Women

Stefanie Amadeo, U.S. Deputy Representative to ECOSOC, addressed the annual session of the UN Women Executive Board on June 27, 2017. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/7882>.

* * * *

Thank you, Madam President. We thank Executive Director Phumzile Mlambo-Ngcuka for her leadership of UN Women. The United States strongly supports UN Women's work, which is aligned with key U.S. goals for advancing gender equality and women's empowerment. These include advancing women's leadership and political participation; creating economic opportunities for women; preventing and responding to gender-based violence; and empowering adolescent girls. We are pleased that the Secretary-General has included UN Women on the principal-level Executive Committee, as this has helped raise awareness of these concerns throughout the UN system.

Turning to UN Women's 2018-2021 Strategic Plan, UN Women has made steady progress toward a comprehensive plan, Integrated Results and Resources Framework and Integrated Budget. We support your efforts to strengthen normative frameworks related to gender equality and women's empowerment; assist member states to strengthen their activities on behalf of women and girls; and promote accountability within the UN system around gender equality. Overall, the plan articulates a clear vision of how UN Women will focus its efforts in the 2018-2021 planning period. It targets areas within the mandate while recognizing that decisions have to be made about resource spending. We appreciate your commitment to using evidence in the development of this planning document, including increasing focus on larger-scale projects—Flagship Programme Initiatives—instead of small-scale, short-duration projects. We support the focus on monitoring, reporting, and evaluation of UN Women's efforts, which assures donors that their contributions are put to good use. We encourage you to ensure that adequate financial resources are invested in the evaluation function.

We commend UN Women's efforts to leverage its unique position in the UN system to help close the global digital gender gap, and appreciate that you have included information and communication technology as a "driver of change" in your next strategic plan. Harnessing innovative solutions will be a key way for UN Women to enhance the organization's efficiency and effectiveness and increase your ability to deliver results on the ground. We strongly

encourage you to work with other funds and programs and share best practices as you work to implement these changes.

We commend UN Women for focusing on cultivating important partnerships with others besides member states and the UN, including with civil society, businesses, foundations, and the media. It is impressive to see that your non-government resources have nearly doubled in 2016, largely as a result of private sector interest in the results of the Flagship Programme Initiatives. We support many of the findings in the report on corporate evaluation of UN Women's strategic partnerships. An important recommendation is that UN Women establish a commonly agreed framework for strategic partnerships as a part of its 2018-2021 Strategic Plan. As UN Women seeks to work more in humanitarian contexts, it is also important to think about how its work complements the efforts of UN agencies which already take a leadership role and have strong operation field presences. We recommend that UN Women think about the kind of gender-related work and partnerships that are still needed in humanitarian emergencies and which would complement existing roles and responsibilities in the humanitarian architecture. We urge you to implement these important and timely recommendations.

Your results framework shows a clear link between outputs and outcomes, which taken together ultimately achieve the impact UN Women seeks. In the implementation phase of the Strategic Plan, we will look for alignment of programs of work with the plan and for evaluation reports to provide evidence for decision-making and progress made against the plan.

The United States remains deeply committed to empowering women, and we look forward to continuing our close collaboration with UN Women and other member states on these important issues facing women and girls around the world.

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8. Observer Status in the General Assembly

On November 3, 2017, Counselor Pierce provided a statement to the Sixth Committee on U.S. views on the prospect of granting observer status in the General Assembly to the Secretariat of the Ramsar Convention on Wetlands. Ms. Pierce's remarks are excerpted below and available at <https://usun.state.gov/remarks/8087>.

* * * *

Thank you, Chair. We thank the delegation of Uruguay for its engagement with us on our questions regarding the Ramsar Secretariat's eligibility for observer status in the General Assembly. We regret that after our consultations, we remain convinced that, though Ramsar's activities cover matters of interest to the Assembly, a treaty secretariat does not qualify as an intergovernmental organization.

The United States supports the critically important work the Ramsar Secretariat is doing to facilitate implementation of wetlands conservation decisions by Ramsar Parties. Wetlands provide many environmental services, including clean water, flood abatement, wildlife habitat, recreation, tourism, fishing and groundwater discharge and recharge.

The United States also greatly values the contributions that the Ramsar Secretariat can make to the discussions in the United Nations on topics relevant to Ramsar's work. We share the desire of Uruguay and other delegations to find creative, practical ways to create opportunities for the Ramsar Secretariat to make such contributions. We are reviewing participation modalities for relevant meetings, including those of the High Level Political Forum and ECOSOC, to ensure that, when eligible, the Ramsar Secretariat has a seat in the room at critical discussions. We also strongly encourage organizers of relevant side events and meetings at the UN to invite Ramsar Secretariat representatives to participate and to request the UN to facilitate appropriate entry of Ramsar Secretariat representatives for such events and meetings. In addition, we urge the International Union for the Conservation of Nature, IUCN, which hosts the Ramsar Secretariat in Geneva, Switzerland, to designate Ramsar Secretariat representatives as part of IUCN delegations to UN meetings and conferences relevant to Ramsar's work. We express our readiness to work with Uruguay, the Ramsar Secretariat, the co-sponsors of this application, and other interested delegations towards this important shared goal.

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9. Role of Security Council to consider human rights

On April 18, 2017, Ambassador Haley delivered remarks at a UN Security Council thematic debate on human rights. She made the point that the Security Council should respond to human rights violations in fulfilling its role of maintaining international peace and security. Her remarks are available below and at <https://usun.state.gov/remarks/7772>.

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Thirty years ago, my predecessor, Daniel Patrick Moynihan, made the case that human rights have a special place in foreign policy. It had been just two years since the General Assembly passed its outrageous resolution equating Zionism with racism. Moynihan thought tolerance and compassion could use a win at the UN, and as usual, he was right. The first argument he offered for paying more attention to this subject was that human rights are inalienable rights. When we embrace human rights we embrace the values that are held, among others, by all the world's major religions. Indeed, one of the purposes of the United Nations is "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Ambassador Moynihan did not stop with arguing that protecting human rights is the right thing to do. He also argued that it's the smart thing to do. And it is. Despite his advice in the 1970s, this Council has never had a meeting focused exclusively on human rights. Today, we will do that.

We've had meetings devoted to specific situations in specific countries, but we've never dedicated a meeting to the broader question of how human rights violations and abuses can lead to a break down in peace and security. The traditional view has been that the Security Council is for maintaining international peace and security, not for human rights. I am here today asserting

that the protection of human rights is often deeply intertwined with peace and security. The two things often cannot be separated.

In case after case, human rights violations and abuses are not merely the incidental byproduct of conflict. They are the trigger for conflict. When a state begins to systematically violate human rights, it is a sign, it is a red flag, it's a blaring siren—one of the clearest possible indicators—that instability and violence may follow and spill across borders. It is no surprise that the world's most brutal regimes are also the most ruthless violators of human rights.

Consider North Korea. Systematic human rights violations help underwrite the country's nuclear and ballistic missile programs. The government forces many of its citizens, including political prisoners, to work in life-threatening conditions in coal mines and other dangerous industries to finance the regime's military. And because they do, this Security Council must devote considerable efforts to addressing North Korea's increasing threats to international peace.

Now consider Syria. In 2011, a group of 12 to 15 year-old teenage boys spray-painted a message on the wall of their school: "The people want the fall of the regime." For this, the Syrian regime arrested them. These children were brutally beaten, had their fingernails ripped out by grown men in government prisons, and tortured before they were returned to their parents. The outrage spawned more protests and more crackdowns, and the cycle repeated until the situation turned into a full-fledged war. And not just any war, but a war that has caused hundreds of thousands of deaths and millions of refugees. What began with the sort of human rights violations and abuses that this Council has been reluctant to address has become a security issue that we are focused to address repeatedly. It is a prime example of why we should take human rights violations and abuses more seriously from their beginning.

In other cases, governments use violence and human rights violations to stifle dissent. We've seen numerous instances where the Burundian government services use torture to crack down on protesters. This has forced hundreds of thousands of people to flee to neighboring countries and caused massive regional disruption. It is little wonder that the government has pushed back on the UN's and the AU's work in Burundi.

We continue to watch Burma, where the security forces have allegedly conducted episodes of violence and repression against ethnic Rohingya, who already face widespread ethnic and religious discrimination from governmental authorities and popular social movements, even despite the human rights gains achieved throughout the country as a result of Burma's ongoing democratic transformation. Such treatment drives desperate people to flee to neighboring countries at best or to radicalization at worst. These sorts of allegations demand real, independent investigations as soon as possible. This is why we supported the recent establishment of an international fact-finding mission to look into these allegations.

To be honest, there is hardly an issue on our agenda today that does not involve concerns about human rights, and future threats will continue to challenge us. This kind of violence is not inevitable. But if this Council fails to take human rights violations and abuses seriously, they can escalate into real threats to international peace and security. The Security Council cannot continue to be silent when we see widespread violations of human rights. Why would we tell ourselves that we will only deal with questions of peace and security, without addressing the factors that bring about the threats in the first place? We should be ready to engage early and often in the statements we make and in the measures we impose. It is clear that the connection between human rights and security is a topic worthy of this Council's serious consideration.

To be fair, over the years, the Security Council has addressed human rights issues in various ways. The Security Council has mandated many peacekeeping and political missions to monitor and report on human rights violations and abuses. Several Security Council-established sanctions regimes include serious human rights violations or abuses as criterion for adding individuals to travel ban lists or asset freeze lists. These are tangible, real impacts that show what the Council can achieve for human rights when we set our minds to it. But there is so much more we can do.

The next international crisis could very well come from places in which human rights are widely disregarded. Perhaps it will be North Korea or Iran or Cuba. We don't know where the next revolt against basic violations of humanity will come. But we know from history that they will come. And when they do, the Security Council will be called upon to react. We are much better off acting on the front end, standing for human rights before the absence of human rights forces us to react.

It's past time for this Council to fulfill the mandate we were given 72 years ago. It's past time that we dedicate ourselves to promoting peace, security, and human rights. I thank my colleagues for their consideration.

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B. INTERNATIONAL COURT OF JUSTICE

1. General

On October 26, 2017, Carlos Trujillo, U.S. Special Adviser, delivered a statement at the 72nd session of the UN General Assembly on the report of the International Court of Justice ("ICJ") on its work over the past year. Mr. Trujillo's statement is excerpted below.

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The International Court of Justice plays an important role in adjudicating disputes among states, giving states who so consent a forum in which to settle their disputes peacefully in accordance with Article 33 of the UN Charter.

As the principal judicial organ of the United Nations, the International Court of Justice has, for over seven decades, played an important role in pursuit of the overarching goal, as set forth in the Charter, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

As in years past, we see states increasingly turning to the Court and to other international judicial tribunals to resolve their disputes. The Court has, in turn, increased its efforts to become more responsive to states, including by taking steps to increase its efficiency and to refine its procedures and working methods to keep pace with the rapidly changing times. By providing a trusted channel for states to resolve some disputes up front, and helping to diffuse others before they escalate, the Court continues to fulfill its Chapter XIV mandate.

The United States would also like to commend the Court for continued public outreach to educate key sectors of society about the role of the Court and to promote a better understanding of public international law. These efforts demonstrate the Court's enduring commitment to advancing the rule of law.

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2. Request for Advisory Opinion on the British Indian Ocean Territory

The United States opposed the General Assembly's request that the ICJ provide an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. On June 22, 2017, Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, delivered remarks before a UN General Assembly vote on the request for an advisory opinion. Her remarks are excerpted below and available at <https://usun.state.gov/remarks/7876>.

* * * *

Mr. President, the resolution before us today seeks to place before the International Court of Justice a bilateral territorial dispute concerning sovereignty over the Chagos Archipelago, which the United Kingdom administers as the British Indian Ocean Territory. By pursuing this resolution, Mauritius seeks to invoke the Court's advisory opinion jurisdiction not for its intended purpose, but rather to circumvent the Court's lack of contentious jurisdiction over this purely bilateral matter.

The United States has consistently recognized United Kingdom sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814. For nearly four decades, the United States and the United Kingdom have operated a military base on Diego Garcia in the Chagos Archipelago, which contributes considerably to regional and international security.

The General Assembly's power to request advisory opinions is an important one; it allows the General Assembly to seek assistance from the ICJ in carrying out its functions under the UN Charter. However, we must be cautious not to allow this important power to be misused for political gain of individual states. While Mauritius is attempting to frame this as an issue of decolonization relevant to the international community, at its heart, it is a bilateral territorial dispute, and the UK has not consented to the jurisdiction of the ICJ. Were Mauritius' request to proceed, it would undermine the Court's advisory function and circumvent the right of states to determine for themselves the means by which to peacefully settle their disputes.

Any state currently engaged in efforts to resolve a bilateral dispute should vote against this resolution in recognition of the risk that supporting it suggests that any such dispute could be referred to the Court in this manner, without a state's consent, when the other party does not like how talks are proceeding. Establishing such a precedent is dangerous for all UN Member States. It could lead to normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when a state directly involved has not consented to the jurisdiction of the ICJ.

If, despite these serious concerns, this resolution is adopted, the ICJ would need to consider whether it would be appropriate for it to respond to this request. In our view, it would not. The advisory function of the ICJ was not intended to settle disputes between states.

A decision to refer this dispute to the ICJ would also interfere with ongoing efforts to achieve a solution through bilateral channels. As our UK colleague has discussed, the UK has

engaged in extensive and ongoing dialogue with Mauritius in an effort to address Mauritius' stated reasons for pursuing sovereignty and has made reasonable offers to Mauritius. We regret that Mauritius has chosen to circumvent these bilateral talks, and we continue to believe that this issue can only be addressed through efforts from both sides to negotiate a solution in good faith.

For the foregoing reasons, the United States will vote against this resolution, and encourages all Member States to do the same.

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Ambassador Sison also provided the U.S. explanation of vote before the UN General Assembly voted to request the advisory opinion. That statement follows and is available at <https://usun.state.gov/remarks/7877>:

Mr. President, as we stated in our remarks, the United States continues to view this as a purely bilateral matter that would have more appropriately been resolved through continued diplomatic engagement. Voting for this resolution will set a dangerous precedent, suggesting that the General Assembly could refer a bilateral dispute for an advisory opinion any time one party chooses this path over engaging in good faith negotiations. We urge all Member States to carefully consider the consequences of such a decision and to vote "no" on this resolution. Thank you.

C. INTERNATIONAL LAW COMMISSION

1. ILC's Work at its 69th Session

On October 25, 2017, Acting Legal Adviser Richard Visek delivered remarks at the General Assembly Sixth Committee meeting on the work of the International Law Commission ("ILC") at its 69th session. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8051>. Mr. Visek addressed the topics of "Crimes Against Humanity," "Provisional Application of Treaties," "General Principles of Law," "Evidence before International Courts and Tribunals," and "Immunity of State Officials from Foreign Criminal Jurisdiction."

* * * *

Mr. Chairman, the United States has followed with great interest the Commission's work on the important topic of the immunity of state officials from foreign criminal jurisdiction. We appreciate the effort that Special Rapporteur Escobar Hernandez has put into addressing this complex and, at times, controversial issue.

As we have indicated in past statements, the United States is in general agreement with the Commission's work on immunity *ratione personae*, the status-based immunity that protects incumbent heads of state, heads of government, and foreign ministers. Despite some residual

disagreement on precisely which officials enjoy status-based immunity, the Commission's draft articles on this topic can be seen to rest on customary international law.

The same cannot be said for the Commission's work on immunity *ratione materiae*. As the combined work of two Special Rapporteurs has shown, there are basic methodological disagreements about how to identify customary international law, if any, in this area. In evaluating state practice, does one begin with a baseline of immunity, and then look for examples of exceptions? Or does one begin with a baseline of no immunity, and then look for examples of immunity? And how does one account for prosecutions that are not brought to begin with, where the exercise of prosecutorial discretion could conceivably rest on considerations of immunity, but could also rest on completely different grounds, such as the lack of available evidence, or the absence of probable cause?

The categorical propositions on immunity set forth in draft Articles 5 and 6 on immunity *ratione materiae* do not reflect the full extent of State practice: there have, in fact, been prosecutions of foreign officials, including by the United States, for a range of conduct including corruption, violent crimes, and cyber crimes. Premature generalizations such as those contained in draft Articles 5 and 6 risk being inaccurate and potentially misleading.

In part because of the difficulty of identifying and evaluating state practice and *opinio juris* in the form of prosecutions, or lack thereof, there is a tendency to focus on case law. However, the decisions of national courts on *ratione materiae* immunity remain sparse. As the Special Rapporteur observed in her Fifth Report, "there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes" that Draft Article 7 identifies as exceptions to immunity. Moreover, these few decisions may be based on treaties, as in the *Pinochet* case, or on other considerations. Attempting prematurely to draw broad conclusions from a few decisions is both unwarranted as a legal matter and, in our view, unwise.

The Commission's work on this topic reached a critical phase last year, when the Special Rapporteur issued her Fifth Report, which includes Draft Article 7. The Fifth Report claims that there is a "clear trend" based on treaties, case law, legislation, and other state practice toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. However, the Fifth Report, and state practice in this area, do not actually provide evidence of a "trend" in any particular direction. Perhaps surprisingly, the Commission, by majority vote at its 69th Session, ratified the idea of an asserted trend toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. The Commission reached this conclusion despite the Special Rapporteur's finding that there are very few cases on point. In the view of the United States, there is insufficient state practice to illustrate a "clear trend," let alone the widespread and consistent state practice taken out of a sense of legal obligation required to create, or to demonstrate the existence of, sufficiently specific rules of customary international law to support the ILC's proposal.

The other rationale offered by the majority of Commissioners for adopting Draft Article 7 was that it declines to recognize immunity for the "most serious crimes of concern to the international community." We share the commitment to deterring and punishing these crimes, which we agree are very serious. However, the majority's approach in this instance does not acknowledge that immunity is procedural, not substantive, in nature. As emphasized by the International Court of Justice in the Arrest Warrant and Jurisdictional Immunities cases, immunity is purely procedural in nature, and operates irrespective of whether the alleged conduct is lawful or unlawful. In both cases, the ICJ held that the nature of the allegations does **not** affect

whether immunity exists under customary international law. Draft Article 7 ignores this basic proposition.

In addition to serious concerns about the lack of consistent state practice and *opinio juris* supporting Draft Article 7, we are troubled by the article's statement that immunity *ratione materiae* "shall not apply" to specified crimes. We understand that the Commission chose this language because of uncertainty about whether to characterize serious international crimes as involving "official acts" to begin with. But one cannot assess whether there is an exception to immunity without determining whether immunity would ordinarily attach to an act to begin with—the very question Draft Article 7 explicitly begs.

We are also concerned by the cursory explanation in the Commentary about why Draft Article 7 does not include an exception for crimes by foreign officials in the territory of the forum state. This fundamental issue of territorial conduct and its effect on criminal jurisdiction warrants much more serious attention and analysis. The Commission's limited discussion of this important and complicated issue makes its approach even more difficult to comprehend, and will create confusion rather than clarification. Likewise, the Commentary's brief treatment of corruption further confuses, rather than clarifies, the basis for the Commission's decision to exclude corruption from Draft Article 7.

The Committee's debate on Draft Article 7, which began last summer and continued into this summer, itself demonstrates that no consensus yet exists regarding the contours of immunity *ratione materiae*. The unusual split vote that led to the Committee's provisional adoption of the Draft Article further demonstrates that this topic does not command a true consensus of the Commission, and that the resulting language cannot be said to represent customary international law or even the progressive development of existing law.

This is not to say that all states have adopted an absolutist position regarding *ratione materiae* immunity; to the contrary, as noted above, there have indeed been prosecutions of foreign officials in some circumstances. Nor is it to say that there should not be any exceptions, even if immunity would ordinarily attach. However, in our view, the inconsistent nature of state practice means that premature attempts at codification can do more harm than good in this area.

We are deeply concerned that Draft Article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterizes States' conduct in this space. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to Draft Article 7 as THE definitive and comprehensive expression of international law. With all due respect to the Commission, the development of law in this area properly belongs in the first instance to States. The Commission's work is at its strongest when it rests on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft Article 7 exhibits none of these features, and risks creating the impression that the Commission is creating new law.

The United States looks forward to the Special Rapporteur's next and final report on procedural provisions and safeguards, which the Commission is expected to take up next summer. The Special Rapporteur has recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States is very interested in this final report and supports a full discussion of its proposals. The United States feels strongly that after the debate on procedural safeguards takes place, Draft Article 7 should be suspended until a consensus of the Commission can endorse all of the draft articles as sound and principled. After discussion of the final report, we believe it would be prudent for the Commission to put this

project on hold without further action by the Commission, until additional State practice provides a sufficient basis for meaningful generalizations to be drawn, and for the Commission's work to re-establish itself on a firmer footing.

Sometimes a group of talented legal scholars and practitioners can develop a well-supported set of guidelines to address a difficult international legal issue. But sometimes the best answer, at least to part of the question, is: we don't know—the law is unsettled, State practice is sparse and uneven, and the issue is not capable of being properly resolved at this time. In that situation, we lawyers should follow a principle of our medical friends and resolve to do no harm. I suggest that the Commission revisit Draft Article 7, and the timeline for this project, with that important principle in mind.

Mr. Chairman, the United States continues to follow with great interest the commission's work on the topic of crimes against humanity. Special Rapporteur Sean Murphy brings tremendous value to bear in the commission's work on this topic, including the challenging questions that this topic raises.

The development of the concept of "crimes against humanity" has played a critical role in the pursuit of accountability for some of the most horrific episodes of the last hundred years. Further, the widespread adoption of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, including by non-state actors, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable.

As we have previously noted, this topic's importance is matched by the complicated legal issues that it implicates. We are continuing to review the ILC's completed draft articles and commentary on this topic carefully, as they present a number of complex issues on which we are still developing our views. We are deeply grateful to Professor Murphy and to the other members of the commission for their work on a topic of such importance, and we eagerly look forward to providing our views to the commission. We expect that, under Special Rapporteur Murphy's stewardship, these complex issues will be thoroughly discussed and carefully considered in light of the views that we and other States will provide.

Mr. Chairman, turning to the topic of "Provisional application of treaties," the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, the Drafting Committee, and the working group for their contributions to the Draft Guidelines and commentaries that have been provisionally adopted by the Commission.

As the United States has stated, we believe the meaning of "provisional application" in the context of treaty law is well-settled—"provisional application" means that a State (or international organization) agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State (or organization). Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself once the treaty has entered into force. We approach all of the ILC's work on this topic from that perspective.

Accordingly, while we are in agreement with many of the Draft Guidelines and commentaries as provisionally adopted, we have a number of concerns. We will discuss three of our concerns today.

First, we are concerned that the Draft Guidelines, especially Draft Guidelines 3 and 4 and their commentaries, fail to make clear that provisional application within the meaning of Article 25 of the Vienna Convention on the Law of Treaties requires the agreement of all of the States and international organizations incurring rights or obligations pursuant to the provisional application of the treaty. The lack of clarity arises from the draft's use of the passive voice in describing agreements for provisional application—for example saying that provisional application arises when “it has been so agreed” without indicating whose agreement is required. While the commentary to Draft Guideline 3 explains why the Draft Guidelines do not refer to the agreement of the “negotiating States” as in Article 25 of the Vienna Convention, it does not specify the group of States and international organizations that must instead agree. This problem could be corrected by using the active voice and by indicating whose agreement is required.

We are concerned that the ambiguity in the Draft Guidelines is compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the commentary to Draft Guideline 3 makes reference to the agreement of “only some negotiating States” and “one or more negotiating States or international organizations” without making clear that only those States and international organizations that agree will be engaged in the provisional application of the treaty.

Second, we are concerned by the discussion in subsection (b) of Draft Guideline 4 and the accompanying commentary addressing what is described as a “quite exceptional” practice of establishing provisional application through a unilateral declaration by a State that is accepted by the other States and international organizations concerned. We do not believe that the examples cited in the commentary involve provisional application—within the meaning of Article 25 of the Vienna Convention—having been established through such a mechanism, and we are unaware of any other such practice. For this reason, we believe the discussion of such a hypothetical form of agreement to establish provisional application risks creating confusion, and we would urge that discussion of it be eliminated both from subsection (b) of Draft Guideline 4 and from paragraph (5) of the commentary.

The third concern deals with Draft Guideline 6, which provides that the provisional application of a treaty or part of a treaty “produces the same legal effects as if the treaty were in force” unless otherwise agreed. We are concerned that this may not be true in all respects. For example, as we have noted, provisional application can be more easily terminated than a treaty that is in force for that State. Moreover, we are studying whether—as suggested in the Special Rapporteur's last report and by some members of the Commission—Draft Guideline 6 means that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. To avoid suggesting too close a parallel between provisional application and entry into force of a treaty, we believe that Draft Guideline 6 should be revised to read: “An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof.”

Mr. Chairman, again, we thank the Commission for its work on this important topic and look forward to following future work on these issues.

Finally, we would like to respond to the Commission's decision to include two new topics in its long-term programme of work. The first topic is on “general principles of law,” which is referred to in Article 38(1)(c) of the International Court of Justice's statute as one of the sources of international law the court is to apply. We appreciate the syllabus that Commission member Marcelo Vazquez-Bermudez developed for this topic. Yet, while we agree that the

nature, scope, function and manner of identification of “general principles of international law” could benefit from clarification, we are concerned that there may not be enough material in terms of State practice for the Commission to reach any helpful conclusions on this topic.

With respect to the second topic, “evidence before international courts and tribunals,” we share the sentiments expressed by Commission member Aniruddha Rajput that international adjudication is an important method of peacefully resolving international disputes, and that evidence is an integral part of the adjudicative process. However, we question both the need for and the practicability of discerning general rules of evidence from the heterogeneous practice of international courts and tribunals that has developed over time in light of each forum’s particular circumstances and experience.

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On October 27, 2017, Mr. Simonoff delivered remarks at the General Assembly Sixth Committee on the report of the ILC on the work of its 69th session, addressing the topic of protection of the atmosphere. Mr. Simonoff’s remarks are excerpted below and available at <https://usun.state.gov/remarks/8062>.

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... We continue to be concerned about the direction the Commission appears to be taking with respect to this topic.

Our original concerns, which have only intensified as this topic has progressed, run along two main lines.

First, we did not believe that this topic was a useful one for the Commission to address. Various long-standing instruments already provide general guidance to States in their development, refinement, and implementation of treaty regimes, and, in many instances, very specific guidance tailored to discrete problems relating to atmospheric protection. As such, we were concerned that any exercise to extract broad legal rules from environmental agreements concluded in particularized areas would not be feasible and might potentially undermine carefully negotiated differences among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate ongoing and future negotiations and thus might inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission’s agenda. Our concerns were somewhat allayed when the Commission adopted an understanding in 2013, which we hoped might prevent the work from straying into areas where it could do affirmative harm. Contrary to these expectations, however, all four reports that have thus far been produced have taken an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines previously provisionally adopted by the Commission, the most serious related to the purported identification of “obligations” or “requirements” in contravention of the 2013 understanding that work on this topic would not impose new legal rules or principles on current treaty regimes. This year the Commission has strayed even further from this understanding by provisionally adopting a guideline that purports to inject consideration of the atmosphere not

only into the interpretation and application of treaties, but more broadly into the development of any new rule of international law.

Looking forward, we are particularly concerned by the Special Rapporteur's proposed long-term plan of work. If it were to be followed, the work would continue to stray outside the scope of the understanding and into unproductive and even counterproductive areas. For these reasons we call upon the Commission to suspend or discontinue its work on this topic.

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On November 1, 2017, Mr. Simonoff delivered further remarks in the Sixth Committee on the work of the ILC at its 69th Session, addressing the topics of: peremptory norms of general international law; succession of states in respect of state responsibility; and protection of the environment in relation to armed conflicts. Those remarks are excerpted below and available at <https://usun.state.gov/remarks/8118>.

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With respect to the topic of Peremptory Norms of General International Law, *jus cogens*, Mr. Chairman, we want to thank the special rapporteur, Professor Dire Tladi, for the substantial amount of work and analysis he has devoted to this project. We note that the Drafting Committee has provisionally proposed several new draft conclusions.

We appreciate that the topic of peremptory norms of international law is of considerable intellectual interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of certain areas of international law, perhaps most notably human rights law. However, we continue to have a number of concerns with this topic. As we have explained on previous occasions, from a methodological point of view, we wonder if there is sufficient international practice on important questions, such as how a norm attains *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law.

As a threshold matter, we believe that the criteria for the identification of peremptory norms must be based on, and be consistent with, Article 53 of the Vienna Convention on the Law of Treaties, VCLT. In this regard, we appreciate that the draft conclusions regarding the identification of peremptory norms proposed by the Committee correctly reflect the complete definition of peremptory norms set forth in Article 53. Nevertheless, a number of concerns remain and we would like to explain two of them here. First, we agree with the statement in paragraph one of Draft Conclusion 5 that customary international law is the most common basis for peremptory norms of general international law. However, contrary to what is asserted in paragraph 2 of the same conclusion, we are not aware of any examples of peremptory norms that are based on general principles of law. We would, therefore, suggest that the reference to such general principles be deleted or that the commentary explain that it has not been established that such principles could ever actually be a basis for peremptory norms of international law.

In addition, with respect to Draft Conclusion Nine of the Special Rapporteur's report, which deals with evidence of acceptance and recognition and has not yet been discussed by the Drafting Committee, we do not believe that judgments and decisions of international courts and tribunals may serve as evidence of acceptance and recognition by States of norms as peremptory

norms. Both Conclusion 13 of the Commission's Customary International Law project and Article 38 of the Statute of the International Court of Justice appropriately recognize judgments and decisions of international courts and tribunals only as a subsidiary means for determining rules of law. We believe that this is the approach that should be taken with respect to the identification of peremptory norms as well.

We thank the Special Rapporteur, Pavel Sturma, for his efforts in producing the first report on succession of states in respect of state responsibility, A/CN.4/708, which examines the scope of the project and sets out four proposed draft articles.

We appreciate that the Commission's work on the topic of succession of States in respect of State responsibility may lead to greater clarity in this area of the law. However, we are not confident that the topic will enjoy broad acceptance or interest from States, in view of the small number of States that have ratified the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention Succession of States in Respect of State Property, Archives, and Debts.

The issues raised by the topic of state succession in respect of State responsibility are complex, and careful and thoughtful consideration by governments will be required as the Commission continues to develop the draft articles. At this early stage, we urge the Commission to be clear when it believes it is codifying existing law as opposed to progressively developing the law.

In respect of Draft Article 3 as proposed by the Special Rapporteur, we note that the relevance of agreements to succession of States in respect of responsibility is described as depending in part on the type of agreement at issue. We are uncertain whether the distinctions among the types of agreements described in the draft article and commentary—including so-called devolution agreements, claims agreements, and other agreements—are well understood and established in State practice. We believe the draft article could benefit from further consideration as to whether these distinctions provide a sound basis on which to base general conclusions about State practice in this area. At the same time, we believe paragraph 4 of Draft Article 3 is correct to recognize the central importance of the principles reflected in Articles 34 through 36 of the Vienna Convention on the Law of Treaties, including the general rule that a treaty does not create rights or obligations for a third State without its consent, for the issues addressed in Draft Article 3.

We will continue to study the draft articles adopted by the Commission based on the reports produced by the Special Rapporteur.

Mr. Chairman, with respect to the topic "Protection of the Environment in Relation to Armed Conflicts," the United States would first like again to express its thanks for the efforts of the prior Special Rapporteur, Ms. Marie G. Jacobsson, in drafting reports that recognize the complexity and controversial character of many of these issues. We look forward to the contributions of the new Special Rapporteur, Ms. Marja Lehto.

We would like to note certain areas of concern from the proposed draft principles that emerged from the ILC's Drafting Committee in August 2016 that we hope the new Special Rapporteur will take into account.

First, with regard to the general scope of the project, we remain concerned by the interest and attention paid to addressing the concurrent application of bodies of law other than international humanitarian law during armed conflict. International humanitarian law is the *lex specialis* in situations of armed conflict, and the extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case-by-case basis.

Second, we are similarly concerned that this would not be the appropriate forum to consider whether certain provisions of international humanitarian law treaties reflect customary international law. We emphasize that such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*.

Third, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States “shall” or “must” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. Yet the principles indicate, in an introductory clause, that they are aimed in substance at “enhancing” the protection of the environment in relation to armed conflict—in other words, at influencing the progressive development of the law. Indeed, there is little doubt that several of these principles go well beyond existing legal requirements. For example, Draft Principle 8 introduces new substantive legal obligations in respect of peace operations and Draft Principle 16 expands the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include “toxic or hazardous” remnants of war.

Once again, we thank Ms. Marie Jacobsson and the Commission for their impressive work, and look forward to the efforts of Ms. Marja Lehto on this topic that is so important to all of us.

* * * *

2. Past ILC Work

See Chapter 4 for Mr. Simonoff’s remarks on the ILC’s draft articles on the effects of armed conflict on treaties.

D. REGIONAL ORGANIZATIONS

1. North American Development Bank

The United States and Mexico are parties to the Agreement Concerning the Establishment of a Border Environment Cooperation Commission (“BECC”) and a North American Development Bank (“NADB”), signed in Washington and Mexico City on November 16 and 18, 1993, respectively, and amended by a Protocol of Amendment signed by the parties on November 25 and 26, 2002, (the “Charter”). In 2017, they signed a second protocol amending the Charter in order to transform the BECC into a standing subsidiary component of NADB that is a fully integrated part of NADB. The Charter was amended by replacing the original text in its entirety with the text contained in Appendix I to the second protocol of amendment. The Protocol enters into force thirty days after an exchange of diplomatic notes between the Parties, notifying each other of the completion of domestic legal procedures for entry into force of the Protocol.

2. Organization of American States

a. *Venezuela*

On May 31, 2017, Under Secretary of State for Political Affairs Thomas A. Shannon, Jr. delivered remarks at the Organization of American States (“OAS”) regarding Venezuela. Those remarks are excerpted below and available at <https://www.state.gov/p/us/rm/2017/271487.htm>.

* * * *

Thank you, Mr. Chairman. To you, sir, to the Secretary General and to all my colleagues, I extend my respect and gratitude for your presence here today as we discuss the increasingly dire situation in Venezuela. Over the last 18 months, we have seen a dramatic erosion of constitutional rule in Venezuela. This extends from disputes over the National Assembly’s makeup and powers; the thwarting of the recall referendum late last year; the Supreme Court’s assumption of basic legislative functions in recent months; the ongoing imprisonment of opposition leaders and other restrictions on individual freedoms, including the use of military tribunals to try civilians; the violent repression of peaceful protests; and, most recently, the effort to seat a constitutional assembly to usurp the role of the National Assembly. All of these signal a rupture in Venezuela’s democratic and constitutional order.

At the same time, we have all been moved by the humanitarian hardships faced by 31 million Venezuelans. Economic stagnation has given way to hyperinflation and increasing economic instability. Venezuelan citizens struggle to maintain even basic access to food and medicine. The United States has condemned the government’s violent crackdown against the parties of the parliamentary majority and civil society. In just the past two months of political protests, as has been noted, more than 60 people have been killed, more than 1,000 injured, and nearly 3,000 detained, including 331 civilians charged criminally by military courts. I know many other states have been similarly disturbed by the course of events in Venezuela and ever more determined to do what we can to address it.

Mr. Chairman, beyond this region, the European Union and the Vatican have also expressed grave concerns regarding events unfolding in Venezuela. We also have seen a growing willingness among Venezuela’s neighbors to assist in finding a peaceful, democratic, and comprehensive solution to the problems facing the Venezuelan people. Let me underscore my nation’s continuing call for nonviolence in the streets of Venezuela. The rights of peaceful assembly and peaceful protest ought to be protected and not repressed.

The unfortunate decision by the Government of Venezuela to initiate the nation’s withdrawal from this organization will do nothing to resolve the country’s woes. Withdrawal will only deprive Venezuelans of the tools and institutions they need just when they need them most.

Mr. Chairman, instead of abandoning our hemispheric community of democratic nations and further isolating itself from the international community, we urge the Venezuelan Government to fulfill the commitments it freely made last fall during its participation in the Vatican-backed dialogue process—namely, to promote free elections, respect the independence of the National Assembly, respect the freedoms of all of Venezuela’s political prisoners, and meet the humanitarian needs of the Venezuelan people.

The Organization of American States can partner with other actors in the international community on a renewed effort to identify an agreed path out of the polarization and violence we see to Venezuela toward a better future.

The United States supports the proposal contained in the draft declarations calling for the establishment of a contact group to guide the next stage of our diplomatic efforts. We believe there is an international role in the rebuilding of trust among the main political actors in Venezuela, as well as the reduction of tensions among citizens and their institutions.

Any new effort must begin with concrete confidence-building steps of the kind laid out in our declarations today. Many of these are no more than fulfillment of existing constitutional obligations the government has bypassed or ignored. Our goal is to return to the full respect for the rule of law, the full respect for freedoms of political expression and participation.

Mr. Chairman, the collective commitment to promote and consolidate democracy that we, the nations of the Americas, have enshrined in core OAS instruments remains a model for other regions in the world. Today is an opportunity for us to demonstrate that this commitment remains alive and well and relevant to the current plight of our Venezuelan neighbors. Let us continue to show the world that inter-American solidarity can help find a path back to peace and prosperity for an essential member of our American family, always mindful that our solidarity is based on the respect and legitimacy that extends from the self-determination of peoples and not the self-perpetuation of governments. Thank you very much.

* * * *

b. *Model Law on the Simplified Corporation*

On June 20, 2017, the General Assembly of the Organization of American States adopted a resolution regarding the Model Law on the Simplified Corporation that had been approved by the Inter American Juridical Committee (“IAJC”). The General Assembly resolved to take note of the Model Law and requested that the IAJC and the Department of International Law disseminate the Model Law. OAS Member States were invited to adopt aspects of the Model Law that accord with their domestic laws and regulatory frameworks. The Model Law provides a simplified corporate structure, allowing micro-, small-, and medium-sized business enterprises (“MSMEs”) to receive the benefits of incorporation with lesser degrees of complexity and lower cost than the norm. The model can also benefit larger businesses and facilitate foreign investment to improve economic growth.

The United States supported the approval by the OAS General Assembly of the IAJC Model Law on Simplified Stock Companies. Attorney-Adviser Michael Dennis delivered the following statement of support by the United States on December 1, 2016.

* * * *

We support the call of other delegations that the OAS General Assembly formally approve the IAJC Model Law on Simplified Stock Companies.

We appreciate the excellent report of the Department of International Law on the model law and its similarity to standards developed in other fora, particularly the World Bank, UN

Commission on International Trade Law (UNCITRAL) and UNCTAD. We also want to thank Dr. Reyes for his highly informative presentation concerning the effect laws on simplified stock companies have had on informality and commercial development around the world, particularly in the OAS.

Micro-, small- and medium-sized enterprises (MSMEs) are the engines of economic growth and job creation in all OAS member states. They were identified as essential to the post 2015 UN development agenda as key to the achievement of sustainable development goals. It is envisaged that the funding of SDGS will come from commercial trade rather than development aid.

MSMEs typically constitute 95% or more of businesses in the OAS and employ a substantial portion of the work force. However, the vast majority of MSMEs in developing countries operate in the informal sector. UNCITRAL has reported that 90% of MSMEs in developing countries operate in the informal sector despite the need for a formal legal status to operate and enter into contracts. The OECD has also found that 60% of the world's workers (1.8 billion people out of 3 billion) are employed in the informal sector. According to the World Bank IFC, "[w]orldwide, women are three times more likely than men to be working in the informal economy."

The legal uncertainty under which informal businesses operate renders their transactions costlier and discourages attempts to grow, hire employees and seek credit. Courts and officials regard them as "irregular" entities subject to the invalidation of their contracts, plus fines. Informal businesses don't pay taxes or minimum wage nor do they offer maternity leave or health and safety protections afforded by international labor standards.

On the other hand, simplified business registration and incorporation promotes the rule of law. Greater formalization is the basis for inclusive growth, providing workers with the dignity of lawfulness and access to social services and protections. It reduces corruption and opportunities for extortion and gives workers peace of mind. Workers who pay taxes feel empowered to demand good infrastructure and governmental services. This increases governments' accountability and efficiency and ultimately increases economic growth.

An enabling legal environment providing for simplified business incorporation creates the gateway through which businesses enter the formal economy and provides them:

- Greater certainty of operation;
- Access to previously unreachable markets; and
- The capacity to compete and seek a fair treatment under the law.

The benefits of simplified business incorporation are not limited to the businesses themselves.

- Entering the formal sector obligates businesses to pay taxes and comply with labor laws.
- Easier start-up laws generate more businesses, lower prices, and increase product availability.

For these reasons, ILO Labor Standard (R204) recommends that ILO Members facilitate workers' transition from the informal to the formal economy. The World Bank has also found that economies with modern business registration "grow faster," "promote greater entrepreneurship and productivity," "create jobs," "boost legal certainty," and "attract larger inflows of foreign direct investment."

As the Juridical Committee concluded, for a majority of small entrepreneurs in the OAS, becoming and remaining formal is a very complicated endeavor. According to the Committee:

The lack of a progressive legislative framework permitting simpler and more modern business associations is often described as a major impediment to economic development within our hemisphere. Under many national legal codes, only certain types of business associations are permitted.... These business forms have roots in European legal codes of the last century and often require businessmen to follow elaborate and costly notarial and administrative processes.

As highlighted in the Committee report, the framework for the Model Law on Simplified Companies is drawn from successful legislative reforms in both developed and developing countries, including in the OAS. The Model Law blends features of two business forms: partnerships and corporations. We agree with the conclusion of the Committee that by combining both corporate and partnership-like components, the Model Law promotes significant contractual flexibility, while preserving the benefits of limited liability and asset partitioning.

As noted by the Department of International Law, the best practices underlying the Model Law are substantially similar to standards developed by UNCITRAL, UNCTAD, and the World Bank. Additionally, APEC is using the same core elements to evaluate its member economy laws on simplified registration and incorporation. The study is based on the following 10 criteria, specifically whether the law permits:

- creation of a simplified company by one or more persons;
- full- fledged limited liability;
- maximum freedom of contract;
- a flexible organizational structure;
- optional minimum capital;
- use of a general-objectives clause;
- fiscal transparency and simplified accounting;
- simple registration and incorporation requirements;
- optional use of intermediaries (e.g., lawyers, notaries, or witnesses);
- flexible means of enforcing shareholder agreements.

It is designed to assist APEC economies in identifying legal gaps to help them develop an enabling legal environment for business startups.

In summary, we hope the CAJP omnibus resolution for the General Assembly will formally approve the Model Law. We believe widespread implementation of the Model Law would assist OAS states in providing an enabling legal framework for simplified incorporation that will: (1) empower small businesses; (2) promote international economic growth based on trade not aid; and (3) enable women to participate more fully in the global supply chain. This reform has the potential to make a difference for many people across the OAS and give them a job, a future and a hope.

* * * *

E. OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Charter of the OAS authorizes the Inter-American Commission on Human Rights ("IACHR" or "Commission") to "promote the observance and protection of human rights" in the Hemisphere. The Commission hears individual petitions and provides recommendations principally on the basis of two international human rights instruments, the American Declaration of the Rights and Duties of Man ("American

Declaration”) and the American Convention on Human Rights (“American Convention”). The American Declaration is a nonbinding statement of principles adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international treaty that sets forth binding obligations for States parties. The United States has signed but not ratified the American Convention. As such, the IACHR’s review of petitions with respect to the United States takes place under the substantive rubric of the American Declaration and the procedural rubric of the Commission’s Statute (adopted by OAS States via a nonbinding resolution) and the Commission’s Rules of Procedure (“Rules”) (drafted and adopted by the Commissioners themselves).

In 2017, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings. The IACHR also unveiled a number of measures aimed at implementing more efficient case-management. For example, the Executive Secretariat started applying a Commission decision from October 2016 that allows the Secretariat to administratively join, on the Commission’s behalf, the admissibility and merits stages of existing cases if certain criteria are met. See <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-16-en.pdf>. In 2017, the Secretariat announced admissibility and merits joinder in several cases in which the United States had filed responses. These cases satisfied one or more of the criteria set forth in the Commission’s 2016 decision, *i.e.*, they involve the death penalty, are subject to an outstanding request by the Commission for precautionary measures, or were filed with the Commission before 2006. The cases in which the Commission announced joinder in 2017 are: *Four Million American Citizen Residents of Puerto Rico* (13.154); *Walter Mickens* (13.220); *René Schneider* (13.221); *Melissa L., Jesús L., and Yolanda L.R. (Undocumented Workers)* (13.222); *Rosello et al.* (13.326); *Manuel Valle* (13.339); *Jurijus Kadamovas et al.* (13.352); *Nelson Ivan Serrano Saenz* (13.356); *Héctor Rolando Medina* (13.358); *Julius O. Robinson* (13.361); and *Linda Carty* (13.362).

As another strategy to reduce its backlog of cases, in 2017, the IACHR began adopting streamlined admissibility reports of far fewer pages than before. The United States welcomed this strategy in its July 31, 2017 filing in *Rosello* (Case No. 13.326). The IACHR also archived, under Article 42 of its Rules of Procedure, three petitions in which there had been no activity for years, effectively closing the proceedings without a decision on admissibility or merits: *Benatta* (P-18-09), *Thomas et al.* (P-990-06), and *Enwonwu* (12.206).

Despite these efforts at improved efficiency, the IACHR only issued one merits report in a case involving the United States (*Saldaño*, 12.254) and two admissibility reports (*Igartua*, 13.154, and *Rosello*, 13.326). The United States responded to a preliminary version of the *Saldaño* merits report in January 2017.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2017 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2017 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2017 that are not discussed herein, are posted in full (without their annexes) at <https://www.state.gov/s/l/c8183.htm>.

1. Substantive Response Briefs and Letters

a. *Case No. 12.729 (Summerlin): Archival of Long-Dormant Case and Petitioner's Duty to Keep IACHR Updated About Status of Domestic Proceedings*

On January 9, 2017, the United States filed a letter in Case No. 12.729, requesting the IACHR archive or close the case based on its discretion to reconsider admissibility and to dismiss if there has been effective domestic relief, emphasizing the need for the petitioner to keep the IACHR updated. Excerpts follow from the January 9 letter to IACHR Executive Secretary Paulo Abrão.

* * * *

This letter serves as a request that the Commission archive this matter for lack of activity. Alternatively, the Commission should ask the Petitioners to provide detailed, updated information regarding the status of their various claims, should declare inadmissible those claims which have been the subject of effective domestic relief, and should at minimum declare inadmissible or archive the claims of any Petitioner who has died of causes unrelated to the death penalty.

The Commission found this Petition admissible on October 29, 2009, with respect to all named Petitioners except Mr. Daniel W. Cook, for whom the Commission found all claims inadmissible. On July 21, 2011, the Commission issued a decision on the merits for Mr. Jeffrey Timothy Landrigan, one of the nine original Petitioners, whose claims had been separated from those of the other remaining Petitioners.

We are unaware of any activity on the claims of the remaining 97 Petitioners since October 2009. Our own research indicates that of those individuals still associated with the Petition, nearly half have had significant developments in their status since the Petitioners' last filing that would significantly affect the status of their claims, and may (or does) moot their claims entirely. According to public records, at least 19 of the Petitioners have had their death sentences overturned, reduced to life in prison, or have otherwise been resentenced to non-capital prison terms; at least five of them have been released from prison; at least nine of them have died of unrelated causes; and at least 14 of them have been executed.

Furthermore, as the Commission knows, the United States strongly supports the Commission and the important role it has historically played in promoting human rights throughout the Hemisphere. Accordingly, the United States has a strong interest in the maintenance of the Commission's efficient functioning in a severely constrained budgetary environment. In the United States' view, archiving this entire Petition due to the long period of inactivity would be an appropriate course of action in light of the Commission's limited resources, the urgent need to clear out its backlog of cases, and the Commission's many other priorities with respect to the United States and the other countries of the Hemisphere.

Alternatively, if the Commission chooses not to archive this Petition, it should ask the Petitioners' representatives for detailed information as to the current status of the domestic proceedings of each of the 97 Petitioners—many of whom, as explained above, are deceased, no longer in prison, or no longer serving capital sentences—so that it may properly evaluate the

continued admissibility of each Petitioner's claims. It is, after all, petitioners and their representatives—not the State—who should proactively keep the Commission updated as to material developments that could affect the disposition of their claims before the Commission. Despite many material developments over the past seven years, the United States is unaware of any such update provided by Petitioners' representatives.

With such updated information at its disposal, the Commission should then reconsider its admissibility report with respect to the Petitioners who have received effective relief in the domestic system, as it has the discretion to do, and declare those Petitioners' claims inadmissible under Article 34(c) of the Rules of Procedure in light of the supervening information. ...

* * * *

b. *Petition No. P-300-09 (Bullock): Dismissal of IACHR Petition in Light of Untimeliness; Domestic Settlement; Fourth Instance Formula; Nonbinding Nature of American Declaration*

On January 13, 2017, the United States filed its supplemental response to Petition No. P-300-09 (*Bullock*). The United States transmitted an initial response on November 28, 2014, to which the petitioner responded with a letter containing additional information on June 1, 2015 (transmitted on September 28, 2016 to the United States). The supplemental response filed in 2017 urges IACHR dismissal when the matter has been voluntarily settled in the domestic system.

* * * *

Since his 1984 conviction, Mr. Bullock has received several payments from state and local governments in the United States. The November 2014 U.S. response to this Petition cited two of those payments: first, in 1986, Mr. Bullock brought a claim against the City of Chicago, Illinois, for false arrest related to his 1983 arrest for the rape and kidnapping that led to his 1984 conviction and incarceration. The City of Chicago settled that claim with Mr. Bullock for a sum of \$3,000. ...

Second, also in 1986, Mr. Bullock brought a claim against Cook County, Illinois, for allegedly failing to protect him from gang violence while he was incarcerated in the county jail pending trial The County settled that claim with Mr. Bullock for \$20,000, and we are not aware that Mr. Bullock has challenged the sufficiency of this settlement in U.S. courts.

Beyond those two payments, Mr. Bullock received a third payment. ... Mr. Bullock filed a claim in the Illinois Court of Claims ... and was awarded a payment from the State of Illinois on August 5, 1998 in the amount of \$120,300, specifically as compensation for his unjust imprisonment of 12 years, which the Court "calculated ... as being the maximum allowed by the statute" in Mr. Bullock's case. Mr. Bullock disputed the amount of this award, but failed to appear at three subsequent status hearings (he did appear at other status hearings, where he requested a continuance). ... Thus, his award of \$120,300 was finalized on March 15, 2001, and this compensatory payment was reported publicly in the Illinois Court of Claims Annual Report for Fiscal Year 2001.

Mr. Bullock also brought a series of claims against the City of Chicago for alleged violations of his rights relating to his conviction and imprisonment. Mr. Bullock filed at least five lawsuits in relation to the circumstances surrounding his 1983 arrest between 1986 and 1987, ... After his exoneration, Mr. Bullock also filed a civil lawsuit under 42 U.S.C. § 1983 However, the U.S. District Court for the Northern District of Illinois ... did not find in Mr. Bullock's favor.

Mr. Bullock filed a motion for reconsideration of his claim, and in 2003, the court found that there had been no concealment of evidence from Mr. Bullock... In other words, the court found no deliberate wrongdoing by the City of Chicago, and therefore did not find in Mr. Bullock's favor. Mr. Bullock appealed this decision to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the district court's finding on a variety of grounds, including that Mr. Bullock's claims were meritless and untimely filed. A petition to have this case reheard was denied on February 11, 2005.

The United States is aware of no further activity in Mr. Bullock's domestic proceedings after February 2005. Mr. Bullock filed his Petition before the Commission on March 3, 2009.

B. DISCUSSION

For a petition to be admissible before the Commission, it must satisfy several procedural requirements under the Commission's Rules of Procedure ("Rules"). Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when ... it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure" Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments" For the United States, the American Declaration is the only "applicable instrument."

In this petition, Mr. Bullock alleges that the United States has violated his rights under Articles II, XVIII, and XXV of the American Declaration. However, Mr. Bullock's claims must be dismissed because they are untimely and because Mr. Bullock has already received a domestic remedy for these claims. Separately, the Commission lacks competence in light of the "fourth instance formula" to review the Petition and it should also be dismissed on this basis. Mr. Bullock has raised each of his claims through the domestic court system and is simply unhappy with the result. The Commission may not sit as a "court of fourth instance" to second-guess the factual and legal determinations of the domestic courts and juries. These grounds for dismissal are discussed, in turn, below.

1. The Petition Must Be Dismissed as Untimely

Article 32(1) of the Rules requires that petitions be "lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." Article 28(7) stipulates that compliance with this statute of limitations is a threshold requirement for the Commission's consideration of petitions. In this matter, the compensation paid by the State of Illinois to Mr. Bullock for his wrongful conviction was finalized in March 2001, and the subsequent litigation arising from the same facts concerning Mr. Bullock's conviction and imprisonment was concluded in February 2005. However, Mr. Bullock did not file his petition with the Commission until more than four years later, in March 2009, and he provides no explanation for this long delay. The Commission has repeatedly dismissed as inadmissible petitions that have been filed after the six-month period of time set forth in Article 32(1). In keeping with the requirements of Articles 28(7) and 32 of the Rules, as

applied by the Commission in many prior matters, the Commission must find Mr. Bullock's claims inadmissible in their entirety because his petition was not timely filed.

2. The Petition Must Be Dismissed ...

Mr. Bullock has voluntarily settled claims and received compensation arising out of his wrongful arrest, conviction, and imprisonment. He has already received compensation in the amount of \$120,300 from the State of Illinois related to his wrongful conviction and imprisonment, and voluntarily settled his claims against the City of Chicago relating to his 1983 arrest for \$3,000. He cannot now assert that the United States has violated the American Declaration with respect to those settled matters because he has already received a remedy.

* * * *

The settlements, compensatory payments, and ensuing dismissals of Petitioner's cases in Illinois state courts, U.S. federal district court, and a U.S. federal court of appeals show that Mr. Bullock received adequate and effective remedies for his claims, to which he freely and fully agreed, through the process of exhausting remedies through the U.S. court system. In his June 1, 2015 letter, Mr. Bullock appears to assert that his settlements and compensation from the State of Illinois and the City of Chicago were insufficient, and encloses as "evidence" of this insufficiency a series of newspaper articles documenting settlements awarded to victims of completely unrelated actions by employees of the City of Chicago. These include compensation paid to a paraplegic who was fatally shot by a Chicago police officer in 2007, compensation paid to a man who was injured by a vehicle driven by a city worker, compensation paid to individuals who were discriminated against on the basis of race in a firefighters' entrance exam, individuals injured by a fire in a city building, and individuals subjected to physical abuse during interrogations by city police. None of these settlements are even remotely related to Mr. Bullock's claims, which concern a wrongful arrest, conviction, and imprisonment.

The only remotely related cases that are cited by Mr. Bullock are in his October 16, 2009 letter. These cases outline jury verdicts awarded to individuals who were convicted as a result of unlawful actions by City of Chicago officials. Yet Mr. Bullock's case is not analogous to any of these cases: courts have not found that Mr. Bullock was the victim of any unlawful action or intentional wrongdoing by City officials. Instead, he was the subject of a mistaken eyewitness identification that led to an incorrect conviction. The State of Illinois has a law in place to deal with just such a situation: as described above, Illinois law provides for a process by which individuals who are later exonerated of crimes based on innocence or a pardon by the Governor of Illinois are eligible for compensation from the State. Mr. Bullock pursued such a claim and succeeded, receiving compensation that he and his attorney freely accepted. The fact that Mr. Bullock is unhappy with the amount of his compensation is insufficient to state facts that tend to establish a violation of the American Declaration, and any such claim before the Commission is manifestly groundless.

As a result, the Commission should reject Mr. Bullock's claims as manifestly groundless under Article 34(a) and (b) of the Rules.

3. The Petition Must Be Dismissed Under the Commission's Fourth Instance Formula

The Commission must also dismiss the Petition because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have

been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”

The fourth instance formula recognizes that the Commission cannot substitute for the States’ domestic judiciaries, and nothing in the American Declaration, the Charter of the Organization of American States (OAS), the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. ...

As the United States has consistently maintained, it is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or the requisite expertise to perform such a task.

* * * *

4. The Commission May Not Issue Binding Orders with Respect to the United States, Under the American Declaration or Otherwise

Finally, the United States reaffirms its longstanding position that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on Member States of the OAS; and the Commission may issue recommendations but not binding orders.

Nevertheless, the United States has undertaken a political commitment to uphold the American Declaration. As the Commission well knows, the United States takes its American Declaration commitments and the Commission’s recommendations very seriously. The protections afforded individuals in the U.S. criminal justice system are among the strongest and most expansive in the world, and the U.S. Constitution—which governs both federal and state criminal proceedings—establishes a wide range of rights and legal protections for individuals charged with criminal offenses, as do other federal and state laws and regulations.

* * * *

c. *Petition No. MC-454-14 (Owen): Inadequate Information Provided by Petitioners; Untimeliness of Petition; Fourth Instance Formula*

On April 3, 2017, the United States filed its response to the request for precautionary measures by parents of two minors. The parents challenged a Kansas state court’s custody determinations. The U.S. response, excerpted below, notes the failure by the petitioners to provide sufficient information, the petition’s untimeliness, and the application of the fourth instance formula as a ground for dismissing the petition.

* * * *

In the interim, we wish to point out that, if the Commission treats the Petitioners’ filing as a petition seeking a determination of admissibility and on the merits under the Rules of Procedure (“Rules”)—and not only a request for precautionary measures—the filing appears to be untimely. Pursuant to Article 32(1) of the Rules, “[t]he Commission shall consider those

petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.” As discussed above, Petitioners have indicated that their custody case in the domestic court system was dismissed on February 26, 2014, nearly three years before your office transmitted their filing to the United States. The petition itself is undated, so we have no way of knowing whether the petition was lodged within a period of six months following the date on which the alleged victim has been notified of the decision that allegedly exhausted the domestic remedies. Pursuant to Article 28(7) of the Rules, a petition addressed to the Commission shall demonstrate “compliance with the time period provided for in Article 32 of the[] Rules of Procedure.” Pursuant to Articles 26(2) and 27, the “Commission shall consider petitions ...only when the petitions fulfill the requirements set forth...in the Rules of Procedure” and “[i]f a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.”

Finally, it is worth observing that Petitioners have requested that the Commission provide them with “a hearing on [their] court cases.” However, as the Commission has explained on numerous occasions, the Commission is not a court of fourth instance. The Commission may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth-instance formula.” Where, as here, a petition “contains nothing but the allegation that [a domestic] decision was wrong or unjust in itself, the petition must be dismissed” under the fourth instance formula.

* * * *

d. *Petition No. MC-184-17 (Rahim): Lack of Competence; Nonbinding Nature of Precautionary Measures; Failure to Exhaust Domestic Remedies; Illegality of Torture Under International Law*

On July 14, 2017, the United States filed its response to a Commission request for information on a precautionary measures request lodged by a petitioner at the Guantanamo Bay Naval Station detention facility.

* * * *

The United States respectfully submits that the Commission should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the reasons set forth below.

As a preliminary matter, Mr. Rahim is detained under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the law of war, in the ongoing conflict with al-Qaida, the Taliban, and associated forces. ... Mr. Rahim was reviewed by the Periodic Review Board (PRB or “Board”) on September 19, 2016. ...The PRB found that Mr. Rahim merited continued law of war detention...

Lack of competence

Mr. Rahim alleges that the United States has “violated” certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS). ...

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to certain claims of Mr. Rahim because during situations of armed conflict, the law of war is the *lex specialis*. ...

Precautionary measures**Lack of authority to issue precautionary measures**

Your office’s communication dated May 10, 2017 notes that a request has been made for precautionary measures in this case. The United States respectfully reiterates that the Commission does not have the authority to require that States adopt precautionary measures. The reasons for the U.S. position on precautionary measures have been stated in detail in past submissions...

* * * *

Inadmissibility

As noted above, in his petition for precautionary measures Mr. Rahim additionally requests the Commission to undertake admissibility and merits determinations based on the allegations presented in the petition. The Commission should decline this request to proceed to the admissibility stage because Mr. Rahim’s petition is inadmissible for failure to exhaust domestic remedies. Furthermore, the Commission should not request precautionary measures in instances where Petitioner has not exhausted available domestic remedies, where those remedies hold the prospect of providing him or her with effective relief. In this case, Petitioner has filed a petition for a writ of *habeas corpus*, as described below, and as a result should not benefit from the Commission’s intervention at this stage because a successful *habeas* petition would provide certain relief he now seeks from the Commission.

* * * *

As a courtesy, we here provide some general information regarding U.S. law, policy, and practice regarding detention authorities; safeguards against torture and ill-treatment in U.S. custody; and medical treatment in detention, including, where relevant, information specific to Mr. Rahim.

Detention authority, procedural protections during habeas proceedings in Federal court, and Executive Order 13492

As noted above, all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare circumstances required by compelling security interests, all of the evidence relied upon by the government in *habeas* proceedings to justify detention is disclosed to detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal

authority to hold the detainees. Detainees whose *habeas* petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. The U.S. government respects the critical role of detainees' counsel in these proceedings and, more broadly, the fundamental importance of that role in the U.S. system of justice. It will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

As holders of a valid U.S. security clearance, detainees' lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. government. All holders of U.S. security clearances are subject to these same obligations. In accordance with Executive Order 13526, in no case may information be classified in order to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency."

Additionally, in 2009, then-President Barack Obama issued Executive Order 13492, which required a comprehensive review of the status of Guantanamo detainees to determine their appropriate disposition by way of release, transfer, prosecution, or continued detention pursuant to the law of armed conflict. That review was completed on January 22, 2010, and Mr. Rahim was designated for continued law of war detention at that point. Detainees such as Mr. Rahim at Guantanamo are now eligible for review by the PRB, as described above, which continues its work of assessing whether continued law of war detention of certain detainees is necessary to protect against a continuing significant threat to the security of the United States. Since the PRB began its work in October 2013, it has held 78 full hearings, with the results of 77 now made publicly available. Of those 77 determinations, 38 detainees were designated for transfer, 36 of whom have been released from U.S. custody and resettled or repatriated. The pace of hearings increased in 2015 and 2016, with hearings and file reviews as listed on the PRB website. The PRB is not designed to assess the lawfulness of a detainee's detention. If, however, at any time during the periodic review process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Detainees are assisted in proceedings before the PRB by a U.S. government-provided personal representative, and may also be assisted by private counsel at no expense to the U.S. government. Each detainee, aided by his representative, is permitted to participate in the review process by presenting to the PRB a written or oral statement, introducing relevant information, including written declarations, and answering any questions posed by the PRB. Additionally, the detainee may call reasonably available witnesses who are willing to provide information relevant and material to the PRB's determination of whether continued law of war detention of the detainee is necessary to protect against a significant threat to the security of the United States.

A detainee's personal representative receives full access to the information considered by the PRB, except in rare instances where doing so would put national security at risk. Any private counsel also receives such information, provided he or she possesses an appropriate security clearance. In cases where information considered by the PRB is withheld from a detainee's personal representative or private counsel, substitutes or summaries of the withheld information are provided. The PRB ensures that any substitutes or summaries are sufficient to provide the personal representative and private counsel with a meaningful opportunity to assist the detainee during the review process.

Mr. Rahim was represented in his initial PRB hearing by two personal representatives, who were provided with the information considered by the PRB as described above. Mr. Rahim is also represented by private counsel in his efforts before the PRB, but that counsel did not file his paperwork in time to receive the necessary security clearance to participate in Mr. Rahim's PRB proceeding in 2016 or to get access to the information for that proceeding. Mr. Rahim continues to be eligible for review by the PRB. He will automatically receive another full review before the PRB in September 2019, three years after his initial full review. In the interim, he receives a file review every six months to determine whether any new information raises a significant question as to whether his continued detention is warranted. If such a significant question is raised during a file review, he will promptly receive a full review.

Treatment in detention

Law and policy

The United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has taken steps to strengthen protections against torture and cruel, inhuman, or degrading treatment or punishment. Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and the international community.

All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo. Executive Order 13491, *Ensuring Lawful Interrogations*, directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including cruel treatment and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It further orders that such individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized and listed in the Army Field Manual 2-22.3. The Army Field Manual explicitly prohibits threats, coercion, and physical abuse, and is publicly available for the Commission's review. The National Defense Authorization Act for Fiscal Year 2016 ("2016 NDAA") codified many of the key interrogation-related reforms required by the Executive Order. It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09 requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must

be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2310.01E requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.” All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

U.S. law provides several avenues for the domestic prosecution of U.S. government officials and contractors who commit torture and other serious crimes overseas. ...

The U.S. government has investigated allegations of torture or cruel treatment. Prior to August 2009, career prosecutors at the Department of Justice carefully reviewed several cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a U.S. Central Intelligence Agency (CIA) contractor and a Department of Defense contractor. In 2009, the U.S. Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. government custody subsequent to the 9/11 attacks. The inquiry was limited to a determination of whether prosecutable offenses were committed. The review considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. That review of the alleged mistreatment of 101 individuals, led by a career Federal prosecutor and now known as the Durham Investigation, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not have been sufficient to obtain and sustain convictions beyond a reasonable doubt.

Beyond the Department of Justice, there are many other accountability mechanisms in place throughout the U.S. government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. ...

* * * *

International Committee of the Red Cross (ICRC) access

The 2016 NDAA requires that any U.S. government department or agency provide the ICRC with notification of, and prompt access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with existing Department of Defense regulations and policies. The Department of Defense has worked closely with the ICRC to facilitate increased opportunities for Guantanamo detainees to communicate with their families. The addition of near real-time communication is another step in the Department of Defense’s efforts to assess continually and, where practicable and consistent with security requirements, improve conditions of detention for detainees in its custody. Detainees are given the opportunity to send and receive letters, facilitated by the ICRC, and are able to talk to their families periodically via phone or video teleconference.

Medical care at Guantanamo

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detainees. JMG providers take seriously their duty to protect the physical and mental health of the detainees and approach their interactions with detainees in

a manner that encourages provider-patient trust and rapport and that is aimed at encouraging detainee participation in medical treatment and prevention. Detainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians. For example, detainees may make a request to guard personnel in the cell blocks or to the medical personnel who make daily rounds on each cell block at any time in order to initiate medical care. In addition to responding to such detainee requests, the medical staff will investigate any medical issues observed by staff. The availability of care through ongoing monitoring and response to detainee-initiated requests has resulted in thousands of outpatient contacts between detainees at Guantanamo and the medical staff, followed by inpatient care as needed. The healthcare provided to the detainees at Guantanamo is comparable to that which U.S. service personnel receive while serving at Joint Task Force-Guantanamo.

* * * *

On August 2, 2017, the Commission notified the United States that it had issued a precautionary measures resolution in MC-184-17 dated July 25, 2017. The United States responded on August 11, 2017, reiterating its previous arguments and informing the Commission that it would construe the resolution as a recommendation.

e. Petition No. P-524-16 (Hernández): Supervening Domestic Settlement Renders Petition Manifestly Groundless and Therefore Inadmissible Before IACHR

On September 12, 2017, the United States responded to a petition filed by family members of an individual who died in U.S. government custody after attempting to enter the United States illegally. The key argument of the U.S. response is that the settlement reached in a lawsuit brought by petitioners in U.S. court precludes the pursuit of any remedy at the IACHR.

* * * *

As noted above, these claims, which were outlined in the Third Amended Complaint, effectively mirror the claims that Petitioners assert before the Commission. The dismissal of the case with prejudice means that Petitioners are legally prohibited from ever again raising the claims asserted in the U.S. federal court case. They are likewise legally prohibited from ever again raising claims they could have asserted, or that they might in the future assert, arising directly or indirectly from the acts or omissions that gave rise to the federal court case. These include “any and all claims” and “rights” “of whatsoever kind and nature,” which by the plain meaning of those terms includes the claims that were pending in the instant Petition at the time Petitioners reached the settlement agreement with the U.S. government.

Accordingly, Petitioners can no longer bring claims before a reviewing forum asserting that the United States violated Mr. Hernández-Rojas’s rights with regard to acts or omissions that gave rise to their district court complaint. These acts or omissions include all the claims that Petitioners make in the Petition before the Commission.

Apart from the fact that Petitioners have now obligated themselves under U.S. law not to further pursue the claims in the Petition against the United States, nothing in the principles established by the American Declaration or in the Rules would suggest that the Commission should intervene in a matter that has been voluntarily settled between a petitioner and the governmental authorities that are accused of violating the petitioner's rights. Moreover, implicit in the requirement of exhaustion in Article 31 of the Rules is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then his or her claim is not admissible before the international forum. And in fact, the Commission itself encourages the settlement of human rights claims, by placing itself at the disposal of petitioners and the government to reach a friendly settlement, as reflected in Article 40 of the Rules. It would also be fundamentally unfair for the Commission to allow the Petition to go forward even though the United States believed, at the time it agreed to the settlement agreement, that any and all other claims arising from this incident would be relinquished, and paid monetary compensation in reliance on that belief.

In considering the instant Petition's admissibility under the Rules, it is important to recall the procedural timeline. Petitioners filed the Petition on March 30, 2016. The Commission forwarded the Petition for a U.S. response on May 12, 2017. Thereafter, a material development occurred: on May 30, 2017, Petitioners and the U.S. government reached a settlement whereby Petitioners relinquished all claims of whatever nature against the United States, in any forum. Therefore, as a result of the settlement agreement Petitioners voluntarily concluded with the U.S. government, the claims in the earlier-in-time Petition have now been rendered manifestly groundless, and thus inadmissible in light of supervening information, as provided for under Articles 34(b) and (c) of the Rules. The Commission should respect the legally binding agreement reached by Petitioners and the U.S. government, dismiss the Petition, and close this matter so that it may focus its resources on the many other matters that demand its attention.

* * * *

f. Petition No. P-627-17 (Mitchell): Competence to Review Collective Rights; Lawfulness of Death Penalty; Fourth Instance Formula; Basis for Precautionary Measures

On September 21, 2017, the United States filed its response to a petition brought by a member of the Navajo Nation who was convicted and sentenced to death in federal court in the United States. The U.S. response asserts, *inter alia*, that while the Commission may review claims of violations of individual human rights, it does not have competence to evaluate claims of violations of the collective rights of indigenous peoples, including pursuant to the UN Declaration on the Rights of Indigenous Persons ("UNDRIP") and the American Declaration on the Rights of Indigenous Peoples; that the application of the death penalty for crimes committed by an Indian in Indian Country would violate neither international law nor U.S. domestic law under the circumstances; and that the IACHR improperly decided to request precautionary measures when there was no risk of immediate harm to the petitioner.

* * * *

Mr. Mitchell raises two primary arguments. First, he argues that the United States violated the sovereignty of the Navajo Nation by seeking the death penalty in Mr. Mitchell's case. Second, he argues that Mr. Mitchell's rights related to due process and a fair trial were violated as a consequence of alleged collusion between the U.S. government and tribal law enforcement, ineffective assistance of counsel, and the decisions of the federal courts in his own *habeas* proceedings. As explained below, the Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Additionally, the arguments presented in the Petition are unreviewable in light of the Commission's "fourth instance formula" as they amount to a mere disagreement with determinations of domestic courts on these same issues, rendered in compliance with the American Declaration.

Should the Commission nevertheless declare the Petition admissible and choose to examine the claims presented by Mr. Mitchell on their merits, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules, it should deny the requested relief because the Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration. The reasons the Petition is inadmissible under Article 34(a), the reasons the Commission lacks competence to review it, and the reasons it is meritless in any event are discussed in tandem throughout this brief.

1. Mr. Mitchell's Allegation of Infringement on Navajo Sovereignty Is Beyond the Commission's Competence to Review ...

In 1994, Congress passed the Federal Death Penalty Act ("FDPA"), creating 60 capital offenses under federal law. In a show of respect for tribal self-determination, the law provided that unless a tribe opted in to the federal death penalty, "no person subject to the criminal jurisdiction of an Indian tribal government" could be sentenced to death for crimes where federal jurisdiction derived from the offense having been committed on tribal land. Mr. Mitchell alleges that applying the FDPA in his case violates the tribal sovereignty of the Navajo Nation. He further claims that because the tribe never opted into the federal death penalty and recommended against its use in Mr. Mitchell's case, the government's decision to pursue a death sentence was "contrary to then-existing federal policy and contrary to evolving standards of decency." As explained below, however, in reviewing Mr. Mitchell's claim, the Commission must limit itself to the American Declaration, an instrument setting forth individual rights that makes no mention of the collective rights of indigenous peoples. Moreover, Mr. Mitchell's sentencing was entirely lawful because federal jurisdiction over the crime for which he received the death penalty was not dependent on it having taken place on tribal land and therefore the provision of the FDPA requiring a tribe to opt in did not apply.

a. The American Declaration Does Not Speak to Collective Rights ...

The Commission may not review Mr. Mitchell's claim that the United States infringed on the Navajo Nation's sovereignty by imposing the death penalty with respect to crimes committed by Indians in Indian Country, because this claim goes beyond the scope of the American Declaration. Mr. Mitchell supports this claim by reference to specific articles of the American Declaration and general references to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the American Declaration on the Rights of Indigenous Peoples ("OAS DRIP"), as well as the Commission's merits report in the *Dann* case and a decision of the Inter-American Court of Human Rights.

The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's plain text. The articles cited in the Petition begin with the words "[e]very human being," "[a]ll persons," "[e]very person," or "[e]very accused person." All of the other rights, and all of the duties, similarly begin with language referring to individual persons. As such, these articles, on their face, do not set forth rights pertaining to the Navajo Nation.

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP or the OAS DRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States. *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP and OAS DRIP declaring collective rights of indigenous peoples—*pueblos indígenas*. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been "born free and equal, in dignity and in rights, . . . endowed by nature with reason and conscience," and which are the rights recognized and protected by the American Declaration.

Furthermore, both the UNDRIP and the OAS DRIP are aspirational statements of political and moral commitment, and are not binding under international law. Neither instrument was intended to create new international law, nor are they reflections of states' existing obligations under conventional or customary international law.

With respect to the OAS DRIP in particular, the United States has persistently expressed objections to that instrument, and dissociated from consensus upon the Organization of American States ("OAS") General Assembly's adoption of it in June 2016. As the Commission will recall, the United States strongly disagreed with the Commission's assertion in the *Dann* merits report that "aspects of" the OAS DRIP, which was at that time still a draft, "reflect[ed] general international legal principles" and could thus be considered in interpreting and applying the American Declaration in the context of indigenous peoples.

With respect to the UNDRIP, the United States supports that instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes. But U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights, and there is no domestic law that precludes the United States from imposing the death penalty for federal crimes committed by Indians in Indian Country. Furthermore, Mr. Mitchell points to no provision of the UNDRIP that would provide him the substantive relief he seeks.

b. The U.S. Government's Decision to Seek the Death Penalty for Mr. Mitchell Was Consistent with U.S. Domestic Law

In addition, the decision to seek the death penalty for Mr. Mitchell did not contravene any provision of U.S. domestic law. Under U.S. law, American Indian tribes possess a unique legal status as "domestic dependent nations" by virtue of the fact that they existed as sovereign nations prior to European settlement of North America. A "federally recognized tribe" is one that has a documented government-to-government relationship with the United States. There are currently 567 such tribes, of which the Navajo Nation is one. The U.S. Supreme Court has long acknowledged that federally recognized tribes retain inherent powers of self-government by virtue of their preexisting sovereignty, but these powers may be limited by federal law. For

instance, some federal criminal statutes apply, by operation of federal law, to crimes between Indians in Indian Country (“enclave crimes”). However, others apply throughout the United States, including in Indian Country, to Indians and non-Indians alike. Federal jurisdiction over such “crimes of general applicability” derives from Congress’s plenary power under the U.S. Constitution to regulate interstate commerce.

* * * *

Mr. Mitchell asserts that in at least 20 other instances of murder on tribal land, the U.S. government has ultimately declined to pursue the death penalty, “apparently based on the tribe’s opposition to capital punishment.” Here too, the prosecution requested the Navajo Nation’s input regarding the possibility of the United States seeking the death penalty in Mr. Mitchell’s case. The Navajo Nation held public hearings to gauge tribal members’ position, after which the Attorney General of the Navajo Nation communicated the tribe’s opposition in a letter dated January 22, 2002 to the United States Attorney for the District of Arizona. The tribe had ample opportunity to articulate its cultural opposition to the death penalty before the penalty phase of Mr. Mitchell’s case, and it did so. But there was no requirement under U.S. law for federal prosecutors to defer to the tribe’s preferences. Nor was there any requirement to do so under any binding international instrument to which the United States is a party, and, as discussed above, the provisions of the nonbinding UNDRIP do not apply to these circumstances. Even if they did, the United States does not interpret the UNDRIP to require tribal consent to the death penalty. If the U.S. government did exercise prosecutorial discretion to decline to seek the death penalty in past tribal cases, it was no guarantee that the death sentence would never be lawfully pursued in the future.

* * * *

Multiple layers of careful judicial review, both state and federal, provided Mr. Mitchell extended opportunities to challenge his trial and conviction, and he fully availed himself of these opportunities. Consequently, the claim should be rejected as inadmissible under Article 34(a) of the Rules because it does not state facts that tend to establish a violation of the American Declaration, and is without merit.

* * * *

In this matter, the United States has provided Mr. Mitchell with a comprehensive and expansive system of review. Over many years, his claims have been reviewed through both direct appeals and the *habeas* procedure, at each of three levels of the federal court system: the U.S. District Court for the District of Arizona, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court. This public record demonstrates that the United States has allocated substantial time and resources to thoroughly and impartially considering Mr. Mitchell’s claims and afford him judicial review. Consequently, in presenting his meritless claim that the United States domestic courts provided him insufficient opportunities to pursue *habeas* relief, Mr. Mitchell has failed to set forth facts that tend to establish a violation of the American Declaration under Article 34(a) of the Rules.

3. The ... “Fourth Instance Formula”

In addition, the Commission should dismiss Mr. Mitchell’s claims because the Commission lacks competence to sit as a court of fourth instance. The Commission has

repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”

* * * *

C. PRECAUTIONARY MEASURES

In its letter dated July 2, 2017, and without first asking for U.S. views, even though the “immediacy of the threatened harm” did not “admit of no delay” as would be required for the Commission to disregard Article 25(5) of the Rules, the Commission requested that the United States “adopt the necessary measures to preserve the life and physical integrity of Mr. Lezmond Mitchell ... so as not to render ineffective the processing of his case before the Inter-American system.” In addition to that request for precautionary measures, Mr. Mitchell has petitioned the Commission to request that the U.S. government: (1) suspend execution of his sentence in order to allow him to challenge the government’s lethal injection protocol and/or file a clemency petition; and (2) make evidence available as needed to file a petition before the Commission regarding the federal government’s lethal injection protocol.

There was no basis for the Commission’s issuance of precautionary measures in this matter. The United States reiterates that Mr. Mitchell is a party to an active lawsuit filed against the United States, in which he alleges that the means by which the government seeks to implement the death penalty in his case violates the U.S. Constitution as well as federal statutory law. Mr. Mitchell’s case is pending and, pursuant to the government’s representations in the course of that suit, it will not seek an execution warrant or carry out an execution until revision of the lethal injection protocol is completed. Thus, Mr. Mitchell is not in danger of immediate execution, and his challenge to the federal government’s lethal injection protocol remains unexhausted.

* * * *

2. Hearings

The IACHR invited the United States to hearings at three Periods of Sessions in 2017: on March 21, 2017 at its Washington, D.C., headquarters; on September 7, 2017 in Mexico City; and on December 7, 2017, again at its headquarters. While the United States attended and actively participated in the latter two sets of hearings, it chose not to participate in the March 2017 hearings. In a press conference on March 21, the Department of State spokesperson explained that participation in the two thematic hearings (respectively on then-recent executive orders, including one barring terrorist entry, and on access to asylum in the United States) would be inappropriate because of sensitivities surrounding ongoing litigation on those matters in U.S. courts. The third hearing concerned *Shibayama et al.* (12.545), involving claims for reparations for the World War II-era detention in the United States of civilians of Japanese descent. While the United States also did not attend that hearing, it filed written observations shortly after the hearing, on April 3, 2017. There, it reiterated jurisdictional arguments made in several prior written filings—including about the IACHR’s lack of jurisdiction over claims arising prior to the adoption of the 1948 American Declaration, as reflected in the

IACHR's dismissal of several such claims in its March 2006 admissibility report—and also stated the following:

Please be assured that the United States acknowledges the suffering experienced by the Shibayama family and those similarly situated, which Isamu and Bekki Shibayama bravely and movingly described in their testimony before the Commission on March 21. Nevertheless, as a purely legal matter, the petition in this case is both inadmissible and the Commission lacks competence to pronounce on its merits.

The United States participated in two hearings on September 7, 2017 in Mexico City: one a thematic hearing about military commissions at the detention facility at Guantanamo Bay Naval Station, and the other a petition-based hearing concerning a person formerly detained at Guantanamo, Djamel Ameziane (12.865). Excerpts follow from the as-prepared remarks at the latter hearing by James Bischoff of the Office of the Legal Adviser at the U.S. Department of State, on behalf of the United States, regarding, *inter alia*, the long history of the case before the IACHR, the IACHR's lack of authority to issue binding orders or to pronounce on the law of war, the nonbinding nature of the American Declaration, the absence of a *non-refoulement* commitment therein, and the United States' humane transfer policies.

* * * *

Part 2 – Procedural History

Matters covering much of the same ground as the petition under discussion today have been before the Commission for over 15 years. As Mr. Stevenson pointed out at the thematic hearing this morning, this hearing is the 17th time we have appeared to discuss issues surrounding Guantanamo. Since 2002, when the Commission initially recommended precautionary measures with regard to the 254 detainees then being held at Guantanamo Bay, we have participated in three other thematic hearings, eight petition-based hearings, and four working meetings on Guantanamo, as well as a roundtable discussion in connection with the rollout of the Commission's 2015 report on Guantanamo. We have also filed over 20 written submissions about Guantanamo, including in this and other individual cases. Despite its limited resources, the Commission has already explored this area in great detail.

This case in particular has a long history before the Commission. ... All in all, Mr. Ameziane's counsel have filed at least 12 substantive written submissions, and the United States has submitted at least six written submissions, including the latest in December 2016. This hearing is the third in this case alone.

This history shows that the Commission already has before it a large amount of information about this case, which raises questions as to the utility of yet another hearing about Mr. Ameziane, particularly given the Commission's very limited resources. The utility of yet another hearing in this case is also questionable when one recalls the Commission has so many other cases open on its docket, including 98 involving the United States alone and many more

involving our fellow OAS Member States. This docket continues to grow at a pace that far exceeds the Commission's capacity to dispose of these cases.

Part 3 – Precautionary Measures

Before addressing the substance of this petition, I will address a few procedural matters. First, we do not dispute that Mr. Ameziane was repatriated to Algeria in 2013 and released from U.S. custody. We also acknowledge that the Commission had requested precautionary measures in 2008 with respect to his treatment in U.S. custody. These measures also recommended that the United States take steps to ensure Mr. Ameziane was not transferred to a country where there were substantial grounds for believing he would be in danger of being subjected to torture or other mistreatment. The United States respectfully reiterates its longstanding view that although the Commission may make recommendations for precautionary measures, the Commission's governing instruments do not give it the authority to *require* that States adopt precautionary measures, as it has repeatedly claimed with regard to Mr. Ameziane and other petitioners.

The practice of requesting precautionary measures is based on Article 25 of the Rules, drawn up by the Commissioners themselves. Article 25 provides for the Commission to *request* that a State adopt precautionary measures. But the OAS Member States have not given the Commission any mandate to assert that such precautionary measures are mandatory. The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention on Human Rights, which the United States is not. Even there, the Statute does not give the Commission the power to request or require such measures directly of a Member State. The Statute instead gives the Commission the power to request that the Inter-American Court of Human Rights take provisional measures in serious and urgent cases with respect to States subject to its jurisdiction. There is no provision in the OAS Charter, the Commission's Statute, or even the American Convention that provides the Commission the authority to itself require any OAS Member State—American Convention party or not—to take precautionary measures. As such, the Commission's request for precautionary measures can at most be a nonbinding recommendation.

Regardless, the United States' actions with respect to Mr. Ameziane were not inconsistent with the precautionary measures request. The United States did not remove Mr. Ameziane to a country where there were substantial grounds for believing he would be in danger of being tortured or mistreated—a point I will discuss in more detail below. And the precautionary measures are moot in any event, as Mr. Ameziane is no longer in U.S. custody.

Part 4 – Recommendatory Powers

With respect to the Commission's authority beyond precautionary measures, the United States reiterates its position that there too, the Commission may only issue recommendations, not decisions that are binding on States. The relevant provisions of the OAS Charter and the Commission's Statute state in general terms that the Commission was created to "promote the observance and defense of human rights." Article 106 of the OAS Charter and Article 1 of the Commission's Statute clearly establish the Commission as a "consultative organ" of the OAS with carefully delimited responsibilities in matters of human rights. Article 18 of the Commission's Statute, which sets forth the general functions and powers of the Commission, and Article 20, which sets forth supplemental powers of the Commission with respect to States that are not parties to the American Convention, like the United States, also set forth powers to make recommendations, not to issue binding decisions.

Specifically, in Articles 18 and 20 the Commission's powers are defined with terms such as the following: "pay particular attention to," "examine ... and make recommendations," and

“develop an awareness of human rights.” These are not functions that carry an implication that the Commission may make decisions that are binding on States.

On a similar note, Mr. Ameziane’s counsel in their letter requesting this hearing and again today take issue with the discussion in our December 2016 submission about the nonbinding normative character of the American Declaration. Counsel assert that the jurisprudence of the inter-American system recognizes the Declaration as a source of legal obligation for OAS Member States.

It is, of course, true that the Commission and the Inter-American Court have long taken the view that the Declaration is a source of legal obligation. Yet while we have great respect for the views of the Commission and the Court, we must reiterate that the United States simply does not accept, and has never accepted, this view, and is not bound by it as a matter of international law. While we recognize the good intentions of those who would wish the Declaration had binding force, it would seriously undermine the process of international lawmaking, by which sovereign States voluntarily undertake specified legal obligations, to impose legal obligations on States where no obligation has been accepted, through some form of *ipse dixit*—which is precisely how this longstanding jurisprudence originated in the Commission’s *Baby Boy* decision back in 1981. Contrary to the Commission’s assertions there and those of the Court in its 1988 advisory opinion, it is simply not the case that the States that negotiated and later ratified the OAS Charter or its amendments—particularly the 1967 Protocol of Buenos Aires—or the States that adopted the Commission’s Statute, intended the Commission to apply the American Declaration as a binding source of international law.

From our perspective, it really does not matter how many times the Commission or Court may restate this view. Indeed, as far as we are aware, neither body has ever seriously reconsidered the flawed legal reasoning underlying it. As a sovereign State, the United States voluntarily undertakes international law obligations, and it takes those obligations seriously. But we have never undertaken an obligation that would render the Declaration binding—not when it was adopted, not when we ratified the OAS Charter or any of its amendments, not when we and other OAS States adopted the Statute, and not at any other time. Indeed, we have persistently objected to any such notion since at least the early 1980s. We also argued against it before the Court in 1988 and have persistently stated our objection in scores of hearings and written submissions over the years.

We realize that the Commission is unlikely to change its view that the American Declaration and its precautionary measures have binding force, no matter how many times we argue to the contrary. These are areas in which we simply will have to continue to disagree, but we always do so in a spirit of respectful dialogue. And our political and moral commitment to the American Declaration remains steadfast.

Part 5 – Lack of Competence

I’ll now say a few words about the Commission’s competence in this case. First, we reiterate our position that the only relevant instrument which the Commission could be competent to evaluate in relation to the conduct of the United States would be the nonbinding American Declaration. Article 27 of the Rules of Procedure directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments” Article 23 of the Rules, in turn, identifies the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention. Although Article 23 lists several other instruments, the United States

is not a party to any of those other instruments. Thus, for the United States, the American Declaration is the only “applicable instrument.”

Many of Mr. Ameziane’s claims, however, fall outside the purview of the American Declaration. During situations of armed conflict, the law of war is the *lex specialis*. As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The Commission has no competence under its Statute and Rules to consider matters arising under the law of war and may not incorporate the law of war into the principles of the American Declaration. Nor may it apply the Convention Against Torture or other instruments beyond the American Declaration.

One final point on competence: Petitioners argued in their letter [and here again today] that the Commission has already declared its competence in this case and therefore our arguments on competence are “no longer relevant.” This is incorrect. Although the Commission is not a court or judicial body, it is guided by principles of competence that apply generally to such bodies. One such principle is that questions of subject-matter jurisdiction—or jurisdiction *ratione materiae*—are always relevant, and can always be raised and reconsidered by that body.

Part 6 – Adverse Inferences

As a final procedural point, I’d like to turn to one more assertion by counsel for Mr. Ameziane in their letter requesting this hearing, that Article 38 of the Rules of Procedure requires the Commission to presume as true factual allegations made in their merits brief of September 2015—including allegations that Mr. Ameziane is indigent and homeless as a result of U.S. government actions—if the United States did not expressly refute them.

We reject the suggestion that the U.S. government is somehow responsible for Mr. Ameziane’s financial and housing situation in Algeria. In any event, it simply cannot be that Article 38 requires the respondent State to respond to each and every factual allegation made in a petitioner’s written filings, of which there are myriad in this case, as I explained earlier. Moreover, even if the Commission were inclined to look to Article 38 here and accept these facts as true, it should not do so. Article 38 appears to reflect a well-established principle used in many international courts and tribunals that the body may draw an adverse inference if a party that can reasonably be assumed to possess information or documentation to refute a claim against it fails to produce that information or documentation. Here, the information in question is not uniquely in the possession of the Government of the United States—indeed, it is not in our possession at all. The best source for this information is Mr. Ameziane himself. Article 38 is simply inapposite in these circumstances.

Part 7 – Non-refoulement and Transfers

I’ll now discuss Mr. Ameziane’s claim that the United States violated the principle of *non-refoulement*—which Mr. Ameziane claims is guaranteed by the American Declaration—when the United States repatriated him to his home country of Algeria in December 2013.

Before I get into the reasons why these claims are meritless, it’s important to acknowledge that the Commission has already expressed itself publicly on this issue. In its press release of December 2013, the Commission found that Mr. Ameziane’s transfer had been forcible and violated the principle of *non-refoulement*, and it repeated these conclusions in its report on Guantanamo in June 2015. With respect, it was wholly inappropriate for the Commission to make these premature findings while the present proceedings were still ongoing, with the parties were still submitting facts and arguments—effectively prejudging one of the central issues in this case. We would urge the Commission not to take its unfortunate prior findings as settled, as counsel for Mr. Ameziane have urged you to do, and instead examine this

issue *de novo*. And it is important to recall at the outset that Mr. Ameziane is not alleging that he has been subjected to torture or other mistreatment by the Government of Algeria since his transfer.

Turning to the claim itself, the claim is unreviewable because no article of the American Declaration contains an express or implied *non-refoulement* commitment. As we have explained in several prior submissions to the Commission, the United States respectfully disagrees with the Commission's conclusion in the *Mortlock* case in 2008 that, in exceptional circumstances owing to humanitarian concerns, the issuance of a removal order may amount to a violation on the part of the removing State of Article XXVI's ban on cruel, infamous, or unusual punishment. In addition to improperly characterizing removal as punishment, the *Mortlock* case and those following its lead represent an inappropriate attempt to declare impermissible procedures that fall within the State's sovereign prerogative.

As the Commission has acknowledged, international law recognizes the sovereign right of States to regulate the entry, residence, and expulsion of noncitizens, subject to their international obligations. While the United States has undertaken *non-refoulement* obligations as a State Party to the UN Convention Against Torture and the Protocol Relating to the Status of Refugees, these treaties are beyond the scope of the Commission's competence to interpret and directly apply, as mentioned earlier.

It is also worth noting, with respect, that the reasoning in the *Mortlock* case is fundamentally flawed. The standard announced in *Mortlock* was based upon an interpretation of Article 3 of the European Convention on Human Rights, set forth by the European Court of Human Rights in the case of *D v. United Kingdom*. However, the United States is not a party to the European Convention and Article 3 of the European Convention is broader than Article XXVI of the American Declaration, as it prohibits not only certain forms of "punishment" but also inhuman or degrading "treatment." That the Commission chose not to address this distinction in the *Mortlock* case, notwithstanding its recognition of the distinction, is particularly problematic because the opinion in the *D* case did not address the relevant definition of "punishment" and, instead, held that the removal of the petitioner—a noncitizen of the United Kingdom who suffered from HIV/AIDS—to her country of origin would amount to "inhuman treatment." Absent from the *Mortlock* decision is any explanation as to why the Commission was adopting the European Court's test for inhuman *treatment* in order to assess whether the order of removal in *Mortlock*'s case amounted to cruel or unusual *punishment* under Article XXVI or another article of the Declaration.

With that said, the policy of the United States is not to transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This policy includes transfers of Guantanamo detainees, and is reflected in U.S. law: Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 provides that

[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

To further the goal of ensuring humane transfers in all contexts, a Special Task Force issued a set of recommendations in 2009 aimed at ensuring that U.S. transfer practices, including

practices concerning Guantanamo detainees, comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to face torture. The Special Task Force's report, apart from a classified annex, is publicly available.

All transfers of detainees from Guantanamo are conditioned on the receipt of assurances of humane treatment from the receiving government. The U.S. government transfers a detainee only if it determines that the transfer is consistent with our humane transfer policy. In making any such determination, U.S. officials consider the totality of relevant factors relating to the individual to be transferred and the proposed recipient government. When considering a transfer, the United States may consider, among other factors: the individual's allegations of prior or potential future mistreatment in the receiving State; the receiving State's overall human rights record; the specific factors suggesting that the individual in question is at risk of being tortured in the receiving State; whether similarly situated individuals have been tortured in the receiving State; and any humane treatment assurances provided by the receiving State (including an assessment of their credibility).

The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he is being transferred. Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be consistent with applicable international and domestic law. The U.S. government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial practices and penal conditions of the receiving country; U.S. relations with the receiving country; the receiving country's capacity and incentives to fulfill its assurances; political or legal developments in that country; the country's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

In a case in which the United States becomes aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments the receiving country has made to the U.S. government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

With respect to Mr. Ameziane specifically, he was repatriated to his home country after a review, which examined a number of factors, including security issues. The transfer was consistent with U.S. practice of repatriating detainees when this can be done consistent with our security and humane treatment policies, and was coordinated with the Government of Algeria to

ensure the transfer took place with appropriate security and humane treatment assurances. The United States only repatriated Mr. Ameziane after satisfying itself that the Algerian government would continue to abide by lawful procedures and uphold its humane treatment obligations under domestic and international law in managing the return of Mr. Ameziane. In the years since his transfer Mr. Ameziane has, as far as we know, been living freely in Algeria. Even if it is true that Mr. Ameziane is indigent and that life conditions are generally difficult for him in Algeria, our available information indicates that Mr. Ameziane has not been subjected to mistreatment that would indicate a violation of the principle of *non-refoulement*.

For these reasons, the United States rejects the argument that Mr. Ameziane's return violated the principle of *non-refoulement*, even if such a principle could be taken as implicit in the American Declaration. The Commission should reverse its prior conclusion on this point and dismiss this claim.

Part 8 – Conclusion

In our December 2016 submission, we gave detailed information demonstrating that Mr. Ameziane's detention at Guantanamo was lawful under international and domestic law, as is the detention of other Guantanamo detainees, and that he and other detainees had availed themselves of judicial avenues, including *habeas* proceedings in federal civilian court. In his case, *habeas* proceedings were ultimately rendered moot through his release from U.S. custody.

More generally, the United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo, and U.S. laws, executive orders, and policy provide detailed rules for their proper treatment. I again refer you to our December 2016 submission and our March 2015 response to the Commission's Guantanamo report, which go into significant detail on these protections.

* * * *

As noted above, the United States also participated in a thematic hearing in Mexico City about the military commissions at the Guantanamo facility. The as-prepared presentation by James Bischoff of the Office of the Legal Adviser, U.S. Department of State, is excerpted below.

* * * *

The military commissions were created in the context of the armed conflict between the United States and al Qaida, the Taliban, and associated forces. During this conflict, the United States has captured and detained enemy belligerents and is generally permitted under the law of war to hold them until the end of hostilities. As a matter of domestic law, this detention is authorized by the Authorization for Use of Military Force (AUMF) of 2001, as informed by the laws of war. The Military Commissions Act (MCA) of 2009, as amended, is the U.S. statutory authority for military commissions to try detained alien unprivileged enemy belligerents in this conflict. I'll refer to the statute as the MCA for the remainder of my remarks.

The purpose of the commissions is to try alien unprivileged enemy belligerents for violations of the law of war and certain other offenses. An "unprivileged enemy belligerent" is defined by the MCA as an individual who is *not* a prisoner of war under Article 4 of the Third Geneva Convention and who has:

- engaged in hostilities against the United States or its coalition partners;
- purposefully and materially supported hostilities against the United States or its coalition partners; or
- was a part of al Qaida at the time of the alleged offense.

The offenses triable by military commission are set forth in the MCA and reflect the very serious nature of the acts that are examined by the commissions. These include the following offenses, among others:

- Murder of persons who are entitled to protection under one or more of the 1949 Geneva Conventions, including civilians not taking an active part in hostilities.
- Intentionally engaging in an attack on a civilian population or a civilian object.
- Subjecting persons in their custody to torture or cruel or inhuman treatment.
- Intentionally causing serious bodily injury to one or more persons, in violation of the law of war.
- Mutilating or maiming one or more protected persons.
- Rape, sexual assault, or abuse.
- Terrorism, or
- Attacking property that is specifically protected by the law of war.

Part 5 – Procedural Safeguards

The MCA incorporates fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 to the 1949 Geneva Conventions and other applicable law, and are also consistent with those in the 1977 Additional Protocol II to the 1949 Geneva Conventions. I'll go through some of these.

Presumption of innocence

First, the MCA provides that every accused individual is presumed innocent until his guilt is established beyond a reasonable doubt. In any given case, "if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted." The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the United States. This is the same standard of proof applied in criminal cases in U.S. civilian courts.

Right to counsel

Every accused whose case is being heard by a military commission is entitled to defense counsel. Each defense counsel must be an attorney serving in the U.S. armed services and, in addition, he or she must be certified as competent to perform duties as defense counsel before general courts-martial by the armed force of which he or she is a member. No one who has acted as an investigator, military judge, or member of a military commission—that is, a juror—may later act as trial counsel or defense counsel in the same case. In non-capital cases, the accused has the right to be represented by civilian counsel, and by either the defense counsel assigned or the military counsel of the accused's own selection. When any of the charges are capital offenses, the accused has the right to be represented by counsel in the same manner as in a non-capital case, but is also entitled to at least one additional counsel who is learned in applicable law relating to capital cases. The learned counsel may be a civilian. If he so desires, the accused may also represent himself *pro se*.

Composition of commission

The MCA requires military commissions to have at least five members (that is, jurors), except where the alleged offenses may give rise to the death penalty. In those cases, there must be no fewer than 12 members/jurors.

Right to present evidence and be present at proceedings

The MCA also provides that the accused has certain procedural rights. Defendants are entitled to:

- Be present at all sessions of the military commission, other than those for deliberations or voting;
- Present evidence in his or her defense;
- Cross-examine witnesses; and
- Examine and respond to all evidence admitted against him or her on the issue of guilt or innocence and for sentencing.

Evidentiary rules

The MCA sets forth a number of evidentiary rules that also provide procedural safeguards for the accused. These rules include the following:

- The suppression of evidence that is not reliable or probative.
- The suppression of hearsay evidence; and
- The suppression of evidence the probative value of which is substantially outweighed by, inter alia, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
- In addition, no statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, whether or not under color of law, is admissible in a military commission, except as evidence against a person accused of torture or cruel, inhuman or degrading treatment.
- No person is required to testify against himself or herself in a proceeding.

The MCA also provides that a statement of the accused may be admitted in evidence only if the military judge finds—(1) that the totality of the circumstances renders the statement reliable and probative; and (2) that—

(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or

(B) the statement was voluntarily given.

In order to determine the voluntariness of a statement by the accused, the military judge must consider the totality of the circumstances. Defense counsel must be given a reasonable opportunity to obtain witnesses and other evidence. In addition, trial counsel—that is, the attorney in the role of the prosecutor in the military commission—must disclose to the defense the existence of any evidence that reasonably tends to negate the guilt of the accused of an offense charged, or reduce his degree of guilt.

Specific rules govern the handling of classified information. Where the record contains classified information, the accused receives a redacted version of the record in order to safeguard that information. However, defense counsel has access to the unredacted record. If the United States seeks to delete or withhold classified information from the accused, the MCA requires trial counsel to submit a declaration invoking the government's classified information privilege and setting forth the damage to national security that would result from access to that information. A military judge may authorize the United States to delete or withhold specified items of classified information; substitute a summary; or substitute a statement admitting relevant facts that the classified information would tend to prove.

Undue influence

Furthermore, the MCA provides for additional safeguards against efforts to unlawfully influence the action of a military commission. No authority convening a military commission may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence handed down by the military commission, or with respect to any other exercise of their functions. In addition, no person may attempt to coerce or influence by any unauthorized means —(A) the action of a military commission or any member thereof in reaching the findings or sentence; (B) the action of any convening or reviewing authority with respect to their judicial acts; or (C) the exercise of professional judgment by trial counsel or defense counsel. The MCA also includes rules preventing military personnel who participate in commissions, including as defense counsel, from suffering adverse professional consequences by reason of having participated.

Sentencing

As soon as practicable upon a finding of guilt, trial counsel must disclose to the defense the existence of evidence that reasonably may be viewed as mitigation evidence at sentencing. The only available sentences are incarceration or execution. Cruel or unusual punishment is prohibited. Generally, an accused may not be found guilty of an offense unless two-thirds of the commission members agree. The MCA allows for capital sentences only when certain conditions are met, including:

- the panel members (that is, jury) unanimously find beyond a reasonable doubt that the accused is guilty of the offense and that at least one of the aggravating factors existed;
- the panel members unanimously agree on a sentence of death after a hearing in which the defense has the full opportunity to submit testimony and matters in mitigation and extenuation; and
- the Convening Authority approves of the sentence after affording the accused an opportunity to provide further mitigating and extenuating information.

No person may be sentenced to life imprisonment, or to confinement for more than 10 years unless three-fourths of the commission members agree.

Challenges and appeal

The MCA also provides for the right to appeal final judgments to the U.S. Court of Military Commission Review and to federal civilian courts of appeal. The Court of Military Commission Review reviews the record and may only affirm a guilty finding or sentence insofar as it finds it to be correct in law and fact based on the entire record. The Court may weigh the evidence and judge the credibility of witnesses. If the Court sets aside the findings or sentence, the Court may order a rehearing or dismiss the charges. A case may then be appealed to the United States Court of Appeals for the District of Columbia Circuit, which is a federal civilian court consisting of life-tenured judges; and ultimately to the Supreme Court of the United States on a writ of certiorari.

Part 6 – Transparency

Further, the United States is committed to ensuring the transparency of military commission proceedings. To that end, proceedings are transmitted via live video feed. Court transcripts, filings, and other materials are also available to the public online.

Finally, the United States participated in four thematic hearings on December 7, 2017 at the IACHR's headquarters in Washington, D.C. The themes of these hearings were: economic, social, cultural, and environmental rights in Puerto Rico; labor rights in the U.S. automotive industry; freedom of association, peaceful assembly, and expression in the United States; and impunity for extrajudicial killings in the United States. The U.S. delegation, led by Interim Permanent Representative to the OAS Kevin K. Sullivan, delivered remarks at the four hearings and answered questions posed by the Commissioners.

After remarks by civil society at the hearing on freedom of association, assembly, and expression, Lynn Sicade of the Bureau of Democracy, Human Rights, and Labor delivered remarks on behalf of the United States. Those remarks are excerpted below.

* * * *

In my remarks today, I will endeavor to provide the Commission and those attending and watching this hearing with some general information about freedom of expression, association, and peaceful assembly in the United States. These freedoms are core values of the United States, embedded in our foundational document: the Constitution of the United States of America. Protecting these rights from government infringement was central to shaping the design of the U.S. government. Our government's framers sought to do this by limiting the power of the national government vis-à-vis the constituent States and by breaking up the power of the national government between three separate, co-equal branches. At the same time, many strongly believed that individual freedoms could not be sufficiently safeguarded unless they were spelled out in our Constitution itself. This was done very early on through the first ten amendments to the Constitution—known as the Bill of Rights. From the beginning, our government's framers foresaw that a delicate and constant balancing would be required to ensure that the exercise of government power did not threaten the rights it was meant to protect.

The federal executive branch has played a role by enforcing laws and judicial decisions and also through its own actions. By 1946, the unwillingness or inability of state officials to uphold the civil rights of racial minorities and the weakness of existing federal statutes had led to increasing demands for new legislation to strengthen the powers of the national government. ...

Check and Balances Have Safeguarded Civic Space during Difficult Periods

While noting civil society's stated concerns about the current status of civic space in the United States, we believe it is helpful to consider the present situation in historical context. In the twentieth century, U.S. society experienced periods of intense divisiveness—particularly, in the 1960s and 1970s. ...

The U.S. Supreme Court Has Broadly Defined These Rights

During this time the U.S. Supreme Court recognized that the First Amendment protected a right to freedom of association, though not explicitly spelled out in the text. It further held that such right is fundamental, protected from infringement by both the federal government and the governments of the U.S. states. ...

The Supreme Court has defined the rights to freedom of speech and peaceful assembly broadly. There are relatively few limits on what individuals in the United States can say or on when, where, and how they can say it, for example. Unless speech is determined—through the

applicable legal tests—to be obscene, child pornography, incitement to imminent violence, or a true threat of violence, it is protected by the First Amendment. ...

In a similar way, the Supreme Court has broadly defined the right to peaceful assembly to include political meetings, marches, sit-in protests, rallies before government buildings, gatherings in a public park, group boycotts, labor pickets, filing lawsuits, and lobbying the government. ...

Civic Space Is Working

There are numerous rationales for guaranteeing respect for and protection of open civic space. One is to ensure citizens are informed and able to meaningfully participate in political decision-making and to hold their governments accountable. Another is to foster resilient, stable societies by ensuring outlets for the airing of grievances and allowing people to have their voices heard. Yet another is to promote tolerance by ensuring there is space for the broadest possible diversity of voices, viewpoints, values, interests, and ideas. There is also the view that open civic space facilitates debate and competition among those with divergent views and ideas regarding facts, opinions, and lies, with the hope and expectation that truth will ultimately prevail. If we consider the current situation of civic space in the United States in this light, we see that all these things are indeed happening. ...

Global and Regional Engagement

The United States has long viewed the freedoms of expression, association, and peaceful assembly as belonging to every individual, which is why we prioritize opening of civic space in our foreign policy. In the United Nations, the U.S. leads on freedom of expression. We were the main sponsor behind the creation of the mandate for the rapporteur on freedom of peaceful assembly and association at the Human Rights Council. At the United Nations General Assembly Third Committee in November, we were pleased once again to co-sponsor the resolution on human rights defenders and the resolution on the safety of journalists and the issue of impunity.

Here at the OAS, we strongly support General Assembly resolutions which address freedom of expression and association issues. In addition to our historic support for the IACHR's work on human rights defenders and freedom of expression, we also actively promote and support the registration of credible civil society organizations to participate in OAS events, ministerials, and in the Summits of the Americas processes. Let me now talk a little about recent and ongoing efforts by the United States to promote active civil society engagement in the Summits process, which is a very timely issue for our region.

The United States has a long history of supporting the efforts of the Summits Secretariat at the OAS, the Inter-American Development Bank, and other institutions to expand and formalize the role of stakeholders in the Summit process, including civil society from the region and the United States. At the last Summit in Panama, civil society representatives were clear in their recommendations to leaders that they wish to formalize and magnify their role in the Summit process.

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3. Commission Decisions in 2017

a. Case No. 12.254: Texas Death Row

On March 18, 2017, the Commission published Report No. 24/17, the merits report in *Saldaño* and its only merits report in a case involving the United States in 2017. As noted above, the United States filed a response to a preliminary version of the report on January 12, 2017, in which the United States acknowledged the report, took it under advisement, and notified the Commission that it had forwarded the report to the appropriate Texas authorities for their consideration. One day prior to the report's publication, on March 17, the United States participated in a working meeting regarding Mr. Saldaño.

b. Case No. 13.154 (Petition No. 766-06): Presidential Vote in Puerto Rico

On June 13, 2017, the Commission transmitted its May 25, 2017 report on admissibility on the petition brought on behalf of *Four Million American Citizens of Puerto Rico (Igartúa)*. The petition was brought on behalf of all U.S. citizens residing in Puerto Rico claiming human rights violations based on the lack of electors from Puerto Rico in U.S. presidential elections. The Commission found the petition admissible and directed that the case continue to consideration of the merits. Reports on admissibility are available by year and country at <http://www.oas.org/en/iachr/decisions/admissibilities.asp>.

c. Case No. 13.326 (Petition No. 1105-06): Presidential Vote and Congressional Representation of Puerto Rico

On March 3, 2017, the Commission transmitted its January 27, 2017 report on admissibility on the *Roselló* petition, also brought on behalf of U.S. citizens residing in Puerto Rico, but raising claims with regard to both presidential as well as congressional elections. The Commission found the claims admissible except as to Article XXXII (duty to vote) and Article XXXIV (duty to serve the community and the nation) because those articles have been referred to "for the purpose of interpretation of the balance between the rights set out in the first part of the instrument and the duties individuals may have as citizens." The report on admissibility on the *Roselló* petition is also available at <http://www.oas.org/en/iachr/decisions/admissibilities.asp>.

The United States filed a response on July 31, 2017 declining the Commission's invitation to enter into settlement discussions in *Rosello*. The U.S. letter states, in part:

We also acknowledge your correspondence dated July 6, 2017, in which you forward a letter from Petitioners dated May 30, 2017. In that letter, Petitioners state that they intend to file a merits brief and ask for an extension until October 3, 2017. Petitioners also state that they are prepared to attempt to reach a

friendly settlement with the United States in this case. While we likewise acknowledge the Puerto Rico Senate's April 4, 2017 resolution calling on the United States to desist from defending against Petitioners' claims of human rights violations and enter into a friendly settlement with Petitioners, we are not in a position to discuss friendly settlement at this time. We continue to doubt that the Commission's individual petition process is an appropriate or effective avenue for the U.S. citizen residents of Puerto Rico to assert claims about representation in the U.S. Congress.

Cross References

International Criminal Tribunals, **Ch. 3.B.**

ILC's work on the effect of armed conflict on treaties, **4.A.2.**

International Organizations Immunities, **Ch. 10.E.**

G7 and UN actions on cultural heritage, **Ch. 14.C.**

UNCITRAL, **Ch. 14.A.1.**

UN sanctions, **Ch. 16**

Middle East peace process, **C. 17.A.**

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