Table of Contents

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. Upholding International Law while Maintaining International Peace and Security

On May 17, 2018, U.S. Permanent Representative to the United Nations Nikki Haley addressed a UN Security Council open debate on upholding international law within the context of the maintenance of international peace and security. Her remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-upholding-international-law-within-the-context-of-the-maintenance-of-international-peace-and-security/.

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Even though this is a debate about international law, it's worth stepping back to think about what the people who wrote the UN Charter set out to create. The preamble of the Charter begins, "We the peoples of the United Nations," echoing the U.S. Constitution, which begins with "We the people of the United States."

Joining the United Nations is an act of sovereign peoples who came together to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small…" In this way, the Charter makes a clear connection between respecting human rights and upholding and promoting peace. Respect for the freedom and dignity of the individual is fundamental to international law. It is also fundamental to the founding values of the United States.

Our longstanding national commitment to human rights is why the United States made human rights a key theme of our last presidency of the Security Council. Durable peace cannot be separated from respect of human rights. In the last year, the United States has championed a number of efforts to highlight this connection. We've emphasized the connection between the

way the Iranian, Syrian, Venezuelan, and North Korean regimes treat their citizens and the threat to peace and security these governments pose internationally.

The Security Council has also recognized the connection between human rights and peace. We mandate many of the Council's peacekeeping and political missions to promote human rights and report on human rights violations and abuses. In many places, these missions are the first to know about human rights violations and abuses. We need to support these missions and ensure they fulfil their role to protect human dignity.

A related issue is the obligations of Member States under international humanitarian law. Here, too, the Security Council has never been clearer about what we expect from parties of conflict. The Council has adopted resolutions and statements on the protection of civilians, children in armed conflict, medical neutrality, and famine in armed conflict. Many of our resolutions addressing conflicts include a demand for unfettered humanitarian access. Many of our sanctions regimes allow for the listing of individuals or groups that obstruct that humanitarian aid.

The Security Council has been increasingly outspoken and demanding of respect for human rights and international humanitarian law. This is important. But the challenge that remains is a familiar one: following through.

Human rights violations and abuses and humanitarian needs have only increased on our watch. And our response has been completely inadequate.

Some argue that the Security Council has no business in a nation's domestic disputes. A nation's sovereignty, they argue, prevents any outside action, even when people are suffering and abused, and even when that nation's neighbors feel the consequences. We, too, recognize and cherish our sovereignty and the sovereignty of other nations.

But here's the thing: joining the United Nations, and pledging to abide by the words of its Charter, is the act of sovereign peoples, of sovereign nations. It is an act that is freely chosen.

Governments cannot use sovereignty as a shield when they commit mass atrocities, proliferate weapons of mass destruction, or perpetrate acts of terrorism. In these instances, the Security Council must be prepared to act. That's why we're here.

That's why the Council has such wide-ranging authority to impose sanctions, establish tribunals, or authorize the use of force. We have these tools because the people who drafted the Charter realized that there might be times when the Council needs to resort to its broad authority under Chapter VII.

And it's the inability of the Council to follow up, especially when it comes to human rights and humanitarian issues, that allows suffering to continue. And it is the inability to act that erodes our credibility and makes it more likely that more people will suffer in the future. I again thank the President of Poland for calling this critical debate. There are so many places in the world where human dignity and well-being are under assault today. There is so much more good work that we could be doing.

As I mentioned earlier, the reasons for our failures are often obvious. But the Security Council's continued paralysis in the face of so much suffering is unacceptable. It should be unacceptable to all of us. We've accepted this mandate. We have the tools necessary to follow through. The time has come to recall the fundamental purpose of the United Nations, and for the sovereign peoples who make up the United Nations to come together to take meaningful action to fulfill it.

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2. Rule of Law

On October 8, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations delivered remarks at a meeting of the Sixth Committee on "Agenda Item 86: Rule of Law at the National and International Levels." His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-86-rule-of-law-at-the-national-and-international-levels/.

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The United States would like to thank the Secretary-General for his report on this agenda item.

We would also like to thank the Rule of Law Coordination and Resource Group and the Rule of Law Unit. The individuals who perform this work often do so under very difficult circumstances. We are deeply grateful for their efforts.

The Secretary-General's report identifies a number of concerning trends. It says that in all parts of the world, there are significant political and security challenges, many of which have eroded progress in accountability, transparency, and the rule of law.

Among the most concerning of the Secretary-General's findings is the global trend toward undermining the independence of judicial institutions. This is deeply unsettling. In every country, judicial institutions must be allowed to perform their work free from any form of interference. They must be allowed to apply applicable domestic legal frameworks, even when the decisions of a government are at issue. And they must be allowed to conduct their work without fear of reprisal.

Equally worrying is the Secretary-General's reporting on corruption. Corruption is a corrosive force. It erodes trust in institutions. It increases the imbalance between those with power and those without. And it goes hand-in-hand with the defiance of international norms. For these reasons, it is only appropriate that the Security Council recently convened a meeting dedicated exclusively to this issue. In post-conflict scenarios, the United Nations and other international actors face the daunting challenge of providing assistance without inadvertently supporting the networks of corruption that may have contributed to conflict in the first place. It should come as no surprise that the first clause of the preamble to the UN Convention against Corruption draws a direct connection between corruption and the erosion of the rule of law. The preamble highlights the "seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law."

Having spoken mostly about concerning trends, let me also acknowledge some bright spots. We welcome the report that the number of female judges in Afghanistan has doubled since 2014. We also welcome the United Nations' efforts in El Salvador, where reports indicate that the Organization's support to community security has contributed to a significant decline in homicides. Furthermore, in Jordan, Kyrgyzstan and Timor-Leste, the United Nations' legal clinics have provided meaningful support to many in great need.

With respect to the work before us in the coming weeks, we hope that the Sixth Committee will be able to reach a consensus on a subtopic for next year. We think that the past practice of selecting subtopics can lead to more focused and productive debates on the rule of law in this forum.

Finally, let me say that when we gather here in the Sixth Committee, we do so on the basis of an implicit understanding. That at its best, legal discourse is a substitute for more dangerous ways to approach problems.

In our view, that same understanding is fundamental to preserving the rule of law. If the rule of law is protected, then the rules-based international legal order is also protected, and we will be better enabled, together, to address the challenges before us.

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3. Charter Committee

On October 12, 2018, Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks at a meeting of the Sixth Committee on the report of the Special Committee on the Charter of the United Nations. Her remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-85-report-of-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt/.

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We welcome this opportunity to provide a few observations on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and the Committee's work in 2018. The United States first notes that there were further positive developments in the work of the Charter Committee this year, building on the positive spirit and momentum that grew out of the 2016 and 2017 meetings. For example, delegations engaged in the Special Committee's first annual debate on the means of peaceful settlement of disputes, focusing on the role of negotiations and enquiry. The debate proved a useful platform to exchange views and state practice, and the United States looks forward to the debate in 2019, which we expect will further advance and deepen the Committee's dialogue on the role of mediation.

The United States welcomes that the Special Committee's agenda was further streamlined this year after the withdrawal of a long-standing proposal to establish an open-ended working group to study the proper implementation of the Charter of the United Nations. This proposal did not generate consensus within the Committee for nearly a decade, and its withdrawal is a positive step towards the rationalization of the Committee's work. The United States encourages Committee members to continue to make further improvements in this regard, giving further scrutiny to proposals with an eye toward updating our work and making the best use of scarce Secretariat resources. This includes the proposals made 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. In addition, the Special Committee should take

additional steps to improve the efficiency and productivity of the Committee, including seriously considering biennial meetings or shortened sessions. In the current reform-minded environment in which we operate, with tighter budgets and increased focus on improving the efficiency of the United Nations, the Special Committee needs to do its job by recognizing that these steps are reasonable and long overdue.

With respect to items on the Committee's agenda regarding the maintenance of 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 long-standing working paper that calls for, among other things, legal study of General Assembly functions and powers. This also includes a long-standing proposal regarding UN reform, as well as the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, a proposal that the United States has consistently stated it does not support. As we have noted in the Sixth Committee, and the Special Committee before, if a proposal such as that of Ghana could add value by helping to fill gaps, then it should be seriously considered. We hope that Ghana will take on board suggestions from delegations to narrow the ideas presented in its revised paper in advance of the 2019 Special Committee meeting.

In the area of sanctions, the United States thanks the Department of Political Affairs for its briefing during the Committee meeting in February, which we attended… with interest. The United States emphasizes that targeted sanctions adopted by the Security Council in accordance with the Charter of the United Nations remain an important instrument for the maintenance of international peace and security.

With respect to the issue relating to assistance to third States affected by sanctions, 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. 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. The United States was instrumental in having a working group established by this Committee to examine the issue some years ago. Our position is now, despite the biennialization of the Committee's consideration of the item, that it is time for the Committee to move on.

The United States continues 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, not duplicate efforts elsewhere in the United Nations, as well as respect the mandates of the principal organs of the United Nations. With this in mind, the United States does not believe that the Special Committee is the appropriate forum to assess the sufficiency of Member State communications submitted pursuant to Article 51 of the Charter.

Finally, we welcome the Secretary-General's report A/73/190, 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.

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B. INTERNATIONAL COURT OF JUSTICE

1. Alleged Violations of the 1955 Treaty of Amity (*Iran v. United States*)

On August 27, 2018, oral proceedings commenced at the International Court of Justice ("ICJ") in The Hague in a case brought by Iran against the United States, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*. See August 27, 2018 Secretary of State press statement, available at https://www.state.gov/on-u-s-appearance-before-the-international-court-of-justice-2/. Iran sought provisional measures to prevent the re-imposition of sanctions by the United States as a result of its withdrawal from the Joint Comprehensive Plan of Action ("JCPOA"). The United States made its oral submissions on August 28 and 30, 2018. Legal Adviser Jennifer Newstead, Professor Donald Childress, Counsel Daniel Bethlehem, and Assistant Legal Adviser Lisa Grosh presented the position of the United States. Excerpts follow (with footnotes omitted) from the presentation by Legal Adviser Newstead. The full transcript is available at https://www.icj-cij.org/en/case/175.

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2. Mr. President and Members of the Court: the United States is here in strong opposition to Iran's Request. Iran manifestly cannot meet the conditions required for the indication of provisional measures. My colleagues and I will address how Iran fails to carry its burden to establish the existence of prima facie jurisdiction; how the rights Iran invokes are not plausible Treaty of Amity rights; how the measures Iran seeks would irreparably prejudice the United States; how provisional measures are not required to avoid irreparable prejudice to Iran; and how, in reality, the measures Iran seeks would amount to an interim judgment on the merits.

3. First, notwithstanding what you heard from Iran's representatives yesterday, this case is *entirely* about an attempt to compel the United States, by order of this Court, to resume implementation of the Joint Comprehensive Plan of Action, or JCPOA. This is clear from the fact that Iran seeks to reinstate sanctions relief that the JCPOA provided, and to do so in circumstances that the JCPOA, by design, did not authorize: namely, an application to this Court. Iran is endeavouring to use the procedures of the Treaty of Amity to enforce rights that it claims under an entirely different instrument that specifically excludes judicial remedies.

4. Second, looking to the Treaty of Amity, Iran's attempt to engage the jurisdiction of this Court by invoking that Treaty is unsustainable. The Treaty, in Articles XX and XXI, carves out from its scope *precisely* the types of national security measures—those that are necessary to protect essential security interests and those relating to nuclear materials—which lie at the heart of this case. Iran's nuclear ambitions pose a grave threat today, as they have for decades, to the United States and the international community. Iran has proven its willingness to commit and to

support acts of terrorism and to pursue violent and destabilizing policies when it serves the régime's interests. The possibility that Iran may take such actions in the future with a nuclear weapons capability is not a risk that can be tolerated.

5. The United States' decision to cease participation in the JCPOA was made in recognition of the threat that Iran's behaviour continues to pose to the national security, foreign policy and economy of the United States, and the JCPOA's failure to address the totality of those concerns about Iran's behaviour. But the Treaty of Amity preserves the United States' sovereign right to make such decisions and to take such measures. It cannot, therefore, provide a basis for this Court's jurisdiction, nor does it provide Iran any basis to demonstrate rights that are plausible on the merits.

6. Third, the provisional measures that Iran requests would provide, in effect, the very relief that Iran seeks on the merits, which is contrary to this Court's jurisprudence. The prejudice to the United States from such an order by the Court is plain to see. Such an order would purport to prevent the United States, for years to come, from taking non-forcible, lawful measures to counter Iran's nuclear ambitions, as well as Iran's threatening conduct outside the scope of the JCPOA, including its development of ballistic missiles, its support for international terrorism and its escalating campaign of regional destabilization.

7. For this Court to accept Iran's legal manoeuvrings would have grave and sobering consequences. The United States' sovereign right to take lawful measures in defence of its essential security interests is not simply a prima facie right: it is more firmly rooted. And it cannot be properly constrained through a provisional measures request that does not, and cannot, engage with the substance of that U.S. right.

8. Mr. President, Iran's Request warrants another observation before I proceed. It rests on the basis of a treaty whose central purpose—friendship with the United States—Iran has expressly and repeatedly disavowed since 1979 in its words and actions, by sponsoring terrorism and other malign activity against United States citizens and interests. In other words, the situation that the Parties find themselves in today is nowhere near what was contemplated when the Treaty was concluded in 1955. In spite of this, Iran invokes the Treaty in an effort to force the United States to implement an entirely separate, non-binding arrangement—the JCPOA—which contains its own dispute resolution mechanism that purposefully excludes recourse to this Court. That cannot be an appropriate role for provisional measures.

9. Before I elaborate on these points further, I will take a moment to address what you heard yesterday. Iran sought to characterize itself as a victim, as a law-abiding State, brought to its knees by unlawful U.S. sanctions. The suggestion that Iran is a victim does not withstand scrutiny at any level. The history of Iran's destructive acts is well-documented, and I will address it in detail shortly.

10. For now, I will simply note that the United States' 8 May decision to cease participation in the JCPOA, which is at the centre of this case, was motivated by an acute, long-standing, and growing concern about the national security threat posed by Iran. The sanctions that the United States has reintroduced are lawful and appropriate in the face of Iran's activities—past, continuing, and threatened. They are the very same sanctions that were integral to a multilateral effort over years prior to the JCPOA, including with the European Union and the United Nations Security Council, to respond to the growing and well-recognized threat posed by Iran. Whether or not one agrees with the United States' decision regarding the JCPOA, there should be no misapprehension of the threat that Iran poses.

11. It also bears emphasis that the economic and social concerns that Iran's representatives raised yesterday, which Iran seeks to lay at the doorstep of the United States, find deep roots in the Iranian government's mismanagement of its own economy and repression of its own population. The Iranian government cannot succeed in shielding itself from responsibility for the consequences of its own threats to international peace and stability, as well as to its own people, by submission to this Court.

12. Mr. President, I must also be clear that the United States does intend, lawfully and for good reason, to bring heavy pressure to bear on the Iranian leadership to change their ways. We do this in the interests of U.S. national security, as well as in pursuit of a more peaceful Middle East and a more peaceful world. Contrary to what you heard yesterday, the United States takes seriously the importance of ensuring that sanctions do not apply to humanitarian activities. This is why there are humanitarian exceptions in all of the U.S. domestic sanctions statutes at issue in this case. In addition, the United States has affirmed in public guidance from the Department of the Treasury that authorizations to permit humanitarian transactions and the Statement of Licensing Policy for Safety of Flight remain in effect following the 8 May decision. Mr. Bethlehem will have more to say on this issue shortly.

13. With this introduction, let me provide a brief roadmap to my submission to come. I will provide additional background on the JCPOA and the U.S. decision of 8 May, as it is helpful in understanding the reasons why Iran's request should not be granted. Following that, I will demonstrate—by recalling for this Court Iran's support for terrorism and promotion of regional conflicts, as well as its history of repeated violations of internationally agreed restrictions on its nuclear programme—that essential national security concerns, which fall expressly outside the scope of the Treaty of Amity, are the foundation of the actions which Iran seeks to challenge. I will conclude by addressing in a summary fashion why Iran's request does not meet the requirements for the indication of provisional measures.

I. This case is about the JCPOA, which provides no consent to jurisdiction to this Court, not the Treaty of Amity

14. Let me now turn to expand on the point that this case is in reality about the JCPOA, not the Treaty of Amity. Yesterday, Iran sought to reassure this Court that its case was *not* founded on the JCPOA. As my colleagues and I will show, Iran's Request for provisional measures is fundamentally an effort to restore the sanctions relief that the United States had provided when implementing the JCPOA. The Treaty of Amity is therefore simply a device in Iran's search for a jurisdictional basis to this Court.

15. The JCPOA is a distinct, multilateral instrument, entered into in 2015 by the Permanent Members of the United Nations Security Council, Germany, the European Union and Iran. Its motivation was an attempt to address the international community's concerns about Iran's nuclear programme.

16. The JCPOA represents a series of "reciprocal commitments" by the participants. Iran committed to take steps—most of which were time-limited—to scale back its nuclear programme and to allow for certain verification measures. In return, the other participants lifted specific "nuclear-related" sanctions. Consistent with the participants' deliberate intent, the JCPOA was drafted to reflect the non-legally binding nature of the commitments thereunder. In this way, the JCPOA certainly did not guarantee Iran that the sanctions measures imposed by any of the participants prior to its entry would not be reimposed if a participant decided to exit. Equally, the JCPOA clearly declined to provide any recourse to this Court to adjudicate such a decision.

17. Both Iran's Application and its Request for provisional measures make clear that this is in fact a dispute about the JCPOA. On the screen in front of you, and at slide 1 in your judges' folder, is an extract from paragraph 2 of Iran's Application, which states:

> "The present Application exclusively concerns the internationally wrongful acts of the USA resulting from its decision to re-impose in full effect and enforce the 8 May sanctions that the USA previously decided to lift in connection with the Joint Comprehensive Plan of Action".

18. The *relief* that Iran requests also underscores this point. It asks the Court to order "the suspension of the implementation and enforcement of the 8 May sanctions". This is, fundamentally, a request for the restoration of sanctions relief under the JCPOA.

II. The U.S. measures were taken to counter the persistent threats posted by Iran to the United States and vital U.S. national interests

19. Mr. President, I will now turn to the context in which the United States made the decision of 8 May. As I have said, the JCPOA was an attempt to meet the threat of Iran's pursuit of nuclear capabilities. Some believed the JCPOA might also improve regional stability or moderate Iran's behaviour in other respects. But in the view of the United States, it is a flawed initiative for a number of reasons. It is time-limited. It contains insufficient inspection and verification measures, despite Iran's well-known deception about the purposes of its nuclear programme. It does not address the threat posed by Iran's ballistic missile programme. Nor does it address Iran's sponsorship of terrorism. And it provides a windfall of access to extraordinary amounts of funds that the Iranian régime has used to fuel proxy wars across the Middle East.

20. Iran's behaviour continued, and in many respects worsened, after the JCPOA was concluded. Iran provides hundreds of millions of dollars a year to Hezbollah in support of its worldwide terrorist activities, including using rockets supplied by Iran to target Israeli neighbourhoods and providing ground forces for the conflict in Syria. Recent reports have described the arrest of a Vienna-based Iranian diplomat in connection with an alleged plot to bomb an Iranian dissident rally in France. Here in The Netherlands, authorities have expelled two Iranian officials believed to be tied to the murder of an Iranian dissident, Ahmad Mola Nissi. And last week, the United States Department of Justice indicted two individuals accused of acting on behalf of the Government of Iran by conducting covert surveillance of Israeli and Jewish facilities in the United States and collecting detailed information on American members of an Iranian dissident group. The Islamic Revolutionary Guard Corps continues to send thousands of fighters into Syria to support the Assad régime, perpetuating a conflict that has displaced more than 6 million Syrians. And months after the ink was dry on the JCPOA, and repeatedly thereafter, Iran has tested ballistic missiles capable of delivering a nuclear weapon.

21. These more recent actions must be viewed against a long history of violent and destabilizing activities by the Iranian régime. The seizure of the U.S. Embassy in Tehran and the taking of U.S. personnel hostage on 4 November 1979 was just the beginning. In the decades since, Iran has sponsored international terrorism, including attacks against Americans and nationals of many other countries, and has provided material and financial support to terrorist groups and their proxies. Iran violated its obligations as a non-nuclear weapon State party to the Nuclear Nonproliferation Treaty (NPT) and under agreements with the International Atomic Energy Agency (IAEA). Among other things, it developed a covert, underground enrichment facility and engaged in weaponization activities, while denying the IAEA information and access

to address those issues. And, as is well-known, for years Iran has openly defied the binding decisions of the United Nations Security Council applicable to it, while contesting the unimpeachable lawfulness of those very measures.

22. Mr. President and Members of the Court, in the face of these actions by Iran, the United States has found it imperative to act. As outlined in the National Security Presidential Memorandum of 8 May, an extract of which is on the screen:

> "[i]t is the policy of the United States that Iran be denied a nuclear weapon and intercontinental ballistic missiles; that Iran's network and campaign of regional aggression be neutralized; to disrupt, degrade, or deny the Islamic Revolutionary Guards Corps and its surrogates access to the resources that sustain their destabilizing activities; and to counter Iran's aggressive development of missiles and other asymmetric and conventional weapons capabilities".

23. Mr. President, the actions of the United States taken to protect its essential national security interests over decades, using sanctions and other peaceful tools, were lawful under the Treaty. The use of these peaceful measures to counter Iran's behaviour and protect U.S. essential security interests ha[s] directly tracked the history of Iran's threats. They are aimed at preventing Iran from having the resources to sustain and increase these threats, and from using the United States financial system in furtherance of those threats. On the screen we have provided an overview of the critical sanctions authorities adopted over time by the United States to address these essential security concerns.

24. For example, the United States designated Iran as a State sponsor of terrorism in January 1984, a designation it retains to this day, which prevents certain exports and assistance from the United States to Iran. In 1987, President Reagan banned the importation of most Iranian goods and services due to Iran's active support for terrorism and to prevent such imports from contributing to financial support for such acts. In 1995, President Clinton prohibited certain transactions with respect to development of petroleum resources in Iran. Following years of Iranian evasion of sanctions aimed at a range of illicit activities, President Obama imposed measures in 2012 that blocked all property subject to U.S. jurisdiction of the Government of Iran, including its Central Bank and Iranian financial institutions. Each of these measures was firmly grounded in national security considerations and the recognition that, because resources are fungible, the imposition of economic restrictions would directly contribute to combatting Iran's actions.

25. The United States has also enacted a range of sanctions measures over time which were expressly tied to Iran's persistent effort to expand its nuclear programme, in clear violation of multiple United Nations Security Council resolutions, Iran's obligations under the NPT, and decisions by the IAEA Board of Governors.

26. For example, the U.S. Congress enacted the Iran Sanctions Act of 1996 after finding that Iran's efforts to acquire weapons of mass destruction "endanger the national security and foreign policy interests of the United States" and that "additional efforts to deny Iran the financial means to sustain its nuclear, chemical, biological, and missile weapons programs" were necessary.

27. In 2010, as part of a concerted multilateral effort, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act, which stated that the sanctions it imposed, as well as other Iran-related sanctions, are "necessary to protect the

essential security interests of the United States" to prevent Iran from developing nuclear weapons. As noted on the screen, this Act, as well as subsequent statutes enacted in 2012, followed the adoption between 2006 and 2010 of multiple United Nations Security Council resolutions intended to constrain Iran's nuclear programme, and was reinforced by parallel restrictive measures adopted by the European Union. These were among the measures that were lifted by the JCPOA.

28. Executive Order 13846, which the United States issued on 6 August—as Iran acknowledged yesterday, simply reimposes many of the sanctions previously relieved—and directly states its national security purpose by referring to "the goal of applying financial pressure on the Iranian regime in pursuit of a comprehensive and lasting solution to the full range of threats posed by Iran".

29. In the interest of time, I will not specifically cite to all of the sanctions that Iran contests today, but the point is clear. Each of these measures shares a common theme—to counter the growing threat to the United States posed by Iran by cutting off the sources of funds that can be used to support its malign activities. The sanctions are designed to, and have the effect of, constraining Iran's economic capacity to do harm.

30. Mr. President, the United States' decision to participate in the JCPOA was a continuation of these multilateral efforts to address the threat posed by Iran's nuclear programme. But in light of all of these facts and particularly the conduct of Iran following the JCPOA, the United States concluded that the JCPOA did not have its intended effect and decided to cease its participation.

31. This decision, which was announced on 8 May of this year, followed a full review of the United States' policy toward Iran. The specific reasons for the decision include the following U.S. national security concerns:

- First, the nuclear issues. The JCPOA "provided [Iran] with significant benefits in exchange for temporary commitments to constrain its uranium enrichment program and to not conduct work related to nuclear fuel reprocessing". Its mechanisms for inspecting and verifying Iran's compliance were insufficient. And the revelation of a large trove of Iranian documents relating to nuclear weaponization activities, which Iran was apparently preserving during the pendency of the JCPOA, called into question whether Iran could be trusted to enrich or control nuclear material.
- Second, the JCPOA did nothing to curb Iran's continuing development of ballistic missiles and cruise missiles, which could deliver a nuclear weapon.
- Third, since the JCPOA's inception, Iran had "only escalated its destabilizing activities in the surrounding region", using the benefit of the JCPOA sanctions relief to "fuel[] proxy wars across the Middle East and lin[e] the pockets of the Islamic Revolutionary Guard Corps …".
- Fourth, despite the JCPOA, Iran remains "the world's leading state sponsor of terrorism, and provides assistance to Hezbollah, Hamas, the Taliban, al-Qaida, and other terrorist networks".
- And finally, Iran continues to commit "grievous human rights abuses, and arbitrarily detains foreigners, including United States citizens, on spurious charges without due process of law".

32. Mr. President and Members of the Court: these are concerns that many of our partners have publicly affirmed that they share, even if they disagree with our calculus on the JCPOA. In a Joint Statement issued on 8 May, the Heads of Government of the United Kingdom, France and

Germany noted their agreement that "other major issues of concern need to be addressed", including "shared concerns about Iran's ballistic missile programme and destabilising regional activities, especially in Syria, Iraq and Yemen".

33. Mr. President, as this history demonstrates, the basis for the sanctions measures imposed over decades by the United States toward Iran is protection of the essential security interests of the United States. As Ms. Grosh will address, the Parties excluded such measures from the Treaty of Amity to preserve their sovereign discretion to decide, and to act, in accordance with their solemn national security interest on such sensitive matters. The decision and the measures imposed are squarely within the Treaty's exceptions for measures necessary to protect U.S. essential security and other national security interests.

III. Iran's Request fails to meet the requirements for the indication of provisional measures

34. Mr. President and Members of the Court, I have already given you the essence of our case, as it will be developed by my colleagues. Let me, in the interest of clarity, summarize our case so that you have all the elements knitted together in one place.

35. Iran has failed to show each of the four essential elements of a request for provisional measures, as well as other conditions my colleagues will address. Its request for provisional measures should therefore be rejected.

36. *First*, it must be rejected because the Court lacks prima facie jurisdiction to hear Iran's claims. The dispute between the United States and Iran is manifestly a dispute about the implementation of the JCPOA and an effort to interfere with the sovereign rights of the United States to take lawful measures in support of its national security. This dispute is not about the interpretation or application of rights arising under the Treaty of Amity. As this Court has recognized, it "cannot decide a dispute between States without the consent of those States to its jurisdiction". The JCPOA reflects a clear intent that such matters are to be handled through political channels. The JCPOA participants, including Iran, clearly excluded from the dispute settlement mechanism of the JCPOA any resort to this Court. Iran's application to the Court is therefore a deliberate effort to manufacture a legal right to challenge the U.S. decision that continued participation in the JCPOA is not in its essential security interests. As a result, the Court lacks jurisdiction to address this dispute.

37. But even if the Court looks to the text of the Treaty of Amity as a potential source of jurisdiction, there is none to be found. Iran has failed to satisfy the basic preconditions of the Treaty's compromissory clause in Article XXI, paragraph 2. Read together with Article XX, paragraph 1, of the Treaty, this excludes from the scope of application of the Treaty exactly the kinds of measures that the United States is now taking against Iran, and has taken for approaching 40 years. Ms. Grosh will develop this reasoning in greater detail.

38. *Second*, the rights Iran asserts do not plausibly arise under the Treaty of Amity. They are in actuality benefits that arose under the JCPOA that Iran is seeking to cast as rights and to have restored. In addition, because Article XX (1)'s exceptions clause applies to all the measures at issue here, Iran does not have a plausible claim on the merits with respect to any of the particular substantive provisions invoked.

39. *Third*, as Mr. Bethlehem will address more fully, Iran cannot show either irreparable prejudice or urgency. The harm of which Iran complains is economic harm. This is presumptively not amenable to interim relief, and Iran cannot rebut the presumption.

40. *Finally*, when weighing whether provisional measures are warranted, the Court must also consider the rights of the Respondent. This includes with respect to the effect of any provisional measures on those rights, as well as whether it prejudices the final decision of the Court at the merits stage. Our position is that Iran's request fails, yet again, on these grounds. A grant of provisional measures in this case would fundamentally prejudge Iran's merits claims and would cause irreparable prejudice to the rights of the United States.

* * * *

On October 3, 2018, the ICJ issued an order partially granting Iran's request for provisional measures, not entirely as requested by Iran. The court ordered the United States to

> … remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of goods required for humanitarian needs, such as (i) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. To this end, the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above.

2. Certain Iranian Assets (*Iran v. United States*)

On October 8, 2018, the United States appeared before the ICJ in another case brought by Iran, *Certain Iranian Assets*. See October 8, 2018 press statement of the Secretary of State, available at https://www.state.gov/on-u-s-appearance-before-the-international-court-of-justice/. In this case, Iran challenges measures adopted by the United States to deter Iran's support for terrorism by, among other things, allowing victims of terrorism to recover damages in U.S. courts. As discussed in Chapter 9, *infra*, the United States decided to terminate the 1955 U.S.-Iran Treaty of Amity, which Iran invoked in its cases against the United States before the ICJ.

Deputy Legal Adviser Richard Visek appeared as agent of the United States in the proceedings in *Certain Iranian Assets*. His statement providing an overview of the U.S. preliminary objections in the case is excerpted below (with footnotes omitted). Professor Donald Childress, Assistant Legal Adviser Lisa Grosh, Attorney-Adviser Emily Kimball, Deputy Assistant Legal Adviser John Daley, Counsel Daniel Bethlehem, and Laurence Boisson de Chazournes also presented the position of the United States. Transcripts and submissions in the case are available at https://www.icj-cij.org/en/case/164.

* * * *

2. Mr. President and Members of the Court, the United States is here today to present our serious objections to the application filed by Iran. At the outset, we should be clear as to what this case is about. The actions at the root of this case centre on Iran's support for international terrorism and its complaints about the U.S. legal framework that allows victims of that terrorism to hold Iran accountable through judicial proceedings and receive compensation for their tragic losses.

3. Iran's effort to secure relief from the Court in this case — to in effect deny terrorism victims justice — is wholly unfounded, and its application should be rejected in its entirety as inadmissible. First, Iran's invocation of the Treaty of Amity as a basis for challenging the U.S. measures here is an abuse of process. Iran's overarching complaint that it should not be subjected to litigation in U.S. courts relating to its sponsorship of terrorism is not something to be resolved under the Treaty of Amity. Second, the integrity of the judicial process would not be served were the Court to order relief in favour of a litigant with such unclean hands. Beyond that, Iran's case suffers from significant jurisdictional defects. Nothing in Iran's written pleading overcomes the obstacles to admissibility or cures the jurisdictional defects that the United States has identified.

4. In this introductory presentation, I will place the U.S. preliminary objections in the context of the overall case before you. First, I will provide an overview of what this case concerns and place it in its appropriate historical, legal, and factual context. Second, I will summarize the U.S. objections to admissibility and jurisdiction. Third, I will address the fact that all of the U.S. objections are exclusively preliminary in nature.

A. Iran's case must be understood in its appropriate context

5. Mr. President, Members of the Court, this case concerns measures taken by the United States progressively over a period of years to enable victims of terrorism to hold Iran accountable for acts of terrorism directed at or affecting U.S. persons. This accountability takes the form of litigation in U.S. courts pursuant to legislation that allows for States that sponsor terrorist acts to be held accountable for such acts and for victims to obtain compensation. Throughout its submissions, Iran references in particular the *Peterson* proceeding, which arose from the Iran-sponsored bombing of the U.S. marine barracks in Beirut, Lebanon in 1983, which killed 241 U.S. peacekeepers. Because Iran has made the *Peterson* proceeding the cornerstone of its case before this Court, it is fitting to begin there and consider the facts underlying that litigation.

6. As Mr. Bethlehem will explain in greater detail, military personnel of the United States had been present in Beirut since August 1982, as part of a multinational peacekeeping force to help the Lebanese armed forces restore order. An agreement between the United States and Lebanese Governments specifically provided that the U.S. forces would not engage in combat and would be equipped only with weapons consistent with that non-combat role. On the morning of 23 October 1983, a member of Hezbollah who was an Iranian citizen drove a 19-ton truck loaded with high explosives through the barriers at the U.S. Marine barracks. He crashed through a wire fence and wall of sandbags, entered the barracks, and detonated the device, destroying the four-story barracks, and killing 241 U.S. servicemen and gravely wounding many more. Shortly afterward, a similar attack on the French barracks killed 58 French peacekeepers and five Lebanese civilians.

7. Iran's most senior leaders took responsibility for this deadly attack, and even boasted about it. Here is what the Minister of the Islamic Revolutionary Guard Corps had to say: the United States "knows that both the TNT and the ideology which in one blast sent to hell 400 officers, NCOs and soldiers of the Marine Headquarters have been provided by Iran". Mr. President and Members of the Court, there is nothing equivocal about that statement. Iran took responsibility for the attack, and did so shamelessly.

8. Following this attack and other malign acts during this period, the United States designated Iran as a State sponsor of terrorism and enacted legislation allowing U.S. victims of terrorism to sue States that provide support for such acts — this is the legislation that Iran challenges in this case. The families of the deceased and surviving victims of the Beirut bombing sued Iran in federal court in the District of Columbia to seek recovery for their losses. The opinion of the U.S. District Court paints a picture of the gravity and intensity of the attack and its impact on its victims. In addition to the immediate suffering of those who experienced the attack, the opinion describes the anguish of the victims' family members who learned of the explosion, waited to learn whether their family members had survived the attack, and for those least fortunate, brought their relatives home to bury them, honour them, and grieve their loss.

9. Relying on legislation that Iran challenges in this case, the family members and surviving victims holding judgments against Iran for the bombing sought to satisfy their judgments through attachment and enforcement proceedings. The specific proceeding that Iran makes the centrepiece of its case here is a judgment enforcement proceeding against assets in which Iran's central bank, Bank Markazi, had an interest. Iran — having provided support for the deadly attack against the peacekeepers and having boasted about it — now asks this Court to find that the U.S. court-ordered turnover of Bank Markazi's assets to the victims of that attack somehow violates the Treaty of Amity. Mr. President, Members of the Court, Iran's case must be understood in this context.

10. In setting out its case, Iran ignores the Beirut barracks bombing and other terrorist acts for which Iran provided material support despite the fact that these incidents are the reason why the United States adopted the measures Iran challenges. Iran's narrative is therefore wholly incomplete and misleading. Iran would have the Court focus selectively only on two sets of facts. One, that the Parties concluded the Treaty of Amity in 1955 with the expectation of a rich and mutually beneficial commercial and consular relationship based on enduring peace and sincere friendship. And two, that in 1996, the United States began enacting measures that, by virtue of Iran's designation as a State that repeatedly sponsored acts of international terrorism, restricted Iran's sovereign immunity in U.S. courts and enabled the turnover of its assets. Iran's narrative conveniently leaves out critical pieces of the picture.

11. To place Iran's case in its appropriate historical, factual and legal context, it is necessary for the Court to consider what Iran has so conveniently omitted. The friendly bilateral relationship between Iran and the United States, on which the 1955 Treaty of Amity was based, was fundamentally ruptured on 4 November 1979, with the seizure of the U.S. embassy in Tehran and the taking of hostages, which was the subject of this Court's decision in case concerning United States Diplomatic and Consular Staff in Tehran. While the hostage crisis was ultimately resolved with the signing of the Algiers Accords on 19 January 1981, and the hostages' release, the relationship between the United States and Iran could not be salvaged, as Iran has continued to engage in violent and destabilizing acts targeted at the United States, its nationals and its interests up to the present day. Iran's bad acts include support for terrorist bombings, assassinations, kidnappings and airline hijackings, the encouragement and promotion

of terrorism and other violent acts by Iran's most senior leaders, and violation of nuclear non-proliferation, ballistic missiles and arms trafficking obligations. Iran's malicious conduct cannot be set to one side. It is the lens through which both the Treaty of Amity and U.S. measures must be viewed.

B. The U.S. measures were designed to counter Iran's sponsorship of terrorism

12. Mr. President and Members of the Court, the measures Iran challenges in this case encompass a range of legislative, executive and judicial actions that respond to Iran's misconduct. The U.S. measures seek to hold State sponsors of terrorism like Iran accountable and make State sponsorship of terrorism costly in order to deter such acts in the future. Rather than repeat all of the measures, which are detailed in our written submission, I will provide an overview of the types of measures challenged by Iran and their purpose.

13. In 1996, Congress enacted an amendment to the Foreign Sovereign Immunities Act, or "FSIA", to provide for lawsuits against State sponsors of terrorism. As one Member of Congress stated in connection with this amendment: "We must make a clear statement that support for terrorism is unacceptable in the international community. Allowing lawsuits against nations which aid terrorists will allow us to increase the pressure against these outlaw states." This and other congressional statements to which I will refer are at tab 5 of your judges' folders.

14. Subsequently, as part of the Terrorism Risk Insurance Act of 2002, or "TRIA", following the September 11, 2001 terrorist attacks, the United States adopted enforcement measures for judgments entered under the 1996 amendment. The sponsoring Senator stated that "deterrence" was a central principle motivating the legislation. The FSIA was further amended as part of the 2008 National Defense Authorization Act to provide for a terrorism exception to the jurisdictional immunity of a foreign State. A Senator sponsoring this amendment to the FSIA stated that his proposed legislation was "an important tool designed to deter future state-sponsored terrorism". Finally, in 2012, Congress enacted the Iran Threat Reduction and Syria Human Rights Act, which specifically addressed issues related to the *Peterson* enforcement proceeding. The sponsor of that legislation cited the need to hold Iran accountable for its actions. The United States has taken these measures progressively over a period of years to enable victims of Iranian-sponsored terrorism to pursue some measure of accountability and redress in U.S. courts.

15. Similarly, U.S. Executive Order13599, which was issued by President Obama and implements the National Defense Authorization Act of 2012, responds to serious concerns about Iranian behaviour and seeks to address Iran's use of its financial resources for troubling ends. That Order blocks the property of Iran and Iranian financial institutions in the United States, and was imposed to protect U.S. essential security interests by addressing Iran's illicit activities relating to the development of ballistic missiles and its provision of arms and other support to militant and terrorist groups.

16. Iran's characterization of this case seeks to discount this critical context. Iran makes cursory efforts — both in its Application and Memorial and in its response to the United States' preliminary objections — to cast this case as an anodyne legal dispute about the interpretation and application of a commercial and consular treaty. But these efforts do not withstand scrutiny. To the contrary, Iran's grievance goes to its long-standing disapproval of the U.S. domestic legal framework for allowing victims of terrorism to seek compensation in U.S. courts from Iran and Iranian State entities for their calculated cruelties.

17. The Treaty of Amity does not address the issues Iran seeks to litigate here. This case is not about the treatment of each country's companies and individuals doing business with the other in the context of a normal commercial and economic relationship. And, how could it be? The United States and Iran have not enjoyed the type of commercial and consular relations that the Treaty was intended to govern in decades. In an attempt to overcome this fundamental flaw in its case, Iran has approached this litigation by contorting the meaning, object and purpose of the Treaty to fit otherwise unrelated claims. It has invented novel and overly expansive theories of treaty interpretation, and dodged any direct engagement with the issue of its own sponsorship of terrorism and the relationship between that support and the U.S. measures at issue. These objections advanced by the United States warrant the Court's attention and resolution at this preliminary stage and provide a clear basis for ruling that this case should not proceed to the merits.

II. Overview of U.S. objections to jurisdiction and admissibility

18. Turning now to the specific U.S. objections, I will take the opportunity to summarize those objections in brief and highlight a few key points.

A. Objections to admissibility

19. As Mr. Bethlehem will address, the United States raises two objections to admissibility of Iran's Application and urges the Court to decline to adjudicate this case on the basis of these objections.

1. Abuse of process

20. First, the United States objects to the admissibility of Iran's case on the grounds that it constitutes an abuse of process. This is because Iran's case does not come within the scope of the Treaty of Amity, and the friendly relationship on which the Treaty was predicated no longer exists. Iran's invocation of the compromissory clause in the Treaty is accordingly a misuse of the Court's judicial function.

21. Before proceeding to the next objection, I will make one additional point regarding Iran's cynical litigation tactics. Iran's unwillingness to be forthcoming with respect to the pleadings filed in the U.S. court proceedings in *Peterson* serves as yet another example of Iran's misuse of this Court's judicial function.

22. As the United States has explained in prior communications to the Court, the *Peterson* documents were filed in the U.S. judicial proceeding that concerned assets in which Iran's Central Bank, Bank Markazi, had an interest. Those assets were sought by plaintiffs holding judgments against Iran related to the 1983 bombing of the U.S. Marine barracks in Lebanon. In the present case, Iran claims that the turnover of those assets violated various provisions of the Treaty of Amity. The *Peterson* documents are, therefore, highly relevant to the United States ability to fully appreciate the factual and legal aspects of Iran's claims in this case and to properly defend itself before the Court. Despite the fact that certain of Iran's claims are based on the treatment of Bank Markazi in that litigation, Iran attempted to deny the United States and the Court access to the complete record of that proceeding, including Bank Markazi's filings. Those filings address a range of arguments relevant to Iran's claims in this case, including representations pertaining to matters such as Bank Markazi's structure and operations, the nature of its investment and dealings in the assets in question, and its articulation of how principles of sovereign immunity and certain provisions of the Treaty of Amity applied in relation to the disputed turnover of assets. At tab 4 of your judges' folders is the plaintiffs' Second Amended Complaint, which is representative of the types of issues that were raised over the course of the proceeding.

23. Bank Markazi's filings in the *Peterson* case contain arguments that undermine the very arguments Iran has presented to this Court. Because of Iran's efforts to prevent access to the documents, the United States did not have these highly probative documents during preparation and submission of our preliminary objections filing, and was forced to submit the documents to this Court on 19 September 2017. Despite the direct relevance of these documents to this case, Iran continued to object to the U.S. submission. This lack of transparency calls into question Iran's credibility as a litigant, and further highlights the abusive nature of Iran's case.

2. Unclean hands

24. The second objection to the admissibility of Iran's application is that Iran comes to the Court with unclean hands. Indeed, it is a remarkable show of bad faith that Iran now seeks relief from this Court because of the outcome of the *Peterson* proceeding, which arose from Iran's support for a brutal and deadly terrorist attack, an act about which the Iranian leadership boasted.

25. Iran has no response to this. This is telling, and we would urge the Court to draw from this the only appropriate inference — there is no rebuttal to the facts and evidence adduced by the United States demonstrating Iran's long-standing support for international terrorism.

B. Objections to jurisdiction

26. Mr. President, Members of the Court, I will now turn to summarizing briefly the U.S. jurisdictional objections.

27. Ms Kimball will start off with submissions addressing the Court's jurisdiction and questions of applicable law. As she will explain, the Court should dismiss for lack of jurisdiction *ratione materiae*, Iran's claims that concern matters that are plainly not encompassed by the Treaty. The exclusive basis asserted for the Court's jurisdiction in this case is the compromissory clause of the Treaty which limits the Court's jurisdiction to "any dispute …as to the interpretation or application of" the Treaty of Amity. However, Iran grounds important aspects of its claims in customary international law, or seeks redress for measures that either are not governed by the Treaty articles that Iran invokes or fall within explicit exclusions set out in the text of the Treaty. These claims therefore should be dismissed for lack of jurisdiction.

28. This brings me to the three specific U.S. objections to jurisdiction.

1. Article XX (1) (c) and (d)

29. First, Mr. Daley will present on the U.S. objection to Iran's challenge to U.S. Executive Order 13599. This measure blocks the property and interests in property of the Government of Iran and Iranian financial institutions in the United States. It is excluded from the Treaty's coverage by the exceptions in Article XX, paragraph 1 (c), which applies to measures regulating production and trafficking in arms, and paragraph 1 (d), which applies to measures necessary to protect a party's essential security interests. Measures covered by these exceptions are excluded from the Court's jurisdiction as reflected in the Treaty's compromissory clause.

2. Sovereign immunity

30. Second, Professor Boisson de Chazournes will explain that there is no jurisdiction under the Treaty to adjudicate one of Iran's core grievances, namely the claim that the U.S. measures at issue offend customary international law principles of sovereign immunity. Iran's contention that the Treaty of Amity was intended to incorporate broad rules of sovereign immunity is unsupported. The application of well-established treaty interpretation rules clearly demonstrates that the Treaty of Amity, a commercial and consular treaty designed to facilitate trade and private investment, is not an instrument that establishes any rights to sovereign immunity protections for the Government of Iran or other Iranian State entities. Thus, all of

Iran's claims that are predicated on the U.S. purported failure to accord sovereign immunity to the Government of Iran, Bank Markazi or other Iranian State-owned entities are ripe for dismissal at this stage because these claims are not grounded in the Treaty.

3. Bank Markazi

31. Third, Professor Childress will address the U.S. objection to Iran's claims regarding the treatment of Bank Markazi. At the same time that Iran complains that the U.S. measures do not afford sovereign immunity to Iran and Iranian government entities, including Bank Markazi, Iran also complains that its central bank was not afforded the protections owed to "companies" under certain provisions of the Treaty. These two complaints cannot be reconciled.

32. Iran's argument that Bank Markazi is owed the protections afforded to "companies" under the Treaty is plainly wrong and runs counter to the requirements of Article 31 (1) of the Vienna Convention on the Law of Treaties to read the ordinary meaning of a treaty's terms "in their context" and "in light of [the treaty's] object and purpose". A proper analysis of the relevant Treaty provisions illustrates that the Parties never intended for the Treaty to govern the treatment of a State entity exercising sovereign functions. Accordingly, the Court should dismiss Iran's claims regarding the treatment of Bank Markazi.

III. U.S. objections are exclusively preliminary

33. Mr. President, Members of the Court, Article 79 of the Rules of the Court provides for preliminary decision with respect to "[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits". As my colleagues will explain, all of the U.S. objections to admissibility and jurisdiction are exclusively preliminary in nature and can — and should — be decided at this preliminary stage. The Court need not venture into the merits to find in favour of the United States.

34. Iran devotes a section of its written submission to enumerating elements of its claims that the United States allegedly does not contest. I wish to comment briefly on this to ensure our position is clear. The United States has addressed only those elements of Iran's claims that are relevant to the five U.S. preliminary objections raised at this stage. The United States has certainly not consented to Iran's interpretation of the various articles of the Treaty or other aspects of its case simply because the United States has chosen not to address those issues at this preliminary stage. To the extent that the Court were to decide that certain of Iran's claims should move forward, the United States reserves the right to pursue all other arguments or objections opposing Iran's claims, as appropriate.

35. Mr. President, Members of the Court, before concluding, I would like to address a recent development. Last week, Secretary of State Pompeo announced the U.S. decision to terminate the Treaty of Amity with Iran. For the reasons I have discussed and Ms Grosh will elaborate upon, Iran and the United States have not enjoyed the normal commercial and consular relationship that was originally envisioned. Iran's malign acts in the preceding decades and up to the present day have led to a prolonged breakdown in friendly relations. As recently as last month, the United States evacuated and temporarily relocated the personnel of its consulate in Basra, Iraq because of attacks by militias supported by the Iranian government. Mindful of the absurdity of continuing to enable Iran to use a treaty predicated on friendship to bring illegitimate cases, the United States decided to terminate the Treaty of Amity with Iran.

IV. Conclusion

Mr. President, Members of the Court, my colleagues will proceed with the U.S. presentation from here, providing an overview of the Treaty of Amity and setting out in detail the U.S. preliminary objections. I now ask that you call on Ms Grosh to continue the United States' submissions.

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3. Relocation of the U.S. Embassy to Jerusalem (*Palestine v. United States*)

On September 28, 2018, the Palestinians filed an Application instituting proceedings against the United States at the ICJ under the Vienna Convention on Diplomatic Relations' ("VCDR") Optional Protocol Concerning the Compulsory Settlement of Disputes, alleging that the U.S. decision on December 6, 2017 to relocate the U.S. Embassy in Israel to Jerusalem violated U.S. obligations under the VCDR. As reflected in the Court's scheduling order of November 15, 2018, excerpted below and available at https://www.icj-cij.org/en/case/176, Legal Adviser Jennifer Newstead wrote to the Court on November 2, 2018 to request that the Court dismiss the case as consent to the Court's jurisdiction is manifestly lacking in the absence of treaty relations between the United States and the Palestinians. As discussed in Chapter 4, the United States gave notification of its withdrawal from the Optional Protocol to the VCDR Concerning the Compulsory Settlement of Disputes. The United States remains party to the VCDR.

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Whereas, by a letter dated 2 November 2018, Ms Jennifer G. Newstead, Legal Adviser of the United States Department of State, informed the Court that, on 13 May 2014, following the Applicant's "purported accession" to the Vienna Convention, the United States had submitted a communication to the Secretary-General of the United Nations, declaring that the United States did not consider itself to be in a treaty relationship with the Applicant under the Vienna Convention; whereas she added that, on 1 May 2018, following the Applicant's "purported accession" to the Optional Protocol, the United States had submitted a similar communication to the Secretary-General of the United Nations, declaring that the United States did not consider itself to be in a treaty relationship with the Applicant under the Optional Protocol; whereas, in her letter, Ms Newstead observed that the Applicant had been aware of these communications by the United States before it submitted its Application to the Court; and whereas she concluded that, according to the United States, "it [was] manifest that the Court ha[d] no jurisdiction in respect of the Application" and that the case ought to be removed from the list;

* * * *

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

On February 28, 2018, the United States submitted its initial written statement in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) before the ICJ. See *Digest 2017* at 305-6 regarding the U.S. objection to the request for an advisory opinion. On May 15, 2018, the United States submitted written comments. On September 5, 2018, the United States made its oral submission. Legal Adviser Jennifer Newstead presented the U.S. position. The February 28, 2018 U.S. Statement, excerpted below (with footnotes omitted) includes chapters describing the context of the referral to the ICJ; identifying reasons why the Court should decline to provide an advisory opinion; identifying issues the Court would need to consider were it to examine the questions referred; and demonstrating that a proper application of the test for identifying rules of customary international law reveals the absence of any international law rule in 1965 that would have made the establishment of the British Indian Ocean Territory ("BIOT") unlawful. Submissions and transcripts are available at https://www.icj-cij.org/en/case/169.

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3.1 It is well established that the Court has jurisdiction under Article 65, paragraph 1, of its Statute to render an advisory opinion at the request of the General Assembly on "any legal question."

3.2 Even where the Court's jurisdiction is established, its authority to issue an advisory opinion is discretionary. The Court has recognized that the "discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function." In this regard, and despite this otherwise broad grant of advisory jurisdiction, both this Court and its predecessor, the Permanent Court of International Justice ("Permanent Court"), have recognized inherent limitations stemming from the Court's judicial character. The Court not only has the power to decline an opinion, but also "the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function."

3.3 The United States recognizes that the Court, mindful of its responsibilities as the principal judicial organ of the United Nations, has stated that only "compelling reasons should lead the Court to refuse its opinion." The Court has indicated that the lack of an interested State's consent could present such compelling reasons if responding to a request for an advisory opinion would circumvent the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.

3.4 The present case falls squarely within the very circumstances envisaged by the Court, such that it is difficult to see how the Court could exercise its advisory jurisdiction without circumventing the fundamental principle of consent to judicial settlement.

3.5 This Chapter is divided into three sections. Section A explains that the Court was not provided advisory jurisdiction to adjudicate disputes between States. Section B discusses the Court's jurisprudence, which affirms that the advisory function should not be used to adjudicate disputes between States. Section C explains that the Court should decline to respond to the

General Assembly's request in this instance, because the request calls for the adjudication of a bilateral sovereignty dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent.

A. The Court was not provided advisory jurisdiction under its Statute to adjudicate disputes between States.

3.6 The Court's advisory jurisdiction is limited to "any legal question" asked by an authorized U.N. organ or agency. This language reflects a deliberate decision by the drafters of the Statute of the Court to adopt a narrower formulation of the provision granting advisory jurisdiction as compared to that of the Permanent Court.

3.7 Article 14 of the Covenant of the League of Nations empowered the Permanent Court to give an advisory opinion on "any dispute or question referred to it by the Council or by the Assembly." As one leading commentator has noted, this formulation envisaged two distinct types of opinion, one on "disputes" and another on "questions."

3.8 The drafters of the provisions that set forth the advisory jurisdiction of this Court, however, quickly dispensed with the phrase "any dispute or question" in favor of the narrower formulation "any legal question."

3.9 The drafters also rejected several proposals that would have extended the right to request an advisory opinion to individual States, either acting alone or in concert with others. The Informal Inter-Allied Committee, a group of experts charged with making recommendations on the structure and functions of the International Court of Justice, explained the reason for not allowing an individual State to request an advisory opinion as follows:

[G]iven the authoritative nature of the Court's pronouncements, *ex parte* applications would afford a means whereby the State concerned could *indirectly impose a species of compulsory jurisdiction* on the rest of the world.

3.10 States that adhered to the U.N. Charter and the Statute of the International Court of Justice accepted the Court's authority in principle to render an advisory opinion on "any legal question" when requested by an authorized U.N. organ or agency. But they did so with the understanding that there would be a clear demarcation between the Court's advisory jurisdiction on the one hand and its contentious jurisdiction on the other.

3.11 Those States, moreover, expected that the Court would preserve and protect its judicial character, including through application of necessary judicial safeguards, such as the fundamental principle of consent to judicial settlement. States did not intend to introduce through the Court's advisory jurisdiction a nonbinding substitute for the Court's consent-based contentious jurisdiction. To do so would have meant subjecting States to dispute settlement without their consent, and without the normal procedural safeguards for adjudicating bilateral disputes.

B. The Court's jurisprudence affirms that the advisory opinion function should not be used to adjudicate disputes between States.

3.12 It is a fundamental principle that a State is not obliged to allow its disputes to be submitted for judicial settlement without its consent. Both this Court and its predecessor have addressed the application of this principle in the advisory opinion context. In *Eastern Carelia*, the Permanent Court found that it could not exercise its advisory jurisdiction because the question put to it "concerns directly the main point of the controversy between Finland and Russia" and because "[a]nswering the questions would be substantially equivalent to deciding the dispute between the parties." This Court has affirmed the applicability of this principle to

advisory proceedings on a number of occasions, including most recently in *Construction of a Wall*.

3.13 This Court first addressed the important issue of rendering an advisory opinion in the absence of interested States' consent in *Interpretation of Peace Treaties*, in which Bulgaria, Hungary, and Romania contested the Court's power to render a response. There, the Court affirmed the fundamental principle of consent to judicial settlement and stressed the continuing validity of the expression of that principle as set forth in *Eastern Carelia*, but distinguished the facts of that case. It stated:

> In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case (Advisory Opinion No. 5), when the Court declined to give an Opinion because it found that the question put to it was *directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties ...* .
>
> As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it *in no way touches the merits of those disputes ...* .
>
> *It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it*.

3.14 As Judge Azevedo emphasized in his separate opinion, "the compelling reason which had led to the abolition of [the 'dispute' clause in Article 14] of the Covenant—i.e. the refusal to make use of the advisory function to decide a genuine dispute at law over the heads of the parties concerned—continues to retain its force, for it is the only means of avoiding a misuse of that function."

3.15 Twenty-five years later, in *Western Sahara*, the Court again reaffirmed the fundamental principle of consent to judicial settlement as a constraint on the Court's advisory function. Citing *Interpretation of Peace Treaties*, it stressed that the lack of consent, while not a jurisdictional bar in advisory cases, "might constitute a ground for declining to give the opinion if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." …

3.16 The Court has reaffirmed this language on several occasions, including most recently in *Construction of a Wall*. In reaching the conclusion in that case that a response would not have the effect of circumventing the principle of consent to judicial settlement, the Court highlighted that "the opinion [was] requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute."

3.17 Importantly, however, as Judge Owada stressed, it remains the case that rendering a response to a request would be incompatible with the Court's judicial function if doing so would be "tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute."

C. The Court should decline to respond to the General Assembly's request because the request calls for the adjudication of a bilateral territorial dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent to judicial settlement by this Court.

3.18 Applying the Court's jurisprudence to the facts of this request, it is difficult to see how responding to the questions that have been posed would be compatible with the judicial character of the Court.

3.19 There is undoubtedly a bilateral territorial dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago and the questions referred—however disguised—strike at the core of that dispute.

3.20 The request does not merely touch on or relate indirectly to the merits of the bilateral territorial dispute between Mauritius and the United Kingdom—it addresses itself to the central elements of that very dispute. When viewed in light of the history of the bilateral dispute discussed in Chapter II above, it becomes clear that the questions referred reflect an attempt on the part of Mauritius to repackage its claim to sovereignty advanced in other fora. As such, the questions put to the Court are "directly related to the main point of a dispute actually pending" between Mauritius and the United Kingdom, and "answering the question[s] would be substantially equivalent to deciding the dispute between the parties."

3.21 In addition, as the Court noted in *Western Sahara*, the "origin and scope of a dispute ... are important in appreciating, from the point of view of the exercise of the Court's discretion, the real significance" of a State's lack of consent. It is notable in this regard that Mauritius first asserted its sovereignty claim against the United Kingdom as a State-to-State dispute over a decade after it gained its independence from the United Kingdom.

3.22 In contrast to the requests in *Western Sahara* and *Construction of a Wall*, the dispute between Mauritius and the United Kingdom did not arise during the proceedings of the General Assembly and in relation to matters with which the General Assembly was dealing. The General Assembly did consider and adopt a resolution pertaining to the Chagos Archipelago *prior* to Mauritius's independence. However, when Mauritius's application for U.N. membership was presented to the U.N. Security Council and General Assembly for consideration in 1968, there was neither any debate nor even mention of the territorial scope of the newly independent State of Mauritius, nor any suggestion of Mauritius's decolonization as being "incomplete."

3.23 Mauritius has pursued its sovereignty claim bilaterally since 1980, twelve years after its independence, and has since raised its claim to the Chagos Archipelago before various U.N. bodies. As far as the United States is aware, however, no U.N. organ has considered Mauritius or its claim to the Chagos Archipelago as falling within the United Nations' decolonization agenda since Mauritius gained its independence in 1968, until the request for an advisory opinion was added to the General Assembly's agenda on September 16, 2016.

3.24 The lack of U.N. General Assembly involvement in this matter for the decades following Mauritius's independence, and the fact that a new General Assembly agenda item needed to be created in 2016 for consideration of this referral request, belie any assertion that a response to the General Assembly's request is "necessary for [it] in [its] actions."

3.25 It is quite clear that Mauritius sought an advisory opinion in order to advance its sovereignty claim against the United Kingdom, after failed attempts to seek adjudication of that claim in other fora. The views expressed by many U.N. Member States during the General Assembly debate on the request for an advisory opinion indicate that they understood this as the purpose of the request.

* * * *

3.28 This inquiry is particularly appropriate when, as discussed in Chapter IV below, the questions referred are not adequately formulated and require clarification as to which legal

questions are really in issue. An understanding of the General Assembly's purpose in making the request would help to inform that determination, and hence to discern the type of advice the General Assembly is seeking. Statements made by members of the General Assembly in the context of the adoption of the referral resolution, along with the actions of the requesting body itself, are an important source of that understanding.

3.29 Increased scrutiny is called for in the exercise of the Court's advisory jurisdiction in this instance because the dispute involves sovereignty over territory. Indeed, the Court emphasized this consideration in *Western Sahara*, where, in discussing Spain's lack of consent, the Court stated that "[t]he issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today ... ," and noted that the questions referred did not "relate to a territorial dispute ... between the interested States." There, before responding to the General Assembly's request, the Court first satisfied itself that "the request for an opinion [did] not call for adjudication upon existing territorial rights or sovereignty over territory."

3.30 In sharp contrast, the questions posed in the present case invite an examination of the validity of the United Kingdom's exercise of sovereignty over the Chagos Archipelago today, such that it would be difficult to form a response that would not be tantamount to adjudicating on the very subject matter of the territorial sovereignty dispute between Mauritius and the United Kingdom.

3.31 Allowing the advisory opinion process to be used to address territorial disputes—fifty years after the boundaries were established, as here—could open the door to the adjudication of any number of such disputes without the consent of interested parties. This attempt to circumvent the Court's lack of contentious jurisdiction over a bilateral matter creates a potentially dangerous precedent, and could lead to the normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when the States directly involved have not consented to judicial settlement by the Court.

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On May 15, 2018, the United States submitted written comments responding to other submissions received by the ICJ in the matter. Excerpts follow from the introductory section of the U.S. submission made in May.

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1.5 Chapter II begins by highlighting important points of agreement among the written statements, including with respect to the circumstances that would warrant the Court's exercise of its discretion to decline to respond to the General Assembly's request. Those very circumstances are evident in this case, since the questions referred focus on a bilateral territorial dispute between Mauritius and the United Kingdom. Unless the Court can avoid addressing that dispute—which is difficult to imagine—responding to the request would circumvent the fundamental principle that a State is not obliged to submit its disputes for adjudication without its consent.

1.6 Chapter II then explains why none of the arguments in favor of responding to the questions referred dispense with the very serious concerns regarding the propriety of utilizing the

Court's advisory jurisdiction in a case that is, at its core, about an ongoing bilateral sovereignty dispute. There does not appear to be any disagreement in the written statements that this case bears directly on such a dispute. Indeed, many of the written statements affirm this reality, some going so far as to endorse the resort to the Court's advisory jurisdiction as an effort to resolve that sovereignty dispute. The United States and a number of other States, however, have underscored that the Court must proceed with great caution in the face of such an overt effort to circumvent the fundamental principle of consent to judicial settlement. Some States, including the United States, also cautioned that doing so could have the effect of blurring the deliberate distinction that was created between the Court's consent-based contentious jurisdiction and its advisory jurisdiction.

1.7 For these reasons, as the United States observed in its Written Statement, it is incumbent upon the Court to determine whether it could answer Question (a) in a manner consistent with the principle of consent to judicial settlement.

1.8 There is no doubt that answering Question (a) would embroil the Court in a bilateral dispute and that the United Kingdom has not consented to judicial settlement of that dispute by this Court. Of particular note, a number of the written statements acknowledge that the separation of the Chagos Archipelago would not have been unlawful if it reflected the free consent of the people of the territory. For its part, Mauritius suggests that the agreement, which both parties reaffirmed after Mauritius's independence, and which an arbitral tribunal concluded gave rise to binding obligations between the two States, did not or could not reflect such consent. But, as discussed in Chapter II, it would be inappropriate for the Court to conduct, in these advisory proceedings, an assessment of the validity of a bilateral agreement.

1.9 The position of the United States thus remains that the Court should decline to respond to the questions posed. That said, should the Court choose to respond to Question (a), the answer should be that the process of decolonization of Mauritius was lawfully completed in 1968. In its Written Statement, the United States set forth its analysis as to why the historical record supports this conclusion.

1.10 In Chapter III, the United States responds to arguments made in some of the written statements about whether international law supplied a rule at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory (BIOT).

1.11 Were it to answer Question (a), the Court would need to ascertain the law as it existed at the relevant time. The written statements that addressed this issue generally agree that the relevant time would have been 1965 (when the United Kingdom established the BIOT) or, at the latest, 1968 (when Mauritius gained its independence), but present a range of views as to the state of the relevant law and how the Court might determine it.

1.12 Most of those submissions either did not accurately describe how the Court would determine a relevant rule of customary international law or drew incorrect conclusions from the historical record about state practice and States' contemporaneous beliefs about the law. As such, the submissions failed to demonstrate that a specific legal obligation existed at the relevant time that would have made the establishment of the BIOT unlawful.

1.13 Implicit in the way the various written statements approach the questions referred is a common understanding that the answer to Question (b) is linked to Question (a). This understanding supports the conclusion, as the United States explained in its Written Statement, that if the Court either cannot, for reasons of propriety or otherwise, provide an answer to Question (a), or if its answers Question (a) in the affirmative (*i.e.*, that the decolonization of Mauritius was lawfully completed in 1968), there is no need to answer Question (b).

1.14 The United States therefore does not deem it necessary to address Question (b) in any detail. Instead, in Chapter IV, the United States offers several observations on others' written statements, including identifying some assumptions that present an overly simplistic or incomplete view of the complex set of issues involved.

1.15 Chapter V concludes by again urging that the Court, in order to preserve the integrity of its judicial function, decline to respond to the request for an advisory opinion. The written statements submitted to the Court differ on the appropriate response to this request. But there is no disagreement that the questions bear directly and significantly on an ongoing bilateral sovereignty dispute over territory. Attempts to present the legal questions that are at issue in this dispute as ones that might guide the General Assembly in the exercise of its decolonization mandate neither alters that reality, nor displaces the principle of consent to judicial settlement as an important constraint on the Court's advisory jurisdiction.

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Oral proceedings in the case commenced on September 3, 2018 and the United States made a statement. The statement of Legal Adviser Newstead follows. Submissions and transcripts are available at https://www.icj-cij.org/en/case/169.

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2. We have heard a great deal in these proceedings about the long and difficult process of decolonization, and about the struggle faced by many formerly colonized countries. We have heard about the suffering endured by the Chagossians, who now live dispersed among a number of States. And the United Kingdom has described its programmes, including its agreement with Mauritius, for compensating the Chagossians. We have also heard about extensive litigation, including proceedings by Mauritius against the United Kingdom under the Law of the Sea Convention, and contentious proceedings it sought to bring before this Court.

3. These facts provide an important backdrop for this case. The worldwide struggle for freedom and independence after World War II was hard fought and hard won. Nothing I will say today is intended to diminish this remarkable achievement, which the United States strongly supported.

4. The task before the Court, however, is to decide how to address the General Assembly's referral of two questions. Since these questions go to the heart of a bilateral sovereignty dispute over territory, answering them would pose a fundamental challenge to the integrity of the Court's advisory jurisdiction.

5. My submission today will focus on why the Court should exercise its discretion to decline to answer the questions referred. Advisory jurisdiction was not included in the Court's Statute as a way to circumvent the fundamental principle of consent to adjudication of bilateral disputes. None of the participants here has adequately addressed how the Court could provide a substantive response without transgressing this principle. Mauritius, which spearheaded the referral, has conceded that the purpose of the request was to enable it to exercise sovereignty over the Chagos Archipelago.

6. In the view of the United States, the observations provided by the participants in these proceedings make clear that the Court has been invited to give an advisory opinion that would be tantamount to adjudicating the territorial dispute between Mauritius and the United Kingdom. As such, this is demonstrably a situation in which the exercise of advisory jurisdiction would be inappropriate.

7. Mr. President, Members of the Court, after developing this point, I will turn to address Mauritius's claim that a specific rule of customary international law had emerged by 1965 that prohibited the United Kingdom from establishing the British Indian Ocean Territory. To be clear, in our view, this is not an issue that the Court should address in the absence of consent by both Parties to this dispute. But if the Court does decide to reach the merits, our submission will clarify the appropriate methodology for ascertaining the state of the law as it stood more than 50 years ago and will apply that methodology to the historical record. This is something that many of the submissions have failed to do, or have done incorrectly in our view. When judged under the rubric set out in this Court's jurisprudence, the historical record does not support Mauritius's contention that a prohibition existed under customary international law at the relevant time.

8. In addition, I note the fact that a key element of the bilateral dispute between Mauritius and the United Kingdom is their 1965 Agreement regarding the Chagos Archipelago. Mauritius has sought to challenge the validity and effect of that agreement here, as it tried to do in the Law of the Sea arbitration. But this is precisely the type of challenge that is unsuitable for resolution in advisory proceedings. The United States respectfully submits that the Court should exercise its discretion to decline to answer the questions referred, lest it be drawn into a bilateral dispute over sovereignty in the guise of an advisory proceeding.

II. THIS CASE PRESENTS COMPELLING REASONS FOR THE COURT TO DECLINE TO PROVIDE THE OPINION REQUESTED

9. Mr. President, Members of the Court, I will now turn to the Court's discretion to decline to provide the opinion, which resides in Article 65, paragraph 1, of its Statute.

10. I will focus on two areas where States have disagreed in these proceedings. First, they have disagreed about the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction. In this regard, I will explain that the questions referred relate so substantially and directly to that dispute that answering them would mean the Court has effectively dispensed with the principle of consent.

11. Second, States have disagreed about the applicability of the Court's jurisprudence to the present request. Some have emphasized that the Court has not found it necessary to exercise its discretion in prior advisory opinions where lack of consent was an issue. Those prior opinions are readily distinguishable, however, and this case raises exactly the issues that the Court has identified as factors that could lead it to decline to provide an opinion.

12. Following this discussion, I will touch briefly on the importance of the distinction between the Court's advisory and contentious jurisdictions, which the current Request seeks to erode.

A. The relevance of the relationship between the request and the bilateral sovereignty dispute

13. Mr. President, Members of the Court, I turn first to the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction.

1. The origin and scope of the dispute

14. In its Advisory Opinion in *Western Sahara*, the Court stated that where a request for an advisory opinion relates to a bilateral dispute, and one of the parties to that dispute has not given its consent, the origin and scope of the dispute are important for appreciating the "real significance" of a State's lack of consent. In this regard, I recall a few points about the origin and scope of this dispute:

(a) First, Mauritius gained its independence in 1968 and in the same year became a Member of the United Nations. When its application for United Nations membership was presented to the Security Council and the General Assembly, no State mentioned the territorial scope of the newly independent State of Mauritius or suggested that its decolonization remained "incomplete". It was not until more than a decade after independence that Mauritius began to challenge the 1965 Agreement and to assert a sovereignty claim over the Archipelago.

(b) Second, prior to this case, Mauritius pursued its sovereignty claim against the United Kingdom through other legal avenues. Mauritius attempted to bring a contentious dispute before this Court, and the United Kingdom declined to consent. Mauritius also initiated arbitral proceedings under the Law of the Sea Convention, claiming that Mauritius alone possessed sovereign rights arising from the Archipelago.

(c) Third, the submissions of Mauritius and the United Kingdom in these proceedings, when read in light of their very similar submissions in the arbitration, reveal a direct relationship between the request for an advisory opinion and the main points of the bilateral dispute.

2. The history of the request in the General Assembly

15. A review of the proceedings in the General Assembly that led to the present Request also attest to the understanding of many States and the General Assembly that the Request was aimed at resolving a bilateral dispute. Four points are notable in this regard.

16. *First*, the matter arose in the General Assembly only after Mauritius requested in 2016 that a new item be added to the agenda.

17. *Second*, the President of the General Assembly facilitated an understanding between Mauritius and the United Kingdom that the Assembly would not consider requesting an advisory opinion until the following year. It did so to allow the parties time to negotiate a resolution to their dispute.

18. *Third*, the Assembly took the matter back up in 2017 due to lack of progress between the parties to resolve the dispute8.

19. *Fourth,* many States indicated that they understood the Request as seeking the Court's assistance in resolving the bilateral dispute — whether they voted for, against, or abstain on the resolution itself.

3. The wording of the two questions in the General Assembly's request

20. Finally, the wording of the two questions presented to the Court also confirms that they are designed to invite the Court to adjudicate the bilateral dispute.

21. The first question refers to "the separation of the Chagos Archipelago from Mauritius" in 1965. This "separation" is central to Mauritius's sovereignty claim, as it argued in the Law of the Sea arbitration and in its submissions to this Court.

22. The second question asks about the legal consequences of the United Kingdom's "continued administration" of the Archipelago, and references a programme by Mauritius to settle Mauritian nationals there. These matters bear directly on sovereignty over the Archipelago, and it is difficult to discern how such consequences could be addressed without adjudicating the underlying dispute.

23. Mr. President, Members of the Court, far from dispelling concerns that the Request improperly invites the Court to adjudicate a bilateral dispute, Mauritius has been clear that this is precisely what it wants the Court to do. In Mauritius's own words, "sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by" the first question referred to the Court. If that is the case, the Court could not, consistent with its own jurisprudence, provide a response.

24. In short, this Request places the Court in an untenable position. It asks the Court to opine on a sovereignty dispute in an advisory context, in circumvention of the principle of consent. However, this situation is one that the drafters of the Court's Statute had the foresight to address by giving the Court the discretion, under Article 65, to decline to provide an opinion. This discretion was provided to "protect the integrity of the Court's judicial function".

B. The Court's jurisprudence

25. Mr. President, Members of the Court, several States have reminded you that this Court has never declined to give an advisory opinion. And that is true. But the Court has repeatedly recognized that it has "the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function". In addition, the Court in those prior advisory opinions has identified circumstances that readily distinguish those cases from the present case and that should lead the Court to decline to issue an opinion here.

26. Before turning to the advisory opinions most relevant to this case, I will briefly address the *Namibia* case. As counsel for Mauritius noted, the United States supported the Security Council's request for an advisory opinion in that case. However, there is no parallel to be drawn from the facts of that case to the request now pending before the Court. That request did not concern a bilateral dispute, it concerned a territory that had been under a League of Nations mandate, and it addressed the obligations of States arising from South Africa's continued presence in Namibia after the mandate had been terminated.

1. *Western Sahara* and the *Wall* cases

27. As many participants have recognized, the Court's advisory opinions in the *Western Sahara* and *Wall* cases are more instructive. There are, however, important points of distinction between those cases and the present Request. In this regard, I will make three observations:

28. *First*, in *Western Sahara*, the Court emphasized that it could respond to the General Assembly's request because the dispute between Morocco and Spain was *not* about the current legal status of the territory and an opinion would *not* affect the existing rights of Spain. The Court emphasized that the questions did *not* relate to a territorial dispute nor did they call for the adjudication of existing territorial rights or sovereignty. As a result, the Court found that its response would *not* compromise the legal positions of the parties even though Spain had refused its consent. This case presents opposite circumstances. Mauritius *does* assert a claim to sovereignty today, it *does* seek to affect the existing rights of the United Kingdom, and this dispute *is* one over territory.

29. *Second*, in concluding in the *Wall* case that an advisory opinion would not have the effect of circumventing the principle of consent, the Court did not rely only on whether the request was situated in the context of a much broader set of issues. It also took care not to address permanent status issues, which were at the core of the underlying bilateral dispute between the Israelis and the Palestinians. In contrast, the submissions in this case demonstrate that sovereignty is at the core of the dispute between Mauritius and the United Kingdom, and cannot be separated from it.

30. *Third*, unlike in prior cases, the General Assembly has not addressed the decolonization of Mauritius since its independence in 1968, and has never engaged in the sovereignty dispute that arose over a decade later. In contrast, the Court will recall that in *Western Sahara*, the General Assembly had been actively considering the situation for more than a decade when the request was made, and the Court observed that the request in that case was "the latest of a long series of General Assembly resolutions dealing with Western Sahara". In the *Wall* case, the Court likewise emphasized the United Nations' "acute concern" with the question referred, given the General Assembly's historic involvement in the future of Mandate Palestine. Although it is true that Mauritius has periodically reminded the General Assembly of its sovereignty claim to the Chagos Archipelago, the General Assembly itself has not been engaged in the matter, and certainly not to a degree that is comparable to its involvement in the matters at issue in the *Western Sahara* or *Wall* cases.

2. The relevance of the source of law at issue

31. Mr. President and Members of the Court, Mauritius has also suggested that the Court could respond to this Request consistent with its jurisprudence because the territorial dispute can be "fully resolved exclusively by reference to the rules of international law on decolonization and self-determination". Mauritius contends that this renders the dispute not "purely bilateral", particularly when coupled with the *erga omnes* character of the obligations purportedly at issue.

32. However, this argument fails to account for the Court's emphasis in its jurisprudence on the anticipated *effect* an advisory opinion may have on the principle of consent. If, as Mauritius concedes, the advisory opinion would have the effect of disposing of the bilateral dispute, then giving the opinion would, in the words of Judge Owada in the *Wall* case, be "tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute". In such circumstances, the Court has a duty to decline to provide the opinion regardless of whether the substantive principles at issue may be of broader interest or importance.

33. Nothing in the Court's jurisprudence suggests that the application of the consent principle hinges on the source of law a State may invoke to advance its claim. In fact, the Court has reached the opposite conclusion, upholding the consent principle even when the obligations purportedly in question had an *erga omnes* character. In *East Timor*, the Court found that it could not adjudicate the validity of a bilateral agreement — even one alleged to violate obligations *erga omnes* — absent the consent of the parties to that agreement. The Court explained that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". The Court also noted that "[w]hatever the nature of the obligations invoked", the Court could not rule in a manner that "would imply an evaluation of the lawfulness of the conduct of [a] State" that had not given its consent to adjudication.

34. To summarize, Mr. President and Members of the Court, the approach advanced by Mauritius on the question of the Court's discretion would seriously undermine the separation between the Court's two distinct functions: on the one hand, to resolve disputes with the consent of the parties, and on the other to render legal advice to the United Nations. If, as Mauritius suggests, the fundamental principle of consent could be avoided by simply recasting a bilateral dispute as one involving matters of general interest to the United Nations, those bodies empowered to seek an advisory opinion could effectively impose a form of dispute settlement on States, absent their consent, through a simple majority vote. But the Court's architects drew clear lines in the Statute between the Court's contentious and advisory jurisdictions. They rejected proposals that would have authorized the Court to provide advisory opinions on "disputes" or

which would have had the effect of extending to States the authority to impose compulsory jurisdiction on other States without their consent.

III. NO RULE OF CUSTOMARY INTERNATIONAL LAW HAD EMERGED IN 1965 (OR 1968) THAT WOULD HAVE PROHIBITED THE UNITED KINGDOM FROM ESTABLISHING THE BRITISH INDIAN OCEAN TERRITORY

35. Mr. President, Members of the Court, I will now offer a few observations to assist the Court should it embark on the difficult task of attempting to address the first question referred: whether the decolonization of Mauritius was lawfully completed in 1968.

36. As our written submissions explain, there are a few key points on which States agree, and a number on which they do not. I will briefly summarize the areas of agreement before focusing on the disagreements, as these bear directly on this Court's jurisprudence on the development of international law.

37. Before beginning, I note that we are discussing the views of a limited subset of States. Some States felt it inappropriate for the Court to reach the questions referred. Other States provided only cursory views on these questions. What matters, of course, is not the total number of States advocating for one position or another, but the merits of their legal position.

38. Turning to the areas of agreement: States agree that, were the Court to reach this issue, it would need to ascertain the law as it existed at the relevant time. For these purposes, the relevant time is 1965, when Mauritius and the United Kingdom concluded their agreement regarding the Chagos Archipelago or, at the latest, 1968, when Mauritius became independent. In other words, the Court is being asked how it would view the matter if it were sitting in 1968, and not in 2018 on the basis of 50 years of progress in developing self-determination as a legal concept. In addition, most States that have addressed the issue acknowledge that multilateral treaties did not supply a relevant rule at the time, and the Court would thus need to focus on whether a relevant bilateral agreement existed between the parties or a relevant rule of customary international law had emerged. Finally, whatever the contours of international law at the time, the States that addressed the issue all agree that the boundaries of a non-self-governing territory could be altered prior to independence subject to the freely expressed wishes of the people.

39. In this respect, the Court has heard from the United Kingdom and Mauritius that much of their dispute centres on the relevance of their 1965 Agreement, which the Arbitral Tribunal found to be binding. If the Court were to address the merits, questions about the 1965 Agreement would play a central role. The United States' focus on customary international law is not meant to suggest otherwise. But it is, of course, Mauritius and the United Kingdom, and not third States, that are in the best position to explain their bilateral agreement.

40. Instead, the value we can add relates to the formation and content of customary international law, since the United States has been an active participant in promoting self-determination for the past century. During the 1950s and 1960s, the United States, along with many other States, expressed strong political support for decolonization and saw it as indispensable for securing freedom for peoples across the world. At the same time, States maintained markedly different views about whether specific international legal rules governing self-determination had yet developed.

41. Turning to the points of disagreement in these proceedings: States disagree on whether a specific rule of customary international law existed at the relevant time and as to how the Court might make this determination. In particular, they disagree on four key points:

— *First*, how the Court might determine whether a specific rule of customary international law existed at the relevant time.

— *Second*, whether resolution 1514 reflected or created a rule of customary international law and, specifically, whether it created a "right to territorial integrity" for non-self-governing territories.

— *Third*, whether there was a requirement for non-self-governing territories to exercise self-determination through a plebiscite.

— *Fourth*, exactly when States reached consensus on the existence and content of a right of self-determination.

A. A rule of customary international law requires evidence of extensive and virtually uniform State practice and *opinio juris*

42. I turn to the first area of disagreement, over the proper test for determining a rule of customary international law. A number of States in these proceedings have simply asserted, without supporting evidence, that a relevant rule of customary international law existed at the relevant time. Others have misstated the methodology for determining the existence of such a rule.

43. As the Court explained in *North Sea Continental Shelf* and many times since, the emergence of a rule of customary international law requires two elements: "extensive and virtually uniform" State practice and *opinio juris*. Only where these two elements are satisfied can the Court identify a rule of customary international law.

44. Mr. President, Members of the Court, this seems a self-evident proposition. And as shown by the evidence on State practice and *opinio juris*, which is cited extensively in our written submissions, there was no rule of customary international law that would have prohibited the establishment of the British Indian Ocean Territory.

B. The contemporaneous statements and practice of States do not indicate resolution 1514 reflected or created customary international law

45. The second area of disagreement concerns whether resolution 1514 reflected or created a relevant rule of customary international law. Several States have cited resolution 1514, and other decolonization resolutions, in arguing that a specific rule of customary international law existed at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory. But General Assembly resolutions do not themselves create customary international law. They could only be relevant to the extent that they reflected then existing *opinio juris.* The fact that the General Assembly cited particular resolutions in the question referred to the Court does not alter their non-binding nature. As the Court explained in *Kosovo*, it is for the Court, and not the General Assembly, to determine the law applicable to answering the referral.

46. To determine whether a particular resolution provides evidence of *opinio juris*, this Court has stressed that "it is necessary to look at its content and the conditions of its adoption" and that deducing *opinio juris* from "the attitude of States towards certain General Assembly resolutions" must be done "with all due caution". The best evidence of States' contemporaneous attitude toward a resolution are the statements they make during negotiation and adoption. Expressions of moral and political support are not enough. Instead, the Court must be presented with evidence sufficient to establish that States at the relevant time believed that international law required the conduct in question.

47. None of the resolutions from the 1950s and 1960s cited by Mauritius and others as evidence of a rule of customary international law meets this standard, and here I will offer three observations.

48. *First*, during negotiation and adoption of these resolutions, several States emphasized that the resolutions did not create a new rule of international law or indicated that the resolutions did not reflect their views. In particular, States debated the reference to a "right" of self-determination in paragraph 2 of resolution 1514. On Monday, counsel for Mauritius invited the Court to draw significance from the fact that only two States in these proceedings indicated that the right of self-determination had not yet crystallized in the 1960s. But counsel failed to address the relevant fact that, during the 1960s, other States expressed similar views, as noted in our written submissions.

49. *Second*, the fact that several States abstained on these resolutions means that the resolutions did not reflect a consensus among States, much less *opinio juris*. Some participants in these proceedings seek to dismiss the importance of abstentions, stressing instead that no State voted against resolution 1514 and other decolonization resolutions. However, the absence of votes against a resolution in no way establishes that it reflected *opinio juris*. States are often able to support a resolution, or at least to not vote against it, even where they may not agree with all of its terms, precisely because resolutions are not binding and States can explain their understanding of the resolution on the record.

50. *Third*, some States argue that paragraph 6 of resolution 1514 reflected or established an international legal right for non-self-governing territories. However, the negotiation records of this resolution do not demonstrate a consensus among States that paragraph 6 reflected a then existing international legal right with respect to non-self-governing territories.

51. Instead, some States saw paragraph 6 as a reaffirmation of Article 2, paragraph 4, of the United Nations Charter and nothing more. Others emphasized that *newly independent States* were entitled to territorial integrity, but did not suggest that paragraph 6 applied to non-self-governing territories. Two States understood paragraph 6 as *excluding* a right of self-determination for peoples of contested territories. From this mixed record, it would be impossible to conclude that States understood paragraph 6 to reflect or establish an international right of territorial integrity for non-self-governing territories.

52. State practice at the relevant time also illustrates that there was no right to territorial integrity that would have precluded the establishment of a British Indian Ocean Territory. Several territories changed their boundaries before or upon achieving independence and were endorsed by the United Nations.

53. For example, shortly before Jamaican independence, the United Kingdom made administrative changes to the colony of Jamaica by separating it from the Cayman Islands and the Turks and Caicos Islands. Jamaica opted for independence in 1962, and the two other territories freely decided to remain UK territories. The United Nations admitted Jamaica as a Member and treated the Cayman Islands and the Turks and Caicos Islands as separate non-self-governing territories. Neither the United Nations nor Member States complained that the separation of these territories from Jamaica and their maintenance as UK territories was inconsistent with resolution 151436.

54. On Monday, counsel for Mauritius suggested that international law required the people of Mauritius to be given the option of independence for a territory that included the Chagos Archipelago. But many territories in the 1960s were presented with options that did not include independence within prior territorial boundaries, and their independence was no less valid for that. For example, in British Cameroons, the United Nations held two separate plebiscites in the North and South and gave voters in each region only two options: independence by joining the Republic of Cameroon, or independence by joining Nigeria. These

plebiscites did not include an option of independence with prior boundaries, contrary to counsel's claim that such an option was legally required.

55. These examples demonstrate that, even if resolution 1514 were interpreted to address the adjustment of territorial boundaries, States did not engage in any consistent practice on that issue before or after resolution 1514 was adopted.

C. At the relevant time, there was no international legal requirement to hold a plebiscite prior to independence

56. I turn to the third area of disagreement. States generally agree that territorial boundaries could be changed prior to independence based on the freely expressed wishes of the people. However, a few States have asserted in these proceedings that the wishes of the people regarding such changes could only be determined through a plebiscite. And that is simply not consistent with history.

57. As this Court has previously advised, an essential feature of self-determination decisions is that they take into account the freely expressed wishes of the peoples concerned. As a matter of State practice, general elections as well as negotiations or agreements between the administering State and representative bodies were used throughout the post-war wave of decolonization. For example, during this period the United Kingdom relied on both referenda and general elections, and the United Nations supported the United Kingdom's methods. There is no dispute that, as a general matter, self-determination may be exercised through a variety of means.

58. Despite this history, Mauritius and a few other States have argued that there is an exception to this general principle when a territory's boundaries change prior to independence. They rely primarily on examples of the trust territories where the General Assembly called for plebiscites, such as those in the British Cameroons and Ruanda-Urundi. However, these States fail to adequately explain why a plebiscite was not required for Jamaica, Turks and Caicos, and the Cayman Islands. Nor do they explain why the General Assembly never called for a plebiscite for Mauritius in any of the resolutions mentioning Mauritius between 1965 and 1967.

59. In Mauritius, independence was achieved through decisions by its elected representatives following a general election in which the parties favouring independence achieved a clear majority. After independence, Mauritius was admitted to the United Nations as a Member State without dissent. No State at the time contended that Mauritius's independence was incomplete or that its decision to become independent did not reflect the wishes of its people. There is no basis for the Court to advise now, 50 years later, that a different process should have been used.

D. States continued to disagree about the existence and content of a right of self-determination until 1970, with the adoption of the Friendly Relations Declaration

60. Mr. President, Members of the Court, I turn to the fourth area of disagreement, whether States reached consensus about the existence and content of a right of self-determination prior to 1970. Although many States in these proceedings have focused on resolution 1514 of 1960, it is the Friendly Relations Declaration, adopted in 1970, that marks the turning point for the emergence of a right to self-determination under customary international law. The Declaration articulated, for the first time with the consensus support of all States, the specific elements of the "principle of equal rights and self-determination of peoples".

61. The negotiating record of the Declaration, which is cited in detail in our Written Comments, undermines any argument that consensus about resolution 1514 or self-determination had been reached by 1965 or even 1968. Through the late 1960s, key aspects of self-

determination remained unsettled, such as the peoples to which the right extended, the status options available to such peoples, and whether force could be used to achieve self-determination. States also continued to disagree about whether self-determination constituted a legal right and whether resolution 1514 could be regarded as reflecting international law. In fact, most aspects of the self-determination provision of the Declaration remained unresolved until 1970.

62. In addition, the formulation of self-determination in the Declaration departed in material ways from resolution 1514, as shown by the United Kingdom on Monday. In fact, the Declaration did not even mention resolution 1514.

63. Mr. President and Members of the Court, Mauritius conspicuously made no mention of the Friendly Relations Declaration on Monday. Its written submissions likewise do not address the Declaration's negotiation history and gloss over the differences between it and resolution 1514. That is likely because the historical record simply does not support the conclusion that *opinio juris* among States was reached prior to 1970, or that States had engaged by that time in extensive and virtually uniform State practice.

64. Contrary to some States' assertions, the Court has never held otherwise in its opinions addressing self-determination. Although the Court discussed the evolution of the principle as early as 1971 and 1975 in the *Namibia* and *Western Sahara* Opinions, it did not hold that a customary international law rule crystallized before the adoption of the Declaration in 1970, much less one specific enough to have prohibited the establishment of the British Indian Ocean Territory. And nothing in the Court's treatment of self-determination in later cases — in *East Timor*, the *Wall*, and *Kosovo* — indicates that a right of self-determination had crystallized prior to 1970.

65. Mr. President, Members of the Court, Mauritius has repeatedly drawn attention to the fact that our written submissions, alongside those of the United Kingdom, are in the minority in arguing that no relevant rule of customary international law existed. However, the United States respectfully submits that our conclusions about the law are based on a rigorous assessment of the evidence of State practice and *opinio juris* in accordance with the jurisprudence of the Court.

66. Even if one could conclude that there was a growing consensus in 1965 or 1968 regarding the existence of a right of self-determination in international law, there was no consensus as to the specific rule that Mauritius asserts here: that the United Kingdom was required to hold a plebiscite prior to establishing the British Indian Ocean Territory. Further, there was no extensive and virtually uniform State practice.

IV. CONCLUSION

67. Before concluding, I would like to briefly address the assurances offered by Mauritius that it is prepared to accept the continued operation of the military facility on Diego Garcia and recognizes the facility's role in supporting international and regional security. As stated in our Written Comments, the United States has operated this facility jointly with the United Kingdom for decades, and we agree that it continues to play a critical role in the maintenance of peace and security, both in the Indian Ocean region and beyond. Mauritius neglects, however, to note how the United States has responded to those assurances. And on this issue, I refer the Court to our written submissions. In addition, I note that offering those assurances underscores the fact that Mauritius is asking the Court to adjudicate its sovereignty claim through the guise of an advisory opinion.

68. Mr. President, Members of the Court, during these proceedings we have heard a great deal about a turbulent but inspiring period in history. However, the task before the Court is clear: to decide how to address the referral by the General Assembly of two questions that go to the

heart of a bilateral sovereignty dispute over territory. There is no mistaking that these questions seek to engage the Court's advisory jurisdiction to resolve this dispute without the consent of both Parties. Answering the questions would accordingly run counter to the Court's mandate, its jurisprudence and the fundamental principle of consent to judicial settlement.

69. The United States thus urges the Court, in light of these compelling circumstances, to exercise its discretion to decline to issue the opinion requested.

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C. INTERNATIONAL LAW COMMISSION

1. ILC Draft Conclusions on the Identification of Customary International Law

As discussed in *Digest 2016* at 278-80, the United States engaged in a detailed review of the draft conclusions and commentary adopted in 2016 by the International Law Commission ("ILC") regarding the identification of customary international law. On January 5, 2018, the United States formally submitted its comments on the ILC's Draft Conclusions on the Identification of Customary International Law. The U.S. comments are excerpted below (with footnotes omitted) and are available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. See *infra* for remarks by Legal Advisor Jennifer Newstead on the report of the ILC on its 70th Session on October 31, 2018, which also touch upon the U.S. comments on the Draft Conclusions on the Identification of Customary International Law.

* * * *

The United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation—a general and consistent practice of States followed by them out of a sense of legal obligation—are met. Although there is no precise formula to indicate how widespread and consistent a practice must be, the State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity (*i.e.*, specially affected States). This high threshold required to establish that a particular rule is customary international law is important to all aspects of analyzing or otherwise identifying customary international law.

Against this background, we agree with many of the propositions in the Draft Conclusions and commentaries. The Commission and its Special Rapporteur have produced an impressive draft that is already contributing to a better understanding of the formation and identification of customary international law. However, the United States continues to have serious concerns regarding certain issues addressed in the Draft Conclusions and commentaries. We are particularly concerned about Draft Conclusions and commentaries that we believe go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. Although recommendations regarding progressive development are appropriate in some Commission topics, we believe that they are not well-suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the

established legal framework regarding the identification of customary international law. …To the extent that the Commission wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law or that reflect existing legal methodology.

We take this opportunity to address the most significant of our concerns regarding the Draft Conclusions and commentaries. We note that our failure to comment on any particular aspect of the commentaries should not be taken as U.S. agreement with it.

Practice of International Organizations

The United States believes that Draft Conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law. In particular, the statement in paragraph 1 that "it is *primarily* the practice of States that contributes to the formation, or expression, of rules of customary international law" (emphasis added) inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

* * * *

…In this regard, we have concerns in at least five respects.

The first way in which the proposition that the practice of international organizations contributes to the formation and expression of customary international law is not adequately developed concerns when it is that such contributions occur. Draft Conclusion 4, paragraph 2, states that "[i]n certain cases" the practice of international organizations contributes to the formation, or expression, of rules of customary international law. … Since the mandates of international organizations are generally carefully negotiated in treaties, we would be concerned by a novel interpretation of international law that would implicitly and retroactively expand the mandates of international organizations in this unclear way. …

The second way in which the proposition is not adequately developed is that the Draft Conclusions and commentary fail to address how one would determine the *opinio juris* of an international organization. If the practice of an international organization ever directly contributed to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so. See Draft Conclusion 9. The question that arises is how to determine whether an international organization has the requisite *opinio juris*. Is it the *opinio juris* of the secretary general (or equivalent), the secretariat, all member States, or a subset thereof? This crucial question is not addressed in the Draft Conclusions or commentary, and as noted above, is not, in our experience, addressed expressly in the mandates of international organizations.

The third way in which the proposition is not adequately developed is the failure to articulate the types of conduct by international organizations that might constitute practice for the purpose of Draft Conclusion 4. International organizations are very different from States in that they are created by and composed of States and do not have distinct branches of

government. Therefore, the forms of State practice discussed in Draft Conclusion 6 do not all have clear analogues in the activities of international organizations.

The fourth way in which the proposition is not adequately developed concerns the consequences for a traditional analysis of saying that the practice of some or all international organizations contributes to the creation or expression of customary international law. …

The fifth way in which the proposition is not adequately developed is the failure to consider the precise range of practice deemed relevant in conducting a customary international law analysis. The practice of *all* States is relevant to whether there is a general and consistent State practice, and the task of analyzing State practice is made easier since they number fewer than 200. By contrast, the Commission's text has paid no attention to how such an approach would operate with respect to international organizations. Indeed, we believe that the Commission's approach unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates.

Finally, the United States believes that the discussion in paragraph (8) of the commentary demonstrates why the better approach is to recognize that it is the practice of States within international organizations that is the practice (with *opinio juris*) that contributes to the formation and expression of custom, not the practice of the international organization as such. That paragraph argues that, in weighing the practice of an international organization, one should consider the number of member States and their reaction to the practice of the international organization plus whether the organization's practice is carried out on behalf of the member States, whether the members States have endorsed the practice, and whether the practice is consonant with that of member States. In other words, one should look through the international organization to its member States to see how to value the practice of the international organization. We believe that, as the discussion in paragraph (8) suggests, what is really of relevance is the practice and *opinio juris* of the member States themselves, not the practice of the international organization.

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***Opinio Juris* and "Rights"**

The United States notes that the State practice that contributes to the formation of customary international law has often been referred to historically as practice that is undertaken out of "a sense of legal obligation." The Draft Conclusions and commentaries expand this language to include practice undertaken with a sense of legal right. …

* * * *

The United States agrees, in principle, that international law recognizes that States have certain rights (such as the inherent right of self-defense, or navigational rights and coastal state entitlements under the law of the sea), and that States exercising those rights may do so with the legal view that they are legally entitled to do so. However, we believe that, in this context, expressly including the concept of a legal right in Draft Conclusion 9 is unnecessary because States have generally understood the phrase undertaken out of "a sense of legal obligation" to encompass, where appropriate, State practice undertaken out of a sense of legal right or

obligation (or, in the words of the International Court of Justice, a "recognition that a rule of law or legal obligation is involved"). For example, one State's legal obligation can sometimes be characterized as a right of other States (*e.g.*, one State's obligation not to commit acts of aggression is also the right of other States to be free from acts of aggression), and vice versa. Adding "right or" to the Draft Conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase "a sense of legal obligation."

Addition of the phrase "right or" is also potentially confusing by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to ascertain whether States *may* act. The United States believes that it is important that the Draft Conclusion and commentary adhere to common, widely used language on this issue, both to avoid suggesting any conflict with existing State practice and in order to avoid being misunderstood to affect the longstanding principle that States are free to act in the absence of a legal restriction. …

Given the potential for misunderstanding on this issue and the longstanding use of "a sense of legal obligation," we therefore believe the text of the Draft Conclusion should retain the common formulation and omit "right or," which was not found in the Special Rapporteur's initial draft of the Draft Conclusion. We believe the commentary should then explain that the widely used phrasing "a sense of legal obligation" can encompass not merely legal obligations but also, in appropriate circumstances, legal rights. The commentary should also be explicit that, where there is no legal restriction, a State need not identify a specific customary international law right to justify its action, but instead the State may rely on the general principle that States are free to act in the absence of legal restrictions.

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Draft Conclusion 5 (Conduct of the State as State practice), Commentary paragraph (5).

The United States has concerns with the statement in paragraph (5) of the commentary to Draft Conclusion 5, which asserts that "[p]ractice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law." The statement does not indicate what is meant by the purported requirement that practice be "publicly available" and no authority is cited to support it. The fact that the practice might not otherwise be "publicly available" or known to some would not, in our view, preclude its relevance to the formation and identification of customary international law. For this reason, we suggest that the sentence either be deleted or revised accordingly.

Draft Conclusions 6 (Forms of practice) and 10 (Forms of evidence of acceptance as law (*opinio juris*))—Inaction

The United States shares the concerns reflected in the statements of many States before the General Assembly's Sixth Committee in 2016 regarding the circumstances in which State inaction should be considered either State practice or evidence of *opinio juris* for the purpose of the identification of customary international law. We agree that great caution is appropriate because of the many different factors and motivations that may lead a State to decline to take action, particularly in the international arena.

With regard to inaction as State practice, we agree with the statement in paragraph (3) of the commentary to Draft Conclusion 6 that "only deliberate abstention from acting may serve" as State practice. Therefore, in order for a State's inaction to "count" as State practice, it must be

shown that the State had full knowledge of the facts and deliberately declined to act.

* * * *

Situations in which a State's inaction reflects the State's *opinio juris* are even more exceptional than those situations in which the State's inaction is deliberate and thus may constitute practice. Most State behavior (both action and inaction) is not motivated by international legal considerations. Therefore, a State's failure to act rarely evidences its views on international law. For example, one could not infer from a State's decision not to exercise diplomatic protection in a given circumstance that the State had concluded a particular act (a regulation or other measure) was not wrongful under international law. …

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Draft Conclusion 7 (Assessing a State's practice)

The United States is concerned that paragraph 2 of Draft Conclusion 7 could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law. A State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule. However, it seems inconsistent with the principle of the sovereign equality of States to say that the former State's practice is of less weight than the latter. The former's "weight" is merely placed in support of a different legal rule, or the absence of a rule. …

Draft Conclusion 8 (The practice must be general)

The United States continues to believe that Draft Conclusion 8 should define more clearly the quantum and quality of State practice that is required to identify a rule of customary international law. We do not believe that "sufficiently" in the first paragraph of the Draft Conclusion is adequate for this purpose—indeed, it begs the question of what degree of widespread and representative practice is "sufficient" to meet the standard. Rather, the Draft Conclusion should incorporate the "extensive and virtually uniform" standard articulated by the International Court of Justice in the *North Sea Continental Shelf* cases, as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule.

The United States also believes that the important role of specially affected States should be addressed in the Draft Conclusion itself. A requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard. Moreover, as noted in the commentary at paragraph (4), "[i]t would clearly be impractical" to determine the existence or content of a rule of customary international law without considering the practice of the States most engaged in the relevant activity. Further, although the commentary makes passing reference to specially affected States in paragraph (4) and footnote 297, we believe that the Draft Conclusions and commentary may lead to confusion by defining what it means for practice to be "general" in the Draft Conclusion with no reference to specially affected States, but then suggesting their practice is "an important factor" in paragraph (4) of the commentary and only using the term "specially affected" in a footnote.

Finally, the United States believes that Draft Conclusion 8 should explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law. It is critical that "negative practice" be given

sufficient weight. Just as seeking contrary evidence to disprove a hypothesis is a sound methodological practice that is part of the scientific method, consideration of contrary evidence should also be part of sound methodology for identifying customary international law.

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Draft Conclusion 10 (Forms of evidence of acceptance of law (*opinio juris*))—Other Issues

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The United States wishes also to note with regard to paragraph (5) of the commentary to Draft Conclusion 10 that caution must be exercised in assessing what constitutes evidence of the *opinio juris* of the State. For example, official government publications frequently (if not most commonly) reflect policy and domestic legal considerations rather than, or in addition to, any international law factors. Moreover, as the United States noted in response to the ICRC's *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations." Similarly, decisions of national courts are generally based on domestic law, rather than international law. Evidence must therefore be carefully assessed to determine whether it in fact reflects a State's views on the current state of customary international law.

In addition, in many instances, limited information about the full range of relevant State practice or *opinio juris* should warrant caution in reaching conclusions about whether a customary law rule has formed. Some practice of States may be known to other States but not otherwise publicly available. In addition, most legal advice that is given within the executive branches of governments is provided on a confidential basis. Care must be taken to account for all relevant practice and *opinio juris*, even such practice and *opinio juris* as may be inaccessible to the public, in reaching conclusions about whether a customary law rule exists.

Draft Conclusion 11 (Treaties)

The United States agrees with the text of Draft Conclusion 11 (Treaties) and believes it accurately reflects the ways in which a treaty provision may come to reflect a rule of customary international law.

We are, however, concerned about aspects of the commentary to the Draft Conclusion.

First, we believe that the last phrase of the first sentence of paragraph (3) of the commentary ("treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect") and accompanying footnote should be deleted. We believe that this passage is likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case. Similarly, we believe that the quotations included in footnote 323 may inaccurately suggest that the requirement to demonstrate both a general practice and acceptance as *customary international law* may be bypassed in the case of widely ratified treaties.

Second, the last sentence of paragraph (3) of the commentary should be edited to replace "participation" with "ratification," which would be more precise. "Participation" could be misunderstood to suggest that a treaty negotiated by only a handful of States is likely to be influential, when it is not. In addition, this paragraph should be supplemented to observe that

mere ratification by States of a treaty does not itself reflect that particular provisions of the treaty may correspond to customary international law. To the extent, for example, that particular provisions of a widely ratified treaty are not implemented in practice by States parties to the treaty, such lack of implementation would cast doubt on the conclusion that the requisite State practice existed to establish that the treaty rules in question reflected customary international law.

Third, with respect to Paragraph 2 of the Draft Conclusion on rules set forth in multiple treaties, we strongly agree with the statement in paragraph (8) of the commentary to the effect that the fact that a rule is set forth in a number of treaties does not create a presumption that the rule is reflective of customary international law. Indeed, the need to repeat the rule in many treaties may be evidence of exactly the opposite—that the rule is not customary international law. In order to determine whether an oft-repeated treaty provision is a customary rule, the same assessment of State practice and *opinio juris* is required as for any other potential customary rule. It is not sufficient to show that States have treaty obligations. States must be shown to have expressed the view that they have an obligation under customary international law as well.

Draft Conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

The United States appreciates the care with which the Commission and Special Rapporteur have addressed the question of resolutions of international organizations and intergovernmental conferences as evidence of customary international law. The United States agrees that such resolutions may provide relevant information regarding a potential rule of customary international law, most likely regarding the *opinio juris* of States, although potentially also their practice. However, as the Draft Conclusion and commentary reflect, resolutions must be approached with a great deal of caution. The United States notes that the UN General Assembly alone adopted 329 resolutions in its 71st session. By necessity, many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States. Moreover, because of the volume of resolutions and the limited capacity of States, the choice of whether to support or oppose a resolution may be made for political or other reasons in lieu of a legal analysis of its content, or despite disagreement with the articulation or assessment of a purported rule of customary international law addressed therein. As a result, even widely supported resolutions may provide limited or ambiguous insight into the practice and *opinio juris* of the States that support them. As a result, they must be approached with a degree of skepticism when proffered as evidence of State practice or *opinio juris*. Such resolutions are certainly insufficient on their own to prove the existence of a customary law rule. It must be established that the provision corresponds to a general practice that is accepted as law (*opinio juris*) as stated in Draft Conclusion 12.

In order to reflect the caution with which resolutions should be approached when assessing a potential customary international law rule, and consistent with the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion cited in paragraph (5) of the commentary, the United States believes that the words "in certain circumstances" should be added to the second paragraph of Draft Conclusion 12. …

Draft Conclusions 13 (Decisions of courts and tribunals) and 14 (Teachings)

Draft Conclusions 13 and 14 address circumstances in which decisions of courts and tribunals and teachings may serve as subsidiary means for the identification of customary international law rules. The commentaries to these Draft Conclusions appropriately note the

important point that (except where national court decisions may constitute State practice) these are not themselves sources of international law, but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*. In line with this point, we recommend that the Commission clarify in the commentary some of the limitations on the value of judicial opinions as subsidiary means in efforts to identify customary international law.

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Draft Conclusion 15 (Persistent objector), Commentary paragraph (9)

The United States agrees with the observation in paragraph (9) of the commentary to Draft Conclusion 15 that assessing whether an objection to a customary law rule has been maintained persistently must be done in a pragmatic manner, bearing in mind the circumstances of each case, and with its important affirmation that States cannot "be expected to react [restate their objection] on every occasion, especially when their position is already well known." In this context, we are concerned that the particular example used in paragraph (9) involving "a conference attended by the objecting State at which the rule is reaffirmed" may be misleading. In our view, it would rarely, if ever, be necessary for a State to object at a particular conference to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as fora for practice relevant to the formation of customary international law, which we do not believe to be the case. Accordingly, we believe this example should be deleted from the commentary.

Draft Conclusion 16 (Particular customary international law)

Draft Conclusion 16, titled "Particular customary international law," is also of concern for the United States for two reasons. First, we question whether paragraph 2 of the Draft Conclusion adequately defines when a rule of particular customary international law should be determined to exist. Notably, by stating only that "it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*)," the Draft Conclusion leaves open the nature of the *opinio juris* that must be held by the States concerned. As a result, it is unclear whether the *opinio juris* requirement would be met if the States concerned simply mistakenly believe the rule is a rule of general customary international law or whether they must correctly understand the rule to apply among themselves only.

Our second concern is regarding the ideas of bilateral custom and custom among groups of States other than regional groups. The commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship. In this regard, we appreciate the language in paragraph (5) of the commentary that "there is no reason *in principle* why a rule of particular customary international law should not also develop" among States linked by something other than geography (emphasis added). However, we do not believe this language will make clear to the reader that particular customary international law among States other than those linked by geography, and bilateral customary international law generally,

are theoretical concepts only and are not yet recognized parts of international law. We believe that it is important that this fact be made clear in the commentary to avoid confusing readers.

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2. ILC's Work at its 70th Session

Legal Advisor Jennifer Newstead delivered remarks at a meeting of the Sixth Committee on the Report of the International Law Commission on the Work of its 70th Session on October 31, 2018. She reflected on the role of the ILC on its 70th anniversary; addressed concerns regarding the working methods of the ILC; discussed the topics on its current program of work, including identification of customary international law, subsequent agreements and subsequent practice in the interpretation of treaties, and peremptory norms of general international law; and expressed concerns about some new proposed areas of work. Her remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-82-report-of-the-international-law-commission-on-the-work-of-its-70th-session/. See *supra* for U.S. comments on the ILC Draft Commentary on the Identification of Customary International Law and Chapter 4 of this *Digest* for the U.S. comments on the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice.

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Before I begin, I would like to congratulate the Commission on its 70th anniversary. It was an honor to be part of the commemorative events here in New York in May. On behalf of the United States, I extend my thanks to the members of the Commission for their dedication to international law. Similarly, the United States extends its appreciation to the Office of Legal Affairs, and particularly the Codification Division, for its efforts in this regard, including through critical support for the International Law Commission. Our discussions here in this Committee offer a reminder of the vital role that the Commission can play in our collective efforts to address today's global challenges.

The celebrations this year have offered an opportunity to reflect on the Commission's contributions to the codification and development of international law. The United States has closely followed the Commission's work since its inception. In its 70 years, the Commission has addressed a broad range of issues and produced analyses that provide insights to government lawyers, private practitioners, judges, and academics. At times, the Commission's work has formed the basis for multilateral treaties that have become foundational elements of international law.

More recently, the Commission's work products have become more varied, with fewer instances of proposals for draft treaty articles that States may then decide, after formal negotiations, whether to adopt in the form of a treaty and whether to express their consent to be bound. For example, most of the projects on the Commission's current program take the form of draft guidelines or draft conclusions. While there can be benefits to these different forms of work, including shorter timeframes for completion, the absence of a clear expression of State

consent to codification can lead to confusion as to what status should be afforded to the ILC's work. The Commission is, of course, not a legislator that establishes rules of international law. Rather its contributions focus on documenting the areas in which States have established international law or proposing areas in which States might wish to consider establishing international law. In this respect, the Commission has an important role to play in ensuring its work is well supported by relevant practice and properly distinguishes between efforts to codify international law and recommendations for its progressive development. As reflected in Article 15 of the ILC Statute, "codification of international law" is appropriate for "fields where there is already has been extensive State practice, precedent and doctrine." At the very least, certainly we can agree that where there is little or no state practice identified in support of a particular principle, the Commission's work must clearly indicate that it is not purporting to reflect existing law. Unfortunately, there are several examples contained within projects discussed in the Commission's report of proposals that seem to disregard this fundamental principle.

States also have an important role to play, to ensure the Commission's work remains responsive to States and reflective of State practice. For its part, the United States has supported the work of the Commission by engaging with the full range of topics on the Commission's agenda, commenting in this Committee on the Commission's work, and nominating highly qualified candidates for election to the Commission. We also encourage active engagement with the ILC by other governments. A productive relationship between governments and the ILC is vitally important to the relevance and continuing vitality of the Commission's work. In that regard, we were pleased that the ILC held half of its session in New York this year and we hope that this practice continues in the future, as I understand that the many side events during that period enabled worthwhile and stimulating informal discussions among ILC members and Sixth Committee delegates.

Mr. Chairman, I would like [to] begin with the topic Identification of Customary International Law. The United States takes this opportunity to recognize and express its appreciation for the efforts of the Commission, and in particular its Special Rapporteur, Sir Michael Wood, on this important topic.

The United States also provided written comments earlier this year on the ILC's Draft Conclusions for this project. While we agree with many of the propositions in the Draft Conclusions and commentaries, we identified serious concerns regarding a few issues and those concerns remain. I will not reiterate each of the comments contained in the United States' prior submission, but will highlight a few issues of particular significance.

As a general matter, the United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation—a general and consistent practice of States followed by them out of a sense of legal obligation—are met. Such State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity. This high threshold required to establish that a particular rule is customary international law is important to all aspects of analyzing or otherwise identifying customary international law. In this regard, the statement in Draft Conclusion 8 that practice must be "sufficiently widespread and representative, as well as consistent" should not be misunderstood as suggesting that a different or lower standard applies; as any such suggestion would reflect an inaccurate view of the law. More generally, the Draft Conclusions and commentary should not be read to suggest that customary international law is easily formed. Suggesting otherwise could risk lending credence to the view, held by some, that the exercise of identifying the content of customary international

law has become too facile, with experts too readily extending international law beyond what is supported by the consistent practice of States, which risks imposing outcomes that do not reflect the policy choices of their citizens expressed through their respective State's practice.

The United States has previously noted a few areas in which the Draft Conclusions and commentaries go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. We regret that there is not clearer distinction in those areas between the proposals for progressive development and material more clearly reflective of existing law. We believe the Commission should have made this distinction plain in this project and that it should do so in other projects. Failure to distinguish between codification and suggestions for progressive development creates risk that users of these materials will misunderstand them or afford them greater weight than is merited by the authority on which they are based. For these reasons, readers of these materials will need to review them with careful scrutiny, noting what authority and state practice have been identified in support of the proposition addressed.

One area in which the Draft Conclusions depart from existing law merits particular mention. The United States believes that Draft Conclusion 4, on "Requirement of practice", is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law. In particular, the statement in paragraph 1 that "it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

Mr. Chairman, it is axiomatic that customary international law results from the general and consistent practice of States followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the International Court of Justice. It is also reflected in the practice of States in their own statements about the elements required to establish the existence of a customary international law rule. There is no similar support for the claim in Draft Conclusion 4 that the practice of international organizations—as distinct from the practice of Member States that constitute those organizations—may, in some cases, similarly contribute to the formation of customary international law. It is noteworthy in this regard that, unlike other of the draft conclusions in this project, there is virtually no support provided in the commentary for Draft Conclusion 4. Accordingly, the claim in Draft Conclusion 4 with regard to a direct role for the practice of international organizations in the formation of customary international law can only be understood as a proposal by the Commission for the progressive development of international law. Even when appropriately understood as a proposal for progressive development, the position advanced in Draft Conclusion 4 with regard to the role of international organizations has numerous flaws. Among other things, it contains no explanation as to which international organizations might be relevant when identifying a rule of customary international law, no explanation as to how the *opinio juris* of an international organization might be identified, and no explanation as to whether a lack of support from international organizations can defeat the formation of a rule that is otherwise accepted by States. For these and other reasons, the United States cannot endorse the ILC's proposals on this issue.

Mr. Chairman, the United States also has followed with great interest the Commission's work on the topic of Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties. The United States takes this opportunity to express its appreciation for the efforts of the Commission, and in particular its Special Rapporteur, Georg Nolte, on this important topic.

Earlier this year, the United States provided extensive written comments on the ILC's Draft Conclusions for this project. The text of those Draft Conclusions contained in the ILC's report has changed very little from that on which the United States commented previously. The United States takes this opportunity to reaffirm the views expressed in its prior comments.

In general, the United States agrees with most of the propositions contained in the Draft Conclusions. We have had greater difficulty, however, evaluating the voluminous commentary that accompanies the Draft Conclusions, and are unable to assess its general accuracy and reliability. As with any ILC product of this nature, the utility of the Draft Conclusions and commentaries on any particular issue should be understood to be only as great as the authority and state practice identified in support of the proposition addressed. Once again, I will not reiterate each of the comments contained in the United States' prior submission, but instead will highlight a few issues of particular significance.

Draft Conclusion 10 asserts that subsequent practice of parties to a treaty establishing their agreement with regard to the treaty's interpretation "requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept." Although this statement is correct with regard to subsequent agreements under Article 31(3)(a) of the Vienna Convention on the Law of Treaties, it is not correct with respect to subsequent practice under subparagraph Article 31(3)(b). Rather, the parties' parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding or agreement of the parties regarding the treaty's meaning and fall within the scope of Vienna Convention Article 31(3)(b). Indeed, this is one of the primary differences between a subsequent agreement and subsequent practice—that is, subsequent practice "establishes," using the term in Vienna Convention Article 31(3)(b), the agreement of the parties; the Vienna Convention does not require that the agreement exist independently.

Draft Conclusion 12 addresses subsequent agreements and subsequent practice in respect of the interpretation of the constituent instruments of international organizations. Paragraph 3 of Draft Conclusion 12 asserts that the "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32" of the Vienna Convention. The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the States party to the international organization, but to the conduct of the international organization itself.

As the United States has previously observed, an international organization is not a party to its own constituent instrument. Accordingly, the practice of an international organization "as such" cannot constitute subsequent practice of a party to the agreement of the kind contemplated by Article 31, paragraph 1 of the Vienna Convention, and cannot contribute to establishing the agreement of the parties regarding the interpretation of the instrument. The Draft Conclusion's assertion to the contrary is incorrect.

Draft Conclusion 13 addresses the role of expert treaty bodies in connection with subsequent agreements and subsequent practice. Expert treaty bodies are not parties to treaties, and accordingly their views cannot constitute subsequent practice regarding the interpretation of

a treaty within the meaning of Vienna Convention Article 31(3)(b). The commentary to Draft Conclusion 13 appropriately emphasizes this important point, and nothing in Draft Conclusion 13 itself should be understood to the contrary. In general, the views of expert treaty bodies may be helpful to States parties to treaties to the extent that those views are well reasoned and persuasive. However, States ultimately decide whether to reflect such views in their interpretation and application of treaties, and accordingly such views are relevant to subsequent agreements and subsequent practice in the interpretation of treaties only to the extent that states have done so.

Before concluding this portion of my remarks, Mr. Chairman, I would like to address the Commission's decision to include one new topic in its current program of work and two new topics in its long-term program.

The topic to be included in the Commission's current program of work, "General principles of law," is referred to in Article 38(1)(c) of the International Court of Justice's statute as one of the sources of international law that the Court is to apply. 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.

The two topics that the Commission added to its long term program of work are "universal criminal jurisdiction" and "sea-level rise in relation to international law." With respect to the topic, "universal criminal jurisdiction," we have concerns about the ILC taking up this topic while it is still under active deliberation in the Sixth Committee, including in a working group, and are concerned about the parameters of any potential study. We do not consider this topic ripe for active consideration.

With respect to the topic, "sea-level rise in relation to international law," we are concerned that the broad topic, as proposed to the ILC, does not meet two of the Commission's criteria for selection of a new topic, namely that "the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification" and that "the topic should be concrete and feasible for progressive development and codification." In particular, we question whether the issues of Statehood and protection of persons as specifically related to sea level rise are at a sufficiently advanced stage of State practice. We also share the concerns others have expressed regarding the number of topics on the Commission's active agenda. However, if the Commission does move this topic to its current program of work, we would agree that a Study Group, as is currently proposed, would be the most appropriate mechanism to examine it.

Mr. Chairman, I will now turn to the topic of "Peremptory norms of general international law, jus cogens."

The United States takes this opportunity to recognize the efforts of the Commission, and in particular its Special Rapporteur, Professor Dire Tladi, for the work devoted to the topic on jus cogens. We appreciate that this topic is of considerable interest and recognize that a better understanding of the nature of jus cogens might contribute to our understanding of its role in the field of international law.

However, we continue to have a number of serious concerns with this topic, including with respect to working methods and analytical approach. In terms of working methods, it is incumbent upon the Commission not only to ensure that States have meaningful and sufficiently frequent opportunities to provide their views to the Commission, but also for the Commission to take those views into account. Unfortunately, the current working method for this project has not

been conducive to either pursuit. To the contrary, there appears to have been an intentional departure from standard practice that has delayed referral to the Commission's plenary of the draft conclusions and delayed the drafting of any draft commentaries, which then severely limits the ability of States to follow and engage with the Commission's work. This working method is especially problematic given that the project is not intended to result in a final outcome that will be negotiated and adopted by States.

As such, at this time the United States provides preliminary comments on only a few of the proposed draft conclusions as they were apparently adopted in the Drafting Committee, while noting our intent to provide further comments in the future once the Commission adopts the draft conclusions with commentary. Yet we urge the Commission to return to the normal working method whereby incremental parts of a topic are adopted by the Commission, as that would allow all concerned to give full and careful consideration to this important topic as it develops.

In terms of analytical approach, we have previously questioned whether there is sufficient international practice or jurisprudence 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. These questions have already generated contentious debate even within the Commission as well as differing views among States. The Special Rapporteur has acknowledged that the relative lack of State practice in this area presents particular challenges, yet he does not appear to view that as a limiting principle with respect to several proposed draft conclusions. This is of particular concern where, as here, there has been insufficient engagement by the Commission with States on the topic to date, thereby precluding States from reacting either favorably or unfavorably to Commission-adopted text.

In short, the clear divergence of views on the sensitive questions addressed in the Third Report, an absence of widespread or consistent State practice, and the lack of any mechanism to facilitate a clear expression of State consent to codification all point to a need for a cautious approach. In this regard, the United States observes that the proposal for the Commission to conclude a first reading of the draft conclusions at its next session appears quite premature.

More generally, the absence of state practice or jurisprudence on the vast bulk of the questions being addressed in this project has clear implications for the role and function of any Draft Conclusions that are ultimately adopted. Though framed as "Draft Conclusions," the statements contained in this project are not grounded in legal authority, but rather reflect an effort to imagine through deductive reasoning ways in which certain principles could apply in hypothetical circumstances. This kind of approach neither reflects the state of the law as it exists, nor provides insight into ways in which the law is developing. Rather, it can only be understood as reflecting proposals by the Commission for possible law for consideration by States. It will be for States to assess whether they find the proposals useful, and any weight or influence the Draft Conclusions may have will depend on whether they are ultimately accepted by and reflected in the practice of States. In this regard, the Commission should consider whether the broader cause of international law, which has depended in important respects on a carefully nurtured consensus of legitimacy, would be better served by greater adherence to traditional analytical principles.

For purposes of my remarks today, I will focus primarily on one of the draft conclusions that starkly illustrates the methodological concerns I have just mentioned: draft conclusion 17.

This draft conclusion states that binding resolutions of international organizations, including those of the UN Security Council, "do not establish binding obligations if they conflict with a peremptory norm of general international law". The Special Rapporteur cites virtually no evidence of State practice to support the claim that States can disregard their obligations under

the UN Charter to carry out the binding decisions of the Security Council based on a unilateral assertion of a conflict with a norm of jus cogens. Yet Draft Conclusion 17 could have quite serious implications. This claim carries the risk of leading to meritless challenges to the binding nature of Security Council resolutions, thereby undermining their implementation and the effective operation of the collective security framework established under the UN Charter. This is not a theoretical concern, not least because there is no clear consensus on which norms have jus cogens status.

The United States also understands that two other draft conclusions proposed by the Special Rapporteur that suffered from these significant analytical concerns—draft conclusions 22 and 23—will be set aside in the Drafting Committee and replaced with a single "without prejudice" clause. This is a welcome development. For example, the idea that immunity does not apply to jus cogens violations is particularly problematic, given the lack of clarity on which norms have jus cogens status. The proposal, if adopted, would remove immunity as a result of the mere allegation of a crime, apparently without any procedural protections. Moreover, whether there are certain crimes for which immunity from national jurisdiction will not apply has already been debated in the ILC's topic on "Immunity of State officials from foreign criminal jurisdiction." The United States is of the view that any discussion of this issue should be confined to that project.

Finally, with respect to future work, the United States takes note of the proposal to consider "regional jus cogens". We question the utility of such an effort and share the concerns expressed by others that this concept seems in tension with the view that jus cogens norms are "accepted and recognized by the international community as a whole."

Mr. Chairman, with respect to the topic "Protection of the atmosphere," we have taken note of the Draft Guidelines that have been adopted at first reading. As we have noted here on prior occasions, the United States has found many elements of this topic problematic. We intend to study the Draft Guidelines closely and submit comments and observations as requested by December 2019.

With respect to the topic "provisional application of treaties," we thank the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, for his fifth report on this topic. We take note that the ILC has completed its first reading of a draft "Guide to Provisional Application of Treaties" and commentaries thereto. We look forward to reviewing the Draft Guide in detail with a view to providing written comments by December 15, 2019. We note that the Special Rapporteur intends to continue work on this project in the next session leading to the possible adoption of model clauses, in which case we wonder whether States will be provided sufficient time to comment on those clauses prior to a second reading.

In any event, as with other projects, we will be particularly interested in the extent to which the Draft Guide and commentaries accurately reflect existing state practice in this area. While a careful, rigorous study of state practice may serve as a useful guide to promote understanding of the law, products that mix proposals for progressive development of the law with statements otherwise intended to reflect the state of the law risk creating confusion.

Mr. Chairman, I will now turn to the topic "Immunity of State Officials from Foreign Criminal Jurisdiction."

The United States appreciates the efforts of Special Rapporteur Concepción Escobar Hernandez to develop reports regarding the important and complex topic of the immunity of State officials from foreign criminal jurisdiction. We would like to comment specifically on the

Special Rapporteur's recently published Sixth Report, while also highlighting several points the United States has made in previous years regarding the Commission's work on this topic.

At the outset, the United States would like to reiterate its general accord with the Commission's approach to immunity ratione personae. The United States agrees that Heads of State, Heads of Government, and Foreign Ministers are immune from foreign criminal jurisdiction while serving in office on account of their status. Similarly, where the Sixth Report addresses procedural issues with respect to those enjoying immunity ratione personae, the United States generally has not found the Special Rapporteur's conclusions to raise significant concerns.

In contrast, as the United States noted last year, the approach that both the Fifth and Sixth Reports have taken with respect to immunity ratione materiae is not reflective of any settled customary international law on the issue. It is difficult to make generalizations from State practice, in part due to the sparsity of publically available State practice and opinio juris on this issue, and the complexity inherent in decisions involving prosecutorial discretion. The Commission's categorical pronouncements in terms of immunity ratione materiae cannot, then, be said to rest upon customary international law.

Notably, we do not agree that Draft Article 7 is based on any "clear trend" in State practice. We also take note of the unusual circumstances associated with the adoption of Draft Article 7; it was, according to the Report, "adopted by a vote and not by consensus, as [is] the Commission's usual practice."

Certainly, the United States agrees that genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearances are serious crimes that should be punished. The United States does not agree, however, that the Commission was right to adopt Draft Article 7 provisionally given the many serious concerns expressed both inside and outside the Commission. The United States reiterates that Draft Article 7 is in tension with the notion that immunity is procedural, rather than substantive, in nature, and that it operates regardless of gravity of the alleged conduct.

Draft Article 7 creates the false impression that the exceptions are sufficiently established in State practice such that they form customary international law—and in our view they simply do not.

Turning to the Sixth Report's focus upon procedural aspects of immunity, the United States would like to comment on certain of the procedural issues addressed in the Report.

First, the United States notes that, as the Sixth Report identifies, there is a range of State practice in terms of the stages that various sovereigns follow in the course of criminal proceedings. For that reason, the United States wishes to caution restraint before attempting to formulate a general rule regarding timing that would apply to States with potentially very different criminal procedures.

Second, with regard to the acts that States can take that would implicate immunity, there is an assertion that it is "impossible" to locate rules of international treaty law or customary international law regarding a number of potential acts that State officials could take. Yet, at the same time, the Report attempts to identify firm rules regarding whether immunity would be implicated by such acts. This section of the Report could benefit from further deliberation. For example, the Report cites no international legal support or State practice for its assertion that "the rules on immunity do not apply when detention is a purely executive act carried out in the context of the exercise of criminal jurisdiction by a court in the forum State." In the U.S. system, the executive branch of the government is distinct from the judicial branch, and exercises of criminal jurisdiction by a court would not be considered a "purely executive act," as described by

the Report. Again, the United States wishes to underscore that it would be imprudent to draw sweeping conclusions in an area where there is unclear State practice and a dearth of statements of opinio juris, and where there is a diversity of national systems of relevant criminal law.

Finally, with respect to the determination of immunity, the United States again emphasizes the riskiness of asserting generalizations from what the Special Rapporteur appears to recognize as varied State practice. Both with respect to the identity of the State entity tasked with making immunity determinations and the analytical steps that precede such a determination, State practice is inconsistent and precludes drawing conclusions of a universal nature. We would note in this regard that the Report states that, in the United States, the Executive Branch is able to make the determination of immunity though a suggestion of immunity binding on the court. We merely note that the practice cited in the Report is applicable only in civil cases and not in the criminal context. In the criminal context, determinations regarding immunity could be made by the Executive as part of the exercise of prosecutorial discretion. Moreover, it is not clear from the Report that all States analyze "official capacity" in precisely the same manner, and thus, again, it would be preferable to avoid drawing conclusions in an area that does not yet reflect a consistent pattern of state practice. Rather than focus on specific domestic procedures, which might vary significantly according to the criminal law of each State, it may be prudent to consider any relevant international standards and the need for a State to apply principles of immunity consistently across the various organs of its government.

The United States looks forward to the Special Rapporteur's next report and its analysis of the remaining issues of procedure associated with immunity of State officials from foreign criminal jurisdiction, and we appreciate her time and efforts devoted to this difficult topic.

Mr. Chairman, with respect to the topic "Protection of the Environment in Relation to Armed Conflicts," the United States would first like to recognize the contributions to this topic of the prior Special Rapporteur, Ms. Marie Jacobsson. We would also like to welcome the new Special Rapporteur on this topic, Ms. Marja Lehto, and express our thanks for her efforts in drafting a report that recognizes the complexity and controversial character of many of these issues.

I would like to make three points. First, it is critical that the draft principles and commentary reflect the fact that international humanitarian law, or IHL, is the lex specialis in situations of armed conflict. 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. We welcome the Special Rapporteur's acknowledgment of this in her report, but believe that the draft principles and commentary should more clearly acknowledge the role of IHL as lex specialis.

Second, as stated on previous occasions, we remain concerned that the Commission is not 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. There is little doubt that several of these principles go well beyond existing legal requirements, making binding terms inappropriate. I want to highlight a few examples in this regard.

Draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.

Draft principle 16 purports to expand 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. The draft commentary appears to recognize that this principle exceeds existing legal requirements, noting, that "Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation." Also, it correctly acknowledges that the term "toxic remnants of war" does not have a definition under international law.

We are likewise concerned that the draft principles applicable in situations of occupation go beyond what is required by the law of occupation.

Finally, with respect to the topic "Succession of States in Respect to State Responsibility," we thank the Special Rapporteur, Pavel Šturma, for his efforts in producing the Second Report. That report seeks to address certain general rules, mainly the issues of transfer of the obligations arising from the internationally wrongful act of a predecessor State.

We appreciate that the Commission's work on this topic may lead to greater clarity in this area of 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 Vienna Convention on Succession of States in Respect of Treaties and Vienna Convention on 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 thorough consideration by governments will be required as the Special Rapporteur continues to develop the draft articles.

Thank you all very much for your attention, as I know it is not the standard course to deliver statements on all three clusters at one time. Once again, I would like to thank the members of the Commission for their work. We look forward to engaging with the Commission, the Sixth Committee, and fellow UN Member States on the Commission's projects.

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D. REGIONAL ORGANIZATIONS

1. Organization of American States

a. Venezuela

On February 23, 2018, Interim U.S. Permanent Representative to the OAS Kevin K. Sullivan addressed a special session of the OAS Permanent Council regarding a draft resolution advanced by the United States regarding Venezuela. Mr. Sullivan's remarks are excerpted below and available at https://usoas.usmission.gov/oas-approves-resolution-venezuela/.

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… The United States is of course one of the member states proposing the draft resolution today, and we strongly believe that its content is timely, relevant and appropriate.

I think my distinguished colleague from Bolivia asked a valid question a few moments ago, which is—what are we accomplishing here? What are we seeking to accomplish with this resolution? And I think there is a simple answer to that.

I think our group of countries is seeking to highlight the deep concerns that we have about the course of events in Venezuela, which has continued to evolve since the last time this body engaged on the situation—and we have some urgent concerns about those events.

My Dominican colleague mentioned a few moments ago the dialogue that the Dominican government generously and ably hosted for the Venezuelan government and opposition leaders to try precisely to find an appropriate way out of the current difficulties they're encountering and put the country back on track and restore democratic order there.

The United States strongly supported that dialogue, as we have all previous efforts at dialogue, to resolve the difficulties in the Venezuelan Republic. But unfortunately, it became clear in the last round of negotiations, which was also supported by a number of other member states around this table today—both those selected by the government and several selected by the opposition—that the Venezuelan government was not prepared to show good faith and to demonstrate a willingness to agree to opposition requests in those negotiations that were nothing more than minimum guarantees necessary for free, fair and credible elections.

There is ample agreement around this table that free, fair and credible elections would be the most appropriate way to resolve the political crisis in Venezuela, and the United States continues to strongly support that idea. But unfortunately, the Maduro regime continues to deepen Venezuela's rupture from its Constitution. And most recently, the Venezuelan government, President Maduro, has suggested that not only do they intend to move up the presidential elections to April 22nd without resolving any of the serious problems that exist in the electoral environment today, but most recently it has suggested it would like to move up the elections for the National Assembly, also for the coming weeks or months, in a way that is not consistent with the Constitution and in fact is continuing evidence that they are re-writing the rules as they go along, which is truly inconsistent with the idea of democracy that this body represents and has defended for many years now.

In addition to that, I think we see increasing humanitarian suffering in Venezuela, increasing malnutrition, increasing suffering by Venezuelans looking for medical assistance that is no longer available. All of us are concerned about these things, and all of these are elements of the urgency that we see in this situation, and which I believe has inspired countries that brought forth today's draft resolution to do so, and on an urgent basis.

And so from our perspective, this is an appropriate time for the OAS to reengage on Venezuela, and in fact it is high time, past time for us to signal the grave concerns we have while at the same time leaving the door open to progress. I don't think anything in the resolution today closes any doors. In fact, the resolution—which we believe is cast in very constructive terms—simply calls on the Venezuelan government to reconsider its decision to move up presidential elections without resolving the underlying issues about fairness, about access, about free participation.

We should not forget that over the last year and a half or so the Venezuelan government has prohibited the participation of a number of parties and important political figures in the electoral process, including many that appear to have ample support in reliable polling, thus denying the Venezuelan people valid options for an electoral process. We have also seen that

hundreds of political prisoners remain detained and thus also unable to participate in a free and fair political process in addition to suffering from violations of their human rights.

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On April 15, 2018, Vice President of the United States Michael Pence addressed the Summit of the Americas in Lima, Peru. His remarks are available at https://www.whitehouse.gov/briefings-statements/remarks-by-vice-president-pence-at-first-plenary-session-of-the-summit-of-the-americas/ and excerpts below relate to Venezuela.

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In Venezuela, as in Cuba, the tragedy of tyranny is on full display. As this body knows well, Venezuela was one of our hemisphere's richest nations once, and not too long ago. It is now among the poorest. Venezuela was also once a flourishing democracy. It has now collapsed into dictatorship and tyranny.

Now let me be clear, the responsibility for the Venezuelan people's suffering can be laid at the feet of one man — Nicolas Maduro. …

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Last month, we also announced that we are providing, through the generosity of the American people, $2.5 million to help meet the needs of vulnerable Venezuelans living in Colombia. And yesterday, it was my privilege to announce that we'll add nearly $16 million more dollars of direct aid to assist Colombia's efforts to come alongside those Venezuelans.

To be clear, the United States and our allies and partners stand ready to do more, much more, to directly support the long-suffering Venezuelan people. But the world deserves to know that as the people of Venezuela suffer, lacking basic humanitarian aid, Nicolas Maduro stands in the way. Maduro stands today, refusing to allow humanitarian assistance simply because he claims there is no humanitarian crisis, as his people starve and die and flee.

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And today, we call on the Maduro regime to open up their country to life-saving aid the Venezuelan people so desperately need. Allow me to thank the many nations here who have already taken action to support the Venezuelan people with assistance and aid—nearly two million that have been displaced thus far. And the compassion and generosity of nations across this region is inspiring to see.

Let me also thank all those that have stepped forward to join us to rebuke and isolate the dictator Maduro and his brutal regime through economic and diplomatic means. Costa Rica has refused to let Venezuela's Minister of Defense land on its territory, setting a precedent for other nations to deny Venezuela official travel.

Canada has sanctioned more than 40 Venezuelan officials. Argentina and Brazil led the effort to suspend Venezuela from Mercusor.

Panama designated more than 50 Venezuelan officials as high risks for money laundering and recalled its ambassador from Caracas.

And Peru withdrew Venezuela's invitation to this summit. Mr. President, that sent a powerful message that Maduro and dictatorship and his despotism is not welcome here, and I commend you.

To all of you whose nations have taken action: Thank you for you stand. Thank you for your stand for freedom in our hemisphere.

… Every free nation gathered here must take stronger action to isolate the Maduro regime. …

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On May 7, 2018, Vice President Pence addressed the OAS and, among other things, called for the OAS to suspend Venezuela from membership. Those remarks are excerpted below and available at https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-protocolary-meeting-organization-american-states/.

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As this body knows well, Venezuela was once one of our hemisphere's richest nations. It is now astoundingly one of the poorest. At this very moment, nearly 9 out of 10 Venezuelans live in crushing poverty. Opportunity has evaporated, with an economy that's already shrunk by half, and is still growing smaller with every passing day.

Venezuela's grocery stores are all but empty, with food and daily necessities nearly impossible to find. Hospitals lack the most basic medical supplies. And in the last year alone, the infant mortality rate in Venezuela jumped 30 percent, and maternal mortality rates skyrocketed by 66 percent.

And every day, some 5,000 Venezuelans flee from their homeland. It's the largest cross-border mass exodus in the history of the Western Hemisphere.

* * * *

In the last month, in Lima, I met four courageous leaders of the Venezuelan opposition—two of whom I'm told are actually here today—Julio Borges, Carlos Vecchio, David Smolansky, and Antonio Ledezma. These four men are great defenders of democracy in their homeland, and they have our respect.

Having taken a stand for freedom in their homeland, they were forced to flee the regime's wrath, but they described to me … in painstaking detail, how Maduro has systematically corrupted the upcoming election and how he's replaced that nation's once-great democracy with dictatorship.

The truth is, the Venezuelan people would choose a better path if they could. But under Nicolás Maduro, they will never have that chance.

The so-called elections in Venezuela, scheduled for May the 20th, will be nothing more than a fraud and a sham. The Maduro regime has already stacked the Venezuelan courts and Electoral Council with its cronies. It's banned major parties. It's barred opposition leaders from standing for office, and stifled a free press, and jailed its political enemies, including more than 12,000 politically motivated detentions.

On Election Day itself, the Maduro regime has already given every indication that it will resort to its standard authoritarian playbook: manipulate voting data, change polling places at the last possible minute, and engage in widespread intimidation, and even violence.

In short, there will be no real election in Venezuela on May 20th, and the world knows it. It will be a fake election, with a fake outcome. Maduro and his acolytes have already ensured that their reign of corruption, crime, narco-trafficking, and terror will continue.

And that's why today we call on Maduro and regime: Suspend this sham election. Hold real elections. Give the people of Venezuela real choices because the Venezuelan people deserve to live in democracy once again.

With every day, Venezuela becomes even more of a failed state. And we do well to remember, failed states know no borders.

Venezuela's collapse is already affecting economies across the region. It's spreading infectious diseases that were once eradicated in our hemisphere. It's giving drug traffickers and transnational criminal organizations new opportunities to endanger our people. And as Venezuela continues to collapse, the consequences will radiate across the wider hemisphere, affecting all of our countries.

… The United States will not idly stand by as Venezuela crumbles. We have already imposed strict financial sanctions on more than 50 current and former senior Venezuelan officials, and we cut off the so-called "Petro" from the United States' financial system.

And today, I am pleased to announce that the United States is designating three Venezuelans with direct ties to the Maduro regime as narcotics "kingpins." We have frozen their assets, blocked their access to our nation, so they can no longer poison our people with their deadly drugs.

We've also been demonstrating the heart of the American people. The United States is also providing $2.5 million to help meet the needs of vulnerable Venezuelans now living in Colombia. And last month, in Lima, it was my privilege to announce that our nation will devote nearly $16 million across the wider region to support Venezuelans who have fled the tyranny of their homeland.

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For months, Nicolás Maduro has refused to allow humanitarian assistance into Venezuela. He actually claims that there's no humanitarian crisis, even as his country collapses into poverty all around him.

So today, we say to Nicolás Maduro and his entire regime: The time has come to open Venezuela to international aid, and do it now. Every day you don't … is another day innocent people starve and die—men, women, and children—and millions flee your country for a better life.

Allow me to take a moment to thank the many nations here that have already taken action to shelter and assist the Venezuelan people. …

… Last month, at the Summit of the Americas, we were pleased to see 15 nations join with the United States to declare that Venezuela's upcoming elections lack credibility and legitimacy, and to demand that Maduro hold a real election that is free, fair, and transparent. …

And on the world stage, just last week, the International Monetary Fund censured Venezuela for its repeated failure to meet treaty obligations and its lack of economic transparency. …

But all these steps are not enough. We believe it is time to do more …

Today, … I call on all … to take three concrete actions:

… cut off Venezuela's corrupt leaders from laundering money through your financial systems.

… enact visa restrictions that prevent Venezuela's leaders from entering your nations.

… hold Maduro accountable for destroying Venezuela's democracy.

* * * *

We've all signed the Inter-American Democratic Charter, which declares, and I quote, "the peoples of the Americas have a right to democracy… and their governments have an obligation to promote and defend [democracy]."

Venezuela has repudiated this promise, men and women… So today, on behalf of the United States of America, we call on the members of this institution to uphold our long-standing commitment to democracy and freedom. We call on members of the OAS to suspend Venezuela from the Organization of American States. This is an institution dedicated to democracy.

… The people of Venezuela deserve democracy. They deserve this institution — all of their neighbors to live up to our word — a word we gave one another some 70 years ago. The people of Venezuela deserve to regain their libertad.

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On June 4, 2018, Secretary Pompeo addressed the OAS General Assembly and discussed Venezuela, among other topics. His remarks are excerpted below and available at https://www.state.gov/remarks-at-the-general-assembly-of-the-organization-of-american-states-oas/.

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Just as we did when this first body met 70 years ago, the United States continues to place a great deal of value on the OAS and its role in forging a hemisphere distinguished by democracy, peace, respect for human rights, and cooperation. We must all do our part to strengthen the OAS to deal effectively with the challenges to our values we face together today and, of course, those we will face in the future.

I would like to thank our fellow member-states for their support of a decision at last year's General Assembly to reduce the OAS's dependence on a single member-state: mine. This is an important step rooted in increasing buy-in and burden sharing to achieve our shared goals. This year

I hope that we can agreeably adopt a plan to implement this decision in order to put the OAS on more sustainable financing footing.

As for confronting shared challenges in the region, at the Summit of the Americas our leaders agreed upon steps to combat corruption, a cancer that eats away at the underpinnings of democracy and stifles the dreams of our citizens. We must continue to improve transparency in government and public procurement, and call out and prosecute corrupt officials.

* * * *

But there is no greater challenge today than the full-scale dismantling of democracy and the heartbreaking humanitarian disaster in Venezuela. While the United States welcomes the release of the unjustly imprisoned Holt family, our policy towards Venezuela remains unchanged. The United States stands steadfast in support of the Venezuelan people and their efforts to return to democracy. The Maduro regime's efforts …to move towards unconstitutional government and its human rights abuses are now well known by all. All these actions have, among other ill consequences, resulted in an unconstitutional alteration of Venezuela's constitutional order.

Given these circumstances, we are all challenged to act under the Inter-American Democratic Charter, which this body has already begun to do.

On more than one occasion, Venezuela has squandered opportunities to have the kind of dialogue that the charter calls for. We seek only what all the nations of the OAS want for our people: a return to the constitutional order, free and fair elections with international observation, and the release of political prisoners. The regime's refusal to take meaningful action on these issues has demonstrated unmistakable bad faith and exhausted options for dialogue under current conditions.

Just two weeks ago, the Venezuelan Government staged sham elections that offered no real choice to Venezuelan people and its voters. Many of them responded sensibly by simply staying home.

For all of these reasons, Vice President Pence challenged member-states last month to do what the Democratic Charter asks of us when faced with an unconstitutional interruption in democratic order of a member-state: suspend Venezuela from this body.

That suspension is not a goal unto itself. But it would show that the OAS backs up its words with action. And it would send a powerful signal to the Maduro regime: Only real elections will allow your government to be included in the family of nations.

In addition to suspension, I call on fellow member-states to apply additional pressure on the Maduro regime, including sanctions and further diplomatic isolation, until such time as it undertakes the actions necessary to return genuine democracy and provide people desperately needed access to international humanitarian aid.

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b. Nicaragua

On July 18, 2018, Ambassador Carlos Trujillo addressed the OAS as it approved a resolution condemning government-sponsored violence in Nicaragua. The resolution was adopted by a vote of 21 in favor, including the United States, 3 against, 7 abstentions, and 3 absences (Dominica, Saint Kitts and Nevis, Bolivia). Ambassador

Trujillo's remarks are available at https://usoas.usmission.gov/oas-condemns/ and excerpted below. See also OAS press release, available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-048/18.

* * * *

The United States condemns the ongoing attacks by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country—in addition to the arbitrary detention of Civic Alliance leadership and threats against those who support them, including the arbitrary detention of Medardo Mairena and Pedro Mena.

We likewise condemn the passage on Monday of a law against "terrorism" and money laundering which we fear will be used during the current crisis to arrest and prosecute those who are expressing their legitimate desire for political change—as well as to target peaceful, non-governmental organizations engaged in valuable work. Further, this Friday, July 19, is the 39th anniversary of the Sandinista Revolution that toppled the dictator Anastazio Somoza.

We are putting the government of Nicaragua and its supporters on notice that the world will be watching their actions on that day. We will be watching those who participate in government-sponsored violence.

We will also be watching those who do not participate, and who do not allow their professional loyalty to be abused by a corrupt leadership seeking to cling to power through brutal means.

Every additional victim of this escalating violence and intimidation campaign further undermines President Ortega's legitimacy. So we call yet again on Ortega to cease immediately his repression of the people of Nicaragua. Only then can Nicaraguans begin to plan a brighter future.

While the severity of this violence has taken some in this Council by surprise, this crisis has been years in the making.

Sadly, we are now experiencing the direct product of the hollowing-out of democratic institutions and consolidation of powers under President Ortega and Vice President Murillo.

The current government has disregarded the rule of law, basic tenets of democracy, and international commitments to protect human rights and fundamental freedoms in favor of "pacts" where they allocated the political and economic spoils of dictatorship with other groups.

So we meet again today to renew our commitment to work together to assist Nicaragua overcome an increasingly dire situation.

This body has taken decisive action, Madam Chair and fellow colleagues. Now more than ever, the world's eyes are focused on how we—as the OAS—respond to the crisis in Nicaragua. Today is our moment to respond—through pragmatic and forward-leaning action.

The United States believes today's resolution represents an important step forward to strengthen democratic institutions and processes in Nicaragua.

The text reaffirms that we all are committed to working together on a grave matter of concern—as members of this Organization, as friends of the Nicaraguan people, and in solidarity with their democracy.

We strongly agree with the text's appropriate condemnation of the ongoing violence and the Nicaraguan government's intimidation campaign against its own citizens and church officials.

Despite the Nicaraguan government's cynical efforts to disguise the truth, we know that the escalating violence is being perpetrated by government forces and government supporters, who are attacking religious leaders—including those whom the government earlier invited to mediate the current conflict—as well as students and other ordinary citizens exercising their right to protest.

We know this because the Inter-American Human Rights Commission on the ground has documented this reality in great detail based on eyewitness accounts and recordings. Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

We must express very clearly that violators and abusers of human rights must be held accountable. And as member states, we must reaffirm our full support for the monitoring and investigative efforts of the Inter-American Commission on Human Rights.

Madam Chair, the cessation of government-sponsored violence is a primary condition necessary to resume dialogue on democratization and a peaceful path forward for all Nicaraguans.

Despite the Nicaraguan government's disingenuous claims to this Council, so-called "terrorists" are not to blame for the over 300 deaths in Nicaragua since April. Those responsible for the violence are the very security forces who have a responsibility to protect its citizens.

The United States supports efforts at genuine and inclusive dialogue as a way of guaranteeing respect for the will of the Nicaraguan people.

Let me underscore this point. The Nicaraguan government must heed the Nicaraguan people's call for democratic reforms immediately.

Madam Chair, the United States supports the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Early elections represent the best path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is political will to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

The United States will continue to work with the international community and other partners in support of the Nicaraguan people.

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On August 2, 2018, Ambassador Todd Robinson addressed the OAS Permanent Council at another special session on the situation in Nicaragua. Ambassador Robinson's remarks are excerpted below and available at https://usoas.usmission.gov/remarks-by-ambassador-todd-robinson/.

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Madam Chair, the situation continues to worsen by the day. This despite the growing international condemnation of the ongoing, government-sanctioned violence and intimidation campaign against the Nicaraguan people.

The United States condemns in the strongest possible terms the ongoing attacks by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country—in addition to the arbitrary detention of Civic Alliance leadership and threats against those who support them.

Vice President Mike Pence tweeted on July 24 that "State-sponsored violence in Nicaragua is undeniable." One local human rights group last week put the number killed since the violence began just three months ago at a staggering 448. Further, the government has now begun to use the new anti-terrorism law to arrest its critics.

So we meet again today to advance our strong commitment to work together to assist Nicaragua overcome an increasingly dire situation.

This body must be ready to support effective and proactive engagement, Madam Chair and fellow colleagues. Now more than ever, the world's eyes are focused on how the OAS responds to the crisis in Nicaragua.

We took an important step forward in the resolution adopted overwhelmingly by this Council on July 18.

That resolution condemned ongoing "violence, repression and human rights violations committed by police, para-police groups and others" in Nicaragua; urged full stakeholder participation in the National Dialogue; and supported the monitoring and investigative work of the Inter-American Commission on Human Rights (IACHR) in Nicaragua.

Today, we are taking the next step by organizing more intensive oversight of multifaceted OAS efforts, to ensure that they remain responsive to the situation on the ground in Nicaragua

The text now before us reaffirms that we are committed to working together on a grave matter of concern—as members of this Organization, as friends of the Nicaraguan people, and in solidarity with their democracy

We strongly agree with the text's creation of a special committee of OAS Member States to help provide support and leadership to the ongoing and critical work of this Organization with respect to Nicaragua.

Madam Chair, only a strong, internationally-backed mechanism as envisioned here can help prevent a further escalation of violence there and create better conditions for Nicaragua-led solutions

Madam Chair, despite the Nicaraguan government's cynical efforts to disguise the truth, we know that ongoing violence and repression [are] being perpetrated by government forces and government supporters. They are attacking religious leaders, including those whom the government earlier invited to mediate the current conflict, as well as students and other ordinary citizens exercising their right to protest.

We know this because the Inter-American Human Rights Commission on the ground has documented this reality in great detail—based on eyewitness accounts and recordings.

Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

Madam Chair, last week at the Ministerial to Advance International Religious Freedom here in Washington, Vice President Pence stated that the Ortega government is "virtually waging war on the Catholic Church." As those of you who attended the Ministerial know, Father Zamora

attended and spoke about the recent armed attack on his church where more than 200 students sought shelter.

With these experiences in mind, Madam Chair, we must express quite clearly and directly that violators and abusers of human rights must be held accountable.

As member states, we must reaffirm our full support for continued engagement and monitoring on the part of the OAS and its relevant entities, including the Inter American Commission

We call on the Nicaraguan government to heed the Nicaraguan people's urgent call for democratic reforms.

The United States believes the National Dialogue, established with the mediation of the Nicaraguan Council of Bishops, offers an invaluable opportunity to agree on steps that will advance peace and respect the will of the Nicaraguan people. With this in mind, the United States continues to support the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Early elections represent the only viable path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is political will on the part of the Ortega government to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

The United States will continue to work with the international community and other partners in support of the Nicaraguan people.

The Special Committee called for in our proposed resolution will offer Member States a flexible, agile mechanism that facilitates coordination with other international organizations, including the United Nations and SICA, as well as among various elements of the OAS itself.

Madam Chair, it is for this reason that we urge the Council to adopt immediately the resolution before us.

This action will ensure that we, as member states, are well placed to support inclusive dialogue and proactive OAS engagement, and do our part to prevent further violence.

Such action is fully in line with the commitments all of us have freely undertaken as OAS member states.

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Ambassador Trujillo again addressed the OAS when it adopted a further resolution on Nicaragua on September 12, 2018. The resolution was adopted by 19 votes in favor (including the United States), 4 votes against, with 9 abstentions and two countries absent. Ambassador Trujillo's remarks are excerpted below and available at https://usoas.usmission.gov/oas-adopts-resolution-on-nicaragua/. See also OAS press release available at http://www.oas.org/en/media_center/photonews.asp?sCodigo=FNE-94950.

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The efforts of our Council's new Working Group on Nicaragua, led by Canada and Chile, are essential for supporting a coordinated and efficient response on the part of the OAS.

With this in mind, the United States welcome today's timely report on the Working Group's efforts, and are proud to be an active member of the Group.

Unfortunately, Madam Chair, the situation continues to worsen in Nicaragua. This, despite the growing international condemnation of the ongoing, government-sanctioned violence and intimidation campaign against the Nicaraguan people.

The United States condemns in the strongest possible terms the ongoing attacks and arbitrary detentions by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country, and threats against those who support them.

We also condemn the Ortega government's recent arbitrary detention of six prominent student members of the National Dialogue. These students are the latest example of the thousands of citizens who are peacefully and democratically protesting government actions, only to be harassed, detained, disappeared, or even killed. These actions represent the Ortega government's aims to criminalize all forms of dissent.

Five of these students have been released. We call for the release of all arbitrarily detained persons, Madam Chair. We also call on the Ortega government to ensure the safety of all who choose to exercise their universal rights to freedom of speech and freedom of assembly.

It is therefore within this context that we meet again today to raise our concerns, and reaffirm our shared commitment to work together to assist Nicaragua overcome an increasingly dire situation.

The world's eyes remain focused on how the international community—including through the UN and the OAS—is responding to the crisis in Nicaragua.

We took an important step forward in the resolution adopted by this Council last month by establishing a Working Group on Nicaragua. That Working Group is now actively engaged in assessing developments in Nicaragua.

As we noted when this group was established, only a strong, internationally-backed mechanism can help prevent a further escalation of violence there and create better conditions for Nicaragua-led solutions.

Madam Chair, despite the Nicaraguan government's cynical efforts to disguise the truth, ongoing violence and repression continues from government forces and government supporters. They are attacking religious leaders, including those whom the government earlier invited to mediate the current conflict, as well as students and other ordinary citizens exercising their right to protest.

We know this because the UN Office of the High Commissioner for Human Rights, which the Nicaraguan government has now expelled from the country, and the Inter-American Human Rights Commission have documented this reality in great detail, based on eyewitness accounts and recordings.

Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

With these experiences in mind, Madam Chair, we as member states must reaffirm clearly and unequivocally that violators and abusers of human rights must be held accountable.

We must also underscore continued support for engagement and monitoring on the part of the OAS and its relevant entities. To this end, we call on the Nicaraguan government to heed the Nicaraguan people's urgent call for democratic reforms.

In this context, the United States believes the National Dialogue, established with the mediation of the Nicaraguan Council of Bishops, offers an invaluable opportunity to agree on steps that will advance peace and respect the will of the Nicaraguan people.

The United States therefore continues to support the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Let me be quite clear—early elections represent the only viable path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is any political will on the part of the Ortega government to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

Let me close Madam Chair by noting that all governments should promote democracy, good governance, and human rights for the greater welfare of their citizens. The United States will continue to stand by the people of Nicaragua and hold the Ortega government to account for its repression and violence.

It is for all of these reasons that we urge the Council to adopt the resolution before us today. This text reaffirms our collective concern over the deteriorating state of democratic practice in Nicaragua.

It also makes clear that we—as member states of the OAS and also of the UN—seek a peaceful return to inclusive dialogue and proactive OAS engagement, in order to prevent further violence and promote a peaceful solution to this ongoing crisis.

Such action is fully in line with the commitments all of us have freely undertaken as OAS member states.

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c. Migration

On June 29, 2018, Ambassador Trujillo addressed the Regular Meeting of the OAS Permanent Council regarding discussions on migration. His remarks are excerpted below.

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[W]e welcome discussions on migration as part of ongoing efforts to engage with governments around the world to find collective solutions to ongoing migration challenges, including enhancing border security, combatting human smuggling and trafficking, and addressing the underlying conditions driving migration in the region.

This is reflected by our ongoing engagement here at the OAS in matters before the Inter-American Commission on Human Rights and the OAS Committee on Migratory Affairs (CAM).

We have welcomed various site visits by the Inter-American Commission to the United States in the past, including to the U.S. Southern border regarding migrant detention and are open to discussing with the Commission a potential visit on these matters in the current context.

Mr. Chairman, the United States is a welcoming home for immigrants. In the last year alone, our country welcomed more than 1.1 million legal immigrants to our country and our communities. The United States is proud of this legacy. We are proud to be a nation of laws and a nation with recognized and respected borders, as well.

This reflects the reality that it is the sovereign right of states to control their borders, and set migration policies in accordance with their domestic laws and policies, consistent with their international obligations.

Whether to expand migration pathways, detain migrants who seek illegal entry into the United States, impose criminal penalties for illegal immigration, or adjust the status of migrants—such issues lie solely at the discretion of states. With this in mind, the United States will continue to exercise its own sovereign authority over its immigration policy.

As Vice President Michael Pence noted in Brazil on Tuesday: *"To all the nations of the region, let me say with great respect, that just as the United States respects your borders and your sovereignty, we insist that you respect ours … We want the people of our Hemisphere to have the chance to build a better life for themselves in the land of their birth, rather than leaving for ours."*

In turn, Mr. Chairman, the United States seeks well-managed and legal migration, while reducing displacement and irregular migration, which present complex challenges for all countries—including significantly putting vulnerable migrants at greater risk of harm.

We also believe that states share a responsibility in managing migration flows such as protecting refugees, asylum seekers, and migrants; enforcing border controls; combatting human smuggling and trafficking; implementing public messaging campaigns; facilitating the return of their citizens; and enhancing law enforcement cooperation.

With these points in mind let me be quite clear, Mr. Chairman: every state has the sovereign right to regulate the entry, screening, and stay of foreign nationals in its territory, subject to its international obligations—and every state also has a responsibility under international law to accept the return of its citizens that another state seeks to expel, remove or deport.

These are essential elements to reducing irregular migration, fighting migrant smuggling and human trafficking, and countering terrorism.

We also want citizens of our hemisphere to have a chance to build a better life for themselves in the land of their birth. That is why the United States is renewing our commitment to address the root causes behind the crisis that we face.

In Central America, the United States is providing more than $2.6 billion in foreign assistance in fiscal years 2015 to 2018 to address the security, governance, and economic challenges in the region.

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Let me now comment on issues pertaining to child migrants,…

Within our hemisphere, the United States is assisting governments in Central America and Mexico to strengthen migration management policies and implementation.

Through our partner the International Organization for Migration (IOM), we have long-standing cooperation with governments that focuses on identifying migrants in situations of

vulnerability, including unaccompanied children, and providing them with information and assistance.

We also provide support for governments and civil society to disseminate information to migrants so they understand the dangers that await them on the route to entering the United States illegally.

As to cases involving family separation during detention, on June 20, 2018, President Trump signed an Executive Order that directs the Administration to continue to protect the border, while simultaneously avoiding the separation of families to the extent we can legally do so.

It is the policy of the United States Government to maintain family unity, including by detaining alien families together where appropriate and consistent with the law and available resources.

The U.S. Departments of Homeland Security (DHS) and Health and Human Services (HHS) are working to reunify parents with their children.

In closing, Mr. Chairman, the United States will continue to engage in a respectful manner on migration matters here at the OAS – emphasizing the need for all states to:

- address the distinct protection needs of refugees and victims of human trafficking;
- assist migrants *as appropriate* to return home safely; and
- to address the underlying conditions that drive migrants to seek irregular channels to access opportunities beyond their borders.

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2. OAS: Inter-American Commission on Human Rights ("IACHR")

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 2018, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2018 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2018 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2018 that are not discussed herein,

are posted in full (without their annexes) at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

a. Case No. 10.573 (Salas)

The Commission issued a preliminary merits report in *Salas* et al., Case No. 10.573, on December 6, 2017. The United States complied with a request from the Office of the Executive Secretary of the IACHR for a report on measures taken to comply with the Commission's recommendations by submitting the letter excerpted below, dated March 1, 2018.

* * * *

We have read the report and have taken under advisement the nonbinding recommendations set forth therein. The United States takes this opportunity to reiterate its objection to the way the Commission sought to interpret and apply the law of armed conflict in the draft report. As explained in detail in our previous written submissions and hearings in this and several other cases, OAS Member States have not granted the Commission the competence or authority to interpret and apply the law of armed conflict in Commission proceedings. The only international instrument relevant for the United States in IACHR petitions is the American Declaration of the Rights and Duties of Man ("American Declaration"), the terms of which do not embrace the customary or conventional law of armed conflict.

Furthermore, the United States objects to the suggestion that it establish a special mechanism that would permit recovery for death, injury, or property damage experienced by civilians in conjunction with combat operations during Operation Just Cause. Neither the American Declaration nor customary international law establishes a private right of compensation for individuals who suffer death or injury during the course of lawful international armed conflict.

We also take this opportunity to recall that the United States provided substantial financial assistance to the Government of Panama in the form of reconstruction and other recovery assistance in the years following Operation Just Cause, as explained in detail in our previous written submissions and during the several hearings in this case. In addition, the United States has met with the December 20 Commission, established by the Government of Panama to investigate the events surrounding Operation Just Cause, to identify areas in which the United States can cooperate with the December 20 Commission. As we urged at the December 2016 hearing, the Commission should have waited for the December 20 Commission to finish its important work instead of issuing a series of recommendations to the United States that are infeasible for implementation.

Finally, we take this opportunity to reiterate and incorporate by reference the additional jurisdictional, admissibility, and substantive arguments we have made numerous times over the history of this nearly 30-year-old case.

The United States requests that when the Commission issues a final, public version of the merits report, it note and take account of the additional U.S. views set forth in the present letter, in line with past practice.

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b. Igartua et al. (Four Million American Citizen Residents of Puerto Rico*), Case No. 13.154 and* Rosselló et al.*, Case No. 13.326*

On June 28, 2018, the United States submitted its consolidated response to the merits submissions filed by the petitioners in *Igartua* and *Rosselló*. The United States requested that the Commission join the petitions, which raise similar issues regarding the rights of residents of Puerto Rico to vote in U.S. elections. Excerpts follow (with footnotes omitted) from the U.S. response.

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The Petitioners in *Four Million American Citizen Residents of Puerto Rico*, which we refer to under the name of the lead Petitioner, Gregorio Igartua, claimed that their right to vote in U.S. Presidential elections is denied on a discriminatory basis. The Petitioners in *Rosselló* claimed that their right to vote in U.S. presidential and congressional elections is denied on a discriminatory basis. The United States responded to Petitioners' assertions on June 25, 2010 and argued that the claims in both Petitions were inadmissible for failure to state facts which, if true, would tend to establish a "violation" of the American Declaration of the Rights and Duties of Man ("American Declaration"), the instrument over which this Commission has competence with respect to the United States and that also identifies U.S. human rights commitments in the Inter-American System.

On January 27, 2017, the Commission decided that the *Rosselló* Petitioners' claims were admissible under Articles II, XVII, and XX of the American Declaration. On May 25, 2017, the Commission decided that the *Igartua* Petitioners' claims were admissible under Articles II, XVII, XVIII, and XX of the American Declaration. Both sets of Petitioners subsequently provided submissions on the merits.

Argument

* * * *

… [T]he United States submits that its constitutional structure, under which citizens who reside in Puerto Rico do not have the same voting rights in Presidential and Congressional elections as citizens who reside in the 50 states, is not inconsistent with the rights expressed in Articles II, XVII, XVIII, and XX of the American Declaration. Puerto Rico is a self-governing territory of the United States and Petitioners may exercise their democratic rights in Puerto Rico elections under Puerto Rico law and the Commonwealth's Constitution.

With respect to federal elections, it is important to clarify that Puerto Rico residents are not banned from voting in presidential elections. Puerto Rico residents can, and do, vote in the presidential primaries that occur in the spring every four years for the purpose of choosing the party candidates for President. Puerto Rico may also, if it wishes, organize a ballot for the general U.S. presidential election in November every four years. But as repeatedly reaffirmed by

the U.S. Court of Appeals for the First Circuit, the U.S. Constitution does not allocate electoral votes to Puerto Rico, and so Puerto Rico's preference would not be added to the electoral vote tally in the general election.

Puerto Rico residents vote in congressional elections, both in party primaries and in the general election. Specifically, the residents of Puerto Rico vote for Puerto Rico's delegate to the U.S. House of Representatives, known as the Resident Commissioner. Furthermore, if they wish, Puerto Rico residents, almost all of whom are U.S. citizens, are also free to move to any state of the United States, where they can take up residence and exercise their voting rights in local, state, and federal elections. The U.S. Constitution applies in a fair and nondiscriminatory manner to all U.S. citizens.

Nothing in the American Declaration suggests that Organization of American States Member States may not maintain federal systems in which their citizens' participation in local and federal elections is determined by their residence or the status of the federal entity in which they reside. There is no allegation that Petitioners are prevented from residing anywhere they choose within the United States, including in states where they could vote in local, state, and federal elections. Petitioners' suggestion that the right to vote in particular U.S. federal elections is an intrinsic human right that flows from citizenship is simply not supported by the text of the American Declaration or by international law, and there is no basis for the Commission to infer such a right here.

Efforts in Puerto Rico to Reevaluate the Territory's Political Status

The federal government has provided the residents of Puerto Rico multiple opportunities to review and reconsider Puerto Rico's legal relationship with the United States. In 1952, the people of Puerto Rico, in an act of self-determination, voted by referendum to become a self-governing Commonwealth, or *Estado Libre Asociado*. The residents of Puerto Rico then participated in five different free and public referenda over the subsequent 65 years, and the majority of voters in each instance chose to retain the current Commonwealth status and relationship to the United States. In a sixth vote, through a plebiscite held on June 11, 2017, the majority of Puerto Rico voters indicated for the first time that they desired to pursue status for Puerto Rico as a U.S. state.

Following the plebiscite, Puerto Rico's Governor, Ricardo Rosselló (son of lead Petitioner Pedro Rosselló) initiated an "offensive" to pursue statehood aided by his creation of the Puerto Rico Statehood Commission. …

* * * *

The United States cannot predict the outcome of this political process. The United States emphasizes, however, that all past U.S. territories that became U.S. states, other than the territories for the original 13 states, completed a political process culminating in Congress granting the relevant territory statehood and extending to the residents of that territory all the rights of a state under the U.S. Constitution, including the right to vote in presidential general elections and the right to be represented in Congress by two senators and a number of representatives in the House of Representatives commensurate with the new state's population. Puerto Rico has not yet completed this political process.

Further, legal issues relating to Puerto Rico's status are actively reviewed, not ignored, by the independent federal judiciary. A 2016 U.S. Supreme Court case noted that, while not a distinct sovereign for the narrow purposes of the U.S. Constitution's "double jeopardy" clause, "Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing

Commonwealth" with "wide-ranging self-rule." As noted above, the First Circuit Court of Appeals has also extensively and repeatedly reviewed Petitioner Igartua's claims under the U.S. Constitution, which largely parallel the claims he has made before the Commission, and has found them lacking in merit. The Supreme Court has declined to review these decisions, including most recently with a denial of certiorari issued on June 18, 2018. The Commission should defer to the requisite political process, which is being conducted consistent with the U.S. Constitution, and should dismiss the above-captioned Petitions.

* * * *

c. Petition No. P-1756-10, Ismael Estrada

Also on June 28, 2018, the United States submitted its response to various *pro se* submissions to the IACHR by Ismael Estrada, a federal prisoner and national of Panama. Excerpts follow (with footnotes omitted) from that response.

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* * * *

The Petition is inadmissible because Mr. Estrada ("Petitioner") has not exhausted the domestic remedies available to him in the United States. It is further inadmissible because the Petition does not in any way indicate even a potential failure on the part of the United States to live up to any commitment under the American Declaration of the Rights and Duties of Man ("American Declaration"). Moreover, insofar as it relies on legal arguments submitted to and rejected by courts in the United States, it impermissibly seeks to place the Commission in the position of acting as a fourth instance review mechanism. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioner's request for relief, as the Petition is entirely without merit.

* * * *

THE PETITION IS INADMISSIBLE AND SHOULD BE DISMISSED

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules of Procedure ("Rules"). Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b); and its consideration would be inappropriate in light of the Commission's fourth instance formula.

1. Petitioner Has Not Pursued or Exhausted Domestic Remedies

The Commission should declare the Petition inadmissible because Petitioner has not satisfied his duty to demonstrate that he has "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that "[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. …

Petitioner chose not to appeal the District Court's denial of his objection to jurisdiction predicated on the immigration court's order of removal when he appealed his conviction to the Eleventh Circuit. The fact that Petitioner later apparently came to regret this litigation decision does not entitle him to pursue before the Commission a claim he failed to exhaust domestically.

For these reasons, Petitioner has failed to exhaust his local remedies and the Petition is inadmissible under Article 31.

2. The Petition Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration

The Petition is also inadmissible under Article 34 because it does not establish facts that even arguably could establish a violation of the American Declaration and it is manifestly groundless. Petitioner does not specify which provision or provisions of the American Declaration he alleges the United States to have violated, though he lists the rights he believes to have been violated as "the right to life, the right to personal liberty, the right to a fair trial, the right to compensation for having been sentenced by a final judgment through a miscarriage of justice, the right to equal protection of the law, the right to judicial protection against violation of fundamental rights, etc." On Petitioner's theory, his conviction allegedly violated these rights because he had a "right" not to be in the United States at all based on the immigration court's order of removal. In other words, Petitioner seeks to transform his own wrongdoing—his evasion of justice for drug trafficking and money laundering—into the source of a "right" not to be held accountable for his criminal activities. Petitioner apparently seeks relief in the form of being released from prison and returned to Panama in lieu of serving his sentence for drug trafficking and money laundering.

However, nothing in the American Declaration recognizes a human right to evade criminal prosecution by fleeing a State in which one has committed a crime. On the contrary, the American Declaration affirms that "[i]t is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." It is also a general principle of law recognized by international courts and tribunals that an unlawful act cannot serve as the basis for a claim under international law. Petitioner nevertheless seeks to use his own wrongful flight from the United States in violation of U.S. law as the basis for asserting that he has an alleged "right" not to be in the United States and that his subsequent extradition to face criminal charges for drug trafficking violated his human rights. The Commission should not allow itself to be used for such a purpose.

3. The Commission Cannot Review the Merits of the Petition Without Running Afoul of the Fourth Instance Formula

Furthermore, the Petition plainly constitutes an effort by Petitioner to use the Commission as a "fourth instance" body to review claims already heard and rejected by U.S.

courts. 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 United States' domestic criminal process, including the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. Petitioner has availed himself of this legal framework to challenge his conviction and his sentence in multiple proceedings over a number of years, including on the basis of his claim of a purported "right" not to be in the United States to face criminal charges. He asserted this claim not only in the primary criminal proceedings—in which he pursued an appeal to the Supreme Court—but also in the variety of collateral claims and challenges he has pursued. In each of these proceedings, the courts carefully reviewed the evidence and rejected Petitioner's jurisdictional argument as either meritless or procedurally barred due to his own litigation choices.

* * * *

THE PETITION IS MERITLESS

Even if the Commission could overcome these many barriers and proceeded to examine Petitioner's allegations—which it plainly lacks the competence to do—it should find the allegations without merit and deny Petitioner's request for relief.

Petitioner provides no legal argument for the premise on which his Petition is based. It would appear that his theory is that U.S. immigration law, in the form of a court order that he should be removed from the United States, renders unlawful the operation of the U.S.–Mexico Extradition Treaty ("Treaty"). On this theory, he asserts a right—which he argues rises to the level of a human right—not to be in the United States or in its prison system and to be returned to Panama.

However, as explained above, there is no human right to avoid criminal prosecution based on due process of law, and an immigration court's order that an individual is subject to removal from the United States cannot serve to nullify the operation of the U.S. criminal justice system. Indeed, the District Court that convicted and sentenced Petitioner took due notice of the order of removal by ordering that Petitioner be turned over to immigration authorities for appropriate deportation proceedings after he completed his sentence.

Nor can U.S. immigration law displace international law in the form of the Treaty. Equally meritless is Petitioner's assertion that U.S. immigration regulations required permission from the U.S. Attorney General in order for him to enter the United States by means of extradition. This assertion relies on flawed reasoning concerning the relationship between immigration regulations and criminal laws; the former cannot, and do not, displace the latter.

It also ignores the fact that the Attorney General supervises the Department of Justice, and it was the Department of Justice that sought and accepted Petitioner's extradition from Mexico and prosecuted him for his crimes. When individuals are extradited to the United States to face criminal charges, they are typically not admitted into the United States after inspection by an immigration officer, as Petitioner's claim seems to imply; rather, they are paroled into the United States for purposes of prosecution pursuant to INA section 212(d)(5). As such, it can

hardly be argued that the Attorney General did not consent to Petitioner's return to the United States to stand trial for his crimes and serve the sentence he received.

* * * *

Finally, as one of the strongest supporters of the Commission and by far its largest financial contributor, the United States continues to have concerns about the efficient management of the Commission's resources. It is unclear why this Petition was forwarded to the United States despite its obvious inadmissibility. In any event, further consideration of the present matter would not be a prudent use of the Commission's limited resources.

* * * *

d. Petition No. P-1307-12, David Johnson

Also on June 28, 2018, the United States submitted its observations on the petition regarding David Johnson. Petitioner is a Jamaican national who sought U.S. citizenship (his father had acquired U.S. citizenship but his mother had not). Petitioner was removed from the United States based on several felony convictions. Excerpts follow from the U.S. submission, with footnotes omitted.

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* * * *

A. Admissibility

Article 34(a) of the Rules provides that the Commission shall declare any petition or case inadmissible when the petition does not state facts that tend to establish a violation of the rights set out in the American Declaration. For the reasons set forth below, Mr. Johnson has failed to state facts that tend to establish a violation of his right to equal protection under the law, protection of his private and family life, his right to residence, or his right to nationality, under Articles II, V, VIII, and XIX of the Declaration.

1. Right of Equality Before the Law—Article II

Petitioner claims that former Section 321(a)(3) of the [Immigration and Nationality Act, or] INA contains impermissible distinctions based on gender, illegitimacy, and family composition that are contrary to Article II's provision that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Yet the IACHR, rightly, does not construe the wording of Article II to prohibit all differences in treatment: Although judgments of the Inter-American Court of Human Rights construing the American Convention on Human Rights do not govern U.S. commitments under the American Declaration, it is noteworthy that the Court has also recognized the validity of "distinctions" as opposed to "discriminations," in that only the latter constitute arbitrary differences that violate human dignity. The Court has opined that "[d]istinctions" that are "reasonable, proportionate and objective" are compatible with the American Convention on Human Rights.

(a) The statute served important government interest in protecting parental rights.

As noted in Section II.A, above, the statutory scheme embodied in former Section 321 is substantially related to the United States' important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens. Congress looked to ensure that under the INA the interests of the naturalized parent would not crowd out the rights of the noncitizen parent, both for children of married parents and those born out of wedlock. Congress sought to protect the parental rights of the noncitizen parent, whose "parental rights could be effectively extinguished" when only one parent was naturalized. The baseline standard articulated in 321(a)(1), that *both* parents must naturalize in order to confer automatic citizenship on a child, "recognizes that either parent—naturalized or noncitizen—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." The statute protected both parents' rights by preventing the automatic acquisition of U.S. citizenship by a child of a parent who had chosen not to naturalize. This mechanism reflected the fact that naturalization is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship."

(b) Exceptions to two-parent baseline were well-grounded.

Beyond the baseline standard, however, Congress recognized that there were situations where a child would not have two confirmed and living parents in a position to naturalize. In paragraphs (a)(2) and (a)(3) of former Section 321, Congress set forth governing rules for such situations that could still afford such children a path to U.S. citizenship. Significantly, eligibility for each of the statutory categories delineated in those paragraphs was determined, along with the threshold requirement of the naturalization of one parent, by the existence of a precise, objective, legally defined relationship or circumstance: death ((a)(2)); legal custody and legal separation ((a)(3), first clause); or lack of legitimation by the father ((a)(3), second clause).

None of these criteria corresponds to Mr. Johnson's situation. Mr. Johnson's mother never naturalized—so (a)(1) is not applicable. Mr. Johnson's mother was alive throughout his period of minority until after he turned 18 in 1993—so (a)(2) is not applicable. Mr. Johnson's father had legal custody of his child, but had never been married to Mr. Johnson's mother and hence there had been no legal separation—so the first clause of (a)(3) is not applicable. Last, again, Mr. Johnson's mother never naturalized—so the second clause of (a)(3) is not applicable.

* * * *

(c) Mr. Johnson's alternative path to naturalization was never pursued.

From the time of Mr. Johnson's father's naturalization in 1973 until the time Mr. Johnson turned 18 in 1983, Mr. Johnson's father could have sought a certificate of U.S. citizenship for his son pursuant to former Section 322 of the INA (codified then at 8 U.S.C. § 1433). That provision provided that a child born abroad would be a citizen upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. Whether or not there had been a "legal separation" of Mr. Johnson's parents would have been immaterial. Mr. Johnson offers no explanation for why his father failed to secure his citizenship under Section 1433 other than an assertion that his father believed his son would automatically derive U.S. citizenship. But the validity of a statute is not called into question merely because an individual's misreading of the law and consequent inaction deprived his son of the readily available benefit of citizenship.

Moreover, a foreign-born child who develops substantial connections to the United States through marriage or permanent residence in the United States may apply to become a naturalized citizen upon reaching age 18 by meeting standard naturalization requirements. That Petitioner did not seek to take advantage of these options does not mean in consequence that the United States or its Congress can or should be deemed to have disregarded his right to equal protection under the law.

(d) Mr. Johnson's arguments continue to be unavailing.

Mr. Johnson had the opportunity to present his arguments to no fewer than five U.S. administrative and judicial forums—the immigration agency, two quasi-judicial review bodies at the Department of Justice, a court of appeals, and ultimately the U.S. Supreme Court. None accepted his claims as meritorious. The substantive decisions were reached in reliance upon the U.S. Constitution's well-established equal protection principles, consistently with Article II of the Declaration. So too here, regardless of what level of review the Commission might apply to the statute, Section 321(a)(3) did not violate Mr. Johnson's rights.

For these reasons as well, the Commission should dismiss the Petition in light of the "fourth instance formula" because it does not have the competence to second-guess the legal and evidentiary judgment calls of domestic courts unless there is "unequivocal evidence … that guarantees of due process have been violated."

2. Right to Family Life—Article V

(a) This case does not fall within the ambit of Article V, which was intended to ensure that families are not subject to direct violence by the state.

Petitioner claims that by removing him without considering his family and community ties, the United States violated Article V of the American Declaration. Article V refers to the right to be free from abusive attacks on one's honor, personal reputation, and private and family life. Petitioner's claims must fail because the right related to family and private life established by Article V was not intended to apply his situation. Rather, the language of Article V makes clear that it is intended to ensure that families are not subject to direct violence by the state.

Specifically, the text of Article V and much of the Commission's own jurisprudence demonstrate that Article V is intended to apply only to direct state action that affects family life. The words "abusive attacks upon ... private and family life" in Article V clearly imply something more than incidental interference. Rather, they imply some degree of state action directly aimed at harming family life.

The Commission's jurisprudence bears out this textually supported interpretation of Article V and related rights. In a case regarding the persecution of the Ache people in Paraguay, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family. In the case of the Gelman family in Uruguay, the Commission found the petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter.

Here, there is no such direct state action. As detailed above, removal proceedings—which form the basis of the Petitioner's complaint—are merely the civil consequence of the Petitioner's decision to commit serious crimes while residing in the United States, and his resulting failure to comply with the terms and conditions bearing upon his residence in the country. As a secondary consequence of the permissible exercise of the sovereign right of states to expel foreign nationals who commit serious crimes within their territory, removal proceedings are not the type of direct state action that Article V sought to target. Indeed, any expansion of Article V to cover the secondary consequences of lawful and reasonable state action, as in this case, would have the

effect of seriously disrupting the state's ability to make the many critical determinations necessary to provide for security and promote the general welfare.

(b) Article V is not implicated by a state's lawful removal of a noncitizen who has committed serious crimes in violation of its immigration laws.

Even if Article V could extend its reach beyond direct state action to the secondary consequences of state action, which the United States maintains it cannot, and a balancing of state interests in removal of a noncitizen against the noncitizen's family and community ties were appropriate, the Commission still could not find a violation of Article V in a case such as this involving a noncitizen who has committed multiple felonies, including drug trafficking and crimes of violence, in violation of his host state's immigration law. As made clear in the American Declaration, the state may limit the enjoyment of private and family rights by taking lawful actions that provide for the general welfare and protect the security of all. In no case is that standard more clearly met than in the case of a criminal noncitizen like Mr. Johnson, whose presence in the United States, following multiple criminal convictions for serious crimes, could harm public order and threaten the well-being of U.S. citizens and lawful noncitizen residents.

While not required to do so as a matter of international law, the United States, through its immigration laws, does routinely take into account a noncitizen's family ties both inside and outside the United States as relevant factors in determining a noncitizen's eligibility for discretionary immigration relief. Similarly, U.S. immigration authorities often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis. Yet consideration of family unity does not always outweigh other factors. As in this case, the United States will remove noncitizens who have committed an aggravated felony in the United States regardless of their family ties. While an expulsion of a noncitizen unlawfully present in the country will by its very nature have unfortunate consequences for that individual's family, the removal of such noncitizen on the basis of his criminal violations and in conformity with a carefully conceived set of rules of general application designed to protect a nation's welfare and security, which it is free to pursue as an incidence of its sovereignty, constitutes action that fully complies with international law. For these reasons, the United States maintains that the American Declaration is not violated by removal under these circumstances.

(c) Article V is not implicated by U.S. nationality laws intended to protect parental rights.

Petitioner further argues that the United States violated Article V by virtue of Section 321(a) of the INA, on the grounds that this provision discriminates on the basis of family composition. However, as set forth at length above, this statutory scheme is not discriminatory, but rather, reflects the state's rational interest in limiting automatic changes to a child's citizenship status, to situations where either (1) both parents are part of the decision regarding a family's naturalization; or (2) there is only one custodial parent. This approach serves the important objective of protecting the rights of both parents of a foreign-born child when one or both parents become naturalized U.S. citizens, ensuring that the interests of the naturalized parent would not crowd out the parental rights of the noncitizen parent without his or her knowledge or consent. As a result, and in direct contradiction to Petitioner's argument, the naturalization provisions that Petitioner challenges in this case were intended to safeguard the very privacy and family interests he contends he was deprived of.

3. Right to Residence—Article VIII

(a) The United States did not violate Mr. Johnson's right to residence under Article VIII by removing him from the country of which he is not a national.

Petitioner argues that the United States violated his "right to residence" in the United States under Article VIII of the American Declaration by permanently removing him from the state in which he lived the majority of his life. However, there is no "right" to reside in a country other than one's own. Article VII of the American Declaration, which provides that "[e]very person has a right to fix his residence within the territory of the state *of which he is a national*," is, by its terms, inapplicable given that Mr. Johnson is not a national of the United States, and his longtime residence in this country does not change that fact.

Not only is Article VII by its terms inapplicable to Mr. Johnson's circumstances given that he lacks U.S. citizenship, but any other reading would be inconsistent with the universally recognized sovereign right of States under international law to regulate the entry and residence of noncitizens in their territory, and to expel noncitizens, consistent with international obligations. A nation's legitimate interests in controlling the admission of noncitizens, their departure, and their conditions and duration of stay within the country has been universally recognized from the earliest times and reaffirmed through treaty law. …

Finally, the United States wishes to emphasize that Mr. Johnson could have avoided being removed from the United States if he had chosen not to commit serious criminal acts while in the United States, or if his father had petitioned for U.S. citizenship on his behalf, or potentially if he himself had applied for U.S. citizenship. None of these circumstances being the case, Mr. Johnson remained subject to the immigration laws that he now challenges before the Commission.

4. Right to Nationality—Article XIX

The United States did not violate Mr. Johnson's right to nationality under Article XIX by denying him automatic derivative citizenship.

Petitioner next argues that the United States violated his "right to nationality" under Article XIX of the American Declaration by denying him automatic derivative citizenship. Petitioner's position is once again inconsistent with the textual right he invokes. Article XIX provides that "[e]very person has the right to the nationality *to which he is entitled by law*" (emphasis added). Inherent in the articulation of this right is the sovereign right of countries to establish their own standards and procedures for determining who is (and who is not) its citizen or national—in other words, the "law" from which any entitlement to nationality derives is the domestic law of the particular state. While the United States is in agreement with the petitioner that under international law a state must not arbitrarily deprive a national of his or her nationality, Mr. Johnson, a Jamaican citizen, does not have and never has had a U.S. nationality to which he is entitled or of which he could have been deprived.

In this regard the *Case of the Yean and Bosico Children v. Dominican Republic* is clearly distinguishable from the present facts. The petitioners in *Yean and Bosico*, having been born in the Dominican Republic, were entitled to Dominican citizenship as a matter of its domestic law, but were unable to obtain the birth certificates that would have allowed them to prove it or otherwise have their citizenship acknowledged so as to avail themselves of that citizenship. In contrast, Mr. Johnson was never entitled to citizenship under U.S. law. For the reason stated, he was not eligible for automatic derivative citizenship under former Section 321 of the INA. As the child of a U.S. national father, the law provided an avenue for Mr. Johnson to *pursue* U.S. citizenship, but Mr. Johnson never applied for U.S. citizenship on his own behalf and Mr.

Johnson's father also failed to use the procedure Congress created to apply for U.S. citizenship on his son's behalf. Because Mr. Johnson never became a U.S. citizen, Article XIX is not implicated in this case.

B. Merits

For the reasons set forth above, the Commission should not reach the merits of the Petition because it is inadmissible in its entirety under Article 34(a) of the Rules. Should the Commission nevertheless declare the Petition admissible, the United States urges it to find the Petition lacking in merit. Petitioner has not provided sufficient evidence that the United States discriminated against him on the basis of sex or illegitimacy in violation of equal protection under the law. Petitioner has also failed to show that the United States violated his right to family life, residence, or nationality. While the United States reserves the right to provide further views on the merits should the Commission declare the Petition admissible, we reiterate that international law recognizes the right of states to regulate the exclusion and admission of noncitizens, subject to the states' international obligations.

* * * *

*e. Petition No. MC-505-18 (*Antonio Bol Paau*) and Petition No. MC-731-18 (*Migrant Children*)*

On June 29, 2018, the United States submitted its response to a request for information from the IACHR regarding U.S. migration policy and actions with respect to migrant families. The testimony of Ambassador Trujillo mentioned in the U.S. response excerpted below is discussed in section D.1.c., *supra*.

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* * * *

As Ambassador Trujillo noted in his remarks before the Organization of American States (OAS) Permanent Council this morning, the topic of migration is one of significant interest to the United States, as reflected by our ongoing engagement in several migration-related matters before the Commission and in other OAS bodies. As the Commission is aware, the United States is a welcoming home for immigrants, having welcomed more than 1.1 million legal immigrants in the last year alone, a legacy of which we are proud.

We are also a nation of laws. As the Commission itself has repeatedly recognized, it is the sovereign right of States to control their borders and set migration policies in accordance with their domestic laws and policies, consistent with their international obligations. States retain the discretion to determine whether to expand migration pathways, detain migrants who seek entry, impose criminal penalties for illegal immigration, or adjust the status of migrants. With this in mind, the United States will continue to exercise its sovereign authority over its immigration policy.

* * * *

With respect to issues pertaining to child migrants, the United States is assisting governments in the region to strengthen migration management policies and implementation. Through our partner the International Organization for Migration, we have longstanding cooperation with governments that focuses on identifying migrants in situations of vulnerability, including unaccompanied children, and providing them with information and assistance. We also provide support for governments and civil society to disseminate information to migrants so they understand the dangers that await them on the route to entering the United States illegally.

As to cases involving family separation during detention, on June 20—after the Petitioners in the above-referenced matters submitted their respective petitions for precautionary measures—President Trump signed an Executive Order that directs the Administration to continue to protect the border, while simultaneously avoiding the separation of families to the extent we can legally do so. The U.S. Departments of Homeland Security and Health and Human Services are also working to reunify parents with their children. In light of litigation on these matters before our independent judiciary and recent court decisions, we are unable to provide the Commission with further details at this time.

Finally, we take this opportunity to reaffirm our longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail. Because the United States is a not a State Party to the American Convention, the Commission has only the authority "to make recommendations … to bring about more effective observance of fundamental human rights." As such, should the Commission adopt a precautionary measures resolution in the above-captioned matters, the United States will take it under advisement and construe it as recommendatory.

* * * *

On August 9, 2018, the United States submitted its response to letters from the IACHR Executive Secretary requesting information regarding U.S. migration policy and actions with respect to migrant families in the cases of *Bol Paau* and *Migrant Children*. Excerpts follow from the August 9 letter. The letter reiterated the U.S. position regarding precautionary measures, as stated in the June 29 letter, *supra* (and not excerpted again below).

* * * *

Under order of the U.S. District Court for the Southern District of California (*Ms. L., et al. v. U.S. Immigration and Custom Enforcement, et al.*), the Departments of Health and Human Services (HHS), Homeland Security (DHS), and Justice (DOJ) have been reunifying eligible alien parents with their minor children in the custody of HHS. Dedicated teams at HHS, DHS, and DOJ have worked to ensure the safety of the children of *Ms. L* class members. For the latest information on reunifications pursuant to the order, we respectfully refer the Commission to the supplemental filing to the most recent joint status report filed in the case on August 2, 2018.

Throughout this process, the primary goal of the U.S. Government has been to protect the safety and welfare of children in our custody and reunify them with their eligible parents. This

critically important task was carried out by the dedicated employees of the administration who have spent weeks meeting this challenge to reunify expeditiously while at the same time ensuring familial relationships and safety of the child.

In the coming days and weeks, the U.S. Government will continue to reunify additional parents with children as they are located and their wishes regarding reunification are identified. The U.S. Government will also continue working to reunify removed adults, including those who previously indicated a preference for leaving their child in the United States but who now would like to be reunified. Finally, if the U.S. Government is unable to reunify a child with his or her parent—because the parent chose not to be reunified the child or is deemed ineligible—HHS will continue to adhere to its sponsorship process to place the child with a sponsor in the United States—often a family member.

The U.S. Government leads international efforts to develop solutions to the underlying conditions driving irregular migration from Central America. The U.S. Government works in partnership with regional governments, international organizations, the private sector, and civil society to enhance citizen security, improve governance, and boost economic prosperity.

In light of ongoing litigation on these matters before our independent judiciary, we are unable to provide the Commission with further details at this time.

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On August 20, 2018, the Commission transmitted Precautionary Measures Resolutions 63/2018 and 74/2018 in the cases of *Bol Paau et al.*, and *Migrant Children*. The United States submitted a further response letter providing further information on the issues in these cases on August 30, 2019. Excerpts from that letter follow.

* * * *

We acknowledge receipt of your office's communications of August 20, 2018, transmitting Precautionary Measures Resolutions 63/2018 and 64/2018. Consistent with our longstanding position on the Commission's lack of competence to require precautionary measures, we have construed Resolutions 63/2018 and 64/2018 as recommendations and have transmitted them to the relevant offices within the U.S. Government for their consideration.

We take this opportunity to inform the Commission of further progress by the U.S. Government to reunify class member parents with their children. The U.S. Government is currently implementing a court-approved Reunification Plan to reunite minors who were separated from class member parents and who have been removed or have departed from the United States. The U.S. Government also continues to reunify class member parents who are in, or have been released from, the custody of U.S. Immigration and Customs Enforcement. The ACLU Family Reunification Hotline has been posted on U.S. Embassy websites. The Reunification Plan for parents outside the United States is attached for the convenience of the Commission. For the latest information on reunifications, we respectfully refer the Commission to most recent joint status report filed on August 23, 2018, in the *Ms. L., et al. v. U.S. Immigration and Custom Enforcement, et al.* litigation. As reflected in the joint status report, the U.S. Government continues the reunification of class member parents with children pursuant to

the Reunification Plan. As noted in the report, the data remain dynamic and continue to change as more reunifications or discharges occur.

In this regard, the United States remains concerned about the Commission's tendency to attempt to intervene in domestic political and legal matters that are complex, fast-changing, and the subject of ongoing domestic litigation. This can make it very difficult for the United States to meaningfully engage with the Commission about such matters, and reduces the value of the Commission's involvement. The Commission is well aware of our similar longstanding concerns about the practice of convening thematic hearings about matters in active litigation in our domestic system.

We understand the Commission's desire to provide its views on important issues of the day. And we acknowledge the Commission's effort to engage with us before recommending precautionary measures, as we asked it to do in sensitive matters. But the recommendation of precautionary measures in these matters reflects a larger problem of increasing concern to the United States: the Commission has been expending an inordinate amount of its limited resources involving itself in high-profile and sensitive on-going domestic political discussions instead of taking decisive action to address the severe and growing backlog of individual petitions. As a strong supporter of the Commission and by far the Hemisphere's largest financial contributor, we are concerned that the Commission is operating outside of its mandate and not focusing its limited resources as it should.

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f. Hearings

On February 27, 2018, the U.S. delegation participated in IACHR hearings in Bogotá, Colombia on two themes. Excerpts follow (with footnotes omitted) from the U.S. remarks at the thematic hearing on "Regulation of Gun Sales and Social Violence."

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Distinguished Commissioners, colleagues at the other table, and Secretariat colleagues—I am Andrew Stevenson of the U.S. Mission to the Organization of American States, and I am here with James Bischoff of the U.S. Department of State's Office of the Legal Adviser to represent our delegation at this hearing.

* * * *

…I will take a few minutes to convey the serious concerns of my government about the Commission's decision to convene this hearing and the next one this morning.

Just over a month ago, the Commission sent the United States notification of its decision to hold these hearings—this one on Regulation of Gun Sales and Social Violence, and the next one on Temporary Protected Status and Deferred Action for Childhood Arrivals.

In those notifications, the Commission said that it was convening these hearings on its own initiative, presumably under Article 61 of the Rules. We also understand that they are

intended to be "Hearings of a General Nature"—or "thematic" hearings—governed by Article 66 of the Rules.

Increasingly in recent years, the Commission seems to have made it standard practice to insert itself into ongoing domestic political discussions through the mechanism of a thematic hearing. The subjects on which the Commission convenes thematic hearings are often complex, fast-changing, the subject of significant domestic litigation or congressional consideration, and of great political sensitivity. This can make it very difficult for the United States to meaningfully engage with the Commission about them, and reduces the value of the Commission's involvement.

The Commission is well aware of our similar longstanding concerns about the practice of convening thematic hearings about matters in active litigation in our domestic system. As we have repeatedly told the Commission, we cannot discuss specific details on such matters while the outcome of litigation is pending. It was in part for this reason that we found ourselves unable to participate in the March 2017 hearings at all.

The number of thematic hearings has risen sharply in recent years, and now dwarfs the number of petition-based hearings, even as the Commission's backlog of petitions continues to grow and undermine its effectiveness. Since 1996, the Commission has convened 90 hearings involving the United States. From 1996 through 2011, petition-based hearings represented 75% of all hearings, with the Commission holding 34 petition-based hearings and just 13 thematic hearings.

By contrast, from 2012 to the present, the Commission has convened just eight petition-based hearings, contrasted with 35 thematic hearings, meaning that thematic hearings have represented over 80% of all hearings in the past six years.

We understand the Commission's desire to provide its views on important issues of the day. But the disproportion between thematic and petition-based hearings feeds directly into a larger problem of increasing concern to the United States: the Commission has been expending an inordinate amount of its limited resources involving itself in high-profile and sensitive on-going domestic political discussions instead of taking decisive action to address the severe and growing backlog of individual petitions. As a strong supporter of the Commission and by far the Hemisphere's largest financial contributor, we are concerned that the Commission is operating outside of its mandate and not focusing its limited resources as it should.

For the United States alone, there are nearly 100 cases open on the Commission's docket. In the vast majority of the open cases, action lies with the Commission to make a decision. Newly opened cases are typically at least five years old by the time the Commission is able to send them to the United States for a response.

The backlog continues to grow because the number of petitions received in any given year far exceeds the number of decisions per year. The Commission usually issues one or two merits decisions per year involving the United States, typically many years after the events being complained about.

The IACHR's statistics website indicates much larger numbers for other OAS Member States such as Mexico, Colombia, and Peru. Although we applaud recent efforts to streamline case management, you face a monumental task simply in addressing the cases currently before you.

The Commission's strength and credibility in the region depend on its ability to operate effectively and efficiently in a constrained budgetary environment. It must demonstrate to States, civil society, and individuals that it is an efficient and effective institution. The severe backlog of

individual petitions, and the long amount of time that elapses between the filing of a petition and the case's ultimate resolution, significantly diminishes this perception.

To be sure, dealing with individual petitions is tedious, requires examination of alleged abuses that occurred years ago, and occurs mostly out of public view. But as you of course appreciate, it is indispensable work on which many individuals across the Hemisphere hang their hopes.

In sharp contrast, the topics to be discussed at the hearings today are not the subject of a petition before the Commission. Nor do they lack full and transparent debate and consideration in all relevant democratic and judicial fora in the United States. They were instead convened at the Commission's own initiative, using a rarely invoked provision of the Rules, at least with respect to the United States.

We understand that you may disagree with the views we have just set forth. We respect your independence and will, of course, listen to your point of view and to that of civil society.

Nevertheless, it remains the position of my government that the Commission should not have convened hearings on these issues, especially absent a petition. Each time the Commission convenes yet another thematic hearing on a hotly contested political issue that is the subject of robust debate in democratic institutions or a matter in active litigation, the United States finds itself reevaluating the utility of participating in hearings. Despite these concerns, we ultimately decided it was important to come here and relate our concerns to you, and to convey our desire to continue this discussion in Washington at a mutually convenient time.

Turning now to the topic of this hearing, I will give the floor to my colleague from the Office of the Legal Adviser, Mr. Bischoff.

James Bischoff, Office of the Legal Adviser

Distinguished Commissioners, good morning. My name is James Bischoff, and today I will discuss the Commission's lack of competence to consider the domestic regulation of firearms and private violence perpetrated by firearms. I will then discuss the constitutional right to bear arms in the United States, U.S. laws and regulations on firearms, and prosecutions of those who violate gun laws.

Lack of competence

As provided under Article 20 of its Statute, the Commission has the competence to examine allegations that the United States, which has not chosen to ratify the American Convention on Human Rights, has failed to live up to its commitments in the American Declaration of the Rights and Duties of Man.

This year marks the 70th anniversary of the Declaration, a proud moment the Commission is celebrating at this Period of Sessions. It was truly a groundbreaking instrument that set forth, months before the Universal Declaration on Human Rights, key human rights commitments that States of the Americas undertook voluntarily to respect, as well as duties that individuals owe toward one another and to society—such as the duty to obey the law. Many of the Declaration's rights reflected rights contained in our own Constitution's Bill of Rights, another groundbreaking document at the time of its adoption.

Despite the importance of the Declaration as a statement of moral and political commitments, the commitments in it are, in the United States' longstanding view, nonbinding. By the same token, the Commission has recommendatory but not binding powers, as the terms of the Commission's Statute make clear—in particular, Articles 18 and 20 thereof.

We of course understand that the Commission and the Inter-American Court take the view that the Declaration is a source of legal obligation. Yet while we have great respect for the

Commission and the Court, the United States 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*. This is precisely how this jurisprudence originated in the Commission's *Baby Boy* decision back in 1981, backed up by a Court advisory opinion in 1989.

Contrary to the Commission's and Court's assertions in those two decisions, it is not the case that the States that negotiated and ratified the OAS Charter or its amendments or the States that adopted the Commission's Statute, intended the Commission to apply the American Declaration as a binding source of international law.

This basic fact holds true no matter how many times the Commission restates the view that the Declaration has binding force, and it does so frequently. But as far as we are aware, neither the Commission nor the Court has ever seriously reconsidered the legal reasoning underlying this view.

Nevertheless, we continue to make our objections known. 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 and not since then. And we have persistently objected to any such notion in scores of written and oral submissions since at least 1979.

In sum, the Declaration remains, after 70 years, one of the key blueprints for the protection and promotion of human rights in the Americas. But as a matter of international law, it also remains nonbinding, just as those who negotiated and adopted it intended 70 years ago. While the United States and the Commission disagree on this basic issue, we always do so in a spirit of respectful dialogue.

Turning now to the substance of the Declaration and the topic of this hearing, there is no article in the Declaration addressing the right of individuals to bear arms, in contrast to the United States Constitution, where as our friends at the other table mentioned, the right is set forth in the Second Amendment of our Constitution. The constitutional right to bear arms is the starting point for any discussion of firearms in the United States.

Furthermore, the Declaration is silent on any right to be free from private violence, including violence inflicted by firearms.

More broadly, as we have explained in numerous submissions over the years, the United States does not recognize that OAS Member States, by pledging support for the Declaration or joining subsequent OAS instruments, undertook a commitment—much less an obligation under international law—to prevent private violence.

Those who unjustifiably use guns against other individuals certainly fail to respect their duty to obey the law. But there is no provision in the Declaration or in the other governing instruments of the Commission that would permit such private conduct to be imputed to the State.

Of course, as a matter of domestic law and policy, the United States government takes very seriously its responsibility to prevent and punish crime.

However, as a matter of international human rights, questions of private gun violence and States' regulation of firearms and States' actions to address private violence lie beyond the Commission's competence to consider.

Right to bear arms

Despite this lack of competence, I will briefly discuss for the Commission's benefit some aspects of the U.S. domestic legal regime related to the right to bear arms and firearm regulation.

As noted above, the Second Amendment of the U.S. Constitution states that "the right of the people to keep and bear Arms[] shall not be infringed."

This right has been explained by the U.S. Supreme Court, in the case *District of Columbia v. Heller*, as "guarantee[ing] the *individual* right to possess and carry weapons." The Court also held that this right extends to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding [of the United States]."

The Second Amendment means that governments at all levels of our federal system are prohibited from outright banning ownership, possession, and sale of firearms, because to do so would run afoul of the Constitutional right to bear arms.

Firearm regulation and efforts to combat gun violence

However, the existence of the right does not mean that governments are powerless to regulate firearm sale and possession. As the Supreme Court has also recognized, governments may lawfully impose prohibitions on the possession of firearms by, for example, felons and the mentally ill. Governments may also, as two more examples given by the Supreme Court, forbid the carrying of firearms in schools or government buildings; and impose conditions on the commercial sale of arms.

Both federal and state laws address firearms possession and use. And the federal government has recently undertaken a number of important efforts to ensure violent offenders—including those who criminally misuse firearms—are held accountable.

In March 2017, Attorney General Sessions sent a memorandum to Department of Justice prosecutors, ordering them to prioritize cases against the most violent offenders, those who are driving the violence in the most violent places in the United States. In October, he reinvigorated the Department's Project Safe Neighborhoods program, directing federal prosecutors to partner with law enforcement at all levels of government, along with the communities they serve, to develop localized plans to reduce violent crime.

In 2017, federal prosecutors brought cases against the greatest number of violent criminals in at least a quarter century – the most since the Department began tracking a "violent crime" category. And they prosecuted more defendants on federal firearms charges than they have in a decade.

* * * *

Excerpts below from the February 27 hearings in Bogotá are from the presentation by James Bischoff of the Office of the Legal Adviser on the situation of human rights of persons affected by the cancellation of the Temporary Protected Status ("TPS") and Deferred Action for Childhood Arrivals ("DACA") in the United States.

* * * *

The right to admit, exclude, expel, and regulate the presence of noncitizens within a State's borders is an inherent and inalienable right of every State, essential to its safety, independence, and welfare. As the Commission itself has acknowledged, international law has long recognized this sovereign right, subject to States' respective international treaty obligations.

This principle is also set forth in the Havana Convention of 1928, which provides that "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."

Our domestic courts, including the U.S. Supreme Court, likewise have recognized this maxim of international law for more than a century.

Under our constitutional system, the U.S. Congress passes laws on the admission and exclusion of noncitizens. It also passes laws to prescribe the terms and conditions on which they be permitted to enter or on which they remain after having been admitted; and to establish rules for removing noncitizens who entered or have remained in violation of the law. In enforcing the immigration laws, Executive Branch agencies, such as the Department of Homeland Security (DHS) and its components such U.S. Immigration and Customs Enforcement (ICE), act in accordance with the U.S. Constitution, federal statutes and regulations, and the President's enforcement priorities. The President also has inherent executive authority to control the entry of noncitizens.

Temporary Protected Status

Congress established the statutory framework for Temporary Protected Status, or TPS, in 1990 by amending the Immigration and Nationality Act (INA). Congress designed TPS as a discretionary humanitarian measure to provide temporary safe haven to foreign nationals already present in the United States who meet certain requirements and are temporarily unable to return to their home country due to an ongoing armed conflict, environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected, or extraordinary and temporary conditions. The foreign national must request TPS.

Congress, through the INA, has given the Secretary of Homeland Security the authority to designate a country for TPS and to extend or terminate a country's existing designation. TPS designations and any extensions are limited to periods of up to 18 months before they must be reviewed and assessed to determine whether they should continue.

Prior to the expiration date of a country's existing TPS designation, DHS reviews conditions in the country and, after consultation with appropriate federal agencies, determines whether the statutory conditions for TPS continue to be met. If DHS determines that the conditions upon which the country's designation is based continue to be met, it will extend the designation, which prolongs TPS for existing beneficiaries who timely re-register. DHS has the discretion to make a new designation for TPS on the same or an alternative basis, which could allow for new beneficiaries.

If, on the other hand, DHS determines that the statutory conditions for the existing TPS designation are no longer met, it must terminate the designation. Termination ends a country's TPS designation and establishes a date by which beneficiaries who do not hold another lawful immigration status must depart the United States. DHS generally allows for a period of between six and eighteen months for such individuals to retain TPS and TPS-based employment authorization while they prepare for their orderly departure.

TPS is only available to individuals who were physically present in the United States prior to the date of their country's designation for TPS, as well as meeting other criteria. Throughout the period of designation, DHS cannot detain TPS beneficiaries because of their

immigration status, and it cannot remove them from the United States, although TPS may be withdrawn from certain individuals who are no longer eligible to receive it. Beneficiaries are authorized for employment and may obtain permission to travel outside the United States and return.

It is important to emphasize that TPS is at its heart designed to be a *temporary* benefit. DHS may only designate TPS for a given country for a maximum of 18 months, and must then re-examine the conditions in the country in order to determine whether to extend or terminate the TPS designation.

DHS makes this temporary nature clear to applicants, informing them through various channels of the expiration date associated with a designation that TPS does not lead to lawful permanent resident status or give any other immigration status on its own, and that, upon termination, TPS beneficiaries continue in any other immigration status they maintained or obtained while holding TPS, unless that other immigration status has expired. Individuals granted TPS must re-register each time their country's TPS designation is extended by submitting an application to DHS, and must also apply to extend their employment authorization documentation.

Beneficiaries of TPS and other stakeholders are provided notice of all TPS decisions. In addition to a notice in the *Federal Register*—the official journal of the U.S. government—TPS decisions are announced on the DHS website and the website of USCIS, the DHS component that administers TPS programs.

TPS does not preclude an individual from seeking a different immigration status. For example, a TPS beneficiary could petition for a change to nonimmigrant status, file for adjustment of status to permanent resident based on an immigration petition (for example, based on marriage to a U.S. citizen) or seek asylum or withholding of removal—that is, withholding of deportation—if he or she fears persecution or torture in his or her home country.

In 2017, DHS announced decisions on TPS designations for 7 countries that were set to expire: Haiti, Honduras, Nicaragua, Somalia, South Sudan, Sudan, and Yemen. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Somalia, South Sudan, and Yemen.

Thus far in 2018, DHS has announced decisions on TPS designations for two countries that were set to expire: El Salvador and Syria. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Syria.

For El Salvador, Haiti, Nicaragua, and Sudan, DHS determined that the conditions supporting the designation of these countries for TPS no longer existed, and therefore the designations could not legally be extended.

In sum, Congress designed TPS to be a temporary humanitarian measure that does not lead to permanent residence or a path to citizenship. The law requires the Executive Branch to terminate a country's TPS designation when the conditions that led to the designation no longer exist.

The United States has provided significant resources and support to the governments of Haiti and Central America to help them recover from the events that prompted their TPS designations and promote a safe and prosperous region. Thankfully, conditions in these countries are now better, and as a result, those individuals who benefited from TPS may now return home or seek another lawful immigration status allowing them to remain in the United States.

DACA

I will now say a few words about the Deferred Action for Childhood Arrivals policy, known as DACA.

DACA was established by a memorandum from the Secretary of Homeland Security on June 15, 2012.The stated purpose of the policy at the time was to protect from deportation those brought illegally to the United States as children.

Under DACA, individuals who meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal. They also may apply for work authorization. DACA determinations are be made on a case-by-case basis.

Deferred action is a discretionary determination to defer removal of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual. In addition, although an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does not excuse individuals of any previous or subsequent periods of unlawful presence.

Under the June 15, 2012 memorandum, individuals could be considered for DACA as a matter of discretion if they:

- Were under the age of 31 as of June 15, 2012;
- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of their request for consideration of deferred action with USCIS;
- Entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

DACA does not confer lawful permanent resident status or a path to citizenship, a fact that the U.S. administration made clear to the public and to individual requestors. Only the Congress, acting through its legislative authority, can confer these rights.

On September 5, 2017, in light of pending litigation, DHS rescinded the original memorandum that had put DACA in place and announced that it would "take all appropriate actions to execute a wind-down of the program."

As part of the winding-down process, DHS stated that it would continue to adjudicate pending DACA initial and renewal requests and associated applications for employment authorization.

More recently, in response to federal court orders, DHS resumed accepting requests to renew a grant of deferred action under DACA on the same terms as were in place before September 5, 2017. However, DHS is not accepting requests from individuals who have never before been granted deferred action under DACA. DACA recipients may not request permission to travel via advance parole.

With Congress currently debating legislation to address the status of DACA and others who meet similar criteria and several pending lawsuits on the legality of DACA, it is clear that this matter is in flux and is working its way through the democratic political process to find a permanent solution.

We are unable to comment further given the ongoing litigation before the federal courts.

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On October 5, 2018, the United States participated in an IACHR hearing in Boulder, Colorado, on "Four Million American Citizen Residents of Puerto Rico." The hearing was convened based on petitions (*Igartua* and *Rosselló*) claiming denial of the right to vote by residents of Puerto Rico. The U.S. brief responding to the petitions on the merits is discussed *supra*. Excerpts follow from the prepared remarks of Ambassador Carlos Trujillo, U.S. Ambassador to the OAS.

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Both petitions raise the same fundamental issue—the scope of federal representation accorded to residents of Puerto Rico under the U.S. Constitution. This is a domestic political issue if there ever was one.

The *Igartua* petition focuses on participation in U.S. Presidential elections. The *Rossello* petition focuses on participation both in Presidential as well as in Congressional elections. Given the similar legal and factual issues here we have consolidated our responses to both petitions and we encourage the Commission to do the same.

We hope consolidation will also help the Commission start to clear the backlog of cases like this one—which has been pending now more than a decade.

The petitions are framed in terms of voting rights. However, these petitions are really about the political status of Puerto Rico as a Commonwealth in the U.S. Federal system. As a Commonwealth, Puerto Rico does not have voting representatives in the U.S. House of Representative and Senate, or voting electors in the Electoral College—just as other non-state territories in our Federal Union. Residents of Puerto Rico—as U.S. citizens—are free to reside in U.S. states that do have voting representatives and voting electors, as delineated by the United States Constitution, and to participate in elections for those representatives and electors.

The U.S. Constitution's allocation of representatives and electors with respect to Puerto Rico is not inconsistent with the American Declaration or the Inter American Democratic Charter. Nothing in the American Declaration entitles Puerto Rico to statehood in the U.S. Federal system. I will address this in more detail in a few minutes.

But it bears emphasizing at the outset that these petitions plainly seek to litigate the political status of Puerto Rico before this Commission. The Commission should not allow itself to be used in this way.

On behalf of the U.S. Government, we reiterate our request that the Commission dismiss both petitions in their entirety and wrap up these cases promptly. The petitions are totally without merit and attempt to convert a domestic political matter into a human rights matter.

The question of Puerto Rico's legal status is one under consideration now within the United States. Just last year, the residents of Puerto Rico voted in an island-wide public referendum to pursue statehood. The Government of Puerto Rico is now pursuing that path energetically.

Finally, I urge the Commission to focus on the subject of these petitions. This hearing is not about the scope or effectiveness of hurricane relief efforts after Hurricane Maria. Nor are these petitions about the scope of federal relief efforts related to Puerto Rico's fiscal crisis. And the question of the political status of Puerto Rico within the U.S. Federal system is well-beyond the competence of this Commission. The petitioners would seek to have the Commission merge all these issues together and somehow identify violations of the American Declaration.

Competence of the Commission

Before I turn to the merits of the *Ignartu* and *Rossello* petitions, I must make one observation about the competence of the Commission.

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."

However, in its 2017 admissibility report on the *Igartua* petition, the Commission indicated its intent to "take into account the terms of" the Inter-American Democratic Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights in the present case.

Under the Rules of Procedure, the application of instruments beyond the American Declaration in the present case would be manifestly improper and beyond the competence of the Commission.

Merits of the Petitions

Turning now to the merits of the petitions.

The United States Constitution governs how states are represented in the House of Representative and the Senate, and how states participate in the Electoral College, which chooses the President. Article 1 of the United States Constitution, the supreme law of our land, establishes apportionment of representatives and Senators amongst the states. Article 2 of the Constitution, and the 12th Amendment, provide the procedure for electing the President and Vice President by states through the Electoral College.

As a result, pursuant to Article 1 of the U.S. Constitution, Senators and U.S. Representatives are elected by the people of the **states**. Pursuant to Article 2 of the U.S. Constitution, the President of the United States is chosen by Electors—and those electors are chosen by the **states**.

There is one significant exception to these rules—the only **non-state** within the United States that chooses Presidential electors is the District of Colombia, which acquired that right by an express amendment to the Constitution adopted in 1961.

Citizens of the United States are free to reside in whichever State they wish.

Other provisions under the U.S. Constitution govern how U.S. territories may evolve into U.S. states. Specifically, Article 4 of the Constitution provides for the admission of new States. Consistent with that process, a number of territories have become U.S. states over time.

Puerto Rico, however, is **not a state**. Accordingly, under the U.S. Constitution, residents of Puerto Rico enjoy US citizenship—and all of the rights and benefits thereof—but do not participate directly in Presidential or Congressional elections because Puerto Rico is not a state and, under Articles 1 and 2 of the United States constitution, only states are represented by voting Electors, Senators, and U.S. Representatives.

This does **not** mean that residents of Puerto Rico somehow enjoy fewer rights than other U.S. citizens.

If a resident of Puerto Rico wants to participate fully in Presidential or Congressional elections, the Constitution does not bar them from doing so—provided they move and begin to reside in any state of the United States.

I want to digress here a moment to correct the record. It is clearly not true, as Petitioners allege, that the residents of Puerto Rico have no "political voting rights at the federal level". Puerto Rico residents can, among other things, vote in the presidential primaries for the purposes of choosing the party candidates for President. Puerto Rico residents also can vote in congressional elections, both in party primaries and in the general election. Thus, the residents of Puerto Rico **do** enjoy representation at the Federal level.

The difference in Federal election participation between residents of U.S. states and residents of territories arises from the very nature of statehood under the U.S. Constitution. Through the Constitution, the people of the United States created a federal union. That federal union provided for the distribution of political power among the states in that union. Within that structure, states that elected to join the union gave up a portion of their sovereignty. They took on certain responsibilities and obligations. They also acquired at the same time certain rights including the rights to choose the President, the Vice President, and members of Congress.

If Puerto Rico wishes to participate differently in this process, it must comply with the requirements under our Constitution to become a state. And as the Commission knows, the Government of Puerto Rico is vigorously pursuing that statehood path now.

Pursuing statehood is not just a theoretical possibility. Recall that Puerto Rico's legal status has evolved significantly through the course of the 20th century. It has evolved from being a territory in 1898 to its current status as a self-governing Commonwealth. It can continue to evolve and join a number of other U.S. territories which have been admitted as States to the federal union during the course of our history.

The Commission's role is not to help Puerto Rico bypass the political process of achieving statehood through a baseless claim of discrimination. It also is not the Commission's task to influence that process or promote a particular outcome in that campaign.

Puerto Rico's legal status is governed by the U.S. Constitution which reflects a careful balancing of the rights of the federal government, the states, and the territories.

Moreover, the U.S. Constitution's structure of Federal representation does not violate Articles 2, 17, 18, or 20 of the American Declaration. Nor does it violate any provision of the Inter American Democratic Charter. I will highlight some key considerations in support of our position.

Article 2 of the Declaration focuses on the right to equality before the law. The U.S. Constitution's structure of Federal representation does not constitute unequal treatment within the meaning of Article II the American Declaration. The difference in the political representation

of states and other territorial entities under our Federal system is not based on race, sex, language, creed or any other invidious distinction barred by Article 2. Rather, it arises from the very nature of statehood under the U.S. Constitution.

There is nothing discriminatory in this constitutional structure. U.S. citizens resident in Puerto Rico enjoy the freedom to move at will within the United States, and to establish new residency at any time, in any of the states—as state residents, those U.S. citizens have the same voting rights as any other state resident to participate in elections for the state's Federal representatives and Electors.

Similarly, U.S. citizens resident in any of the states may at any time move to Puerto Rico and establish residency there—at which time they could not directly participate in Presidential and Congressional elections because Puerto Rico, as a Commonwealth, does not have voting Federal representatives or Electors.

Nothing in Article 2 or elsewhere in the American Declaration suggests that parties may not maintain federal systems in which their citizens' participation in federal elections is determined by their residence or the status of the federal entity in which they reside.

Article 17 of the Declaration provides that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. Residents of Puerto Rico are U.S. citizens and enjoy the very same civil rights as all citizens. With respect to participation in federal elections, the same rules apply to all citizen of the United States. Residents of Puerto Rico are recognized everywhere in the United States as persons having rights and obligations, and entitled to enjoy basic civil rights. Petitioners have failed entirely to present a cognizable claim under Article 17 of the Declaration.

Article 18 of the Declaration provides that every person may resort to the courts to ensure respect for his legal rights. Residents of Puerto Rico have access to the courts of the United States just as any other citizen of the United States. As noted in our written submissions, petitioners' claim here is really about the legal status of Puerto Rico. And the question of Puerto Rico's legal status has been litigated repeatedly before the U.S. courts, including the Supreme Court. Most notably the Supreme Court took up two cases involving the legal status of Puerto Rico within the last year. Petitioner *Igartua*, himself, has pursued claims similar to those raised in his petition before this Commission before federal courts. The notion that the residents of Puerto Rico have somehow been denied access to U.S. courts is fanciful. Petitioners have failed to state a claim under Article 18. What Article 18 of the Declaration does not provide is that a court will always side with petitioners' views.

To the extent that the Commission proposes to "analyze whether allegedly contradictory and restrictive decisions of Federal Courts could constitute a violation of the petitioners' right to effective judicial remedies," this evaluation of domestic judicial decisions would run afoul of the Commission's "fourth instance formula."

The fourth instance formula recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries, and indeed, nothing in the American Declaration, the OAS Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: "The Commission … lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts." 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 requisite expertise to perform such a task.

Article 20 of the Declaration, provides that "every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free." The residents of Puerto Rico have that right. Residents of Puerto Rico, for example, elect their own Governor and Senate and House of Representatives. They also have the right to vote in US elections in various capacities and even have had the right to vote repeatedly on their fundamental legal relationship with the United States periodically through public referendum. And, as I noted earlier, residents of Puerto Rico are represented by an elected delegate to the U.S. House of Representatives, known as the Resident Commissioner. As such, residents of Puerto Rico participate in both the government of their country as well as popular elections.

But the American Declaration does not dictate the exact modalities of such participation in elections. Specifically there is no indication, for example, whether political participation may or may not be effectuated through federated states. There is also no indication of whether political participation should be by majority or proportional rule, whether there should be a popularly-elected Presidents, mayors, regional councils, a parliamentary system, bicameralism, federalism, or any other specific feature of democratic participation.

Further there is no allegation that Petitioners are prevented from residing anywhere they choose within the United States, including in states where they could participate in different federal elections.

Similarly, neither Article 20 nor any other provision of the American Declaration mandates that every Federal office be subject to universal popular election by every citizen. Petitioners suggest, for instance, that Article 20 requires the United States to permit the popular election of federal judges, however nothing in Article 20 supports that claim. In the United States, Federal judges are appointed under the Constitution by the President, with the advice and consent of the Senate.

Moreover the idea that a state's constitution can regulate representation at the Federal level is not dissimilar to the decision taken by some nations to exclude overseas residents from voting in elections or otherwise restrict participation in elections based on duration of stay abroad.

Finally, Petitioners' suggestion that participation in particular U.S. federal elections is an intrinsic human right that flows from citizenship is simply not supported by the plain text of the American Declaration. There is no legal basis for the Commission to infer such a right here.

g. Decision in Case No. 12.958-A, Bucklew

On April 11, 2018, the Commission issued its merits report in Case No. 12.958-A with respect to Russell Bucklew, an inmate scheduled for execution by the State of Missouri on March 20, 2018. On June 28, 2018, the United States submitted a letter to the IACHR Executive Secretary acknowledging the Commission's recommendations and non-binding request for precautionary measures. The U.S. letter also conveyed the following:

> After granting a stay of execution for the Petitioner on March 20, 2018, the Supreme Court of the United States granted a petition for *writ of certiorari* on April 30, 2018 in order to examine questions related to the method of execution

at issue in this case. The Court plans to hear the petitioner's case in the next term, which begins in October 2018, with a decision being reached several weeks or months thereafter.

The United States requests that the Commission rescind its prematurely issued final report on the merits. The Petitioner continues to be engaged in active domestic litigation and is being afforded due process with respect to the matters at issue in the report.

Cross References

Temporary Protected Status, **Ch. 1.C.1.**
Visa Restrictions relating to Nicaragua, **Ch. 1.B.2.d**
ICJ judgment in Avena*,* **Ch. 2.A.**
UN Commission on Narcotic Drugs, **Ch. 3.B.2.c.**
ICC, **Ch. 3.C.1.**
ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, **Ch. 4.A.2**
Termination of Treaty of Amity with Iran, **Ch, 4.B.1**
Withdrawal from Optional Protocol to VCDR Concerning the Compulsory Settlement of Disputes, **Ch. 4.B.2**
Withdrawal from the Universal Postal Union, **Ch. 4.B.3**
Efforts of the Palestinian Authority to Accede to Treaties, **Ch. 4.B.4**
Self Determination, **Ch. 6.D**
Termination of Treaty of Amity with Iran, **Ch. 9.A.2**
Venezuela, **Ch. 9.A.8**
Venezuela, **Ch. 10.C.2**
Immunities of International Organizations, **Ch. 10.D**
Venezuelan Navy's actions in Guyana's EEZ, **Ch. 12.A.3.b**
UNESCO, **Ch. 14.A**
UNCITRAL, **Ch. 15.A.1**
Iran/JCPOA, **Ch. 16.A.1.a**
Venezuela sanctions, **Ch. 16.A.4**
Nicaragua sanctions, **Ch. 16.A.11.a**
Export controls on South Sudan, **Ch. 16.B.3**
UN Relief and Works Agency for Palestine Refugees, **Ch. 17.A.1**
Closure of the PLO office in Washington, **Ch. 17.A.1**
Nicaragua, **Ch. 17.B.6**
South Sudan, **Ch. 17.B.8**