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CHAPTER 7

International Organizations

A. UNITED NATIONS

1. Accountability of UN Officials and Experts on Mission

On October 10, 2019, Emily R. Pierce, counselor for the U.S. Mission to the UN, delivered remarks at a Sixth Committee meeting on “Agenda Item Number 76: Criminal Accountability of UN Officials and Experts on Mission.” Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-the-74th-general-assembly-sixth-committee-agenda-item-number-76-criminal-accountability-of-un-officials-and-experts-on-mission/>.

* * * *

The United Nations plays a critical role in the world, discharging its solemn mandate to maintain international peace and security, promote and respect human rights and fundamental freedoms, and promote international cooperation in solving economic, social, cultural, and humanitarian problems. We recognize and thank the multitude of officials and experts on mission who perform these duties admirably, upholding the high standards of integrity expected of those working on behalf of the United Nations. We must remain vigilant in protecting the credibility of the United Nations in carrying out this work, and clear-eyed about the effect incidents of criminal behavior by UN officials and experts on mission has on the public’s confidence in the United Nations. The United States reiterates its firmly held belief that UN officials and experts on mission should be held accountable for the crimes they commit.

Each of us has a role in promoting accountability for alleged criminal activity and, in that regard, we appreciate opportunities for cooperation. In particular, we welcome the United Nations’ cooperation with U.S. authorities on various criminal investigations, even those that do not involve allegations against a UN official, but about which the UN may have relevant

information. The UN Office of Legal Affairs (OLA) continues to implement the General Assembly's request for more follow up with Member States to which referrals of criminal allegations have been made when no response has been received, and we appreciate their readiness to assist, when requested, on all referrals.

The responsibility to take action on referrals lies with us, the Member States, and the Secretary-General's report clearly reflects that some of us are not living up to that responsibility. Member States need to do better. In this regard, we note that earlier this year, the State Department provided proposed legislation to our Congress that, if enacted, will close jurisdictional gaps in our domestic laws so that U.S. authorities can take appropriate steps to follow up on *all* referrals of criminal allegations involving U.S. citizens serving with the United Nations abroad. One case of impunity is one case too many. We reiterate our call on other Member States to take similar steps.

The United States thanks OLA for its two reports, and appreciates in particular the progress made on training and vetting at the UN. For example, the Secretary-General reported on the standardization of conduct and discipline induction training across the entire Secretariat. Appropriate and timely training is fundamental to instilling the expectation of high standards, and we encourage that such training be standardized across UN funds and programmes, as well. We also welcome the implementation of enhanced vetting measures, particularly the expansion of the ClearCheck database to screen for prior substantiated SEA allegations and sexual harassment, including for those personnel who have resigned from the UN when the allegations are pending.

The Secretary-General continues to demonstrate leadership on addressing sexual exploitation and abuse at the UN, and the United States has been one of the leading proponents of reforms. Nonetheless, the information provided in the annexes to the Secretary-General's report A/74/145 makes clear that the issue before the Sixth Committee goes beyond sexual exploitation and abuse that may amount to criminal conduct. Allegations of corruption, fraud, and theft constitute a large portion of the referrals made by the United Nations to Member States this reporting period, as well as in previous years. The Sixth Committee, rather than engaging in a parallel debate with the Fifth Committee on SEA in the peacekeeping context, should provide greater focus on civilian officials and experts on mission across the UN and failures to hold them criminally accountable.

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2. Administration of Justice

On October 17, 2019, Ms. Pierce delivered a statement for the United States at the Sixth Committee meeting on administration of justice at the UN. Ms. Pierce's statement is excerpted below and available at <https://usun.usmission.gov/statement-at-the-74th-general-assembly-sixth-committee-agenda-item-number-148-administration-of-justice-at-the-united-nations/>.

* * * *

We would like to thank the Secretary-General, the Internal Justice Council, and the Office of the United Nations Ombudsperson and Mediation Services for their reports.

This year marks ten years since the United Nations system of administrative justice—an independent, transparent, and professionalized system—commenced operation in July 2009. By many accounts in the reports, this anniversary has been marked by both progress and challenges. The United States appreciates the steadfast resolve of the UN Dispute Tribunal (UNDT) and UN Appeals Tribunal (UNAT) Presidents to lead the tribunals in reform, including through implementation of General Assembly resolution 73/276. We also commend the tireless efforts of the Principal Registrar and Executive Director of the Office of the Administration of Justice to provide independent and autonomous support of the tribunals through this critical period.

One of the goals of resolution 73/276 is to protect and foster staff trust in the administrative justice system by ensuring that the tribunal presidents have the tools and support they need to exercise their statutory mandates to enhance tribunal efficiency through effective case management. The General Assembly took steps in response to the growing backlog of pending cases in the UNDT, which led to unacceptable delays in delivering justice and undermined the credibility of the system. Credibility is the foundation of administration of justice.

We began to see results. Because of the data-based caseload disposal plan, case-tracking dashboard technology, and performance indicators, cases that had been pending for a long time—some for more than two years—were disposed of expeditiously. The case disposal rate of the UNDT for 2019 is already higher than that for 2018. We look forward to this continued trend and full implementation of resolution 73/276.

Despite the progress in judicial efficiency, we cannot ignore that the reports reveal deeply concerning issues related to judicial accountability. This session, the Sixth Committee should explore practical solutions so that effective and transparent mechanisms are in place to resolve issues before they become disruptive to judicial work. The administrative justice system was designed to help foster and protect a workplace that is consistent with UN values, including civility and respect for diversity and the dignity of all. We welcome the newly elected judges, and are optimistic about the future.

Chair, the United States welcomes efforts to improve the transparency of the system, in particular the revision of the staff member's guide to resolving disputes. As last year, however, there remains work to do in the area publicizing the workings of the system. We note that the judicial directives were not published or otherwise made available online. Transparency of the system is critically important so that UN staff, their representatives, and the General Assembly can better understand how the tribunals are carrying out administrative justice. Publication of such directives is a common practice among courts, and the UNDT and UNAT should take steps necessary to make this happen.

The Management Evaluation Unit and Office of Staff Legal Assistance (OSLA) also continued important work in helping to resolve requests before they reached the litigation stage, which is a crucial part of maintaining efficiency and effectiveness of the entire system. It is important that OSLA reports that it did not turn away any applicants because of a lack of resources, and we hope that trend continues.

Regarding accessibility for non-staff, we note the Office of UN Ombudsperson and Mediation Services will be providing an assessment of the feasibility of institutionalizing the

pilot project in its report for the 75th session. The United States appreciates the Office's work to proactively build competency in conflict resolution.

Finally, justifications to support recommendations to amend the UNDT and UNAT statutes should meet a reasonably high bar. In this regard, the United States is not convinced of the legal necessity of the statutory amendments recommended in the reports.

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3. Charter Committee

On October 17, 2019, Ms. Pierce delivered remarks at a Sixth Committee meeting on the report of the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization. Ms. Pierce's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-sixth-committee-meeting-on-agenda-item-84/>.

* * * *

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 2019. Overall, the Special Committee's work lacks the flow and movement of years past. The Committee has considered at least two of the proposals on its agenda every year, for more than twenty years. Committee members may have legitimate disagreements over the substantive issues before them, but we share an interest in the need to rationalize the Committee's work. The Special Committee should take steps in 2020 to improve the efficiency and productivity of the Committee, including giving further scrutiny to proposals with an eye toward updating its work and making the best use of scarce Secretariat resources. Committee members should also give serious consideration to 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 should recognize 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 thanks the Department of Political Affairs for its briefing on sanctions 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. We would support further discussion on options to strengthen implementation.

Regarding other topics under 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 before, if a proposal such as that of Ghana could add value by helping to fill gaps, then it should be considered.

With respect to items on the Committee's agenda regarding the peaceful settlement of disputes, the United States again welcomed the opportunity to participate in the Special Committee's second debate on this issue. We look forward to the third debate in 2020 on state practices on the use of conciliation. Regarding other topics under this agenda item, the United States does not support the allocation of resources to build a website for information that is already widely available online.

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 Special Committee is not the appropriate forum to debate the sufficiency of communications submitted pursuant to Article 51 of the Charter, nor to debate the role of the Security Council with respect to such communications.

Finally, we welcome the Secretary-General's report A/74/194, 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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4. Rule of Law

On October 11, 2019, Deputy Legal Adviser Julian Simcock, of the U.S. Mission to the UN, addressed the Sixth Committee on Agenda Item 83: Rule of Law at the National and International Levels. His remarks are excerpted below and available at <https://usun.usmission.gov/statement-at-the-74th-general-assembly-sixth-committee-agenda-item-83-rule-of-law-at-the-national-and-international-levels/>.

* * * *

The Secretary-General's report identifies a number of concerning developments. Particularly alarming are its findings regarding the proliferation of hate speech and incitement to violence. As the Secretary-General has said, "Hatred is a threat to everyone—and so this is a job for everyone." We look forward to engaging on the United Nations Strategy and Plan of Action on Hate Speech. We believe we can work to address these problems, while remaining cognizant that efforts to counter hate speech must respect freedom of expression.

With respect to this year’s subtopic—“Sharing best practices and ideas to promote respect for international law among states”—I wish to highlight some of the United States’ engagement in the area of international humanitarian law, also known as “IHL.”

States can improve their implementation of IHL through the voluntary sharing of State practice, including official publications, policies, and procedures. The United States has worked to share its own practices regularly and publicly, including through certain publications that provide explanations and guidance on the rules and principles of the law of armed conflict.

The United States has also participated in international fora that present an opportunity for sharing best practices for improving compliance with IHL and mitigating civilian harm. We thank the Austrian Government for hosting a conference in Vienna last month on Protection of Civilians in Urban Warfare. We hope that future discussions of this important topic will continue to emphasize sharing of state practice and concrete mitigation measures to improve the situation of civilians impacted by armed conflict.

With respect to the forthcoming negotiation on the resolution for this agenda item, we hope that the Sixth Committee will once again be able to reach 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 this Committee has a long history of consensus-based decision making. We are optimistic that it will endure. At a time when the rule of law is under attack in many parts of the world, even where it was once considered sacrosanct, this practice is a welcome reminder of the power of collaborative legal discourse.

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5. UN World Tourism Organization

On June 17, 2019, at the executive council meeting of the UN World Tourism Organization (“UNWTO”) in Baku, Azerbaijan, the United States announced its intent to explore rejoining the Organization. The State Department media note sharing the announcement, available at <https://www.state.gov/the-united-states-to-explore-rejoining-the-united-nations-world-tourism-organization/>, includes the following:

The United States will now begin negotiations with UNWTO and its member states to seek terms to rejoin that are advantageous to the United States and will maximize benefits to the American tourism sector. The Administration believes that UNWTO offers great potential to fuel growth in that sector, create new jobs for Americans, and highlight the unmatched range and quality of U.S. tourist destinations.

B. INTERNATIONAL COURT OF JUSTICE**1. Certain Iranian Assets (*Iran v. United States*)**

As discussed in *Digest 2018* at 227-34, the United States appeared before the International Court of Justice (“ICJ”) in the case, *Certain Iranian Assets*, in which Iran challenges measures adopted by the United States to deter and counteract Iran’s support for terrorism and respond to other internationally destabilizing actions taken by Iran that threaten U.S. national security. The United States made preliminary objections on jurisdiction and admissibility in the case. On February 13, 2019, the ICJ delivered its judgment on the U.S. preliminary objections, which is available at <https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>. *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, 2019 I.C.J. Rep. 7 (Feb. 13). On the same date, the State Department issued the following statement on the judgment, which is available at <https://www.state.gov/statement-on-icj-preliminary-judgment-in-the-certain-iranian-assets-case/>.

* * * *

Today the International Court of Justice has made a preliminary ruling in *Certain Iranian Assets*, rejecting many of Iran’s baseless claims and significantly narrowing what remains. This is a significant victory for the United States. *Certain Iranian Assets* is yet another case in which the Iranian regime seeks to misuse legal process and distort principles of international law. This time, Iran’s goal is to prevent United States victims of the Iranian regime’s wanton acts of terrorism over decades, including families of U.S. peacekeepers who died in the bombing of the Marine barracks in Lebanon in 1983, from recovering compensation from Iran in U.S. courts.

While we disagree that the Court should allow any of Iran’s claims to go forward, we are pleased that today the Court saw through Iran’s effort to distort the 1955 Treaty of Amity and rejected Iran’s core arguments. As we have made clear, the 1955 Treaty of Amity was never intended to provide cover for Iran’s bad acts. Iran must not be permitted to continue to misuse the International Court of Justice’s judicial process for political and propaganda purposes.

The United States will continue vigorously to support victims of terrorism and resist Iran’s efforts to prevent their lawful recoveries. We stand with those who seek to hold Iran accountable and will continue efforts to increase the pressure on the Iranian regime. We hope that Iran’s leaders will come to recognize that the only way to ensure a positive future for their country is by ceasing their campaign of terror and destruction around the world.

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

As discussed in *Digest 2018* at 235-51, the United States submitted written and oral statements in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) before the ICJ. The United States asserted that the Court should decline to provide an advisory opinion and that there was no rule of customary international law in 1965 that would have prohibited the establishment of the British Indian Ocean Territory (“BIOT”). On February 25, 2019, the ICJ issued an advisory opinion, finding no compelling reasons not to respond to the UN General Assembly’s questions. The ICJ advised that the decolonization was not completed under international law with respect to Mauritius because the U.K. separated the Chagos Archipelago in 1965 to form “a new colony.” The ICJ further advised that the UK is responsible for an internationally wrongful act of a continuing nature, that it must end its administration of the BIOT as rapidly as possible, and that all States are under an obligation to cooperate with the UNGA in this regard. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, (Feb. 25, 2019), <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

On May 6, 2019, the State Department issued a press statement in support of the United Kingdom’s continued sovereignty over the BIOT. The U.S. statement followed an April 30, 2019 statement by the U.K. Government. The U.S. statement is available at <https://www.state.gov/the-united-states-recognizes-the-united-kingdoms-continued-sovereignty-over-the-british-indian-ocean-territory/>, and includes the following:

The joint U.S.-U.K. military base on Diego Garcia plays a critical role in the maintenance of regional and global peace and security.

The United States views the BIOT issue as a purely bilateral dispute between the U.K. and Mauritius, which can and should be addressed through efforts by both parties to negotiate a solution.

The United States remains concerned about the precedent the International Court of Justice (ICJ) case could set for all UN member states. UN General Assembly advisory opinion requests should not be used to litigate bilateral disputes, particularly when a State directly involved has not consented to the jurisdiction of the ICJ.

On May 22, 2019, Ambassador Jonathan Cohen, acting permanent representative to the U.S. Mission to the UN, delivered remarks at a UN General Assembly debate on a resolution on the ICJ’s advisory opinion regarding the BIOT. Ambassador Cohen’s remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-mauritian-biot-resolution/>.

* * * *

As the United States and others cautioned two years ago, it was inappropriate to seek an advisory opinion with respect to this purely bilateral dispute, particularly without the consent of both parties. The resolution presently under consideration makes clear that those concerns were warranted.

We share the views already expressed about the scope of the resolution and the dangerous precedent it sets for misuse of the ICJ’s advisory function, and the ability of states to decide for themselves how best to peacefully settle their bilateral disputes.

I’d like to briefly reiterate our views on this matter.

First, the United Kingdom remains sovereign over the BIOT—as it has been continuously since 1814. The United States unequivocally supports UK sovereignty over the BIOT. Its status as a U.K. territory is essential to the value of the joint U.S.-UK base on the BIOT.

That joint base is critical to our mutual security as well as broader efforts to ensure global security. The strategic location of the shared base enables the United States, the United Kingdom, and our allies and partners to combat some of the most challenging threats to global peace and security. It also allows us to remain ready to provide a rapid, powerful response in times of humanitarian crisis.

The specific arrangement involving the facilities on the BIOT is grounded in the uniquely close and active defense and security partnership between the United States and the United Kingdom. It cannot be replicated.

Second, all States should be concerned by the overreaching of this resolution, especially those currently engaged in efforts to resolve their own bilateral disputes. Even in its revised form, the text goes beyond the non-binding advisory opinion issued by the ICJ, and mischaracterizes the content and effect of that opinion in critical respects.

The Court did not say that Mauritius is today sovereign over the BIOT, or suggest that States or international organizations must recognize it as such. Further, it rejected Mauritius’s argument that transfer of sovereignty must be immediate.

In sum, this resolution sets an unsettling precedent with potentially far-reaching implications. And it undermines a fundamental principle of international law—one enshrined in the Statute of the ICJ—that States must consent to have their disputes adjudicated.

For these reasons, we oppose this resolution and we encourage all Member States to do the same.

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C. INTERNATIONAL LAW COMMISSION

1. ILC Draft Articles on Crimes Against Humanity

On April 26, 2019, the United States provided written comments on the International Law Commission’s (“ILC”) draft articles on “Crimes Against Humanity” (“CAH”) as

adopted by the commission in 2017 on first reading (“Draft Articles”). The U.S. comments are excerpted below (with most footnotes omitted). The full submission is available at <https://www.state.gov/digest-of-United-states-practice-in-international-law/>.

On December 15, 2019, the United States submitted separate comments on the ILC draft guidelines for Provisional Application of Treaties and the draft guidelines on Protection of the Atmosphere. See Chapter 4 for discussion of the draft guidelines for Provisional Application of Treaties and Chapter 13 for discussion of the draft guidelines for Protection of the Atmosphere. The 2018 ILC report, UN Doc. A/73/10, requested comments on both sets of draft guidelines. The request for comments regarding provisional application of treaties was reiterated in the 2019 ILC report, UN Doc. A/74/10.

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...The United States reiterates that it is critical that the Commission account for the views of States in this and other topics on the Commission’s program of work because international law is built on the foundation of State consent. International law has binding force as a result of the consent States give to international law and the process of making international law. The Commission is, of course, not a legislative body that establishes rules of international law. Rather, its contributions focus on documenting areas in which States have established international law or on proposing areas in which States might wish to consider establishing international law. In the view of the United States, developing these Draft Articles is not primarily an exercise in codifying customary international law, but instead is primarily an effort to provide the Commission’s recommendations on progressive legal development.

The United States acknowledges that the concept of CAH has been part of international law and the domestic laws of various foreign States for a number of years. The United States has a long history of supporting justice for victims of CAH and other international crimes. The adoption and widespread ratification of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—have been a valuable contribution to international law, and the United States shares a strong interest in supporting justice for victims of atrocities.

With due appreciation of the importance and gravity of the subject, the United States submits that the significant concerns that it has identified with the current Draft Articles, described in part below, are sufficient to call into question whether, absent substantial further work to address such concerns, a treaty based on the Draft Articles could attract wide acceptance by States, including the United States. The United States offers the edits and comments below in a spirit of constructive engagement, but notes that these edits and comments do not represent acceptance of the draft in whole or in part or that the United States is indicating its approval of future work on the articles or any possible resulting convention. The edits and comments below should not be taken as representing the United States’ agreement with any conclusion as to the content of customary international law in this area.

The United States believes the work of the ILC in this area should be guided by three objectives.

First, clarity should be an important objective for the ILC's work on CAH, and is a *sine quo non* of both a well-crafted treaty that would support justice for victims of CAH and any U.S. acceptance of a possible resulting treaty. . . . In particular, not all States, including the United States, have made the definition of CAH and how they should be addressed the subject of codification, and there is no universally accepted definition of CAH. . . .

Second, any convention should be drafted with a view toward recommending to States an instrument that could be universally (or at least very widely) ratified by States, as the Geneva Conventions of 1949 have been.⁴ To this end, the Draft Articles need to be flexible in implementation, accounting for a diversity of national systems (*e.g.*, common law and civil law systems), parties to the Rome Statute of the International Criminal Court (the Rome Statute) and States that are not parties to the Rome Statute, as well as diversity within national systems (*e.g.*, federal and local law enforcement authorities or civilian and military authorities may apply different criminal law and procedures).

Third, in order to be useful to States in strengthening accountability, the draft provisions of the proposed convention should be mindful of the challenges that have arisen in the area of international criminal justice, including by reflecting lessons learned and reforms enacted after overbroad assertions of jurisdiction by national and international courts. In this context, the United States recalls and reiterates its continuing, longstanding, and principled objection to any assertion of jurisdiction by the International Criminal Court (ICC) over nationals of States that are not parties to the Rome Statute, including the United States, absent a UN Security Council referral or the consent of such a State. The United States remains a leader in the fight to end impunity and continues to support justice for victims of international crimes. We respect the decision of those nations that have chosen to join the ICC, and in turn we expect that our decision not to join and not to place our citizens under the ICC's jurisdiction will also be respected. Were other nations to conclude a CAH treaty that the United States did not join, the United States would not be bound by it and would reject any claim of authority to impose its terms on the United States absent its consent.

The Draft Articles, of course, differ in significant ways from the Rome Statute, including that they are focused on facilitating justice for victims of CAH in domestic legal systems rather than intended to establish an international court. However, experience and lessons learned with respect to the ICC nonetheless need to inform the Draft Articles in order to avoid the very serious concerns that have arisen with respect to the ICC. In particular, the Draft Articles need safeguards to avoid providing a pretext for prosecutions inappropriately targeting officials of foreign States. Absent such safeguards, any convention could give rise to tensions between States and thereby undermine rather than strengthen the legitimacy of efforts to promote justice.

To that point, throughout the Draft Articles one issue that merits further consideration is the scope of specific draft articles, including limitations on a State Party's obligation based on territory, jurisdiction, or both. The United States has serious concerns regarding unwarranted

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter, collectively, Geneva Conventions].

assertions of jurisdiction in this context and believes that portions of the current draft have no basis in customary international law and could lead to increased tensions between States as States seek to exercise jurisdiction over the same matter in conflicting ways. Accordingly, the United States believes that further work needs to be done to clarify and justify the scope of potential State obligation under each of the Draft Articles, including whether territory, jurisdiction, or other limitations should provide the appropriate scope of such obligation. The United States believes it is vital that the ILC undertake such clarification and analysis in order for any proposed convention to be successful in winning State support and in strengthening justice for victims of CAH. Indeed, for its part, absent such clarification, the United States would not ratify a proposed convention based on the draft articles. This work should also include consideration of the appropriate limits on the exercise of jurisdiction for prosecution and investigation under any convention that might result, such as a nexus to the location of the offense, the offender or material evidence, or the nationality of the offender or the victims. Without such limitations, the United States is concerned that abuses that have been demonstrated in the context of the ICC and certain domestic proceedings will be repeated in this context, and such abuses will undermine genuine efforts to promote justice and inhibit ratification of an eventual draft convention by concerned States. Indeed, without clear provisions that define the scope of each State's obligations on CAH or other safeguards, States would have to consider how a possible CAH convention would affect the legal risks and potential inappropriate exposure of their governments and their officials in domestic, foreign, and international courts. As the country with the world's largest overseas presence, significant portions of which are engaged in combatting CAH by terrorist groups and in addressing the conditions in which CAH have historically occurred, the United States will continue to consider these issues carefully and seek to have them addressed appropriately in this draft and any possible proposed convention.

A related issue meriting further consideration concerns the differences between States that have ratified other relevant conventions and States that have decided not to ratify such conventions. In particular, the Draft Articles should not simply be developed for Rome Statute parties, but rather should be acceptable both to States Parties to the Rome Statute and to States that have decided not to become party or remain party to the Rome Statute. This includes, for example, ensuring that the Draft Articles and Commentary do not profess to affect whether a given State has any obligations with respect to an international court or tribunal. Addressing these concerns will also help further the goal of promoting universal acceptance of the instrument, as noted above.

The United States notes that the below comments, which include both general views and specific suggestions for changes to the current draft, reflect an effort by the United States to engage in constructive dialogue with the ILC on the Draft Articles. The below comments should be understood in this specific context and not as representing approval by the United States of future work on the Draft Articles and its Commentary or on any possible resulting convention or with regard to international criminal law issues outside the context of the Draft Articles. The absence of comment by the United States on a particular provision of the Draft Articles or Commentary should not be understood to indicate the absence of concerns with respect to that provision.

Preamble

The preamble should be adjusted in line with the objectives outlined above. We recommend adding a preambular paragraph modelled after language in the preamble to the 1977

Additional Protocol I to the 1949 Geneva Conventions clarifying that nothing in the Draft Articles may be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations. Such language is noticeably absent from the Draft Articles and could help assuage concerns that any convention would be used as a pretext to otherwise unlawful uses of force. Similarly, the Draft Articles, and any convention that follows, should not seek to infringe upon the sovereign rights of any State. Therefore, we propose adding preambular paragraphs that recognize the sovereign equality of States and that States should seek to resolve disputes concerning how to address CAH through peaceful means and in accordance with relevant and applicable domestic and international law.

Article 1: Scope

Draft Article 1 notes that the Draft Articles apply to the prevention and punishment of CAH. The United States believes it is necessary, in Draft Article 1 or elsewhere, to clarify that these provisions of the proposed convention would not modify international humanitarian law, which is the *lex specialis* applicable to armed conflict. ...

Finally, the United States underscores the necessity of clarifying, in Draft Article 1 or elsewhere, that the text as proposed for the convention will not and is not intended to modify any rules of international law that may be applicable to the exercise of jurisdiction by one State in relation to the sovereign acts of another State.

Article 2: General Obligation

Draft Article 2 states that CAH, “whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.” The United States suggests clarifying that all efforts to prevent and punish must be done in accordance with international law. In addition, please see our comments below on Draft Article 4 for our views on the scope of the obligation to prevent.

Article 3: Definition of crimes against humanity

Draft Article 3 lays out a definition of CAH. We recognize that the first three paragraphs of Draft Article 3 are drawn almost verbatim from the Rome Statute and that Rome Statute parties may have an interest in ensuring that the definition of CAH in the Draft Articles would be consistent with the Rome Statute. The United States, along with many other States, is not party to the Rome Statute and has not accepted the definition of CAH in that instrument. Some of the specifically enumerated offenses and definitions in Draft Article 3, paragraph 3, as in the Rome Statute, are problematic because of the inclusion of references to unidentified and amorphous principles of “fundamental rules of international law,” “universally recognized” concepts of international law, and “fundamental rights” of international law. It is unclear whether these references encompass, for example, all the rights enshrined in the Universal Declaration of Human Rights or all rights enshrined in the International Covenant on Civil and Political Rights.

In addition, the ILC should explain in more detail the meaning and scope of Draft Article 3, paragraph 1, section (d) that would criminalize “deportation or forcible transfer of population.” Although the Draft Article 3, paragraph 2, section (d) defines “deportation or forcible transfer of population” as “forced displacement of persons ... from the area in which they are lawfully present, without grounds permitted under international law,” the Commentary should explicitly state that the offense does not include a State enforcing its own immigration laws against individuals not lawfully present in the State, consistent with its obligations under international law. International law has long recognized the prerogative of all States to control their own borders and, subject to certain exceptions, to remove individuals not lawfully present.

The ILC should also explain in more detail the meaning and scope of Draft Article 3 paragraph 1, section (k) that would criminalize “inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” This Draft Article is so broadly and vaguely worded that it could cover any number of government acts lawful under domestic law. For example, to the extent the definition continues to be drawn from the Rome Statute, the definition should be further clarified by explicitly incorporating, with small technical modifications to address the context, the relevant text of the ICC Elements of Crimes relating to CAH, and another draft article or draft annex reflecting these understandings, *mutatis mutandis*, could provide the basis for additional useful clarification if the Rome Statute definition continues to be used in the Draft Articles

In addition, the United States concurs with the conclusion in the Commentary that the definition set forth in Draft Article 3 does not provide that the perpetrator would in all circumstances be a State official or agent. Indeed, non-State groups such as the Islamic State in Iraq and Syria (ISIS) have been responsible for crimes against humanity.¹⁶ However, the inclusion of the Commission’s 1991 comment that “de facto leaders and criminal gangs” may be non-State groups that can formulate a “policy” for purposes of the Draft Articles merits further clarification. The United States notes that, in general, criminal gangs would not be considered to commit CAH. Moreover, an overly broad definition of CAH in which ordinary criminal activity by gangs and other organized criminals would qualify as CAH could make non-refoulement obligations very difficult to administer. Accordingly, the Draft Articles and the Commentary should be clarified to ensure that the Draft Articles do not suggest that organized criminal activity would ordinarily constitute CAH.

Article 4: Obligation of Prevention

Draft Article 4 further defines the obligation to prevent CAH. Subparagraph 1(a) requires a State to undertake to prevent CAH via effective legislative, administrative, judicial, or other preventive measures in any territory under its jurisdiction. First, we note that the Draft Article itself expressly limits a State’s obligation to take measures to those measures in “any territory under its jurisdiction.” This language differs from the language in conventions in which the territorial limitation on the obligation to prevent is explicitly applied to the crimes to be prevented.¹⁸ We recommend adhering to the more established approach as the formulation in the Draft Article might be interpreted to suggest an obligation to prevent CAH that occur abroad. The Commentary suggests, based on a similar provision of the Genocide Convention, that the obligation to prevent in the Draft Articles requires that States follow a “due diligence standard”, whereby “the State party is expected to use its best efforts...when it has a ‘capacity to influence effectively the action of persons likely to commit, or already committing’” CAH. It is the United States’ strong belief that an obligation to undertake to prevent would be a general undertaking by its clear terms and, in accordance with common practice, would express the general purpose and intent of States parties rather than creating an independent obligation to take specific actions. To

¹⁶ See, e.g., Remarks by Secretary Tillerson on Religious Freedom, reprinted in the Digest of U.S. Practice in International Law 2017, p. 238 (“Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled. ISIS is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.”).

¹⁸ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Article 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

suggest that a very general obligation in the Draft Articles would create an unclear array of specific requirements that are not reflected in the remainder of the Draft Articles, which does articulate specific requirements, would pose an undue burden on States in implementing the convention and could discourage States from ratifying it. Moreover, there are existing procedures, including action under Chapter VII of the UN Charter, that are available where States assess that risks of CAH merit collective action, or, as appropriate, the need for a dispute resolution mechanism provided in Draft Article 15. We suggest clarifying as such in the Commentary.

Subparagraph 1(b) of Draft Article 4 indicates that a Party's obligation to prevent CAH includes "cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations." The Commentary notes in passing that whether an international organization is "relevant" will depend, *inter alia*, on "the relationship of the State to that organization," but this still leaves little guidance on when there would be an obligation to cooperate and may result in misinterpretations. For example, consistent with the fact that international organizations derive their mandate and authority from State consent, the text of the Draft Articles should clearly avoid any implication that a State would be obligated pursuant to this convention to cooperate with an international organization or other entities in circumstances where the State is not otherwise bound by such an obligation. Accordingly, we suggest that moving "as appropriate" to the end of Draft Article 4, Paragraph 1, subparagraph (b), such that "as appropriate" modifies the entire clause.

Article 5: Non-Refoulement

Draft Article 5 details the obligation that States would have regarding non-refoulement where there are substantial grounds for believing that he or she would be in danger of being subjected to a CAH. The United States is not convinced of the value or practicality of this Draft Article; it creates a new non-refoulement obligation specific to CAH, and the Commentary does not address why a new non-refoulement obligation is necessary. The 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), have been widely ratified and provide protection from return to countries where individuals fear many of the types of conduct included under the definition of CAH. These existing obligations do not require individuals seeking protection to meet any purported predicate requirements of CAH, however defined, that the actions are part of a "widespread or systematic attack directed against a civilian population, with knowledge of the attack." In this sense, Draft Article 5 would, in many circumstances, offer narrower protection than would be provided by existing international instruments.

In addition, given that the Draft Article 3 provides more protected bases for "persecution" than the Refugee Convention, and a more expansive definition of "torture" than that contained in the CAT, Draft Article 5 could result in an expansion of mandatory non-refoulement protections in other circumstances. In particular, on its face, the "torture" definition in the Draft Articles omits any requirement for State action, as is required in the CAT, and therefore requires non-refoulement regardless of the fact that the "torture" would have been conducted by private criminals with no knowledge or acquiescence by any public official. We suggest that further consideration of this issue is warranted, taking into account the Refugee Convention and the CAT.

Moreover, the extent the treaty would provide protection from refoulement to those who have engaged in conduct that raises security and other concerns (e.g., human rights abusers, those who have made terrorist threats) is unclear and deserves further consideration. Existing international law has long stipulated certain security-related exceptions in the refugee context, and those exceptions are integral to the United States' administration of asylum and statutory withholding of removal. Although the CAT's non-refoulement obligations do not provide any such exceptions, the Commission should consider exclusions similar to those in the Refugee Convention.

In addition, Draft Article 5 differs in material respects from well-established non-refoulement obligations in other treaties. The Commentary does not explain the reasoning behind these differences, and such changes could conflict with current State practice. For example, the Commentary states that the Draft Article is modeled on the Convention on Enforced Disappearances (CED), which has only been ratified by 59 States. Further, although the CED addresses returning individuals to "another State," Draft Article 5 refers to "territory under the jurisdiction of another State," and no explanation is provided for this change.

Moreover, although Draft Article 5 utilizes the same standard as Article 3 of the CAT for determining whether a person would be in danger of being subjected to a crime against humanity—"where there are substantial grounds for believing" that the ill treatment would occur—the U.S. Senate's advice and consent was subject to the understanding that the United States would interpret this phrase to mean "more likely than not." The United States likely would take a similar approach to this provision. But the Commentary seems to go against this interpretation, by citing the European Court of Human Rights' interpretation of Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms: "While a 'mere possibility' of ill-treatment is not sufficient, it is not necessary to show that subjection to ill-treatment is 'more likely than not.'"

Paragraph 2 of Draft Article 5 refers to competent authorities making a determination of a consistent pattern of violations in the territory of another State. It would be useful to revise this paragraph to include the concept of "credible information supporting" the existence of such a pattern.

Finally, as noted above, throughout the Draft Articles, the scope of the Draft Articles, particularly whether a specific Draft Article's scope should be limited based on territory, jurisdiction, or both, bears further consideration. To the extent the Draft Articles continue to include a non-refoulement obligation, we suggest making clear in Draft Article 5 that a State Party would only have such obligation with respect to persons within its territory and subject to its jurisdiction.

Article 6: Criminalization under national law

Draft Article 6 addresses requirements for the criminalization of CAH under domestic law, including modes of liability. As noted above, we underscore the importance that the Draft Articles be drafted with a flexible approach allowing for implementation by a variety of legal systems. Given the egregious nature of CAH, the conduct constituting CAH should already constitute a domestic crime in most circumstances. Moreover, as noted above, we do not think that the Rome Statute definition is sufficiently clear, and adopting a novel and unclear definition of CAH that broadens the definition of CAH would be unhelpful.

Since a convention would seek to enhance international cooperation, the United States acknowledges that the benefit of a common definition for offenses is dual criminality, which will

allow for a similar concept of the crime in both the requesting and requested jurisdiction in extradition cases. Although we emphasize that dual criminality does not require laws that are mirror images of each other, we recognize that having common definitions as the starting place would greatly facilitate reaching end results that satisfy dual criminality requirements. If the Commission is not able to draft a common definition that would be acceptable to a wide range of States, it may wish to give consideration to further describing the prohibited conduct in cases involving requests for extradition based on allegations of CAH, rather than suggesting that States should enact new domestic offense provisions.

As to the doctrine of command responsibility, conceptions and applications have varied widely among and even within States. For example, some see it as a form of vicarious liability for the offense of a subordinate, while others view it as a standalone offense, such as dereliction of duty. As noted above, the standards articulated in the Draft Articles must allow flexibility for appropriate and diverse domestic implementation. The Commission should give further consideration to tailoring its provision on command responsibility to the context of CAH or to acknowledging that States that have not accepted the Rome Statute standard in their domestic law, such as the United States, might not find the Draft Articles acceptable.

Paragraphs 1 to 7 of Draft Article 6 are directed at criminal liability of offenders who are natural persons, although the term “natural” is not used, which is consistent with the approach taken in treaties setting out crimes. Paragraph 8, in contrast, addresses the liability of “legal persons” for the offences referred to in Draft Article 6. As acknowledged in the Commentary, there is no universal, international concept of criminal responsibility for legal persons in this area (or in others). The United States believes international law establishes substantive standards of conduct but generally leaves each State with substantial discretion as to the means of enforcement within its own jurisdiction, which could include the precise category of potential perpetrators and type of relief. Draft Article 6 acknowledges such a principle by explicitly providing that national laws and “appropriateness” may dictate whether and how States establish liability for “legal persons,” a class broader than natural persons. The United States emphasizes that at a minimum, the flexibility provided for in the Draft Article should be maintained—both as to how such liability would operate under criminal laws, but also its appropriateness in a national system.

Finally, as a general note, we suggest replacing “national law” with “domestic law” throughout this and other Draft Articles, to track more closely the terminology in other law enforcement cooperation treaties.²⁸ ...

Article 7: Establishment of national jurisdiction

Draft Article 7 sets out the circumstances where the establishment of jurisdiction for CAH would be proper under the draft convention. The Draft Articles should clarify that jurisdiction be established when a State party does not extradite in accordance with the Draft Articles and “other applicable international law,” because extradition or surrender could be subject to a variety of international obligations depending on the circumstances, including bilateral treaties, multilateral human rights treaties, or international humanitarian law treaties.

²⁸ See generally United Nations Convention against Corruption art. 4, Dec. 9, 2003; United Nations Convention against Transnational Organized Crime art. 4, *adopted by resolution* Nov. 15, 2000; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, *adopted by the Conference* Dec. 19, 1988.

In addition, the Draft Articles should be interpreted to exclude the exercise of criminal jurisdiction inconsistent with or contrary to the Draft Articles and applicable international law, such as prosecution for CAH that did not comport with international human rights law, including fair trial guarantees. Accordingly, we suggest modifying subparagraph (3) of Draft Article 7 to make explicit that the Draft Articles do not authorize deviations from existing requirements and that the Draft Articles must be applied consistent with international law. Additionally, based on recent history, we are mindful that mechanisms for cooperation set forth in the Draft Articles could be open to abuse, particularly in those domestic legal systems where prosecutors are given broad discretion to open investigations or file charges. If the Draft Articles provide for obligations to establish jurisdiction over CAH more broadly, then such obligations are likely to increase the number of situations in which States will have concurrent jurisdiction. The Draft Articles and Commentary should clarify how such conflicts should be addressed, including by consideration of factors commonly recognized in criminal law, such as the location of the offense, the offender, or material evidence; the nationality of the offender or the victims; or a State's essential interest in ensuring accountability for its personnel. We further express concern that although subparagraphs (1) and (2) and the Commentary speak about the "establishment" of jurisdiction, subparagraph (3) speaks of the "exercise" of jurisdiction. It is unclear whether this shift in terminology is intentional, and if so, what implications it may have. The United States also recommends the Commission consider language similar to subparagraph (b) of paragraph (2) of Article 16 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict to address concerns related to unwarranted prosecutions.

Finally, we note that the Commentary construes jurisdiction over ships and aircraft registered in a State as encompassed within that State's "territorial" jurisdiction. The United States does not agree with this interpretation and believes the Draft Articles should not construe such jurisdiction over ships and aircraft as necessarily "territorial" in nature; for example, although a flag State generally enjoys exclusive jurisdiction over its ships on the high seas, the ship is not the territory of the State as such.

Article 8: Investigation

As drafted, Draft Article 8 creates an obligation to investigate whenever there are reasonable grounds to believe that acts constituting CAH have been or are being committed in any territory under its jurisdiction. The United States notes that a State should investigate allegations that its officials have committed CAH abroad. Moreover, in contrast to Draft Article 7(1)(a), Draft Article 8 and other Draft Articles address only "territory under its jurisdiction," not ships and aircraft registered in that State. This distinction generally makes sense, given that in certain circumstances another State may be better positioned than the State of registry to take relevant action (*e.g.*, to conduct an investigation). We would suggest that to avoid any confusion, the Commentary highlight and clarify this distinction expressly, consistent with the ordinary meaning of "territory" and with the unique phrasing of Draft Articles 7 and 8. The United States also suggests considering more generally whether an additional provision is needed in the Draft Articles to clarify the scope of their provisions with respect to ships and aircraft.

Finally, it would be useful to clarify that the competent authorities must possess the information in order to trigger the obligation to investigate.

Article 9: Preliminary measures when an alleged offender is present

Draft Article 9 provides what measures a State must take when an alleged offender is present in territory under its jurisdiction. The United States is concerned that the Draft Articles fail to acknowledge that States may have conflicting obligations with respect to taking foreign officials into custody, including depending on the status of those officials. Therefore, we recommend that the Commentary address and acknowledge the different obligations faced by States with respect to this issue.

Regarding subparagraph (2) of Draft Article 9, we note that what constitutes a “preliminary inquiry” is unclear. We believe that, depending on how it is defined, at least a preliminary inquiry into the facts should be part of an examination of information for the purposes of detaining a person. The United States suggests the Draft Articles reiterate that a person should not be taken into custody for allegations without even a preliminary inquiry into the facts.

Finally, in subparagraph (3) of Draft Article 9, we have concerns regarding the blanket requirement that the circumstances that warrant detention be shared with States of which the individual is a national. Such a requirement ignores privacy concerns and legal restrictions under domestic and international law, and also could expose law enforcement and intelligence sources and methods. We strongly believe that such an obligation for sharing should be limited to only that information and situations that the State deems appropriate.

Article 10: *Aut dedere aut judicare*

Draft Article 10 sets out the obligation to prosecute an alleged offender for CAH where no other State has requested extradition. As an initial note, the United States suggests reconsidering the use of the phrase *aut dedere aut judicare* in the title of the Draft Article. Including this phrase inserts a degree of uncertainty, since it may be translated as a principle. This potentially undermines, or at minimum, obfuscates, the fact that the obligation is to consider the matter for prosecution, not to prosecute, and as drafted, the use of the phrase in the title does not accurately describe the obligations in the Draft Article. Similarly, the United States suggests Draft Article 10 more closely track the provisions in the United Nations Convention against Transnational Organized Crime (UNTOC), the United Nations Convention against Corruption (UNCAC), and other law enforcement treaties. In addition, the Draft Article should clarify that a State need not prosecute a case automatically. Rather, a State could decide to dispose of allegations in other appropriate ways, for example, if the allegations have already been investigated and found to be without basis, or through immigration removal proceedings.

In addition, although the United States supports the Draft Articles’ aim to help facilitate domestic accountability processes and extraditions and strengthen the ability of immigration authorities to ensure that such persons are not able to find safe haven in the United States, the United States does not support the creation of new obligations under Draft Article 10 that vary in meaningful ways from current extradition practice. For example, Draft Article 10 is modeled on the text of Article 44 the United Nations Convention Against Corruption (UNCAC); under Article 44(6)(a) of the UNCAC, if a State declines to extradite the alleged offender solely on the ground that he or she is one of its nationals, the State shall pursue prosecution if the State seeking extradition so requests. In contrast, Draft Article 10 requires that, if a State does not act to extradite an offender, it *must* use the Draft Articles as a basis for domestic prosecution. Such a shift is problematic, and the United States does not support its inclusion, as it would no longer allow for the requesting State to exercise discretion as to whether their cases are submitted for

prosecution. To be consistent with UNCAC Article 44, we suggest revising the draft article to allow requesting States to choose whether their cases are submitted for prosecution in requested States.

Finally, we would note the Commentary specifically states that the Draft Article would encompass cooperation with hybrid tribunals. A strict argument could be made that hybrid tribunals are neither “competent international criminal tribunals” nor “State tribunals”; accordingly, broadening the Draft Article to include “competent tribunals” would allow hybrid courts to address such cases as necessary under the framework of the convention.

Article 11: Fair treatment of the alleged offender

Draft Article 11 sets out rights of individuals who are accused of CAH. We strongly recommend explicitly including a reference to international humanitarian law, as applicable, in paragraph (1) given that different protections and procedures to implement those protections can apply in that context. More generally, portions of paragraph 1 of Draft Article 11 are vague and overbroad—in particular the phrases “measures are being taken in connection with an offence” and “full protection of his or her rights under . . . international law”—even if further expounded in the Commentary. Comparatively, Article 7(3) of the CAT refers only to “fair treatment at all stages of the proceedings.” The United States suggests that revising paragraph 1 of Draft Article 11 to be more general, along the lines of the CAT language could ensure acceptance and implementation by a diversity of criminal systems. In addition, with regard to paragraph (2) of Draft Article 11, the provision should be clarified to make clear that the obligation should not be applicable to situations in which a non-State actor unlawfully detains a person.

The United States believes that the incorporation of the individual “right” to consular access in paragraph (2) of Draft Article 11 is misplaced. The “rights” of consular notification and access described in Article 36 of the Vienna Convention on Consular Relations belong to States and not individuals. As such, they are not enforceable by private individuals. Draft Article 11 suggests otherwise and should likewise be clarified.

Finally, in paragraph (3), as above, it would be useful to make explicit the principle that the law of armed conflict is *lex specialis* in relation to armed conflict by providing for the application of the Geneva Conventions of 1949 rather than the provisions of the Draft Articles when the Geneva Conventions of 1949 are applicable.

Article 12: Victims, witnesses and others

Draft Article 12 requires that States take necessary measures to ensure an individual right to complain to competent authorities regarding CAH. As a general matter, the United States supports a broad range of options for individuals to bring attention generally to CAH being committed anywhere. However, for purposes of the Draft Article, it is necessary to articulate explicitly temporal, geographical, or jurisdictional limits. In the same vein, the individual “right” of complaint in Draft Article 12 should be reframed as a duty of competent authorities to allow and consider complaints rather than an individual right. Such a framing avoids a focus on the individual making the complaint, which could invite abusive complaints or invite limitations on such a right. Instead, we think the more important aspect to emphasize is that the competent authorities be open to receiving complaints and assessing them.

We further suggest adding “or other unlawful sanctions” to subparagraph (b) of paragraph (1) of Draft Article 12. Such an addition clarifies that ill-treatment or intimidation refers to actions prohibited by law, and also clarifies that it may be appropriate to subject

someone to lawful sanctions for giving false testimony or other offense against the administration of justice.

Draft Article 12 also discusses legal measures to ensure victims of CAH can obtain reparation for material and moral damages on an individual or collective basis from a constituted government. The United States believes that further work should be done to examine whether an individually enforceable damages remedy is appropriate in this context. The United States opposes an individually enforceable damages remedy against government officials. To the extent such a concept remains, given the variance in States' legal systems, the Draft Articles should clarify who would be responsible for such reparations, including when non-state actors commit CAH. It may also be valuable to engage further on whether and when any temporal, geographical, or jurisdictional limits should apply to such remedies

Article 13: Extradition

Draft Article 13 sets out the parameters States must follow when extraditing alleged offenders for CAH. In general, the United States asserts that negotiating new extradition treaties just to cover one offense or a narrow range of offenses would be ill advised. The United States does not understand that the Draft Articles nor the Commentary require such actions, but the Commentary should further clarify this point.

In addition, the United States suggests that the Draft Article should more closely track the language in other law enforcement conventions, in particular the UNTOC and the UNCAC, including to clarify further how extradition treaties currently in force will interplay with the Draft Articles. In particular, such conventions generally include the concept that if the requested State has already convicted or acquitted the fugitive for the same offense for which extradition is requested, then extradition must be denied. Such clarification would be helpful here and important for ensuring that the extradition process created under these Draft Articles does not conflict with current practice. Additional consideration also should be given to tailoring this provision to the context of CAH and situations that could arise frequently, depending on the eventual scope of obligations under the convention to investigate or prosecute allegations of CAH.

Finally, the United States notes the helpful caveat in Draft Article 13 paragraph 8 with regard to extradition to serve a sentence, noting that a requested State should only pursue service of a sentence if a national cannot be extradited and "upon application of the requesting State." That same caveat is not articulated with regard to extradition to face charges.

Article 14: Mutual legal assistance

Draft Article 14 provides obligations with regards to mutual legal assistance for prosecutions of CAH. However, the article should more closely track the model for mutual legal assistance in the UNTOC and UNCAC, with adaptations to the specific context of CAH. Both of these conventions include far more complete provisions governing mutual legal assistance than the Draft Articles. In particular, they more clearly define the relationship between the multilateral obligation to provide mutual legal assistance and bilateral treaties and, when no such bilateral treaty exists, they define the grounds on which mutual legal assistance may be denied. One illustration of why this is important is that in certain cases, the United States has received requests to provide mutual legal assistance in relation to proceedings that the United States believes to be objectionable, such as efforts to prosecute U.S. service members for alleged war crimes in foreign courts. Although existing bilateral treaties have provisions that allow the United States to reject these and similar requests, as do the UNTOC and UNCAC, the Draft

Articles could benefit from a tailoring to the context and level of international tensions that are likely to arise in the context of requests from mutual legal assistance in relation to efforts against current or former government personnel for CAH.

Paragraphs 2 and 4 of Draft Article 14 draws directly from the UNCAC and make reference to “legal persons” and to “bank secrecy”. The United States recommends that the Commission consider whether these references are relevant in a CAH context. Similarly, in paragraph 3 of Draft Article 14, the United States notes that the language “including obtaining forensic evidence” is an odd formulation because it does not specify who is collecting the forensic evidence. States may have domestic laws that only allow law enforcement activity by the requested State, not by foreign law enforcement. Accordingly, we recommend deleting this language.

Finally, paragraph 7 of Draft Article 14 notes that its provisions shall not affect the obligations under existing applicable agreements “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.” This is new language not found in prior drafts, nor is it found in the UNCAC or the UNTOC. It is unclear whether the two concepts practically work together or whether there would be difficulties in applying different agreements on an *ad hoc* basis. We recommend further consideration of the language.

Annex

Although the second, fourth, and sixth sentences of paragraph 2 of the annex come from the UNCAC and UNTOC, they are extraneous for this text. We therefore recommend deleting them. With regard to the seventh sentence, the purpose of creating mutual legal assistance treaties, or miniature ones in multilateral conventions, is to bypass the *ad hoc* diplomatic process for requesting assistance, which is cumbersome and more time consuming than the process used in mutual legal assistance treaties. As such, use of diplomatic procedures would be regressive, so the United States recommends deleting the reference. Finally, the United States posits that the reference to INTERPOL is unnecessary if the purpose of the paragraphs is to encourage working through central authorities in each State.

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2. ILC’s Work at its 71st Session

Acting Legal Adviser Marik A. String delivered remarks on the issues in “Cluster I” of the report of the ILC on the work of its 71st Session on October 29, 2019. Mr. String’s remarks are excerpted below and available at <https://usun.usmission.gov/sixth-committee-debate-agenda-item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session/>.

* * * *

The United States remains supportive of the work of the ILC. The Members of the Commission are to be congratulated for their hard work over the past year, and on behalf of the United States,

I extend my thanks for their dedication to international law. We also thank the Office of Legal Affairs, and particularly its Codification Division, for its continued effort to support the work of the ILC. The United States considers the ILC's work in the codification and the promotion of the progressive development of international law to be of vital interest, and we follow its proceedings closely. We look forward to addressing its work over the next several days.

Mr. Chairman, I would like to begin by addressing the ILC's draft articles on the prevention and punishment of crimes against humanity. The United States has a long history of supporting justice for victims of crimes against humanity and other international crimes. The adoption and widespread ratification of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—have been a valuable contribution to international law, and the United States shares a strong interest in supporting justice for victims of atrocities. We submitted extensive U.S. Government comments on the project in April 2019.

We would like to thank the Special Rapporteur for this project, Sean Murphy, for his prodigious efforts. He has brought tremendous value to this project, and we particularly appreciate his efforts to take into account States' views on this topic. Robust interaction and a productive relationship between States and the ILC is vitally important to the relevance and continuing vitality of the Commission's work. We have also particularly appreciated his extensive consultations with Member States.

With due appreciation of the importance and gravity of the subject, the United States submits that it is not yet the moment to consider negotiating a convention based on the draft articles. Careful consideration must be given to the draft articles and commentaries by all States. In addition, although some of the written comments submitted by the United States and others were taken into account in the final draft articles, the ILC chose not to incorporate other State proposals for revision. The United States is therefore concerned that as currently formulated, the draft articles lack clarity with respect to a number of key issues, and believes these issues must be addressed in order to reach consensus among States and to ensure that any future convention would be effective in practice.

Among other concerns, the draft articles need to be flexible in implementation, accounting for a diversity of national systems, parties to the Rome Statute and States that are not parties to the Rome Statute, as well as diversity within national systems. The draft provisions of the proposed convention are also not sufficiently mindful of the challenges that have arisen in the area of international criminal justice, including by reflecting lessons learned and reforms enacted after overbroad assertions of jurisdiction by national and international courts. In this context, the United States recalls and reiterates its continuing, longstanding, and principled objection to any assertion of jurisdiction by the International Criminal Court over nationals of States that are not parties to the Rome Statute, including the United States, absent a UN Security Council referral or the consent of such a State.

For these reasons, the United States respectfully proposes that the subject of Crimes Against Humanity be included on the Sixth Committee Agenda for the 76th session, for further work based on the draft articles. Consideration should be given to potential modalities of work that would enable thorough, substantive exploration of the challenges that are posed by a potential convention on crimes against humanity, such as a working group. An inclusive and rigorous approach would have the greatest probability of a successful outcome that strengthens the ability to provide justice for victims of crimes against humanity.

Mr. Chairman, I will now address the topic of peremptory norms of general international law, or *jus cogens*. We recognize the work of the Commission on this project and in particular the efforts of Special Rapporteur Professor Dire Tladi. We look forward to providing our full comments to the draft conclusions by December 2020. In the meantime, we offer preliminary observations on six of the draft conclusions, which reflect our ongoing concerns with this project. We hope these comments will be constructive as other Member States and the Commission further consider this topic.

First, we have questions as to the purpose of draft conclusion 3, which, on its face, appears to introduce additional criteria for the identification of *jus cogens* norms. The commentary indicates this was not the intent. If that is the case, the content of draft conclusion 3 and its commentary seem more appropriately placed in a discussion of the historical development of the principle of *jus cogens*.

Second, draft conclusion 5 addresses the bases for peremptory norms of international law. In our view, draft conclusion 5 is of limited utility. As a threshold matter, we wish to emphasize a point made in the commentary to draft conclusion 4: there is no substitute for establishing the existence of the relevant criteria for *jus cogens*. In this respect, we are particularly concerned by the statement that general principles of law may serve as a basis for *jus cogens*. We are not only unaware of any evidence to support this conclusion, but concerned by the implication that there are characteristics of general principles of law that would allow one to assume the existence of criteria required for establishing a principle of *jus cogens*. While general principles of law may influence the practice of States in this context, they do not themselves constitute an independent basis of peremptory norms.

Third, in respect of draft conclusion 7, we note that the Commission appears to have considered several variations of what standard of acceptance and recognition by States would be sufficient to meet the criteria “international community as a whole”. We have questions about whether “a very large majority” is sufficient in light of the peremptory status of *jus cogens* principles and note the ILC’s own discussion included formulations that suggest there should be a higher threshold. We appreciate that this is a difficult concept to capture and will be giving this careful thought as we prepare our full comments for submission by the end of next year.

Fourth, we must express again our concern about what is now draft conclusion 16 (formerly 17), indicating that a resolution, decision, or other act of an international organization does not create binding effect if it is contrary to *jus cogens*. While the draft conclusion no longer expressly includes resolutions of the UN Security Council, the commentary makes clear that the conclusion would apply to such resolutions and could invite States, irrespective of Article 103 of the UN Charter, to disregard or challenge binding Security Council resolutions by relying on even unsupported *jus cogens* claims. We appreciate the note in the commentary that Security Council decisions require “additional consideration,” but remain highly concerned that what is now draft conclusion 16 could have quite serious implications, not least because there is no clear consensus on which norms have *jus cogens* status.

Fifth, we are confused by the inclusion of draft conclusion 21, the dispute resolution clause. In principle, we appreciate the idea of establishing procedural safeguards as a check on meritless assertions of a breach of a *jus cogens* norm. It is, however, unclear how the current proposal would work in practice if there were not agreement, at step 4, between the affected states to submit the matter to dispute resolution. More fundamentally, in our view it is inappropriate to include draft conclusion 21 for two reasons: First, international law imposes no

obligation on states to agree to submit disputes relating to jus cogens—or disputes related to any other matter—to binding third-party dispute resolution. Second, and relatedly, these are draft conclusions that purport to reflect the existing state of the law rather than draft articles proposed for inclusion in a convention to be negotiated by states. Because international law imposes no obligation on states to agree to submit disputes relating to jus cogens to binding dispute settlement, there is no basis for the ILC to reach a “conclusion” to this effect.

Finally, the United States disagrees with the decision to include a non-exhaustive list of peremptory norms in the draft annex. We recognize the effort to limit the list to a factual statement of norms that the ILC has previously referred to as having jus cogens status, without express comment as to whether those prior references were well founded. Even so, the list is presented as being “without prejudice to the existence or subsequent emergence of other peremptory norms”, which can be read as presupposing that the norms on the list have been properly included. Inevitably, questions will arise about why certain norms are included in this list and some, like piracy, are not, and whether the earlier ILC documents on which it relies accurately identified the jus cogens norms.

Certainly, some of the items in this list are jus cogens norms, including most prominently the prohibition of genocide. We are not convinced, however, that other specific items on the list either should be included or are accurately described. For example, while the United States recognizes the right to self-determination, we question whether this right constitutes a jus cogens norm such that it is hierarchically superior to other norms. The ILC itself has been inconsistent with respect to this conclusion, which is reflected in its lack of methodology when considering the status of the right to self-determination in prior projects. In this context, we note that, in discussing the status of the right to self-determination, the commentary obscures the distinction between peremptory norms and obligations erga omnes. While peremptory norms give rise to obligations erga omnes, the reverse is not always the case and cannot be assumed with respect to the right to self-determination. Other items on the list may very well constitute peremptory norms, but are ill defined in the annex and commentaries. As an example, we would point to the inclusion of what is described as “the basic rules of international humanitarian law”. Even if one were to accept that some IHL rules are jus cogens norms, there is considerable uncertainty as to which are peremptory. The report suggests that some future project may resolve which specific IHL rules are peremptory, but the need for this future work only underscores why this broad category should not be included in the annex, and indeed, why draft conclusion 23 and the annex should be removed.

Mr. Chairman, I would like to conclude by addressing the other decisions of the Commission during its 71st session. First, I would note that the Special Rapporteur on the topic Provisional application of treaties has proposed a series of “model clauses” for possible inclusion in its draft guide on this topic. We are currently reviewing these draft clauses, and considering whether including them would provide any particular benefit. We may provide additional views as part of the U.S. Government’s formal comments on this project later this year.

I would now like to turn to the Commission’s consideration of new topics. With the end of the quinquennium still two years away, and as the Commission considers several possible new topics, now might be a valuable time for the ILC to consider its workload and working methods. The United States recalls discussions in this Committee last year, during which some States expressed concerns with the number of topics and the tremendous resources it takes for States to conduct meaningful review of the voluminous materials produced by the Commission. We share

those concerns and respectfully submit that the ILC should consider whether it would be more valuable to tackle fewer topics. A more targeted approach could allow for deeper government engagement and increased opportunity for comment by a wider array of states. In that respect, the United States would favor the ILC taking on only one new topic—in addition to the work that has begun on sea level rise—at this time.

Of the proposed new topics, the United States would be most supportive of ILC consideration of the prevention and repression of piracy and armed robbery at sea. Piracy remains an issue of critical international concern. While there is much existing codified and customary international law, further elucidation by the ILC may prove useful.

The United States does not support adding to the ILC's program of work the proposed topic of "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law." Focusing the topic on "gross violations" of international human rights law and "serious violations" of IHL is likely to create three significant challenges. First, it is difficult to see how the project could avoid addressing the substance of these two distinct bodies of law, given that it sets a threshold for the level of violation that would potentially be addressed, and the substance of these bodies of law has been addressed extensively elsewhere. Second, there is a risk that the topic could be politicized, as there may be significant disagreement on the types of situations that give rise to "gross" or "serious" violations. Finally, given the many variables in the context of reparations, including the forum and process for such claims and facts of the particular situation, we believe it would be difficult to identify generalizations that would be valuable and instructive. We also continue to have concerns with the ILC taking up the topic "universal criminal jurisdiction" while it is still under active deliberation in the Sixth Committee, including in a working group, and remain concerned about the parameters of any potential study.

Finally, I would like to offer one observation with respect to the ILC's work products. As the ILC has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles. This is the case, for example, in the draft principles on protection of the environment in relation to armed conflict. Although fashioned merely as "principles," the first substantive provision, Principle 3, provides that "States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict." It would be useful to have more transparency as to what the ILC intends by fashioning conclusions, principles, and guidelines, and whether any distinctions should meaningfully be drawn between them. A Commission delineation on this issue may also help avoid confusion as to what status should be afforded to the ILC's work in the absence of a clear expression of State consent to codification.

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Mark Simonoff, minister counselor for the U.S. Mission to the UN, discussed the "Cluster II" issues in the work of the ILC's 71st Session on November 5, 2019. His remarks are excerpted below and available at

<https://usun.usmission.gov/statement-at-the-sixth-committee-debate-agenda-item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session-a-74-10/>.

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With respect to the topic “protection of the environment in relation to armed conflicts,” we recognize the efforts of this Commission and in particular, the Special Rapporteur, Ms. Marja Lehto, and note the completion of the first reading of draft principles and commentaries. We look forward to providing our full comments by December 2020. In the meantime, we offer some initial comments.

As noted in our statement for cluster 1 of this debate, the United States would appreciate greater clarity from the ILC on the intended legal status of draft principles, as distinguished from draft articles and guidelines. Most of the draft principles for this topic are clearly recommendations, phrased in terms of what States “should” do with respect to environmental protection before, during, and after armed conflict.

We are concerned, however, that several of the other draft principles are phrased in mandatory terms, purporting to dictate what States “shall” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. There is little doubt that several of these draft principles go well beyond existing legal requirements, making binding terms inappropriate. I would like to mention three specific examples:

- First, draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.
- Second, draft principle 27 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, despite the previous commentary on this draft principle recognizing that the term “toxic remnants of war” does not have a definition under international law.
- And third, the draft principles applicable in situations of occupation similarly go beyond what is required by the law of occupation.

Separately, we note that the draft principles include two recommendations on corporate due diligence and liability. It is unclear to us why the ILC has singled out corporations for special attention. The draft principles do not address any other non-State actors such as insurgencies, militias, criminal organizations, and individuals. This has the effect of suggesting that corporations are the only potential bad actors when it comes to non-State activity in the context of protection of the environment.

Madam Chair, I turn now to the topic “Immunity of State Officials from Foreign Criminal Jurisdiction.” We appreciate the effort that Special Rapporteur, Concepcion Escobar Hernandez, has made on this difficult topic. We commend also the thoughtful contributions by other members of the ILC.

The United States refers to and reiterates its serious concerns detailed in prior years’ statements, including, in particular, that we do not agree that draft Article 7 is supported by consistent State practice and *opinio juris* and, as a result, it does not reflect customary international law. We also underscore our desire for the Commission to work by consensus on

this difficult topic, as that would be the approach most likely to produce draft articles that accurately reflect existing law or that reflect sound progressive development addressing all the relevant concerns.

The most recent report on procedural aspects of immunity reflects some of the same methodological challenges that also affected prior reports—there is generally very little visibility on prosecutions not brought (either due to immunity or for other reasons), and case law in this area is exceedingly sparse. Against this backdrop, the most recent report expounds on what the Special Rapporteur believes would be appropriate procedures without the benefit of significant State practice. Most provisions are best viewed as suggestions, not law, and the drafting of the articles should reflect this. For example, it would be more appropriate to use the word “should” rather than “shall.”

Moreover, some of the Special Rapporteur’s suggestions overlook practical consequences. For instance, if one State were to notify the State of the official once it concludes that the foreign official “could be subject to its criminal jurisdiction,” in the absence of assurances that the official would not be notified, this could jeopardize a criminal investigation. Such a step could permit the official to destroy evidence, warn partners in crime, or flee from the forum State’s reach. As a result, this provision could very likely have a severe detrimental effect on the investigation and prosecution of crimes that cross international borders. Moreover, the draft articles disregard the fundamental principle and practice observed in the United States that foreign official immunity is not considered a bar to criminal investigation, and U.S. prosecutors may investigate crimes involving foreign officials without notifying the foreign official’s state of the investigation or of potential immunity issues.

In addition, paragraph 3 of draft Article 16 should be deleted. It misstates the applicable customary international law on consular notification reflected in the Vienna Convention on Consular Relations. When applicable, consular notification is only required if requested by the detained individual; there is no “entitlement” to assistance, and we disagree with the notion that fair and impartial treatment cannot be provided in the absence of consular notification.

Whereas other, more developed areas of immunity law, such as diplomatic immunity, deal with procedural issues in a handful of paragraphs, the report suggests nine articles on procedure with a total of 35 subparts. Even so, the Special Rapporteur leaves unaddressed difficult questions raised by many countries in our debate last year, such as how to address the issue of politically motivated or abusive prosecutions. The draft articles seem to rely on cooperation and consultation between friendly States, but this problem can also arise when countries are in a state of animosity, for example, in the case of accusations of “war crimes” by military officials on the other side of a regional armed conflict. How can procedural safeguards prevent abuses and resolve conflicts in such a context? Other important questions remain unanswered, such as: Do the procedures apply even to potential prosecution of an official or former official if it is clear that the act in question was not taken in an official capacity? Although paragraph 21 of the draft report states that “any proceeding by the forum state concerning this type of immunity involved the presence of the [State official],” would these procedures apply even when the foreign official is not in the forum State at the time of indictment? In States where criminal prosecutions can be instituted by a person who claims to be a victim, do the rules secure a role for appropriate government ministries to express substantive views, or under draft Article 9, is there a role only if national laws so provide? Article 8 states that competent authorities shall “consider” immunity, but is a court required to make a

determination of immunity with input from competent authorities, at the initiation of any legal proceeding?

Further consideration should also be given to the relationship between the procedural provisions and safeguards in Part Four and the provisions in Parts One through Three of the draft articles. For example, the draft articles do not clearly address the legal effect of an invocation of immunity by a foreign State. We would also note in passing that Draft Article 9, paragraph 2, refers to the immunity of the foreign State rather than the immunity of the foreign State officials, and the reason for this is not clear. In addition, we believe that paragraph 4 of Article 11 merits further consideration. The concept of a waiver being “deduced” seems inconsistent with the concept of an express waiver.

Finally, we wish to express concern with the suggestion that the Special Rapporteur would address the immunities of State representatives before international criminal tribunals, such as the International Criminal Court (ICC). We believe this goes beyond the mandate of the ILC’s project on immunities of State officials before foreign criminal jurisdictions. We also take this opportunity to note that we had many concerns with the ICC Appeals Chamber’s decision on Head of State immunity in the case involving Jordan. As but one example, we disagreed with the Appeals Chamber’s far-reaching conclusions that no Head of State immunity exists under customary international law before an “international court” established by “two or more” States. In any event, such issues would not be appropriate for inclusion in the current ILC project on immunities.

Madam Chair, with respect to the topic of “sea-level rise in relation to international law”, the United States continues to have concerns that the topic as proposed to the ILC did not meet two of the Commission’s criteria for selection of a new topic. In particular, we continue to have questions regarding 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.

As the Commission decided to move the topic to its active agenda, we think it was appropriate that the Commission chose to do so via a Study Group, and that it has decided to focus its work during the 2020 session on issues related to the law of the sea. We also think it is appropriate that the Study Group will be open to all members of the Commission, and that the issue papers developed in connection with this topic will be made available to UN Member States.

With respect to issues related to the law of the sea, the United States recognizes that sea level rise may lead to increases in coastal erosion and inundation, which, in some areas, could lead to a reduction or loss of maritime spaces and the natural resources therein. In this connection, the United States supports efforts to identify measures that could protect states’ maritime entitlements under the international law of the sea in a manner that is consistent with the rights and obligations of third states. Such efforts could include, for example, physical measures for coastal reinforcement, such as the construction of seawalls or other measures for artificial protection; coastal protection and restoration; and the negotiation and conclusion of maritime boundary agreements. We are also supportive of efforts by states to delineate and publish the limits of their maritime zones in accordance with international law as reflected in the Law of the Sea Convention.

We appreciate the Commission’s attention to these issues, and we welcome further discussions on steps that can be taken to protect states’ interests, in accordance with international law, in the context of sea level rise.

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On November 6, 2019, Deputy Legal Advisor Simcock delivered the U.S. statement at the UN Sixth Committee debate on the report of the ILC on the work of its 71st session regarding “Cluster III” topics (“Succession of States in Respect of State Responsibility” and “General Principles of Law”). His remarks are excerpted below and available at <https://usun.usmission.gov/statement-at-the-sixth-committee-debate-agenda-item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session-a-74-10-2/>.

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I will start our comments today with succession of States in respect of State responsibility, and on this, we can be relatively brief since the project is still in its early stages. The United States expresses its appreciation for the Special Rapporteur for this project, Pavel Sturma, for his work thus far. The United States looks forward to observing and commenting on this project as it develops.

In light of the fact that the Vienna Convention on State Succession in respect of treaties has not found widespread acceptance, we are concerned about the value of this particular project if it remains in draft article form. We appreciate that the Special Rapporteur, in his third report, acknowledges that the proposed draft articles would constitute the progressive development of international law, but respectfully suggest that draft guidelines or principles may be more useful.

This suggestion is based not only the prospects of success for a convention, but also on the substance of the initial draft articles. For example, we point to draft article 9. The United States does not yet have a position on draft article 9. We would point out, however, that practice in this area is uneven, and that determinations by predecessor or successor states to deny or accept liability are likely driven more by diplomatic and political considerations than by legal ones. We therefore, again, query whether this is appropriate for a draft article to be, in theory, considered for a convention, as opposed to draft guidelines or principles from which States can draw guidance in their diplomatic and legal negotiations addressing responsibility after State succession.

I will turn next to general principles of law. Mr. Chairman, we have read with great interest the first report produced by Marcelo Vazquez-Bermudez, the special rapporteur for this topic and thank him for his work. We offer here some general comments in line with the preliminary nature of that report.

First, the United States shares the view that the focus of the ILC’s work on this topic should be on the concept of general principles of law and a clear methodology for how States, courts and tribunals may practically apply the concept. We likewise agree with the Special Rapporteur that an illustrative list of general principles of law would be impractical, incomplete, and would divert attention from the central aspects of this topic. Instead, we agree that any examples of general principles of law that the Commission may refer to in its work must be illustrative only and contained in the commentaries.

The United States also agrees that the element of “recognition” is essential to the identification of general principles of law. In this respect, we would underscore that the relevant analysis is whether a legal principle is recognized by States, by the community of nations. We agree with the unanimous view of the Commission that the term “civilized nations” is outdated and should be abandoned.

With respect to the possibility of addressing regional or bilateral principles of law, the United States is of the view that such principles would not be sufficiently “general” to come within the scope of the topic.

Finally, we note that the report addresses two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. We have a number of questions and concerns about whether there is support for the latter category and whether there is sufficient State practice in the international legal system to determine whether a particular principle may be considered a general principle of law.

Going forward, it will be important for the General Principles of Law project for the Special Rapporteur to indicate clearly whether particular assertions are supported by State practice or should be understood as proposals for progressive development of the law. Certain portions of the first report seem to rely solely on references to academics or unsupported prior ILC assertions. We also query whether there will be sufficient State practice on the more granular questions of the functions of general principles, their relationship with other sources of international law, and the rules applicable to identifying general principles. In the absence of significant State practice on these points, there will not be a basis for making meaningful conclusions about them.

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D. REGIONAL ORGANIZATIONS

1. Inter-American Treaty of Reciprocal Assistance

On September 11, 2019, the United States joined the Interim Government of Venezuela and other countries in invoking the Inter-American Treaty of Reciprocal Assistance (“TIAR” or “Rio Treaty”). A September 11, 2019 State Department press statement announcing the action is available at <https://www.state.gov/the-united-states-joins-the-interim-government-of-venezuela-and-other-countries-in-invoking-the-inter-american-treaty-of-reciprocal-assistance/> and excerpted below.

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The United States joins the Interim Government of Venezuela and ten other countries in invoking the Inter-American Treaty of Reciprocal Assistance (TIAR). This Venezuelan-led request is proof of the region’s support for the Venezuelan people and recognition of the increasingly destabilizing influence that the former regime of Nicolas Maduro is having on the region.

More than four million Venezuelans have fled their homeland, finding refuge in countries throughout Latin America and the Caribbean, though their long-term presence increasingly taxes the social services of their host countries. Recent bellicose moves by the Venezuelan military to deploy along the border with Colombia as well as the presence of illegal armed groups and terrorist organizations in Venezuelan territory demonstrate that Nicolas Maduro not only poses a threat to the Venezuelan people, his actions threaten the peace and security of Venezuela's neighbors. Catastrophic economic policies and political repression continue to drive this unprecedented refugee crisis, straining the ability of governments to respond.

We look forward to further high-level discussions with fellow TIAR parties, as we come together to collectively address the urgent crisis raging within Venezuela and spilling across its border through the consideration of multilateral economic and political options. Today's action demonstrates the hemisphere's resolve to stand beside the Venezuelan people struggling for a better, freer future and it is proof of the region's collective recognition that Nicolas Maduro is not only the cause of the suffering of the Venezuelan people, he is threatening the peace and stability of the region.

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On September 23, 2019, the State Parties to the Rio Treaty adopted a resolution (with 16 voting in favor; one opposed; and one abstention) committing to bring diplomatic and economic pressure to bear against the former Maduro regime in Venezuela. Under the TIAR, decisions (adopted by a two-thirds vote of the parties) requiring the application of certain measures are binding on all TIAR states. The resolution commits TIAR State Parties to several actions, including: (1) to identify or designate senior former Maduro regime officials who are corrupt or have committed serious human rights violations, and officials and entities associated with the Maduro regime involved in illegal money laundering, drug trafficking, transnational crime and terrorism or terrorism financing, in order to use all available means to investigate, prosecute, capture, extradite, and punish the responsible parties and to freeze their assets located in TIAR States Parties, in accordance with national legal systems; (2) to create an operational network to share financial intelligence and increase cooperation between respective governments to investigate events regarding certain types of crimes by those linked to the Maduro regime; (3) to instruct their OAS Permanent Representatives to monitor the situation in Venezuela in order to evaluate possible recommendations for additional TIAR measures against the former Maduro regime. OAS, RC.30/RES. 1/19 rev. 1 (Sept. 23, 2019), https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-018/19. Deputy Secretary of State John J. Sullivan led the U.S. delegation at the TIAR Organ of Consultation on September 23, 2019, where the resolution was adopted. His intervention on the resolution follows.

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Good afternoon. Thank you, Mr. President, Vice-Presidents, and delegates. Today's meeting of Western Hemisphere democratic countries marks a turning point for the horrific crisis in Venezuela. Your presence here sends a resounding message that freedom and democracy are values our nations cherish, dictators and tyrants will face accountability for crimes against their citizens, and we as a region stand united against the repression of the illegitimate narco-state of Maduro's regime.

It is a great honor to join you today in this Organ of Consultation of the Inter-American Treaty of Reciprocal Assistance. As an essential element of the Inter-American system—older than the Organization of American States itself—today's meeting on the Rio Treaty provides a critical, legal forum for additional, regional action to support the Venezuelan people's pursuit of freedom from tyranny.

As you all know, the State Parties to the Rio Treaty last met in the wake of the brutal terrorist attacks on my own country. These attacks, in this very city, claimed nearly 3,000 American lives on September 11, 2001. We as the United States of America will never forget that horrific day or the regional solidarity you showed in support of us.

Now, the Venezuelan people have asked their democratic neighbors for mutual assistance in "maintaining inter-American peace and security" as outlined in the Treaty. Not only does the brutal dictatorship and narco-state of Nicolás Maduro's illegitimate regime pose a grave threat to the Venezuelan people, it also directly threatens the "common defense" and "peace and security of the Continent" as these terms are defined in the Rio Treaty.

Ninety percent of Venezuelans live in poverty and more than 4.4 million people have fled Venezuela, accounting for the largest forced displacement of individuals in our hemisphere, second only to the humanitarian crisis in Syria on a global scale. The UN High Commissioner for Human Rights has condemned the violations committed by the former Maduro regime, including some 7,000 murders since 2018 at the hands of his security forces. Maduro's forces tortured Venezuelan Navy Captain Rafael Acosta so grievously that he died in their custody. Councilman Fernando Alban likewise died in their custody, thrown to his death after returning to Venezuela following his participation in UNGA events here in New York last year.

We have witnessed this regime silence media, jail dissenters, and attempt to dismantle all elements of democracy, including the National Assembly. We have seen on multiple occasions how this regime has manipulated well-intentioned negotiations as a stalling tactic, including the most recent round of the Oslo Process, where they refused to discuss the elements necessary to reach a resolution of the crisis—a transitional government to organize free and fair elections. The Venezuelan people can't wait any longer.

Mass migration, public health risks, oil shortages, rising crime and violence, criminal groups operating with impunity, and Russian, Chinese, and Cuban patrons—all these destabilize regional security and our countries' abilities to protect our citizens and advance economic prosperity. In short, the former Maduro regime is a clear threat to peace and security in the Western Hemisphere.

And let's be clear—what people are suffering through today was not caused by war or natural disaster. Nor was this caused by international sanctions, as the regime would have others believe. The Maduro regime's rampant greed and lust for power caused this humanitarian crisis. Through massive kleptocracy and economic mismanagement, they drove one of the hemisphere's richest countries into total economic collapse. We cannot, we must not, accept that anybody but Maduro bears responsibility for this catastrophe.

The Venezuelan people are leading the effort for change, but they cannot solve this crisis alone. Some of us have already unilaterally stepped up to help the people of Venezuela. The United States is leading the effort in providing humanitarian assistance to those who need it most. Earlier this month, I announced an additional \$120 million in humanitarian assistance during a visit to the Colombian-Venezuelan border, bringing the total U.S. humanitarian assistance to more than \$376 million since 2017.

And we must recognize the tremendous support provided by Colombia to over 1.5 million Venezuelans who have fled their homes, and the support by countries throughout the hemisphere, from Brazil to Ecuador, Curacao, Peru, and others. To stem Venezuelan suffering and respond to humanitarian consequences in our hemisphere, we must continue to work together as a whole.

Our decisions here today can help reset Venezuela's trajectory, and in so doing, reaffirm our commitment to the Inter-American Democratic Charter. With that Charter, we agreed that "the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it."

Words on paper are only as good as the actions that flow from them. The Rio Treaty affords an opportunity to the region to finally take corrective action. We strongly encourage everyone to support the draft resolution to allow for the region to hold the former Maduro regime officials responsible for violations of human rights, corruption, narcotics trafficking, and their many financial crimes.

We understand the resolution commits all of our countries, for example, to identify or designate relevant person and entities to take appropriate measures where doing so is supported by the facts and consistent with national law. Indeed, in the case of the United States, we have already identified and designated people associated with these crimes.

We have revoked over 700 visas and sanctioned over 200 individuals and entities. But the key Maduro officials have used this situation to enrich themselves, which has crippled the Venezuelan people. These sanctions have crippled the regime's ability to profit from their illicit behavior. The United States has [supported]—and will continue to support—the Venezuelan people and Interim President Guaidó's efforts to restore democracy. We look forward to the discussion today on additional actions the region, collectively, can take to see Venezuela return to a free and prosperous country. Thank you.

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The States Parties to the Rio Treaty adopted a subsequent resolution on December 3, 2019, in Bogotá, Colombia. Among other things, in this resolution, States Parties adopted a consolidated list of certain persons affiliated with the former Maduro regime relevant to the commitments in the September 23 resolution noted above, and initiated a process to define parameters and conditions for adding or removing names to the list in the future. In the resolution, States Parties also resolved to instruct their competent authorities to apply, in accordance with applicable national laws and international obligations, measures restricting entry and transit in the territories of the States Parties to the TIAR. OAS, *The Crisis in the Bolivarian Republic of Venezuela and its Destabilizing Effects on the Hemisphere*, RC.30/RES. 2/19 (Dec. 3, 2019), <http://scm.oas.org/IDMS/Redirectpage.aspx?class=II.30%20RC.30/RES.&classNum=2&la>

[ng=e](#). Michael G. Kozak, Acting Assistant Secretary for the State Department’s Bureau of Western Hemisphere Affairs, delivered the U.S. statement at the December 3 meeting of the TIAR Organ of Consultation that adopted the resolution. Ambassador Kozak’s remarks are excerpted below.

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We are gathered here today because the Venezuela crisis represents a clear and growing threat to security and stability in our hemisphere, a threat that requires a coordinated, energetic and effective regional response. The Río Treaty—or TIAR—is an appropriate vehicle to pursue such regional coordination at this critical time, with Article 6 providing the basis for meaningful action.

Nearly 60 governments around the globe, including the United States, have formally recognized the interim Guaidó government and rightly declared the Maduro regime illegitimate. The Organization of American States has successfully seated representatives of the Guaidó government. This diplomatic progress has been real; and it has been welcome; but it has not been sufficient to compel the needed change in Venezuela itself.

Notwithstanding our collective bilateral and multilateral efforts up to now, the former, illegitimate regime of Nicolás Maduro has selfishly clung to power, essentially burrowing and barricading itself in. Of course, the word “illegitimate” does not capture the true nature nor the cruel reality of the regime.

It is much worse than “illegitimate.” It is a criminal enterprise, a gang of thugs, a ruthless and cunning regime that is indifferent to the enormous suffering of the Venezuelan people with the sole aim of preserving its personal profits, privileges and power through a patronage scheme.

It is a regime dedicated to the illicit enrichment of a chosen few and their families at the expense of the Venezuelan people and, now more than ever, its neighbors. It is a dictatorial regime that has repeatedly shown itself capable of taking whatever corrupt or criminal or repressive action it believes necessary to preserve its hold on power.

Let us be clear: The former Maduro regime is the source and origin of this manmade humanitarian crisis and the only reason this crisis continues to deepen and expand.

Meanwhile, the Venezuelan people continue to endure death, hunger, insecurity, persecution, sickness, and lack of access to other basic necessities. As a result, more than four million Venezuelans have fled their country, making it the single largest crisis of forcibly displaced people in the history of our hemisphere. It is more massive in scope and absolute numbers than crises in other parts of the world such as Syria.

Venezuela’s neighbors continue to bear a heavy and ultimately unsustainable burden of this crisis, a heavier burden with each passing day. This is most acutely true of our hosts here in Colombia, which has taken in close to 2 million Venezuelans and counting. It is also true of Venezuela’s other neighbors in South America, Central America, and the Caribbean. The United States salutes your solidarity with the Venezuelan people and we are committed to doing all we can to help you help them.

The risks posed by the Maduro regime to the security and political and social stability of our hemisphere are real.

The governments of this hemisphere cannot simply stand by and watch as Venezuela deteriorates. We have the tools to take effective action. That is why we are gathered here today under the authority of the Río Treaty. To coordinate and implement a series of measures to effectively address the problem at its criminal source.

Our steps together under the TIAR will focus on increasing travel restrictions as well as economic and other pressure on the key corrupt actors of the criminal Maduro regime. To increase the costs of their clinging to de facto power. To compel them to reconsider, step aside, and enable a democratic transition, if not for the sake of Venezuela's future, then at least to preserve their own futures.

That is our objective: prepare the path for a democratic transition, free, fair and transparent democratic elections, and the full restoration of Venezuela's democracy.

* * * *

2. Organization of American States

a. *Venezuela*

On January 24, 2019, Secretary Pompeo addressed the Organization of American States ("OAS") regarding Venezuela. His remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-organization-of-american-states/>.

* * * *

Yesterday, in solidarity with the Venezuelan people, and out of respect for Venezuelan democracy, the United States proudly recognized National Assembly President Juan Guaido as the interim president of Venezuela. You've seen the statements from President Trump and from myself.

Many other countries, including a number of OAS states, have also recognized the interim president. We thank them for their support.

It's now time for the OAS as an institution as a whole to do the same. All OAS member states must align themselves with democracy and respect for the rule of law. All member states who have committed to uphold the Inter-American Democratic Charter must now recognize the interim president.

The time for debate is done. The regime of former president Nicolas Maduro is illegitimate. His regime is morally bankrupt, it's economically incompetent, and it is profoundly corrupt. It is undemocratic to the core. I repeat: The regime of former president Nicolas Maduro is illegitimate. We, therefore, consider all of its declarations and actions illegitimate and invalid.

In light of these facts, we call on Venezuelan security forces to ensure the protection of interim President Guaido's physical integrity and his safety. We've seen reports that a number of protesters were killed yesterday and that more than one hundred were arrested, so I reiterate our warning about any decision by remnant elements of the Maduro regime to use violence to repress the peaceful democratic transition.

The United States did not arrive at this conclusion overnight. We came to this conclusion after a long and bitter experience and following a considered assessment of the facts. And we're not alone. The OAS General Assembly has itself agreed to these facts. In June of last year, the OAS General Assembly declared the re-election of former president Maduro an invalid sham. This past January 10th, the OAS Permanent Council declared former president Maduro's second term illegitimate.

Venezuela's National Assembly became the only legitimate, duly and democratically elected body in the country. On January 23rd, National Assembly President Juan Guaido declared himself the interim president of Venezuela, pursuant to Article 333 and 350 of Venezuela's constitution. He made this declaration with the full support of the National Assembly and, most importantly, of the Venezuelan people.

In his public address, interim President Guaido also outlined the steps he plans to take to restore democracy to his country, including free, fair, transparent, and truly democratic elections.

The United States stands solidly behind him. We stand ready to support the efforts of the National Assembly, the Venezuelan people, and the interim president to restore democracy and respect for the rule of law in Venezuela.

We also stand ready to provide humanitarian assistance to the people of Venezuela as soon as logistically possible. Today, I am announcing that the United States is ready to provide more than \$20 million in humanitarian assistance to the people of Venezuela. These funds are to help them cope with the severe food and medicine shortages and other dire impacts of their country's political and economic crisis. Our announcement of aid is in response to a request from the National Assembly, led by the interim president.

As a friend of the Venezuelan people, we stand ready to help them even more, to help them begin the process of rebuilding their country and their economy from the destruction wrought by the criminally incompetent and illegitimate Maduro regime.

Our support for Venezuela's democratic hopes and dreams is in sharp contrast to the authoritarian regimes across the globe who have lined up to prop up former President Maduro. And there is no regime which has aided and abetted Maduro's tyranny like the one in Havana. Maduro's illegitimate rule was for years sustained by an influx of Cuban security and intelligence officials. They schooled Venezuela's secret police in the dark arts of torture, repression, and citizen control. Maduro was a fine student at the Cuban academy of oppression.

We call on the OAS and all its member states to act on basic, decent, democratic principles and the incontrovertible facts on the ground.

Each of us ... must live up to our calling to promote and defend democracy, as expressed in the tenets of the Inter-American Democratic Charter, to which everyone in this chamber is a signatory.

And we call on all our partners and responsible OAS member states to show leadership and pledge support for Venezuela's democratic transition and for interim President Guaido's pivotal role in that.

We look forward to welcoming Venezuela back into the fold of responsible democratic nations and remaining in our inter-American community. We look forward to welcoming representation of the interim Venezuelan Government to the OAS at the earliest possible opportunity. And we look forward to working with all responsible OAS member states, with the Venezuelan people, our inter-American system, and with the interim government of President Guaido to restore democracy in Venezuela.

We ... have a critical opportunity to help the Venezuelan people live free once again. I ask my colleagues to reconvene a meeting of foreign ministers to continue our conversation on the peaceful democratic transition for Venezuela. History will remember whether we help them or not. The United States calls on all nations of the OAS to make the right choice and make that right choice right now.

* * * *

On March 1, 2019, Michael G. Kozak, then in the State Department's Bureau of Democracy, Human Rights, and Labor, addressed the OAS at hearings on state corruption and the humanitarian crisis in Venezuela. Ambassador Kozak's remarks are excerpted below and available at <https://www.state.gov/remarks-for-hearings-on-state-corruption-and-the-humanitarian-crisis-in-venezuela/>.

* * * *

Kleptocrats like Maduro blame everyone but themselves for their people's misery. They have made U.S. sanctions a scapegoat. Yet, Maduro's theft and mismanagement had produced widespread scarcity and misery long before U.S. sanctions on the individuals responsible for this disaster took effect.

Politically-connected businessmen and military brass have extracted billions of dollars in wealth from the Venezuelan economy. The humanitarian crisis has forced more than three million Venezuelans—ten percent of the population—to flee the country. U.S. Prosecutors have brought criminal charges against those who used the U.S. financial system to launder the riches they robbed. Hundreds of millions of dollars in assets have been frozen in the U.S. alone.

The United States will continue to investigate, prosecute, and sanction officials who rob their own people. Other countries are undertaking similar efforts. I have seen examples of gross corruption during my years in government, but never anything of this scale.

U.S. sanctions are not on—but for—the people of Venezuela. Sanctions are placed on the regime with the intent to stop their looting the last remnants of Venezuela's wealth. The ill-gotten accounts of those sanctioned for corruption are frozen so that those funds can be returned for the benefit of those harmed by corruption—the people of Venezuela.

For those sanctioned for their continued participation in the Maduro regime, the sanctions need not be permanent. The United States will remove sanctions on persons who take concrete and meaningful action to disavow the illegitimate Maduro regime, support the Guaido government and National Assembly, and help Venezuela's legitimate interim government establish conditions for free and fair presidential elections.

* * * *

Venezuelans are in charge of their own destiny. The bravery of leaders like Juan Guaidó has kindled rising aspirations for freedom. A broad coalition of democracies has assembled to support them.

The leadership of numerous members of the OAS has built an international coalition to defend democracy in Venezuela. They have recognized the constitutional interim government of President Guaidó. They have echoed his efforts to organize free and fair elections. What remains is for Maduro and his kleptocrat cronies to get out of the way and allow decent leaders from across the political spectrum in Venezuela to make that happen.

We urge all nations in the OAS to sanction Maduro's corrupt kleptocrats. Block their assets. Cancel their visas. Bring criminal charges for corruption.

* * * *

b. General Assembly

The United States sent a delegation, led by Assistant Secretary of State Kimberly Breier, to the 49th OAS General Assembly in Medellin, Colombia, June 26-27, 2019. On July 1, 2019, the State Department issued a media note regarding U.S. participation in the General Assembly, which is available at <https://www.state.gov/participation-in-the-49th-organization-of-american-states-general-assembly/>. The media note includes the following:

Assistant Secretary Breier reiterated our commitment to working with the OAS on restoring democracy and respect for human rights in Venezuela and Nicaragua, pursuing OAS reform, and promoting religious freedom throughout the region. The OAS reaffirmed the decision of the OAS Permanent Council, chaired by U.S. Permanent Representative to the OAS Ambassador Carlos Trujillo, to recognize the Venezuelan National Assembly's representatives at the OAS General Assembly. This decision means these representatives can participate in all OAS institutions, including the Pan American Health Organization. The OAS resolution also addressed migration and other regional impacts from the crisis in Venezuela. The OAS expressed its strong concerns about the violations of human rights and erosion of democratic principles in Nicaragua. Further, the OAS approved a reform package that increases transparency and auditing to improve the effectiveness of the organization, as well as a resolution supporting religious freedom.

3. 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 adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international agreement 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 2019, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings. The United States submitted responses to twenty-four petitions in 2019. Specifically, the United States submitted responses on the admissibility of fifteen petitions and the merits of another nine petitions; the United States responded to an additional four requests for information. This engagement marks a sharp increase in the Commission’s petition-based activity with respect to the United States from recent years. This dramatic increase in activity reflects efforts by the Commission to clear its significant backlog of petitions. Many of the petitions to which the United States responded in 2019 had been lodged at least four years prior to being forwarded to the United States.

In addition to its written engagement, the United States participated in Commission hearings in Kingston, Washington, and Quito. These hearings consisted of five “thematic” hearings requested by civil society on matters of interest to the Commission and just one petition-based hearing. In addition, the United States participated in one private working meeting convened by the Commission on a long-completed case.

The United States also submitted a response to the Inter-American Court of Human Rights on a request for an advisory opinion on the obligations of a state denouncing the American Convention and purporting to withdraw from the OAS. This appears to have been the first time the United States has responded to a request for an advisory opinion since 1998 and the fourth such response submitted by the United States.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2019 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2019 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2019 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. *Petition No. P-561-12: Robinson*

On April 3, 2019, the United States made a further submission in the *Robinson* case. The Submission reiterates arguments made in the 2016 U.S. submission. See *Digest 2016* at

305-07 for discussion of and excerpts from the 2016 submission by the United States. The following excerpts from the 2019 submission also address the attempt to add a new claim. The April 3, 2019 submission in *Rogovich* (not excerpted herein) includes a similar response regarding that petitioner’s attempt to insert new claims into “additional observations on the merits.” Petition No. P-1663-13.

* * * *

The United States further recalls that the Petition raised six claims, and that the United States submitted in its prior submission that the claims in the Petition lack merit because the Petition does not show a failure to live up to the commitments the United States has made under the American Declaration. However Petitioner now introduces a new claim under Article XXVI of the American Declaration not included in the Petition. In its letter dated September 20, 2017, the Commission requested that the Petitioner submit “additional observations on the merits of the case.” Although Petitioner has characterized this as a request for a submission “addressing the admissibility and merits of his claims,” the Commission did not invite Petitioner to present further admissibility arguments, much less introduce entirely new claims. Petitioner cannot be permitted to introduce by sleight of hand an entirely new claim at the merits phase of this proceeding. Nothing in the Rules permits Petitioner, at this stage, to introduce new claims beyond those in the Petition, and Petitioner’s “Claim VII” is plainly out of order under Article 34(b) of the Rules and, as such, inadmissible.

Moreover, the Commission’s stated purpose in invoking Article 36(3) of the Rules to defer an admissibility decision is to reduce its procedural backlog. However, allowing Petitioner to introduce new claims at this stage would undermine the stated purpose of such joinder because it would require additional submissions on the admissibility of such new claims prior to reaching their merits. Allowing Petitioner to expand the scope of the Petition by introducing new claims at this stage undermines the Commission’s procedures and challenges the integrity of the Commission’s practice of joining the admissibility and merits consideration of a petition. Accordingly, and because Petitioner has not first established the admissibility of those new claims pursuant the Rules, it must be deemed inadmissible at this stage under Article 34(b) of the Rules. The United States therefore regards the scope of the Petition to remain those claims raised by Petitioner in the Petition.

* * * *

b. *Petition No. P-1010-15: José Trinidad Loza Ventura*

On April 3, 2019, the United States provided further observations on the petition in response to communications provided by petitioner Mr. Loza. The petition alleges defective consular notification, among other claims. The excerpts below relate to the consular notification claim and also assert that the Commission should apply the notion of a “margin of appreciation” for local discretion when considering petitioner’s claim that the protocol used for administering the death penalty constitutes cruel and unusual

punishment. For discussion of, and excerpts from, the 2016 U.S. submission in this case, see *Digest 2016* at 300-04.

* * * *

A. Petitioner’s consular notification claim is not cognizable under the American Declaration

In his Supplemental Observations, Petitioner presents an extensive discussion about his background and experience in Los Angeles under the guise that such information would have been known to trial counsel if Petitioner “had not been denied his right to consular assistance.” However, as the United States has emphasized in numerous previous submissions—including its 2016 Submission—consular notification is not a human right. Moreover, the Commission does not, in fact, have competence to review claims arising under the Vienna Convention. This lack of competence is not avoided by characterizing a claim as one arising under the American Declaration. ...

* * * *

D. Petitioner’s challenges to Ohio’s execution protocol are without a basis in fact and fail to set forth facts that tend to establish a violation of Article XXVI of the American Declaration, and are meritless

Finally, in his Supplemental Observations, Petitioner repeats his allegation that Ohio’s legal injection protocol violates Article XXVI of the American Declaration. This claim, too, is without merit.

As the United States explained in its 2016 Submission, the Commission should provide the State with a margin of appreciation, deferring to the discretion of local actors who are required to make difficult decisions based on their own factual assessments. Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the discretion of those responsible for decisionmaking. In these types of difficult cases, international bodies such as the Commission and the Inter-American Court of Human Rights use this “margin of appreciation” standard to respect state sovereignty and conserve their limited resources while still ensuring that human rights are protected.

In this regard, the United States also explained in its 2016 Submission that U.S. courts have carefully reviewed and rejected other claims alleging that U.S. states’ lethal injection protocols constitute cruel and unusual punishment, and that Ohio has complied with constitutional requirements by seeking to make lethal injections as humane as possible. Most recently, in 2017, the U.S. Court of Appeals for the Sixth Circuit found that Ohio’s lethal injection procedure is the same as that which the U.S. Supreme Court had already upheld. Petitioner attempts to dismiss the findings of U.S. courts in this regard by asserting that “the Commission utilizes a different framework.” This assertion is not, however, consistent with the role of the American Declaration and the function of the Commission. Whether or not Petitioner’s right to be free from cruel and unusual treatment or punishment—a right affirmed at the regional level in the American Declaration—has been respected is a question of whether such

protection has been afforded under domestic law. The 2016 submission of the United States correctly framed the issues as such, and conclusively demonstrated that domestic law did in fact afford the protection affirmed in the Declaration. The subsequent decision by the U.S. Court of Appeals in 2017 only reaffirms this conclusion. As a result, Petitioner’s claim should be dismissed because it lacks merit and because the Commission lacks competence to sit as a court of fourth instance.

* * * *

c. *Petition No. P-1561-13: Rivera and others*

Ten named petitioners submitted claims relating to the Vieques Naval Training Range (“VNTR”) in Puerto Rico, where military exercises were conducted and where the U.S. government remains engaged in ongoing environmental restoration. The U.S. response, submitted April 3, 2019, and excerpted below, explains: why the claims are beyond the Commission’s competence; the particularization of the requirement of exhaustion; and the failure of the petition to establish any violation of rights set forth in the American Declaration.

* * * *

A. Claims Related to the Acquisition of Land on Vieques are Inadmissible because they are Outside the Commission’s Competence *Ratione Temporis*.

The Commission may not consider claims in the Petition relating to alleged “expropriation” that occurred between 1941 and 1943 in violation of Petitioners’ “right of residence and movement” (alleged violations of Article VIII of the American Declaration) because these events do not fall within the Commission’s competence *ratione temporis*. These events occurred before the adoption of the American Declaration and the establishment of the Commission, and they do not constitute continuing acts that would otherwise bring them within the Commission’s jurisdiction.

i. Prohibition on Retroactive Application of the American Declaration

The principle that relevant instruments, in this case the American Declaration, cannot be applied retroactively is well-established in Inter-American and international jurisprudence and has been consistently applied by the Commission to reject the consideration of claims that predate the commitments set forth in the instrument. Here, the acquisition of land between 1941 and 1943 predates the Commission’s competence as to claims brought against the United States, which began in 1951. Thus, the Commission does not have the competence *ratione temporis* to review Petitioner’s claims related to the transfer of land on the island of Vieques, including alleged violations of Article VIII of the American Declaration.

ii. Events at Issue Do Not Constitute a Continuing Act

The Commission has held that events predating the relevant commitments may only be considered if they constitute continuing acts. However, by their very nature, the acquisition of property in 1941-1943 is not a continuing act. The acquisition of land on Vieques by the United States Navy was a discrete event. Moreover, the ten petitioners identified in the Petition have

presented no facts to suggest any claim to the land purchased by the Navy and, in fact, no Petitioner was even alive at the time that the Navy acquired land on Vieques. It is therefore impossible as a factual matter for Petitioners to articulate a claim that the acquisition of property in 1941-1943 constitutes a continuing act in violation of their rights.

In some respects, this claim resembles the petition in *Isamu Carlos Shibayama et al. v. United States*, which is highly relevant to the present case. In that petition, the Commission was asked to consider alleged violations related to a World War II-era internment program, and the petitioners attempted to argue, as they do in the instant Petition, that the violations dating from the 1940s were continuing acts. In its decision on admissibility, the Commission rejected that argument and correctly concluded that these events were outside of its competence *ratione temporis*. The Commission should do the same in this case with regard to the acquisition of land by the Navy on Vieques in 1941-1943.

iii. No Obligation to Provide a Remedy Without a Cognizable Underlying Violation

The Petitioners go to great efforts to demonstrate that the alleged violations committed during and after the 1941-1943 acquisition of land on Vieques are attributable to the United States and consequently that the United States has violated the American Declaration by “continuing to impose conditions that impede the return of the Petitioners” to that land. But these arguments do nothing to change the fundamental fact that the events during and after the acquisition of land on Vieques are outside the competence *ratione temporis* of the Commission and therefore may not be considered by the Commission, either directly or indirectly through a legal argument that the alleged harm suffered as a result of the acquisition somehow brings that acquisition itself within the Commission’s jurisdiction. Such an argument is without foundation in the American Declaration or international jurisprudence more broadly.

Indeed, it is a fundamental principle that the obligation to provide a remedy only accrues when there has been a cognizable violation of an underlying human rights commitment. The Human Rights Committee’s consideration of this issue in *R.A.V.N. et al. v. Argentina* is instructive. In that case, the Committee held that “under article 2 [of the International Covenant on Civil and Political Rights], the right to a remedy arises only after a violation of a Covenant right has been established. However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible *ratione temporis*.” In the present case, where the underlying alleged human rights violations are inadmissible *ratione temporis*, the Commission should similarly hold claims related to a remedy for those alleged violations inadmissible. To do otherwise would create a backdoor mechanism for claims related to events that would otherwise not be admissible.

B. Claims based on Instruments beyond the American Declaration are Inadmissible because they are outside the Commission’s Competence *Ratione Materiae*.

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

Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

Moreover, although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate their claims that international legal obligations have been violated. Such recourse to international instruments and authorities beyond the American Declaration reflects the reality that Petitioners' claims do not implicate provisions of the American Declaration, leaving them to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [('American Convention')] and other applicable instruments" Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list various instruments and bodies Petitioners rely on to articulate their claims. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioners' claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

C. Claims based on *Actio Popularis* are Inadmissible because they are outside the Commission's Competence *Ratione Personae*.

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*.

The Petition is filed on behalf of ten residents of Vieques: Zaida Torres, Wanda Bermúdez, Ivis Cintrón Díaz, Ida Vodofsky Colón, Norma Torres Sanes, Cacimar Zenón, Asunción Rivera, Ismael Guadalupe, Ilsa Ortiz Ortiz, and Nilo Adams Colón. Therefore, the Commission only has competence to review particularized claims with respect to these ten individuals. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege "concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State's responsibility for those violations" The Commission's governing instruments "do not allow for an *actio popularis*." Consequently, an individual petition is not the proper means by which to request a decision about alleged violations suffered by particular

industries in Vieques (e.g., “the commercial fishing industry”), the “people of Vieques” as a whole, or indeed, in the absence of an allegedly aggrieved individual or group of individuals altogether. While the matters Petitioner complains about may be a proper subject for a thematic hearing before the Commission, they are improper in the context of an individual petition.

D. The Petitioners Have Not Pursued or Exhausted Domestic Remedies.

To the extent that Petitioners articulate alleged violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate that they have “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. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State conducting judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.” The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies.

As an initial matter, the Petition does not evidence that the Petitioners have pursued *any* domestic remedies to attempt to redress their claims and, on that basis alone, the Petition should be deemed inadmissible. In addressing the Commission’s exhaustion requirement, the Petition states that 7,125 residents of Vieques filed a complaint against the United States under the Federal Tort Claims Act (FTCA) in 2005. Reference to the *Sanchez* litigation is insufficient to satisfy the requirement that Petitioners exhaust domestic remedies with respect to their alleged violations of Articles I, IV, VI, VII, VIII, IX, XI, XIV, XVIII and XXIV of the American Declaration. Even if the reasoning of the *Sanchez* litigation might apply to some of the claims presented by Petitioners, it is their responsibility to pursue those claims in U.S. courts. It therefore is not possible for Petitioners to invoke that litigation here as a panacea for their failure to pursue and exhaust domestic remedies for each of the claims presented in the Petition. To be sure, the Petition makes no showing that Petitioners who have submitted the Petition even participated in the *Sanchez* litigation or that they lodged their particularized claims against the United States. But even if it had, the requirement that Petitioners exhaust domestic remedies is a *particularized* requirement that requires individual petitioners to pursue their specific claims under domestic law to address their concerns before invoking the Commission’s authority. For their claims to be admissible, Petitioners must demonstrate that “remedies of the domestic legal system have been pursued and exhausted.” There is absolutely no indication in the Petition that the Petitioners have satisfied this requirement.

Therefore, even if some residents of Vieques have pursued some remedies under U.S. law alleging the Navy was negligent because it violated particular statutes and regulations and did not alert residents of Vieques to certain safety risks related to military operations, Petitioners have failed to demonstrate that they have pursued or exhausted all available domestic remedies in several ways. First, with respect to claims based on property rights, Petitioners have not pursued or exhausted Constitutional remedies for alleged takings. Second, with respect to claims based on environmental contamination, Petitioners have not pursued or exhausted statutory mechanisms for judicial review. Third, and more broadly, Petitioners have not pursued or exhausted avenues to challenge U.S. Government action. Finally, with respect to claims based on access to information, Petitioners have failed to pursue existing mechanisms to receive the information they appear to desire. Each of these avenues of redress that Petitioners have failed to pursue will be described in turn.

* * * *

E. The Petitioners Fail to Establish Facts that Could Support a Claim of Violation of the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

i. Article I (Right to Life, Liberty, and Security of Person)

Petitioners allege that the United States has violated Article I of the American Declaration due to contamination by military practices in Vieques. To the extent that contamination in connection with military activity has impacted enjoyment of this right, the U.S. Government has been actively engaged in providing a compressive remedy to address this contamination. ...

To the extent that Petitioners take issue with the remedy provided by the United States, such complaint is insufficient to constitute a claim under Article I of the American Declaration because the Commission should provide the United States with a margin of appreciation in the provision of a remedy. The Commission should defer to the discretion of local actors who are required to make difficult decisions based on their own factual assessments. ...

In this context, it is worth recalling the cautionary words of *Fadeyeva v. Russia*, a European Court of Human Rights case that has been cited by the Commission. *Fadeyeva* emphasized that “States have a wide margin of appreciation in the sphere of environmental protection,” that “the national authorities ... are in principle better placed than an international court to evaluate local needs and conditions,” and that it is not for such a court “to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere.” ...

ii. Article XI (Right to Preservation of Health through Sanitary and Social Measures)

Article XI of the American Declaration provides that every person “has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Petitioners have failed to establish facts that could support a claim of violation of this provision. Importantly, Article XI of the American Declaration articulates the “right to the preservation of health” through specific means: “sanitary and social measures” relating to “food, clothing,

housing and medical care.” The right to the preservation of health through such measures under Article XI is further qualified “to the extent permitted by public and community resources.”

Critically, Petitioners have failed to articulate any violation of their rights to the preservation of health in the context of “sanitary and social measures” relating to “food, clothing, housing and medical care.” ...

... Petitioners’ claim under Article XI of the American Declaration is therefore inadmissible under Article 34 of the Rules because it does not establish facts that could support a claim of a violation of this provision of the Declaration.

Regarding alleged health impacts of U.S. operations at Vieques, Petitioners’ claims are also without merit. ... Petitioners offer tragic but individual anecdotal situations as evidence, and information from now-dated sources that was used in previous litigation on a narrower question of law only tangentially related to the larger cleanup. In fact, the United States Government and independent researchers have analyzed whether health on the island is impacted by historic naval activities. Repeated studies have shown no causal link.

* * * *

iii. Article VI (Right to Freedom of Expression)

Article VI of the American Declaration provides that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Petitioners’ claim that their right under Article VI has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration. As with other provisions of the American Declaration, the Petition overstates the reach of Article VI, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. Article VI plainly does not contemplate some unbridled access to information—or even the disclosure of information at all. Petitioners have therefore failed to establish facts that could support a violation of this provision of the Declaration.

Moreover, Petitioners’ claim that they have been denied access to information about the Navy’s military operations at Vieques is plainly baseless. A vast amount of information is publicly available about the Navy’s cleanup at Vieques, including information about the military munitions used during military operations at Vieques. ...

* * * *

Therefore, even if Petitioners’ claim of access to information was cognizable under Article VI—which it is not—the claim is manifestly groundless given that the information Petitioners seek is publicly available and various mechanisms to affirmatively enable access to such information have been afforded to Petitioners. Petitioners’ claim under Article VI of the American Declaration is inadmissible.

iv. Article XVIII (Right to a fair trial)

Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his

prejudice, violate any fundamental constitutional rights.” Petitioners plainly fail to articulate any violation of their right to resort to courts in the United States. ...

To support their allegation of a violation of Article XVIII, Petitioners refer to litigation unrelated to this Petition lodged under the FTCA in 2005 (the *Sanchez* litigation, discussed above). ...

* * * *

v. Article VIII (Right to residence and movement)

As discussed above, the allegations contained in this claim are predicated on events which predate the Commission’s competence as to claims brought against the United States. Thus, the Commission does not have the competence *rationae temporis* to review Petitioner’s claims related to the transfer of land on the island of Vieques, including alleged violations of Article VIII of the American Declaration.

Article VIII provides that “[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.” Petitioners’ claim that their right under Article VIII has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration with respect to them. As with other provisions of the American Declaration, the Petition overstates the reach of Article VIII, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments.

As an initial matter, Petitioners have failed to establish facts that could support a claim of a violation of Article VIII. There is no evidence that Petitioners have been denied the right to fix their residences in the territory of the United States, to move about freely within the United States, or to leave the United States except by their own will. ...

vi. Article XIV (Right to work and to fair remuneration)

Article XIV provides that “[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.” Petitioners’ claim that their right under Article XIV has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration with respect to them. ...

It bears noting at the outset that the right to work under Article XIV is qualified by “under proper conditions,” and the protection “to follow his vocation freely” is similarly qualified “insofar as existing conditions of employment permit.” ... In so doing, Article XVI expressly does not impose expectations upon the State to ensure that “proper conditions” or “existing conditions of employment” persist, nor could it: the dynamics of a free market preclude the state from imposing the sort of stasis that Petitioners apparently seek in their demand that states “respect, protect and fulfill the human right to work.”

Even if Petitioners’ invasive interpretation of Article XIV could be sustained, they have failed to allege that they have suffered any violation of this right. ... Importantly, however, Petitioners present no facts about how their rights under Article XIV have been purportedly infringed by the United States. ...

What is more, the prevailing facts about Vieques coastal waters sharply refute Petitioner's unsubstantiated claims. ... Contrary to Petitioners' unsubstantiated claims, studies of fish, invertebrates, and sediment by the National Oceanic and Atmospheric Administration (NOAA) have shown no elevated levels of contaminants different from the overall region. ...

Research also disproves ... claims that fish availability has been negatively impacted by historic activities. ...

For the foregoing reasons, the Petition is inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

* * * *

d. Petition No. P-1939-13: Mirmedhi

On April 3, 2019, the United States submitted its response to the petition in *Mirmedhi*, a claim brought by Iranians who were denied political asylum and detained in the United States. Excerpts follow from the U.S. response.

* * * *

B. 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 The Petitioners have 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. The Petitioners Have Not Pursued or Exhausted Domestic Remedies

The Commission should declare the Petition inadmissible because the Petitioners have not satisfied their duty to demonstrate that they have "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." ...

The Petitioners in this case failed to pursue or exhaust all available domestic remedies in several ways. First, the Petitioners chose not to appeal the Ninth Circuit's affirmation of the denial of their asylum claims to the U.S. Supreme Court. Second, the Petitioners' habeas corpus petitions challenging the [immigration judges' or] IJs' decisions failed to exhaust administrative remedies. After the [Board of Immigration Appeals or] BIA had concluded that the INS met its burden of demonstrating a material change in the Petitioners' circumstances that warranted a

change in their custody status, the burden then shifted to the Petitioners to demonstrate that their release would not pose a danger to property or persons and that they were not a flight risk. However, the Petitioners did not carry this burden and the BIA therefore declined to reconsider the Attorney General's custody decision. The Petitioners chose not to challenge the BIA's decision, which illustrates yet another way that they did not pursue or exhaust all domestic remedies. Third, although the Petitioners have made numerous allegations about the conditions of their detention, claiming that the conditions were "cruel, inhuman, and punitive," the Petitioners voluntarily settled these claims rather than pursue remedies in court. The Petitioners thus chose to settle claims that they now bring up before this Commission.

For these reasons, the Petitioners have failed to exhaust their 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 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless. The Petitioners allege that the United States has violated Article I (Right to Liberty), Article II (Right to Equality Before the Law), Article IV (Right to Freedom of Expression), Article XVII (Right to Recognition of Juridical Personality), Article XVIII (Right to Civil Rights), Article XXI (Right of Assembly), Article XXII (Right of Association), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) of the American Declaration.

a. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article I, Article XVII, Article XVIII, Article XXV, and Article XXVI of the American Declaration

The Petitioners allege that the United States violated their right of protection from arbitrary arrest under Article XXV of the American Declaration, arguing that "[t]he process by which [they] were detained ... was anything but fair." The Petitioners also allege that the United States violated their right to liberty under Article I, claiming that their detention was arbitrary and "State agents presented [false] evidence ... to secure the Petitioners' detention." Finally, the Petitioners charge that the United States violated their rights under Articles XVII, XVIII, and XXVI by detaining them, despite their insistence that they had no connection to terrorist activities.

It should be noted at the outset the lawfulness of Petitioners' detention is uncontested: Petitioners were detained for violating the immigration laws of the United States. What the Petitioners take issue with is the subsequent denial of bond while they awaited removal proceedings from the United States following their violation of U.S. immigration laws and denial of their asylum applications. However, individuals are not entitled to bond pending removal proceedings under the American Declaration, and so the denial of bond following the Petitioners' second arrest cannot be construed as a violation of the American Declaration.

Yet, even if such denial of bond could be construed in terms of arbitrary arrest or detention, the Petitioners challenged their detention through five levels of administrative and judicial review: IJs, the BIA, a magistrate judge, the District Court, and the Ninth Circuit. U.S. immigration laws and regulations provide a "comprehensive scheme for [Petitioners] to challenge their bond revocation and detention," as they were represented by counsel at the bond revocation hearing, who cross-examined Special Agent Castillo and presented rebuttal evidence.

The “L.A. Cell” list—which Petitioners claim to have been fabricated and therefore wrongfully relied upon by detaining officials—was also not the only piece of evidence considered when the IJ determined that the Petitioners constituted a risk to persons or property and should have their bond revoked: the IJ considered the “totality of the information” in reaching this conclusion. The Petitioners were thus provided with a process that was not arbitrary: they were afforded a hearing before an impartial judge, “given an opportunity to present evidence and to know and meet the claims of the opposing party,” and the proceedings complied with the rules of procedural fairness.

Moreover, the Petitioners either entered or remained in the United States unlawfully and now seek to transform their own wrongdoing into the source of a “right” not to be held accountable for their fraudulent actions. Nothing in the American Declaration recognizes a human right to unlawfully enter or remain in a State without facing the immigration consequences for these actions. 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. The Petitioners nevertheless seek to use their own wrongful entry or over-staying of their visas in violation of U.S. law as the basis for asserting that they have an alleged right that was violated by their detention pending the outcome of their immigration proceedings. The Commission should not allow itself to be used for such a purpose.

The Petitioners also repeatedly insist that the evidence against them was fabricated, but do not provide any evidence to support this claim. ...

For these reasons, the Petitioners have failed to establish facts to support their claims that the United States violated their rights ...

b. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article II, Article IV, Article XXI, and Article XXII of the American Declaration

The Petitioners allege that the United States violated their right of equality before the law under Article II of the American Declaration, claiming that they were “subjected to differentiated and coercive treatment due to their Iranian nationality and presumed political views” and “deprived of liberty due to their perceived political opinions” The Petitioners also allege violations of their right to freedom of expression under Article IV, stating that the United States “used evidence of the Petitioners’ participation in a lawful and peaceful demonstration to justify their arrest and prolonged detention.” Finally, the Petitioners charge that the United States violated their right of assembly and right of association under Articles XXI and XXII by detaining them based on their attendance at a demonstration.

What the Petitioners fail to acknowledge, however, is that their bond revocation was not based on their Iranian nationality or participation in a rally. The Petitioners were included in the L.A. Cell list, which listed names of people with ties to a Foreign Terrorist Organization, the MEK. ...

The Petitioners also make broad-sweeping allegations that the United States denied them equality before the law because of their Iranian nationality and cite to various non-governmental actors that claim that the United States profiled Iranian nationals after the terrorist attacks of September 11, 2001. Crucially, however, the Petitioners fail to identify any particularized evidence that they were profiled in such a way in this case. ...

For these reasons, the Petitioners have failed to establish facts to support their claims that the United States violated their rights ...

3. The Petition Must Be Dismissed Under Article 34(b) of the Rules Because the Petitioners have Already Been Compensated and Received Effective Remedy for the Claims They Assert, and Their Claims Are Thus Manifestly Groundless

The Petitioners have voluntarily settled some of their claims. The only claims that they did not settle were those “against Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights, against Castillo for intimidation of a witness, and against the United States for false imprisonment.” The Petitioners cannot now assert that the United States has violated the American Declaration with respect to those settled matters because they have already received a remedy. ...

4. 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 the Petitioners 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.”

* * * *

C. THE PETITION IS MERITLESS

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

The Petitioners provide no evidence for the premise on which their Petition is based. The Petitioners repeatedly allege that Special Agents Castillo and MacDowell knowingly and intentionally fabricated evidence that was used to revoke their bond, but they have provided no evidence to support this claim. In fact, contrary to the Petitioners’ claims, the L.A. Cell list was not the only piece of evidence that was used by the IJ in concluding that the Petitioners have ties to a Foreign Terrorist Organization. This case has proceeded through five levels of administrative and judicial review in the United States and not once did a judge or reviewing entity determine that the United States had falsified evidence or that there was insufficient evidence to detain the Petitioners.

Moreover, the Petitioners allege that they were profiled and detained by the United States because of their Iranian nationality and political activity. However, as explained above, the Petitioners were not detained because of their nationality or political activity; rather, they were detained because they violated U.S. immigration law by either entering or remaining in the country unlawfully, they falsified their asylum applications that were eventually denied, and they were determined to have ties to a Foreign Terrorist Organization that led to revocation of their bond.

As such, the Petitioners’ allegations have no merit and the Commission should deny their request for relief.

* * * *

e. *Petition No. P-654-11: Eastern Navajo Diné Against Uranium Mining*

On April 3, 2019, the United States submitted its response to the petition brought by the “Eastern Navajo Diné against Uranium Mining” and several named individuals, alleging violations of the Declaration that could result from uranium mining. The U.S. submission asserts that the petition is inadmissible. Specifically, the submission discusses two bases for inadmissibility: (1) under Article 34(a) of the Commission’s Rules for failure to state facts that tend to establish a violation of the American Declaration; and (2) under the Commission’s “fourth instance formula.” Excerpts follow from the submission (with footnotes and factual background omitted).

* * * *

Petitioners raise three primary arguments. First, Petitioners claim that [uranium] mining pursuant to the [U.S. government agency] license at issue would, should it commence, have the effect of infringing upon their rights to life and health under Articles 1 and 11 of the American Declaration on the basis of environmental contamination that may arise from the proposed mining. Second, Petitioners claim, *inter alia*, that such mining would, should it commence, have the effect of infringing upon their rights to religion and cultural participation under Articles 3 and 13 of the American Declaration because possible environmental contamination that may arise from the proposed mining could negatively impact Petitioner’s ability to participate in traditional practices. Finally, Petitioners argue that such mining would, should it commence, infringe upon Petitioners’ right to property under Article 23 of the American Declaration.

As explained below, the Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Additionally, the arguments presented in the Petition are unreviewable in light of the Commission’s “fourth instance formula” as they amount to a mere disagreement with determinations of domestic authorities on these same issues, rendered in compliance with the American Declaration. To the extent further administrative proceedings remain, Petitioners have failed to exhaust their domestic remedies as required by Article 31 of the Rules.

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

I. The competence of the Commission is limited

Although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by

invoking an array of other international instruments. This reflects the reality that, even if the future acts articulated by Petitioners come to fruition, they do not implicate provisions of the American Declaration, requiring Petitioners to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [(‘American Convention’)] and other applicable instruments” Article 20 of the Commission’s Statute and Article 23 of the Rules identify the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICESCR, ICCPR, UNDRIP, or ILO Convention No. 169. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioners’ claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission’s competence.

II. The “Fourth Instance Formula” precludes review of domestic licensing proceedings

As a factual matter, it is the potential future mining operation of a private entity, HRI, rather than the Federal licensing procedures administered by the NRC under the Atomic Energy Act (AEA), that forms the basis of Petitioners’ claims. Even so, Petitioners’ ostensible hook to implicate a failure on the part of the United States to live up to its commitments under the American Declaration lies with the NRC’s administration of the AEA and, specifically, the license granted to HRI. To the extent that Petitioners seek to challenge that license, the issues raised by Petitioners have been fully adjudicated before the courts of the United States and there has been no failure by the United States to live up to its political commitments under the American Declaration with respect to that license.

...[T]he HRI license has been subjected to robust administrative and judicial procedures—procedures in which Petitioners actively participated. The Commission should dismiss Petitioners’ claims because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”

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. The United States' administrative process, including the availability of judicial review of administrative decisions, afforded petitioners the opportunity to participate in, and indeed challenge, the NRC license to HRI. Petitioners, over an extended period of time spanning more than a decade, both participated in the NRC licensing process and appealed the outcome of that process in Federal court.

Specifically, after the NRC Staff issued the requested license to HRI following a technical review, several parties, including Petitioners, filed an administrative challenge to the license. The NRC referred the challenge to its administrative hearing division (the Atomic Safety and Licensing Board Panel), which assigned a Presiding Officer to rule on whether the petitioners had filed a viable challenge, and if so, to conduct a hearing. Two separate and successive Presiding Officers conducted a two-phase hearing that lasted approximately ten years. The Presiding Officers issues multiple initial decisions that were each appealed to the NRC itself. Ultimately, the NRC approved the issuance of the HRI license, subject to several conditions to modify the license in response to the issues raised by Petitioners during those domestic proceedings. Petitioners challenged the NRC's decision in the U.S. Court of Appeals for the Tenth Circuit, which ruled for the NRC on each issue. Petitioners asked the U.S. Supreme Court to review the case but the Supreme Court denied their request.

Dissatisfied with the outcome of these exhaustive domestic proceedings, Petitioners now ask the Commission to reexamine issues already heard by the Atomic Safety and Licensing Board Panel, the NRC, and the U.S. Court of Appeals for the Tenth Circuit, which acted in full conformity with the due process protections reflected in the American Declaration. Petitioners raise the same issues before the Commission raised in their U.S. judicial proceeding. ...

The Commission must consequently decline Petitioner's invitation to sit as a court of fourth instance. ...

Petitioners received abundant opportunity to raise the very issues presented to the Commission in domestic proceedings and fully availed themselves of that opportunity. ...

III. Failure to exhaust other domestic remedies in connection with the HRI operation

Article 31(1) of the Rules only allows the Commission to consider a petition after it has verified that domestic remedies have been exhausted. The Petitioners have failed to exhaust domestic administrative remedies, thus rendering their Petition inadmissible before the Commission.

Although, as described in greater detail above, the NRC regulates ISL operations under the AEA, a number of other entities also have regulatory authority over these operations under other statutes. Thus, while an ISL project requires an NRC license for its development and operation, it is not the only authorization an ISL operator must obtain. Critically, these remaining administrative procedures relate precisely to the issues raised by Petitioners and have not yet been pursued, much less exhausted.

One such administrative proceeding pertains to "aquifer exemptions." ...

Another such administrative proceeding pertains to Underground Injection Control ("UIC") permits, which an ISL operator must obtain for the injection wells used in each wellfield to conduct the ISL operations. ...

The Commission has repeatedly emphasized that petitioners have 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.” The Rules do not require that these domestic remedies be judicial in nature in order to require their exhaustion before a petitioner may have recourse to the Commission, and the Commission has previously considered non-judicial remedies as remedies that need to be properly exhausted in order for a matter to become admissible under Article 31.

As a result, because Petitioners have available to them additional domestic remedies in the event that HRI seeks the outstanding administrative approvals and exemptions necessary prior to commencing operations in connection with the NRC license—remedies that could provide Petitioners the relief they currently seek from the Commission—Petitioners have also failed to exhaust domestic remedies within the meaning of Article 31 of the Rules. The Petition is therefore inadmissible. The Commission must, in line with past practice, dismiss it.

IV. Failure to state a claim under the American Declaration

... At this procedural stage, the Commission is to undertake a prima facie evaluation, not for purposes of establishing alleged violations of the American Declaration, but rather for examining whether the petition denounces facts that may potentially constitute violations of rights ensured under said instrument.

Petitioners raise three primary arguments. ...

As an initial matter, and before considering each argument in turn, the petition fails to set forth a cognizable violation of any provision of the American Declaration because the alleged violations remain inchoate. ...

In this case, however, “a cognizable violation of a protected human right” has not been set forth by Petitioners. Instead, the claims presented in the Petition are predicated upon a series of interdependent assumptions of future events: that HRI will successfully complete the necessary regulatory stages to commence mining operations; that HRI will actually commence such mining operations in the future; and that such mining operations will cause the harm through contamination and non-remittance that Petitioners hypothesize. In fact, almost eight years have passed since Petitioners submitted this petition to the Commission and they are no more able today to substantiate the speculative harms upon which their claims are based than they were at the time the Petition was filed. As a factual matter, any potential violation of the American Declaration at some point in the future remains wholly speculative. Therefore, Petitioners allegations do not set forth any cognizable violation of American Declaration. This fundamental defect precludes an affirmative admissibility finding by the Commission.

* * * *

f. Petition No. 1075-06: Schneider

The United States submitted further observations on the *Schneider* petition on April 24, 2019, which include the excerpts below, discussing extraterritoriality.

* * * *

A. The Applicability of the American Declaration is Defined by Jurisdiction

As an initial matter, the applicability of the American Declaration is limited by the jurisdiction of the State. . . . Although the United States is not a party to the American Convention, Article 1 of the Convention contains a clear jurisdictional provision that mirrors the applicability of the American Declaration. . . . This limitation to the application of the Convention is relevant in the present context because it reinforces the limited, jurisdictionally-bound application of human rights commitments undertaken through the American Declaration. Moreover, the Commission has been consistent in its limited application of the American Declaration extraterritorially only to situations in which the State, according to the Commission, exercises jurisdiction.

Petitioner cites a number of prior reports by the Commission addressing the extraterritorial application of the American Declaration. In each of those instances, the applicability of the American Declaration was conditioned on the Commission's finding of the respective State's exercise of jurisdiction. As such, these reports reinforce the limited applicability of the American Declaration to the jurisdiction of the State and do not support the proposition that the American Declaration generates commitments or obligations beyond the jurisdiction of the State. Nothing in the American Declaration, the American Convention, or the prior reports of the Commission support the proposition that commitments and obligations in the Inter-American system apply extra-jurisdictionally as Petitioners suggest.

While Petitioner notes that "obligations of several international human rights instruments, including those in the International Covenant on Civil and Political Rights, apply extraterritorially," whether a particular instrument applies extraterritorially and beyond the jurisdiction of a State party is entirely dependent upon the text of that instrument. Whether or not commitments by States under the ICCPR may apply extraterritorially simply has no bearing on the scope of an OAS member State's commitments under the American Declaration.

Although the jurisprudence of the European Court of Human Rights is entirely beyond the scope of the Commission's competence, it should be noted that Petitioner's selective citations to the Court's jurisdictional reasoning in the *Al-Skeini* case are profoundly misleading. In *Al-Skeini*, the Court grounded the applicability of the relevant instrument on the State's exercise of jurisdiction in a given territory, i.e., the exercise of "executive or judicial functions on the territory of another State." The Court found that, because the United Kingdom "assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government," such authority and control was sufficient to establish "a jurisdictional link" for purposes of the Convention. The Court's assessment in that case of whether or not the United Kingdom could be in breach of its obligations under the European Convention was predicated upon an initial finding that the United Kingdom exercised jurisdiction over the relevant territory (and, accordingly, that the Convention applied in the first instance). In this regard, the approach to extraterritoriality by the ECtHR is consistent with the jurisdictional application of the American Declaration and the American Convention, as consistently applied by the Commission.

B. No Breach in the Absence of an Applicable Commitment under the American Declaration

It is axiomatic that the existence of an obligation must be established prior to establishing a breach of such obligation; in the absence of an obligation, there can be no breach or responsibility arising therefrom. Because the American Declaration does not apply beyond the jurisdiction of the State, and because the United States did not exercise jurisdiction in Chile, the United States could not have violated its commitments under the American Declaration with respect to General Schneider as Petitioner alleges.

* * * *

g. *Petition No. P-1586-13: Churchill*

On July 18, 2019, the United States submitted its response to the petition on behalf of Ward Churchill. The petition relates to Churchill’s termination as a professor at a public university. Excerpts below discuss the claimed violation of the right to freedom of expression.

* * * *

Article IV of the American Declaration provides that “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Petitioner does not allege facts that tend to establish a violation of Article IV. Petitioner continued his activism following an investigation into professional misconduct that resulted in his termination from a faculty position at the University of Colorado. By his own account, “Professor Churchill’s voice was, and continues to be, critical to challenging mainstream histories.” Petitioner’s failure to adhere to the University’s standards of academic integrity led to termination from his position, but such termination did not infringe upon the right articulated at Article IV of the Declaration, a right that Petitioner continues to enjoy. Accordingly, Petitioner’s claim under Article IV of the Declaration is inadmissible under Articles 34(a) and 34(b) of the Rules.

Petitioner turns to a host of other instruments to buttress his claim under this provision, including the International Covenant on Civil and Political Rights, the American Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples’ Rights. However, as noted above, under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [(‘American Convention’)] and other applicable instruments” Article 20 of the Commission’s Statute and Article 23 of the Rules identify the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention such as the United States. Again, the United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICCPR or other instruments cited by Petitioner.

Moreover, Petitioner’s reliance on interpretations of Article 13 (Freedom of Thought and Conscience) of the American Convention by the Inter-American Court are not relevant to the present assessment. 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. States party to the American Convention have undertaken obligations under international law that cannot be applied to the United States because the United States has undertaken no such obligations. Because, in the judgments cited by Petitioner, the Inter-

American Court is applying the provisions of Article 13 of the American Convention—an instrument distinct from the American Declaration whose terms are far broader and more particular than those of Article IV of the American Declaration—the court’s interpretation of such provisions, even by analogy, are not applicable to the claims stated in the Petition.

It bears emphasizing that the facts in this matter establish that Petitioner was clearly terminated because of his academic misconduct. An extensive investigation resulted in a determination by the Board of Regents of the University of Colorado that Petitioner’s conduct fell below the minimum standards of professional integrity and academic honesty. This conduct was found to have included plagiarism, evidentiary fabrication, and falsification. Petitioner’s failure to adhere to the University’s standards of academic integrity, rather than his speech, led to termination from his position at the University of Colorado. Accordingly, Petitioner’s claim under Article IV of the Declaration is inadmissible under Articles 34(a) and 34(b) of the Rules.

* * * *

h. Petition No. P-106-14: Amber Anderson et al.

On November 4, 2019, the United States submitted its response to a petition filed on behalf of multiple individuals related to incidents of sexual abuse in the military. The U.S. submission articulates several grounds for inadmissibility including failure to exhaust domestic remedies and failure to state a claim. Excerpts follow from the introduction to the submission.

* * * *

The United States military has never tolerated or condoned sexual assaults by or against its members. At all times covered by the Petition, the United States military operated professional, efficient criminal investigation and criminal justice systems and provided effective services to assist service members who were the victims of sexual assault. Moreover, since the date of the last incident alleged by the Petition, the U.S. sexual assault response system has further evolved to become what is almost certainly the most victim-protective criminal investigation and justice system in the United States.

As the United States Supreme Court recognized just last year, the American court-martial system “closely resembles civilian structures of justice.” The Supreme Court expressly stated that the “military justice system’s essential character” is “judicial.” The court also observed that “[t]he procedural protections afforded to a service member are virtually the same as those given in a civilian criminal proceeding,” and “the judgments a military tribunal renders ... rest on the same basis, and are surrounded by the same considerations, as give conclusiveness to the judgments of other legal tribunals.” The U.S. military justice system is a fair, mature, and professional criminal justice system that plays a vital role in promoting lawful conduct by U.S. service members, including in deployed areas where such a robust system is important to promoting accountability.

The United States military today includes approximately 1.3 million active duty members and more than 800,000 reservists. The Petition collects 20 allegations that service members were

sexually assaulted between 2001 and 2010. Together, those allegations relate to 0.0015% of today's U.S. military population; they comprise a far smaller percentage of U.S. service members over the time span from which they are drawn. We condemn sexual assault in the U.S. military in the strongest terms, and the robust system of justice in place to protect victims and promote accountability for perpetrators reflects our commitment to preventing and appropriately punishing sexual assault. That there exists some level of crime, including sexual assaults, however, does not constitute a failure of the United States to meet its commitments under the American Declaration of the Rights and Duties of Man ("the American Declaration"). Nor has the U.S. military's response to those individual cases or incidents of sexual assault in the U.S. military as a whole violated the American Declaration. On the contrary, the U.S. Government's response has been driven by care for its service members affected by sexual assault and a commitment to the careful investigation and adjudication of such allegations to promote appropriate accountability. This response has also been characterized by steady evolution as the U.S. Government considers and implements additional sexual assault prevention and response measures, as detailed below.

* * * *

i. *Petition No. P-191/14: Mathurin et al.*

On November 4, 2019, the United States submitted its response to a petition filed on behalf of Haitian nationals residing in the United States who were removed to Haiti between 2011 and 2013 because of criminal convictions. The United States explained that the petition is inadmissible because it alleges general violations on behalf of people other than the individual petitioners (based on a theory of *action popularis*) and because petitioners failed to exhaust domestic remedies. Excerpts follow from the U.S. submission.

* * * *

I. Claims based on *Actio Popularis* are Inadmissible because they Fall Outside the Commission's Competence *Ratione Personae*

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*.

* * * *

II. The Petition is Inadmissible because Petitioners Failed to Exhaust Domestic Remedies

To the extent that Petitioners articulate alleged violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because the Petitioners have not satisfied their duty to demonstrate that they “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

* * * *

In the instant case, Petitioners have manifestly failed to exhaust their domestic remedies. As noted above, three of the Petitioners—Ms. Mathurin, Mr. Pinette, and Ms. Gustave—failed to appeal their final orders of removal to the BIA for reasons that the Petition leaves unexplained. The other three Petitioners—Ms. Nazaire, Mr. Sainvil, and Ms. Fleury—did appeal their cases to the BIA, but none of them was successful, and none of them filed a petition for review of the BIA decision with the federal circuit court with jurisdiction over their case. Petitioners, citing the Commission’s decisions in *Mortlock v. United States* and *Smith & Armendariz v. United States*, argue that their failure to appeal their cases is “irrelevant . . . because they had no opportunity to present humanitarian defenses at any stage of their immigration proceedings.” However, Petitioners were free to attempt to raise such a defense before the BIA or the federal circuit courts, notwithstanding the unlikelihood that it would succeed. That they believed the BIA and federal circuit courts would be skeptical of such a defense, or would be unable to grant relief or protection on the basis of it consistent with the Immigration and Nationality Act (“INA”) and applicable regulations, does not excuse Petitioners’ failure to exhaust these domestic remedies. Consistent with the Rules and general principles of international law, the United States is entitled to the opportunity to redress any alleged human rights violations by its own means within the framework of its own domestic legal system before the alleged victims resort to the Commission. Therefore, the Petition must be dismissed for failure to exhaust domestic remedies.

III. The Petition is Inadmissible because it is Untimely

Even if the Commission determines that Petitioners have exhausted their domestic remedies, the Petition should be dismissed as untimely. Under Article 32(1) of the Rules, the Commission will only consider “petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.” Here, the Commission received the Petition on February 14, 2014, which, as the Petition acknowledges, was more than six months after all of the Petitioners but Ms. Fleury and Ms. Gustave were removed to Haiti. However, even the claims of Ms. Fleury and Ms. Gustave are untimely because they were notified of the latest decision in their domestic proceedings (remedies they failed to exhaust) more than six months prior to filing the Petition on February 14, 2014—Ms. Fleury, on July 30, 2013, when the BIA dismissed her appeal, and Ms. Gustave, in 2004, when she received her final order of removal from an immigration judge and did not appeal. Therefore, none of the claims in the Petition is timely under Article 32(1).

* * * *

IV. The Petition is Inadmissible because it Fails to Establish Facts that Could Support a Claim of a Violation of the Declaration and Contains Claims that are Manifestly Groundless

The Petition is also inadmissible because it fails to state facts that tend to establish violations of Petitioners' rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules. The Commission must declare a petition inadmissible when, under Article 34(a), it does not state facts that tend to establish a violation of the American Declaration or, under Article 34(b), the claims in the Petition are manifestly groundless. The Commission Statute explicitly provides that in relation to non-state parties to the American Convention, for purposes of the Statute, human rights are understood to be only the rights set forth in the American Declaration. Here, the rights set forth in the American Declaration, contrary to Petitioners' assertions, include neither express nor implied protection from return to a country based upon the general conditions in that country. As Petitioners seek such protection in an instrument that does not afford it, they have failed to state facts that tend to establish a violation of the American Declaration and their claims are manifestly groundless. Their petition is thus inadmissible.

A. The Declaration Does Not Recognize a Right to Protection from Refoulement

Notwithstanding the arguments of Petitioners and prior decisions of the Commission, the American Declaration does not incorporate a right of foreign nationals convicted of serious crimes to be protected from return to a country based upon the general conditions in that country. It is well-established that States have the sovereign right to control the admission of foreign nationals, their departure, and their conditions and duration of stay within the country, subject to their obligations under international law. Courts of the United States, for instance, have long recognized the federal government's sovereign powers under international law to regulate the admission, exclusion, and expulsion of foreign nationals. The United States' sovereign right to remove foreign nationals from its territory is limited only by its non-refoulement obligations under international refugee law and international human rights law. Article 33 of the 1951 Convention relating to the Status of Refugees, which is binding on the United States through its incorporation in the 1967 Protocol relating to the Status of Refugees, prohibits the United States, with limited exceptions, from expelling or returning a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. Likewise, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") prohibits the United States from expelling, returning, or extraditing a person to any country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The United States' non-refoulement obligations under the 1967 Protocol and CAT are not self-executing and, accordingly, they do not confer judicially enforceable rights beyond those implemented by Congress by statute. Regardless, the Petition acknowledges that neither of these forms of international protection was applicable to Petitioners because they were not at risk of persecution or torture in Haiti, as those terms are understood in U.S. and international law, at the time of their removal.

Instead, Petitioners claim that, by removing them to Haiti "without due consideration of the humanitarian and human rights crisis in Haiti ... and the individual circumstances of the deportees," the United States violated Article I (right to life, liberty, and security of person), Article V (right to protection of honor, personal reputation, and private and family life), Article VI (right to a family and to protection thereof), Article VII (right to protection for mothers and children), Article XI (right to the preservation of health and to well-being), Article XVIII (right

to a fair trial), and Article XXVI (prohibition on cruel or unusual punishment) of the American Declaration.

As an initial matter, all of these articles impose limitations on action by the U.S. government in U.S. territory, but none of them protects foreign nationals convicted of serious crimes from being returned by the United States to a country based upon the general conditions in that country. Put another way, even assuming *arguendo* that the facts alleged by Petitioners establish a violation of their rights under the Declaration, that violation was committed in Haiti by Haitian government officials after the U.S. government removed Petitioners from U.S. territory. As a result, the Commission lacks competence *ratione loci* to consider the Petition because the alleged violations of the American Declaration occurred beyond the jurisdiction of the United States. ...

* * * *

Nor is the United States responsible for alleged violations based on a theory of refoulement. The United States does not bear any responsibility for such a violation under the American Declaration because the Declaration does not recognize any protection from refoulement, especially not one for foreign nationals convicted of serious crimes who are not at risk of persecution or torture.

* * * *

As discussed at length above, any alleged violations of Petitioners' human rights in Haiti are beyond the *ratione loci* competence of the Commission with respect to the United States. Petitioners expressly "urge the Commission to reconsider its Article XI analysis in *Mortlock*, and to instead look at whether conditions *in the receiving country* violate an individual's right to health and well-being under Article XI of the Declaration." Any such violations identified by the Commission are not attributable to the United States.

For these reasons, Petitioners' argument that their removal violated Articles I and XI of the Declaration should be dismissed for failure to establish a claim and as manifestly groundless.

* * * *

In the immigration setting, however, the United States reiterates its position that Article XXVI—concerned as it is with protecting the rights of criminal defendants—simply does not apply. As the U.S. Supreme Court has repeatedly held, the immigration detention or removal of foreign nationals is predicated on a person's immigration status and does not constitute punishment for a crime. Removal is merely the civil consequence of a foreign national's non-compliance with the terms and conditions upon his or her residence in the country, bearing in mind that no foreign national has a right to live in the United States. ...

* * * *

V. Petitioners Seek To Use The Commission As A Fourth Instance Review Of United States Court Decisions

The Petition plainly constitutes an effort by Petitioners to use the Commission as a “fourth instance” body to review claims already heard and rejected in administrative and judicial proceedings in the United States. 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.”

* * * *

VI. Even if Admissible, Petitioners’ Claims Fail on the Merits

The United States reserves the right to submit further observations should the Commission find the Petition to be admissible, but notes at this initial stage that the United States’ removal of Petitioners to Haiti was fully consistent with the rights that Petitioners allege were owed to them under the Commission’s decisions in *Mortlock* and *Smith & Armendariz*. Petitioners argue that those decisions prohibited the United States from removing them without conducting a balancing test that took into account facts specific to their individual circumstances, such as their family ties to the United States and their medical issues, as well as the general humanitarian and human rights situation in Haiti. As the Petition explains it, “the United States must apply to all deportations a balancing test that weighs the public security risk posed by the non-citizen against the equities implicated by the deportation and that takes into account the burden placed on Haiti of reabsorbing additional vulnerable people at this critical moment in time.” The Petitioners overlook, however, that the United States in fact did just that.

In addition to offering Petitioners the opportunity to seek protection from return to persecution or torture on an individualized basis before an immigration judge, the United States implemented two discretionary measures with respect to Haitians during the relevant period: Temporary Protected Status (“TPS”) and ICE’s April 1, 2011 “Policy for Resumed Removals to Haiti.” ...

Petitioners concede that the factors in the balancing test that ICE announced were “similar” to those articulated in *Smith & Armendariz*, but argue that it was inadequate for various reasons and that an appropriate balancing test would “always weigh against deportations to Haiti” given “the scale of the ongoing catastrophe” there. In other words, Petitioners seem to believe that there should be a blanket rule against removing anyone to Haiti, regardless of their individual circumstances—i.e., there should be no balancing test at all. This line of argument exceeds the bounds of *Mortlock* and *Smith & Armendariz* and stretches the rights proclaimed in the American Declaration beyond any reasonable limit.

* * * *

j. Request by Colombia for an Advisory Opinion

On December 19, 2019, the United States submitted written observations on the request by Colombia for an advisory opinion regarding the consequences of a State denouncing and withdrawing from the American Convention and the OAS Charter. Excerpts follow from the U.S. submission.

* * * *

Pursuant to Article 64.1 of the American Convention on Human Rights, the Republic of Colombia (“Colombia”) has requested an advisory opinion of the Inter-American Court of Human Rights (the “Court”). The Colombian request raises three questions. The first is presented by Colombia as follows:

In the light of international law, conventions and common law, and in particular, the American Declaration of the Rights and Duties of Man of 1948: *What obligations in the matters in matters [sic] of human rights does a member State of the Organization of American States have when it has denounced the American Convention on Human Rights?*

The second question elaborates on the first:

In the event that that State further denounces the Charter of the Organization of American States, and seeks to withdraw from the Organization, *What effects do that denunciation and withdrawal have on the obligations referred to in the FIRST QUESTION?*

The third question is presented as:

When a situation of serious and systematic violations of human rights arises under the jurisdiction of a State in the Americas which has denounced the American Convention and the Charter of the OAS,

1. *What obligations do the remaining member States of the OAS have in matters of human rights?*
2. *What mechanisms do member States of the OAS have to enforce those obligations?*
3. *To what mechanisms of international protection of human rights can persons subject to the jurisdiction of the denouncing [S]tate take recourse?*

In connection with these questions, Colombia notes that member States of the Organization of American States (“OAS”) are subject to a range of human rights obligations arising from various instruments that are part of the Inter-American human rights system...

... The United States respectfully submits that the Court should refrain from addressing elements of Colombia’s request that invite the Court to address the scope or enforcement of human rights obligations established outside of the Inter-American system.

I. The Court’s jurisdiction over human rights obligations of member States of the OAS that have denounced the American Convention on Human Rights is limited to binding instruments which are in force with respect to that State and which are within the competence of the Court.

A State that denounces the American Convention would remain bound by any other international human rights obligations it has undertaken, including those within the Inter-American system. However, the Court should refrain from addressing human rights obligations set forth in instruments which are either beyond the competence of the Court and / or outside of the Inter-American system altogether.

a. The instruments within the competence of the Court are defined by relevant authorities.

The Court’s authority to issue advisory opinions is set forth in Article 64.1 of the American Convention and is limited to interpretations of the Convention and “other treaties concerning the protection of human rights in the American states.” ...

So long as the human rights treaties in the Inter-American system remain in force, a State party to such instruments would continue to be bound by those treaties unless and until the State

suspended, terminated or withdrew from the instrument in accordance with the terms of the treaty or as otherwise consistent with customary international law.

b. The Court is not a body of general jurisdiction and should decline to address the applicability of human rights instruments or obligations under customary international law (CIL) that are outside of its competence.

The Court's competence under Article 64.1 does not include human rights obligations established in sources other than treaties—such as customary international law obligations—or in treaties which are outside of the Inter-American system. ...Accordingly, the Court should decline to address the scope of obligations under instruments that are not relevant to its functions, such as the Universal Declaration of Human Rights. The Court should also refrain from addressing customary international law pursuant to Article 64.1.

Similarly, Article 64.1 does not direct the Court to interpret instruments which do not qualify as "treaties." As reflected in Article 2 of the Vienna Convention on the Law of Treaties, a treaty is an international agreement concluded between States in written form and *governed by international law*" (emphasis added)—i.e. a legally binding instrument. The Court should decline to address in its advisory opinion the scope of instruments that are not legally binding and thus do not constitute treaties. In this regard, the United States has consistently maintained that the American Declaration is a nonbinding instrument which does not create legal rights or obligations on OAS member States. United States courts have viewed it as such. The text of the Declaration and the circumstances of its conclusion demonstrate that the negotiating States did not intend for it to become a binding instrument. The United States recognizes that the American Declaration establishes standards against which States' conduct is assessed and can inform the interpretation of other instruments in the Inter-American human rights system. Consistent with its nonbinding text, however, it does not create independent human rights obligations for States. As the Court has recognized, the American Declaration is not a treaty within the meaning of the Vienna Convention on the Law of Treaties, and is thus "not a treaty within the meaning of Article 64(1)."

From the perspective of the Court's competence, therefore, it is appropriate for the Court to avoid addressing any nonbinding instruments, instruments that exist outside of the Inter-American human rights system, or customary international law.

II. A State remains bound by other obligations which it has undertaken ...

Withdrawal from the OAS does not affect a State's obligations under other treaties to which it is a party unless those treaties so provide. Accordingly, following a State's withdrawal from the OAS, in general, it would remain bound by the terms of any treaties from within the Inter-American human rights system to which it is a party. If the State wished to terminate its obligations under such a treaty, it would need to do so according to the treaty's provisions regarding withdrawal or as otherwise permitted under customary international law. Withdrawal from the OAS Charter itself would not have the effect of terminating the withdrawing State's human rights obligations under instruments other than the OAS Charter (to the extent that the OAS Charter is understood to be a source of such human rights obligations), including instruments in the Inter-American system for which membership in the OAS was a condition precedent to accession or ratification. The United States notes that suspension of an OAS Member State from participation in the OAS under Article 21 of the Inter-American Democratic Charter does not affect its human rights obligations.

- a. A State is not bound by any human rights obligations derived from the OAS Charter after it has denounced the Charter.

The OAS Charter explicitly contemplates that a State may denounce the OAS Charter and withdraw from the OAS so long as the denouncing State provides written notice and “fulfill[s] the obligations arising from the ... Charter.” Two years after notice is provided, the Charter “shall cease to be in force with respect to the denouncing State.” By its plain language, Article 143 of the OAS Charter confirms that States parties retain the ability to withdraw from the OAS if they so choose; a State which has denounced the Charter must be understood as having no further obligations arising under it under international law following the effectiveness of denunciation.

- b. Even if the American Declaration were understood to have acquired a normative character by virtue of the OAS Charter, it would no longer bind a State that has withdrawn from the OAS.

Although the United States respectfully opposes this view, the Court and the Commission have asserted that the American Declaration has taken on a binding “normative character.” In making this claim, the Court and Commission have reasoned that such binding force arises from States’ adoption of the OAS Charter; they have not claimed that such binding status arises from the text of the Declaration itself or from the intent of the States that adopted the Declaration. Thus, if a State properly denounces the OAS Charter and ceases to be a member of the OAS, the reasoning of the Court and Commission would mean that the Declaration would no longer apply to the denouncing State.

III. Whether OAS Member States have obligations in matters of human rights with respect to a denouncing State...

- a. OAS Member States do not have obligations under the OAS Charter and the American Convention with respect to a State that has denounced ...

To the extent that the OAS Charter and the American Convention create obligations between States parties to those instruments, States parties would not be subject to such obligations vis-à-vis a State that has withdrawn from the OAS Charter and the American Convention. Whether or not OAS Member States have obligations in matters of human rights vis-à-vis such a denouncing State would depend on the provisions of instruments to which OAS Member States and the denouncing State remain parties.

- b. The Court and the Commission have competence with respect to instruments within their competence that a State has recognized as binding on it, but the Court should refrain from addressing mechanisms available to States or individuals to enforce human rights obligations outside of the Inter-American system.

As discussed above, where a State denounces the OAS Charter and withdraws from the OAS, such a denouncing State remains subject to human rights obligations it has undertaken in treaties to which it remains a party. Whether mechanisms exist for enforcing such obligations depends on the relevant provisions of the treaties to which the denouncing State remains a party. As addressed already, however, the Court should decline to opine on the availability of alternate mechanisms of human rights enforcement which may exist outside of the Court’s competence or the Inter-American system.

* * * *

Cross References

Temporary Protected Status, **Ch. 1.C.1.**

UN Commission on Narcotic Drugs, **Ch. 3.B.2.c.(1)**

International Tribunals and Accountability Mechanisms, **Ch. 3.C.**

ILC Draft Guide to Provisional Application of Treaties, **Ch. 4.A.2.**

Universal Postal Union, **Ch. 4.B.2.**

Remarks on State Responsibility at the UN Sixth Committee, **Ch. 8.A.1.**

Remarks on Diplomatic Protection at the UN Sixth Committee, **Ch. 8.A.2.**

Recognition of Juan Guaido as interim president of Venezuela, **Ch. 9.A.2.**

Immunity of International Organizations, **Ch. 10.D.**

UN Convention on the Law of the Sea, **Ch. 12.A.1.**

UN Framework Convention on Climate Change (“UNFCCC”), **Ch. 13.A.1.**

ILC Draft Guidelines on Protection of the Atmosphere, **Ch. 13.A.3.**

UNCITRAL, **Ch. 15.A.1.**

Venezuela sanctions, **Ch. 16.A.5.**

UNSCR 2449 on humanitarian aid to Syrians, **Ch. 17.B.2.**

Responsibility to Protect, **Ch. 17.C.4.**