Contents

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. World Health Organization

a. Taiwan's exclusion from the World Health Assembly

On May 18, 2020, the State Department issued a press statement by Secretary Pompeo condemning the exclusion of Taiwan from the World Health Assembly of the World Health Organization ("WHO"). The statement, available at https://2017-2021.state.gov/taiwans-exclusion-from-the-world-health-assembly/, includes the following:

> No one disputes that Taiwan has mounted one of the world's most successful efforts to contain the pandemic to date, despite its close proximity to the original outbreak in Wuhan, China. This should not be a surprise. Transparent, vibrant, and innovative democracies like Taiwan always respond faster and more effectively to pandemics than do authoritarian regimes.
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> WHO's Director-General Tedros had every legal power and precedent to include Taiwan in WHA's proceedings. Yet, he instead chose not to invite Taiwan under pressure from the People's Republic of China (PRC). The Director-General's lack of independence deprives the Assembly of Taiwan's renowned scientific expertise on pandemic disease, and further damages the WHO's credibility and effectiveness at a time when the world needs it the most.

b. U.S. withdrawal

On July 6, 2020, the United States notified the Secretary General of the United Nations of the United States withdrawal from the WHO. UN Secretary-General, Depositary Notification (July 14, 2020), https://treaties.un.org/doc/Publication/CN/2020/CN.302.2020-Eng.pdf. This action followed President Trump's May 29, 2020, announcement that the United States would

terminate its relationship with the WHO over its handling of the coronavirus pandemic. The U.S. letter is excerpted in Chapter 4.*

On September 2, 2020, the State Department hosted a briefing (via teleconference) regarding next steps with regard to the U.S. withdrawal from the WHO. Participants in the briefing include: Deputy Assistant Secretary of State Nerissa Cook from the Bureau of International Organization Affairs; Director of the Office of Global Affairs at the Department of Health and Human Services Garrett Grigsby; and Dr. Alma Golden, assistant administrator for global health, USAID. The briefing is excerpted below and available at https://2017-2021.state.gov/briefing-with-nerissa-cook-deputy-assistant-secretary-of-state-bureau-of-international-organization-affairs-garrett-grigsby-director-of-the-office-of-global-affairs-department-of-health-and-human/.

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MS COOK: … Today we are announcing significant steps to complete th[e withdrawal] process …, and including on matters related to funding.

I am pleased to be joined today by colleagues from USAID and HHS. …

Before we proceed, let me note in advance that the information we are providing today was also presented to WHO Director General Tedros during a meeting earlier today with our U.S. ambassador in Geneva, Andrew Bremberg.

To begin, I would like to discuss the status of U.S. assessed contributions to the WHO. These are the annual dues that member-states are required to pay as the price of membership. As with many UN organizations, the U.S. is assessed at 22 percent of the WHO's regular budget, which typically totals more than $100 million a year. For Fiscal Year 2020, the U.S. assessment was just over $120 million, of which 58 million had already been contributed at the time of the President's April decision to suspend additional funding. Today we are announcing the remaining portion of the 2020 assessment, slightly more than $62 million, will be reprogrammed to the UN to pay other assessments.

I would like to turn now to my colleagues to discuss some of the specific steps their agencies are taking to implement the President's decision, but let me make one additional comment about the U.S. institutional relationship with the WHO going forward: There may be instances in the future when the United States wishes to participate in particular meetings of the WHO's governing bodies and technical and advisory committees where we believe American interests need to be represented. We will consider those instances on a case-by-case basis.

Now for additional detail on questions related to funding of global health priorities, let me turn first to HHS ….

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* Editor's note: On January 20, 2021, the United States retracted its notice of withdrawal and stated that it "intends to remain a member of the World Health Organization." The depositary notification is available at https://treaties.un.org/doc/Publication/CN/2021/CN.11.2021-Eng.pdf.

MR GRIGSBY: … A number of operating divisions of the Department of Health and Human Services traditionally have engaged with the World Health Organization and some of these interactions have included voluntary contributions. In the case of voluntary program funding, operating divisions of HHS have in some cases … found other recipients to carry out activities moving forward. …

The WHO activities that HHS will support this year are one-time exceptions for funding, up to $40 million, in the program areas of immunization and influenza. These contributions would be to ensure continuity of activities important to the health security of Americans for which there was not immediate alternative programmatic partners. They'll ensure that activities … of critical concerns to the health of Americans will continue until appropriate alternative partners are secured. The one-year timeline for U.S. withdrawal from WHO allows time to find and secure partnerships to fund critical programs. HHS is well underway with this process to make this happen in advance of the one-year anniversary of Secretary Pompeo's letter to the UN Secretary-General making known U.S. intentions with regard to WHO.

Finally, HHS has a number of individuals detailed to WHO working on technical health issues. We're working with these individuals to bring them home or to send them to their next assignment in advance of 2021 when the U.S. will no longer be a member of WHO.

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MS GOLDEN: …

… USAID has funded our work with the World Health Organization through voluntary contributions. My colleagues and I at the agency have worked diligently to identify appropriate partners to carry out this urgent and complex work on which we previously collaborated with WHO. Despite progress on the humanitarian reform, it is critical that the WHO better prepare for, prevent, detect, and respond to outbreaks of dangerous pathogens with transparency and with accountability. While in the vast majority of cases, USAID has identified strong and appropriate partners to carry forward this work, we will make a one-time disbursement of up to $68 million to the WHO to support humanitarian health assistance in Libya and Syria as well as efforts to eradicate polio in priority countries. These exceptions reflect the few cases in which WHO has the unique capabilities that an alternate partner could not replicate at this time.

Since 2001, the U.S. Government has contributed more than $142 billion to help prevent, detect, and treat HIV/AIDS, malaria, tuberculosis, Ebola, and other dangerous diseases and conditions. We give an average of $10 billion per year for global health, and this year, it will be double that as we surge to fight COVID-19 worldwide.

USAID is determined to ensure that our withdrawal from WHO does not affect the level of our overall health assistance to the most vulnerable. The United States leads the world in health and humanitarian aid through an all-of-America effort, and we are committed to ensuring that our generosity directly reaches people around the world. We and the rest of the U.S. Government will continue to engage the WHO on a limited basis during this coming year of our withdrawal.

On a case-by-case basis, the United States will participate in specific meetings of the WHO's governing bodies and technical and advisory committees. Our priorities will be events and processes of a normative, regulatory and standard-setting nature that have a direct impact on Americans, on U.S. national security, on U.S. economic interests, U.S. companies, and on the U.S. Government's global health investments.

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On September 3, 2020, the State Department issued a press statement providing an update on steps with respect to U.S. withdrawal from the WHO and the redirection of resources previously provided to the WHO. The press statement is excerpted below and available at https://2017-2021.state.gov/update-on-u-s-withdrawal-from-the-world-health-organization//index.html.

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The United States has long been the world's most generous provider of health and humanitarian assistance to people around the world. This assistance is provided with the support of the American taxpayer with the reasonable expectation that it serve an effective purpose and reach those in need.

Unfortunately, the World Health Organization has failed badly by those measures, not only in its response to COVID-19, but to other health crises in recent decades. In addition, WHO has declined to adopt urgently needed reforms, starting with demonstrating its independence from the Chinese Communist Party.

When President Trump announced the U.S. withdrawal from that organization, he made clear that we would seek more credible and transparent partners.

That withdrawal becomes effective on July 6, 2021, and since the President's announcement, the U.S. government has been working to identify partners to assume the activities previously undertaken by WHO.

Today, the United States is announcing the next steps with respect to our withdrawal from the WHO and the redirection of American resources. This redirection includes reprogramming the remaining balance of its planned Fiscal Year 2020 assessed WHO contributions to partially pay other UN assessments.

In addition, through July 2021, the United States will scale down its engagement with the WHO, to include recalling the Department of Health and Human Services (HHS) detailees from WHO headquarters, regional offices, and country offices, and reassigning these experts. U.S. participation in WHO technical meetings and events will be determined on a case-by-case basis.

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2. PAHO

On July 15, 2020, Secretary Pompeo issued a press statement regarding the Pan American Health Organization ("PAHO"). His statement follows and is available at https://2017-2021.state.gov/pan-american-health-organization-transparency/.

The United States government welcomes the Pan American Health Organization's decision to initiate an independent review of its role in the Mais Medicos program, pursuant to which PAHO provided well over a billion dollars to Cuba. The United States and other key PAHO member states have actively worked with PAHO leadership to design this review into how Mais Medicos was initiated and operated.

The review is designed to answer the questions that the U.S. government has raised.

3. Charter Committee

On February 18, 2020, Elizabeth Grosso, attorney-adviser for the U.S. mission to the UN, delivered the U.S. statement at the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization. Ms. Grosso's statement is excerpted below and available at https://usun.usmission.gov/statement-of-the-u-s-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengthening-of-the-role-of-the-organization/.

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The United States welcomes this opportunity to make some general observations about the work of the Special Committee this year. As we celebrate the 75th Anniversary of the signing of the UN Charter in San Francisco, we reaffirm our commitment to the Charter, and the spirit of multilateral cooperation embodied in that landmark occasion. In this milestone year, examining and strengthening adherence to the Charter through the work of this Committee takes on renewed importance.

With respect to items on the agenda under the peaceful settlement of disputes, the United States is looking forward to the annual thematic debate during this meeting focusing on the exchange of information on State practices regarding the use of conciliation. As member states, we must dedicate ourselves to preventive diplomacy. The annual debate is an opportunity to deepen the Committee's dialogue on this topic.

With respect to items on the Committee's agenda concerning the maintenance of international peace and security, the United States continues to note the positive developments that have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. We will look forward to the annual briefing on sanctions, and the biannual briefing on Article 50, and hope that these discussions will further advance an effective and appropriate approach to the use of sanctions.

The United States continues to believe that the Committee should not pursue activities in the area of the maintenance of peace and security 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 working paper that calls, among other things, for a Charter Committee legal

study of General Assembly powers, as well as a longstanding proposal regarding UN reform. On the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, we have consistently stated that the United States does not support the proposal.

However, we also continue to believe that consideration of the proposal of Ghana could lead to fruitful results, if its scope can be narrowed to areas where consensus is possible on how to fill specific gaps. We look forward to continued engagement and discussion in the working group.

The United States has welcomed productive steps in recent years to streamline the agenda of this Committee and to close the discussion of proposals that failed to generate consensus. We believe that there is more progress to be made in the area of productivity and rationalization of the Committee's work. The United States encourages Committee members to continue to make further improvements in this regard, giving further scrutiny to proposals with an eye toward updating our work and making the best use of scarce Secretariat resources. This includes the proposals made in past years to update the 1992 Handbook on the Peaceful Settlement of Disputes between States, and to establish a website also dedicated to the peaceful settlement of disputes.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, the United States continues to stand ready to engage on matters that have the potential to add value. These new items should be practical, non-political, and not duplicate efforts elsewhere in the United Nations. In addition, we would not wish this Committee to become a forum for the airing of bilateral concerns, or for meaningful discussion within its mandate to be displaced by consideration of topics more appropriately raised in other forums. In particular, concerns about the obligations of the host country should be raised in the dedicated Host Country Committee. We do not support the new proposal concerning unilateral coercive measures, and also have serious doubts about the new proposal concerning Article 51. We believe consideration of these politically charged topics has little prospect for generating consensus in this committee.

Finally, we thank the Codification Division of the Office of Legal Affairs for their continued work on the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council. 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. Responsibility of International Organizations

On November 11, 2020, Deputy Legal Adviser Julian Simcock delivered the statement on behalf of the U.S. Mission to the UN regarding the responsibility of international organizations. Mr. Simcock's remarks are excerpted below and are available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-88-responsibility-of-international-organizations/.

> We appreciate the work of the International Law Commission on the responsibility of international organizations, which is an important topic in light of the number of international organizations and their growing functions. We

also express our gratitude to the Secretariat, in particular the Office of Legal Affairs, for compiling the two reports that form the basis of our discussion today. The Reports enable us and the rest of the international community to stay current on the development of the law in this area. It was informative to review the application of the draft Articles by several arbitral and judicial bodies between 2017-2019. However, the limited development of the law in this area since the last time this topic was on our agenda confirms that it is not appropriate to take further action on the draft Articles.

In light of the lack of significant developments in this area over the last three years, we reiterate the view we have expressed on past occasions that many of the rules contained in the Draft Articles fall into the category of progressive development rather than codification of the law, a point expressly recognized in the General Commentary introducing the Draft Articles. We continue to agree with the Commission's assessment that the provisions of the present Draft Articles do not reflect the current law in this area to the same degree as the corresponding provisions on state responsibility. In this connection, we again highlight our view that the principles contained in some of the Draft Articles – such as those addressing countermeasures and self-defense – likely do not apply generally to international organizations in the same way that they apply to states.

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

5. Annual Program Budget

On December 31, 2020, the United States called for a vote in the UN General Assembly and voted against the 2021 UN Program Budget. In a press statement, available at https://2017-2021.state.gov/u-s-vote-against-the-united-nations-2021-program-budget/, the State Department provided the following explanation:

> [I]t is outrageous that the UN will fund in 2021 an event to promote the objectives of the Durban Declaration—a document saturated with anti-Semitism, anti-Israel bias, and hostility toward freedom of expression. Over the last 20 years, the United States has consistently opposed the corrosive Durban process. We call on all UN member states to seek new means to address constructively and inclusively the challenge of racism and racial discrimination. The United Nations should never serve as a platform for those determined to divide and diminish, but sadly that is all too often the case. For our part, we will continue to hold the United Nations to a higher standard.

B. INTERNATIONAL COURT OF JUSTICE

1. General

On December 18, 2020, Deputy Permanent Representative Richard Mills delivered remarks at a UN Security Council open debate on cooperation between the UN Security Council and the International Court of Justice. Ambassador Mills's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-cooperation-between-the-un-security-council-and-the-international-court-of-justice-via-vtc/.

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We are pleased that South Africa has organized this debate. The Security Council receives an annual briefing from the President of the International Court of Justice and exchanges views about issues of common interest, but those meetings by custom are held in private. In this 75th anniversary year of the Court, it is fitting that we have a second opportunity to highlight the crucial role of the ICJ and to do so at a public meeting.

I would first like to extend our congratulations to those candidates recently elected or re-elected to the Court, as well as our deep gratitude to all of the candidates for their dedication to the field of international law.

We appreciate the opportunity to address the relationship between the Court and the Security Council and the complementary role these principal organs play in the maintenance of international peace and security. The ICJ plays a vital role in promoting and preserving the rule of law, and in advancing international peace and security through the peaceful resolution of disputes.

The increasing workload of the ICJ demonstrates a recognition by Member States that accept its jurisdiction that it is preferable to resolve disputes peacefully through the ICJ rather than to allow them to fester and possibly lead to conflict. That these disputes may, as a result, never reach these chambers reinforces the effectiveness of the UN framework. As situations develop into matters requiring the Security Council's attention, we must, of course, remain mindful of where the Court might play a role while preserving the fundamental principle enshrined in the ICJ Statute of State consent to judicial settlement of disputes.

We are also mindful that the UN Charter, as we've heard, provides in Article 33 that parties to a dispute that is likely to endanger international security and peace shall first seek a solution through the peaceful means of their choice, which can run from negotiation, mediation, conciliation, arbitration, or judicial settlement.

Many disputes are successfully resolved through other means of dispute settlement, so that they never need to reach the Security Council or the ICJ. And with the multiplicity of available dispute settlement mechanisms, such as regional courts and international tribunals, parties to a dispute have a range of avenues to consider to resolve their disputes. And it is gratifying to know that for those Member States that accept its jurisdiction, the ICJ stands ready to adjudicate their disputes.

We should not forget, on this 75th anniversary, that there once was a day when territorial disputes, and even trade matters, were resolved, almost routinely, through military means. We should not take for granted how transformative the UN Charter and the ICJ Statute were when they were adopted, including in their advancement of the peaceful resolution of disputes in accordance with international law. On this 75th anniversary of the UN and of the ICJ, we celebrate their contribution to the promotion of the rule of the law and the preservation of international peace and security.

Mr. President, finally, let me add a few words as well about the trust fund to support participation in the ICJ judicial fellowship program. The program was founded in 1999, through an initiative of a very prominent law school in our host city: the New York University School of Law. The program has expanded over the years so that dozens of law school graduates have benefited from this worthy, valuable opportunity to work with and learn from the Judges of the ICJ.

We certainly agree that recent law school graduates from developing countries should also have the opportunity to participate in the ICJ's judicial fellowship program. Increasing opportunities for future practitioners of international law to learn about the Court and learn from its esteemed judges will itself serve to strengthen the rule of law and help to spread awareness of the valuable role the Court can play in the promotion of international peace and security.

Accordingly, we were very pleased to co-sponsor and to join consensus on the resolution establishing the trust fund, which the General Assembly adopted on Monday of this week.

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2. *Alleged Violations of the 1955 Treaty of Amity*

See *Digest 2018* at 220-27 for background on this case at the ICJ. On September 14, 2020 the ICJ held oral proceeding on the U.S. preliminary objections in *Alleged Violations of the 1955 Treaty of Amity*. The opening remarks of Legal Adviser Marik String are excerpted below. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Verbatim Record 2020/10 (Sep. 14, 2020, 3 p.m.), https://www.icj-cij.org/public/files/case-related/175/175-20200914-ORA-01-00-BI.pdf. The records of all oral proceedings in the case are available at https://www.icj-cij.org/en/case/175/oral-proceedings. The records of written proceedings, including the August 23, 2019 preliminary objections of the United States that were the subject of the 2020 oral proceedings, are available at https://www.icj-cij.org/en/case/175/written-proceedings.[**]

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[**] Editor's note: The Court rejected the U.S. objections in a February Judgment available at https://www.icj-cij.org/en/case/175/judgments.

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is my honour to appear as Agent of the United States in these proceedings. I am joined by two colleagues from the US Department of State—Lisa Grosh and Kimberly Gahan—who will present portions of our argument, together with Sir Daniel Bethlehem and Professor Laurence Boisson de Chazournes.

2. I wish to express, on behalf of the United States, our sincere appreciation for the Court's efforts to adjust its mode of work in view of the COVID-19 pandemic, while taking into account principles of due process and equality. I offer my best wishes for the health and safety of the Court and its staff, as well as the delegations participating in these proceedings.

II. Overview of the broader context of Iran's case

3. I turn now to our task in this hearing, to underscore the reasons why Iran's Application requires dismissal at this preliminary stage. It is well known that the United States has long considered Iran's conduct to present a grave threat to US national security and the safety and security of US nationals and interests, as well as to the security of our regional allies. These concerns are well founded in Iran's persistent actions: its support for terrorism, including terrorist acts that have taken, or threaten to take, the lives of US nationals; its supply of weapons and training to militant groups, fuelling conflict throughout the Middle East; its arbitrary and unlawful detention of US and foreign nationals; its development and proliferation of ballistic missile technology; and, of central significance to this case, its efforts to advance a destabilizing nuclear programme.

4. There is a deep and continuing record of Iranian misconduct in these areas, as addressed in detail in the US written submission. And it is important to be clear that these concerns—long-standing though they may be—persist and remain as urgent and necessary to address as ever.

5. The United States has engaged on a number of different tracks over the years to counter the threats posed by Iran. It has worked alongside other States within international organizations, such as the International Atomic Energy Agency (IAEA), in response to Iran's repeated violations of its nuclear safeguards obligations, which included the construction of undeclared nuclear facilities and the unreported importation, processing and enrichment of fissionable materials. It has pursued efforts in the Security Council, which—beginning in 2006—adopted a series of resolutions imposing measures to restrict Iran's nuclear activities, its trade in sensitive nuclear materials and technology, its ballistic missile-related activities, and its import and export of arms. And of course, the United States—like other States, as well as the European Union—has adopted measures under its domestic law to deter and discourage Iran from advancing these activities, and to deny it the materials, resources and capabilities to carry them out. The United States has adjusted its approach over time in light of the evolution of the threats posed by Iran and the need to develop effective means of addressing them.

6. In 2015, a political arrangement known as the Joint Comprehensive Plan of Action, or JCPOA, was concluded. The basic bargain in the JCPOA was that Iran would take steps to constrain its nuclear programme and provide greater transparency into it, while the United States and others would provide for the lifting of what were identified expressly by all sides, including Iran and the United States, as "nuclear-related" sanctions measures. Other areas of threatening Iranian activities, and the measures adopted to counteract them, were not addressed by the JCPOA.

7. After more than two years of implementing the JCPOA, the United States' assessment of whether this arrangement was advancing, or instead undermining, US national security had changed. As this Court well knows, the United States announced on 8 May 2018 that it would no longer participate in the JCPOA, and would not continue the lifting of US nuclear-related sanctions measures, in view of the persistent national security threats posed by Iran and the inadequacy of the JCPOA to address them.

8. The United States summarized its reasons in a National Security Presidential Memorandum issued on the same date. These reasons are also discussed at length in our written submission and accompanying annexes, so I will touch upon them just briefly now. The broad range of non-nuclear threats posed by Iran had continued, and in some cases grown, during US participation in the JCPOA. The United States assessed that, instead of leading to an overall reduction in the national security threats to the United States posed by Iran, the JCPOA—and in particular the lifting of nuclear-related sanctions—had the opposite effect, strengthening not only Iran's ability but also, crucially, its willingness to engage in other threatening activities outside the nuclear realm. The United States also explained its assessment that the JCPOA was not adequate in either the scope or duration of key commitments to address long-term concerns about Iran's nuclear activities, particularly given Iran's past deception regarding its nuclear programme and failures to co-operate as required with international inspectors. The United States concluded, in view of the totality of the threats posed by Iran, that it was in the national security interests of the United States to cease participation in the JCPOA.

9. The measures at issue in this case, which were reimposed as a consequence of that 8 May decision, reversed the US sanctions relief provided in the JCPOA. What Iran seeks in these proceedings is to obtain the Court's assistance to nullify the effect of the United States' decision to leave the JCPOA by giving Iran all the benefits that it would have received had the United States remained in the arrangement.

10. To accomplish this aim, Iran has resorted to an instrument that has nothing whatsoever to do with the JCPOA: the Treaty of Amity. It does so purely for purposes of trying to establish jurisdiction. The Treaty is well known to the Court, but the manner in which Iran is using it once again necessitates careful scrutiny. That scrutiny will show that this case should not proceed to the merits.

11. The measures that Iran challenges remain critical to the United States' efforts to address the national security threats posed by Iran, including the current threat posed by Iran's nuclear programme. The IAEA reported recent failures by Iran with respect to its nuclear safeguards obligations. Furthermore, Iran has engaged in enrichment and stockpiling of nuclear materials, as well as nuclear-related research and development activities, in clear failure to uphold its commitments under the JCPOA. Whatever Iran says about the reasons for its actions, they leave little room for doubt that depriving Iran of the means to further its destabilizing nuclear escalations is of continued and vital national security interest to the United States.

III. Developments since the last hearing

12. Against this backdrop, I would like to address two points that have arisen since the last hearing in this case in late August 2018. As the Court noted in its Judgment on preliminary objections in *Certain Iranian Assets*, on 3 October 2018, the United States gave notice to Iran of the Treaty of Amity's termination. The United States recognizes that the termination of the Treaty does not go to questions of jurisdiction, as Iran's Application was submitted before the termination. But it is not correct to assert, as Iran does, that the Treaty "remains in force" for the

purposes of this case. There can be no mistake about this: the Treaty of Amity is no longer in force.

13. Second, inasmuch as Iran has raised the point in its written submissions, I would like to affirm before the Court that the United States is acting fully in accordance with the Court's provisional measures Order. As the Court will know from the detailed US correspondence to the Court on this subject, the United States has taken significant steps since the ***issue*** of the Order to ensure the effectiveness of all relevant humanitarian exceptions, exemptions and authorizations, and to ensure that the reimposition of measures at issue in this case has not posed an impediment to the exportation to Iran of the goods and services identified in the Order. That said, this hearing is not about the issuance or compliance with the provisional measures Order. The task in the coming days is, rather, to address the US preliminary objections.

IV. Overview of US objections

14. Mr. President, Members of the Court, I turn now to outline briefly the remainder of our presentations today.

15. First, Mr. Bethlehem will elaborate on the inescapable reality that the real issue in dispute concerns Iran's attempt to obtain from the Court the sanctions relief that was provided under the JCPOA, an issue that is well outside the Treaty of Amity.

16. Next, Ms Grosh will address the fundamental mismatch between the Treaty's provisions and the measures that Iran challenges. The Treaty's provisions address specific elements relating to the Parties' *bilateral* economic and consular relations. They do not address measures concerning trade and transactions between one party and a third country, or between their nationals and companies—what we refer to as "third country measures".

17. Next, Ms Gahan, building on Ms Grosh's submissions, will explain that the vast majority of the challenged measures are such third country measures. The Court should accordingly dismiss claims predicated on those measures for lack of jurisdiction.

18. Professor Boisson de Chazournes will conclude our submissions today by explaining why, in any event, in this case, and in accordance with Article 79 of the Rules of Court, the Article XX exceptions in the Treaty of Amity concerning measures relating to fissionable materials and measures that are necessary to protect the essential security interests of a party preclude Iran's claims from proceeding to the merits.

V. Conclusion

19. Mr. President, Members of the Court, the United States has deep respect for this Court's role in the peaceful settlement of disputes. We are here to argue our case. But Iran has brought to the Court a dispute whose subject-matter does not fall within the Treaty of Amity. Iran has done so in relation to issues of the utmost gravity from the perspective of US national security: namely, the need to address Iran's destabilizing nuclear programme, as well as its ballistic missile activities, support for terrorism and regional destabilization, and the arbitrary and unlawful detention of US nationals. Iran's efforts to shoehorn this dispute into a legal instrument not intended for the purpose run counter to the aim of resolving these issues and are entirely without merit. For all the reasons you will hear over the course of the day, we respectfully request dismissal of Iran's case.

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

As discussed in *Digest 2018* at 235-51, and *Digest 2019* at 219-21, the United States participated in ICJ proceedings in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion). The ICJ issued its advisory opinion in 2019. On February 3, 2020, the United States provided a submission to the UN Secretary General, included in his May 18, 2020 report on the advisory opinion of the ICJ. U.N. Secretary-General, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Rep. of the Secretary-General, U.N. Doc. A/74/834 (May 18, 2020). https://digitallibrary.un.org/record/3865093/files/A_74_834-EN.pdf. The U.S. submission follows.

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The United States recognizes the important work of the General Assembly and the International Court of Justice, and recalls that their respective mandates must be exercised consistent with the right of States to determine for themselves how to peacefully settle their disputes. This fundamental principle of international law is reflected in both the Charter of the United Nations and the deliberate limitations that States elected to place on the Court's jurisdiction.

Consistent with this principle, the United States voted against General Assembly resolutions 71/292 and 73/295. These resolutions respectively sought and welcomed an advisory opinion inappropriately designed to address a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the British Indian Ocean Territory, also referred to as the Chagos Archipelago. The United States did not support referral of this matter to the International Court of Justice out of concern that it could set a dangerous precedent, including by disregarding the fundamental principle of international law that States must consent to adjudication of their bilateral disputes. During the debate in the General Assembly on resolution 71/292, other States Members of the United Nations expressed similar concerns and ultimately less than half voted in favour of referring the request to the Court.

However, out of respect for the International Court of Justice and given the potential implications of this improper request, the United States participated fully in the proceedings before the Court. It is notable that there was no disagreement among participants in those proceedings that the questions referred bore directly and significantly on an ongoing bilateral dispute over sovereignty, or indeed that the purpose of the referral was to adjudicate that sovereignty dispute. Attempts to present the questions as ones that might guide the General Assembly in the exercise of its decolonization mandate neither altered that reality nor displaced the principle of consent to judicial settlement as an important constraint on the Court's jurisdiction.

The General Assembly, in its resolution 73/295, did nothing to allay these concerns, including in its suggestion that a non-binding advisory opinion of the Court could not only resolve a bilateral dispute but also lead to obligations for third States and international organizations to take steps in support of one side in that dispute. This is a troubling

mischaracterization of the effect of the Court's opinion, a mischaracterization that reflects conclusions that are unsupported by either the historical record or the Court's own test for determining the existence of rules of customary international law, as is made clear in the submissions of the United States during the course of the proceedings before the Court.

Indeed, the approach taken by the General Assembly in its resolution 73/295 suggests that a State that is party to any bilateral dispute could be compelled to have its sovereignty dispute adjudicated through the Court's advisory opinion procedure simply through a recasting of its claim as a matter that could be addressed by the General Assembly. This position would effectively dispose of the non-circumvention principle, as well as rewrite the careful and conscious jurisdictional limitations that were placed upon the Court.

In conclusion, the United States reiterates its unequivocal support for the position that the United Kingdom is and remains sovereign over the British Indian Ocean Territory, as has been the case continuously since 1814. Furthermore, the United States notes that the arrangement involving the joint United States-United Kingdom military base in the British Indian Ocean Territory is grounded in the uniquely close and active partnership between the United States and the United Kingdom. The Territory's status as a United Kingdom territory is essential to the value of the joint United States-United Kingdom base in the Territory, which is critical to not only shared security interests but also our broader efforts toward global security. The importance of the base to the Indian Ocean region and beyond has been recognized by many States. The location of the shared base enables the United States and the United Kingdom to provide a rapid response in times of humanitarian crisis and allows us, with our allies and partners, to combat some of the most challenging threats to global peace and security, including terrorism and piracy, natural disasters and various types of maritime crime, including trafficking in persons and illicit drugs, as well as illegal, unreported and unregulated fishing.

* * * *

C. INTERNATIONAL LAW COMMISSION

Deputy Legal Adviser Julian Simcock delivered remarks on November 5, 2020 at a meeting of the Sixth Committee on the report of the International Law Commission. Excerpts follow from Mr. Simcock's remarks, which are available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-80-report-of-the-international-law-commission/.

* * * *

We would like to express our gratitude to the chair designate and secretary of the International Law Commission for their reports today, and we ask them to accept our thanks on behalf of the entire Commission for its work. 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 remains committed to the important work of the ILC. We reaffirm the written and oral comments that we offered last year on several ILC projects, and we look

forward to submitting our written comments by June 2021 on the drafts regarding peremptory norms in general international law or jus cogens, and protection of the environment in armed conflict. We urge the members of the Commission to take these comments fully into account as they revise their work products.

We also read with interest the reports drafted last spring by the various special rapporteurs, as well as the chairs of the sea-level rise working group. We will not be providing comments on those reports today, as the full Commission did not have an opportunity to work through those reports over the summer. To comment on those projects now would therefore be premature. Our silence on those matters today should not, however, be regarded as indicative one way or the other of the U.S. position on any specific aspect of those reports.

The United States appreciates the difficulty faced by the ILC in conducting its business during the pandemic, and the complications presented by virtual meetings. We trust the ILC's assessment of what is, and what is not, possible to accomplish on its substantive projects before it reconvenes in Geneva.

In this regard, the United States has a modest proposal for procedural work that might be accomplished virtually. As the U.S. delegation and others have pointed out in previous years, there is some confusion about the range of ILC work products, which in the past two decades has included draft articles, principles, conclusions, guides, and guidelines. The precise difference between some of these various frameworks is not readily apparent. Even when adopting the same framework over multiple projects the format and content of the final work products vary significantly. In addition, some recent products styled as draft "principles" or "conclusions" have included material more appropriate for draft articles — including, for example, binding language and dispute resolution clauses.

The United States therefore proposes that the ILC consider drafting a practice guide for the selection of the framework of its work products. This practice guide could detail the criteria for the selection of a particular work product framework, the types of provisions that may be included within that framework, and what the legal implications of the framework choice might be, if any.

We hope the ILC finds this proposal useful. On behalf of the United States, we send our best wishes for the health and safety of the ILC Members and their families during these difficult times.

* * * *

D. ORGANIZATION OF AMERICAN STATES

1. Actions on Venezuela

On January 17, 2020, Secretary Pompeo addressed the Organization of American States ("OAS") regarding Venezuela. His remarks are excerpted below and available at https://2017-2021.state.gov/the-oas-revival/.

_____

* * * *

Throughout this past year, the OAS has been a vanguard for helping the Venezuelan people, they who are so downtrodden and starving because of Maduro's cruelty.

In only three months—very fast by diplomatic standards—we sat a new representative from Venezuela to the OAS, Ambassador Tarre.

We have helped bolster Juan Guaido's legitimacy in the international community, despite Maduro's best efforts to undermine him.

We revived the Rio Treaty, which led to increased travel restriction on Maduro and dozens of other officials. And you all should know that more actions will be coming.

Maduro certainly knows that we mean business. It's why he sought to withdraw Venezuela from this institution, the OAS. We welcomed Venezuela's new representative before he got the chance to do so.

We mean what we say in that charter that …the previous speakers referred to. The OAS Charter says as follows, quote: "Representative democracy is an indispensable condition for the stability, peace, and development of the region."

This is multilateralism, nations coming together in a way that truly does work.

These have been landmark actions, and in taking these actions we're returning to the spirit the OAS showed in the 1950s and 1960s. We sent election monitors to Costa Rica in 1962. Two years later, we imposed sanctions on Cuba for attempting to overthrow the democratically elected Government of Venezuela by force.

But sadly, the OAS drifted in the 1970s and 1980s. Military dictatorships in our hemisphere colluded to prevent concerted action to support freedom. Some Latin American countries were still in the thrall to leftist ideas that produced repression for their own kind at home and stagnation in this building. And even in the early part of this century, with the OAS, many nations were more concerned with building consensus with authoritarians than actually solving problems.

But the good news is—and I'm so proud of what you all have accomplished—that's all changed. …

As I said in Santiago last year, in 2019, people of the Americas have brought a new wave of freedom, freedom-minded governments all throughout our hemisphere. Only …in Cuba and Nicaragua and Venezuela do we face stains of tyranny on a great canvas of freedom in our hemisphere.

Look at the work that we have all done together. We have rejected despotism this year, besides what we've done in Venezuela.

In Nicaragua, the Permanent Council named a Commission of Member States that has investigated the Ortega regime's killing of hundreds and made clear recommendations for the future of that country.

More recently, the OAS honored the former Bolivian government's request to conduct an audit of the disputed election results. The probe conducted uncovered proof of massive and systemic fraud. It helped end the violence that had broken out over the election dispute. It helped the Bolivian Congress unanimously establish a date and conditions for a new election. And it honored … the Bolivian people's courageous demand for a free and fair election, and for democracy.

These actions didn't happen within the OAS by accident. It took hard work. They happened because the member states … decided to use the organization to get results. All of us, together.

They happened because we have a leader for our times as well. Secretary Almagro is fearless in guarding against authoritarian regimes. He believes in multilateralism that holds people accountable, that puts new ideas on the table, and forces countries to take a position.

He restored the OAS financial health too—building the reserve fund and strengthening internal financial controls. This is crucial to making the OAS effective in promoting prosperity throughout the region.

Just a handful of years ago, …the U.S. Congress openly entertained slashing funding for the OAS. Now Congress, America's Congress, is more eager than ever to support what we're doing together, because his leadership values capture the bipartisan values of freedom and of democracy. And the good financial management here too gives confidence that OAS progress will be effective, cost-effective, and transparent.

Secretary Almagro is worthy of our respect and our admiration. The heroes in the Hall of the Americas would be proud of what he's done. He is a true champion for freedom throughout our entire hemisphere.

And his example isn't just for those of us in the room. I think other leaders and other organizations—from the UN, to ASEAN, to NATO—should take note of how this institution has been run by the Secretary General …

* * * *

2. Summit of the Americas

On July 10, 2020, Acting Assistant Secretary of State for Western Hemisphere Affairs Ambassador Michael Kozak accepted the chair of the Ninth Summit of the Americas on behalf of the United States. See media note, available at https://2017-2021.state.gov/the-united-states-assumption-of-the-summit-of-the-americas-chair/. The media note explains:

> The United States will host the Summit in 2021.
>
> Acting Assistant Secretary Kozak participated in a virtual handover ceremony with the Organization of American States (OAS) Secretary General Luis Almagro, Peruvian National Summit Coordinator Luis Enrique Chávez, and OAS Secretary for Hemispheric Affairs Ambassador James Lambert. Acting Assistant Secretary Kozak recognized Peru for its leadership and vision for the Summit of the Americas process over the last four years which focused on the role of democratic governance in the fight against corruption.

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).

By the end of 2020, the IACHR appears to have successfully cleared the backlog of individual petitions pending its initial action on admissibility. This marked the conclusion of a years-long effort by the IACHR, with sustained encouragement from the United States, to resolve this substantial backlog in petitions. In the process of working through its backlog of petitions, the Commission's activity with respect to the United States increased in various respects. Since mid-2018, the Commission adopted sixteen merits reports making recommendations to the United States, fourteen of which concerned death penalty matters. The two non-death penalty matters concerned a Guantanamo Bay detainee and brothers of Japanese ancestry interned during World War II. During this same period, the Commission archived twenty-five petitions filed against the United States. In addition, the Commission determined seven petitions against the United States to be inadmissible in their entirety. The Commission also closed several requests for precautionary measures. These outcomes are best viewed in light of the practice of the Commission, which is not to adopt merits reports in favor of the United States.

In 2020, 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 26 petitions in 2020. Specifically, the United States submitted responses on the admissibility of 20 petitions and the merits of another six petitions; the United States responded to an additional four requests for precautionary measures and one request for information.

In addition to its written engagement, the United States participated virtually in three "periods of sessions" convened by the Commission. This consisted of two "thematic" hearings, requested by civil society on matters of interest to the Commission, and three closed working meetings on completed cases. No petition-based hearings were convened for the United States.

The United States also submitted a response to the Inter-American Court of Human Rights (IACtHR) on a request for an advisory opinion on the compatibility of executive term limits with human rights obligations and commitments under various Inter-American instruments, only the fifth such response submitted by the United States. In addition, the U.S. delegation participated virtually in two hearings convened by the Inter-American Court: one on the request regarding executive term limits, and the other on a request concerning obligations of a state denouncing the American Convention on Human Rights and purporting to withdraw from the OAS (on which the

United States submitted a written response in 2019). Apart from a 1989 advisory proceeding on the normative status of the American Declaration on the Rights and Duties of Man, these appear to be the only appearances by the United States before the Inter-American Court.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR and IACtHR in 2020 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2020 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2020 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-2528-17: Allen

On September 3, 2020, the United States submitted its response to a petition by Bridget Allen, relating to foreclosure on Petitioner's property in 2013, in which she alleges the United States is engaged in "genocide of black residents of the United States." The U.S. response, from which the discussion section is excerpted below, raises numerous procedural objections.

* * * *

The matters addressed by the Petition are not admissible and must be dismissed because the Petition fails to meet the Commission's established criteria in Articles 31, 32, 33, and 34 of the Rules. Claims presented in the Petition are beyond the *ratione personae* and *ratione materiae* competence of the Commission. Moreover, Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 20(c) of the Commission's Statute and Article 31 of the Rules. The Petition is not in compliance with the deadline for the presentation of petitions under Article 32 of the Rules. Because the Petition has apparently been submitted to another international governmental organization, it is precluded by the rule against duplication of procedures under Article 33 of the Rules. Finally, the Petition is 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, and it is manifestly groundless under Article 34(b).

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

Petitioner does not allege that the United States has "violated" the American Declaration. Instead, Petitioner purports to submit the Petition pursuant to 1948 Genocide Convention, "ICCPR Optional Protocol," CAT, ICESCR, and a U.N. Resolution. Each of these instruments is outside the Commission's competence *ratione materiae*. 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 1948 Genocide Convention, the "ICCPR Optional Protocol," CAT, ICESCR or the cited U.N. resolution. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioner's claims, which are based on such instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

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

To the extent that Petitioner articulates generalized allegations beyond those cognizable in relation to Petitioner, 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 Petitioner Bridget Allen. Therefore, the Commission only has competence to review particularized claims, to the extent such claims have been articulated, with respect to this named Petitioner. 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 generally by "black residents of the United States," "all black persons," or "black victims known and yet to be identified." Such claims are beyond the *ratione personae* competence of the Commission and out of order in the context of an individual petition. This same conclusion applies to Petitioner's claims pertaining to what she refers to as "Debtors' Prisons" in Ferguson, Missouri, which claims are also inadmissible because the Commission's governing instruments do not allow for an *actio popularis*.

C. The Petitioner has not Pursued or Exhausted Domestic Remedies.

To the extent that Petitioner might allege violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because Petitioner has not satisfied her duty to demonstrate that she has "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

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

The Petition does not evidence that Petitioner has pursued any domestic remedies to attempt to redress her claims of alleged human rights violations and, on that basis alone, the Petition should be deemed inadmissible. For example, Section 42 U.S.C. § 1983 provides for suit against state government officials for violations of constitutional rights in U.S. district court. However Petitioner did not pursue her constitutional or civil rights claims against state officials. And, although Petitioner curiously indicated that the Petition was intended to provide the state of Virginia with notice of her intent to pursue certain tort claims in state court, there is no indication that such claims were pursued.

Instead, Petitioner unsuccessfully pursued a series of claims before the U.S. Court of Federal Claims, a court of special jurisdiction. The U.S. Court of Federal Claims explained that it lacked jurisdiction over Petitioner's civil rights and constitutional due process claims. As the Commission has noted, pursuit of claims that cannot provide a petitioner the relief he or she seeks do not satisfy the exhaustion requirement. For example, in *Josué Luís Zaar v. Brazil*, the Commission found that pursuit of administrative remedies incapable of providing relief was insufficient to satisfy the Commission's exhaustion requirement:

> Based on the information provided by the parties, the Commission verifies that, as provided by domestic legislation, the alleged victim could have engaged competent judicial mechanisms . . . . However, he limited himself to the complaint filed with . . . a body with administrative jurisdiction that would not have been able to give the alleged victim what he was seeking. Thus, the Commission considers that this petition does not meet the requirement for exhaustion of domestic remedies.

Similarly, in its report in *Leonardo López Amancio v. Peru*, the Commission "reiterate[d] that the domestic remedies that must be taken into account for the purpose of exhaustion of domestic remedies are those capable of resolving the legal situation infringed." Because the remedies pursued in that case, even if resolved in petitioner's favor, "would not have remedied the situation brought before the IACHR," they were insufficient to satisfy the Commission's exhaustion requirement. The same reasoning is applicable to the instant Petition. Because Petitioner's claims before the U.S. Court of Federal Claims were not capable of providing remedies for Petitioner's human rights claims, those claims—even if they had been exhausted, though there is no indication that they were—would not be sufficient to satisfy the Commission's exhaustion requirement. Therefore, Petitioner has failed to satisfy the exhaustion requirement at Article 20(c) of the Commission's Statute and Article 31 of the Rules and the Petition must be dismissed.

D. The Petition is Inadmissible because it is Untimely under the Statute of Limitations.

Even if the Commission determines that Petitioner has exhausted her domestic remedies, which it should not, 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 December 22, 2017, which is more than six months after decisions were rendered by the U.S. Court of Federal Claims in 2013 and 2014 dismissing Petitioner's claims. The Commission applies the six-month

requirement under article 32(1) strictly. Petitioner does not assert, and could not substantiate, entitlement to exemption from the exhaustion requirement under Article 31 of the Rules and, even if she had, could not demonstrate that the Petition was "presented within a reasonable period of time" within the meaning of Article 32(2). Petitioner failed to submit the instant Petition in conformity with the statute of limitations for petitions under Article 32 of the Rules, further rendering the Petition inadmissible.

E. The Petition appears to be Duplicative of other Procedures.

Article 33 of the Rules provides that the Commission "shall not consider a petition if its subject matter . . . essentially duplicates a petition pending . . . by another international governmental organization of which the State concerned is a member." The Petition is styled as a "UN OHCHR Petition and Complaint" and appears to be duplicative of a petition submitted to the Office of the High Commissioner of Human Rights. The OHCHR is a human rights organ of the United Nations, an international governmental organization of which the United States is a member. Therefore, it appears that the Petition is inadmissible under Article 33 of the Rules as duplicative of other procedures.

F. The Petitioners 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.

First, Petitioner alleges without basis that the United States has engaged in "Genocide of black residents of the United States" through generalized allegations of violations of several instruments beyond the competence of the Commission. However, Petitioner has not articulated facts that tend to establish any violation of any right in the American Declaration by the United States in this regard. Instead, Petitioner presents baseless assertions that, *inter alia*, the United States "has undertaken a massive cover-up to conceal that it has completely eliminated" Title VI of the Civil Rights Act of 1964, and engaged in a conspiracy "of takings of black citizens' property, without their knowledge." These frivolous claims do not state facts that tend to establish a violation of the American Declaration, including any violation of the right to life under Article I, pursuant to Article 34(a) of the Rules. Moreover, such claims are baseless and must be rejected under Article 34(b) of the Rules.

Second, to the extent that Petitioner has articulated particularized claims alleging human rights violations, it appears that those claims are based on alleged discrimination by various organs and entities of the state of Virginia and the Federal government. However, Petitioner has failed to state facts that tend to establish that she has suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. The Petition asserts throughout that actions Petitioner complains of were motived by discrimination. Yet Petitioner states no facts that tend to establish that actions she complains of were animated by a protected factor. The mere fact of Petitioner's race or sex, without more, is insufficient to substantiate a claim that actions were taken with respect to her on an impermissible basis. Therefore, Petitioner's claims based on alleged discrimination are inadmissible under Article 34(a) and 34(b) of the Rules.

Finally, the Petition includes a series of allegations of discrimination by private entities. It is well established that State responsibility for the conduct of private actors is limited to certain specific circumstances, none of which is present here. The International Law Commission has articulated such exceptional circumstances as arising where "the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out

the conduct." Thus, for alleged private abuses to be attributable to the United States, Petitioner would have to show that each abuse occurred either as a result of control exercised or instructions given by the United States. Petitioner has shown nothing of the kind. The private conduct Petitioner complains of, even if true, could not be attributed to the United States under international law. Therefore Petitioner's claims in this regard are inadmissible and cannot form the basis of any purported violation of the American Declaration.

* * *

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 because it is manifestly groundless.

G. The Petition Fails to Satisfy the Requirements for a Precautionary Measures Request.

While the Petition includes a request for precautionary measures, Petitioner fails to state how the Petition satisfies the requirements for such a request under Article 25 of the Rules. Article 25 reserves precautionary measures for "serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the Inter-American system." The Petition fails to satisfy these elements, as defined in Article 25(2) of the Rules, and Petitioners present no argument to the contrary. There is no basis for a request by the Commission for precautionary measures in this matter.

The United States respectfully reaffirms its longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail. Because the United States is a not a State Party to the American Convention, the Commission has only the authority "to make recommendations … to bring about more effective observance of fundamental human rights." As such, the United States would construe any request by the Commission with respect to precautionary measures as recommendatory in nature.

* * * *

b. Petition No. P-2309-12: Carty

Excerpts follow from the May 4, 2020 U.S. response in *Carty*, a Texas death penalty petition raising consular notification and other issues.

_____

* * * *

As discussed in more detail below, consular notification claims do not raise a violation of a human right enshrined in any international instrument to which the United States—or any OAS member to our knowledge—is a party or has endorsed. However, the United States takes its consular notification and access obligations very seriously.

Carty was twice given written notice that, if she were a foreign citizen, the appropriate consulate would be notified of her arrest. The first such notice was provided on May 17, 2001 (the day following her arrest), the second on May 21, 2001. On May 17, a Magistrate Judge asked Carty if she was a United States citizen, and she confirmed that she was a United States

citizen. The accompanying written warning has been attached as Attachment 1. Had she informed the court that she was a foreign national, she would have received the following notice: "As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. Do you want us to notify your country's consular officials?" Had she informed the court that she was a U.K. citizen, she would have additionally received the following notice: "Because of your nationality, we are required to notify your country's consular representative here in the United States that you have been arrested or detained. We shall notify your country's consular officials as soon as possible."

On May 21, 2001, she was given the following warning when she appeared before a Magistrate Judge, attached as Attachment 2:

> "On this day, Carty, Linda, black, female, 42 years of age, personally appeared before me in the custody of Brenda Pope of HCSO, and I gave said accused the following warning: Carty, Linda, you have been accused of the offense of capital murder.
>
> You have the right to retain counsel. You have the right to remain silent. You have a right to have an attorney present during any interview with peace officers or attorneys representing the state. You have a right to terminate an interview with peace officers or attorneys representing the state at any time. You have a right to request the appointment of counsel if you are indigent and cannot afford counsel, and you have a right to have an examining trial.
>
> You are not required to make any statement and any statement you make may and probably will be used against you in your trial.
>
> **If you are not a citizen of the United States, you may have the right to contact your consulate. If you are a foreign national of certain countries, you have the right to have your consulate contacted for you**." (emphasis added)

Carty signed underneath the sentence "I understand the above warning," and in the "remarks" section, the Magistrate Judge noted, "per Δ: she is a U.S. citizen," indicating that this warning was provided orally, as well as in writing.

During a competency evaluation performed by Dr. Edward Friedman, a court-appointed psychiatrist, on June 27, 2001, Carty stated that she was born in the U.S. Virgin Islands, which, at least in part, explains why Texas officials may not have suspected that she was a foreign national despite her accent.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 20(c) of the Commission's Statute and Articles 31 and 34 of the Rules. The Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration, includes claims beyond the *ratione materiae* competence of the Commission, and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would be inappropriate in light of the Commission's Fourth Instance doctrine.

* * * *

b. Petitioner's Consular Notification Claim is not Cognizable under the American Declaration

Petitioner contends that when she was arrested, Texas authorities failed to tell her that she had the option of requesting that they notify the U.K. consulate of her detention, and that this alleged failure violated the VCCR.

This claim is inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the rights in the American Declaration, and lacks merit in any event. While the United States acknowledges that the Commission has taken a different view on this issue with respect to the VCCR, we respectfully maintain our firm position that the Commission does not, in fact, have competence to review claims arising under the VCCR. This lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration. Claims concerning consular notification do not give rise to a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission's Statute and Articles 23 and 27 of the Rules preclude their consideration here.

As the United States has emphasized in numerous previous submissions, consular notification is not a human right. The VCCR's consular notification protections are based on principles of reciprocity, nationality, and function, and any rights arising from those protections attach to consular officers for the purpose of facilitating a foreign state's information about—and access to—its nationals. Nor is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. In the *Avena* case, the International Court of Justice noted that neither the text, nor the object and purpose, nor the *travaux* of the VCCR support the conclusion that consular notification is an essential element of due process in criminal proceedings.

Moreover, the American Declaration's due process rights are not defined by the provisions of the VCCR. The availability of consular notification and access is premised on the existence of consular relations between governments. Consular access and assistance is thus undeniably a right exercised by the detained individual's State of nationality, through its consular officers, in order to facilitate that State's access to its national, as clearly stated in the introductory clause of Article 36(1) of the VCCR. As the plain text of Article 36(l)(c) provides: "*consular officers* shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation" (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual.

Furthermore, consideration of other VCCR clauses supports this view. The VCCR's preamble states that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a *state's right* to care for its nationals."

It is therefore up to representatives of the individual's State of nationality to determine whether or not to provide assistance, and the VCCR does not provide the detained individual any right or authority to demand it. While the State of nationality may diplomatically protest any failure to observe the terms of the VCCR and attempt to negotiate a solution, the individual does

not have a judicially enforceable right to compel compliance. To accept the argument that Petitioner's consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who is not given the option of consular notification at the time of arrest because of an absence of consular relations cannot receive a fair trial or due process of law.

Thus, because consular notification is not a right in the American Declaration, nor a component of any right therein, Article 34(a) of the Rules prevents the Commission from entertaining Petitioner's consular notification claims, and any such claims are meritless for the same reason.

Although this claim is inadmissible and meritless, the United States wishes to emphasize once again that it takes its consular notification and access obligations under the Vienna Convention very seriously and has made significant efforts over the past several years, as discussed in detail in several past proceedings before the Commission, to meet the U.S. goal of across-the-board compliance by domestic authorities. The United States has a robust outreach and training program on consular notification and access that targets federal, state, and local law enforcement, prosecutors, and judges. The centerpiece of this outreach is the regularly revised *Consular Notification and Access Manual*, a one-of-a-kind public resource also utilized as a best practice by governments of other States in seeking to improve their compliance with the VCCR's obligations. Among other things, the *Manual* provides detailed guidance on the law regarding consular notification and access, its application in a myriad of specific scenarios, and best practices. The *Manual* also contains sample consular notification statements in English, Spanish, and 27 other languages, sample fax sheets for providing notification, information on the applicable treaties, and sample diplomatic and consular notification cards, and contact information for foreign embassies and consulates in the United States. Since 1997, moreover, the U.S. Department of State has conducted more than 1,000 training sessions and distributed millions of manuals and pocket cards so that police and other officials may have easy access to the basic consular notification and access requirements.

Moreover, at the urging of the U.S. Departments of State and Justice, the Federal Rules of Criminal Procedure were updated in December 2014 to help facilitate compliance with U.S. consular notification and access obligations. Pursuant to these changes, under Federal Rules of Criminal Procedure 5(d)(1)(F) and 58(b)(2)(H), a defendant who is not a U.S. citizen and who has been charged with a federal crime shall be informed by a federal magistrate judge at the initial appearance that he or she "may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested." In addition to ensuring prospective compliance with our consular notification and access obligations, the United States is committed to honoring its obligations under *Avena*. The Commission is likely aware of our ongoing, concerted efforts over several years, including before the U.S. Supreme Court and with U.S. state officials, to give effect to the judgment. The Executive Branch has continued to take steps to promote compliance with *Avena*, including by seeking legislation. The United States reiterates its willingness to provide the Commission, at the Commission's request, further updates as to its robust consular notification outreach efforts.

* * * *

c. Petition No. P-2173-17: Citizens of Flint, Michigan

On October 14, 2020, the United States submitted its response to the petition filed by certain *Citizens of Flint, Michigan* claiming that the "right to democracy" was violated in connection with the Flint water crisis. Excerpts follow from the U.S. response.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 20(c) of the Commission's Statute and Articles 31 and 34 of the Rules. Claims presented in the Petition are beyond the *ratione materiae* and *ratione personae* competence of the Commission. Moreover, 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 and is manifestly groundless under Article 34(b). Additionally, consideration of the Petition would be inappropriate in light of the Commission's fourth instance doctrine. Finally, the Petition fails to satisfy the requirements for a precautionary measures request.

A. Claims based on instruments beyond the American Declaration, and certain provisions of the American Declaration, are inadmissible because they are outside the Commission's competence *ratione materiae.*

Petitioners allege 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). …

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 claims that international legal obligations have been violated. Petitioners identify such "applicable instruments" to include the OAS Charter, the Inter-American Democratic Charter, and the International Covenant on Civil and Political Rights. Petitioners also invoke, among other things, "regional custom," a U.S. decision applying the Alien Tort Statue, and a host of "developments" in "related areas of law." Claims based on such international instruments and purported authorities beyond the American Declaration are beyond the competence *ratione materiae* of the Commission and must be rejected as inadmissible.

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 such instruments and purported authorities, are inadmissible under Article 34(a) as outside the Commission's competence.

Moreover, Article 20 of the Commission's Statute further identifies the particular provisions of the American Declaration over which the Commission is empowered "to pay particular attention" vis-à-vis States not party to the American Convention. Article 20(a) enumerates these as "the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration." Therefore, Petitioners' principal claim based on Article XX of the Declaration falls beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission's Statute. Petitioners' subsidiary claims under on Articles V and XI of Declaration also fall beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission's Statute.

* * * *

C. The Petition fails to state facts that tend to establish a violation of the American Declaration and presents manifestly groundless claims.

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.

1. Violation of Article XX of the American Declaration

Petitioners' principal claim is that the United States violated Article XX of the American Declaration because, *inter alia*, the Local Financial Stability and Choice Act, Public Act 436 (PA 436) authorizes the appointment of emergency managers, who under certain circumstances exercise the power of the local government. Petitioners argue that, because such emergency managers are unelected, their appointment constitutes a violation their "right to democracy." This claim is inadmissible under Article 34 of the Rules.

Article XX of the Declaration provides that "[e]very person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free." As is clear from the text, Article XX does not limit the ability of democratically elected state officials, by operation of law enacted by democratically elected representatives, to appoint certain local officials to exercise municipal functions.

It does not follow from a right to participate in the government of one's country that each local official must be elected. Again, nothing in Article XX suggests that democratically elected state representatives may not, by operation of law enacted by democratically elected representatives, appoint local officials. This conclusion is consistent with the holdings of U.S. courts considering this matter. The U.S. Court of Appeals for the Sixth Circuit held, in addressing Petitioners' claims:

> American governments, whether state or federal, have subsidiary agencies that are led by appointed officials, and which make orders and regulations that may carry the force of law. No federal constitutional provision requires the administrators or boards that run these agencies to be elected. Suggesting as much would be revolutionary to our way of

> government, even assuming that a government under such a constraint could even function. . . .

The right to political participation does not require that each and every public official be elected. It should be recalled that public officials appointed pursuant to PA 436 remain subsidiary to democratically elected state officials.

To the extent that Petitioners complain about their enjoyment of the right to participate in government in the United States, such complaint is insufficient to constitute a claim under Article XX of the American Declaration because the Commission should provide the United States with a margin of appreciation to implement that right. The Commission should defer to the discretion of local democratically elected 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 factual and policy circumstances in this matter counsel strongly in favor of deferring to the discretion of those democratically elected officials responsible for decision-making. 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.

Here, 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 in another context that "States have a wide margin of appreciation," 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." In this case, Petitioners' arguments invite the Commission to intervene in domestic policy matters and substitute its policy judgment for that of national authorities with technical expertise in the relevant subject matter, legal competence to address the claims, and authority to impose appropriate remedies. This approach must be rejected because it is not supported by the provisions of the American Declaration on which Petitioners rely or by the facts in the record. Accordingly, Petitioners' claim under Article XX of the American Declaration is inadmissible under Article 34 of the Rules.

2. Violation of Articles I, II, VI, and XI of the American Declaration

Petitioners allege that, "[a]s a consequence of the violation of the right to democracy, the United States violated numerous other rights under Inter-American treaty law." Specifically, Petitioners argue that PA 346, "in undermining democracy, violated the right to life" as well as other rights defined by Petitioners, including under Articles I, II, VI, and XI of the Declaration. Petitioners attempt to bootstrap these subsidiary claims to their Article XX claim—perhaps in an effort to bypass their inadmissibility under Article 31 of the Rules—must be rejected under Article 34 of the Rules.

a. Article I (Right to Life)

Article I of the Declaration provides that "[e]very human being has the right to life, liberty and the security of his person." As an initial matter, the Petition does not state facts that tend to establish that any of the thirteen named Petitioners suffered a violation of their right to life. Moreover, even if any of the named Petitioners could allege that their right to life had been violated, such deprivation or violation did not result (and as a matter of logic could not have

resulted) from an alleged violation of the right to political participation under Article XX of the Declaration.

b. Article II (Right to Equality Before the Law)

Article II of the Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The named Petitioners have failed to state facts that tend to establish that they have suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. Moreover, again, even if any of the named Petitioners could allege that their right to equality before the law had been infringed, such deprivation or violation did not result from an alleged violation of the right to political participation under Article XX of the Declaration.

c. Article VI (Right to Establish a Family)

Article VI of the Declaration provides that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore." Petitioners argue that "violation of the right to democracy also resulted in a violation of the right to protection of the family." Petitioners' claim that the alleged violation of Article XX of the Declaration by PA 346 also violated Article VI should be dismissed for failure to establish a claim and as manifestly groundless. Again, even if any of the named Petitioners could allege that their right to establish a family had been infringed, such deprivation or violation did not result from an alleged violation of the right to political participation under Article XX of the Declaration.

Moreover, the right to family reflected in Article VI was not intended to apply to the Petitioners' situation. Rather, the language of this provision makes clear that it was intended to provide that all persons have the right to procreate and raise a family. The Commission's own practice bears out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family and to receive protection therefor. Moreover, in the case of the Gelman family in Uruguay, the Commission found the Gelman's petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter. Here, there is no similar direct State action, as required by Articles VI. Petitioners allege that the violation of their right to political participation, in and of itself, violated their right to family; even if this were true, this is not the type of direct state action that Article VI sought to target. Beyond this defect, the claim that one named Petitioner was "afraid" to procreate cannot be construed as a denial by the United States through PA 346 of the ability to procreate and raise a family within the meaning of Article IV.

d. Article XI (Right to Preservation of Health)

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. 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."

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." Instead, the Petition attempts to expand the scope of Article XI and relies on cases interpreting other, inapposite international instruments. It is important to emphasize that Article XI is not an open-ended right encompassing all things related to the concept of "health." Rather, Article XI specifically contemplates the right to the preservation of health through "sanitary and social measures" relating specifically to "food, clothing, housing and medical care," and further qualifies that right with the clause "to the extent permitted by public and community resources." Article XI not only allows, but in fact requires, the balancing of the considerations enumerated therein, including scientific and technical resources and economic and social impacts. In other words, even if Petitioners had successfully articulated a claim with respect to sanitary and social measures relating to food, clothing, housing and medical care—which they have not—such claim must further be weighed against the resource limitations expressly contemplated by Article XI itself.

The evaluation and balancing required by Article XI rests with the regulatory regime of the State and, for the reasons so cogently expressed in *Fadeyeva*, discussed above, must be accorded great deference. Section I of this Response demonstrates that the state of Michigan's system under PA 346 is comprehensive and affords ample opportunity for participation by affected individuals and groups, and that Michigan has been, and continues to be, actively engaged in addressing the subsidiary concerns raised by Petitioners. This system may not be perfect, but its processes and results are entitled to the "wide margin of appreciation" demanded by *Fadeyeva*. Such deference to the expertise of domestic institutions is particularly mandated here, where the process of remediation is ongoing and evolving. And, even if Petitioners had, their claim is not cognizable *ab initio* under Article XI of the American Declaration because it falls beyond the preservation of health through 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.

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Taken together, Petitioners' claim that their rights under Articles I, II, VI, and XI of the American Declaration were violated by PA 346, because that legislation allegedly violated Petitioners' right to political participation, must be rejected under Articles 34(a) and 34(b) of the Rules. The claims are inadmissible under Article 34(a) of the Rules because the Petition does not state facts that tend to establish that PA 346 violated Petitioners' rights under the American Declaration as Petitioners alleges; such claim is manifestly groundless within the meaning of Article 34(b) of the Rules.

* * * *

d. Petition No. P-3034-18: Dr. Ismail Elshikh and the Muslim Association of Hawai'i

The petition on behalf of Dr. Elshikh and others was filed after the Supreme Court of the United States upheld Presidential Proclamation 9645 (the final iteration of the so-called "Muslim Ban") in *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018). The petition challenges the proclamation under the American Declaration. Excerpts follow from the U.S. response, submitted on November 13, 2020.

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* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it is, at least in part, beyond the *ratione personae*, *ratione materiae*, and *ratione loci* competence of the Commission and because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules. Petitioners failed to exhaust the domestic remedies available in the United States, as required by Article 20(c) of the Commission's Statute and 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 and is "manifestly groundless" under Article 34(b). Finally, review of the Petition would run afoul of the Commission's fourth instance doctrine.

* * * *

As established above, the Commission should find this Petition inadmissible because at least portions of the Petition are beyond the competence of the Commission and because Petitioners failed to exhaust domestic remedies. 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.

i. Article II (right to equality before law)

Article II of the American Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The Petition alleges that the Proclamation violated the rights of Petitioner Elshikh and members of the Muslim Association of Hawai'i to be free from discrimination. However, Dr. Elshikh and members of the Muslim Association of Hawai'i state they are U.S. citizens and lawful permanent residents of the United States. As such, they are not subject to the Proclamation. The Proclamation does not apply to United States citizens and expressly exempts lawful permanent residents. Therefore, Petitioners could not have been subject to a violation of their right to equality before law by operation of the Proclamation because the Proclamation does not apply to Petitioners. Petitioners may disagree with the Proclamation but such disagreement is insufficient to substantiate a claim of violation of their right to equality before law. Petitioners have therefore failed to state facts that tend to establish a violation of their rights to equality before law under Article 34(a) of the Rules.

ii. Article VI (right to establish a family)

Article VI of the Declaration provides that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore." Petitioners assert that their right to establish a family has been violated because, for example, Dr. Elshikh is "unable to receive visits" of family who reside in countries covered by the Proclamation and because some family members of some members of the Muslim Association of Hawai'i "face similar obstacles" with respect to visitation by family members who reside in countries covered by the Proclamation.

The right to establish a family reflected in Article VI was not intended to apply to the Petitioners' situation. Rather, the language of this provision makes clear that it was intended to provide that all persons have the right to procreate and raise a family. The Commission's own reports bear out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family and to receive protection therefor. Moreover, in the case of the Gelman family in Uruguay, the Commission found the Gelman's petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter.

Here, there is no similar State action, as required by Article VI. That Petitioners may face obstacles with respect to visits by family members from countries covered by the Proclamation is not sufficient to state facts that tend to establish that the United States has violated the right to establish a family under Article VI of the Declaration. In this respect, it should also be emphasized that the Proclamation expressly provides that a waiver of its restrictions may be granted where "the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship." As noted above, it is unclear which Petitioners have allegedly suffered a violation of their right to establish a family, much less whether the individuals on behalf of whom Petitioners purport to assert claims pursued a visa and exhausted such waivers if they were determined to be inadmissible under the Proclamation, before submitting this Petition to the Commission. The Petition's claim based on Article VI of the Declaration is inadmissible under Article 34(a) and 34(b) of the Rules.

iii. Article XXVII (right of asylum)

Article XXVII of the Declaration provides that "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements." The Petition presents a generalized claim that asylum seekers from certain countries who were present in the United States were expelled without an asylum hearing. However, as noted earlier, Petitioners, Dr. Elshikh and members of the Muslim Association of Hawai'i, state they are U.S. citizens and lawful permanent residents of the United States; as such, Petitioners are not in a position to seek and receive asylum in the United States and therefore their right of asylum cannot have been violated by the United States. Moreover, the Proclamation exempts from its restrictions "any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture." The Proclamation further provides that "[n]othing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States." Therefore, the Proclamation could not have violated Petitioners' right to seek and receive asylum in the United States even if they had been in a position to exercise such a right. Petitioners' claim under Article XXVII of the American Declaration is therefore inadmissible under Article 34(a) and Article 34(b) of the Rules.

iv. Article XXVI (right to due process of law)

Article XXVI provides that "[e]very accused person is presumed to be innocent until proved guilty," and further provides that "[e]very person accused of an offense has the right to be

given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment." Article XXVI, by its express terms, is limited to the criminal context as it refers to persons "accused of an offense." As such, Petitioners have failed to state facts that tend to establish a violation of Article XXVI and this claim must be dismissed under Article 34(a) of the Rules.

Even if the Commission adopts a broader interpretation of Article XVII beyond the criminal context, it remains the case that Petitioners have failed to establish that the Proclamation deprived them of any process to which they were due. As discussed above, Petitioners—Dr. Elshikh and the Muslim Association of Hawai'i—state they, or in the case of the Association, its members, are U.S. citizens and lawful permanent residents of the United States, and as such, are not subject to entry restrictions under the Proclamation. Therefore, entry restrictions under the Proclamation could not have deprived them of due process. For this additional reason, Petitioners have failed to state facts that tend to establish a violation of Article XXVI and this claim must be dismissed under Article 34(a) of the Rules.

To the extent that the Petition might refer to otherwise inadmissible, unexhausted claims on behalf of individuals who are not petitioners in this matter (i.e., neither Dr. Elshikh nor members of the Muslim Association of Hawai'i), who were allegedly denied entry into the United States, the United States notes that visas were not revoked pursuant to the Proclamation and that individuals subject to the Proclamation who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued. Any claim to the contrary is groundless and must be rejected under Article 34(b) of the Rules.

Lastly, to the extent that the Petition might refer to otherwise inadmissible, unexhausted claims on behalf of individuals who are not petitioners in this matter, who, under either the Proclamation or a different executive action, were allegedly denied entry into the United States, the United States notes that there is no right to a visa or entry under U.S. law. Further, a visa permits its holder to seek entry into the United States, but does not constitute a "vested legal right" to enter the United States under the Immigration and Nationality Act or any other authority. Nor does the American Declaration reflect any commitment on the part of the United States to create such a right. To the contrary, international law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with its domestic laws and any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of State sovereignty. Accordingly, denial of admission to an alien—regardless of visa issuance—is not violative of any legal right and, accordingly, such denial does not constitute a violation of due process. Petitioners' reference to the Inter-American Court of Human Rights advisory opinion, *The Juridical Condition and Rights of Undocumented Migrants*, is irrelevant to the instant matter because that opinion concerned due process rights associated with deportation, which is not at issue in the Petition, rather than admission.

In sum, Petitioners have failed to state facts that tend to establish a violation of Article XXVI of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners' claim that the United States has failed to live up to its commitments under Article XVIII is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

* * * *

e. Petition No P-502-18: G A-C- and others

On August 30, 2020, the United States submitted its response to the petition filed on behalf of "G A-C-" and others challenging the pardon of Joseph Arpaio, the elected sheriff of Maricopa County, Arizona, from 1993 through 2016.

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The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 20(c) of the Commission's Statute and Articles 31 and 34 of the Rules. Claims presented in the Petition are beyond the *ratione materiae* and *ratione personae* competence of the Commission. Moreover, Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also 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 and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would be inappropriate in light of the Commission's fourth instance doctrine.

* * * *

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.

1. Violation of Articles I, II and XXV of the American Declaration

Petitioner's first claim is that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court violated his rights to liberty, equal protection of the law, and fair trial under the American Declaration. This claim is inadmissible under Article 34 of the Rules.

Article I of the Declaration provides that "[e]very human being has the right to life, liberty and the security of his person." Relatedly, Article XXV of the Declaration provides, *inter alia*, that "[n]o person may be deprived of his liberty except in cases and according to the procedure established by pre-existing law." Although Petitioner claims that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court violated his right to liberty, there are not facts in the Petition that tend to establish such a violation. Assuming that Petitioner suffered a violation or deprivation of his right to liberty in 2013 as he alleges, such deprivation or violation did not result (and as a matter of logic could not have resulted) from the 2017 pardon at issue. The 2017 pardon, and not Petitioner's alleged detention in 2013, is the basis for the claims in the Petition. The pardon at issue had no impact on Petitioner's right to liberty.

Article II of the Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Petitioner has failed to state facts that tend to establish that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court subjected Petitioner to treatment that is unequal before the law. Again, assuming that Petitioner suffered a violation of his right to equal protection in 2013 as he alleges,

such violation did not result (and as a matter of logic could not have resulted) from the 2017 pardon at issue. The pardon at issue had no impact on Petitioner's enjoyment of his right to equality before the law.

Taken together, Petitioner's claim that his rights under Articles I, II, and XXV of the American Declaration were violated by the 2017 grant of executive clemency must be rejected under Articles 34(a) and 34(b) of the Rules. The claims are inadmissible under Article 34(a) of the Rules because the Petition does not state facts that tend to establish that the 2017 grant of executive clemency violated Petitioner's rights under the American Declaration; such claim is manifestly groundless within the meaning of Article 34(b) of the Rules.

2. Violation of Article XVIII of the American Declaration

Petitioner's second claim is that the grant of executive clemency from any sentence that could have resulted from Arpaio's criminal conviction for contempt of court violated his right to resort to the courts under Article XVIII of the American Declaration. This claim is inadmissible under Article 34 of the Rules.

Article XVIII provides that "[e]very person may resort to the courts to ensure respect for his legal rights." Petitioner has failed to state facts that tend to establish that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court deprived Petitioner of access to the courts. The pardon at issue had no impact on Petitioner's access to courts in the United States. Nor has Petitioner stated facts that tend to establish that he was, at any point, deprived access to courts in the United States. In addition to this defect, Petitioner presents a series of related arguments that are beyond the scope of Article XVIII because they do not allege deprivation of Petitioner's access to courts within the meaning of Article XVIII; the United States will nevertheless address the points in turn.

Although Petitioner claims that the pardon "quashed the possibility of effective remedies to the victims of Arpaio's *continued* acts of discrimination and arbitrary detention," Arpaio had ceased to hold office in 2016, some two years before the Petition was filed; there could exist no "continued acts of discrimination and arbitrary detention" by Arpaio at the time the Petition was filed in 2018, much less to this date. Moreover, as early as 2016, plaintiffs in relevant underlying class action litigation no longer alleged that the MCSO remained in violation of the Court's 2011 preliminary injunction through continued engagement in unlawful detention practices. Petitioner's attempt to obfuscate the fact that Arpaio's unlawful conduct has long since been halted—and indeed, that Arpaio was voted out of office by the residents of Maricopa County—is unavailing.

Moreover, assuming that Petitioner qualified as a member of the *Melendres* plaintiff class—which his allegations, if true, suggest—he would have benefitted (and would continue to benefit) from the remedial orders issued in favor of the plaintiff class. These remedies included the creation of an independent disciplinary process to impose the MCSO employee discipline policies in a fair and impartial manner. These remedies also included an extensive victim compensation program to provide monetary remedy to victims of the unlawful practices of the MCSO. Again, these injunctive and other remedial measures were unaffected by the pardon at issue and remain in place. Although Petitioner alleges that the pardon "effectively terminated and made futile pursuit of [remedies]," Petitioner has not explained what such remedies he envisions or how such remedies became unavailable to him as a consequence of the pardon as a factual matter. In any event, this claim is plainly refuted by the factual record. Petitioner would benefit from the remedies secured for the *Melendres* plaintiff class, and has failed to establish that he has been deprived any remedy as a result of the pardon at issue.

Relatedly, although Petitioner takes issue with the fact that Arpaio benefited from clemency in connection with any sanction that could have arisen from Arpaio's criminal contempt charge, it should be emphasized that the criminal conviction itself remains in place. As Judge Bolton noted in her decision not to vacate Arpaio's criminal conviction, the pardon "did not, however, 'revise the historical facts' of this case." Petitioner's invocation of the *Barrios Altos* line of cases in this context is misplaced. In *Barrios Altos*, the Inter-American Court of Human Rights found that domestic law purporting to confer amnesty over violations of certain "non-derogable rights recognized by international human rights law" is incompatible with the American Convention on Human Rights. In addition to the fact that the United States is neither a party to the American Convention nor subject to the jurisdiction (or jurisprudence) of the Inter-American Court, the reasoning of the *Barrios Altos* decision is not relevant to the claims in the Petition because the Petition does not allege that amnesty has been conferred over "non-derogable rights," identified by the court in that case as "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance." Instead, the Petition concerns a prospective pardon for possible sanction arising from a contempt of court conviction. Whatever limitations international law may impose upon the effectiveness of domestic amnesty provisions over certain crimes under international law, those limitations are not implicated by the pardon at issue in the Petition.

Finally, the American Declaration does not prescribe sanction for a criminal charge of contempt of court, and the mere fact that Arpaio did not ultimately face such sanction does not give rise to an actionable claim by Petitioner under the American Declaration of a violation of any human right Petitioner enjoys under the Declaration. Petitioner's human rights were no more impacted by the pardon than they would have been had Arpaio not been referred for criminal prosecution for contempt of court in the first instance; Petitioner was not entitled to such referral, nor was he entitled to any particular outcome from such referral, including any imposition of a sanction upon a contempt of court conviction. Petitioner has failed to state facts that tend to establish a violation of Article XVIII and his claim is baseless; it must be rejected under Article 34 of the Rules.

3. Violation of Article II of the American Declaration

Petitioner's third claim, also under Article II of the American Declaration, alleges that the pardon at issue itself violated Petitioner's right to equality before the law. Petitioner's principal support for this allegation is that the pardon was allegedly not processed through certain administrative channels prior to being granted, which allegedly support's Petitioner's claim that the "pardon lacked a legitimate objective." Whatever internal administrative process within the executive branch by which requests for executive clemency are evaluated is not mandated by the American Declaration and, in any event, cannot form the basis of an allegation of a violation of Petitioner's right to equality before the law. Nor can Petitioner's disagreement with the stated objective of the pardon provide such basis. In this respect, Petitioner has failed to state facts that tend to establish a violation of his rights under Article II and the claim is without basis; it must be dismissed under Article 34 of the Rules.

* * *

Petitioner's claims that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court violated his rights under Articles I, II, XVIII, and XXV of the American Declaration are inadmissible under Article 34 of the Rules. In addition, the Commission has repeatedly found that, where a Petitioner's claims have been addressed at the domestic level, the Commission does not consider *prima facie* that such

claims constitute a potential violation of a right. Plaintiffs in associated class action litigation secured remedies for the plaintiff class for the underlying conduct at issue, providing an additional reason for the inadmissibility of Petitioner's claims under Article 34 of the Rules.

* * * *

f. Petition No. P-1274-14: Islamic Shura Council for Southern California

The petition on behalf of the Islamic Shura Council for Southern California makes claims regarding litigation under the Freedom of Information Act ("FOIA") and access to information. The United States filed its response, excerpted below, on June 12, 2020.

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* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it is, at least in part, beyond the *ratione personae* competence of the Commission and because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules. Petitioner failed to exhaust 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 and is manifestly groundless under Article 34(b). Finally, review of the Petition would run afoul of the Commission's fourth instance doctrine.

A. THE COMPETENCE OF THE COMMISSION IS LIMITED

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to individual Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims that non-governmental organizations are themselves the beneficiaries of human rights commitments.

The Petition is filed on behalf of six organizations and five individuals. The Commission only has competence to review particularized claims with respect to these five 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… ." Relatedly, the Commission's governing instruments "do not allow for an *actio popularis*."

Although Petitioner contends that the six organizations named in the Petition have suffered violations of their human rights, it is axiomatic that the beneficiaries of human rights obligations and commitments are individuals. Generally speaking, a claimant alleging a violation of international human rights law is required to show that the rights of that particular individual have been violated—in other words, international law requires the identification of a specific victim. Absent particularized facts that a specific individual has been the victim of a violation of international human rights law, a human rights violation is not cognizable—irrespective of the

severity or gravity of the violation. This requirement is enshrined in Article 28 of the Commission's Rules of Procedure. Relatedly, Article 23 of the Rules, which concerns the presentation of petitions, clearly distinguishes nongovernmental entities from "person or persons" in such a way as to preclude the latter from encompassing the former by any reasonable canon of construction. Where an organization petitions on behalf of a "person or persons," the organization would not itself be an alleged victim and would not be construed as a "person or persons."

The language of the American Declaration makes clear that the subjects of the rights and duties articulated therein are individuals, not any legal subject more broadly…

The American Convention on Human Rights ("American Convention"), which followed the American Declaration, expressly defines "person" for purposes of the protections set out in the Convention to mean "every human being." While Petitioners invite the Commission to adopt a different and much broader definition of "person" for purposes of the Declaration—and to expand the scope of rights and duties enumerated in the Declaration to apply to all corporate legal persons—Petitioners have failed to provide a basis for adopting a different meaning of "person" than that articulated in the Convention. The absence of such an explanation is fatal where, as here, Petitioners' proposed construction is contrary to the language of the Declaration itself and the resolution by which it was adopted. Petitioners' reference to the Vienna Convention on the Law of Treaties is misplaced because the Declaration is not a treaty within the meaning of the Vienna Convention. Petitioners' reliance on the Mossville case in support of their interpretation of the *ratione personae* competence of the Commission is similarly misplaced because, in that case, the organization that submitted the Petition (Mossville Environmental Action Now) expressly did so on behalf of alleged individual victims: "'Mossville residents' or the 'alleged victims'." There is no indication that the organization, Mossville Environmental Action Now, represented itself to be a victim, independent from the individuals it represented, or that the Commission somehow expressed its intent to expand the protections of the American Declaration to corporate entities. It also bears noting that the rights and duties articulated in the American Declaration would in many instances be entirely nonsensical if applied to corporate entities such as non-governmental organizations.

Abstract corporate entities such as non-governmental organizations are not the beneficiaries of human rights contemplated by the American Declaration. As such, alleged violations of "rights" of organizations are beyond the competence *ratione personae* of the Commission. The Petition is therefore inadmissible insofar as it purports to represent six organizations as "victims" of human rights violations.

B. FAILURE TO EXHAUST DOMESTIC REMEDIES

The Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

A petitioner before this Commission has the duty to pursue all available domestic remedies. As Article 31(1) of the Rules states, "In 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 requirement for exhaustion of domestic remedies stems from customary international law and promotes respect for State sovereignty. It ensures the State within whose jurisdiction a human rights violation allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State has

the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before the dispute falls within the competence of 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." Petitioners have the duty to pursue *all* available domestic remedies. Exhaustion is only realized where such a remedy has been pursued to the highest appellate level, resulting in a final judgment. The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings. In short, "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success." And, as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies."

This Petition fails to satisfy those exhaustion requirements with respect to each of the avenues of relief sought by Petitioners: (1) access to information under FOIA, and (2) FRCP Rule 11 sanctions for alleged misrepresentations to the court. Each is addressed below in turn.

1. Petitioners failed to exhaust their remedy to access information under FOIA

As described in the factual background section above, Petitioners challenged the Government's production of information under FOIA to the U.S. District Court for the Central District of California. That court ultimately concluded that "Plaintiffs are not entitled to any further information regarding the Government's previous searches for documents, and the Government does not need to conduct any additional searches for responsive documents." Petitioners chose not to appeal this decision to the Ninth Circuit. Petitioners have provided no explanation for their decision not to appeal this determination by the district court and have failed to allege, much less demonstrate, the applicability of any exception to the Commission's exhaustion requirement with respect to the adequacy of information produced to Petitioners by the United States under FOIA. Therefore, to the extent that Petitioners allege that they have been deprived access to information, the Commission cannot entertain this claim because Petitioners plainly failed to exhaust their remedy in this regard.

2. Petitioners failed to exhaust their motion for FRCP Rule 11 sanctions for alleged representations to the court

Petitioners also pursued judicial sanctions under FRCP Rule 11 against the FBI for its characterization of documents not subject to the requirements of FOIA. FRCP Rule 11(b) provides guidelines for representations to federal courts. FRCP Rule 11(c) provides that, if the court determines that Rule 11(b) has been violated, "the court may impose an appropriate sanction." It should be noted that this remedy is distinct in kind from the FOIA remedy described above, by which Petitioners could have pursued a challenge to the adequacy of the Government's disclosure of information. Petitioners' FRCP Rule 11 motion for sanctions against the FBI was an attempt to penalize the agency for representations it had initially made, but subsequently amended, to the district court. The district court initially granted the motion for sanctions; however, the Ninth Circuit reversed the district court's order granting the motion and vacated the accompanying order awarding fees. While Petitioners sought *en banc* review of the Ninth Circuit's reversal, which was denied, Petitioners declined to seek review by the United States Supreme Court.

To the extent that Petitioners may rely on their motion for FRCP Rule 11 sanctions as a remedy for purposes of satisfying the Commission's exhaustion requirement, failure to seek Supreme Court review must result in a determination of inadmissibility before this Commission. Petitioners had a clear statutory right to file a petition with the United States Supreme Court seeking review. Under U.S. law, Supreme Court review is not an "extraordinary" remedy. Rather, U.S. law provides that seeking Supreme Court review is part of "[d]irect review." It is an ordinary remedy. To the extent any previous decision by the Commission suggests otherwise, the Commission should revisit the question. It would be inconsistent with respect for an OAS Member State's sovereignty for an international body to consider a petition filed without ever having given the Member State's highest court an opportunity to consider the issue where there was no bar in domestic law to seeking such review. As this Commission has observed, "the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it, before it has the opportunity to remedy them by internal means."

Moreover, in marked contrast to the "Juvenile Offenders Sentenced to Life Imprisonment Without Parole" Report, the Petition contains no indication that the United States Supreme Court has ever been given the opportunity to rule on the issue now being brought before the Commission: whether or not under the circumstances of this case a motion for sanctions made after the judicial rejection of the offending contention should have been granted. Importantly, in "Juvenile Offenders," the Supreme Court had received a certiorari petition "which presented substantially similar questions to those advanced in the petition received by the Commission, including the allegation that life imprisonment without parole represents cruel or unusual punishment, and the allegation of the necessity of differential treatment for adults and persons below the age of 18." The Commission emphasized that one of the petitioners *did* seek review by the United States Supreme Court, giving that court an opportunity to address the matter. Here, on the other hand, Petitioners fail to demonstrate—or even allege—the Supreme Court has *ever* been given an opportunity to rule on a motion for sanctions in the present context made after the judicial rejection of the offending contention.

Finally, although Petitioners cite the exceptions to the exhaustion requirements at Article 31(2) of the Rules, Petitioners have failed to demonstrate that any of those circumstances applied to their motion for Rule 11 sanctions against the Government, the particular remedy upon which Petitioners attempt to rely to satisfy the Commission's exhaustion requirement. Specifically, Petitioners have failed to demonstrate (a) that there has been no due process of law; (b) that petitioners are have been denied access to domestic remedies or prevented from exhausting them; or (c) that there has been an unwarranted delay. Instead, Petitioners assert that "a petition for certiorari would have been undertaken at great cost with almost no chance of success, and thus is not necessary for exhaustion of domestic remedies." To the extent that Petitioners are pessimistic about their chances of success, such pessimism is not an excuse from the exhaustion requirement. Again, as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies." Petitioners' curious assertion that they "exhausted the requirements for certiorari" is no substitute for actually seeking certiorari from the Supreme Court.

* * *

In sum, Petitioners pursued two remedies under U.S. law but failed to exhaust either remedy. Therefore, the Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

C. FAILURE TO ESTABLISH FACTS THAT COULD SUPPORT A CLAIM OF VIOLATION OF THE AMERICAN DECLARATION

As established above, the Commission should find this Petition inadmissible because at least portions of the Petition are beyond the competence of the Commission and because Petitioners failed to exhaust domestic remedies. 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.

1. Article IV (Right to Freedom of Expression)

Article IV 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 IV 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. Petitioners simply have not demonstrated any infringement of their rights to freedom of investigation, of opinion, or expression and dissemination of ideas, by any medium whatsoever. Petitioners have therefore failed to establish facts that could support a violation of this provision of the Declaration.

To overcome this defect, Petitioners attempt to construe Article IV to include a "right of access to information." However, Article IV plainly does not contemplate access to information—much less the disclosure of specific information at all. The Petition therefore overstates the reach of Article IV, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. Petitioners' principal argument in this regard is an attempt to impose a provision of the American Convention, which contemplates information access, upon the United States "because Article IV of the American Declaration corresponds to Article 13 of the American Convention." This is obviously not how States become subject to obligations and commitments under international law. States undertake treaty obligations and commitments under international law through their consent, and the United States has not consented to be bound by any provision of the American Convention. Elsewhere in their Petition, Petitioners concede as much: "the United States is not a party to the American Convention, thus its definition of the rights of 'persons' . . . does not supersede the . . . language of the American Declaration." Petitioners' attempt to reverse course on this point where it suits their argument is disingenuous and without basis under international law. Worryingly, taking Petitioners' arguments together, they invite the Commission to (1) impose Article 13 of the American Convention upon the United States without its consent and (2) broaden its scope by rejecting the application of the American Convention at Article 1(2) to "human beings" only. This slipshod approach to inventing new commitments under the American Declaration must be rejected.

It also bears noting that Article 13 of the American Convention, even if it could be applied to the United States—which it cannot—does not contain such a "right of access to information" that Petitioners seek to attribute to it. The right to freedom of thought and expression at Article 13 of the American Convention "includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in

print, in the form of art, or through any other medium of one's choice." Therefore, neither the American Declaration nor the American Convention contains a "right of access to information."

Even if Article IV of the American Declaration contained a "right of access to information"—which it does not—FOIA would be consistent with such a right as a general matter and as applied in the instant case. It is well established that Petitioners received all of the information to which they were entitled with respect to the relevant FOIA requests. Moreover, Petitioners did not contest this determination by a U.S. district court.

Instead, Petitioners now assert that the FBI's release of information to them was untimely and, apparently as such, incomplete. This claim is baseless as the FBI's release of information to Petitioners was consistent with U.S. law, a legal conclusion by the U.S. district court that Petitioners chose not to challenge. Indeed, Petitioners concede that the FBI's disclosure of information was "fully corrected" on June 23, 2009. As explained above, the crux of this correction was the Government's characterization of documents not subject to the requirements of FOIA and, to the extent that the U.S. district court disagreed with the Government's construction of FOIA, the Government's production of information to Petitioners was "fully corrected." Thus, even if Article IV of the American Declaration could be construed to include a right of access to information, Petitioners would not have articulated a failure by the United States to live up to such a right.

Petitioners also contend that the withholding of certain information by the FBI from the U.S. district court limited the Petitioners' right of access to information unnecessarily and disproportionately; but this contention is difficult to reconcile with Petitioners' admission that the FBI provided Petitioners all of the information to which they were entitled. To support their claim in this regard, Petitioners quote the Inter-American Court of Human Rights decision in *Myrna Mack Chang v. Guatemala*:

> [I]n cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, *to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceedings.*

Although the United States is not a party to the Inter-American Court—and so the court's interpretation of obligations of States party to the American Convention are not relevant to a State, such as the United States, that is not party to that instrument—it bears emphasizing that the United States did *not* "refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceedings" with respect to the FOIA production at issue in the Petition. To the contrary, in its order on the FOIA production, the U.S. district court concluded, in reference to the Government's compliance with FOIA, that "Plaintiffs are not entitled to any further information regarding the Government's previous searches for documents, and the Government does not need to conduct any additional searches for responsive documents." Petitioners did not contest this finding. In other words, even by Petitioners' preferred standard borrowed from the Inter-American Court, Petitioners have failed to articulate any "unnecessary or disproportionate limitation of a right to access." Further, Petitioners admit that the Government's initial characterization of documents not subject to the requirements of FOIA had no material impact on Petitioners: "the end results would have been the same: an *in camera* review with a determination that the documents were properly withheld."

Finally, Petitioners claim that the United States "failed to comply with its obligation to change its domestic legislation to ensure the protection of the right to access information as

required by international law." However this claim is baseless as the United States is not subject to any such commitment under the American Declaration and did not violate any applicable obligations under international law.

In sum, Petitioners have failed to state facts that tend to establish a violation of Article IV of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners' claim that the United States has failed to live up to its commitments under Article IV is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

2. Article XVIII (Right to Judicial Protection)

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 allege that the United States has violated this right in two ways.

First, Petitioners claim that judicial remedies were "not sufficiently prompt." Specifically, Petitioners seem to claim that the delay between (1) either the initial lodging of a FOIA request on May 15, 2006, or initiation of their judicial challenge to the Government's response to that request on June 7, 2007, and (2) the provision of additional documents on March 14, 2008, represents a violation of the United States' commitments under Article XVIII. This claim is baseless. Petitioners may have disagreed with the Government's construction of FOIA in this matter, but there are simply no facts to substantiate a claim that Petitioners were denied their right to resort to the courts due to the pace of litigation.

Second, Petitioners claim that the judicial remedies provided in this matter were "ineffective," thereby constituting a denial of Petitioners' right to access the courts within the meaning of Article XVIII. This claim, too, is baseless. Petitioners were able to challenge the Government's production of information under FOIA in U.S. courts, and U.S. courts concluded that the Government was not required to produce any further information under that statute. The Commission has reiterated that "the fact that the outcome [of a domestic proceeding] was unfavorable … does not constitute a violation." Petitioners additionally claim that the remedies received were not effective because they were not prompt; but this attempt at bootstrapping is unavailing, in part because Petitioners cannot show that they were deprived access to the courts on the basis of promptness of the proceedings. Petitioners also attempt to resuscitate their claim in this regard by arguing that domestic remedies were ineffective because they were ultimately unsuccessful in seeking Rule 11 judicial sanctions against the Government. Again, the fact that Petitioners are dissatisfied with the outcome of their attempt to seek Rule 11 judicial sanctions cannot provide the basis for a violation of Article XVIII because "the fact that the outcome [of a domestic proceeding] was unfavorable … does not constitute a violation."

In sum, Petitioners have failed to state facts that tend to establish a violation of Article XVIII of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners' claim that the United States has failed to live up to its commitments under Article XVIII is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

D. FOURTH INSTANCE DOCTRINE PRECLUDES REVIEW OF U.S. 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 by U.S. courts. The

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

The fourth instance doctrine 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. As the Commission has explained, "[t]he 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." With respect to application of FOIA and Rule 11 judicial sanctions, such substitution is precisely what Petitioners seek from the Commission. 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. Under the fourth instance doctrine, the Commission's review of Petitioners' claims is precluded.

The United States' domestic law provided Petitioners with a basis to seek relief for claims of denial of access to information under FOIA and, as described in detail above, U.S. courts ruled on Petitioners' claims as well as their attempt to seek sanctions against the United States. The central theory of Petitioners' claims in both fora is the same: that the United States is responsible for a violation of Petitioners' right of access to information and should be penalized. Indeed, the bulk of Petitioners' submission to the Commission seeks to re-litigate the merits of Petitioners' litigation over Rule 11 judicial sanctions. Rather than appealing the district court's finding that the FOIA production was appropriate in a U.S. court of appeals, or appealing the Ninth Circuit's determination that sanctions were not warranted in this case, Petitioner chose instead to pursue an "appeal" internationally. It is well established that the Commission cannot be used as a substitute for appeal in the U.S. judicial system. Moreover, if the Commission were to accept a petition based on the same secondary arguments that Petitioners litigated and lost in U.S. courts, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody.

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would have the Commission second-guessing the legal and factual determinations of U.S. courts, conducted in conformity with due process protections under U.S. law and fully consistent with U.S. commitments under the American Declaration. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance doctrine]." The Commission has reiterated that "the fact that the outcome [of a domestic proceeding] was unfavorable … does not constitute a violation." The fourth instance doctrine precludes the review sought by Petitioner.

* * * *

g. Request by Colombia for advisory opinion on withdrawal

As discussed in *Digest 2019* at 277-80, Colombia requested an advisory opinion regarding the consequences of a State denouncing and withdrawing from the American

Convention on Human Rights and the OAS Charter. The United States provided a written submission on the request in 2019. On June 15, 2020, the United States provided an oral submission on the request, presented by Thomas Weatherall, attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State. Excerpts follow from that submission.

* * * *

This system includes the valuable work of the Inter-American Commission on Human Rights and the Court, for those States that submit to its jurisdiction, in interpreting the scope of human rights obligations under the binding instruments of the Inter-American system and monitoring States' compliance with these obligations. However it is also important to recall that the American Convention on Human Rights, and the Charter of the Organization of American States, authorize withdrawal by State Parties. A State that chooses to exercise its right to withdraw from the Convention and the OAS Charter in accordance with the instruments' respective terms is released, upon the effective date of its withdrawal, from any obligations further to perform the Convention or OAS Charter.

It is against the backdrop of these considerations that the questions submitted to the Court must be considered.

I. Competence of the Court

Madam President, Members of the Court, I will begin by briefly addressing the competence of the Court in the present proceeding. Article 64, paragraph 1, of the American Convention sets out the Court's authority to issue advisory opinions with respect to the Convention and "other treaties concerning the protection of human rights in the American states." As Colombia identified in its request, this competence encompasses a number of human rights treaties in the Americas, for those States that have ratified them, including not only the American Convention, but also the Inter-American Convention to Prevent and Punish Torture, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and the Inter-American Convention on the Forced Disappearance of Persons.

From the perspective of the Court's competence to render advisory opinions, however, it is appropriate for the Court to avoid addressing any nonbinding instruments, such as the American Declaration, instruments (binding or otherwise) that exist outside of the Inter-American human rights system, or customary international law, including *jus cogens*. This limit on the Court's competence is because the Court is not a body of general jurisdiction, as reflected by the parameters set out in Article 64, paragraph 1 of the Convention, and in particular the specification in that paragraph that the Court has the authority to issue advisory opinion only with respect to the Convention and certain other "treaties."

II. Obligations of a Denouncing State, and of States Parties vis-à-vis a Denouncing State

To be sure, a State remains bound by other obligations which it has undertaken regardless of its status under the OAS Charter or the Convention, and this brings me to my second point. There would undoubtedly remain other human rights obligations incumbent upon a State that

denounces the Convention and the OAS Charter—in particular under customary international law, including *jus cogens*, and applicable human rights instruments outside the Inter-American system to which that State is party. 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. Relatedly, 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.

States Parties would not be subject to obligations arising under the OAS Charter vis-à-vis a State that has withdrawn from the OAS Charter. Nor would States Parties to the American Convention be subject to obligations arising under that treaty vis-à-vis a State that has withdrawn from it. Whether or not OAS Member States have obligations in matters of human rights vis-à-vis such a denouncing State, beyond any applicable obligations under customary international law, would depend on the provisions of instruments to which OAS Member States and the denouncing State remain parties.

However, it is not feasible to catalog these obligations in the abstract and, even if it were, the Court is not a body of general jurisdiction. Given the Court's limited jurisdiction, the United States respectfully submits that the Court must refrain from addressing elements of the request that invite the Court to address the scope or enforcement of human rights obligations established under customary international law or outside of the Inter-American system.

III. Competence of the Commission vis-à-vis Denouncing State

Madam President, Members of the Court, the third point I would like to make is that it remains the case that the Commission—which is charged by the OAS Charter "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters"— has competence with respect to instruments within its purview that a member State has recognized as binding on it. With respect to a State's denunciation of the American Convention, this raises the question, discussed in at least one participant's submission for this advisory proceeding, of the ability of the Commission to exercise what might be characterized as "residual competence"—that is, competence over matters after the effective date of such State's denunciation of the American Convention alleging violations of the Convention arising before that date.

Article 78 of the Convention provides that "denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation." While Article 78 does not specifically address the competence of the Commission following the effective date of denunciation, a state's obligations under the Convention with respect to its acts prior to denunciation would presumably include obligations regarding the Commission's possible consideration of those acts. Article 78 therefore at least implies that the Commission would retain "residual competence" with respect to such acts. Article 78 so interpreted is consistent with the general rule that withdrawal by a State from an international agreement does not eliminate the consequences of breaches of obligations arising while that State was party to the agreement.

IV. Mechanisms of Enforcement

Madam President, Members of the Court, I will briefly make one final point. Whether mechanisms exist for enforcing a denouncing State's obligations depends on the relevant provisions of the treaties to which the denouncing State remains a party. As already addressed,

the Court should decline to opine on the availability of alternate mechanisms of human rights enforcement which may exist outside of the Inter-American system or otherwise outside of the Court's competence.

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h. Request by Colombia for advisory opinion on indefinite presidential re-election

Colombia also requested an advisory opinion from the IACHR on the question of "indefinite presidential re-election." Specifically, Colombia submitted two questions to the court:

1. Is indefinite presidential re-election a human right protected by the American Convention on Human Rights? Relatedly, do term limits restrict the political rights of an incumbent leader or those of voters?
2. If a State modifies its legal order toward "the permanence of an incumbent leader in power through indefinite presidential re-election," does this impact that State's human rights obligations?

Colombia framed the request within the American Convention on Human Rights—to which the United States is not a party. However, Colombia also requested that the court opine on relevant provisions of the OAS Charter, to which the United States is a party, as well as the American Declaration on the Rights and Duties of Man and Inter-American Democratic Charter, non-binding instruments that the United States recognizes to be applicable. Excerpts follow from the July 24, 2020 written observations of the United States on Colombia's 2020 request for an advisory opinion. Request for an Advisory Opinion by the Republic of Colombia, Written Observations of the United States, CDH-OC-4-2019/068 (July 24, 2020), https://www.corteidh.or.cr/sitios/observaciones/oc28/3_estadosunidos.pdf.

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Colombia raises two questions in its request for an advisory opinion. The first is presented as follows:

> In the light of international law, is indefinite presidential re-election human rights protected by the American Convention on Human Rights? In this sense, are regulations that limit or prohibit presidential election contrary to Article 23 of the American Convention on Human Rights, whether by restricting the political rights of the incumbent leader who seeks to be elected, or by restricting the political rights of the voters? Or on the contrary, is the limitation or prohibition of presidential re-election a restriction of political rights which is in accordance with the principles of legality, necessity and

> proportionality, in line with the jurisprudence of the Inter-American Court of Human Rights on this matter?

The second question is related to the first:

> In the event that a State modifies or seeks to modify its legal order in order to assure, promote, propitiate or prolong the permanence of an incumbent leader in power through indefinite presidential re-election, what are the effects of that modification on the obligations of that State in area of respect and guarantees of human rights? Is that modification contrary to the international obligations of States in matters of human rights, and particularly, their obligation to guarantee the effective exercise of rights a) to participate in the management of public affairs, directly or through freely elected representatives; b) to vote and be elected in authentic and regular elections, conducted by universal and equal suffrage or by secret ballot, to guarantee the free expression of the will of the electors, and c) to have access, in general conditions of equality, to the public functions of that country?

Alongside these questions, Colombia identifies a host of obligations and commitments arising from various Inter-American instruments and invites the Court to interpret such provisions in light of in its request. Colombia's request for the Court's advice on these questions is animated by the risk of "abuse" of the regulation of democratic governance by an incumbent head of State in pursuit of "indefinite presidential re-election."

I. Representative Democracy in the Inter-American System

The Charter of the Organization of American States ("OAS Charter") regards representative democracy within its constituent States to be a condition of its stability and a purpose of the organization. Article 3(d) of the OAS Charter specifically articulates that "[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."

American States affirmed their commitment to this principle, and elaborated on its content, in the Declaration of Santiago, Chile, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 ("the Santiago Declaration"). The fifth preambular paragraph of the Santiago Declaration reiterates that "[h]armony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them." The Santiago Declaration further identifies some features of the democratic system in this hemisphere to enable "national and international public opinion to gauge the degree of identification of political regimes and governments with that system." One such principle is that "[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy." In this way, as early as 1959, American States can be seen to have taken a position on the important role limiting time in office can play in the effective exercise of democracy, in the particular context of preventing entrenchment or concentration of political power.

The Inter-American Democratic Charter ("the Democratic Charter") articulates a right of the peoples of the Americas to democracy and restates that "[t]he effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the

member states of the Organization of American States." The Democratic Charter also identifies elements essential to the effective exercise of representative democracy, to include, *inter alia*, "access to and the exercise of power in accordance with the rule of law" and "the holding of periodic, free, and fair elections."

The United States supported each of these instruments affirming the importance of representative democracy within the member states of the OAS.[12] The Inter-American Court has also concluded that "representative democracy is a determinant factor of the entire system" of which Inter-American instruments are a part.[13]

II. Political Participation in the Inter-American System

The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. The American Declaration of the Rights and Duties of Man, at Article XX, states that every person is "entitled to participate in the government of his country, directly or through his representatives." The American Convention, for parties to that instrument, expanded upon the "rights and opportunities" to participate in government at Article 23, to include the ability to "take part in the conduct of public affairs," "to vote and be elected in genuine periodic elections," and "to have access, under general conditions of equality to the public service of his country." These provisions of Article 23 of the American Convention closely parallel Article 25 of the International Covenant on Civil and Political Rights, to which thirty-one of the thirty-five OAS member States are parties.

The rights of individuals associated with participation in political affairs support the effective exercise of representative democracy repeatedly affirmed by the American States. The Inter-American Court has affirmed this premise: "[t]he political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of

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[12] The United States respectfully recalls that the Court's authority to issue advisory opinions is set forth in Article 64 of the American Convention and, under Article 64.1, is limited to interpretations of the Convention and "other treaties concerning the protection of human rights in the American states." Article 64.1 does not empower the Court to interpret instruments which do not qualify as "treaties." As reflected in Article 2(a) 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"—i.e., a legally binding instrument. Vienna Convention on the Law of Treaties, art. 2(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The Court should decline to address in its advisory opinion the interpretation 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 of the Rights and Duties of Man is a nonbinding instrument which does not create legal rights or obligations on OAS member States. United States courts have viewed it as such. *See, e.g.*, Garza v. Lapin, 253 F.3d 918, 925 (7th Cir. 2001) (assessing that "OAS's Charter reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members"). The text of the American Declaration and the circumstances of its conclusion demonstrate that the negotiating States did not intend for it to become a binding instrument. Similarly, neither the Santiago Declaration nor the Democratic Charter are "treaties" for purposes of Article 64.1 of the American Convention, and thus fall beyond the scope of the Court's advisory opinion authority.

[13] Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

democracy and political pluralism."[18] From this point of departure, the Court has also contemplated the permissibility of reasonable restrictions on such political rights with a view toward promoting the effective exercise of representative democracy.[19] The principles enumerated in the Santiago Declaration are relevant in this context, and in particular, that "[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy." Interpreting political rights in a way that undermines the effective exercise of democracy is inconsistent with the longstanding view, reflected in relevant Inter-American instruments and previously endorsed by the Court, that political rights should facilitate the effective exercise of representative democracy.

III. Presidential Term Limits in the United States

That individuals' rights associated with political participation should be interpreted in a manner that facilitates the effective exercise of representative democracy is reflected in the practice of the United States. Most relevant to the present discussion is the 22nd Amendment to the United States Constitution, which imposes a limitation on the number of terms that may be served by a U.S. President.

Article II, Section 1 of the U.S. Constitution provides for re-election of a sitting President after a term of four years but sets no limit on how many such terms might be served. From the presidency of George Washington, the first president of the United States (1789-1797), a practice emerged that a U.S. president would serve only two terms. The third president of the United States, Thomas Jefferson, was the first to cite concern for "perpetual reeligibility" as informing his decision not to pursue a third term in office. Jefferson felt that "a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind," and that he had "a duty to do no act which shall essentially impair that principle." This practice held until 1940, when President Franklin D. Roosevelt was re-elected for a third term following the outbreak of World War II. Roosevelt ran for and was re-elected to a fourth term in 1944, which he served until his death in April 1945.

Following Roosevelt's departure from the two-term precedent established by President Washington, the United States Congress sought to formally establish the two-term presidential term limit through constitutional amendment. The 22nd Amendment to the U.S. Constitution was proposed by the U.S. Congress in March 1947 and ratified by the states in February 1951. The 22nd Amendment limits the number of terms to which a President may be elected to two. The 22nd Amendment expressly did not apply to the occupant of the office of the presidency at the time the Amendment was proposed, and expressly did not prevent the occupant of the office at the time the Amendment became operative from serving out the remainder of that term. As such, the incumbent President could not be removed from office by the Amendment's establishment of term-limits. The Amendment was deliberately crafted in this way to demonstrate its nonpartisan character, i.e., it was not an effort directed toward the incumbent. President Harry Truman, the incumbent both at the time the 22nd Amendment was proposed and at the time it became operative, supported the Amendment, remarking at a press conference in 1952 that, "[w]hen we

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[18] Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

[19] *See, e.g.*, Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 141 *et seq.* (Aug. 6, 2008); Case of Yatama v. Nicaragua, Preliminary Objections, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 195 *et seq.* (June 23, 2005).

forget the example of such men as Washington, Jefferson, and Andrew Jackson, all of whom could have had a continuation of the office, then we will start down the road to dictatorship and ruin."

IV. Opposition to Constitutional Backsliding around the World

The United States has consistently expressed support for reasonable executive term limits in representative democracies and cautioned against attempts by political incumbents to erode such restrictions. For example, in an address to the African Union in 2015, President Barack Obama extolled the benefits of preserving conditions for regular transfers of power and articulated the risks of backsliding:

> When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife . . . . And this is often just a first step down a perilous path. And sometimes you'll hear leaders say, well, I'm the only person who can hold this nation together. If that's true, then that leader has failed to truly build their nation.
>
> You look at Nelson Mandela – Madiba, like George Washington, forged a lasting legacy not only because of what they did in office, but because they were willing to leave office and transfer power peacefully. And just as the African Union has condemned coups and illegitimate transfers of power, the AU's authority and strong voice can also help the people of Africa ensure that their leaders abide by term limits and their constitutions. Nobody should be president for life.

That same year, Secretary of State John Kerry also addressed the alteration of presidential term limits to favor an incumbent:

> Elections are vitally important . . . . Just as important is respect for term limits. No democracy is served when its leaders alter national constitutions for personal or political gain. . . . A free, fair and peaceful presidential election does not guarantee a successful democracy, but it is one of the most important measuring sticks for progress in any developing nation. . . . The United States remains committed to helping make those aspirations a reality.

The United States Congress has also articulated the importance of respect for presidential term limits. For example, in "A resolution supporting democratic principles and standards in Bolivia and throughout Latin America," adopted by the United States Senate in 2019, the Senate resolved that it:

> (3) expresses concern for efforts to circumvent presidential term limits in the Bolivian constitution;
>
> (4) supports presidential term limits prevalent in Latin America as reasonable checks against a history of coups, corruption, and abuses of power;
>
> . . .
>
> (6) agrees with the Organization of American States Secretary General's interpretation of the American Convention of Human Rights as not applicable to presidential term limits; [and]
>
> . . .

(8) calls on Latin American democracies to continue to uphold democratic norms and standards[.]

The United States remains committed to promoting term limits in representative democracies. Term limits promote accountability and prevent entrenchments of power. The United States will continue to caution against efforts by incumbents to undermine the effective exercise of representative democracy by modifying limitations to re-election for their own political gain.

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The United States also presented remarks on September 28, 2020 to the Inter-American Court of Human Rights on the subject of Colombia's request for an advisory opinion on executive term limits. The remarks reiterate the points in the U.S. written submission, with additional points responding to other written submissions such as one from Nicaragua. The U.S. remarks follow.

* * * *

Thank you Madam President, Mr. Vice-President and Members of the Court. My name is Thomas Weatherall, and I am honored to appear today on behalf of the United States in my capacity as an attorney-adviser in the Office of the Legal Adviser of the U.S. Department of State. I am joined today by my colleague, Oliver Lewis, the Assistant Legal Adviser for Western Hemisphere Affairs in the Office of the Legal Adviser. These remarks will supplement the United States' written submission in this matter.

Today's hearing provides an opportunity to discuss the political principle at the core of the Organization of American States: representative democracy. As has been noted today and in a number of the written submissions, democracy is essential to the exercise and enjoyment of human rights and fundamental freedoms. The OAS Charter regards representative democracy within its constituent States to be a condition of its stability and a purpose of the organization. The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. Individuals' rights associated with political participation should be interpreted by this Court in a manner that facilitates the effective exercise of representative democracy.

Colombia's request for the Court's advice on these matters is animated by the potential for "abuse" of the regulation of democratic governance by an incumbent head of State in pursuit of what has been characterized as "indefinite presidential re-election." In light of this concern, our presentation today will address the importance of the effective exercise of representative democracy and interpretation of individual rights associated with political participation to this end, particularly from the perspective of U.S. practice.

I. Representative Democracy in the Inter-American System

Madam President, Members of the Court, I will begin by briefly addressing representative democracy in the Inter-American system. Consideration of representative democracy in the Inter-American system begins with the OAS Charter. The OAS Charter

expressly articulates in Article 3(d) the principle that the "solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."

American States affirmed their commitment to this principle, and elaborated on its content, in the Declaration of Santiago, Chile, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. The Santiago Declaration reiterates that "Harmony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them." The Santiago Declaration further identifies some features of the democratic system in this hemisphere to enable "national and international public opinion to gauge the degree of identification of political regimes and governments with that system." One such principle is that "Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy." In this way, as early as 1959, American States can be seen to have taken a position on the important role limiting time in office can play in the effective exercise of democracy, in the particular context of preventing entrenchment or concentration of political power.

The Inter-American Democratic Charter articulates a right of the peoples of the Americas to democracy and restates that "The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States." The Democratic Charter also identifies elements essential to the effective exercise of representative democracy, to include, *inter alia*, "access to and the exercise of power in accordance with the rule of law" and "the holding of periodic, free, and fair elections."

The United States supported each of these instruments affirming the importance of representative democracy within the member states of the OAS. The Inter-American Court has also concluded, in its 2008 *Gutman v. México* Judgment, that "representative democracy is a determinant factor of the entire system" of which Inter-American instruments are a part.

II. Political Participation in the Inter-American System

Madam President, Members of the Court, against this backdrop, I will turn now to the rights associated with political participation. The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. The American Declaration of the Rights and Duties of Man, at Article 20, states that every person is "entitled to participate in the government of his country, directly or through his representatives."

The American Convention, for parties to that instrument, expanded upon the "rights and opportunities" to participate in government at Article 23, to include the ability to "take part in the conduct of public affairs," "to vote and be elected in genuine periodic elections," and "to have access, under general conditions of equality to the public service of his country." These provisions of Article 23 of the American Convention closely parallel Article 25 of the International Covenant on Civil and Political Rights, to which thirty-one of the thirty-five OAS member States are parties. Article 23, paragraph 2 of the American Convention refers to certain bases for regulating the exercise of the rights and opportunities set out in paragraph 1 of Article 23 regarding participation in government. However, practice by States with respect to executive term limits raises serious questions about whether this provision could reasonably be interpreted as indicating that States parties intended the Convention to preclude such term limits. Indeed—as cataloged in the Inter-American Commission's written submission in these proceedings—many States parties to the Convention impose such term limits. As a general matter, the question of

whether an individual enjoys rights associated with political participation is separate from the structure of representative democracy—including the definition of elective terms and their limitations—within which she or he participates.

The rights of individuals associated with participation in political affairs support the effective exercise of representative democracy, a relationship repeatedly affirmed by the American States. The Inter-American Court has affirmed this premise: it has found that "The political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of democracy and political pluralism." From this point of departure, the Court has also contemplated the permissibility of reasonable restrictions on such political rights with a view toward promoting the effective exercise of representative democracy, including in cases cited for this point in our written submission. The principles enumerated in the Santiago Declaration are relevant in this context, and in particular, that "Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy." The notion that such limitations are somehow inherently discriminatory or run afoul of equal protection is nonsensical. To the contrary, such limitations can apply with equal force to everyone. And interpreting political rights in a way that undermines the effective exercise of democracy is inconsistent with the longstanding view, reflected in relevant Inter-American instruments and previously endorsed by the Court, that political rights should facilitate the effective exercise of representative democracy.

Madam President, Members of the Court, let me now turn the floor over to my colleague, Oliver Lewis.

III. Presidential Term Limits in the United States

Madam President, Members of the Court, let me now turn to the practice of the United States, which reflects interpretation of rights associated with political participation in a manner that facilitates the effective exercise of representative democracy. Most relevant to the present discussion is the 22nd Amendment to the United States Constitution, which imposes a limitation on the number of terms that may be served by a U.S. President.

Article II, Section 1 of the U.S. Constitution provides for re-election of a sitting President after a term of four years but sets no limit on how many such terms might be served. From the presidency of George Washington, the first president of the United States (from 1789 to 1797), a practice emerged that a U.S. president would serve only two terms. The third president of the United States, Thomas Jefferson, was the first to cite concern for "perpetual reeligibility" as informing his decision not to pursue a third term in office. Jefferson felt that "a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind," and that he had "a duty to do no act which shall essentially impair that principle." This practice held until 1940, when President Franklin D. Roosevelt was re-elected for a third term following the outbreak of World War II. Roosevelt ran for and was re-elected to a fourth term in 1944, which he served until his death in April 1945.

Following Roosevelt's departure from the two-term precedent established by President Washington, the United States Congress sought to formally establish the two-term presidential term limit through constitutional amendment. The 22nd Amendment to the U.S. Constitution was proposed by the U.S. Congress in March 1947 and ratified by the states in February 1951. The 22nd Amendment limits the number of terms to which a President may be elected to two. The Amendment was deliberately crafted in a manner that demonstrates its nonpartisan character, in other words, it was not an effort directed toward the incumbent. Specifically, the 22nd

Amendment expressly did not apply to the occupant of the office of the presidency at the time the Amendment was proposed, and expressly did not prevent the occupant of the office at the time the Amendment became operative from serving out the remainder of that term. As such, the incumbent President could not be removed from office by the Amendment's establishment of term-limits. President Harry Truman, the incumbent both at the time the 22nd Amendment was proposed and at the time it became operative, supported the Amendment: he remarked in 1952 that, "When we forget the example of such men as Washington, Jefferson, and Andrew Jackson, all of whom could have had a continuation of the office, then we will start down the road to dictatorship and ruin."

IV. Opposition to Constitutional Backsliding around the World

Madam President, Members of the Court, let me make one final point: the United States has consistently expressed support for reasonable executive term limits in representative democracies and cautioned against attempts by political incumbents to erode such restrictions. For example, in an address to the African Union in 2015, President Barack Obama extolled the benefits of preserving conditions for regular transfers of power and articulated the risks of backsliding:

> When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife . . . . And this is often just a first step down a perilous path. And sometimes you'll hear leaders say, well, I'm the only person who can hold this nation together. If that's true, then that leader has failed to truly build their nation. […]

That same year, Secretary of State John Kerry also addressed the alteration of presidential term limits to favor an incumbent:

> Elections are vitally important . . . . Just as important is respect for term limits. No democracy is served when its leaders alter national constitutions for personal or political gain. . . . A free, fair and peaceful presidential election does not guarantee a successful democracy, but it is one of the most important measuring sticks for progress in any developing nation. . . . The United States remains committed to helping make those aspirations a reality.

In other words, the fact of an election does not alleviate the danger to democracy presented by the alteration of presidential term limits to favor an incumbent.

The United States Congress has also articulated the importance of respect for presidential term limits. For example, last year, the United States Senate adopted a resolution supporting democratic principles and standards in Latin America, in which the Senate expressed concern for efforts to circumvent certain presidential term limits and resolved, *inter alia*, that it:

> supports presidential term limits prevalent in Latin America as reasonable checks against a history of coups, corruption, and abuses of power;
> . . .
> agrees with the Organization of American States Secretary General's interpretation of the American Convention of Human Rights as not applicable to presidential term limits; [and]
> . . .

> calls on Latin American democracies to continue to uphold democratic norms and standards[.]

The United States remains committed to promoting term limits in representative democracies. Term limits promote accountability and prevent entrenchments of power. The United States will continue to caution against efforts by incumbents to undermine the effective exercise of representative democracy by modifying limitations to re-election for their own political gain.

V. Conclusion

Madam President, Members of the Court: the effective exercise of representative democracy in the American States is a pillar of the OAS. Individuals' rights associated with participation in political affairs should support the effective exercise of representative democracy, as repeatedly affirmed by the American States. Reasonable restrictions on such rights, as contemplated by Article 25 of the ICCPR, such as term limits on incumbent office-holders, have been adopted by many of the American States, including the United States, with a view toward promoting the effective exercise of representative democracy. The United States has consistently expressed support for term limits in representative democracies and will continue to caution against attempts by political incumbents to erode such restrictions for their own political gain.

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Cross References
International Tribunals and Accountability Mechanisms, **Ch. 3.C.**
*The UN Treaty System***, Ch.4.A.2**
Withdrawal from World Health Organization, **Ch. 4.B.2**
Iran-United States Claims Tribunal, **Ch. 8.C**
Venezuela, **Ch. 9.A.1**
Privileges and Immunities of International Organizations, **Ch. 10.D**
World Intellectual Property Organization ("WIPO"), **Ch. 11.F.5**
Comments to the International Law Commission ("ILC") regarding sea-level rise, **Ch. 12.A.1.a**
The Global Health Response to the COVID-19 Pandemic, **Ch. 13.C.1**
UNCITRAL, **Ch. 15.A.1.**
Iran, **Ch. 16.A.1**
China sanctions related to Hong Kong, **Ch. 16.A.4.b**
Venezuela sanctions, **Ch. 16.A.5**