THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

August 4, 2016

Mr. Emilio Alvarez Icaza L.
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Haji Abdul Rahman et al., Petition No. P-417-12
Response to Petition

Dear Mr. Icaza:

We appreciate the opportunity to provide observations on the Petition forwarded to the United States in the above-referenced matter on behalf of Haji Abdul Rahman and four others (collectively, "Petitioners"). The American Civil Liberties Union (ACLU) filed the Petition in this matter via letter dated March 19, 2012; a stamp at the top of this letter indicates that your office received it on March 20, 2012. Your office transmitted the Petition to the United States on February 17, 2016, via a cover letter dated January 13, 2016.

For the reasons stated below, we urge the Inter-American Commission on Human Rights ("Commission") to find this matter inadmissible because the Commission lacks competence to review certain of the claims and because the Petitioners have failed to exhaust domestic remedies.

Withdrawal of claims

At the outset, we take note of the ACLU's letter dated July 22, 2015, informing the Commission that former Petitioner Ali Hussein Al-Jubouri wishes that his claims be withdrawn, and requesting the Commission not to consider them. We note that your office's letter to the United States dated January 13, 2016, still

listed Mr. Al-Jubouri as a Petitioner (under the name "Ali Hussein"), despite the ACLU's request of six months prior. Nevertheless, this response proceeds on the basis that Mr. Al-Jubouri is no longer among the Petitioners in this matter.

Lack of competence

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") during and after their detention in various facilities in Iraq or Afghanistan. As the American Declaration is a non-binding instrument and does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS), the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration.

The United States has undertaken a political commitment to uphold the American Declaration. Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The United States takes its American Declaration commitments and the Commission's recommendations very seriously but notes, as it has in prior communications, that the Commission lacks competence to issue a binding decision vis-à-vis the United States, including on matters arising under the American Declaration.[1] The Commission also lacks competence to issue a binding

[1] The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States (OAS). United States federal Courts of Appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.*, Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) ("The American Declaration … is an aspirational document which … did not on its own create any enforceable obligations on the part of any of the OAS member nations. … Nothing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's 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 Commission's power is only to make 'recommendations,' which, according to the plain language of the term, are not binding."); *accord, e.g.*, Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493–94 (3rd Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). For a further discussion of the U.S. position regarding the nonbinding nature

decision vis-à-vis the United States on matters arising under international human rights treaties, whether or not the United States is a party,[2] or under customary international law.[3]

Furthermore, although the United States agrees that torture is categorically prohibited by international human rights law and by international humanitarian law, the Commission has no competence under its Statute or Rules of Procedure ("Rules") to consider matters arising under international humanitarian law and may not incorporate such principles into the American Declaration. Although international humanitarian law and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing, and certain provisions of human rights treaties may apply in armed conflicts, international humanitarian law is the *lex specialis* during situations of armed conflict.[4] As the United States has previously noted, OAS member States have not granted the Commission the competence or authority to interpret and apply international humanitarian law in Commission proceedings,[5] and the United

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of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html.

2 Petitioners' arguments include discussions of the International Covenant on Civil and Political Rights, the Convention Against Torture (CAT), the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights. Petition at 31–34.

3 *See, e.g.*, Disabled Peoples' International & International Disability Law, Inc., v. United States, Case No. 9.213, Letter to Dr. Edmundo Vargas Carreno, Executive Secretary, Inter-American Commission on Human Rights, from Amb. Richard T. McCormack, Permanent Representative, U.S. Mission to the OAS, Aug. 26, 1985 ("*Grenada Hospital* U.S. Response"), at 2 (*quoting* Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Argentina, OEA/Ser. L/V/II.49 doc. 19 corr. 1, Apr. 11, 1980, at 25). We have no objection to the Commission sharing this letter with the Petitioners, and that letter contains no privacy protected information or other information about the *Grenada Hospital* petitioners that, in our view, would preclude sharing it with the Petitioners in this matter.

4 As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. However, a situation of armed conflict does not automatically suspend nor does international humanitarian law automatically displace the application of all international human rights obligations. International human rights treaties, according to their terms, may also be applicable in armed conflict. For example, the United States has recognized that a time of war does not suspend the operation of the CAT, which continues to apply even when a State is engaged in armed conflict. Article 2(2) of the CAT specifically provides that neither "a state of war [n]or a threat of war … may be invoked as a justification for of torture." The obligations to prevent torture and cruel, inhuman, or degrading treatment or punishment in the CAT remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict.

5 *See, e.g.*, *Grenada Hospital* U.S. Response, *supra* note 3, at 2; Detainees in Guantanamo Bay, Cuba, PM No. 259, Response of the United States of America to the Inter-American Commission on Human Rights, Dec. 16, 2004, § I, *available at* http://www.state.gov/s/l/2004/78299.htm, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2004 977–79 (Sally J. Cummins ed. 2005), *available at* http://www.state.gov/s/l/c8183.htm.

States reiterates its strong objection to any attempt by the Commission to interpret or apply international humanitarian law in this proceeding. As a result, the Commission must reject as inadmissible any claims arising under international humanitarian law.

Failure to exhaust domestic remedies

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

At the outset, it is important to recall that the United States upholds the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has taken steps to strengthen further protections against torture and cruel, inhuman, or degrading treatment or punishment.[6]

The five remaining Petitioners, as well as Mr. Al-Jubouri, filed a series of lawsuits in different U.S. federal jurisdictions, which were ultimately consolidated into a single suit in the U.S. District Court for the District of Columbia in

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[6] *See, e.g.*, Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2005); Torture Convention Implementation Act, 18 U.S.C. §§ 2340 and 2340A (1994); Exec. Order No. 13491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 22, 2009) ("Order"). Issued by President Obama immediately upon his taking office in 2009, the Order required that, consistent with the CAT and Common Article 3 of the 1949 Geneva Conventions, any individual detained in armed conflict by the United States or within a facility owned, operated, or controlled by the United States, in all circumstances, must be treated humanely, and not be subjected to violence to life and person nor to outrages upon personal dignity. This comports with the Detainee Treatment Act of 2005, which requires that "[n]o individual in the custody or under the control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." 42 U.S.C. § 2000dd(a). The President further directed that no individual

> in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall … be subjected to any interrogation technique or approach, or any treatment related to interrogation that is not authorized by and listed in [the] Army Field Manual,

a direction that is without prejudice to continuing use by the Federal Bureau of Investigation, or other federal law enforcement agencies, of "authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises." Order, *supra*, § 3(b). On November 25, 2015, the President signed into law the National Defense Authorization Act for Fiscal Year 2016, which codified many of these key interrogation and detention-related reforms into U.S. law. The full text of the law can be found at https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS-114s1356enr.pdf.

Washington, D.C.[7] The District Court dismissed all of the Petitioners' claims, but in particular it dismissed the Petitioners' and Mr. Al-Jubouri's international legal claims in that suit because the Petitioners failed to show that they had exhausted any available administrative remedies, which is required by the Federal Tort Claims Act[8] before a judicial remedy can properly be sought in federal court.[9] The Petitioners and Mr. Al-Jubouri appealed some of their claims to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the dismissal of the international legal claims, once again because no evidence was presented to demonstrate that the Petitioners and Mr. Al-Jubouri had exhausted administrative remedies before bringing their suit, as required by the FTCA.[10] The Petitioners and Mr. Al-Jubouri declined to seek further review before the U.S. Supreme Court. The United States is unaware of any attempt by the Petitioners, either before or after the dismissal of these claims, to pursue and exhaust administrative remedies as required by the FTCA, much less of any attempt to re-file the international law claims if they did, in fact, exhaust administrative remedies in accordance with the applicable statute (which the Petitioners would have been entitled to do, given that their international legal claims were dismissed without prejudice).

One administrative remedy that was available to the Petitioners—but that they chose not to pursue—is settlement under the Foreign Claims Act (FCA).[11] The FCA provides the statutory authority for the U.S. Department of Defense to settle claims through an administrative process. More specifically, the FCA

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7 In re Iraq & Afg. Detainees Litigation, 479 F. Supp. 2d 85, 90 (D.D.C. 2007).

8 28 U.S.C. 2675(a).

9 *In re Iraq & Afg. Detainees Litigation*, 479 F. Supp. 2d at 115 (internal citations omitted):

> Anticipating that substitution might be upheld, the United States moved for dismissal under the Federal Tort Claims Act based on its assertion that the plaintiffs have not exhausted their administrative remedies as required by the statute. … The Federal Tort Claims Act mandates that "[a]n action shall not be instituted upon a claim against the United States for money damages … unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." … The plaintiffs never rebutted the United States' assertion that they failed to exhaust their administrative remedies. As a result, for lack of subject matter jurisdiction, the Court also will dismiss without prejudice the international law claims that are now asserted against the United States pursuant to the Federal Tort Claims Act.

10 Ali v. Rumsfeld, 649 F.3d 762, 775 (D.C. Cir. 2011) (internal citations omitted):

> The FTCA "required the plaintiffs to file an administrative claim with either the Department of Defense (DoD) or the appropriate military department before bringing suit." … "[W]e view the failure to exhaust administrative remedies as jurisdictional." … As in *Rasul*, the "record is devoid ... of any suggestion" the plaintiffs filed an administrative claim with DoD or a military department. …The district court thus properly dismissed the ATS claims under FRCP 12(b)(1) for lack of subject matter jurisdiction.

11 10 U.S.C. § 2734.

authorizes the Secretary of Defense to settle claims of an inhabitant of a foreign country for damage to property, personal injury, or death in an amount up to $100,000 (or more if coordinated with the U.S. Treasury Department). Claims under the FCA may be based on either the negligent or wrongful acts or omissions of U.S. service members, or on the noncombat activities of U.S. forces. FCA claims are investigated and adjudicated by Foreign Claims Commissions (FCCs), which usually comprise three Judge Advocates, although other commissioned officers may serve as single-member commissions.[12] If an FCC intends to "deny a claim, award less than the amount claimed, or recommend an award less than claimed but in excess of its authority,"[13] it must notify the claimant. This notice gives the claimant an opportunity to submit additional information for consideration before a final decision is made. When the FCC proposes an award to a claimant, it also forwards a settlement agreement that the claimant may either sign or return with a request for reconsideration. The U.S. Army Claims Service confirmed, in separate proceedings before the U.S. Court of Appeals for the D.C. Circuit, that it would compensate detainees who establish legitimate claims for relief under the FCA.[14] As of February 2013, a total of 36 claims identifying claimants by name alleging detainee abuse or maltreatment arising in Iraq had been filed with the U.S. Army Claims Service. As of 2013, compensation had been awarded for five substantiated allegations of detainee abuse or maltreatment in Iraq.

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that "[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." The Rules do not require that these domestic remedies be judicial in nature in order to require their exhaustion before a petitioner may have recourse to the

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[12] FCCs may have one or three members. At least two members of three-member FCCs must be Judge Advocates. Regardless of their composition, proper authority must appoint FCCs. The U.S. Army Claims Service Commander, the Judge Advocate General, and the Deputy Judge Advocate General are the only appointing authorities for FCCs in Afghanistan and Iraq. In addition, prior to being appointed, FCCs must complete in-person or online training.

[13] OPERATIONAL LAW HANDBOOK (AUGUST 2006) (John Rawcliffe & Jeannine Smith eds 2006) at 154, *available at* http://fas.org/irp/doddir/army/law0806.pdf.

[14] Saleh v. Titan, 580 F.3d 1, 2 (D.C. Cir. 2009).

Commission, and the Commission has previously considered non-judicial remedies as remedies that need to be properly exhausted in order for a matter to become admissible under Article 31.[15]

As a result, because the Petitioners have failed to exhaust the domestic administrative remedies that U.S. law requires them to exhaust before they may pursue a judicial remedy in the federal courts, thereby resulting in the dismissal of their international law claims in those courts, the Petitioners have also failed to exhaust domestic remedies within the meaning of Article 31 of the Rules. The Petition is therefore inadmissible. The Commission must, in line with past practice, dismiss it.

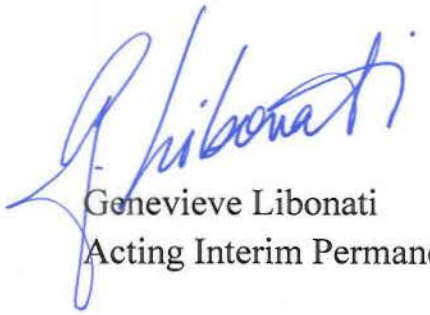
* * *

In sum, the Petition is inadmissible for lack of competence by the Commission to review certain claims and for Petitioners' failure to exhaust domestic remedies under Article 31. The Commission should accordingly declare the Petition inadmissible and, in line with its own practice, close this matter. It should not hold the Petition in abeyance. Holding an inadmissible petition in abeyance—by explicitly deciding to hold the petition or by simply taking no action and allowing the matter to remain open on the Commission's docket—has no basis in the Rules and sets a poor example for, and indeed may even encourage, future petitions that are similarly deficient. We reserve the right to submit further observations should these matters reach the merits stage.

[15] *See, e.g.*, Vázquez & Gil Rendón v. Mexico, Petition Nos. 1352-06 & 580-07, Report No. 67/14, Inadmissibility, July 25, 2014, ¶¶ 39–44 (stating that the petitioners had exhausted domestic remedies even though they had not pursued a special administrative remedy, not because the administrative remedy would not have constituted a domestic remedy, but because that particular special administrative procedure could not have yielded an effective remedy for the petitioners); Cortina González v. Mexico, Petition No. 700-04, Report No. 25/12, Inadmissibility, Mar. 20, 2012, ¶¶ 29–34 (declaring petition inadmissible for failure to exhaust domestic remedies because the petitioner sought *amparo* relief for violations of constitutional principles rather than the proper domestic remedy through the Conciliation and Arbitration Tribunals).

Please accept renewed assurances of my highest consideration.

Sincerely,



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