Table of Contents

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. Strengthening the Role of the UN

On October 14, 2016, Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks at the 71st Session of the General Assembly Sixth Committee on the report of the Special Committee on the Charter of the United Nations ("Charter Committee") and on strengthening the role of the organization. Ms. Pierce's remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7491.

* * * *

Mr. Chairman, we thank the Special Committee for its report, A/71/33, and believe that it reflects some positive movement in the work of the Charter Committee, particularly as it discusses a continuing examination of the matters with which the Committee should concern itself.

A significant challenge to Committee efficiency is the fact that the Charter Committee has a number of longstanding proposals before it. Our view is well known: we believe that many of the issues these proposals consider would be duplicative with work that has been done or is being done elsewhere in the United Nations. In addition, there is a considerable degree of overlap among the proposals themselves. We therefore support further scrutiny by sponsors and members alike of stagnant items on the Charter Committee's agenda, with a view toward rationalization of the work of the Special Committee.

In the area of sanctions, we note once again that positive developments have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. We continue to believe that the Special Committee should decide that the question of the implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions no longer merits discussion in the Committee.

That said, we very much welcomed, upon the important initiative of the EU, the Special Committee's recommendation to move towards biennial consideration of this question, as well as towards requesting biennial reports by the Secretary-General. We think this step was reasonable and makes good practical sense. We strongly urge that the Committee continue to remain focused on ways to improve its efficiency and relevance in future sessions.

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

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 that proposal.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, we continue to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items, it is our position that they should be practical, non-political, and not duplicate efforts elsewhere in the UN system. If a proposal such as that of Ghana aimed at strengthening peacebuilding and related cooperation between the UN and regional organizations could help fill gaps or give value-added, then it should be seriously considered by the Committee. In this regard, we stand ready to participate constructively in the intersessional conversations on this and other proposals.

We were also happy to have the Committee communicate with the President of the General Assembly recalling the 70th anniversary of the International Court of Justice and welcoming the events planned to commemorate the occasion. We also support the recommended General Assembly commemorative resolution to mark the 70th anniversary of the ICJ.

Finally, we welcome the Secretary-General's report A/71/202, regarding the Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council. We applaud the Secretary-General's further progress and ongoing efforts to reduce the backlog in preparing these works and to make them available in electronic form in all official languages on the UN website. Both publications provide a valuable resource on the practice of United Nations organs, and we greatly appreciate the Secretariat's incredibly hard work on them.

* * * *

2. Criminal Accountability of UN Officials and Experts on Mission

On October 7, 2016, Ms. Pierce delivered remarks at the 71st Session of the UN General Assembly Sixth Committee on criminal accountability of UN officials and experts on mission. Ms. Pierce's remarks are excerpted below and available at http://2009-2017-usun.state.gov/remarks/7483.

_____

* * * *

Today we are discussing the important issue of ensuring that UN officials and experts on mission, serving with the UN in both field missions around the world and in headquarters, are held accountable for any criminal acts they may commit. We should remember that this discussion arose more than a decade ago from the broad discussion of establishing and enforcing a policy of zero tolerance for sexual exploitation and abuse by UN personnel. Since then, and in the wake of shocking allegations of sexual exploitation and abuse by UN peacekeepers, the Secretary-General has demonstrated strong leadership in promoting transparency, accountability, prevention, and assistance to victims. The Secretary-General's reforms have prompted a cultural shift in the Organization, taking sexual exploitation and abuse out of the shadows and holding all UN personnel, particularly UN commanders and senior managers, accountable for how they address this issue. We expect that the next Secretary-General will approach the scourge of sexual exploitation and abuse with the same thorough and determined dedication.

However, sexual exploitation and abuse is not the only form of misconduct with which we should be concerned. Annex II to the Secretary-General's report includes information on numerous allegations of other crimes and other violations of the UN's code of conduct committed by UN officials and experts on mission, including: corruption, fraud, physical assault, counterfeiting, firearms violations, diamond smuggling, and theft. Any criminal activity by UN personnel tarnishes the UN's reputation, can seriously impede the effective implementation of mission mandates, and can victimize the very people that UN personnel are mandated to assist or protect.

In this context of seeking accountability for criminal acts, we welcome the work done by the Department of Field Support and the Office of Legal Affairs to finalize guidance for the field on procedures for referring possible criminal misconduct to host countries, and would appreciate an update during this session on the status of that guidance.

We note, however, that of the 89 reports from 2007 to 2016 involving UN personnel listed in Annex II to the Secretary-General's report, in only one did the UN request a waiver of immunity and in only 16 was there any information on actions taken by Member States. And, of those 16, the information was simply that investigations had been initiated, with no further information on the outcome of those investigations. This is not acceptable. We underscore the critical importance greater clarity and further detailed information regarding such allegations in the future. The lack of reporting and follow-up gives the impression of impunity for alleged crimes.

In his latest report on special measures for SEA, the Secretary-General again encouraged Member States to discuss creation of an international convention to address any jurisdictional gaps that might prevent Member States from seeking criminal accountability for actions by their nationals while serving the UN. The United States remains committed to consideration by this Committee of whether a convention could play a useful role in closing legal gaps, particularly jurisdictional gaps that may prevent accountability for serious crimes committed by UN officials and experts on mission.

The United States appreciates the Secretary-General's report, and welcomes the summary of information submitted by Member States on domestic laws related to nationals serving as UN personnel. This information provides an important starting point in identifying potential jurisdictional gaps in Member States' domestic legal systems that serve as roadblocks to accountability. For this Committee to have a well-informed discussion, more information is still needed, in particular about the domestic laws of those Member States who have said they face

legal challenges to holding their nationals to account for criminal acts committed while serving with the UN abroad. For our part, the United States intends soon to make a submission in response to the Secretary-General's request for information, and we encourage others, especially Member States that acknowledge such legal gaps, to do so as well.

It is important that this Committee have a full picture of obstacles in the domestic legal landscape so that we may more deeply consider the possible impact and form of a potentially legally-binding instrument. Having a better understanding of the scope and nature of the issue would also help the Committee to examine other approaches or solutions that may be more effective in addressing obstacles to accountability in UN missions.

The United States strongly supports bilateral and multilateral efforts to address challenges that countries may be facing in terms of limited expertise and capacity for investigation and prosecution. We are reviewing our own programs to see where and how we can be helpful.

* * * *

3. UN Role in Advancing International Law

Ms. Pierce also addressed the Sixth Committee on the UN Program of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. Her remarks, delivered on October 17, 2016, are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7515.

_____

* * * *

The United States thanks the Secretary-General for his report on the United Nations Program of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law.

The United States is pleased to participate on the advisory committee on this United Nations Program of Assistance …As noted in the Secretary-General's report, more than $2 million was included in the regular budget for Program of Assistance activities in the 2016-2017 biennium for the International Law Fellowship Program, the Regional Courses in International Law, and the Audiovisual Library of International Law. …

The Program of Assistance has been making a tremendous contribution to educating students and practitioners throughout the world in international law for more than 50 years. The General Assembly's decision to include the Program of Assistance on the regular budget reflects the belief that it has clearly earned continuing, strong support of all Member States.

Knowledge of international law helps to advance the work of the United Nations. We believe that, fellow by fellow and training by training, the Program of Assistance is developing new generations of lawyers, judges and diplomats, helping them to gain a deeper understanding of the complex instruments that govern so many aspects of this interconnected world, including numerous instruments that are negotiated under the auspices of the United Nations.

* * * *

4. Administration of Justice at the UN

On October 11, 2016, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at the 71st Session of the General Assembly Sixth Committee on administration of justice at the UN. Mr. Townley's remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7517.

* * * *

We would like to thank the Secretary-General, the Internal Justice Council, and the interim independent assessment panel for their reports. We welcome the conclusion of the panel that in general the new system of administration of justice has been an improvement over the prior system. I would like to focus my comments on three particular areas: 1, accountability; 2, efficiency; and 3, transparency.

With respect to accountability, we would be interested in learning more about how best to ensure protection for staff members who report misconduct. We take note of staff rule 1.2(g), but we also agree with the IJC that this issue may require further study, in light of the subtle ways in which retaliation can occur. We also look forward to learning more about improvements to investigations, an issue the panel highlighted was raised by a large number of stakeholders. We would welcome an update on the revisions to the administrative instruction as well as information on training provided by OIOS to lay panels.

With respect to efficiency, we are interested in the panel's recommendation that there is a need for the early resolution of receivability issues, although we agree with the Secretary-General that it would appear that the Dispute Tribunal already has authority to address receivability at an early stage. We also agree with the panel's view that the Appeals Tribunal should be empowered to address urgent motions *in limine*. We agree in this regard with the Secretary-General's emphasis on the importance of interlocutory motions and agree that the question of compensation for work on such motions should be given careful consideration in the Fifth Committee. Finally, we support the recommendation by the IJC to facilitate the tribunal extending time limits to permit settlement discussions, although care will have to be taken to ensure that extensions of time are not abused. We take note of the report of the Secretary-General indicating that this issue is under review and would welcome an update.

We generally agree with the interim independent assessment panel on the importance of transparency. While we agree with the Secretary-General that a number of the panel's recommendations fall within the jurisdiction of the tribunals themselves, we fully agree on the importance of publicizing the workings of the system, and making the tribunals' jurisprudence more accessible. We are pleased that work has progressed on enhancing the jurisprudential search engine and we would welcome an update on whether that work has been completed. We would also be interested in the Secretariat's views on some of the proposals of the IJC with respect to rationalization and clarity of administrative issuances in this regard, an issue that was also elucidated by the panel. Such transparency can have knock-on effects. To give one example, the panel refers to a decision by the Appeals Tribunal regarding decisions of the Ethics Office. One immediate way to mitigate some of the concern expressed would be to better publicize that a staff member may pursue remedies before the tribunals—after management evaluation—in parallel with review by the ethics office.

Finally, I would like to take the opportunity to note that with respect to several issues, we agree with the Secretary-General that particular recommendation of the panel should not be pursued, including, for instance, with respect to the reasons given with respect to the proposal to expand access to the formal system to non-staff.

* * * *

5. Appointment of New Secretary-General

On October 13, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered remarks to the UN General Assembly on the appointment of António Guterres as the next Secretary-General of the United Nations. Her statement is excerpted below and available at http://2009-2017-usun.state.gov/remarks/7484.

_____

* * * *

As the proud host country of the United Nations, the United States joins all the other delegations in this room in welcoming the appointment of António Guterres as the next Secretary-General.

Let me start by saying a word about Secretary-General Ban Ki-moon, who over the last 10 years has shown that progress can be made by setting ambitious goals and mobilizing Member States to meet them. Secretary-General Ban was instrumental in driving the momentum and the concrete commitments necessary to achieve both the historic Paris Agreement on climate change and the Sustainable Development Goals. These are achievements that—if implemented by Member States—will improve people's lives for decades to come. The United States is profoundly grateful to Secretary-General Ban for his leadership and his service to our people and to our planet. Thank you.

The selection of António Guterres as the ninth Secretary-General of the United Nations is an extraordinary outcome that matches the world's growing demands for a strong UN. It is all the more extraordinary because—let's be honest—all too often at the UN, narrow agendas keep us divided and prevent us from taking constructive action. I would like to highlight three ways in which this appointment, and the process that gave rise to it, exceeded expectations. This should inspire us all going forward.

First, given the well-known divisions on the Security Council, many feared that the Council would fail to reach consensus on the next Secretary-General. …Others thought—given the polarization of the Council—that we would agree on a recommendation to the General Assembly, but we would necessarily have to settle for a lowest common denominator candidate, someone who would avoid taking stands on the world's most pressing issues.

We have the privilege today of appointing a supremely qualified candidate as Secretary-General, but also one who has a passion for using this office as an independent force to prevent conflict and alleviate human suffering. The countries of the world—here reflecting, I believe, the longings and the urgent needs of our citizens—are calling on the UN, and by extension, the Secretary-General, to do more than this institution has ever done before.

For the UN to succeed, we are asking you, Mr. Guterres, to serve as a peacemaker—looking for ways to end the brutal conflicts in places like Syria, Yemen, and South Sudan. We

are asking you to serve as a reformer—streamlining the bureaucracy and eliminating redundancies, making sure that peacekeepers are willing and able to protect civilians at risk. And we're asking you to serve as an advocate—rallying the world to respond to humanitarian and manmade catastrophes, and defending the human rights of all people, regardless of their race, creed, nationality, sexual orientation, or gender identity. Mr. Guterres, challenging as these roles may be, we are confident that you can fill them with distinction.

Second, there were fears that this decision-making process for such a critical position would again end up being narrow, exclusive, and shrouded in secrecy. Even though fewer people smoke cigarettes in 2016, the image of a few countries huddled in smoke-filled rooms pervaded. But this year, at long last, the process evolved. For the first time, those vying for the job had to defend their visions for a more secure, just, and humane future in informal dialogues that the entire world could watch in real time. And these conversations mattered—there is no question that the General Assembly and other dialogues shaped perceptions, informing the Council and broader UN membership thinking from the outset. I thank all the exceptional candidates who participated in this more inclusive, more transparent process, and the United States thanks all Member States who contributed to making this process so much stronger.

Of course, some envisaged that change would look a little different in the end. Hopes were high that this election process would deliver the UN's first-ever woman Secretary-General. As the only woman permanent representative serving on the current Security Council, and as one of only 37 women perm reps out of the 193 permanent representatives in the organization, I joined others in encouraging a level playing field for women. And we should consider that until this year, only three women were ever voted upon by the Security Council as candidates. Three women over the course of 70 years. This time, seven out of the 13 candidates voted upon by the Security Council were women. So, over twice as many women were considered in 2016 than in all the previous year's put together. And while being a woman is not among Mr. Guterres's many qualifications (laughter), he has pledged gender parity at all levels of the United Nations, with clear benchmarks and timeframes. This builds upon Mr. Guterres's progress toward achieving gender parity in the workplace as UN High Commissioner for Refugees and back when he was Portuguese Prime Minister.

Third and finally, there was skepticism that we could find in a single candidate a person who could simultaneously get heads of state on the phone to mobilize coalitions and be a person of the people, someone who really appreciated—indeed felt—the pain of the vulnerable. And these are vulnerable people who don't just want the UN to do and be better; they need it and us to be and do better.

In Mr. Guterres, we've selected a candidate who brings both head and heart to the job. Former UNHCR staff have described Mr. Guterres as so impatient to find out the facts of a crisis that he never hesitated to call staff in the field, no matter their rank or their place in the hierarchy. He always asked how headquarters could serve their needs, rather than the other way around. He saw that UNHCR teams in the field were starved for resources, and so shifted funds to help refugees in need, instead of adding jobs in Geneva. And he got out from behind his desk. Mr. Guterres traveled to the refugee camps and witnessed the current crises and the pain and suffering of the displaced for himself, even spending the night in tents in these refugee camps.

We have selected a candidate who is prepared to cut past the jargon and the acronyms, and the sterile briefings, and get real. He knows the only measure of our work here is whether we are or are not helping and supporting real people.

In closing, in 1953, the first Secretary-General, Trygve Lie, heavily criticized both by the Soviet and the United States governments, was so frustrated by the limits of his office that his parting advice to his successor was, "Welcome to the most impossible job on this earth." (Laughter.) The job has not grown easier with time, but it has arguably become even more important.

Mr. Secretary-General Ban Ki-moon, Mrs. Ban, thank you again for your tireless, tremendous service and for your sacrifice. Mr. Secretary-General-Designate Guterres, thank you for taking on this monumental responsibility. We hope that the unity we see today can be sustained, the inclusivity and transparency of the process extended, and your compassion—and that of Secretary-General Ban Ki-moon—embodied in the daily work of this organization. We look forward to a partnership that pays dividends for the people out there who count on us.

* * * *

6. UN Women

On June 27, 2016, Ambassador Sarah Mendelson, U.S. Representative for Economic and Social Affairs, delivered the U.S. Statement at the annual session of the UN Women Executive Board. Her remarks are excerpted below and available at http://2009-2017-usun.state.gov/remarks/7355.

_____

* * * *

We are impressed by UN Women's accomplishments over the past two years in all six of its impact areas, ranging from direct involvement in the implementation of gender equality National Action Plans to helping bring about new laws and constitutional reforms, to training thousands of civil servants on gender awareness. The observable, concrete impact that UN Women has made on the 93 countries where it now has programs is a testament to its determination to fulfil its mandate. The United States strongly supports these efforts to promote women's empowerment and full participation in all aspects and at the highest levels of political and economic life.

We thank UN Women for providing an informative and easily readable report on the strategic plan. We particularly commend the innovative and interactive new website with information keyed to the report. This report speaks well of the international progress on gender equality and empowerment of women and girls through economic empowerment, political participation, national planning, ending violence against women and girls, and most critically, involving women in a robust manner in issues of peace, security, and humanitarian action.

We were pleased to learn that over one billion women and girls will be better protected by the strengthened legislation on violence against women adopted in 26 countries. We also see that 31 countries have increased their budget allocations for gender equality commitments, an indication that countries are placing a greater emphasis on this 21st century best-practice approach to development—or what we used to call "women's issues"—in their resource considerations. We agree that the strategic plan continues to be relevant, and we welcome UN Women's increasing emphasis on the development of local capacity. We have noticed that indicators show that progress on economic empowerment has been somewhat slower than in

other areas. We hope that the adoption and implementation of the Flagship Programs Initiative will help to energize progress in this area.

Mr. President, to achieve its goals, UN Women requires adequate funding and comprehensive financial planning. We strongly support the continued funding of UN Women to promote the rights of women around the world and note that contributions in 2015 still fall short of your goal of $250 million in core contributions, despite 146 countries making contributions. Supporting UN Women will remain a priority for the United States.

An area of importance to the United States where UN Women has been particularly strong is its engagement with civil society. This is illustrated not only in the involvement of over 6,000 civil society representatives at the Commission on the Status of Women, but also by the over 100 consultations UN Women has undertaken with civil society on a wide variety of topics, the 700,000 men who have joined the "He For She" campaign, and the more than six million users who follow its websites. We support UN Women in its robust partnerships with civil society, pushing back against the disturbing trend around the world and at the United Nations of closing space around civil society activity.

Finally, we would like to applaud UN Women's participation in the Grand Bargain on emergency funding for refugees. We hope that this initiative will give women in crisis more autonomy to make life-altering decisions.

We are particularly interested in understanding how UN Women plans to follow-up its commitments made at the World Humanitarian Summit, including the Grand Bargain commitments, and the "Commitment to Action." We encourage UN Women to work independently, as well as with other implementing agencies, to institute joint and impartial needs assessments and prioritized response plans and work to establish a centralized in-country leadership accountable to beneficiaries, implementing agencies, and donors. Additionally, we encourage UN Women to begin using multi-year planning, maximize efficiencies in logistics and procurements with other UN agencies, provide more transparency on where and how money flows, build local capacities, and make better use of data and of feedback loops to guarantee the voices of the beneficiaries are being heard and driving programming. We would like UN Women to provide an update on its efforts in this regard at the Board's September meeting.

Gender equality and the empowerment of women and girls will continue to be a U.S. national priority. The United States also forward to working with UN Women to enhance joint efforts at preventing and combating violent extremism.

The United States stands by its conviction that equal participation by women and girls in all aspects of society benefits everyone. Our "United State of Women Summit" on June 14 celebrated progress made on gender equality but more must be done at home and abroad to promote these efforts and stress the importance of these issues. We look forward to collaborating with UN Women on our shared agenda in the coming year.

* * * *

7. Rule of Law

On October 5, 2016, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at the 71st Session of the General Assembly Sixth Committee on the agenda item, "Rule of Law." His remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7478.

---

* * * *

We take note with interest of the information provided on the Secretariat's review of the regulations giving effect to Article 102 of the UN Charter and on recent developments in and practices in the discharge of the Secretary General's function as depositary of multilateral treaties. In this regard, we welcome the steps the Secretary General has taken to use new technologies to increase the efficiency of the UN's work on treaty matters and to expand access to information. On the question of potential changes to regulations giving effect to Article 102 of the Charter, we believe this Committee should focus its attention on proposals that could further contribute to efficiency, particularly through the effective use of information technology, and make the most productive use of available resources. This said, we believe consideration of any such changes should proceed cautiously, and that the Committee should take careful account of the views of the Secretariat with regard to any implementation issues or challenges that might be posed by particular proposals. We also very much support the UN's work, described in this report, to advance transitional justice.

We are also pleased to discuss our two topics this year: national practices of states in the implementation of multilateral treaties and practical measures to facilitate access to justice for all, including the poorest and most vulnerable.

With respect to national practices of states in the implementation of multilateral treaties, I would like to offer thoughts on how the United States approaches implementation of multilateral treaties. Implementation is a critical focus for the United States beginning at the earliest stages of treaty negotiation. Before the United States begins negotiations on a treaty, it gives careful consideration to what obligations the treaty is likely to contain, and how the United States would give effect to them. The United States follows a formal process, coordinated by the Department of State, designed to ensure that all agencies that will be responsible for implementing the agreement understand what it will provide for and what actions they will be called upon to take to give it effect. Such early engagement also gives relevant agencies early visibility into, and a stake in, the project, and a role in developing the U.S. position during the negotiation, so that the instrument itself is clear, and more readily susceptible of national implementation.

An important part of the U.S. review process is a legal analysis of the agreement, which identifies the laws and authorities that the United States will rely on to implement the agreement, and confirms that these will be sufficient to allow the United States to meet all the obligations it will assume. If authority is lacking to allow implementation of any obligations, such gaps are identified and plans are developed to secure the additional authority needed to allow the United States to implement the obligations before the United States becomes a party to the treaty, which in some cases will require enactment of new laws by the U.S. Congress. This analysis is repeated after negotiations are completed to confirm that the United States will be able to implement the agreement in its final form, including any provisions that may have been added or changed during the course of the negotiations. This process is designed to ensure that the United States will be able to meet its obligations under a treaty from the moment it becomes a party, in accordance with the principle of *pacta sunt servanda*.

As a federal system, U.S. implementation of some treaties may involve actions by state and local officials. Where this is the case, the federal government makes efforts to coordinate with such officials on implementation issues both during the negotiation of treaties and after the

United States has become a party. This has included, for example, participation by state and local officials as part of U.S. delegations that appear before human rights treaty bodies to make periodic reports on U.S. implementation of such instruments. In addition, the United States seeks to engage relevant private sector and civil society stakeholders at appropriate points both before and after the conclusion of treaties to benefit from their perspectives on how treaties might be most effectively crafted and implemented.

We welcome the opportunity to discuss these important issues and are interested in hearing more about how other states approach treaty implementation and promote their compliance with treaty obligations.

Turning now to our second topic this year—one in which the United States is keenly interested—I'd like to focus first on legal aid—both civil and criminal. Last year, President Obama signed a presidential memorandum establishing the White House Legal Aid Interagency Roundtable, WH-LAIR, with a mandate to integrate civil legal aid into a wide array of Federal programs, policies, and initiatives where doing so can improve their effectiveness and enhance justice in our communities. In doing so, federal programs designed to improve access to housing, health care services, employment and education, and enhance family stability and public safety are strengthened and objectives better met. To give examples: a 2014 study from the University of California's Berkeley School of Law indicates that legal interventions, such as expungement of a criminal record, stems the decline in earnings and may even boost the earnings of individuals reentering society; and legal aid can improve patient health by, for example, addressing substandard housing conditions such as mold or rodent or insect infestations that increase use of costly emergency room visits for asthma attacks. In fact, legal aid can *reduce* cost to governments, for instance by reducing the time children may have to spend in foster care, or driving down healthcare costs.

And, while recognizing the resource constraints we face, and recognizing just how much work we have to do in a country where one in five Americans qualifies for legal aid but more than half of those seeking it are turned away because of a lack of funds, we have taken action. For instance, our Department of Health and Human Services has clarified that community health centers can provide health-related legal aid. Subsequently, a number of community health centers across the country received supplemental funding to establish partnerships between the medical and legal communities.

Moreover, some of our programs are specially designed to meet the needs of particular populations, such as indigenous communities. For instance, there are federally-funded legal aid programs that work in Indian Country to provide specialized legal services for our indigenous communities.

On the criminal side, we welcome the recent adoption by the United Nations Commission on Crime Prevention and Criminal Justice of a resolution sponsored by the United States to promote access to criminal legal aid. This resolution helped translate Sustainable Development Goal 16 into new resources and tools for national experts, including by supporting the concept of a new global network for legal aid practitioners. We look forward to participating in the second international criminal legal aid conference, taking place in Buenos Aires in November 2016, which follows on the first conference in South Africa in 2014. We understand that at that conference, a global network for defenders as contemplated in the resolution will be further developed. At the national level, efforts are underway to strengthen the right to criminal legal aid at all levels of government—and later this month the U.S. Department of Justice will host the

second Right to Counsel Consortium, which will solicit recommendations to improve implementation of this right at the federal, state, and local levels.

The last thing I would like to highlight is one element of the recent CCPCJ resolution—and one that is also at the root of our discussion today: the need to share best practices and exchange views. Such exchanges permit critical peer-to-peer learning. We must accelerate such efforts.

But related to exchanges of practice, we need to better understand what works, and what doesn't. And that brings me to another key aspect of this discussion: measurement. Measurement is not some abstruse political yardstick. It's a tool for improvement. We need granular information to understand vulnerabilities in our system. Just last month, at a high-level event on Goal 16, our Department of Justice announced the United States' commitment to identifying national indicators for Target 16.3 of the SDGs through a working group comprised of over 20 federal agencies. And we know that the government can't identify criminal and civil access to justice indicators alone. In September, the federal working group participated in a civil society consultation with over 30 experts on access to justice from across the country. Measuring justice is difficult, but essential, because access to justice is the foundation for more inclusive societies.

Only once we learn the lessons of our experience, once we know what it is that we need to work harder to change, and also what bright spots we deserve the spotlight, will we be well positioned to improve what we do to facilitate access to justice for all.

* * * *

8. UN-African Union Cooperation

On May 24, 2016, Ambassador Power delivered remarks at a UN Security Council open debate on UN-African Union peace and security cooperation and the future of the African Peace and Security Architecture. Her remarks are excerpted below and available at http://2009-2017-usun.state.gov/remarks/7297.

* * * *

I would like to address four key features of the AU-UN partnership today: mutual respect, financing, capacity-building, and prevention.

First, mutual respect. Given that more than 80 percent of UN troops are deployed to Africa, we have a great deal to gain from enhanced communication between the AU and the UN. Given that African peacekeepers contribute more than half of the UN troops who are doing peacekeeping on the African continent, it is both pragmatic and right to seek out African views on mandate formation, political mediation efforts, and all of the tools we deploy as a UN Security Council in service of conflict resolution and conflict prevention. I would note, though, that it would be simplistic to suggest that the "African" view of any issue is a monolithic one, any more than the views inside the UN Security Council are monolithic. But more communication and more listening to one another, more mutual respect, more supplementing of

formal sessions with more informal conversations and brainstorms will make us each—and together—more effective.

Second—a hot topic here today—financing. When it comes to discussing how to strengthen the UN-AU partnership, there is understandably a great deal of focus on how we can better support the deployment of African-led peace support operations to address urgent threats to peace and security.

We know that the UN will not always be able or best positioned to respond to a crisis—and while the Security Council continues to be responsible for the maintenance of international peace and security, we also know that the AU can be a particularly effective partner in this pursuit, including when it comes to conducting offensive military operations in complex security situations where there is no peace to keep and armed groups threaten the civilian population.

There is a clear need to improve the financial and operational arrangements that undergird AU-fielded, UN-authorized peacekeeping missions, and which will reflect our shared ownership and responsibilities. We think there can be progress on this long-stalled issue. We hope that AU member states will fulfill their commitment to finance 25 percent of AU peace operations, while also developing a fiduciary framework to govern the use of those funds, and establishing new approaches to mandating and overseeing these missions with the Security Council to ensure that they are effective and accountable.

The proposals being developed by AU High Representative Kaberuka could be important steps in this direction. If we are able to make progress, we will need to agree on common approaches to mission mandating, planning processes, and transparency and accountability mechanisms. These will enable the Security Council and the AU PSC together to monitor and promote strict adherence to international peacekeeping standards—which should include, of course, full respect for human rights norms and a zero-tolerance policy for sexual exploitation and abuse. By demonstrating that peacekeepers who commit abuses will be held to account, we strengthen the legitimacy of peacekeeping where it counts most: with the civilians that peacekeepers are sworn to protect.

Third, capacity-building. Improving the operational capacity of the relationship will also require continuing efforts to build the capabilities of the AU, as envisaged in the African Peace and Security Architecture roadmap. Greater AU capabilities will translate into the AU delivering more effective peacekeeping missions.

The United States has shown our commitment to this effort; we have strengthened AU command and control capabilities, supported multinational exercises for brigades, and trained more than 250,000 peacekeepers since 2005. Two years ago, President Obama also established the African Peacekeeping Rapid Response Partnership, a major new initiative to build the capacity of key African troop-contributing countries so that they can deploy more rapidly to peacekeeping missions. This was something that they had requested of the international community many times.

And fourth and finally, prevention. Now prevention is the issue on which all of us can agree on in the abstract. Who can be against prevention? But where the differences often emerge inside each of our respective councils is when concrete cases, real countries, and real circumstances emerge. Members of both the UN Security Council and the AU Peace and Security Council must get better at dealing with the political drivers of conflict. This can be more politically sensitive for neighbors than it is for countries that are far removed, and we shouldn't dance around that fact.

All of us must recognize that it is highly destabilizing when political opponents are attacked, people's rights are violated, elections are hijacked, and when constitutions are ignored. We have seen these kinds of actions helping fuel conflict that then ends up on both of our respective agendas. Conversely, those states that prioritize investments in accountable and inclusive institutions, that deepen the rule of law, that include women in decision-making processes, and otherwise pursue improved governance and more open societies are empirically far less likely to descend into conflict, and to eventually threaten regional peace and security. Our partnership must advance these goals, and Member States must be quick and unified in their response when the roots of conflict begin to grow.

The situation in Burundi remains deeply perilous—with more than 400 dead, 250,000 refugees to date, the near collapse of the Burundian economy, rampant insecurity, and the constant threat of a real spiraling in violence. Here the UN Security Council has often lagged behind the AU PSC in responding to the crisis.

In the Democratic Republic of Congo, the government five days ago issued an arrest warrant for opposition leader Moïse Katumbi, soon after he announced he would run for president in elections scheduled for later this year. The government has said that the elections will likely be postponed, and that President Kabila—who is prohibited by the constitution from running for a third time—will remain in office until they can be held. Civil society activists have been arrested and detained for protesting peacefully. On Thursday, opposition leaders are planning nationwide protests. Congolese security forces have in the past used repressive tactics—including deadly force—to prevent Congolese citizens from exercising their right to peaceful demonstration. This is a conflict prevention moment: we know it, we see it. We know from history, we know from the present, and it is imperative that we show a unified front in calling on President Kabila to abide by the constitution and step down when his term ends.

Marshaling a unified political front is equally important if conflict does break out; it is the only way to maintain collective positions and support meaningful action. In South Sudan, the UN and the AU have supported IGAD efforts to pressure both sides. Without those pressure points, without that leverage, it is hard to imagine the formation of the transitional government that has occurred. This situation is extremely fragile, and sustaining momentum in the weeks and months ahead will require high-level attention and a continued, unified IGAD-AU-UN front.

By contrast, sadly, in Sudan the members of this Council and the AU PSC have been embarrassingly divided. We have failed even to successfully pressure the Government of Sudan into permitting the delivery of supplies required by the soldiers and police who comprise the beleaguered mission; hundreds of containers of UNAMID and contingent-owned equipment are languishing in Port Sudan and Darfur regional airports, while attacks against the mission by militia and other armed groups continue. Rather than hosting indicted Sudanese leaders, UN and AU member states should be exerting all influence possible to persuade Khartoum to change course. Even if we could make progress on ensuring more predictable funding for AU missions—something I think we all agree is a priority issue—it will mean little if we cannot unite behind the delivery of food to peacekeepers who are risking their lives on the frontlines.

If we are to forge a more robust UN-AU relationship, we should seek more progress on these concrete cases that affect millions of civilian lives in the here and now.

* * * *

B. INTERNATIONAL COURT OF JUSTICE

On October 27, 2016, Valerie Biden Owens, Senior Adviser to the U.S. Mission to the United Nations, delivered remarks at the 71st General Assembly briefing by the President of the International Court of Justice. Ms. Owens's remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7529.

* * * *

President Abraham's report reminds us that international justice is alive and well. We welcome the fact that states are increasingly resorting to the International Court of Justice and other international judicial bodies to resolve their bilateral disputes, where both parties to that dispute have accepted the court's jurisdiction.

Rather than seeing what some often decry as a fragmentation of international dispute resolution mechanisms, we see a healthy array—or as one judge of the ICJ has called it, a kaleidoscope—of complementary judicial venues so that States may choose which forum best suits their needs.

Resort to an appropriate dispute resolution mechanism is a means to pursue the peaceful resolution of a dispute, an embrace of Article 33 of the UN Charter, which, as we will recall, provides that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

The UN Charter's drafters had the wisdom to make the International Court of Justice one of the principal organs of the United Nations, putting the peaceful resolution of disputes at the heart of the United Nations.

This April, we welcomed the opportunity to celebrate the 70th anniversary of the Court's inaugural sitting at the Peace Palace. It gave us and others a unique opportunity to reflect on the important role the Court has played over the past 70 years. We echo President Abraham's message that "the need for a world court working for international peace and justice is as strong today as it was when the Charter was first signed" and we applaud the Court for its readiness to take on the many new and difficult challenges brought before it.

* * * *

C. INTERNATIONAL LAW COMMISSION

ILC's Work at its 68th Session

On October 24, 2016, Department of State Legal Adviser Brian J. Egan delivered remarks at the 71st Session of the General Assembly Sixth Committee on the work of the International Law Commission ("ILC"). His remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7560. Mr. Egan addressed the topics of protection of persons in the event of disasters; identification of customary international

law; and subsequent agreements and subsequent practice in relation to the interpretation of treaties. The discussion of subsequent agreements and practice is included in Chapter 4.

_____

* * * *

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address more topics in Cluster 1.

On the subject of "Protection of persons in the event of disasters," we thank the Commission and the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for their efforts. In particular, we appreciate their consideration of the comments of Member States, including the United States, on the draft articles adopted after first reading.

The Commission has now completed its second reading and produced in final form a preamble, 18 draft articles and commentary, and has recommended to the General Assembly the elaboration of a convention based on the draft articles, which the Commission stated contain elements of progressive development as well as codification of international law. Although we are continuing our review of the final text, we do not believe all of our concerns have been resolved. We continue to believe that this topic would best be approached through the provision of practical guidance to countries in need of, or providing, disaster relief, rather than in the form of a treaty.

Mr. Chairman, with respect to the topic "Identification of customary international law," the United States would first like to express its thanks and great appreciation for the extraordinary contribution that the Special Rapporteur, Sir Michael Wood, and the Commission have made to international law through the draft conclusions and commentary that were adopted by the Commission this summer. They are already an important resource for practitioners and scholars alike.

We are in the process of conducting a detailed review of the draft conclusions and commentary and look forward to submitting comments and observations by the end of next year.

Although our review is not complete, we would like to note two areas of initial concern.

Our first comment relates to aspects of the draft conclusions and commentary that appear to go beyond the current state of international law such that the result is progressive development rather than codification on the particular issues. While recommendations regarding progressive development are appropriate in some ILC topics, we do not think that they are well-suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the established rules regarding the identification of customary international law. Mixing elements of progressive development and established rules in this project risks confusing and misleading readers and undermining the utility and authority of the ILC's product. To the extent that the ILC wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law.

In this regard, we are most focused on Draft Conclusion 4 and its discussion of the role of the practice of international organizations in contributing to the formation or expression of customary international law. We are concerned that it suggests that the practice of international

organizations may serve as directly relevant practice, or play the same role as State practice, in the formation and identification of customary international law, at least in certain cases. We do not believe that the practice and *opinio juris* of States, or relevant case law, support the proposition that the conduct of international organizations—as distinct from the practice of member States in the IOs—contributes directly to the formation of customary rules. The commentary adopted by the Commission provides very little support for this proposition, and what is included does not appear to support the broad language of Draft Conclusion 4. Indeed, we believe that such language unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze the practice of hundreds if not thousands of international organizations with widely varying competences and mandates. In this respect, we view Draft Conclusion 4 as essentially a proposal for progressive development of the law on this issue, raising the concerns noted earlier.

We encourage other States to give careful consideration to these issues as they review the draft conclusions and commentary.

The second topic that we expect to address in our comments on the draft conclusions and commentary relates to aspects of the text that we believe need adjustments to avoid potentially misleading the reader.

For example, we believe that there is a risk that the draft conclusions and commentary as a whole may leave the impression that customary international law is easily formed or identified. Because that is not the case, we believe that the commentary may need to reinforce the point that customary international law is formed only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* are met.

Mr. Chairman, once again, we thank Sir Michael Wood and the Commission for their very impressive work on this topic that is so important to all of us.

* * * *

On October 28, 2016, Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, delivered remarks at the 71st Session of the General Assembly Sixth Committee on the report of the ILC on the work of its 68th session, addressing the topics of crimes against humanity, *jus cogens*, and protection of the atmosphere. Mr. Simonoff's remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7523.

_____

* * * *

Crimes Against Humanity

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

As described in the commission's work to date, the development of the concept of "crimes against humanity" has played a critical role in the pursuit of accountability for some of

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

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

Jus Cogens

With respect to the topic of *jus cogens*, Mr. Chairman, we would like to thank the special rapporteur, Professor Dire Tladi, for the substantial amount of work and careful analysis he has devoted to this project. We note that the commission has now considered Professor Tladi's first report on this topic, that the commission has referred two of the report's draft conclusions to the Drafting Committee, and that the committee has provisionally adopted parts of these draft conclusions.

We appreciate that this topic of *jus cogens* is of considerable intellectual interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of other issues of international law, perhaps most notably in the area of human rights law. However, we continue to have a number of concerns. From a methodological point of view, we have concerns that only limited international practice exists on important questions, such as how a norm attains *jus cogens* status, and the legal effect of such status vis-à-vis other rules of international law and domestic law. That limited precedent may make it difficult to draw valid conclusions.

We also have some questions about the second paragraph of draft conclusion 3 proposed by the special rapporteur, which has not yet been adopted by the Drafting Committee. This paragraph reads as follows; "Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable." We are concerned that the meaning and purpose of this paragraph are unclear and that describing *jus cogens* norms as protecting "fundamental values" and as "universally applicable" would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by states.

Protection of the Atmosphere

Mr. Chairman, with respect to the topic "Protection of the Atmosphere," we acknowledge the significant amount of work that the special rapporteur, Mr. Shinya Murase, has done on this topic. However, we continue to be concerned about the direction it appears to be taking.

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

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

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

Accordingly, we opposed inclusion of this topic on the commission's agenda. Our concerns were somewhat allayed when the commission adopted an understanding in 2013, which we hoped might prevent the work from straying into areas where it could do affirmative harm. But we have been disappointed. All three reports that have thus far been produced have evinced a desire to re-characterize the understanding and to take an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines provisionally adopted by the commission this summer, the most serious concerns relate to the purported identification of "obligations" or "requirements" in contravention of the 2013 understanding that work on this topic would not impose new legal rules or principles on current treaty regimes.

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

* * * *

On November 2, 2016, Mr. Townley provided the U.S. statement at the Sixth Committee on the Report on the Work of the ILC at its 68th session. The November 2 statement addresses the topics of protection of the environment in relation to armed conflicts; immunity of State officials from foreign criminal jurisdiction; and provisional application of treaties. The U.S. statement is excerpted below and available at https://2009-2017-usun.state.gov/remarks/7536. The discussion of provisional application of treaties is provided in Chapter 4.

* * * *

Mr. Chairman, with respect to the topic "Protection of the Environment in Relation to Armed Conflicts," the United States first expresses its thanks for the efforts of the Special Rapporteur, Ms. Marie G. Jacobsson, in drafting reports that recognize the complexity and controversial character of many of these issues. We are in the process of reviewing the Special Rapporteur's

proposed draft principles that emerged from the ILC's Drafting Committee in August. Although our review is not complete, we note two areas of concern.

First, with regard to the general scope of the project, we remain concerned by the attention paid to addressing the application of bodies of law other than international humanitarian law during armed conflict. We are also concerned that this is not the appropriate forum to consider whether certain provisions of IHL treaties reflect customary international law.

Second, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States "shall" or "must" do. Such an approach, however, is not appropriate for a project that is purporting to assert "principles" and, in any event, several of these so-called "principles" go well beyond existing legal requirements of general applicability. For example, draft principle 8 introduces entirely new substantive legal obligations in respect of peace operations that cannot be found in existing treaties, practice, or case law, and draft principle 16 expands the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include "toxic or hazardous" remnants of war.

Even so, Mr. Chairman, we thank Ms. Marie Jacobsson and the Commission for their work on this topic.

Mr. Chairman, turning to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we appreciate the efforts that the Special Rapporteur, Concepción Escobar Hernández, has made on this important and difficult topic. We commend also the thoughtful contributions by the other members of the ILC.

This summer, the Special Rapporteur issued her fifth report, this time addressing limitations and exceptions to immunity falling within the scope of this topic. We note that the topic does not address immunity of State officials covered by "special rules of international law," such as diplomatic, consular, or international organization officials, or officials on special mission.

For officials falling within the scope of this topic, Draft Article 7 provides that there are no exceptions to their immunity *ratione personae*, but that their immunity *ratione materiae* immunity will not apply with respect to alleged acts falling within three groups: First, genocide, crimes against humanity, war crimes, torture, and enforced disappearances; second, corruption-related crimes; or third, crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

Because the ILC had insufficient time to consider the proposed articles before debating them, its debate commenced but has been held over until next summer.

There are a number of concerns raised by the Special Rapporteur's approach in formulating draft Article 7. First, in stating that immunity will not apply to certain crimes, Article 7 does not specify why immunity does not apply. It is arguable that corruption-related crimes, which are presumably motivated by the defendants' self-interest, would not be considered official acts in the first place. But other crimes, for example war crimes, would often include acts taken in an official capacity. Article 7 presumably makes immunity unavailable for those crimes based on their status as serious international crimes. It would have been helpful to have a better idea of what the conceptual basis is for making immunity not available for certain crimes, otherwise it is difficult to assess whether these exceptions are grounded in existing law.

Second, with respect to the territorial exclusion for immunity, it is not clear why a civil law tort standard was adopted for use in the context of criminal law, nor whether the exception

applies to all crimes involving any level of injury to person or property, or only to crimes involving serious harm. We also do not understand the basis for requiring that the defendant be in the forum state's jurisdiction at the time of the act for the forum state to exercise jurisdiction. For example, we wonder why it would make a difference if anthrax that causes death or injury in the forum state was mailed from some other state, such as the official's state or a neighboring state.

Finally, the accompanying report, while thorough, did not adequately support the exceptions to immunity that appear in draft Article 7 through reference to widespread State practice with *opinio juris*, treaty law or case law.

Next year, the Special Rapporteur may produce a further report addressing procedural matters, and that issue may provide needed clarity with respect to how any limitations and exceptions to such immunity are expected to operate.

We appreciate the time and attention that Professor Escobar Hernández and the Commission have devoted to this important and complex topic, and we look forward to their continuing work.

* * * *

D. OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

In 2016, the United States filed response briefs or letters with respect to 36 petitions lodged by individuals or their representatives—most commonly, nongovernmental organizations, law school clinics, and private attorneys—with the Inter-American Commission on Human Rights ("IACHR" or "Commission"). In addition, the United States filed 14 other letters on procedural matters or to make follow-up inquiries or provide further information on pending cases. The United States also participated in hearings and other proceedings at the IACHR.

The Charter of the Organization of American States ("OAS") authorizes the IACHR to "promote the observance and protection of human rights" in the Hemisphere. The Commission hears individual petitions and provides recommendations principally on the basis of two international human rights instruments, the American Declaration of the Rights and Duties of Man ("American Declaration") and the American Convention on Human Rights ("American Convention"). The American Declaration is a nonbinding statement of principles adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international treaty that sets forth binding obligations for States parties. The United States has signed but not ratified the American Convention. As such, the IACHR's review of petitions with respect to the United States takes place under the substantive rubric of the American Declaration and the procedural rubric of the Commission's Statute (adopted by OAS States via a nonbinding resolution) and the Commission's Rules of Procedure ("Rules") (drafted and adopted by the Commissioners themselves).

The United States remains a strong supporter of the IACHR. U.S. voluntary contributions to the IACHR in 2016 were significant and helped the IACHR avoid layoffs and the cancellation of hearings that would have resulted from its budget shortfall. See OAS press releases, available at

http://www.oas.org/en/iachr/media_center/PReleases/2016/167.asp, http://www.oas.org/en/iachr/media_center/PReleases/2016/104.asp, and http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp).

The United States has repeatedly urged the Commission to streamline its case management in order to reduce its sizeable backlog of petitions awaiting an IACHR decision or other IACHR action. Under the leadership of Professor James Cavallaro, one of the seven Commissioners of the IACHR and a U.S. national, the IACHR adopted new case management procedures in the fall of 2016 and has reduced its backlog somewhat. See October 18, 2016 OAS press release, available at http://www.oas.org/en/iachr/media_center/PReleases/2016/150.asp. In 2016, the United States subscribed to and began utilizing the IACHR's electronic case-management system, the Individual Petition System Portal, http://www.oas.org/en/iachr/portal/, launched in 2015, which is intended to speed up the processing of the parties' filings.

As of January 4, 2017, there were 92 pending matters and cases* against the United States at the IACHR, *i.e.*, those in which the IACHR had at some point forwarded the petition or another request to the United States for some U.S. action, where the matter or case remained open on the IACHR's docket. This figure does not include requests for information under Article 25(5) of the Rules or Article 18(d) of the Statute that had not, as of that date, ripened into a precautionary measures request or a proceeding on admissibility. The United States does not know the number of petitions that, as of the end of 2016, remained under initial review at the IACHR for a determination of whether they meet the threshold requirements for forwarding to the United States. The IACHR's statistics webpage, http://www.oas.org/en/iachr/multimedia/statistics/statistics.html, indicated that there were 280 such petitions as of the end of 2015.

Among the 92 matters and cases that have been forwarded for U.S. action and remain pending before the IACHR, the IACHR had, as of January 4, 2017, requested precautionary measures from the United States in four matters, but had not initiated admissibility proceedings in these matters. Sixty-three of the 92 were matters at the admissibility stage, in all of which the United States has filed at least one response; 14 of those 63 involve the death penalty. Also among the 92, there were 25 pending cases at the merits stage, in all of which the United States has filed at least one response; 16 of these involve the death penalty. In all the death penalty matters and cases, as well as a few others, the IACHR also requested precautionary measures. Separately, in nine other cases in which a merits report had already been issued, an IACHR precautionary measures request to the United States remained outstanding; eight of these involve the death penalty.

The allegations raised in these 92 pending matters and cases cover a broad range of subjects. The most common implicate the death penalty (about 35% of the total);

* Editor's note: Under the IACHR Rules of Procedure, "matter" is the word used to describe proceedings related to a petition that the IACHR has not yet ruled admissible. "Case" is the word for proceedings related to a petition the IACHR has ruled admissible, at the merits stage and thereafter.

other criminal procedure issues (18%); national security and armed conflict issues (14%); immigration and asylum (11 %); alleged prisoner abuse (9%); alleged domestic and other private violence (5%); labor rights (3%); and voting rights (3%).

Looking broadly at the historical U.S. practice before the IACHR from 1965 (when an amendment to the OAS Charter gave the IACHR the ability to entertain individual petitions) through the end of 2016, a total of 76 matters and cases against the United States have concluded. Of these, the IACHR issued merits reports finding against the United States, in whole or in part, in 30 cases. It issued a merits report finding fully in favor of the United States in just one case. It dismissed 12 petitions against the United States on admissibility grounds, and did not reach the merits. The IACHR archived the remaining 33 matters or cases with no ultimate substantive determination for various reasons provided for under the Rules, including that the grounds for the petition no longer subsisted, the petitioner withdrew the petition, or the petitioner had otherwise ceased to display any interest in pursuing the matter at the IACHR.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2016 is discussed below. The United States also filed briefs and letters in several matters and cases not discussed and excerpted herein, including ones concerning immigration (removal of noncitizens, asylum, etc.); alleged criminal process violations at the state level, including in cases involving the death penalty; alleged mistreatment in federal and state prison; and detention resulting from armed conflict situations. The United States additionally filed other correspondence in 2016, such as requests to archive long-dormant cases and to withdraw moot precautionary measures requests. The 2016 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2016 that are not discussed herein, are posted in full (without their annexes) at https://www.state.gov/s/l/c8183.htm.

1. Substantive Response Briefs and Letters

a. Case No. 12.958: Reconsideration of Admissibility

Case No. 12.958 concerns a Missouri death penalty inmate. The United States made several legal arguments in a February 2016 brief arguing for dismissal of the petition for inadmissibility and lack of merit. In the excerpts below (with footnotes omitted), the United States asserts that the Commission may reconsider its previous determination regarding admissibility.

* * * *

The Commission may reconsider admissibility even after a decision on admissibility. This matter presents an especially compelling opportunity for the Commission to reconsider admissibility. The United States never received a petition under Article 23 of the Commission's Rules, nor a

notice of consideration *motu propio* under Article 24. Rather, the United States received a "Request... for precautionary measures under Article 25(2) of the Commission's Rules of Procedure." On May 20, 2014, the Commission forwarded that Request along with a resolution on precautionary measures and a letter asking for "an urgent response to th[e] request for precautionary measures." By May 21, 2014, the requested precautionary measure of preserving [Petitioner]'s life had been granted by the U.S. Supreme Court. Afterward, the United States had no notice that the Commission intended to treat the Request as a petition and rule on admissibility, and therefore did not know that the Commission expected it to file a response prior to the expiration of the three-month time period in Article 30(3) of the Rules. The Commission issued its admissibility decision on July 21, 2014. Serving the interests of justice requires adhering to the rules and giving parties notice, so the United States respectfully urges the Commission to reverse its prior position and, for the reasons set forth below, find that reconsideration is available with respect to any available admissibility ground set forth in the Rules.

The United States is aware that the Commission has previously taken the position that a State waives objections to admissibility based on non-exhaustion of domestic remedies if the State does not raise them prior to the Commission's decision on admissibility. For this proposition, which the Commission called "the doctrine of the inter-American system," the Commission cited to an Inter-American Court of Human Rights ("Inter-American Court") case holding that an objection asserting non-exhaustion "must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. The Inter-American Court did not specify when "an early stage" ends.

As the United States recently argued in another matter—arguments the Commission chose not to deal with in any meaningful way—this jurisprudence should not govern procedures before the Commission, particularly for States not subject to the jurisdiction of the Inter-American Court, for several reasons. First, the Commission should base its decisions on its own governing instruments, not on the jurisprudence of another body interpreting a different set of rules. While Article 30(6) of the Commission's Rules provides that "considerations on or challenges to the admissibility of the petition shall be submitted as from the time that the relevant parts of the petition are forwarded to the State and prior to the Commission's decision on admissibility," the Rules contain no provision barring the Commission from reconsidering admissibility after the Commission has issued an admissibility decision—on non-exhaustion grounds or otherwise—if it is subsequently made aware of information bearing on the case's admissibility. This is so even if the submission containing such information was not filed within the period specified in Article 30(6)—and especially so where, as here, the State had no notice or reason to believe the Commission planned to issue an early admissibility decision.

Second, the text of the Rules affirmatively indicates that an objection based on non-exhaustion may be considered not only at the petition stage (*i.e.*, prior to the decision on admissibility), but also at the merits stage. Article 31(a) provides 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…. " (emphasis added). The choice of the term "matter" here rather than "petition" is significant. Under Article 36(2) of the Rules, "case" is the term for a petition that has been admitted by the Commission. "Matter" is a broader term used throughout the Rules to encompass both petitions and cases, in circumstances where distinguishing between these latter terms is unnecessary.

That the Rules allow the Commission to consider non-exhaustion objections for petitions *and* cases becomes more evident upon reading adjacent provisions of the Rules where the word "petition" is used instead of "matter." For example, Article 32(1) states that "[t]he Commission shall consider those *petitions* that are lodged within a period of six-months following the date on which the alleged victim has been notified" (emphasis added); and Article 33(1) provides that "[t]he Commission shall not consider a *petition* if its subject matter" is pending resolution or already examined by the Commission or an international organization (emphasis added). The Commission cannot simply ignore these careful terminological distinctions or regard them as arbitrary or inadvertent, but must instead construe the provisions of the Rules to give effect, where possible, to the words chosen. This principle of effective construction is well established in U.S. and international law.

Third, even if it were correct that the Commission could rely on "the doctrine of the inter-American system" to refuse reconsideration of admissibility on non-exhaustion grounds even where the evidence shows that domestic remedies have not, in fact, been exhausted, Article 34 provides a separate, *mandatory* ground of inadmissibility, which the Inter-American Court and Commission did not address in the jurisprudence discussed above. Article 34 provides that "[t]he Commission shall declare any petition *or case* inadmissible when," *inter alia,* "it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure" (emphasis added). For the United States and other nonparties to the American Convention on Human Rights, these are the rights in the American Declaration. The inclusion of the words "or case"—which by definition is a matter already declared admissible—in juxtaposition to "petition" indicates beyond reasonable dispute that the Rules require the Commission to deny the admissibility of a case, previously declared admissible, under the Article 34 factors, if and whenever they are satisfied. It is not difficult to divine the rationale for the language in Article 34 since the Commission must always reconsider a case's admissibility when it becomes apparent that it does not state facts that tend to establish a violation of the rights in the American Declaration. In such a circumstance, the Commission has no competence *ratione materiae* to review the case.

Finally, even following the Inter-American Court's jurisprudence quoted above, it is important to note that the Inter-American Court did not say that it *must* presume remedies have been exhausted absent the State's objection on this ground at an early stage; it said "lest" a waiver be presumed—*i.e.*, implying that the Inter-American Court may choose whether to presume a waiver or not.

The Commission has a firm basis to reconsider admissibility on the separate grounds set forth in Article 34(c). Supervening information indicates that the Petition is inadmissible because Petitioner's domestic cases covering the same claims are still being actively considered by U.S. courts, so he has not exhausted domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules. …

* * * *

b. Petition No. P-1481-07: Diplomatic Immunity and Due Diligence

In May of 2016, the United States filed a lengthy response to Petition No. P-1481-07, filed by several domestic workers alleging they were subjected to exploitative living and working conditions while employed by foreign diplomats serving in the United States. Excerpts follow (with footnotes omitted) from the sections of the brief on diplomatic law and the lack of a due diligence commitment under the American Declaration.

_____

* * * *

a. The United States is under an international legal obligation to respect diplomatic immunity in these circumstances.

Protections for the diplomatic personnel of states are fundamental and essential to the conduct of diplomatic relations between all sovereign states. There is a well-established history, dating back centuries, of nations honoring the sanctity of diplomats, even when diplomats are accused of committing illegal actions in the receiving state, and extending even to times of war. The [Vienna Convention on Diplomatic Relations or] VCDR, a multilateral convention binding under international law, to which the United States and 189 other States are Parties, sets forth an agreed framework for how these rules are to be applied. One such vital protection is the immunity diplomats and their families enjoy from the criminal and civil jurisdiction of the receiving State. Specifically, Article 31(1) of the Vienna Convention provides as follows:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administration jurisdiction, except in the case of:
>
> (a)A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b)An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

The Vienna Convention's recognition of the jurisdictional immunity accorded to a diplomat and his or her family codifies a principle that has long been an integral component of customary international law, and that played an important role in the conduct of the United States during and after the time the U.S. Constitution was created. As the preamble to the Vienna Convention explains, diplomatic immunities are accorded "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." By necessity, diplomats must carry out their duties in a foreign—sometimes hostile—environment. Jurisdictional immunities ensure the ability of diplomats to function effectively by insulating them from the disruptions that would accompany litigation in such an environment. This protection was regarded as so important that for almost two centuries the United States accorded diplomats complete immunity.

The privileges and immunities accorded to diplomats under the VCDR, and other international agreements making that Convention applicable, for example, to diplomats at missions accredited to the United Nations in New York, are vital to the conduct of peaceful diplomatic relations and must be respected. If the United States is prevented from carrying out its international obligations to protect the immunities of foreign diplomats, adverse consequences

will very likely result. At a minimum, the United States may hear objections for failing to honor its obligations not only from the mission of the specific country affected, but also from the missions of other States with immunities guaranteed by the Vienna Convention.

Moreover, a decision by this Commission that accepts Petitioners' arguments for limiting the immunities accorded to diplomatic agents by international law could lead to erosion of these essential safeguards, and potentially put all diplomats at increased risk abroad. As the U.S. Court of Appeals for the Second Circuit has observed, "[r]ecent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern."

i. The employment of a domestic worker does not constitute "commercial activity" under Article 31(1)(c) of the VCDR.

As the United States has indicated, the employment of a domestic worker by a diplomat is not a "commercial activity" under Article 31(1)(c) of the Vienna Convention. The "commercial activity" exception focuses on the pursuit of trade or business activity that is unrelated to the diplomatic assignment; it does not encompass contractual relationships for goods and services that are incidental to the daily life of the diplomat and his family in the receiving State. As explained below, this position is consistent with the origins and purposes of diplomatic immunity, and is confirmed by the Vienna Convention's negotiating history. Moreover, this view has been endorsed by all U.S. courts that, to our knowledge, have addressed the issue.

The origins and purposes of diplomatic immunity confirm that employment of a domestic worker is not a commercial activity within the meaning of the Vienna Convention. When the United States became a party to the Vienna Convention, it recognized the small number of limited exceptions to diplomatic immunity provided for in the treaty, including Article 31(1)(c)'s "commercial activity" exception. Consistent with the Vienna Convention's purpose—"not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"—the term "commercial activity" as used in Article 31(1)(c) focuses on the pursuit of trade or business activity unrelated to diplomatic work. Such commercial activity is normally undertaken for profit or remuneration and, if engaged in by the diplomat himself (as opposed to a member of his family), is undertaken in contravention of Article 42, which provides that a "diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." Indeed, Article 31(1)(c) works in conjunction with Article 42 to make clear that, if a diplomat does engage in such an activity, he does not have immunity from related civil actions. Conversely, the term "commercial activity" in Article 31(1)(c) does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and the diplomat's family in the receiving State.

This longstanding interpretation is entitled to great weight. Deference is particularly appropriate with respect to the Vienna Convention, which forms the framework of the Department of State's conduct of diplomatic relations with virtually every country in the world, and which the Department accordingly interprets and applies on a regular basis, taking into account not only the interests of the foreign states with diplomatic representation in the United States, but the interests of the United States in sending diplomats abroad.

The negotiating history of the Vienna Convention confirms that commercial activity did not encompass employment of domestic workers. The United States' interpretation of Article 31(1)(c) is not only consistent with the purposes of diplomatic immunity, but is confirmed by the Vienna Convention's negotiating history. The final version of the Vienna Convention evolved from an initial draft developed in a series of meetings of the United Nations International Law

Commission ("ILC"), a body of international law experts. The ILC draft was then considered by States at a formal diplomatic conference convened by the United Nations in 1961. In each forum, it was clear that, under the Vienna Convention, diplomats would continue to enjoy their traditional immunities for contracts incidental to everyday life.

The ILC began its work in earnest by considering a draft for the Codification of the Law Relating to Diplomatic Intercourse and Immunities proposed by its Special Rapporteur in 1955. The draft contained no exception to immunity for commercial activity. An amendment providing an exception to immunity for acts "relating to a professional activity outside [the diplomatic agent's] official duties" was first introduced into the Draft Articles at the 402nd meeting of the ILC, during its Ninth Session, on May 22, 1957. The author of the proposed amendment, Mr. Verdross, based his proposal on Article 13 of the 1929 resolution of the Institute of International Law, which referred only to "professional" activity. The proposed amendment was also described as being akin to Article 24 of the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities ("Harvard Draft"), which referred to "business" as well as "professional" activity as follows:

> A receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in conjunction with that other business or profession.

That Mr. Verdross's proposed amendment was not intended to address ordinary contractual relationships for goods and services incidental to daily life is evidenced by his reference to the Harvard Draft and his observation that the cases to which the amendment related were "comparatively rare." Indeed, some ILC members suggested that the proposal was unnecessary because it was aimed at activity in which diplomats rarely engaged.

The provisional draft resulting from the ILC's Ninth Session in 1957 would have eliminated civil and administrative immunity for actions "relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions." This provisional draft was submitted to governments for comment. In response to the Australian member's comment that the term "commercial activity" required some definition, the Special Rapporteur explained that "the use of the words 'commercial activity' as part of the phrase 'a professional or commercial activity' indicates that it is not a single act of commerce which is meant, by [sic] a continuous activity." When the U.S. member commented that the commercial activity exception went beyond existing international law, the Special Rapporteur responded by describing the exception in terms of activity that was inconsistent with diplomatic status:

> In case (c), the considerations were as follows. A condition of the exercise of a liberal profession or commercial activity must be that the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities conducted in the country. It would be quite improper if a diplomatic agent, *ignoring the restraints which his status ought to have imposed upon him,* could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.

* * * *

c. The United States is not responsible for the misconduct of foreign government personnel.

Petitioners allege that the private conduct of foreign diplomats should be imputed to the United States government because somehow the United States failed to exercise due diligence to protect domestic workers employed by foreign government officials from exploitation. There are two major flaws to the Petitioners' argument that render these claims in the Petition inadmissible under Article 34(a) of the Rules because the facts stated in the Petition do not tend to establish a violation of the rights in the American Declaration. First, human rights violations under international human rights law entail state action, and the American Declaration contains no duty of "due diligence" that could trigger the United States' liability here. Second, even if the Commission were to entertain the notion of a due diligence principle as applying in this matter, the substantive content of due diligence is unclear, is not clarified by the case law cited by Petitioners, and in any event has been satisfied by the conduct of the United States in this matter. Should the Commission nevertheless reach the merits of this matter, it should find that these flaws also render the relevant claims meritless.

i. There is not a due diligence duty in the American Declaration pertinent to this matter.

… [W]ith few exceptions not relevant here, a human rights violation under international human rights law entails state action. The American Declaration contains no language indicating that Declaration commitments extend generally to private, non-governmental acts, and no such commitment can be inferred. The United States thus may not be found to have failed to honor a commitment under the American Declaration for the conduct of private individuals acting with no complicity or involvement of the government.

Moreover, Petitioners do not, and cannot, cite to any provision of the American Declaration that imposes on States an affirmative duty—for instance, to exercise "due diligence"—to prevent the commission of crimes or civil wrongs by private parties such as foreign diplomats in their treatment of their domestic employees, even where these might undermine an individual's enjoyment of rights in the Declaration. The States that drafted and adopted the Declaration had no intention to create a commitment that would be so open-ended and impossible to implement. Then as now, despite the best efforts of hard-working law enforcement officials, private individuals commit hundreds of thousands of crimes every year in this Hemisphere. Moreover, as noted below, Petitioners cite past cases of the Inter-American Court and of the Commission, but none of these constitute the imposition of a broad affirmative obligation upon the United States to prevent private crimes and civil wrongs.

Specifically, individual Petitioners assert that their employers violated the rights recognized in Article I (right to life, liberty, and personal security), Article II (right to equality before law), Article VII (right to protection for mothers and children), Article IX (right to inviolability of the home), Article X (right to inviolability and transmission of correspondence), Article XI (right to preservation of health and well-being), Article XII (right to education), Article XIV (right to work and fair remuneration), Article XV (right to leisure time and the use thereof), and Article XVIII (right to a fair trial) of the American Declaration, and that these violations are imputable to the United States. However, none of these provisions imposes an affirmative duty upon States to prevent acts by private parties that might undermine an individual's enjoyment of these rights. For example, although Article VII speaks of "special protection for mothers and children" it does not define this term, nor address the circumstances in which the State is expected to respect this right. Notably, with respect to the complex issues involved in this matter, none of these rights addresses the rules governing the conduct of police

officers who may be aware that domestic workers have been legally admitted to this country, but who are unaware of the exploitation they are suffering within a diplomat's home.

In arguing that the United States has an "affirmative obligation ... to prevent private acts of violence," Petitioners rely on incorrect and unduly expansive interpretations of the rights and duties set forth in the American Declaration. To the extent that Petitioners are arguing international human rights law and the non-binding views of international bodies are embodied in the American Declaration and are, in turn, binding upon the United States, the United States disagrees. More specifically, the United States disagrees with the view, put forward by Petitioners, that the substantive obligations of human rights treaties can be imported into the American Declaration. And as a legal matter, the United States is also not bound by other obligations contained in human rights treaties to which it has not joined. Nor should any norm of customary international law be applied by the Commission independent of the American Declaration which, as explained above, is itself nonbinding. …

* * * *

c. Petition No. P-1416-12: Failure to State a Human Rights Violation; Fourth Instance Formula; Case-Management Issues

In May 2016, the United States filed a response letter in Petition No. P-1416-12, which relates to an altercation involving the petitioner and a fellow inmate in New York state prison. Excerpts below (with footnotes omitted) assert the petition should be dismissed for failure to state any human rights violation; highlight a discrepancy in the IACHR's jurisprudence regarding the standard of deference the IACHR should afford domestic courts under the "fourth instance formula"; and provide the IACHR some case-management suggestions.

_____

* * * *

These facts make clear that there is absolutely no basis for the Petitioner to assert that any rights set forth in the American Declaration were implicated by these facts. The Petitioner claims that his rights to life, to equality before the law, and to a fair trial were violated. But the facts presented by the Petitioner show no prejudice to his right to life of any kind. The Petitioner seems to assert a hypothetical concern: that if his life were threatened, he would be forbidden from protecting himself through self-defense because he was punished in this case for pushing another inmate to the wall and being involved in an altercation. However, when the other inmate allegedly threatened him, the Petitioner does not indicate whether he even tried to seek help from the correctional officer accompanying him and the other inmates, who were on their way back from a visit to the infirmary. Moreover, the Petitioner seems to be arguing that the allegedly different disciplinary measures accorded to him and the other inmate would violate the right to equality before the law, but this assertion ignores that the Petitioner, in fact, struck the other inmate, while the other inmate did not strike the Petitioner. Finally, the Petitioner by his own admission received a fair trial at the administrative hearing. When asked by the hearing officer if he had any procedural objections, the Petitioner answered: "No, you [have] been fair." And the

petitioner was able to appeal the findings and discipline imposed by the hearing officer to the Deputy Superintendent of the prison and, following the Deputy Superintendent's decision affirming the decision of the hearing officer, to bring a case in state court seeking further review of the administrative determination. These facts unequivocally demonstrate the Petition's failure to state facts that tend to establish a violation of the American Declaration and its manifest groundlessness, and the Commission should reject the Petition as inadmissible under either or both of these grounds under Article 34 of the Rules.

The full administrative hearing, administrative appeal, and review by the state court also mean that any decision by the Commission to examine this Petition's merits would ignore the fourth instance formula. The Commission has promulgated at least two distinct fourth instance formula tests that are in tension. The Commission has established the "unequivocal evidence" standard, providing that "[t]he Commission cannot take upon itself the functions of an appeals court ... unless there is *unequivocal evidence* that guarantees of due process ... have been violated." However, the different "possible violation" standard would allow the Commission to "review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees" when a petitioner alleges "a *possible violation* of any rights set forth in the American Declaration."

It is unclear what would remain of the fourth instance formula if the "possible violation" formulation were used here and in other matters before the Commission. For States that are not parties to the American Convention or other treaties listed in Article 23 of the Rules, *any* case must allege a possible violation of the rights set forth in the American Declaration in order for the Commission to declare it admissible. Surely the mere fact that a petitioner pleaded alleged violations of the American Declaration cannot mean that the Commission may then freely second-guess domestic courts' legal and evidentiary judgment calls.

Under either formulation, however, this Petitioner has had ample due process through his opportunity to challenge the facts underlying the allegation that he violated prison disciplinary rules and the resulting disciplinary measures through an administrative hearing on the record where he was able to testify and question both the correctional officer and the inmate involved; through the administrative appeal of the results of the administrative hearing; and through the state court's review of the administrative findings and process.

* * * *

Furthermore, in light of the United States' keen interest in maintaining a strong and effective Commission, we reiterate our request to the Commission to consider ways in which it might be able to better fulfill its mandate by reforming the individual petition process to make it more efficient and more manageable. These include developing new criteria for filtering petitions so that it may focus on those petitions that present the most pressing human rights claims, the resolution of which could have a broader impact in the State in question and across the region as a whole. By any measure, this Petition does not meet this standard.

* * * *

d. Petition No. P-1163-10: Extradition Treaty Conditions

In July 2016, the United States filed a response letter in Petition No. P-1163-10. Excerpts below come from the section refuting the petitioner's claims that the United States violated his human rights by allegedly failing to respect the U.S. extradition treaty with Colombia and observing conditions imposed by Colombia in his federal guilty-plea proceedings.

* * * *

…[E]ven if the Commission could overcome these many barriers and proceeded to examine … allegations about the extradition treaty—which as noted above it plainly lacks the competence to do—it should find the allegations manifestly groundless and thus inadmissible under Article 34(b) of the Rules. As an initial matter, the rule of speciality in the extradition treaty is irrelevant because it was not relied upon by Colombia as a ground for the grant of extradition and gives rise to no international legal obligation on the United States. As is typically the case in extraditions from Colombia to the United States, Colombia granted the extradition only on the basis of its domestic constitution and laws. On the basis of one of those domestic laws, Article 494 of Law 906 of 2004, Colombia set forth a restriction on the United States prosecuting [Petitioner] for any crime other than those in Counts 11 and 12 [charging, respectively, conspiracy to commit money laundering and money laundering]. The United States provided diplomatic assurances to Colombia that it would accommodate such a restriction, along with other restrictions regarding the non-subjection of [Petitioner] to, *inter alia*, forced disappearance, torture, life imprisonment, [or] the death penalty. But these assurances did not give rise to any *legal* claim that Colombia may assert against the United States under international law in the event (which did not occur here) that the United States chose not to abide by Colombia's conditions. *A fortiori*, the assurances did not create rights in [Petitioner] that are enforceable in U.S. courts or in proceedings before the Commission.

Even if the United States were legally bound by Colombia's conditions, under the extradition treaty or otherwise, the United States respected the conditions fully and [Petitioner]'s allegations to the contrary are legally and factually incorrect. [Petitioner] claims that at his arraignment in the district court following his extradition to the United States from Colombia, the prosecutor "charged" him with all 12 counts of the indictment. [Petitioner] alleges that the prosecutor's failure to withdraw Counts 1 to 10 was "a calculated plan by the prosecution to coerce [him] into a plea, rather than taking [him] to trial on the two fabricated charges." This factual description is simply false and [Petitioner] provides no evidence to support this contention. The superseding indictment charging [Petitioner] with 12 counts predated the Colombian authorities' decision to extradite him by several months. The Colombian authorities knew the full scope of the criminal violations already charged against [Petitioner], as is shown clearly by the Colombian decision granting extradition of [Petitioner] for Counts 11 and 12 only. [Petitioner]'s subsequent arraignment in the district court was for the purpose of reading the existing charges, and for the district court to hear directly from [Petitioner] that he understood the charges. The prosecutor did not, as [Petitioner] claims, "charge" or "re-charge" the 12 counts at the arraignment.

Moreover, the district court specifically examined and rejected the argument that the prosecutor and court violated the U.S.-Colombia extradition treaty. At the hearing where [Petitioner] pleaded guilty, the prosecutor informed the district court that Counts 1 to 10 had to

be dismissed because Colombia had requested their dismissal as a condition of extradition; the prosecutor also informed the court that Count 12 was being dismissed as part of the plea bargain with [Petitioner], leaving only Count 11. The district court then told [Petitioner]: "[Y]ou understand this unwritten position that the Colombian Government takes here that has limited what you can be prosecuted for. In the end, you're looking at one charge." [Petitioner] responded, "I do, sir. Thank you." As the district court recalled, and reaffirmed, in its subsequent decision on [Petitioner]'s *habeas* petition, the prosecutor, [Petitioner], and the district court all plainly understood that it was the United States' (voluntary) observance of Colombia's extradition conditions that led to the dismissal of Counts 1 to 10; and that these counts did not form part of the bargain made between the prosecutor and [Petitioner] by which [Petitioner] agreed to plead guilty in exchange for the prosecutor's agreement not to prosecute him on any count other than Count 11.

* * * *

e. Petition No. P-2282-12: Lack of IACHR Competence to Review Claims Under Law of War

In August 2016, the United States filed a response letter urging the Commission to find Petition No. P-2282-12, filed by a detainee and his mother inadmissible. The petitioner was detained by U.S. forces as an enemy combatant and later tried and convicted in federal court for crimes related to the September 11, 2001 terrorist attacks. The section of the response explaining the nonbinding nature of the American Declaration and the Commission's recommendatory (*i.e.*, not binding) powers, and the Commission's lack of competence to review claims arising under the law of war, is excerpted below (with some footnotes omitted).

_____

* * * *

Petitioners allege that the United States "violated" certain specific rights recognized in the American Declaration during its detention of [Petitioner] in military custody from June 2002 to January 2006. The United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS). Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally-binding American Convention on Human Rights ("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 on matters arising under the American Declaration. The Commission also lacks competence to issue a binding decision vis-à-

vis the United States on matters arising under international human rights treaties, whether or not the United States is a party, or under customary international law.

Moreover, as discussed above, [Petitioner] was designated as an enemy combatant in the armed conflict against al-Qaida, the Taliban, and associated forces based on an order from the President of the United States, using his authority under the [Authorization for the Use of Military Force or] AUMF and consistent with the law of war. The U.S. Court of Appeals for the Fourth Circuit, in *Padilla v. Hanft*, upheld the legality of [Petitioner]'s designation and detention as an enemy combatant based on the AUMF and the law of war, finding that [Petitioner] met the definitions of an enemy combatant that had been applied by the U.S. Supreme Court. With respect to situations of armed conflict, the law of war is the *lex specialis*; as such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The law of war 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.[12] But, [Petitioner]'s detention in military custody was authorized consistent with and its legality is governed by the law of war, which permits States to engage in the capture and detention of enemy combatants until the end of active hostilities.[13] The Commission has no competence under its Statute or Rules of Procedure ("Rules") to consider matters arising under the law of war and may not incorporate the law of war, whether derived from treaties or customary international law, into the principles of the American Declaration. As the United States has previously noted, OAS member States have not granted the Commission the competence or authority to interpret and apply the law of war in Commission proceedings, and the United States reiterates its strong objection to any attempt by the Commission to interpret or apply in this proceeding the law of war.

* * * *

f. Petition No. P-439-16: Asylum and Non-Refoulement

In August 2016, the United States submitted a response brief to Petition No. P-439-16, filed on behalf of D.S. (a pseudonym granted by the IACHR upon the petitioner's request), a national of El Salvador who unsuccessfully sought asylum in the United States. Excerpts follow (with footnotes omitted) from the U.S. submission, discussing, *inter alia*, the compatibility of U.S. expedited removal proceedings with the American Declaration's provision on asylum; the non-applicability of the American Declaration's

[12] For example, the United States has recognized that a time of war does not suspend the operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed conflict. Article 2(2) of the Convention specifically provides that neither "a state of war [n]or a threat of war ... may be invoked as a justification for torture." The obligations to prevent torture and cruel, inhuman, or degrading treatment or punishment in the Convention remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence. But, the law of armed conflict does not generally displace the Convention's application.

[13] *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004) (plurality) (noting that detention of enemy combatants is "by universal agreement and practice" a "fundamental [] incident to war" and discussing certain law of war principles that relate to such detention).

due process article beyond the criminal context; and the absence of a non-*refoulement* commitment in the American Declaration.

---

* * * *

a. Alleged violation of Article XXVII

Petitioner's primary argument is that her placement in expedited removal proceedings resulted in a denial of the opportunity to seek asylum, presumably in violation of Article XXVII of the Declaration. Article XXVII of the Declaration provides:

> Every 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*.

As the Commission has noted, there are two criteria set forth in Article XXVII, which are cumulative and must both be satisfied in order for the right to exist: (a) "the right to seek and receive asylum on foreign territory must be in 'accordance with the laws of each country,' that is the country in which asylum is sought"; and (b) "the right to seek asylum in foreign territory must be 'in accordance with international agreements.'" Additionally, the Commission "has previously found that the right to seek asylum protected under Article XXVII of the American Declaration encompasses certain substantive and procedural guarantees" including "a hearing to determine [the applicant's] refugee status."

In this case, Petitioner bases her Article XXVII claim solely upon the allegation that she was denied the opportunity to seek asylum. Her allegation is unsupported by the record, which establishes that the United States has fully respected its commitments under Article XXVII. As described above, Petitioner was given ample opportunities to seek asylum by presenting her claim first to an Asylum Officer and later at a hearing before an Immigration Judge, in complete accordance with U.S. laws. These laws, and the manner in which they were implemented in Petitioner's case, are fully consistent with U.S. obligations contained in the relevant international agreements to which the United States is a party—that is, the Refugee Protocol and the [Convention Against Torture or] CAT.

Moreover, as further detailed above, the expedited removal process includes numerous procedural safeguards for asylum seekers. For example, asylum seekers in expedited removal are permitted to remain in the United States pending the completion of the credible fear interview process. Credible fear screenings are conducted by highly trained Asylum Officers and individuals in expedited removal proceedings are given the opportunity to obtain legal assistance. Asylum Officers ask applicants questions aimed at eliciting all information that is relevant to the credible fear determination, a threshold determination involving a standard which is more lenient than the standard required for asylum eligibility. As this case demonstrates, even individuals who do not initially express a fear of return can be granted a credible fear screening if they subsequently express such a fear. Credible fear determinations are communicated to asylum seekers in writing. Moreover, credible fear determinations are subject to supervisory review and independent review by an Immigration Judge.

It is important to note that the majority of asylum applicants in expedited removal proceedings are ultimately provided an opportunity to present their asylum claim in proceedings under INA Section 240. Statistics from the last fiscal year illustrate this point. In fiscal year 2015, DHS completed 48,415 credible fear interviews and 33,988 of those interviews

(approximately 70%) resulted in positive credible fear determinations and placement of the applicant into proceedings under INA Section 240. During that same time period, Immigration Judges reviewed 6,630 negative credible fear determinations and vacated 1,344 of those determinations (approximately 20%), resulting in the placement of those applicants into proceedings under INA Section 240. In other words, during fiscal year 2015, only approximately 11% of applicants who pursued their claim for asylum or protection under the CAT in expedited removal (5,286 out of 48,415) were not given an opportunity to present that claim in proceedings under INA Section 240. The remaining 89% of applicants either: (a) were found to have a credible fear of persecution or torture and placed in proceedings under INA Section 240; or (b) did not pursue their claim by challenging the Asylum Officer's determination. These statistics reflect that the credible fear process is a fair process with numerous procedural safeguards, pursuant to which the vast majority of asylum applicants initially placed in expedited removal proceedings are ultimately provided an opportunity to present their claim for asylum in proceedings under INA Section 240.

In sum, the United States' actions with respect to Petitioner demonstrates full respect for its commitments under Article XXVII of the Declaration, and Petitioner does not state facts that tend to establish a violation of Article XXVII.

b. Alleged violation of Article XXVI

Petitioner also alleges various due process violations, presumably in violation of Article XXVI of the Declaration. Article XXVI provides:

> Every accused person is presumed to be innocent until proved guilty.
>
> Every 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.

By its very terms, Article XXVI applies only in the criminal context. However, removal proceedings are not criminal proceedings. Instead, as the Supreme Court has repeatedly held, removal proceedings are merely the civil consequence of a noncitizen's non-compliance with the terms and conditions bearing upon his or her presence in the country. Consequently Article XXVI is not applicable to Petitioner's removal proceedings.

Even if Article XXVI were to apply to the Petitioner's removal proceedings—which it does not—Petitioner has failed to set forth facts that tend to establish a violation of the Declaration as she neglects to establish any factual basis for her allegations. For example, she alleges that her credible fear interview was "shameful for its brevity" but she does not allege, nor could she credibly allege, that she was not provided with an opportunity to explain the basis for her fear of returning to El Salvador; the record demonstrates that the Asylum Officer did, in fact, engage in an inquiry regarding the basis for Petitioner's fear of returning to El Salvador. Similarly, Petitioner states that she was "not able to consult with an attorney" but she does not explain why she was not able to consult with an attorney and she does not allege that she was not *permitted* to consult with an attorney.

c. Alleged violation of Articles I, XVIII, XXIV, and XXV

Petitioner also alleges violations of Articles I, XVIII, XXIV, and XXV, but does not explain the basis for these allegations.

To the extent that Petitioner may be alleging that her removal to El Salvador amounts to a violation of the right to life under Article I of the Declaration due to gang violence in El Salvador, she has failed to state facts that tend to establish a violation of the Declaration. To make an admissible claim based on Article I, the Petitioner would need to allege that *the United*

States has taken direct actions against the Petitioner that violated her right to life, not that a non-State entity in a third country may violate her right to life. The United States disagrees with any assertion that Article I of the American Declaration, or any other article thereof, contains an additional implied *non-refoulement* commitment. As explained above, noncitizens in expedited removal are eligible to seek and receive asylum, consistent with Article XXVII of the Declaration and with the United States' international obligations.

* * * *

g. Petition No. P-1010-15: Non-Joinder of Admissibility and Merits; Absence of Human Right to Consular Notification; Compatibility of Death Penalty with American Declaration

The United States responded to Petition No. P-1010-15, filed on behalf of an Ohio death row inmate in September 2016. Petitioner's claims relate to his Ohio state court conviction and death sentence. Excerpts follow (with most footnotes omitted) from the U.S. brief's discussion of the impropriety of joining consideration of admissibility with the merits under the circumstances of this petition; the absence of a human right to consular notification in the American Declaration or elsewhere; the compatibility of Ohio's death penalty with U.S. commitments under the American Declaration; and the nonbinding nature of the American Declaration and the Commission's recommendations.

* * * *

1. The Commission Should Not Join Its Review of Admissibility with a Decision on the Merits Because Petitioner's Life is Not in Real and Imminent Danger

Before discussing the Petition's inadmissibility and lack of merit, we first address Petitioner's request that the Commission join its review of the admissibility of the Petition with its evaluation of the merits of his claims. While Petitioner does not point to a specific provision of the Commission's Statute or Rules, he may be referring to Articles 30(7) and 36(3) of the Rules. Article 30(7) allows the Commission to request that a State "present[] its response and observations on the admissibility and the merits of the matter" in the circumstances described in Article 30(4), that is, (a) "serious and urgent cases" or (b) when "the life or personal integrity of a person is in real and imminent danger." Article 36(3), in turn, allows the Commission to consider admissibility simultaneously with merits, *inter alia*, "in cases of seriousness and urgency, or when the Commission considers that the life or personal integrity of a person may be in imminent danger" or "when the passage of time may prevent the useful effect of the decision by the Commission." In such circumstances, Article 36(4) of the Rules directs the Commission to "inform the parties in writing that it has deferred its treatment of admissibility until the debate and decision on the merits." The Commission's February 4, 2016, cover letter forwarding the Petition makes no mention of any decision to join admissibility and merits.

While the United States does not deny the seriousness of capital punishment, Petitioner's situation is not urgent and his life and personal integrity are not in "imminent danger" for the reasons discussed in our February 2, 2016, letter and as follows. First, Petitioner has not yet been scheduled for an execution date.

Second, it is unlikely that an execution date will be scheduled soon because Petitioner's execution has been indefinitely postponed due to the Ohio Supreme Court's denial of the motion to set an execution date, and is thus is not imminent or urgent. Indeed, as noted above, Petitioner concedes that his execution date is unlikely *to be set* before 2017. Third, even if an execution date were set in the near future, any execution is not likely to take place urgently or imminently, given the significant delays in already-scheduled executions that have resulted from the [Ohio Department of Rehabilitation and Corrections or] DRC's postponements of Ohio executions.

For the foregoing reasons, this matter is not so urgent as to justify joining review of admissibility and merits under Article 36(3) of the Rules. As noted above, however, the following sections discuss admissibility and merits together in the event the Commission chooses nevertheless to join them.

* * * *

a. Petitioner's consular notification claim is not cognizable under the American Declaration

Petitioner contends that when he was arrested, Ohio authorities failed to tell him that he had the option of requesting that they notify the Mexican consulate of his detention, and that this alleged failure violated the Vienna Convention [on Consular Relations ("Vienna Convention" or "VCCR")]. He further argues that the United States' commitments under Articles XVIII and XXVI of the American Declaration—which respectively set forth rights related to a fair trial and to due process of law—are implicated by this purported failure to go through proper consular notification procedures when he was arrested.

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, we respectfully maintain our firm position that the Commission does not, in fact, have competence to review claims arising under the Vienna Convention. 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 Vienna Convention's consular notification protections are based on principles of reciprocity, nationality, and function, and persons do not enjoy these protections by mere virtue of their human existence. Neither 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 Vienna Convention 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 Vienna Convention. 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(1)(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 does not receive consular assistance from his or her country's consular officers, because of an absence of consular relations or because those consular officers did not provide such assistance, 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. It also bears noting that Petitioner's consular notification claim has been thoroughly examined and rejected by the Ohio and federal courts in their review of his case.

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, 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, defense attorneys, 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 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, its application in a myriad of specific scenarios, and best practices. The *Manual* also contains sample consular notification statements in English, Spanish, and 20 other languages, sample fax sheets for providing notification, 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 nearly 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.

In addition, 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, to give effect to the judgment. Indeed, as the Commission is aware, Secretary Kerry has written to Ohio Governor John Kasich and former Texas Governor Rick Perry to request compliance with the United States' *Avena* obligations—in the case of Governor Kasich, that letter concerned Petitioner himself. The U.S. government also continues to promote the enactment of legislation that would ensure compliance with *Avena*, and President Obama has included in the Administration's budget requests, as well as in other proposed legislation, certain consular notification compliance provisions. 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.

* * * *

ii. The method of lethal injection for execution in Ohio does not constitute cruel, infamous, or unusual punishment as defined by the American Declaration

As a preliminary matter, the United States notes that this Commission has declined to interpret Article I of the American Declaration as prohibiting use of the death penalty *per se*. The United States reiterates that international law permits capital punishment when it is duly prescribed for commission of the most serious crimes and carried out by a state in accordance with due process of law and stringent procedural safeguards. This is the case in the United States. Under such circumstances, capital punishment is compatible with the right to life and does not constitute cruel, infamous, or unusual punishment.

(1) Lethal injection is not cruel, infamous, or unusual punishment

As capital punishment is legally permissible under international and U.S. law, it follows that "there must be methods of execution that are compatible with [human rights norms]." States that retain capital punishment have often adopted lethal injection as a more humane method than other methods that have been tried or used in the past. Also, the United Nations Human Rights Committee has taken the view that lethal injection does not violate Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and cruel, inhuman or degrading punishment; and medical experimentation without consent. It noted that lethal injection was "at the end of the spectrum of methods designed to cause the least pain" and was "the method proposed by those who advocate euthanasia for terminally ill patients."

In this context, the Commission should provide the State with a margin of appreciation, deferring to the discretion of local actors who are required to make difficult decisions based on their own factual assessments. Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the

discretion of those responsible for 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.

U.S. courts have carefully reviewed and rejected other claims alleging that U.S. states' lethal injection protocols constitute cruel and unusual punishment. In *Baze v. Rees,* for example, the U.S. Supreme Court held that Kentucky's lethal injection protocol—a combination of three drugs used, at the time, by at least 30 other states—did not constitute cruel and unusual punishment, taking into consideration extensive information regarding risks of improper administration.

The Supreme Court observed that almost all states that administer capital punishment in the United States as well as the federal government use lethal injection as the method of execution because it is more humane than other methods. Noting that capital punishment is constitutional, the Supreme Court stated the obvious point that some means is necessary for carrying it out, and that the U.S. Constitution does not demand the avoidance of any possible pain.

As for Petitioner's allegations concerning compounded drugs, such drugs are far from experimental in nature. They are subject to state regulations and have been used in executions by other states since at least 2013. Ohio has instituted precautionary safeguards with respect to compounded drugs in the event that executions were to resume in 2017, as the Execution Protocol sets mandatory procedures to verify the identity and potency of the drugs.

In the present matter, Ohio has complied with constitutional requirements by seeking to make lethal injections as humane as possible. As discussed above, the execution drugs used by Ohio have been regularly used in executions without complications and have been repeatedly recognized by courts as being consistent with the U.S. Constitution's guarantee of freedom from cruel and unusual punishment. In fact, Ohio's lethal injection protocol calls precisely for the administration of a formula that the inmate in *Baze* requested as his preferred choice—a single-drug protocol of either sodium thiopental or pentobarbital. Far from taking its responsibilities lightly, Ohio has twice extended its moratorium on executions to secure a supply of drugs that satisfy its "responsibility to carry out lawful and humane executions." Executions in Ohio have thus been suspended from 2014 until at least 2017.

* * * *

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

Petitioner asks the Commission to "order the United States to provide an effective remedy, which includes providing [Petitioner] with a new trial and sentencing hearing … ." In this regard, we stand firm in our longstanding position that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on Member States of the OAS,[118] and that the Commission may issue recommendations but not

[118] 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 OAS. U.S. 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

binding orders. Nevertheless, the United States has undertaken a political commitment to uphold the American Declaration. Indeed, as the Commission well knows, the United States takes its American Declaration commitments and the Commission's recommendations very seriously.

* * * *

h. Petition No. P-561-12: Lack of IACHR Competence over Actio Popularis; Failure to Establish Claim of Racial Bias

In September 2016, the United States filed a response brief in Petition No. P-561-12, filed on behalf of a federal death row inmate. Excerpts below (with footnotes omitted) address allegations of racial bias and argue that the Commission lacks competence to entertain an *actio popularis*.

_____

* * * *

Petitioner alleges he was subject to racial discrimination, namely that: (1) U.S. government authorities generally administer the death penalty in a racially discriminatory manner; and (2) the prosecutors in his own case engaged in racial discrimination during jury selection. The first claim is not properly before the Commission as it fails to set forth a concrete violation of rights in an individual case. The second claim is perfunctory and unsupported by the record, and consequently fails to state facts that tend to establish a violation of the American Declaration.

a. The Commission's Governing Instruments Do Not Allow for an Actio Popularis *and an Individual Petition Is Not the Proper Means by Which to Present a General Claim Regarding Alleged Widespread Discrimination in the U.S. Criminal Justice System*

Petitioner devotes more than half of his brief to the claim that the U.S. government administers the death penalty in a racially discriminatory manner. In support of this claim, he points to statistics and studies relating to prosecutions in various jurisdictions within the United States and during different time periods. …

While the matter Petitioner complains about may be a proper subject for a thematic hearing before the Commission—and, as discussed below, the Commission has indeed held hearings touching upon aspects of this issue—it is improper in the context of an individual petition. As this Commission has explained on numerous occasions, the Commission has competence to review individual petitions that allege "concrete violations of the rights of specific

---

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."); *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 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.

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 racially discriminatory application of the death penalty in the United States.

We note that allegations of systematic bias or discrimination in the United States criminal justice system have been the subject of several thematic hearings before the Commission in recent years. ….

* * * *

In sum, Petitioner's claim alleging racially discriminatory application of the death penalty writ large in Texas does not allege facts to support a concrete violation of the rights of a specific individual. Therefore, to the extent that Petitioner's petition is based upon such a claim, the Commission should find the Petition inadmissible because it lacks competence to entertain an *actio popularis*.

b. Petitioner's Bare Allegation of Discrimination During Jury Selection in His Domestic Criminal Proceedings Fails to Establish a Violation of Article I or II of the Declaration

In addition to his generalized claim of discrimination in the United States criminal justice system, Petitioner, who is black, also alleges racial discrimination in his own domestic criminal case. Specifically, he contends that the prosecutors in his case "engaged in racial discrimination during jury selection in order to obtain an all-white jury in his case" (though he notes that the jury did include one black member). Petitioner suggests that the number of black jurors stricken by the prosecutor, alone, is sufficient to demonstrate discriminatory intent on the part of the prosecutor where there were nine black jurors in his 125-person venire panel, eight of whom were questioned on *voir dire*, four of whom were stricken for cause, and three of whom (Boulet, DeBose, and Amarh) were subjected to peremptory strikes by the prosecutor, resulting in challenges at trial to two of the three peremptory strikes on racial discrimination grounds. However, Petitioner provides no additional evidence in support of his claim; thus, he has failed to adduce facts that tend to establish a violation of U.S. law or the American Declaration.

For over 100 years, the U.S. Supreme Court has held that, "when a black defendant has been tried by a jury from which members of his own race have been purposely excluded, he has been denied equal protection of the law." In *Batson v. Kentucky*, the Supreme Court "further held that the Equal Protection Clause [of the U.S. Constitution] forbids a prosecutor from using his peremptory challenges to challenge potential jurors solely on account of their race." However, in order to establish a *prima facie* case, a defendant must set forth facts and circumstances that raise an inference that the prosecutor used peremptory challenges to exclude persons from the jury on account of their race. If a defendant establishes a *prima facie* case, the burden shifts to the government to provide a race-neutral explanation for its use of the relevant peremptory challenges and, if it does so, the trial court must decide whether the defendant has demonstrated purposeful racial discrimination.

Applying that standard in Petitioner's case, the district court analyzed the bases for all three of the peremptory strikes exercised by the prosecutor against black persons on the venire panel, and concluded that there was no basis for a claim of discrimination. The district court noted, for example, that both the government and Petitioner's own attorney exercised a peremptory challenge against venire member Boulet. The second black venire member subjected to the prosecutor's peremptory strike, DeBose, was known to the prosecutor's family. The prosecutor chose to subject DeBose to a peremptory strike based upon, among other things,

"reputation information," the prosecutor's recollection of his own involvement in drug cases against DeBose's brother and husband, and DeBose's "apparent reluctance about the death penalty." The final black venire member subject to a peremptory strike, Amarh, also expressed reluctance concerning the death penalty, and the prosecutor exercised a peremptory strike as he did not believe that Amarh's answers were sufficient reason to strike her for cause. The district court explained that the prosecutor also struck several non-black venire members who provided answers similar to Amarh's. Moreover, there were no non-black venire members similarly situated to either DeBose or Amarh who were not stricken.

Petitioner's brief does not make any attempt to address the race-neutral explanations for the peremptory strikes exercised by the prosecutor in this case. Instead, he relies solely upon an inference resulting from the number of black venire members stricken. In so doing, he fails to adduce sufficient facts that tend to establish a violation of the American Declaration and, to the extent that he now alleges discrimination at his criminal trial, the Commission should find the relevant portion of the Petition inadmissible under Article 34(a) of the Rules and, in the alternative, without merit.

* * * *

i. Petition No. P-797-12: Fourth Instance Formula

The United States filed a response to Petition No. P-797-12 in September 2016. Petitioner complained that his conviction in Pennsylvania state court for shooting and killing his roommate in a halfway house violated his rights under the American Declaration. Excerpts follow (with most footnotes omitted) discussing how the application of the "fourth instance formula" should lead the Commission to dismiss the petition for lack of competence.

_____

* * * *

The Commission should also dismiss the Petition because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction"—a doctrine the Commission calls the "fourth instance formula."

The fourth instance formula recognizes the proper role of the Commission as a subsidiary to States' domestic judiciaries, and indeed, nothing in the American Declaration, the Organization of American States (OAS) Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms:

> The Commission ... lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts. The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the

> interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.
>
> As we recently echoed in another matter, "it is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task."
>
> The United States' domestic criminal process, including through the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. [Petitioner] has—in numerous courts, over an extended period of time, and in myriad ways—challenged the legality of his trial and conviction. Indeed, [Petitioner] acknowledges as much. Multiple layers of careful judicial review, both state and federal, provided [Petitioner] extended opportunities to challenge his trial and conviction, and he fully availed himself of these opportunities and continues to do so.
>
> Dissatisfied with the outcome of his domestic proceedings, [Petitioner] now asks the Commission reexamine claims that the Pennsylvania Court of Common Pleas, the Superior Court of Pennsylvania, and the U.S. District Court for the Eastern District of Pennsylvania, acting in full conformity with the due process protections reflected in the American Declaration, each independently determined are baseless under the laws of the United States. These decisions are cited throughout this response, and many of them are appended as annexes, so that the Commission may see for itself the rigor and thoroughness that characterized the domestic courts' consideration of [Petitioner]'s many claims. Even his own [Post-Conviction Relief Act or] PCRA counsel Feinstein concluded [these] were "wholly frivolous" and had "absolutely no merit." [Petitioner]'s broad allegation that U.S. domestic trial and appellate courts have failed to remedy his allegedly unconstitutional conviction does not create admissibility or competence. 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] formula."
>
> The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would amount to the Commission second-guessing the legal and factual determinations of both state and federal courts at all levels, conducted in complete conformity with due process protections under U.S. law, U.S. commitments under the American Declaration, and otherwise in accordance with U.S. commitments and obligations under international human rights instruments. It would also require the Commission to reweigh evidence, something the Commission, by its own admission, cannot do.
>
> [Petitioner] was guaranteed, and received, abundant due process protections in his domestic proceedings. He was not guaranteed, and did not receive, a favorable result, because the evidence showed beyond a reasonable doubt that he murdered another human being, ….[86] While [Petitioner] is obviously unhappy with his fate, justice demands that he face the consequences of his heinous crime. The domestic system functioned precisely as it should have in this matter. This is a compelling case for the application of the fourth instance formula.

[86] The Commission should also bear in mind that [Petitioner] chose not to respect his duty to obey the law under Article XXXIII of the American Declaration, or his duty under Article XXIX to "conduct himself in relation to" [his victim] so that [he] "may fully form and develop his personality."

* * * *

j. Petition No. P-563-13: Untimeliness of Claims; Groundlessness Due to Domestic Settlement; Failure to Pursue and Exhaust Domestic Remedies

The United States filed a brief in Petition No. P-563-13, responding to allegations of mistreatment of petitioner while incarcerated in Illinois state prison. Excerpts follow (with footnotes omitted) from the U.S. brief in *Santiago*, in which the United States argued that the petition is untimely, groundless due to settlement, and inadmissible for failure to pursue and exhaust domestic remedies. The United States made similar arguments regarding the effect of domestic settlement on international claims in Petition No. P-1093, available at https://www.state.gov/s/l/c8183.htm.

* * * *

1. At Least Three of Petitioner's Sets of Claims are Untimely and Should Be Dismissed

Article 32(1) of the Rules requires that petitions be "lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." Article 28(7) stipulates that compliance with this statute of limitations is a threshold requirement for the Commission's consideration of petitions. The Petition is dated May 21, 2012, though the Commission's date of receipt is April 8, 2013. Even taking the date most generous to the Petitioner, Petitioner's first, third, and fourth sets of claims are untimely. The litigation arising from the same facts as Petitioner's first set of claims was decided by a jury verdict on December 21, 2010, after which Petitioner did not appeal. The litigation arising from the same facts as Petitioner's third set of claims was dismissed on appeal on January 4, 2010. The litigation arising from the same facts as Petitioner's fourth set of claims was also dismissed on appeal, on June 9, 2010. All of these dates are well beyond the six-month time period within which a petition must be lodged. The litigation arising from the same facts as Petitioner's fifth set of claims, settled on June 3, 2012, would also miss the deadline using the Commission's date of receipt. The Commission has repeatedly dismissed as inadmissible petitions that have been filed after the period of time set forth in Article 32(1). In keeping with the requirements of Articles 28(7) and 32 of the Rules, as applied by the Commission in many prior matters, the Commission must find Petitioner's first, third, fourth, and possibly fifth sets of claims inadmissible because these claims were not timely filed.

2. Petitioner Voluntarily Settled his Fifth and Sixth Sets of Claims and They Should Be Dismissed as Manifestly Groundless.

Petitioner has voluntarily settled all claims arising out of his … (fifth set of claims) as well as all claims arising out of his … (sixth set of claims). Petitioner voluntarily entered into a separate settlement agreement for each set of claims. He cannot now assert that the United States is in violation of his human rights with respect to those settled matters because he has already received a remedy.

First, as explained above, Petitioner filed a complaint in federal district court on May 17, 2010, alleging, inter alia, that he had a verbal altercation with [Illinois Department of Corrections

or] IDOC guard …, who made threats against Petitioner, filed a false disciplinary charge, and had Petitioner moved to segregated housing that was "filthy" and "roach [and] mice infested." These are the same allegations Petitioner raises in his fifth set of claims before the Commission. Following a voluntary settlement, the district court upheld the validity of the settlement agreement and dismissed the complaint as settled on April 3, 2012.

Second, also as explained above, Petitioner filed a complaint on November 2, 2011, alleging that despite informing several IDOC employees that he had "serious difficulties" with his cellmate …, he did not receive a cell transfer and Petitioner and [his cellmate] had a physical altercation. This is the same allegation Petitioner raises as his sixth set of claims in the Petition. However, in the time that has elapsed since Petitioner submitted his petition, Petitioner voluntarily settled his case with the government defendants; a U.S. district court upheld the validity of the settlement agreement and granted Petitioner's motion to dismiss the complaint as settled on May 15, 2014—supervening information under Article 34(c) of the Rules.

The settlements and ensuing dismissals of Petitioner's cases in the district court show that Petitioner received adequate and effective remedies for his claims, to which he freely and fully agreed, through the process of exhausting remedies through the U.S. court system. Nothing in the principles established by the American Declaration or in the Commission's Rules suggests that the Commission should intervene in a matter that was voluntarily settled between a petitioner and the governmental authorities that he accuses of violating his rights. Implicit in the requirement of exhaustion is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then his or her claim is not admissible before the international forum. The Commission should respect the agreements reached between Petitioner and state and local officials of the United States, and reject Petitioner's submission with respect to both his fifth and sixth sets of claims as manifestly groundless under Article 34(b) of the Rules, and further with respect to his sixth set of claims, inadmissible under Article 34(c) due to supervening information.

3. Petitioner's First, Third, and Fourth and Part of His Second, Sets of Claims Should Be Dismissed for Failure to Exhaust Domestic Remedies

Article 20(c) of the Statute and Article 31(1) of the Rules only allow the Commission to consider a petition after it has verified that domestic remedies have been pursued and exhausted. Petitioner has failed to exhaust domestic judicial remedies with respect to his first, third, fourth, and part of his second sets of claims, rendering these claims inadmissible before the Commission.

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. It is a sovereign right of a State conducting judicial proceedings for its national system to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort 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 emphasized that the petitioner has the duty to pursue all available domestic remedies.

In order to give the State the opportunity to correct alleged violation of rights Petitioner must comply with all reasonable procedural requirements established under domestic law. As the Commission has noted in the context of the right to judicial protection under Article 25 of the American Convention on Human Rights ("American Convention"), the existence and application of reasonable admissibility requirements, prior to examination of the merits of a judicial action, are not incompatible with such a right.

Petitioner chose not to appeal following the second jury verdicts in both [domestic cases related to his first and remanded second set of claims]. He is clearly fully aware of the process for appeal and has appealed four of the cases raised in this Petition, winning a remand and second jury trial in two of them. Petitioner also chose not to seek review by the United States Supreme Court following dismissal of his third and fourth sets of claims by the U.S. Court of Appeals for the Seventh Circuit, another process Petitioner had previously pursued and had no reason not to pursue again.

Petitioner provides no explanation for why he did not pursue his available remedies by appealing these later jury verdicts or seeking a writ of certiorari before the United States Supreme Court. Because Petitioner has failed to pursue his available domestic remedies—much less exhaust them—these claims should be dismissed by the Commission.

* * * *

k. Petition No. P-184-08: Inapplicability of Exceptions to Exhaustion of Remedies Requirement; Lack of State Responsibility for Private Misconduct

In December 2016, the United States filed a supplemental response brief in Petition No. P-184-08, relating to a child custody dispute. Excerpts below (with footnotes omitted) come from the sections of the brief arguing inadmissibility for failure to pursue and exhaust domestic remedies in circumstances where the asserted exceptions to the exhaustion requirement do not apply, and for failure to state a human rights violation because misconduct of private individuals is generally not imputable to the state.

* * * *

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. While the Statute and Rules require the Commission to examine the full array of domestic remedies that may address Petitioners' claims, the Petition contains few and confusing details on whether and how Petitioner attempted to invoke or exhaust domestic remedies related to the abuses alleged in the Petition, through criminal, civil, or administrative processes. In particular, there is no record of any domestic proceedings related directly to the abuses alleged to have been committed by [Petitioner's ex-husband, his wife and step-son], or the violations alleged to have been committed by Virginia state authorities, except to the extent that some of these allegations may have been at issue during the divorce and custody proceedings between [Petitioner and her ex-husband].

In fact, in response to a Commission request for additional information in April 2011, Petitioner described the steps taken at that time to raise the issues contained in the Petition in the domestic system, and only mentioned some administrative measures and "petitions" to federal and state officials. …

* * * *

It was Petitioner's duty to initiate judicial proceedings if she believed the State of Virginia or the United States needed to address the alleged violations through judicial review, but nothing in the record indicates that Petitioner did so. Specifically, Petitioner provides no explanation or evidence of whether she attempted to pursue the ample opportunities she has under state law to bring a civil tort suit or to seek criminal charges against those private actors she claims are responsible for her injuries and the injuries to her children.

As concerns civil suits against government authorities, bases for civil actions in cases of credible, verifiable, and substantiated human rights violations include, but are not limited to, bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief challenging official action through judicial procedures in state courts and under state law, based on statutory or constitutional provisions; and seeking civil damages from participants in conspiracies to deny civil rights under 42 U.S.C. § 1985. Despite her duty to do so, Petitioner makes no showing in the Petition that she pursued any civil suit under Section 1983 against any state or local governments or officials, nor does she cite any attempt to pursue civil suits under other statutes against federal, state, or local governmental authorities. …

While it is not entirely clear, it appears that Petitioner is arguing that an exception to the exhaustion requirement provided for in the Rules applies in this matter. Article 31(2) of the Rules specifies three exceptions to the exhaustion requirement that may excuse exhaustion where: (a) the domestic legislation of the State concerned does not afford due process; (b) the party alleging violation of his or her rights has been denied access to remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment. In particular, Petitioner appears to argue that there is no reasonable possibility of success of her claims on appeal based on existing law, invoking Article 31(2)(a) without citing it, and that her indigence is an excuse, presumably under Article 31(2)(b). Yet, even reading the Petition generously to presume that Petitioner invokes these exceptions, none of the exceptions apply to the Petition.

With specific regard to the exception under Article 31(2)(a) of the Rules, the United States provides for due process of law in cases alleging child abuse, violence against women, misconduct by law enforcement and state officials, and judicial wrongdoing. Petitioner does not explain why domestic law would bar her from relief in U.S. federal or state courts. Quite the opposite: Annex 9 to the original Petition contains a list of Virginia state court decisions, including several related to child sexual abuse cases, which indicate several avenues Petitioner could pursue. … In a letter from Petitioner to the Commission dated January 18, 2014, Petitioner states that she seeks to address exhaustion under Article 31 merely by reference to reports that describe racial disparities in the U.S. justice system, implying that the fact of Petitioner's race alone is determinative in the prospect of success in U.S. courts.

However, 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," meaning that the exception is inapplicable in this instance. As Petitioner has apparently never

attempted to bring suit in Virginia or elsewhere on any of the charges leveled at the United States, Virginia state authorities, or private actors in the Petition, despite the fact that Virginia state law as well as federal law provide extensive options for judicial relief, the Petition's arguments that domestic proceedings would be futile appear to be based on a purely subjective belief that the odds are not in Petitioner's favor because she is African-American and because she is a woman. These arguments are entirely unsubstantiated. …

Petitioner cites alleged indigence and inability to secure counsel as another reason that the exhaustion requirement does not apply to the present Petition. Petitioner has offered no exhibits or other evidence that document diligent but unsuccessful efforts on her part to secure affordable legal counsel in the United States. For instance, Petitioner demonstrates that non-governmental advocacy groups that focus on child abuse issues have taken an interest in this matter. Such organizations generally are connected to legal services organizations or other low- or no-cost attorneys who specialize in children's issues, though Petitioner provides no information as to whether she has attempted to secure counsel through such means in service of subsequent legal proceedings. Nor does she provide reasons as to why her search for counsel has thus far not been successful besides stating that the allegations in her case are civil in nature rather than criminal. On the contrary, the Petition and appended documents demonstrate that in fact Petitioner previously successfully retained counsel from a prominent law firm to represent her in custody proceedings.

Petitioner moreover seeks to assert that the exception in Article 31(2)(b) of the Rules absolves her from satisfying the exhaustion requirement in light of two decisions of the Inter-American Court of Human Rights ("Inter-American Court"), specifically, Advisory Opinion OC-11/9061 and *Velásquez Rodríguez*.

First, the United States has not accepted the jurisdiction of the Inter-American Court, nor is it a State Party to the American Convention on Human Rights ("American Convention"). Accordingly, the jurisprudence of the Inter-American Court interpreting the American Convention does not govern U.S. commitments under the American Declaration.

Second, as the Commission has said, "[a]llegations of indigence are insufficient without other evidence produced by the Petitioner to prove that [she] was prevented from invoking and exhausting the domestic remedies of the United States." Even if Inter-American Court jurisprudence interpreting the American Convention were relevant, the Inter-American Court has also taken the position that indigence alone is not enough: whether indigence excuses a person from exhausting domestic remedies depends on whether domestic law and the circumstances would permit him or her to exhaust. Were the Commission to accept to Petitioner's indigence claims without evidence that Petitioner has engaged in good faith efforts to locate affordable counsel and pursue in domestic courts and other available domestic fora the claims she now avers before the Commission, it would allow Petitioner, and future petitioners, to evade the exhaustion requirement merely by asserting indigence without more.

Further, as explained above, potentially effective domestic remedies—both unpursued and unexhausted—are still available to Petitioner, and Petitioner has not demonstrated that lack of counsel is either inevitable, nor a sufficient reason, standing alone, to excuse Petitioner from exhausting domestic remedies. On the contrary, both the law and the circumstances permit Petitioner to exhaust domestic remedies despite her indigence, and as explained above, she successfully retained competent pro bono counsel in other domestic proceedings.

As such, the Petition is inadmissible for failure to pursue and exhaust domestic remedies and no exception to the exhaustion requirement applies.

2. The Petition Is Inadmissible for Failure to State Facts that Tend to Establish a Violation of the American Declaration, and for Manifest Groundlessness

The Petition is also inadmissible under Article 34(a) and (b) of the Rules because it does not state facts that tend to establish a violation of the American Declaration and the information provided by Petitioner indicate that it is manifestly groundless. …

With few exceptions not relevant here, a human rights violation under international human rights law entails state action. The American Declaration contains no language indicating that Declaration commitments extend generally to private, non-governmental conduct—such as the allegations that [Petitioner's ex-husband, his wife and step-son] committed abuses—and no such commitment can be inferred. The United States thus may not be found to have failed to honor a commitment under the American Declaration based on the conduct of private individuals acting with no complicity or involvement of the government.

Petitioner attempts to get around this basic tenet of human rights law by arguing that law enforcement and members of the judiciary have facilitated the alleged violations, by supposedly favoring [Petitioner's ex-husband and his wife] in judicial proceedings and investigations. First, Petitioner does not, and cannot, cite to any provision of the Declaration that imposes on States an affirmative duty to prevent the commission of crimes or civil wrongs by private parties, even where these might undermine an individual's enjoyment of the rights in the Declaration. Petitioner relies on principles expounded in cases of the Inter-American Court interpreting provisions of the American Convention, most notably *Velásquez Rodríguez*. As noted above, the United States has not accepted the jurisdiction of the Inter-American Court, nor is it a State Party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the American Convention does not govern U.S. commitments under the American Declaration.

Even if the United States were a State Party to the American Convention or this jurisprudence were somehow relevant to U.S. commitments under the Declaration, that case—which involved disappearance, arbitrary detention, and inhumane treatment by paramilitary or related personnel to which the State contributed— is wholly distinguishable from the facts alleged in the Petition. In *Velásquez Rodríguez,* the Inter-American Court … did not state that … international responsibility arose any time the State had failed to prevent a crime committed by a private party. Rather, the Inter-American Court emphasized, "[w]hat is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible." The Inter-American Court then articulated a standard of reasonableness to govern a State's obligation to prevent human rights abuses and to investigate such abuses.

Even if the Declaration did impose such a duty, the United States has fulfilled it here through investigations into the allegations made by Petitioner, consistent with U.S. law, and other appropriate measures by the relevant authorities. None of the investigations or reviews of the facts alleged in the Petition have led to the conclusion that rights under U.S. law or under international human rights instruments have been denied or affected by government action, inaction, or acquiescence. Contrary to the assertions in the Petition, the United States did not sit idly by in the face of allegations of child mistreatment.

* * * *

For these reasons, the Petition does not state facts that tend to establish a violation of the American Declaration and is manifestly groundless, and is meritless for the same reasons. It must therefore be dismissed.

* * * *

I. Petition No. P-888-11: Case-Management Recommendations

The U.S. response in Petition No. P-888-11, filed in March 2016, touched upon issues of IACHR inefficiency—a subject repeatedly addressed by the United States, see *Digest 2015* at 299. Excerpts follow from the U.S. response letter (with footnotes omitted).

_____

* * * *

Unfortunately, this Petition is not unique in its incompleteness, as the Commission has forwarded for a U.S. response many petitions in the recent past that in our view plainly do not meet the basic threshold requirements for consideration. We are dismayed that we must once again file a letter making the same points we made with respect to a similarly patently defective Petition in August 2015, and many other times in the past. As we have discussed with the Commission numerous times in recent years, serving the interests of justice requires adhering to rules.

The Commission's strength and credibility in the region, especially in light of recent efforts by some States to undermine the Commission, depend in large part on its ability to operate efficiently and effectively under limited resources, and to demonstrate to States and the public that it is an efficient and effective institution. The severe backlog of individual petitions that has accumulated on the Commission's docket, and the long amount of time that typically elapses between the filing of a petition and its resolution, significantly diminishes this perception.

In light of the United States' keen interest in maintaining a strong and effective Commission, we would once again urge the Commission to consider ways in which it might be able to better fulfill its mandate by reforming the individual petition process to make it more efficient and more manageable. As we have recommended in the past, reform measures could include strict application of the Article 28 and other admissibility requirements to incoming petitions; archiving or closing matters where the petitioner has died or that are otherwise moot; archiving or closing decided cases where the Commission's recommendations will not or cannot be fulfilled by the State; and archiving or closing cases where the petitioner has not prosecuted the matter for a specified period, as seems to be true with respect to several matters that have remained dormant on the Commission's docket for many years. No stakeholder benefits from the maintenance of cases that are several years old, about which the petitioner or his or her representatives have no active interest, or that have no chance of State implementation of recommendations.

The Commission could also consider developing new criteria for filtering petitions so that it may focus on those that present the most pressing human rights claims, the resolution of which could have a broader impact in the State in question and across the region as a whole. Further, it

could consider imposing strictly enforced page limits on briefs and annexes, along with font and margin size requirements. With the availability of extensive information online, particularly for U.S. cases, the United States would strongly urge the Commission to do a basic Internet review of each Petition filed to ascertain whether there is information that would assist the Commission in assessing whether the Petition has met initial processing requirements.

* * * *

2. Other Letters to the Commission

a. Case No. 12.866: Supervening Developments in U.S. Domestic Law Render Petition Retroactively Inadmissible

In August of 2016, the United States sent a letter to the Commission regarding Case No. 12-866, advising that recent U.S. Supreme Court case law had mooted petitioners' claims on the subject of juvenile life sentences and urging the IACHR to retroactively dismiss the petition. Excerpts follow from the August 2016 letter (with footnotes omitted).

_____

* * * *

We write to provide an update on the momentous curtailment of juvenile life imprisonment without parole ("JLWOP") currently underway in the United States. In light of such beneficial and ongoing supervening developments, we respectfully ask the Commission to reconsider the admissibility of Petitioners' case, and to dismiss it as inadmissible, in consideration of the availability of a new domestic remedy, which at least four of the Petitioners are currently pursuing through active litigation in U.S. domestic courts and which remains available for the others to pursue. Dismissal of this case would allow the United States the opportunity to redress the alleged violations under its domestic law.

New Legal Developments

Petitioners' description of subsequent U.S. Supreme Court decisions in their May 5 letter conveys an incomplete picture of what one federal Court of Appeals has called the "new legal landscape" concerning JLWOP in the United States. In the time since the Commission issued its admissibility report in 2012, expanding protections for juveniles and narrowing grounds for applying sentences of JLWOP have been rapidly underway at both the federal and state levels.

The 2012 decision of *Miller v. Alabama* provided additional protections for juvenile offenders, prohibiting mandatory sentencing of a juvenile to life without parole and laying out a set of factors that must be considered in each case for the sentencing of a juvenile to life without parole. As Petitioners concede, the Supreme Court further ruled in 2016 in *Montgomery v. Louisiana* that *Miller*'s prohibition of mandatory JLWOP applies retroactively to juveniles already sentenced at the time *Miller* was decided. *Montgomery* thus left states with only two options for accommodating the retroactive application of *Miller*—an individualized resentencing or consideration for parole. In addition, *Montgomery* clarified *Miller*'s holding and affirmed the

"constitutionally different" status of juveniles. In particular, holding that the *Miller* decision dictated more than procedural requirements, *Montgomery* categorically prohibits sentencing juvenile offenders to JLWOP except for those rare cases where the juveniles' crimes reflect "permanent incorrigibility." States are also incentivized to offer juvenile offenders who were sentenced to JLWOP prior to the *Miller* decision in 2012 automatic consideration for parole, which the Supreme Court identified as a possible alternative to holding new resentencing hearings for these offenders.

Far from resisting the Supreme Court's direction on JLWOP, U.S. states have in turn implemented additional protections for juvenile offenders as well as new opportunities for resentencing in the wake of *Miller* and *Montgomery*. Since 2012, at least 26 states have reformed their laws for juveniles convicted of homicide, and nine states have abolished the sentence of JLWOP altogether. Where JLWOP remains, many state legislatures and courts have issued retroactivity rulings and reforms to narrow the application of JLWOP even further. Simply put, states are now "rapidly abandoning" JLWOP sentences.

Furthermore, Petitioners' characterization of Michigan sentencing legislation, Michigan Compiled Laws ("MCL") §§ 769.25, 769.25a, in their May 5 letter is likewise incomplete and outdated. As the Supreme Court of Michigan stated in 2014, "The effect of MCL 769.25 is that even juveniles who commit the most serious offenses ... may no longer be sentenced under the same sentencing rules and procedures as those that apply to adults." Enacted in response to *Miller*, MCL 769.25 and 769.25a establish that juvenile defendants convicted of first-degree murder must receive a minimum sentence of 25 to 40 years, unless the prosecution specifically seeks a sentence of life without parole, and proves "beyond a reasonable doubt" that the crime shows that the juvenile is permanently incorrigible under the factors set out in *Miller*. In 2015, the Michigan Court of Appeals recognized additional protections for juveniles. Partially invalidating MCL 769.25, *People v. Skinner* granted juvenile offenders a right to have their sentence determined by a jury. This ruling was not appealed to the Michigan Supreme Court, and the State of Michigan has conceded that it is binding authority and applies to all state criminal trials of juveniles in Michigan.

In any event, existing Michigan legislation concerning juvenile offenders may soon be obsolete. In April 2016, the Michigan House of Representatives— one of the two chambers of the Michigan Legislature—passed, on an overwhelming bipartisan 92–16 vote, HB 4947-4966, a package of 20 bills to overhaul Michigan's juvenile justice system. The bills are now awaiting approval by the other chamber of the Legislature, the Michigan Senate. Among other reforms, the package would raise the age at which offenders are considered adults for criminal offenses to 18; prohibit imprisonment in an adult facility for offenders under 18 years old; require greater consideration of mitigating factors prior to trying juveniles in adult courts; and require out-of-cell programs and outdoor exercise for inmates under the age of 21. If passed, these bills would substantially address Petitioners' claims, such that the recommendations the Petitioners are requesting from the Commission would no longer be relevant because they would have already been provided by Michigan.

Reconsideration of Admissibility

The Commission should reconsider the admissibility of this case, find it inadmissible, and dismiss it under Articles 31 and 34(c) of the Rules of Procedure ("Rules") and Article 20(c) of the Commission's Statute. The supervening information presented above and in the Petitioners' May 5 letter reveals this case to be inadmissible—specifically, Petitioners have not exhausted the

new domestic remedies that have been made available to them by the developments described above. …

More specifically, the legal developments since 2012 elaborated above have guaranteed Petitioners either consideration for parole, or individualized hearings to rebut the prosecution's burden of meeting the high standard of "permanent incorrigibility" that is, in the wake of *Miller* and *Montgomery*, now required in the United States to sentence a juvenile to life without parole. …

Petitioners therefore have a new domestic remedy available to them, and those who have chosen to pursue it are now engaged in active domestic litigation, are being afforded all the guarantees of due process, have been given access to remedies, and have not experienced any unwarranted delays. Under the exhaustion provisions of the Commission's Statute and Rules, which themselves reflect important principles of customary international law, the Commission must allow the domestic remedy to take its course, thereby affording the State the opportunity to fashion any appropriate remedy under its domestic law. …

* * * *

b. Confidentiality in IACHR proceedings: U.S. arguments for presumptive publicity

On July 8, 2016, the United States filed identical letters in connection with Petitions P-1385-14 and P-98-15. The petitions were filed respectively on behalf of Guantanamo Bay detainees Mustafa al-Hawsawi and Moath al-Alwi. In the July 2016 letters, the United States was responding not to the petitioners (for which the United States filed its response in October 2015, as discussed in *Digest 2015* at 301-02), but to a letter sent to the United States by the IACHR Executive Secretariat in April 2016. In that April 2016 letter, the Executive Secretariat made certain assertions about the confidentiality of IACHR proceedings about which the United States felt it necessary to register its disagreement. Excerpts follow (with footnotes omitted) from the July 8, 2016 U.S. letters.

_____

* * * *

Presumptive publicity of IACHR proceedings as enshrined in the Statute and Rules of Procedure, with specific exceptions

To the extent the … Commission's view [is] that all petition-based proceedings are confidential, or that they remain confidential until a final merits report is issued, such a position is at odds with the United States' understanding that Commission proceedings are presumptively public. Presumptive publicity furthers a critical human rights objective by helping to ensure confidence in the fairness of the system, scrutiny of the conduct of governments, and responsible performance by decision makers, and is a hallmark of the independent judicial systems of democratic countries. Indeed, transparency and accountability are, with rare exceptions, prerequisites for fair judicial proceedings. This principle is reflected in the American Declaration

of the Rights and Duties of Man ("American Declaration") (Art. XXVI), the Universal Declaration of Human Rights (Art. 10), and the International Covenant on Civil and Political Rights (Art. 14(1)), among other instruments. While the IACHR is not a court or judicial body, its petition-based proceedings share many of the attributes of court proceedings and members of the public have a compelling interest in being able to observe and scrutinize the proceedings from beginning to end, including the arguments of petitioners and respondent States, except in specific and limited circumstances aimed at safeguarding the integrity of internal deliberations and personal privacy, among other compelling interests.

The IACHR's governing instruments appropriately balance the need for transparency with the need for limited exceptions. We are unaware of any rule in the Organization of American States (OAS) Charter, the Commission's Statute, or its Rules of Procedure ("Rules") establishing a presumption of confidentiality, including in the provisions concerning written submissions of the parties. Instead, these instruments appear only to apply *per se* confidentiality to the Commissioners' deliberations and the final merits report unless and until the Commission makes the report public. The governing instruments also seem to give the IACHR the power to make an *ad hoc* decision declaring a particular proceeding or matter confidential. Article 68 of the Rules, for example, provides that "[h]earings shall be public," but that the Commission "may hold private hearings" "[w]hen warranted by exceptional circumstances ... ." Article 12(3) of the Rules directs the Executive Secretariat to "observe the strictest discretion *in all matters the Commission considers confidential*" (emphasis added), implying that the Commission may deem confidential some subset of all the matters before it, with the rest of them remaining public. Of similar effect, Article 9(3) of the Statute directs the members of the Commission to "maintain absolute secrecy about all matters *which the Commission deems confidential*" (emphasis added). As far as we are aware, in neither *al-Alwi* or *al-Hawsawi* has the Commission made an explicit decision to seal the proceedings or otherwise declare them confidential, nor do we perceive a reason why they should be.

The Rules and longstanding practice also give the Commission the power to take less restrictive means to protect the privacy of alleged victims upon their request by assigning a pseudonym and protecting their identity from discovery even by the respondent State. The Commission also has the power to withhold the identity of experts and witnesses at hearings "if it believes that they require such protection."

Presumptive publicity of IACHR proceedings as reflected in the longstanding practice of the IACHR, petitioners, and States

The presumptively public nature of IACHR proceedings…is reflected in the practice of the Commission, petitioners, and States. The Commission holds closed hearings only in rare circumstances; almost all hearings—including hearings discussing in detail individual petitions at the admissibility and merits stages—are streamed live over the internet and posted as archival video on the Commission's website. The Commission also posts on its website most precautionary measures resolutions, admissibility decisions, and merits reports, large portions of which are dedicated to setting forth the factual and legal allegations of the petitioner and, if available, those of the respondent State. The Commission draws these summaries from the parties' written filings and oral presentations at hearings. The Commission has even published some filings of States on its website. The Commission maintains a webpage called "Answers from the States," with a tab called "Individual Cases" that currently has links to U.S. responses in four cases. The website also contains at least two other U.S. responses that are not linked on the "Answers from the States" page but can be found via an internet search.

Organizations representing petitioners have also frequently posted documents from Commission proceedings on their respective websites. We have long been aware of this practice and we welcome it. For instance, the American Civil Liberties Union (ACLU) has posted on its website many of its own petitions, requests for precautionary measures, the testimony of alleged victims, and other communications to the Commission, including on matters that continue in active litigation. In some matters, the ACLU has also posted the filings of the United States, *amici curiae*, and the decisions of the Commission. The Columbia Law School Human Rights Institute has likewise posted petitions, *amicus* briefs, testimony, expert reports, and other documents. Advocates for Environmental Human Rights has posted its petition, at least one U.S. response, and other documents from the IACHR proceedings in the *Mossville* case. Representatives of the Onondaga and Navajo Nations and the University of California Irvine School of Law Human Rights Clinic have posted petitions they filed respectively in 2014 and 2015. Abundant other examples can be found via an internet search.

For its part, the United States has long published selections of its own written filings and oral presentations in the *Digest of United States Practice in International Law* ("*Digest*"), a publicly available resource widely used and referenced in the international legal community. As early as 1980, for example, the State Department ("Department") published in the *Digest* a lengthy excerpt from an admissibility brief in a matter involving Haitian refugees (No. 3.228), and has published many other U.S. filings and presentation transcripts, in whole or in part, in subsequent volumes; many are accompanied by web links to the full submission, and these links remain active. The 2015 volume, recently posted on the internet, likewise contains passages from and web links to several submissions. Provision of this sort of information in the *Digest* is part of a long tradition of keeping the public informed about the positions the United States is taking on important questions of foreign policy and international and domestic law, not only in proceedings before the IACHR, but also before the International Court of Justice (ICJ), arbitration tribunals, human rights treaty bodies, domestic courts, and a myriad of other international and domestic fora. To our knowledge, we have never received any expressions of concern about publication of U.S. IACHR submissions in the *Digest* from the Commission, petitioners, or civil society organizations that advocate before the Commission.

Suggestions for enhancing the publicity and transparency of IACHR proceedings

Rather than take the view that proceedings are presumptively confidential, we would urge the Commission to explore ways to enhance the publicity and transparency of proceedings, including by making the parties' filings more widely available. In most cases, many years pass between the filing of a petition and an admissibility report, followed by several more years before the Commission issues a final merits report. … The extremely lengthy periods of dormancy which characterize most cases involving the United States weigh in favor of publication of the parties' filings in the interim, so that the public may at least read and scrutinize the parties' positions while the Commission processes and deliberates on the case. It is also beneficial for the public to be able to see and scrutinize the parties' arguments in the parties' own words—in full—rather than solely as characterized by the IACHR in its summary of the parties' positions that appears at the beginning of an eventual admissibility or merits report.

* * * *

One possibility for enhancing the publicity and transparency of proceedings would be for the Commission to modify the IACHR [Individual Petition System] Portal to make a version of it public-facing, with documents specifically deemed confidential selectively made inaccessible to

a public user. A similar approach was taken by the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), which for years maintained an internal "Judicial Database" containing parties' filings and other materials as a resource for judges, prosecution and defense counsel, and Tribunal staff. In 2008, the ICTY launched a public-facing version of the database that allows members of the public access to all court records except certain categories, such as materials marked confidential or *ex parte*, which remain viewable on the internally facing database only to those persons who have a specific need to see them.

Another possible way to enhance publicity and transparency would be for the Commission to create a webpage for each matter or case on the public IACHR website, and link to the parties' written filings along with precautionary measures resolutions, admissibility and merits reports, and other key correspondence, absent special circumstances or with any necessary redactions. The ICJ's website could provide a model for such an approach; there, the ICJ publishes parties' written memorials and a wealth of other case-related documentation under a separate webpage for each case. The Permanent Court of Arbitration publishes memorials and other documentation for many of its cases, and the International Centre for Settlement of Investment Disputes is building similar capabilities into its website.

For our part, we are actively considering creating a page on the website of the U.S. Mission to the OAS linking to all U.S. written filings except those that implicate privacy concerns that are not susceptible to a less restrictive solution such as redaction, or where the Commission has expressly deemed the specific proceedings confidential. Such a webpage could be similar to the website where the Department posts briefs and other materials in arbitration proceedings under the North American Free Trade Agreement, the Central American Free Trade Agreement, and in other arbitration fora.

* * * *

3. Hearings

The United States also participated in six hearings in 2016, all held at the IACHR's headquarters in Washington, D.C.—three in April (all thematic) and three in December (two thematic and one petition-based). The thematic-based hearings concerned the human rights of migrants, access to water, poverty in Puerto Rico, indigenous rights and extractive industries, and alleged disparities in asylum adjudications in U.S. immigration courts. See http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=148 and http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=142.

Case No. 10.573: IACHR Evidentiary Procedures; Deference to Domestic Commission; Reconsideration of Admissibility; Actio Popularis; *Lack of Competence over Law of War; Lack of Merit Because U.S. Actions Complied with the Law of War*

This hearing—the only U.S. petition-based hearing held in 2016—was on the merits of 60 petitions filed jointly before the IACHR in 1990 (later supplemented by 212 additional petitions), collectively denoted as *Salas et al*.. The December 2016 hearing was the third

merits hearing in the case, and fifth hearing overall (the first four hearings all took place in the early-to-mid-1990s). Both parties filed numerous submissions on admissibility and merits in the 1990s totaling many hundreds of pages. The IACHR declared the case admissible in a 1993 decision. For reasons unknown to the United States, the IACHR did not thereafter dispose of the case by issuing a merits report or archiving the case. After 26 years, *Salas* consequently remains the oldest pending U.S. case on the IACHR's docket, although numerous other cases are pending in which the petition was filed in the late 1990s and early 2000s, including those in which the petitioner died years ago.

The *Salas* case relates to the U.S. military operation in Panama that began in late 1989. The U.S. hearing presentation covered a wide range of issues, including: complementarity and deference to a Panamanian commission recently established to review the same events alleged in the IACHR petition ("December 20 Commission"); the IACHR's need to archive this case to focus on the many other cases in its backlog; and competence regarding the law of war.

One week before the hearing, the IACHR sent the United States notice that the petitioners' counsel would be calling two fact witnesses to testify at the hearing. On December 5, 2016, the United States filed a letter with the IACHR objecting to the inadequate notice. Excerpts from that letter follow.

* * * *

… [T]he United States … notes a number of concerns about the process leading up to this hearing. We hope the IACHR will share our concerns with the Petitioners prior to the hearing on December 9, and that the IACHR will improve its practices going forward. To begin, this case has been dormant for over 20 years. As such, the United States has requested on at least two occasions that it be archived.

On November 9, precisely one month before the hearing date, we received a hearing notice pursuant to Article 64(4) of the Rules of Procedure ("Rules"), but no accompanying documentation related to the purpose of the hearing or any indication of the focus and scope of the hearing or whether witnesses would testify. At the request of the United States, on November 18, your staff kindly forwarded us the Petitioners' original hearing request of October 9, in the Spanish language. This request explains that the Petitioners' representative "will be inviting" members of Panama's December 20 Commission to testify. But the request makes no mention of any fact witnesses nor does it give any indication of the scope and content of any particular witness's anticipated testimony.

On November 21, well outside the one-month notice period in Article 64(4) of the Rules, your office transmitted to us a written submission from the Petitioners, in the English language, with some information as to what the Petitioners intend to present at the hearing. In this submission, the Petitioners state they will present testimony of alleged victims. Yet they do not identify these witnesses by name nor give any indication as to the content or scope of the witnesses' anticipated testimony. It thus came as a surprise to us in the late afternoon of

December 2—less than one week before the hearing—when we received the letter from your office informing us that two witnesses, Yolanda Cortés and Edilsa Alarcón, would be called to testify and that the United States would be given ten minutes in which to question each witness. This is the first indication we had of the witnesses' identity, and to date we still have not received witness statements nor any other information about the subject matter of the witnesses' anticipated testimony.

The IACHR is, admittedly, not a court or judicial body. The Commission's rules and practices regarding evidence are sparse. There are no explicit rules or guidelines on giving the other party advance notice of the identity of witnesses or the anticipated content of their testimony, other than Article 65(5)'s terse directive that "[w]hen one party offers witness and expert testimony, the Commission shall notify the other party to that effect." However, it should be obvious to any objective observer that no party can meaningfully prepare to question witnesses without any idea of the subject matter of the witnesses' testimony or sufficient advance notice. We would invite the IACHR to seriously consider adopting detailed guidelines related to advance notice to the other party about the identity of witnesses and the subject matter of their testimony. Unfortunately, such procedural problems are not new, and indeed in this very case we have objected several times in the past about procedural decisions that unfairly disadvantaged the United States.

* * * *

As the IACHR knows, the United States has great respect for the IACHR's critically important role in protecting and promoting human rights across the Hemisphere. As the Hemisphere's foremost human rights forum, the IACHR serves as an example to the domestic systems of the 35 Organization of American States member States and to States all around the world. Fairness and procedural protections must apply to all parties in IACHR cases, both governments and alleged victims. Our proposal regarding guidelines relating to advance notice of witness testimony seeks to ensure such fairness in the procedures applicable to hearings before the Commission. As always, we stand ready to continue a constructive dialogue with the IACHR about how the relevant procedures and practices can be made fairer and more effective.

We trust this information will be considered by the IACHR and that the Commission understands the substantial difficulty in preparing for a hearing on this extraordinarily complex, 26-year-old case without sufficient notice.

* * * *

The IACHR proceeded with the hearing in *Salas* on December 9, 2016. After a colloquy on the United States' procedural objections excerpted above, the IACHR permitted petitioners' counsel to call one witness, whom the United States chose not to question. Thereafter, petitioners' counsel presented her arguments, and the United States followed with its presentation. Excerpts follow from that presentation, delivered by Anne Kolker, James Bischoff, and Yedidya Cohen of the State Department's Office of the Legal Adviser and Tara Jones of the Office of the Assistant Secretary for Special Operations at the U.S. Department of Defense.

_____

* * * *

…As an initial matter, the United States maintains its longstanding position that this case is inadmissible and meritless.

My points today focus on a recent development in Panama, which the Petitioners also highlighted in their remarks, that highlights the need to dismiss this case: the creation by the Government of Panama of the December 20 Commission this past July. …

* * * *

The establishment of the December 20 Commission has direct relevance to the case at hand. In our view, the IACHR should dismiss this case, or at least defer its consideration to allow the December 20 Commission to complete its important work. To do otherwise would discourage exactly the kind of laudable domestic efforts to address and promote human rights that the IACHR should encourage. In fact, as the IACHR and Inter-American Court have repeatedly stressed, international human rights bodies are set up to work as complements to domestic courts and other domestic processes, with the aspiration—and indeed the expectation—that States will, over time, draw upon the guidance and example provided by international bodies in developing their domestic protections and processes.

Moreover, this principle of complementarity is reflected in the governing instruments of regional human rights bodies such as the IACHR, including through the requirement of exhaustion of domestic remedies. Complementarity is also a thread that runs through the reports of the IACHR going back decades, and it is also an important principle in the decisions of the Inter-American Court and other international judicial bodies. …

Further consideration by the IACHR would also be impractical in a number of other ways:

First, continued consideration of this case by the IACHR would be redundant of the work of December 20 Commission. …

Second, consideration of this case by the IACHR before, concurrently with, or even after the completion of the December 20 Commission's work would paint an incomplete and inadequate picture of the relevant events because of the December 20 Commission's much broader mandate. Specifically, the petitions in this case are, in accordance with the IACHR's Statute and Rules, directed solely against one OAS member State—the United States—and the IACHR may only make recommendations with respect to the conduct of that State.

The December 20 Commission, in contrast, may investigate, and recommend appropriate remedial relief in relation to, any event occurring in Panama between December 19 and the withdrawal of U.S. forces. Critically, the December 20 Commission may therefore examine not only the conduct of U.S. forces, but also that of all parties to the conflict, including forces allied with General Noriega, such as the Popular Defense Forces and the Dignity Battalions.

Finally, local proceedings in Panama, conducted entirely in the Spanish language by Panamanian commissioners, hold the prospect of being more visible to, and having greater buy-in by, the local population than do sessions held in Washington. …

* * * *

Even if the IACHR is disinclined to dismiss or defer this case in light of the December 20 Commission process, it should archive it due to the more than two decades of inactivity.

We agree with the Petitioners that if the IACHR were going to make a final decision on this case, it should have done so long before now. Your predecessors, and ours, put a great deal of effort into presenting, receiving, and analyzing myriad submissions. Unfortunately, most of that experience departed long ago. It would be enormously burdensome, and highly inefficient, for you try to familiarize yourselves with and make findings on these extraordinarily complex issues now.

Precisely because the United States wants the IACHR to remain an efficient and effective institution, we have become deeply dismayed at the enormity of the backlog of pending cases. Although we applaud recent efforts to streamline case management, you face a monumental task simply in addressing the cases currently before you.

* * * *

Should the Commission decline to dismiss or archive this case for the reasons already discussed, the United States urges the Commission to re-examine its 1993 admissibility determination. The Commission's admissibility report is seriously flawed for reasons discussed today and in the numerous pleadings previously filed by the United States. Such reconsideration of an admissibility determination is within the scope of the IACHR's authority and is supported by its Rules of Procedure.

* * * *

Reconsideration of the admissibility determination in the instant matter is especially warranted because the contours of the claims set forth by the Petitioners have changed so drastically over the years, including after the 1993 admissibility report. The United States reiterates its position that it has been severely disadvantaged by the fact that Petitioners have been permitted throughout the litigation to add claimants—and to add factual allegations even in "closing briefs." Over the course of this proceeding, the number of petitioners and their claims of damages have multiplied with virtually every submission adding new and implausible factual allegations of personal and property damages.

To the extent that the instant petitions relate to unidentified alleged victims, the Commission must dismiss the petitions as it does not have competence to entertain an "*actio popularis*." This requirement is enshrined in the Rules of Procedure. Article 28 of the Rules, for example, requires that petitions include "the name of the person or persons making the denunciation ... ." There are many important purposes served by Article 28's requirements. For example, neither the Commission nor the State can determine whether an unidentified person has exhausted domestic remedies.

* * * *

Here, the Petitioners readily admit that they are trying to transform this Petition into something akin to a class action lawsuit on behalf of all the Panamanian people. That type of complaint is not permitted and the Commission must dismiss the petitions at least to the extent that they do not relate to identified persons.

Commissioners, you must also dismiss many of the Petitioners' claims because analyzing their merits would require the Commission to interpret and apply a body of law—the law of armed conflict—that is beyond the Commission's mandate and competence. The United States reiterates its position that, as set forth in the Commission's Statute and Articles 23 and 27 of the Rules of Procedure, the only relevant instrument by which the IACHR can evaluate the United States is the American Declaration of the Rights and Duties of Man. However, the allegations here are largely founded, and are wholly dependent upon, proof of alleged violations of the Fourth Geneva Convention of 1949 and other international instruments governing the use of force, and other aspects of the law of war. The Commission has no competence under its Statute and Rules to consider matters arising under the law of war, and may not incorporate the law of war into the principles of the American Declaration.

To be sure, the law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. And a situation of armed conflict does not automatically suspend, nor does the law of armed conflict automatically displace, the application of all international human rights obligations. However, treaties and customary international law may not be applied by the Commission through the nonbinding American Declaration. The UN and OAS member States have never expressly or implicitly granted to the Commission the competence to adjudicate matters arising under the law of armed conflict, a complex, discrete, and highly specialized body of law.

Even if the Commission chooses not to dismiss the petitions for lack of admissibility and competence, the United States maintains its position that the case is without merit because the initiation and conduct of Operation Just Cause were fully justified under international law. Contrary to petitioners' assertions, the operation was consistent with the OAS and the UN Charters, the Fourth Geneva Convention of 1949, and all other applicable international law. …

* * * *

… Here we highlight a few areas where we have been able to ascertain more specific information:

First, Petitioners' allegations that U.S. forces killed thousands of Panamanians and buried them in unmarked graves to cover up the extent of the fatalities are patently false. The United States has never attempted to hide the reporting of Panamanian casualties as a result of Operation Just Cause. Thorough investigations by several human rights groups found no evidence to support these allegations.

* * * *

Second, the Petitioners assert violations related to U.S. actions in the El Chorrillo neighborhood and claim as a "grave breach" that the United States bulldozed a large section of the neighborhood. But they fail to acknowledge that U.S. operations in El Chorrillo were due directly to the fact that the Popular Defense Forces—or PDF—elected to place its *Comandancia* there, and thus to use an urban and largely residential neighborhood as its base of operations against the United States.

The United States was fully authorized by the law of war to return fire from the PDF, even where such fire was coming from offensive pockets interspersed among civilian buildings. The inevitable, and unfortunate, outcome of the PDF strategy was that a number of civilian

buildings were damaged, some beyond repair, and these had to be cleared away in the interest of protecting military and civilian personnel remaining in the area. None of these actions constitute grave breaches or other violations of the law of war.

* * * *

Third, Petitioners allege violations related to a limited number of checkpoint incidents. …

The most important point is that, in times of armed conflict or active hostilities, civilian casualties sometimes occur in the field of operations. When they do, the United States investigates the circumstances very carefully to determine whether there was a violation of U.S. military regulations, or any violation of the law of armed conflict. When investigation indicates a potential violation, the cases are brought before courts-martial for trial and appropriate punishment.

Finally, it is not a foregone conclusion, as Petitioners would have it, that every death or injury suffered in Panama during Operation Just Cause was caused by U.S. armed forces. Quite the contrary: much of the damage was the result of actions by forces loyal to General Noriega, or from individual criminals. We must keep in mind that the PDF and Dignity Battalions were actively operating against U.S. forces on the ground, and both the PDF and Dignity Battalions contributed significantly to the personal and property damage that befell the civilian population.

* * * *

4. Commission Decisions in 2016

a. Case No. 12.834: Workers' and Labor Rights

The IACHR issued one report on the merits in a U.S. case in 2016, Case No. 12.834, *Undocumented Workers* (a.k.a. *Zumaya and Berumen*), Report No. 50/16. The United States responded to the Commission regarding its report in the case in a March 18, 2016 letter, excerpted below. The merits report is available at http://www.oas.org/en/iachr/decisions/2016/USPU12834EN.pdf.

_____

* * * *

With respect to the Commission's recommendations, we have forwarded the merits report to the Departments of Labor, Justice, and Homeland Security; the National Labor Relations Board; and the Governors and Attorneys General of Kansas and Pennsylvania. We would note that several of the recommendations already reflect U.S. law, policy, and action in this area, as explained in detail in our written submissions and at the March 2015 hearing. In general, these include aggressive enforcement of a robust system of laws that protect workers' rights and prohibit many forms of discrimination and retaliation against workers based on their undocumented status; ongoing efforts to combat employer efforts to discover the immigration status of workers during litigation, investigation of claims, and administrative proceedings; and conducting investigations

at worksites and enforcing labor laws, without regard to the worker's immigration status. Our immigration law and policies include safeguards for the protection of various classes of victims and vulnerable individuals. Further, our immigration authorities work collaboratively with labor and employment agencies to ensure consistent enforcement of the law.

Other recommendations, however, do not seem feasible for federal implementation, in that they implicate questions of U.S. state law or otherwise fall within the purview of state authorities for their implementation; or require a change in federal or state jurisprudence. In this regard, we reiterate that for nonparties to the American Convention, the Commission's recommendations are precisely that—recommendations—not requirements under international law. As we explained at the hearing, moreover, the United States has an independent judiciary, and the Executive Branch of the U.S. government cannot compel U.S. federal or state judges to change their case law.

We would also reiterate, for reasons discussed at length in our various filings and in our oral presentation of March 2015, that the United States strongly disagrees with the Commission's assertion that the conduct at issue in this case violated any international legal obligations owed by the United States. Moreover, the United States is disappointed that the Commission chose to summarily reject its arguments relating to the inadmissibility of this case as "untimely," without addressing their substance in any meaningful way. As we have argued in two other recent matters, the Commission has the authority under its Statute and Rules to reconsider a prior decision on admissibility and rescind it if it finds the matter is inadmissible, or has become inadmissible due to supervening events. The United States refers the Commission to its briefs in those matters for its reasoning.

* * * *

b. Case No. 13.027: Detention and Interrogation Program

Despite its substantial backlog of matters and cases pending a decision, the IACHR also only issued one report on admissibility, its April 15, 2016 Report No. 21/16, in Case No. 13.027, *El-Masri*, available at http://www.oas.org/en/iachr/decisions/2016/USAD419-08EN.pdf.

Earlier in April, the United States had filed a brief arguing the inadmissibility of the petition due to the extensive domestic proceedings on the petitioner's claims and the IACHR's lack of competence, but the IACHR found the case admissible nonetheless. Excerpts follow from the U.S. brief.

_____

* * * *

Mr. El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia in December 2005 against the former Director of the U.S. Central Intelligence Agency (CIA), three private companies, and several unnamed defendants, seeking damages for his alleged unlawful abduction, detention, and torture. The U.S. Government intervened in the suit, filing a motion to dismiss based on the state secrets privilege, which is an evidentiary privilege that may be invoked by the U.S. Government in litigation when it is necessary to protect information whose unauthorized disclosure reasonably could be expected to cause significant harm to the national

defense or foreign relations of the United States. The District Court held oral arguments on this issue, after which it granted the U.S. Government's motion to dismiss on May 12, 2006. Mr. El-Masri appealed this decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the dismissal. He then appealed the decision to the U.S. Supreme Court, which denied Mr. El-Masri's petition for review.

The SSCI Report

The [Senate Select Committee on Intelligence or] SSCI conducted a review of the CIA's former detention and interrogation program, culminating in the production of a lengthy report. The SSCI asked President Obama to declassify the report's executive summary and findings and conclusions. After these sections were declassified with appropriate redactions necessary to protect national security, the SSCI released them to the public in December 2014. The declassified executive summary and the findings and conclusions of the SSCI report are now available on the Committee's website at http://www.intelligence.senate.gov/publications/reports. The factual findings and conclusions in the SSCI Report are the views of the Committee and do not necessarily reflect the views or positions of the Executive Branch of the U.S. Government. The declassified summary of the report contains a brief discussion of Mr. El- Masri at pages 128-130, and in footnotes 31, 34, and 2491. For more information about the declassified summary of the SSCI Report, we would refer you to the information the United States provided to the Commission at its thematic hearing on this topic on October 23, 2015.

* * * *

Cross References

International tribunals, **Chapter 3.C.**
ILC's work on law of treaties, **Chapter 4.A.4.**
Indigenous issues, **Chapter 6.G.**
Immunity of international organizations, **Chapter 10.F.**
IMF reform, **Chapter 11.J.4.b.**
Palestinian effort to accede to Law of the Sea Convention, **Chapter 12.A.1.**
UNCITRAL, **Chapter 15.A.**
Middle East peace process, **Chapter 17.A.**
UN peacekeeping, **Chapter 17.B.**